PUBLIC COMMENTS ON THE PROPOSED AMENDMENTS TO THE ALIEN AND INVASIVE SPECIES REGULATIONS AND ASSOCIATED SPECIES LISTS

On 16 February 2018, the Minister of Environmental Affairs, Ms Bomo Edna Edith Molewa, published for public comment, in Government Notice 112 and 115 of Government Gazette 41445 in terms of the National Environmental Management: Biodiversity Act, 2004 (Act No.10 of 2004), the proposed amendments to the Alien and Invasive Species Regulations and associated species Lists.

Any person who wishes to submit written representation and/or objections to the proposed amendments to the Regulations and the species Lists is invited to do so by 19 March 2018.

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

- **Post: The Deputy Director-General: Environmental Programmes, Department of Environmental Affairs, Private Bag X4390, 8001, Attention: Ms Nomahlubi Geja;**
- **Hand-delivery:** The Deputy Director-General: Environmental Programmes, Department of Environmental Affairs, 14 Loop Street, Cape Town, Attention: Ms Nomahlubi Geja; or
- **e-mail: Nemba_Regs@environment.gov.za**

A copy of the proposed amendments can be found on the Department's website or obtained by emailing a request to the above-mentioned email address.

Any enquiries in connection with the proposed amendments to the Alien and Invasive Regulations and associated species Lists can be directed to: Ms Nomahlubi Geja, at tel: (021) 441 2791/2707.

environmental affairs
Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

STAR NEWSPAPER ADVERT 21 FEBRUARY 2018

COX ATTORNEYS

TO: **Dr Guy Preston**
GPreston@environment.gov.za
NembaRegs@environment.gov.za

19 January 2017

Dear Dr Preston

Re: National Environmental Management: Biodiversity Act 2004 (Act No. 10 Of 2004). Draft Alien and Invasive Species Regulations 2017

I write to you regarding in the hope that you can provide additional information regarding the Draft 2017 AIS Regulations that were published for comment on Friday under GN 112 in Gazette 41445.

I am mindful of the fact that although many of the regulations in the 2014 AIS Regulations have been carried across largely unchanged into the Draft 2017 AIS Regulations. But there are substantial changes as well and this and the fact that what is envisaged as a "repeal and replace" of regulations makes this substantial.

This alone makes a supporting memorandum providing additional information essential in my view.

This is quite apart from the fact that the 2014 AIS Regulations are also fatally defective[1] because of a lack of proper notice and a failure to provide the information reasonably required to enable the public to make representations.

I am mindful of the fact that NEMBA was drafted without first being subjected to a completed green and white paper policy making process and that the biocentric focus of the CBD does not naturally align with the anthropocentric values enshrined in our Constitution and which also inform the NEMA principles. I think the failure to synthesise the two (a biocentric CBD with and anthropocentric environmental right) is probably the single biggest reason behind why NEMBA is not ,but you will no doubt point to the fact that NEMBA must be guided by the NEMBA principles.

It is in that context that I ask precisely how the NEMBA principles guided the drafting of these Draft AIS Regulations. I think this constitutes important and very necessary information that is required if one is to

[1] See http://www.durbanflytyers.co.za/Articles/20171011_Letter_To_The_Minister_Final.pdf

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Postal Address: P.O. Box 855, Gillitts, 3603 | Fax: 086 505 6690 | Web: www.coxattorneys.co.za

comment on these regulations at anything more than a level of legality. I think this question is particularly relevant given the general tendency in the Draft AIS Regulations to look at risk to biodiversity without taking into account the benefits including other ecological benefits that result in the possession or use of a species.

I have e mailed Brian Van Wilgen who says that SANBI's AIS Report is at the printers and in the process of finalising what once upon a time were called a "galley proof" of the report. He says it will go from there to Parliament before it is will be made publically available. As you know SANBI's draft AIS Report that was published for comment, painted a picture of widespread failure especially in the regulatory space. It is thus reasonable to assume that the report will speak meaningfully to the success or failure of many of the regulations that have been carried through from the 2014 AIS regulations, as well as contain useful information regarding how they can be improved and perhaps even why the 2017 Draft AIS Regulations are necessary. **So I ask why the Draft 2017 AIS Regulations are being published for comment now. Surely it would be better to wait until the SANBI's AIS Report is made available to the pubic?**

This request for information would not be complete if I did not also ask for details of the newspapers in which the notice was published as well as a copy of the notice that was published in a newspaper.

Yours Faithfully
sent electronically and therefor unsigned

Ian Cox

Ian Cox

From: Nemba AISRegulations <NembaRegs@environment.gov.za>
Sent: 27 February 2018 11:43 AM
To: Ian Cox
Subject: RE: National Environmental Management: Biodiversity Act 2004 (Act No. 10 Of 2004). Draft Alien and Invasive Species Regulations 2017
Attachments: notice public comments the star 2017.pdf

Morning Mr Cox

My apologies for missing the two. Please find attached a copy of the newspaper advert

Regards

Nomahlubi

From: Ian Cox [mailto:iancox@coxattorneys.co.za]
Sent: Tuesday, 27 February 2018 11:34
To: Nemba AISRegulations
Subject: RE: National Environmental Management: Biodiversity Act 2004 (Act No. 10 Of 2004). Draft Alien and Invasive Species Regulations 2017

Thanks Nomahlubi
It came through on my office e mail.
I also asked in my letter to Dr Preston , (see attached) inter alia

1. Why the Draft 2017 AIS Regulations are being published for comment now. Surely it would be better to wait until the SANBI's AIS Report is made available to the pubic?
2. For details of the newspapers in which the notice was published as well as a copy of the notice that was published in a newspaper.

The second is rather urgent as it is very material to a letter I am drafting to the Minister.
Kind regards

IAN COX – 082 574 3722
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COX ATTORNEYS

Simplicity in law

From: Nemba AISRegulations [mailto:NembaRegs@environment.gov.za]
Sent: 27 February 2018 11:20 AM
To: Ian Cox

Cc: iancox6030@gmail.com
Subject: RE: National Environmental Management: Biodiversity Act 2004 (Act No. 10 Of 2004). Draft Alien and Invasive Species Regulations 2017

Good morning Mr Cox

Please find a response to your questions below:

1. Receipt and collation of comments is the responsibility of the branch. Subsequent to which the inputs together with recommendations on how best to deal with them is submitted to the Minister for approval.

2. The detailed lists and the regulations are sufficient information - if there is anything that is not clear please advise what additional information you would require.

3. The listing process was, in some cases, informed by the risk assessment process whereas with some, the precautionary approach based on the invasiveness of that particular species elsewhere in the world in areas with similar climatic conditions was adopted. Some were informed by outcomes of stakeholder engagements and surveys conducted by various specialists. Some are adopted as in an effort to align our legislation with other relevant pieces of legislation so as to avoid contradicting information, which might ultimately confuse our various stakeholders.

4. Since there were a number of amendments to the regulations it is common drafting practice to rather replace the old set of regulations with a new one as this makes it easier for the public to peruse the regulations as a whole without having to work through a cumbersome amendment document. As with any amendments to laws the changes are to improve implementation and clarify any ambiguities and improve wording where necessary or insert new clauses where required. The public has an opportunity to comment on the full document and provide comments on any section which would be welcomed.

5. It is clear that listing invasive species fulfils a number of NEMA principles including the precautionary approach, protection of the environment for present and future generations, the environment held in trust, the polluter pays principles to name but a few, and to the extent that you are of the view these draft Lists and regulations do not concur with any NEMA principles you are invited to make these comments which will be considered together with all other comments.

As much as I appreciate your need to get as much information as possible, I request that you note that we are receiving a number of inputs from other stakeholders and it will prove a bit difficult for me to engage people on an individual basis. Please, therefore, note that we are busy capturing all inputs received and will respond to all comments in a systematic way (after the closing dates for inputs) rather than engaging people on an individual basis, due to the number of comments received this would not be practical.

I trust you will find this in order.

Regards

Nomahlubi

From: Ian Cox [mailto:iancox@coxattorneys.co.za]
Sent: Monday, 19 February 2018 09:19
To: GPreston@environment.gov.za; Nemba AISRegulations
Subject: National Environmental Management: Biodiversity Act 2004 (Act No. 10 Of 2004). Draft Alien and Invasive Species Regulations 2017

Dear Dr Preston
Please see attached.
Kind regards
Ian Cox

IAN COX – 082 574 3722
23 Jan Hofmeyr Road, Westville, 3629
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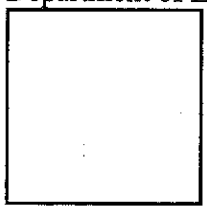

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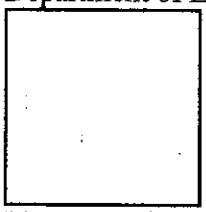

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environmental affairs
Department:
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REPUBLIC OF SOUTH AFRICA

Private Bag x 4390, Cape Town, 8000 14 Loop Street, Cape Town, 8001 Tel: +27 21 441 27900

8 MARCH 2018

Enquiries: Nomahlubi Geja
Tel: 021 441 2791 **Email:** NembaRegs@environment.gov.za

TO WHOM IT MAY CONCERN

RESPONSE TO REQUEST FOR INFORMATION PERTAINING TO THE PROPOSED LISTING OF TROUT UNDER THE NEMBA ALIEN AND INVASIVE SPECIES REGULATIONS

I refer to your email that you sent to the Department of Environmental Affairs (DEA) pertaining to recently published NEMBA Regulations and Alien and Invasive Species Lists, specifically the proposed listing of trout as a Category 2 invasive species.

Please find, in bold text, DEA's response to your email:

1. Kindly provide sufficient detail as to why it is that each of the aforementioned species referred to in the draft list are regarded as invasive?
   Kindly refer to the attached risk assessments for rainbow trout and brown trout.

2. Why do these species pose ecological threats in the areas and in the manner you want the Minister to list them as invasive?
   Kindly refer to the attached risk assessments.

3. Why and how does this supposed threat cause harm or is likely to cause harm to human health and wellbeing?
   Please note that the criteria for listing of an invasive species are not only threats to human health and well-being. A proper reading of the current definition of invasive species, which is quoted below for your convenience, quite clearly includes the aspect of environmental harm. These concepts are separated by an 'OR' and do not all have to be present for a species to be listed. In other words a species can pose a threat to human health 'OR' cause environmental harm. As you will note from the risk assessments, there is a clear risk to the environment.
   "invasive species" means any species whose establishment and spread outside of its natural distribution range-

(a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and

(b) may result in economic or environmental harm or harm to human health;

4. What considerations did the Minister weigh up in arriving at an intention to list each species as proposed in the Notice?

Kindly refer to the attached risk assessments.

5. What policies guided the Minister's considerations?

The Minister is guided by the current legal framework which is clearly stated in the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) and specifically Chapter 5, which empowers the Minister to list invasive species.

6. Why are the existing Alien and Invasive Species Regulations being replaced by new ones'? **Since there were a number of amendments to the Regulations, it is common drafting practice to rather replace the old set of Regulations with a new one, as this makes it easier for the public to peruse the Regulations as a whole, without having to work through a cumbersome amendment document. As with any amendments to laws, the changes are to improve implementation and clarify any ambiguities and improve wording where necessary or insert new clauses where required. The public has an opportunity to comment on the full document and provide comments on any section. The Notices are part of the Regulations, and these need to be updated as further information becomes available about the invasiveness of different species. Updated information has seen species being added to the Lists; moved to different categories; have different controls; or, being removed from the Lists. Invasion biology is a complex field, and is being made more so by climate change and habitat destruction. Whilst the precautionary principle can be used in terms of the law, every effort is made to balance the considerations when an invasive species has already had a widespread impact in the country. For species not yet introduced into the country, the precautionary principle is particularly important in weighing up risk assessments of potentially invasive species.**

7. In what manner do the new Regulations differ from the old Regulations?

This is evident when a comparison is done between the two sets of Regulations – you can comment on any aspect of the Regulations.

8. Why are these changes to the Regulations necessary?

As with any amendment process, laws need to be constantly updated and modified to improve implementation challenges, improve wording and definitions, and close any gaps and other issues which may have been determination during the implementation of the initial Regulations. The environment is dynamic and as such so must the laws be, to keep up with the challenges of managing biodiversity.

9. The National Environmental Management Act stipulates that the environmental principles set out in Section 2 of that Act must be applied to all environmental decision making, including the listing of species as invasive and the making of Regulations. How were these principles applied in the process that resulted in the Draft Alien and Invasive species (AIS) Lists and Regulations? **It is clear that listing invasive species fulfils a number of NEMA principles including the precautionary approach, protection of the environment for present and future generations, the environment held in trust, the polluter pays principles to name but a few, and to the extent that you are of the view these draft Lists and Regulations do not concur with any NEMA principles you are invited to make these comments which will be considered together with all other comments.**

10. It is the declared intention of the government in the recent State of the Nation address, to promote tourism, job creation and industry. The trout fishing industry in South Africa has been in existence for about 75 (seventy five) years. This involves shops, fly tying, hatcheries, trout farms, accommodation and the food and beverage services which accompany same. Whilst this may not concern the Department of Environmental Affairs, the decisions made by your department impacts directly and indirectly on many industries and many jobs. Has a study been done to quantify the size of the Trout Fishing industry and all direct and indirect industries/businesses associated therewith, and the jobs which these industries provide?

The trout industry is indeed important, and should be nurtured. The proposed listing of trout will not inhibit aquaculture or fly-fishing in areas in which trout occur. Long-term permits will be given, and catch-and-release will be permitted in areas in which they are caught. There is no evidence that these Regulations will lead to any negative impact on the industry, other than to prevent the expansion of trout species into areas in which they do not occur.

11. Has a study been done on the negative impact on the industries and businesses referred to in paragraph 10 above, which would result if Trout were to be listed adversely as Category 2 species for which permits are required?

There is no reason why the industries and business should be negatively impacted upon.

12. Has your department seriously considered the practicalities, the costs, the prospects of success of members of the public succeeding in obtaining permits for Trout?
It is unclear what your concerns are relating to application for permits. This is why the proposals are published for public comment, so that concerns with reference to the specific proposed amendments can be articulated. Long-term permits will be issued in areas where trout occur. Self-administration by aquaculture facilities will be considered.

13. If the answer to the question in paragraph 12 is yes, then what precisely step by step is the procedure to be followed to obtain a permit, the documents and reports to be produced, the approximate cost of procuring reports, the approximate costs of obtaining a permit, the time period it would take to do so, and the period of time such a permit was endure before having to be renewed?
These details are all contained in the AIS Regulations.

14. Is there any co-ordination between government departments where supposed conflicting interests are considered and balanced having regard to the interests of the public, the economy and the common good of the country?
DEA, DAFF, DWS and the Provinces, and key entities (e.g. SANBI, SANParks and iSimangaliso), as well as all other Departments that attend the DEA MinMEC (Minister and MECs) meetings, have been consulted and included in this process, and support the proposed regulation of the two trout species.

Yours sincerely

Dr. Guy Preston
Deputy Director-General: Environmental Programmes
Date: 8/3/2018

MEMORANDUM OF OBJECTION

Submitted by Ian Cox

to

The Deputy Director-General Environmental Programmes
Attention: Dr Guy Preston

in respect of

DRAFT AMENDMENTS TO THE ALIEN AND INVASIVE SPECIES LISTS
DRAFT ALIEN AND INVASIVE SPECIES REGULATIONS 2017

Promulgated in terms of the
NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 2004 (ACT NO. 10 OF 2004)

12 MARCH 2018

"The Department of Environmental Affairs wants to take South Africa back to the middle ages where the Bible was written in Latin, it was heresy to dispute the priesthood on matters of religion and the rich and powerful could buy their way out of hell."[1]

[1] Chairman of Trout SA, Mr Gerrie van der Merwe. commenting generally on the AIS Lists and Regulations

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1. Introduction and Executive Summary

1.1 The 2013 AIS[2] Lists and Regulations were judged by a court to be unlawful because the Minister of Environmental Affairs (the "Minister") completely ignored the public consultation process prescribed in section 100 of the National Environmental Management Biodiversity Act, 2004 ("NEMBA"). The 2014 AIS Lists and Regulations also failed to comply with the public consultation process prescribed in section 100 of NEMBA and technically are only enforceable as law because no one has yet seen the need to challenge them in court. The same is true of the 2016 AIS Lists.

1.2 No one has yet seen the need because these AIS List and Regulations have proved to be ineffective and unworkable. They are being ignored by various spheres of government and the public alike. This has been confirmed in the draft report entitled "The status of biological invasions and their management in South Africa in 2017 "[3] ("The Draft SANBI AIS Status Report") that was published for comment by the South African National Biodiversity Institute ("SANBI") last year.

1.3 The Draft 2018 Alien and Invasive Species Regulations and Draft Alien and Invasive Species Regulations published respectively in under GN 115 and 112 in Gazette 41445 on 16 February 2018 (the "Draft 2018 Lists and Regulations") are fatally defective, inter alia for noncompliance with the peremptory requirements of section 100 of NEMBA and are likely to be challenged in court if the Minister does not withdraw them.

1.4 While it is difficult to comment on the substance of the listings and regulations, because the Minister has not provided any information that is sufficient to enable members of the public to do this, it is clear enough that the Minister has yet again ignored the definition of invasive and the purpose of Chapter 5[4] of NEMBA for an incoherent, un-transparent and unlawful regulatory scheme invented outside the law by the Department of Environmental Affairs' ("DEA") .

1.5 The failure to comply with section 100 of NEMBA is not confined to the matters relating to the promulgation of the Draft 2018 AIS Lists and Regulations[5].

1.6 The roots of the failure of the DEA to comply with the public consultation process set out in section 100 of NEMBA lie in the fact that DEA is trying to implement NEMBA as its officials and officials in other environmental authorities think it out to be applied rather than how NEMBA must be implemented in law.

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[2] Alien and invasive species

[3] http://www.sanbi.org/sites/default/files/documents/documents/national-status-report-biological-invasion-south-africa-draft-1-comment.pdf This is a report that SANBI must prepare in terms of section 77 of NEMBA and section 11 of the 2014 AIS regulations (section 11(1)). The section reads: "The Institute or a body designated by the Institute must, for the purpose of reporting as contemplated in section 11(1)(a)(iii) of the Act, submit a report on the status of listed invasive species to the Minister within three years of the date on which these regulations come into effect, and at least every three years thereafter."

[4] Chapter 5 deals with species and organisms posing potential threats to biodiversity. Alien and invasive species (AIS) lists and regulations are promulgated in terms of Chapter 5 of NEMBA

[5] See my letter to the Minister dated 11 October 2017 http://www.durbanflytyers.co.za/Articles/20171011_Letter_To_The_Minister_Final.pdf

1.7 The reason for this is that South African law is anthropocentric and human rights based. This anthropocentric rights based approach to the protection of the environmental right is contained in section 24 of the Constitution and is also expressed in the National Environmental Management Act, 1998 ("NEMA") and to some extent NEMBA. The biocentric nature first approach that underpins the values and beliefs of official involved in biodiversity conservation conflicts with this anthropocentric, human rights based, approach.

1.8 DEA has attempted to ignore this conflict by incorrectly claiming that:

(a) The biocentric approach set out in international instruments such as the United Nation Convention on Biological Diversity must take precedence over domestic law.

(b) It is justified in what it is doing because its approach has been endorsed by experts in the field of invasion ecology (the so called science based approach).

1.9 The sentiments expressed by the Invasive Species Specialist Group of the International Union for Conservation of Nature[6] ("IUCN") in its "Guidelines For The Prevention Of Biodiversity Loss Caused By Alien Invasive Species adopted in 2000 ("IUCN AIS Guidelines 2000") are central to this thinking. This includes the assumption that:

(a) Any species that impacts on native[7] biodiversity must automatically cause or threaten economic harm and harm to human health and wellbeing is central to this thinking and to the approach DEA and South Africa's environmental authorities adopt in respect of biodiversity conservation.

(b) Attempts to preserve native species within their historic distribution ranges before human intervention began to change these natural distributions is an important goal in this biocentric nativist approach to biodiversity conservation, as is:

(i) the idea that native species have an inherently superior right to existence than alien ones; and

(ii) the assumption that alien species, even alien species that have existed in South Africa for over 100 years must be considered as a threat to biodiversity until proven otherwise.

[6] The IUCN is a private association whose membership is composed of both government and civil society organisations. Its focus is biocentric and it uses the size of and diversity of its membership and its United Nations observer status to ensure that nature conservation has a voice at the highest level of international governance.

[7] Native in this context means an indigenous species native to a particular part of South Africa, that is to say that it is within its natural distribution range within South Africa and thus is not an extra limital species. An indigenous species is one that is indigenous to South Africa but may be alien or extra limital in part of South Africa.

1.10 I have challenged DEA for its failure to transform its values to bring them into line with constitutional values. These criticisms have been ignored. There are many reasons why DEA has been able to do this but the one that stands out is the fact that NEMBA was drafted without a policy.

(a) The result was that the biocentric belief in biotic nativism and the preservation of native species above all else that dominated biodiversity conservation in South Africa prior to 1994 was never coherently challenged and thus never had to transform.

(b) There was never any attempt to realign this value system with constitutional values. In particular, the anthropocentric principle that people rather than a nativist view of nature must come first and that the purpose of environmental management is to manage human development sustainably into the future are over-shadowed by a desire to preserve historical distribution ranges of native species.

(c) The result is that environmental authorities sit like square pegs in round holes trying, inter alia through the abuse of state power, to force their beliefs into law despite the law saying that they must not.

1.11 The consequence is that DEA is trying to implement the NEMBA that it believes ought to have been enacted rather than the law as it is written. It has tried to implement Chapter 5 of NEMBA by preferring its definition of invasive for the legal definition. It is trying to formulate and implement laws under NEMBA that fit its idea of the purpose of the law rather that the true purpose as it is written in NEMBA itself.

1.12 The result is plain to see. NEMBA is not working. DEA's attempts to make it do what it was never intended to do and what it cannot lawfully do has resulted in a situation where:

(a) DEA is incapable of running a lawful public consultation process under NEMBA.

(b) Laws that are promulgated under NEMBA lack legitimacy, lack public support and are often unworkable.

(c) DEA tries to remedy these shortcomings by changing the law rather than transforming its attitudes and beliefs. The NEMLA Bill that is presently before Portfolio Committee on the Environment – National Legislature (the "Portfolio Committee") is a current example of this as is DEA's Draft National Environmental Management Biodiversity Bill (the "Draft Biodiversity Bill")[8]

(d) Laws become increasingly draconian as they become increasingly ineffective leaving one wondering whether DEA ultimately envisages a return to a Police State.

[8] See https://otherhand991201715.files.wordpress.com/2018/01/20180101-draft-nemba-bill_15-01-2018.pdf

1.13 This attempt at unconstitutional and unlawful law making not only threatens transparent, effective and democratic government, it is also an attack on human rights including the environmental right set out in section 24 of the Constitution.

PART A: CAUSES OF FAILURE

2. **The failure of the existing AIS Lists and Regulations-**

2.1 The existing AIS Lists and Regulations, namely the 2014 AIS Regulations and 2016 AIS Lists have failed because the DEA ignored Chapter 5 of NEMBA both in identifying which species ought to be listed as invasive and also what must be done with a species once it has been listed as invasive, in favour of a so called science base approach that is neither legal nor effective.

2.2 This failure is evident in the fact that key elements of Chapter 5 of NEMBA are not being implemented.

(a) Section 73(2)(a) NEMBA says:

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

(b) Landowners including organs of state, national, municipal and municipal government have largely ignored these statutory instructions. The Draft SANBI AIS Status Report records inter alia that:

> "Landowners are required to notify government, in writing, of the listed invasive species occurring on their land. A total of 59 notifications were received, constituting less than 0.001 % of the total number of land parcels in the country. The vast majority of landowners are either ignorant of this statutory requirement, or have chosen to ignore it."[9]

(c) Landowners must take steps to control and eradicate the listed invasive species and to prevent it from spreading. The importance of this obligation is emphasised in that the section in effect says this twice. The word "control" when used in Chapter 5 means to combat or eradicate an alien or invasive species or where such eradication is not possible, to prevent, as far as may be practicable its propagation, recurrence or spread.

(d) The legislative scheme that applies to Chapter 5 of NEMBA envisages that the steps that landowners take must be informed largely by the invasive species

[9] Page 211 of the Draft SANBI AIS Status Report

monitoring, control and eradication plans that all municipalities must develop implement and report on in terms of section 76(2)(a) of NEMBA.

(e) Despite this the Draft SANBI AIS Status Report records that:

> "Only 26 alien species area monitoring, control and eradication plans (covering about 4% of the land-surface of the country, where 100% should be covered), were submitted to the Department of Environmental Affairs and the South African National Biodiversity Institute by organs of state. Only four of these plans were of adequate quality when assessed against the guidelines for the preparation of such plans."[10]

2.3 The reason for this failure is not hard to see. It is simply not possible for municipalities to prepare the required monitoring, control and eradication plans for that number of species, let alone implement and monitor them. The resources, capacity and the necessary expertise to do this simply do not exist.

2.4 Section 24 of the Constitution requires the State to protect our environment through reasonable legislative and other measures. But there is nothing reasonable about the AIS lists and regulations that are presently in force:

(a) They contravene the principles described in section 2 of NEMA (the "NEMA Principles") and are incompatible with what is set out in NEMBA.

(b) They are unworkable and irrational, not to mention also being unlawful.

(c) They result in an unjustified abuse of state capacity and resources.

(d) They should be repealed and DEA should start again, this time on terms that applies the law rather than ignores it. .

3. Ignoring the definition of invasive

3.1 One of the root causes of this absurdity lies in DEA's failure to apply the legal definition of "invasive" set out in NEMBA having regard to the true meaning and purpose of Chapter 5 of NEMBA.

3.2 DEA's science based approach to interpreting and applying Chapter 5 of NEMBA has resulted in its preferring scientific definitions of invasiveness over the legal definitions. The trouble with this approach, apart from the obvious one, is that scientists do not agree on what invasive means.

(a) For example:

(i) One may justifiable surmise, that the Minister applied the definition of invasive quoted in DEA's 2014 report entitled "A national strategy for

[10] Page 211 of the Draft SANBI Status Report

dealing with biological invasions in South Africa". This report defines invasive species as:

> "Alien species that sustain self-replacing populations over several life cycles, produce reproductive offspring, often in very large numbers at considerable distances from the parent and/or site of introduction, and have the potential to spread over long distances"[11],

(ii) However this definition is materially different from the biological invasions approach adopted by the authors of the Draft SANBI AIS Status Report where these are defined as:

> "the phenomenon of transporting organisms, through intentional or accidental human activity, to areas outside of their natural range; and to the fate of such organisms in their new ranges, including their ability to survive, establish, reproduce, disperse, spread, proliferate, and influence invaded ecosystems in many ways (Richardson et al. 2011) [12]";

(b) As Richardson points out in A Compendium of Essential Concepts and Terminology in Invasion Ecology, the above definition of invasive species "explicitly excludes any connotation of impact, and is based exclusively on ecological and biogeographical criteria." This observation applies equally to the definition of "biological invasions". It should not be surprising therefore to find that these definitions differ materially from the definition contained in legal instruments such as for example:

(i) The definition of invasive that applies to the United Nations Convention on Biological Diversity (CBD) COP whose Decision 6 VI/23 defines a species as invasive in these terms:

> "invasive alien species" means an alien species whose introduction and/ or spread threaten biological diversity."

It is important to note, as Richardson does in his compendium that the definition supported by the CBD explicitly assumes that invasive species cause impacts to the economy, environment or health (see IUCN 2000).[13]

(ii) This is very different to legal approaches which have been adopted such as in the definition of invasive in the Regulation (EU) No 1143/2014 of

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[11] This is also the definition that was preferred by Richardson et al in their article "A Compendium of Essential Concepts and Terminology in Invasion Ecology" published in Fifty Years of Invasion Ecology: The Legacy of Charles Elton, 1st edition. Edited by David M. Richardson © 2011 by Blackwell Publishing Ltd, pages 409 to 420

[12] Draft SANBI AIS Status Report. See also A Compendium of Essential Concepts and Terminology in Invasion Ecology", Note 11.

[13] The IUCN Guidelines For The Prevention Of Biodiversity Loss Caused By Alien Invasive Species that was prepared in February 2000 http://www.issg.org/pdf/guidelines_iucn.pdf by the Invasive Species Specialist Group is a biocentric document that looks at threats to native biological diversity rather than biodiversity as it is defined in NEMBA as including all forms of biodiversity irrespective of origin.

The European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species[14]. The EU defines invasive as:

> "an alien species whose introduction or spread has been found to threaten or adversely impact upon biodiversity **and** related ecosystem services" (Emphasis added)

Ecosystem services are defined as "the direct and indirect contributions of ecosystems to human wellbeing."

3.3 This EU definition of invasive is a world apart from the scientific definitions referred to above and the definition of invasive used in the CBD. It looks different to the definition of invasive used in NEMBA but is in fact very similar. The trouble is that DEA refuses to recognise this simple fact.

(a) The bar to listing a species as invasive under NEMBA is very high. This is understandable given South Africa's limited resources and capacity and the huge resources that must be applied as a matter of law to controlling a species once it has been declared as invasive.

(b) The process is a two stage one which requires the Minister to determine:

(i) Firstly by applying the component considerations in the definition of invasive in NEMBA whether the species is invasive as defined.

(ii) Secondly by applying the NEMA Principles and having regard to paragraph 3.3(a)above if it should be listed as invasive

(c) The list of attributes required of an invasive species as defined in NEMBA is a long one.

(i) The process of determining if a species was invasive used to be determined in terms of national and provincial boundaries. Thus it could only be listed if it could be shown to be invasive across South Africa or a Province. The 2013 amendments to NEMBA changed this in that species may now be defined as invasive by area. This hugely increases the ability of a Minister or MEC to list a species as invasive provided of course one can accurately define those areas and the resources exist to control the species within those areas.

(ii) A species is only invasive in an area in law if is alien (as in it does not occur naturally) within that area. Species that are native to an area cannot be invasive in that area as the term is defined in law.

(iii) An alien species can is only invasive in law if it has established somewhere in South Africa outside its natural distribution range and is spreading from where it has established.

[14] See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014R1143

- Established mean to establish in the wild in the sense that that the established population can sustainably reproduce successive generations of the species.

- Spread means to spread over long distances.

(iv) A species that fulfils the above requirements is only invasive in an area if the Minister can show that its establishment and spread threatens ecosystems, habitats or species and that this establishment and spread may result in economic or environmental harm or harm to human health.

- Any threat is not sufficient to meet this test. The threat must be significant.

- The reference to environmental harm is not a reference to ecological harm as DEA is wont to allege. "Environmental must be defined applying the definition of environment[15] in NEMA. This means that the Minister must be able to show that the ecological harm may result in harm to human health and wellbeing.

3.4 As I have already mentioned this is very similar to Europe's ecosystem services approach[16] to defining whether or not a species is invasive.

(a) These approaches are different in that

(i) The EU Law refers to the introduction or spread of a species whereas South African law is stricter in that the Minister must show that the species has become established in the wild.

(ii) The EU Law does not refer to economic harm or harm to human health.

(b) However these differences are semantic rather than real because:

(i) Both require a threat to biodiversity though South African law describes that threat as being to ecosystems, habitats or species.

(ii) Both require an adverse impact upon related ecosystem services though South African law describes this as environmental harm.

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[15] Environment is defined in NEMA as "the surroundings within which humans exist and that are made up of-
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and animal life;
(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; **and**
(iv) **the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being**;" (Emphasis added)

[16] See paragraph3.2(b)(ii)

3.5 The fact that a species may be invasive as defined in law does not mean that it must be listed as such.

(a) Section 2(1)[17] of NEMA obliges the minister to apply the NEMA principles in deciding whether or not to list a species as invasive, either throughout the country or in a particular area.

(b) Moreover section 2(2) requires that the Minister adopts a people first approach to doing this. Section 2(2) of NEMA says:

> "Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably."

(c) The NEMA Principles are not a menu of principles from which a decision maker may choose from at will. One cannot only chose to apply the precautionary principle described in section 2(4)(a)(vii) of NEMA or indeed any other of the principles among those listed in section 2(4) as a whole and ignore everything else. They must be applied holistically and purposively having regard to the environmental right described in Section 24 of the Constitution. This must be done by balancing the environmental right in a conspectus of other human rights rather than trying to apply it in isolation as if it is an exceptional right that somehow overrides all other rights.

3.6 SANBI recommended in its Draft SANBI AIS Status Report that:

> "Removing some species from the list of regulated species could free up scarce capacity, and allow both managers and regulators to focus on more harmful species that should arguably receive priority. The continued regulation of many species that are less harmful arguably ties up scarce capacity in activities that do not deliver the returns on investment that would come from a focus on more harmful species.

This is sensible advice that also accords what would happen naturally if Chapter 5 of NEMBA was applied as the legislature intended it to be applied. However this is not what DEA wants to do or what it is doing.

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[17] Section 2(1) of NEMA says "The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and:

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;

(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

3.7 The Americans apply the gambling term to "double down" to describe what happens when a politician refuses to acknowledge a fallacy and instead carry on the basis that by doing so that will make right something that is inherently wrong:

(a) The Draft 2018 Lists and Regulations are an example of doubling down.

(b) Another example of doubling down is the 2015 NEMLA Bill which makes material changes to how Chapter 5 of NEMBA should be applied that ignore the inherent problems in the framework described above and instead try to water down Chapter 5 in an attempt to legalise and reconcile what DEA is doing.

(c) So too is the Draft Biodiversity Bill for the same reasons.

3.8 This begs the question why DEA is ignoring Chapter 5 of NEMBA and why DEA is trying to regulate biodiversity conservation in some other way?

4. **Why is NEMBA being ignored?**

4.1 DEA continues to deny that it is ignoring Chapter 5 of NEMBA, despite the wealth of evidence that points the other way. DEA tends to try and justify what it is doing, when confronted, be generalised arguments that point to the absurdities that arise from applying a lawful approach to its unlawful one as if its unlawful approach is somehow valid. Thus one finds arguments such as this in DEA's recently redistributed trout press announcement of 19 April 2015[18]:

> "A legal argument has been put forward by the anti-regulation lobby that trout should not be listed, because "a species is only invasive if it either causes economic harm or causes harm to human health". In fact, the law says that a species is invasive if its "establishment and spread outside of its natural distribution range (a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and (b) may result in economic or environmental harm or harm to human health." It is quite obvious that, if the spread of a species may result in environmental harm, then they are invasive. (How can a "Biodiversity Act" not protect biodiversity?) To take this to its logical conclusion, indigenous species could then be decimated or driven to extinction, and the law should not intervene, unless human well-being is affected. The Department does not believe that the vast majority of fly-fishers would support that position. (In any event, "human health" can also be "harmed" – think of the psychological sense of loss through rhino poaching.)"

4.2 I have already dealt extensively with the fact that our environmental right is a human right and the fact that a people first ecosystem services approach must be adopted when implementing Chapter 5 of NEMBA. The dystopian "aliens are bad - human beings should never have invented ships or planes" approach to biodiversity conservation that is embedded in the IUCN's AIS Guidelines 2000 is not an appropriate perspective that can be

[18] The Regulation of Invasive Species - Clarification of the Regulation of Brown Trout and Rainbow Trout. The Department of Environmental Affairs 19 May 2014.
file:///C:/Users/iancox.COX/Downloads/DEA%20position%20on%20the%20regulation%20of%20trout.pdf

lawfully brought to bear when government takes reasonable legislative and other measures to conserve biodiversity.

4.3 But the trouble is that:

(a) Those responsible for biodiversity management DEA do not believe in this anthropocentric "people first" approach that is required in terms of the Constitution and NEMA.

(b) They do not subscribe to the core values embedded in the Constitution.

(c) They believe that the 2000 IUCN Guidelines are correct and that that people constitute a threat to nature which they conceive of as the world that existed before people existed or began to transform their environment. Their values are informed by these extracts taken from the opening paragraph (Background) in the 2000 IUCN Guidelines:

> "For millennia, the natural barriers of oceans, mountains, rivers and deserts provided the isolation essential for unique species and ecosystems to evolve. In just a few hundred years these barriers have been rendered ineffective by major global forces that combined to help alien species travel vast distances to new habitats and become alien invasive species. The globalisation and growth in the volume of trade and tourism, coupled with the emphasis on free trade, provide more opportunities than ever before for species to be spread accidentally or deliberately. Customs and quarantine practices, developed in an earlier time to guard against human and economic diseases and pests, are often inadequate safeguards against species that threaten native biodiversity. Thus the inadvertent ending of millions of years of biological isolation has created major ongoing problems that affect developed and developing countries.
>
> The scope and cost of biological alien invasions is global and enormous, in both ecological and economic terms. Alien invasive species are found in all taxonomic groups: they include introduced viruses, fungi, algae, mosses, ferns, higher plants, invertebrates, fish, amphibians, reptiles, birds and mammals. They have invaded and affected native biota in virtually every ecosystem type on Earth. Hundreds of extinctions have been caused by alien invasives. The ecological cost is the irretrievable loss of native species and ecosystems."

(d) This extreme belief in the purity of biocentric biotic nativism means that they are incapable of visualising biodiversity in terms where human impacts and indeed human beings themselves are viewed as part of nature. They are incapable of grasping comprehending that:

(i) We are part of nature;

(ii) Biodiversity is a word that, in both fact and law, describes the diversity amongst all living things (including humans) and not just native species.

(iii) Life is not a static thing any more than biodiversity is. Ecosystems habitats and species change. Species come and go. Anthropogenic change is part of that natural process.

(iv) The purpose of environmental management is not to stop the clock or like King Canute to try and hold back the tide. The purpose of the environmental right and environmental law is to try and avoid a situation where anthropogenic change results in environmental change that is harmful to human health and wellbeing including that of future generations.

(v) This is the basis of the ecosystem services approach that is embedded in section 24 of the Constitution and which underpins NEMA. It is what informs the precautionary and other NEMA principles and ultimately the people first approach described in section 2(2) of NEMA.

(e) The truth is DEA and associated organs of state such as SANBI are:

(i) engaged in a deliberate and incremental step by step strategy aimed at moving biodiversity conservation out of its constitutionally ordained space into a space where biodiversity must be preserved by protecting it from human beings at all costs rather than conserved for human beings; by

(ii) ignoring the legally required people first (anthropocentric) approach to biodiversity conservation.

(f) The consequence is an unworkable AIS law. It is also an attack on basic human rights not to mention the economy and human health and wellbeing.

5. **The lack of a biodiversity policy**

5.1 I think this disconnect between the perspectives and values that operate within DEA and provincial environmental authorities and what is required in law has not been addressed because the policy making process that ought to have led up to the enactment of NEMBA was never finalised. This means that DEA and other environmental authorities have never had to confront the fundamental differences that exist between the people first guiding principles in the white paper that was formally adopted before NEMA was drafted and the biocentric nature first approach adopted in the 1997 Draft Biodiversity White Paper.

(a) This conflict stands out in stark contrast when you compare the draft white paper on biodiversity that was published for comment in July 1997 with the white paper on environmental management policy that was formally adopted in the same month. While both are essentially statist in their perspective there is a world of

difference between the approaches taken in developing the two documents especially around sustainable use.

(b) Sustainable use or development as it is described in the white paper on environmental management was once described to me by eThekwini's Dr Debra Roberts in these terms:

> "We now understand that there is in fact a hierarchy whereby societies and economies are built on the foundation of planetary life support systems and that what we do as Homo Sapiens has to be constrained by the limits of those planetary boundaries if we want to ensure deep sustainability and equity for all (see the work of Rockstrom, Griggs, Raworth etc). This has burst the bubble on the "we can have our cake and eat it" model and clearly indicated that humanity's desires cannot be the sole basis of decision making and that the requirements of the life support systems needs to be prioritized given that they are the foundation for everything. This is an urgent need as the indications are that we have already crossed planetary boundaries in the areas of biodiversity, climate change and the nitrogen cycle."

(c) This is a far cry from the preservationist perspective adopted in the draft white paper on biological diversity which frames biodiversity in the context of biodiversity conservation: The emphasis being on preserving in situ biodiversity in the wild (as in an environment without human beings) on the basis that ex situ environments (as in environments inhabited by human beings) should be managed primarily for the purpose of complimenting in situ biodiversity preservation efforts.

5.2 The enactment of NEMBA did not address this conflict. NEMBA is not a principled or policy driven law like NEMA was when it was first enacted. It is a hybrid attempt to marry the biocentric values embedded in the CBD with the strong culture of biotic nativism that underpins the white paper with the anthropocentric principles of conservation and sustainable development that inform the environmental right and the NEMA Principles. It is thus a curious amalgam of contrasts. For example:

(a) The preoccupation with native biodiversity in the white paper on biodiversity is replaced with a definition of biodiversity that refers to all living things irrespective of whether they are alien or native. But Chapter 4 only permits government to protect indigenous species.

(b) The unconstitutional scheme set out in chapter 5 of NEMBA that makes it a criminal offence to possess or use an alien species (which includes an indigenous species that is not native) is reduced to mere rhetoric by the knowledge that such a law can never be enforced and must be mitigated by the wholesale grant of exemptions by the Minister.

(c) The wide ranging biocentric notions of what makes a species invasive is blunted by a definition of invasive that requires invasiveness to be judged in terms of the harm the ecological threat posed by an alien species poses for the economy human health and wellbeing or what the European Union calls ecosystem services[19].

(d) Biocentric influences within NEMA are further tempered by the requirement that NEMBA must be applied in terms of NEMA and that its implementation must be guided by the NEMA Principles.

5.3 The trouble with hybrids is that they are liable to be shunned by both parents. Just so with compromises. They only work if the parties to the compromise are prepared to commit to do so. The trouble with this compromise is that officials in DEA and other environmental authorities were/are in no mind to compromise.

(a) They are convinced that nature is under threat and that the only way to save nature is to turn back the clock and return ecosystems to what they were before human beings began to impact materially on them.

(b) While they know that this is impractical they believe that they must nonetheless make the effort on the basis that trying, no matter what the cost, must be better than not trying. Dr Guy Preston deposed an affidavit in the Kloof Conservancy Case. After pointing to the enormous cost and difficulty of eradicating even truly invasive species such as famine weed he noted in this regard:

> "None of this is to say that the Department is throwing up its arms in defeat. It is used, rather, to illustrate the magnitude of the challenges facing us, like all countries, in the prevention, control and (where possible and appropriate) eradication of invasive alien species. It was calculated that, relative to Gross National Product, South Africa has the largest budget of any country in the world, for the management of invasive alien species. Whilst South Africa may also be one of the more vulnerable countries in terms of impacts of invasive alien species, it nevertheless demonstrates the commitment of our Government, since democracy, to address the problem of invasive alien species."

5.4 This attempt to pursue a biocentric program of biodiversity preservation based on the belief that biodiversity must be preserved through the in situ preservation of wild ecosystems:

(a) Informs much of the legislative effort aimed at amending NEMBA and the flood of plans, lists and regulations that have been promulgated under NEMBA these past ten or so years.

(b) Is fundamentally misaligned with the environmental right set out in section 24 of the Constitution and NEMA.

[19] See Note 14

(c) Means that DEA cannot properly:

(i) apply the NEMA Principles in legislating and implementing measures dealing with biodiversity management and conservation; and

(ii) allow the public to participate as is required in terms of section 100 of NEMBA.

(d) Is hopelessly ineffective as I have already pointed out.

5.5 The result is a law that is unlawful, a department that is increasingly unaccountable and ineffective and that is increasingly asking for dictatorial "police state" powers in order to do its work.

5.6 One can see this trend in the scheme underlying the Draft Biodiversity Bill.

6. The Draft Biodiversity Bill

6.1 Though the Draft Biodiversity Bill has not yet been published for comment, it has entered the public domain through the MINTECH committees where it has recently been circulating for comment.

(a) It is intended that this Bill, if made law, will replace the existing NEMBA.

(b) The Draft Biodiversity Bill is the next step in an invasion strategy aimed at removing the anthropocentric influences presently in NEMBA by creating islands or bridgeheads of legal rights and powers from which environmental officials can further spread their powers and thereby fill the gaps through the practical implementation of the law in the pursuit of a biocentric agenda which is anti-human rights.

(c) The Draft Biodiversity Bill, will if made law, replace the strategic targeted approach based upon an accountable and peremptory obligation to control listed invasive species under Chapter 5 with the ad-hoc management the use of invasive species by means of:

(i) risk assessments and permits;

(ii) issued by officials vested with wide discretionary powers; and

(iii) little or no obligation to account to the public regarding the exercise of those powers;.

(iv) all in circumstances where it will be a criminal offence to breach the conditions of a permit or disobey and official in the execution of his or her duties.

6.2 Key features of the Draft Biodiversity Bill include:

(a) The nationalisation of private property rights in biological resources by characterising these resources as public property and thus making them subject to state control in the public trust. This deprivation of property rights in a renewable resource that is often the result of people's own ingenuity and labour is increasingly making South Africans labour tenants of the state. This is especially true if your livelihood depends on the possession and use of biological resources.

(b) An increasingly harsh penal regime of command and control which will be policed inter alia by warrantless searches of property and person on the basis that these are merely "routine inspections".

6.3 Further important features of what is envisaged include:

(a) The removal of peremptory requirements from biodiversity laws which can be used to hold officials to account in favour of broad discretions that will be judged upon the opinion of the Minister or the official involved.

(b) Replacing established laws that direct how the Minister must consult with the public with departmental rules made up from time to time and often at the time, regarding the extent of consultation that the DEA believes is necessary.

(c) Limiting the legislative role and oversight of Parliament by increasingly leaving law-making to the Minister in circumstances where she is given very broad law making powers. .

6.4 The result is that South Africans are faced with a situation where:

(a) Environmental law making may not just be directed at advancing a biocentric agenda based on fundamentalist biotic nativism beliefs. It may also be the case that it being used as an instrument of exercising State control in order to replace the constitutional rechstaat with one where rights will be replaced by privileges.

(b) The rule of law will increasingly be replaced by rule by officials. As the reach of the permitting regime is extended it will in fact become increasingly dangerous to seek legal recourse against the actions of officials.

(c) Human rights are compromised to the point where they may even become meaningless.

(d) Corruption will be encouraged rather than combatted.

(e) This will result in a situation in which the state will get to play the greedy landlord extracting rents for the benefit of a privileged and parasitic few at the cost of South Africa and its increasingly oppressed people.

6.5 This move to a police State is disturbing enough in itself. It becomes extremely worrying when read in conjunction with proposals to redefine the property right given the important role private ownership plays as a countervailing force to the unchecked exercise of power by government and the destructive influence this has on rights generally.

PART B OBJECTIONS TO THE DRAFT AIS LISTS AND REGULATIONS

7. Summary of objections

The Draft 2018 Lists and Regulations need to be seen in the context of Part A of this submission.

7.1 I object to the 2018 Draft AIS Lists and Regulations on the following grounds:

(a) Just as was the case with the drafts[20] of the 2014 AIS Lists and Regulations and the 2016 AIS lists the Draft 2018 Lists and Regulations do not comply with section 100 of NEMBA, both as regards

(i) the form of the notice; and

(ii) the lack of sufficient information.

(iii) the failure to publish the notice in a newspaper that is distributed nationally.

(b) They are not accompanied by the requisite social economic impact assessment (SEIA) and thus do not consider the socio economic impacts that will result.

(c) The changes proposed are premature given the manifest failings of the NEMBA law itself and in particular Chapter 5 thereof, (alien and invasive species).To continue with attempts to make further such regulations, especially given the fact that SANBI is about to submit its final report "The status of biological invasions and their management in South Africa in 2017" in term of section 11 of the 2016 AIS Regulations".

(d) While the absence of the required information makes it impossible to comment in detail on this, it seems very likely that neither:

(i) the legal definition of invasive was properly applied in determining if the species referred to in the list are invasive; nor

(ii) the NEMA Principles described in section 2 of NEMA were properly applied in determining if the Minster should list these species as invasive.

(e) Trout are not invasive in South Africa and should not be listed as such.

(f) The sharptooth catfish cannot be listed as invasive throughout South Africa because it is indigenous to South Africa.

[20] No drafts of the 2013 AIS Lists and Regulations were published for comment and they were subsequently declared unlawful for this reason in terms of the judgement in the Kloof Conservancy v Government of the Republic of South Africa and Others (12667/2012) [2014] ZAKZDHC 60 (22 October 2014) http://www.saflii.org/za/cases/ZAKZDHC/2014/60.html.

(g) The widely used winter pasture grasses that are Perennial Ryegrass and Italian Ryegrass are to the best of my knowledge not invasive in South Africa and should not be listed as such.

(h) Species that do not occur in South Africa cannot be listed as invasive in South Africa.

(i) Alien Species cannot be exempted as such by reference to a restricted activity.

(j) NEMBA does not authorise the Minister to use her regulatory authority to add to the list of restricted activities prescribed in NEMBA.

7.2 The merits of many of this extensive list of objections are self-evident and have been confirmed by our courts, often the Constitutional Court.

(a) Some such as the issues raised regarding the defective notice are contained within the judgement of the full bench of the High Court in the Rhino Horn Moratorium Case[21] that survived attempts to mount an appeal against it all the way to the Constitutional Court.

(b) Some have even been conceded by DEA such as is the case with the fact that alien species cannot be exempted as such by reference to a restricted activity. DEA sought the opinion of senior counsel who confirmed that this was so. Despite requests for this opinion, DEA have refused to make it available to the public.

(c) It is particularly shocking, therefore to see these important legal constraints being blatantly ignored.

7.3 A great deal of the failings in NEMBA can be tracked back to the fact that it was enacted without completing the white paper policy making process that normally precedes law making of this nature. It is in any event a draft policy that was promulgated over 20 years ago in July 1997. The time to engage in a fresh policy making process is well overdue.

8. **The Notices - Legal compliance**

8.1 <u>The Counting of Days</u>

(a) Both notices contain the following passage:

> "Any person who wishes to submit representations or comments in connection with the draft lists are invited to do so within thirty (30) days from the date of the publication of the notice in the Government Gazette and by no later than 16h00 on the last day of comment. Comments received after this time may not be considered".

[21] Kruger and Another v Minister of Water and Environmental Affairs and Others (57221/12) [2015] ZAGPPHC 1018 - http://www.saflii.org/za/cases/ZAGPPHC/2015/1018.html

(b) Section 2 of the Interpretation Act, 1957 says the following about the reckoning of days:

> When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.

(c) The obligation to count the last day means the whole day right up to midnight and not a part of the day as determined by the Minister.

(d) Section 100(4) says: "The Minister must give due consideration to **all representations or objections received or presented** before exercising the power." (Emphasis added). Accordingly, it would not be proper for the Minister to indicate in the notices that "Comments received after this time may not be considered". Thus if the representations or objections are received by or presented to the Minister these must give due consideration. To tell the public otherwise is not lawful.

8.2 Publication in a newspaper

(a) DEA has never complied with Section 100(2)(a) of NEMBA. It has never successfully published a notice in a newspaper as is required by this section. I wrote to the Minister in October 2017 pointing out that this makes all law making under NEMBA unlawful and asking her to remedy the situation. The Minister has not responded other than to say that she is looking into the situation.[22]

(b) According to information supplied to me by DEA the notice was published in the Star Newspaper on Wednesday 21 February 2018.

(i) This is 5 days late; and

(ii) the Star is not a newspaper that is distributed nationally.

(c) These are material defects that cause real prejudice. They are according to the judgement in the Rhino Horn Moratorium Case, reason alone to declare any subsequent law unlawful. This is reason alone to invalidate the draft notice itself.

8.3 Oral representation

(a) Both notices contain the following passage:

(i) All representations and comments must be submitted in writing to the Deputy Director-General of the Department of Environmental Affairs, Branch Environmental Programmes:

[22] See Note 5

(b) Section 100(3) of NEMBA says:

> "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 delegated by the Minister.

(c) The Gauteng Division (Pretoria) of the High Court was critical of the Minister's failure to notify interested parties of the possibility that oral submissions may be allowed in the following paragraphs of its judgement in the Rhino Horn Moratorium Case[23]:

> "[30] The Annexure referred to in the quotation is not relevant to the question under consideration. What is clear from the quotation is that there is no information whatsoever, which enables members of the public to submit meaningful representations or objections to the Minister. Therefore, insofar as the Gazette is relied upon for the alleged substantial compliance regarding the process of consultation and participation by members of the public, I find the notice in the Gazette, has failed to meet the requirements in section 100(2)(b).
>
> [31] The Annexure referred to in the quotation is not relevant to the question under consideration. What is clear from the quotation is that there is no information whatsoever, which enables members of the public to submit meaningful representations or objections to the Minister. Therefore, insofar as the Gazette is relied upon for the alleged substantial compliance regarding the process of consultation and participation by members of the public, I find the notice in the Gazette, has failed to meet the requirements in section 100(2)(b).
>
> [33] Furthermore, subsection (3) of section 100 entitles the Minister to allow any interested person or community to present to the Minister or a person designated by the Minister oral representations or objections. The notice in the Gazette does not draw the attention of the public to this fact. But most importantly, the Minister should have been proactive to initiate such a dialogue regard been had to the substantial implications of the moratorium.
>
> [33] It is not like the Minister did not know how to take the lead in initiating oral representations or objections as contemplated in section 100(3).
>
> [36] Inasmuch as the Minister wishes to find substantial compliance in the Gazette and in the publications referred to above, and other publications referred to during oral argument, all did not meet the peremptory requirements in sections 99 and 100. To find substantial compliance in the circumstances of the present case, would render the provisions of sections 99 and 100 of no use and will serve to undermine and infringe everyone's constitutional right enshrined in section 24 of the Constitution. The decision to impose a moratorium is consequently ought to be reviewed and set."

[23] See note 21

8.4 Sufficient information.

(a) Section 100(2) of NEMBA says:

"The notice must-

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

(b) But neither the notice publishing the Draft AIS Lists nor the notice publishing the Draft AIS regulations provided any such information at all!

(c) The court dealt with this very point in the Rhino Horn Moratorium Case at paragraph 34 of its judgment. This is the full bench said:

> [34] However, what is disappointing in the present case is that, compliance in terms of sections 99 and 100 was not adhered to and no proactive steps were taken before the moratorium was imposed. The moratorium on domestic trade in rhino horns should be having a significant adverse impact on the employees and families of the rhino breeders like Hume and Kruger. The communities and business owners in the surrounding areas where rhino breeding operations are conducted could have been engaged due to possible loss of employment benefits occasioned by the moratorium. Secondly, the notice in the Gazette did not contain sufficient information to enable members of the public to submit meaningful representations and/or objectives. All of this has a significant bearing on the decision to impose the moratorium. On this finding alone, the moratorium ought to be set aside." (emphasis added)

(d) The facts of that situation fit the trout value chain like a glove. But it will have to be a much bigger glove because of the wide reach of the trout value chain. Thousands of jobs likely to be affected not to mention the future of the strategic trout based aquaculture industry and towns like Dullstroom, Machadorp, Mooi River, Nottingham Road, Underberg, Himeville, Rhodes. There is a great deal of research that supports the extent of the employment that trout provides and the valuable economic contribution trout makes.

(e) Yet the Minister chooses to ignore this. This is bad enough but what makes it worse still is that she has done so in circumstances where objectors including myself have reminded her many times in the past when submitting representations of this nature that the right the public enjoys to participate by making representations is no mere tick box exercise. It is as important as the right to vote.[24]

[24] See paragraph 115 of Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; - http://www.saflii.org/za/cases/ZACC/2006/11.html. See also paragraphs 87 to 89 of Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22 - http://www.saflii.org/za/cases/ZACC/2016/22.html

(f) I have also reminded DEA of the judgement in the Rhino Horn Moratorium Case[25] where the court held at paragraph 14 that:

> "A notice without a background and in the circumstances, without the reasons for the exercise of a power, will not enable members of the public to submit meaningful representations or objections."

(g) This is not in the least because of the important role public participation makes to the transparency of government and its accountability to the people.

(i) Accountability and transparency were important guiding principles that resulted in the drafting of the Constitution[26].

(ii) Accountability and transparency are also important environmental principles that must be taken into account when making or implementing environmental laws[27].

(iii) Accountability and transparency are also important principles underpinning the ecosystem approach adopted in terms of the CBD[28].

8.5 Insufficient information

(a) I along with many others wrote to the Deputy Director General asking why no information has been supplied despite section 100(2)(b) of NEMBA saying that this information must be supplied and asking inter alia:

(i) In sufficient detail why it is each of the species mentioned in the draft list are invasive and in particular:

- why these species pose ecological threats in the areas and manner described in the notice; and
- why this threat causes harm or is likely to cause harm to human health and wellbeing.

(ii) Given that NEMA says that the NEMA Principles must be applied to all environmental decision making which includes the listing of species as invasive and the making of regulations, how were these principles applied in the process that resulted in the Draft AIS Lists and Regulations?

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[25] See Note 23

[26] Constitutional Principle VI in Schedule 4 to the interim Constitution "There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

[27] See section 24(4)(f) of NEMA which states: "The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured."

[28] COP 7 Decision VII/11

(iii) What changes were being made to the regulations and why it is necessary to repeal and replace them?

(iv) Why were these Draft 2018 Lists and Regulations not delayed until the Draft SANBI AIS Status Report had not been published and members of the public had had an opportunity to read it.

(v) Why no socio economic impact assessment of the Draft 2017 AIS had been supplied.

(b) Again this information has not been supplied and again I have had to seek this and other information by way of a PAIA application. I have not yet received a response to that application.

8.6 Joining the dots

(a) There can be no doubt that the notice is manifestly materially and fatally defective.

(b) This is not mere legalese or legal nit-picking. It is deadly serious stuff which DEA has been ignoring for far too long now.

(c) The Minister must withdraw this notice. DEA is not above the law..

9. **The failure to wait for the SANBI AIS Status Report**

9.1 The Draft SANBI AIS Status Report[29] obviously did not contain conclusions as it was a "for comment draft". However it would seem sensible and just to delay publishing or even preparing the Draft AIS Lists and Regulations for comment given that the final report is all but complete; and [30]:

(a) the manifest failings of the existing AIS Lists and Regulations which I refer to in Part A.

(b) the recommendation in the Draft SANBI AIS Status Report that the list of invasive species be shorted to those that cause real harm.

(c) the socio economic impacts of some of the listings especially trout and rye grass have not been determined;

to delay any amendments to the AIS Lists and Regulations.

9.2 This is not to ignore the fact that the Draft SANBI AIS Status Report must to be read with caution given that it did not consider invasiveness as the term is defined in NEMBA but

[29] See note 3

[30] It is with the printers being finally proof read.

instead compiled the report on the basis that a species was invasive if it resulted in a biological invasion.

9.3 I deal with this in some detail in the in my representations[31] filed in response to the invitation to comment on this report. I need not repeat those here because those comments can be can be accessed online from the URL listed in note 3.

10. **Notice 1-Invasive Species – Restricted activities**

The Federation of Southern African Fly Anglers ("FOSAF") and Trout South Africa ("Trout SA") have made this point before as I have as well:

10.1 NEMBA does not authorise the Minister to prescribe listed activities.

10.2 The general catchall listed in section 97(1)(h) and (i) that permits the Minister to make regulations pertaining to "any other matter that may be necessary to facilitate the implementation of NEMBA and any matter that is necessary or expedient to achieve the objectives NEMBA" is not a general authority to add to the list of restricted activities by regulation.

11. **Notice 2- Exempt Alien Species**

11.1 It is proposed to amend section 1.e. of Listing notice 2 as follows :

2016 Listing Notice	**Draft Listing Notice**
e. All extra-limital taxa in the Republic, other than fresh-water fish.	e. All alien fresh-water fish, except for the release of alien freshwater fish into rivers, wetlands, natural lakes and estuaries.

11.2 The effect of the amendment is that alien fish will be exempted by activity.

11.3 It was established last year through correspondence I had with Dr Preston[32] last year that Part 1 of Chapter 5 of NEMBA does not permit an exempt alien species to be regulated by activity. Furthermore that this is so was confirmed in advice given to the DEA by senior counsel.

11.4 This is because section 66 of NEMBA only allows alien species to be exempt by species, category or by reference to a person. The proposed exemption by reference to the activity of "introduction" is unlawful for the same reason as attempts to regulate trout as alien were unlawful.

[31] See https://otherhand991201715.files.wordpress.com/2018/02/20170524-comment-the-early-draft-of-the-national-status-report-final.pdf

[32] See my Letter to Dr Preston in January 2017 and http://www.durbanflytyers.co.za/Articles/20170106%20_Letter_to_Dr_Preston_Final.pdf and his response in in June of that year http://www.durbanflytyers.co.za/Articles/Letter_To_Trout_Stakeholders.pdf

11.5 It is shocking that DEA having already acknowledged that it cannot lawfully manage exempt alien species by exemption but is still trying to do just this.

12. **Notice 3 - Listed invasive species - General**

12.1 Territorial application of NEMBA

(a) A species cannot be listed as invasive under NEMBA if it does not occur in South Africa. This is because:

(i) Section 4 of NEMBA states that it applies within the Republic, its territorial waters and the Prince Edward Islands. This means that the Minister has no jurisdiction outside this territorial area.

(ii) The reference to establishment and spread in the definition of invasive is a reference to its establishment and spread in South Africa. The reference to harming ecosystems habitats species are a reference to those things within the Republic of South Africa.

(b) We cannot go around listing species that are indigenous to another country invasive in this country if they do not even occur here!

(c) South African law requires laws to be interpreted purposively having regard to the language of the section and the purpose of the law[33]. The purpose of listing a species as invasive in South Africa is:

(i) first to control (as in eradicate or prevent that species from spreading) in South Africa; and

(ii) second, subject to this overriding requirement of control, to manage restricted activities by permit, such permit to be issued only where the permitting of restricted activities has not been prohibited and then only when the risk of harm is minimal.

(d) The purpose is not to manage the importation of species whose importation into this country can be managed by the permitting of alien species on account of the fact that they can be managed as is being done by the exemption of alien species subject to the condition that they occur lawfully in South Africa lawfully.

12.2 Definitions

(a) "Industry association" is not referred to outside the definition itself and its inclusion as a definition is confusing. The definition of "facility" which is only referred to in the definition of "industry association" is likewise confusing.

[33] http://www.saflii.org/za/cases/ZASCA/2012/13.html

(b) It is not clear how these definitions are intended to operate in respect of the proposed nationwide listing of trout as invasive under category 2.

(c) The Minister's noncompliance with section 100 of NEMBA by virtue of her failure to supply "sufficient information to enable members of the public to submit meaningful representations or objections" makes this all the more objectionable.

12.3 Categories

(a) I have made this point before but NEMBA does not authorise the Minister to manage invasive species through the permitting of beneficial use. The categorisation of species such as category 2 as is the case with brown and rainbow trout is ultra vires NEMBA and unlawful.

(b) The proposed amendments to section 73 of NEMBA and the definition of control contained in the 2015 NEMLA Bill seek to address this by conferring a wide discretion on DEA to manage invasive species pretty much as DEA sees fit.

(i) This amendment is being misrepresented as minor. However, it still has to be adopted by Parliament. In any event is liable to be set aside as unlawful inter alia on the basis of a breach of the doctrine of separation of powers.

(ii) This is especially so when you look at that amendment in the light of the underlying purpose of these amendments which is to extend the discretionary scope of the Minister's regulatory power and DEA's power to implement the Minister's environmental law making ultimately as contemplated in the Draft Biodiversity Bill.

13. **Notice 3 Lists 1 and 2 - List of invasive terrestrial, fresh water and marine plant species.**

13.1 I would not have been able to comment on this section at all were it not for the fact that a fellow angler informed me that Perennial Ryegrass and Italian Ryegrass are widely used as fodder for livestock.

13.2 The mind boggles that an important source of fodder can be listed as invasive without any explanation or indication of the impacts this might have on livestock and dairy farming and meat production. This seems to be another example of a failure to apply the definition of invasive as is legally required in terms of NEMBA.

13.3 Save for this I cannot comment generally on this list as no supporting information has been supplied in respect of it. The Minister has, thus deprived me of this opportunity to exercise this important constitutional right by ignoring the requirements of section 100(2) of NEMBA.

14. **Notice 3 List 3 - List of invasive mammal species.**

14.1 I cannot comment generally on this list as no supporting information has been supplied in respect of it. The Minister has, deprived me of this opportunity to exercise this important constitutional right by ignoring the requirements of section 100(2) of NEMBA.

14.2 However it does seem to me there are a number of species that are being listed as invasive despite the fact they do not occur in this country.

(a) There is for example no indication that any of the subspecies of giraffe or sable antelope which the Minister wishes to list as invasive in fact occur in this country or if they are in fact invasive here and if so in what respect.

(b) On the contrary it seems very likely that some if not all such species do not in fact occur in South Africa. I am informed that the Giant Sable, is very difficult to locate in the wild, so much so that it is not clear if it is indeed a separate sub species, does not occur in South Africa.

14.3 I suggest that if species that do not occur here are likely to become invasive if introduced, then they should not be introduced at all and should rather be listed as prohibited aliens. The deliberate introduction of a species that DEA knows will become invasive contradicts the purpose of NEMBA, not to mention being a gross violation of our environmental right and an actionable dereliction of duty.

15. **Notice 3 Lists 4 to 5 - List of bird reptile and amphibian species.**

I cannot comment generally on this list as no supporting information has been supplied in respect of it. The Minister has, deprived me of this opportunity to exercise this important constitutional right by ignoring the requirements of section 100(2) of NEMBA.

16. **Notice 3 – list 7 List of Fresh water invasive fish species - General**

16.1 Introduction

I cannot comment generally on this list as no supporting information has been supplied in respect of it. The Minister has, deprived me of this opportunity to exercise this important constitutional right by ignoring the requirements of section 100(2) of NEMBA.

16.2 *Clarias gariepinus* (Burchell, 1822)

(a) *Clarias gariepinus* (Burchell, 1822) or the African Sharptooth Catfish is indigenous to South Africa and cannot be listed as invasive throughout South Africa as is being suggested.

(b) This is because a species can only be listed as invasive in an area if it is alien to that area.

(c) If the sharptooth catfish is invasive in areas within South Africa where it is alien (as in an extra limital species) then those areas need to be mapped before it can be listed as invasive in those areas.

16.3 Fish species that do not occur in South Africa but which are still proposed to be listed as invasive.

(a) It seems that a great number of the species that are to be newly listed as invasive do not in fact occur in South Africa[34]. For example:

(i) While I am aware of talk of introducing Barramundi as an aquaculture species into South Africa, this has not yet happened.

(ii) Likewise, I am similarly not aware of Piranha or many of the other listed fish species occurring in South Africa in South Africa.

(b) I suggest that if species that do not occur here are likely to become invasive if introduced, then they should not be introduced at all and should rather be listed as prohibited aliens. The deliberate introduction of a species that DEA knows will become invasive contradicts the purpose of NEMBA, not to mention being a gross violation of our environmental right and an actionable dereliction of duty.

17. **Notice 3 – list 7 List of Fresh water invasive fish species - Trout**

17.1 The Minister proposes to list trout as invasive under category 2 throughout South Africa. This listing is considerably tougher than the listing of bass and carp for example which are not listed in dams despite the damage carp do to the quality of water in dams or the consequent harm to human health and wellbeing.

17.2 Dr Preston[35] is quoted by Dr Juniours Marire in his PhD thesis saying the following:

"[B]ut then we said with that specific one [that is, trout] we have absolutely no doubt that our position is the correct one and we will go ahead and we would regulate on the basis of that and people could take us to court..., but it's simply that we are actually convinced that we are correct and that if something is invasive then we are obliged to list it."[36]

(a) But DEA has not been able to explain why this is so in terms that speaks to the definition of invasive nor has DEA been able to justify why trout must be listed as invasive.

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[34] I deal with the general position in law regarding the Minister's attempts to list species as invasive despite the fact that they do not occur in South Africa in paragraph 17.6(c)(iii) (prohibited alien species) and paragraph11 (List of invasive mammal species)

[35] He is clearly identifiable as expert 1.

[36] Dr Juniours Marire: Institutional change, institutional isolation and biodiversity governance in South Africa: a case study of the trout industry in alien and invasive species regulatory reforms Page 202

(b) The factual position is more correctly stated as Marire goes on to observe in the paragraph following this quote:

> "However, some leading aquatic scientists acknowledged that the AIS reform process was constrained by data poverty on alien fish invasions (Ellender and Weyl 2014[37], Van Rensburg et al. 2011[38]) because alien fish invasion research was in its "infancy" in South Africa (Ellender and Weyl 2014, p.125)."

17.3 One cannot help but wonder, especially given the absence of sufficient supporting scientific data and any explanation why this is being done, if this harsh listing of trout is not motivated by considerations that have nothing to do with whether or not trout are invasive.

(a) The compromise that was reached at the Phakisa Ocean Labs Conference[39] that trout would not be listed as invasive in areas where they already occur outside certain protected areas but would be listed as invasive inside those protected areas and in other areas where they could occur was a sensible one that enjoyed widespread public and even scientific support.

(b) The very limited concern that trout might be introduced into areas where they do not occur was could easily be managed through the conditional exemption of trout as an alien species until the matter could be more appropriately addressed through fresh water fisheries legislation. Further protection could have been provided to these limited areas where trout could occur by listing them where needs be as threatened ecosystems under Part 1 of Chapter 4 of NEMBA.

(c) However these simple solutions were ignored by DEA because it required DEA to recognise the proprietary rights that the trout value chain enjoy in respect of trout. This is because the trout that are found in much of South Africa's trout waters are not public property but are in fact privately owned.

(d) "I am responsible so I must be in control" is a phrase that Dr Preston has repeated at least two stakeholder meetings of the trout value chain that I have attended[40]. This sentiment has to be read in the light of new section 3 of the Draft Biodiversity Bill which effectively deprives South Africans of property rights in living things by making the state the trustee of South Africa's genetic resources including genetic material.

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[37] Ellender, B.R. And Weyl, O.L., 2014 - A review of current knowledge, risk and ecological impacts associated with non-native freshwater fish introductions in South Africa. Aquatic Invasions , 9 (2), pp.117-132.

[38] Van Rensburg, B.J., Weyl, O.L., Davies, S.J., Van Wilgen, N.J., Spear, D., Chimimba, C.T. and Peacock, F., 2011. Invasive vertebrates of South Africa. In PIMENTEL, D. (ed.), 2011. Biological invasions: economic and environmental costs of alien plant, animal, and microbe species. Boca Raton: CRC Press, pp. 326-378

[39] This took place in June and July 2014.

[40] He said it at the stakeholder meeting that took place at the Botanic gardens in Pretoria on 3 March 2014 and again at the meeting that took place in Kirstenbosch on 19 August 2014.

17.4 There is very little if anything in the South African literature that points anywhere in the direction that trout may be invasive other than the fact that they are predators. But this behaviour needs to be weighed up against the fact that trout still co-exist in waters with species they predate and other species despite being introduced into these waters over 125 years ago.

(a) There is no evidence of trout being the proximate cause the extirpation of any native species.

(b) Some scientists like to point to the disappearance of the Maloti Minnow from the uMkhomazana in KwaZulu-Natal but as Dr Andrew Mather and I point out in a recent article[41], it is probable that Maloti Minnow were never native to the uMkhomazana and were in fact introduced to feed trout.

17.5 The truth is that:

(a) Trout were introduced into South African waters over 125 years ago and have become a naturalised part of the ecological balance some in rivers where they have become established and now occur and self-replicate in the wild.

(b) In some cases, like the Underberg Himeville district of KwaZulu-Natal, trout were introduced into rivers where according to Dr RS Crass no fish (apart from eels) previously occurred[42]. This is because downstream waterfalls established fish barriers that prevented the natural migration of other fish species into these waters. Thus the uMzimkhulu catchment which includes inter alia the Polela and uMzimudi and the uMzimkulwane along with the uMkomazana upstream of the waterfall on the grounds of the Sani Pass Hotel were fish free prior to the introduction of trout.

(c) There are other rivers where trout occur but have not become established. This is either because they cannot breed in those rivers, such as for example, the Kliplaat in the Eastern Cape or because they cannot survive for any length of time because of adverse seasonal temperatures or water conditions or the degradation of the habitat which trout require in order to reproduce and/or to survive. Trout are maintained in these environments artificially through constant restocking.

(d) Trout cannot breed in still waters. This means that trout cannot establish in these still waters as the term is used in the definition of invasive.

(i) A great deal of the trout waters of South Africa are located in dams which are not natural environments and in which trout do not exist in self-replacing populations.

[41] Available online at http://www.durbanflytyers.co.za/Articles/Extracted_Pages_From_Flyfishing_201802.pdf
[42] Crass R.S. 1964 -Freshwater fishes of Natal.

(ii) They are maintained in these environments artificially through constant restocking.

(e) The areas where trout can survive in the wild are reducing due inter alia to climate change and habitat degradation and with it the ability of trout to spread. Trout did not spread naturally in South Africa in as much as they were introduced largely through constant restocking. The potential for trout to spread naturally has been exhausted. The areas where trout might become established if introduced are very limited and the chances of trout being introduced into these waters is very small indeed.

(f) Trout do not threaten ecosystems habitats or species. In many cases the introduction of trout has in fact been beneficial because the unpolluted conditions trout require in order to survive contribute to the reliance of basic systems that underpin ecosystem resilience and indeed ecosystem services. Removing trout will mean that many landowners will revert to more traditional forms of land use. This will start happening immediately trout are listed as invasive. This will result in significant land transformation with concomitant loss of ecosystem services.

(g) None of the above suggest that trout meet even the first requirement of invasiveness namely that these are species "whose establishment and spread outside of its natural distribution range threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species."

17.6 The idea that the occurrence of trout may result in economic harm or harm to ecosystem services or human health is even harder to justify. There is absolutely no evidence at all that this is the case. On the contrary the opposite is in fact true.

(a) There is a great deal of research that supports the valuable economic contribution trout, makes to the South African economy not to mention the anecdotal evidence of thriving trout fishing towns and destinations, trout based aquaculture and a growing community of active trout anglers.

(i) One example is recent research out of KZN tourism whose research reveals that:

"Some 5% of all domestic tourism trips to KZN in 2016 were for the purposes of fly fishing – and the vast majority of those were for trout fishing. That equates to around 209 500 trips to KZN in order to engage in fly fishing. The value of those trips would have been in the region of R232 126 000 – over R232 million. In other words, this is a substantial niche tourism sector.

Any threat to it, such as declaring trout to be an invasive alien species, would definitely result in a massive decline in its contribution to the tourism and thus the provincial economy. It

would result in business closures and significant job losses, at a time when SA cannot afford such an occurrence, particularly when it is not necessary. Trout have been in SA waters for over 150 years, and in that time, a significant and very productive industry has built up around them. In my view, it would be extremely short sighted to create any threat to the very basis of this industry segment."

(ii) Trout fishing as in the traditional measure of tackle sales, travel and accommodation is a tiny part of the full value chain.

(iii) Trout anglers are unique in South Africa in the fact they invest in their fishery through stocking, river stewardship, trout syndications and trout based tourism development not to mention employing trout fishing guides.

(iv) Trout fishing becomes a lifestyle investment in ways other forms of recreational angling do not. Sadly the exclusion of representatives from the trout value chain in the design stage of the recent economic survey into recreational fishing meant that this difference was not catered for. This is why this it has been agreed that this study will not look at the economic contribution of recreational fishing by sectors such as fly or trout fishing but will instead only do so in terms of salt water, estuarine and fresh water angling in general.

(v) This is all in addition to the trout aquaculture sector which despite severe droughts in recent years is still by far the largest contributor to South Africa's fresh water aquaculture sub sector.

(b) Likewise the contribution of the trout value chain culturally and in terms of general health and wellbeing. The trout fishing community in South Africa is internationally regarded.

(i) The output and success of trout fishing authors is one manifestation of this. Recent examples include Tom Sutcliffe, Peter Brigg, Ed Herbst, Andrew Fowler and Professor Duncan Brown.

(ii) Another is the fact that South Africa will be hosting the international masters Fly Fishing Competition in Lydenberg next year. That is if the Draft AIS Lists and Draft AIS Regulations do not become law and put an end to the competition.

(iii) A third is the increasingly active community of trout anglers that publish their own blogs or participate actively in trout based social media as well as the proliferation of trout based craftsmen and artists engaged in fly tying, rod building, net making, sculptures and painting.

(c) The trout value chain is transforming although far too slowly in my view.

(i) Trout fishing is always going to be an expensive pastime and the high regulatory cost of aquaculture coupled with the difficult conditions under which trout farms operate is always going to make transformation in trout based aquaculture difficult.

(ii) However there are encouraging signs of increasing black participation in trout ecotourism and there are many opportunities where community based trout aquaculture ventures could thrive if environmental authorities supported such initiatives instead of trying to find ways to stop them.

(iii) DEA likes to describe the purpose of biodiversity regulation as being enabling and to promote a more equitable access to biological resources but the reality often is that by enabling officials and officialdom, any access to biological resources is in fact made more difficult.

18. **Notice 3 Lists 8 to 11 - List of invertebrate and microbial species.**

I cannot comment generally on this list as no supporting information has been supplied in respect of it. The Minister has, deprived me of this opportunity to exercise this important constitutional right by ignoring the requirements of section 100(2) of NEMBA.

19. **The Repeal of Notice 4 of the 2014 and 2016 Lists - Prohibited alien species**

19.1 Section 67(1) of NEMBA states:

"The Minister may, by notice in the *Gazette*, publish a list of those alien species in respect of which a permit mentioned in section 65(1) may not be issued."

19.2 Although no explanation is given for this it seems that this notice is being repealed because DEA thinks it can regulate prohibited aliens as if they are invasive.

19.3 This is not the case. A species cannot be listed as invasive if it does not occur in South Africa. There may, however, still be a good reason to prohibit its importation. Section 67 and notice 4 both allow DEA to do this.

19.4 It should be noted that:

(a) Section 67 of NEMBA is nonetheless and extraordinary measure that must only be resorted to where the risk of harm is so great that all restricted activities must be prohibited.

(b) Section 67 stands in contradistinction to section 66 of NEMBA (exemptions) which prohibits the importation of any alien species into South Africa unless the species has been exempted. The importation of an exempt alien species is still subject to phytosanitary control.

19.5 It has been impossible to comment on why species all restricted activities have been prohibited in respect of the alien species listed in Notice 4 because DEA not include any information to this effect in the drafts of AIS listing notices that were published for comment.

20. **The Draft AIS Regulations**

20.1 <u>The legality of the proposed Category 1b Control Plans</u>

(a) The addition of a new section 5 to the Draft AIS Regulations proposes that the Minister be given extensive additional powers to require: "a person to develop a Category 1b Control Plan for one or more Category 1b species, which plan must be submitted to the Minister for approval."

(b) However NEMBA does not empower the Minister to require a person to develop a Category 1b Control Plan. It requires all listed invasive species to be controlled in terms of invasive species monitoring and control plans developed and implemented by municipalities and certain organs of state.

(c) The grant of this power is thus ultra vires NEMBA.

20.2 <u>The legality of categories of invasiveness</u>

(a) The Minister cannot create categories of invasiveness:

(i) unless NEMBA specifically empowers the Minister to do so; or

(ii) in circumstances where the effect of a regulation would be to amend NEMBA itself.

(b) The Minister's law making authority is a delegated one which is confined the strict limits of the delegation and constrained by the exclusive legislative authority of Parliament and the doctrine of separation of powers.

(c) Where one draws the line in matters such as this is often one of degree which in turn needs to be judged having regard to purpose judged against the facts of each case and the environment in which regulation making takes place.

(d) This is a fascinating and technical subject. However it does not affect this enquiry insofar NEMBA is presently drafted because whatever the Minister's delegated authority may be, she cannot regulate in ways that amend substantive provisions set out in NEMBA.

(i) Section 73(2) says that: "a person who is the owner of land on which a listed invasive species occurs must take steps to control and eradicate the listed invasive species and to prevent it from spreading."

(ii) Control is defined in relation to an alien or invasive species, to mean:-

"(a) to combat or eradicate an alien or invasive species; or
(b) where such eradication is not possible, to prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species."

(iii) Any categorisation is inimical with this obligation to take steps to control such as for example one that permits the beneficial use of a category of invasive species on terms where this overriding obligation of control can be ignored will amount to an effective amendment of NEMBA and will therefore be unlawful.

(e) It follows that categories 2 and 3 are all unlawful as both allow an invasive species to be managed in ways that does not amount to control. The current AIS Lists and regulations are unlawful insofar they list or regulate alien species as invasive on any basis that does not require an owner of land on which a listed invasive species occurs to: "take steps to control and eradicate the listed invasive species and to prevent it from spreading."

(f) The Minister nonetheless proceeded to list species as invasive by referring to these categories in August 2014 despite this being clearly unlawful. She did so again in 2016 when amended AIS lists were published.

20.3 Risk Assessment Practitioners

(a) The current scheme which provides for one set of rules as to who qualifies as an environmental assessment practitioner for DEA, SANBI and other environmental departments and another for everyone else is unprofessional and undesirable not to mention also being probably unlawful.

(b) Environmental assessment or risk practitioners should all have the same qualifications regardless of who they work for. This is especially so given that officials at DEA and SANBI have the right to review the reports of environmental assessment or risk practitioners.

(c) It is also undesirable to drop the requirement that the risk assessments be carried out by environmental assessment or risk practitioners who are independent. This is especially so when convictions, such as the belief that trout are invasive, exist in environmental departments. A person is unlikely to produce a balanced risk assessment that is contrary to his or her convictions or beliefs and members of the public will be entitled to distrust the resultant assessment report if that was the case.

PART C: THE DRAFT 2015 NEMLA BILL

21. Some comments on the 2015 Draft NEMLA Bill

21.1 Trout SA and FOSAF a submitted a memorandum[43] last year to the Portfolio Committee dealing with proposed amendments to NEMBA.

21.2 The Minister has by way of the 2015 NEMBA Bill proposed major changes to NEMBA and in particular to section 73 of NEMBA which will fundamentally alter how Part 2 of Chapter 5 works.

(a) These amendments are currently before the Portfolio Committee who will be holding public hearings shortly.

(b) The social and economic impacts of these amendments were not addressed in the impact assessment which accompanied the Bill.

(c) The impact of the proposed changes to section 73 were downplayed in the explanatory memorandum where it was misrepresented that their purpose was to empower "the Minister to develop regulations on the steps to be undertaken to control or eradicate listed invasive species":

(i) The amendments in fact remove the obligation placed on landowners to notify DEA of the presence of alien invasive species on their properties and replace it with a provision that say that the Minister may determine the circumstances in which landowners must give such notice and to whom.

(ii) This massively increases the cost and complexity of the obligation placed on municipalities to prepare invasive species monitoring and control plans.

(d) Dr Preston also misrepresented the amendments to NEMBA in an email to me dated 8 December 2016 where he wrote: "This is not the NEMLA Bill, which sets out proposed minor amendments that will be going to Parliament next year." There is nothing minor in the amendment described above.

(e) It is not clear if this Bill will become law or if it does, if it will survive legal challenge that will inevitably follow.

(i) In any event it is not reasonable to expect members of the public comment on the Draft AIS Lists and Draft AIS Regulations on the basis that this 2015 NEMLA Bill may become law.

[43] Available online at http://www.durbanflytyers.co.za/Articles/171005_Escalation_Letter_Final.pdf

(ii) It is also not lawful to publish amendments contemplated in the Draft AIS Lists and Draft AIS Regulations that may only be lawful (and this is disputed) if section 73 of NEMBA is amended as proposed.

PART D: POSTCRIPT DEA'S RESPONSE TO REQUESTS FOR INFORMATION

22. **Requests for information**

22.1 A number of interested parties wrote to DEA after the draft notices and asked for more information.

(a) Many of the people writing to DEA were trout anglers but this was not always the case. The Draft AIS Notices do not just affect trout anglers. Game rancher's and livestock farmers are also directly affected by what the Minister proposes.

(b) Many trout anglers posed their questions in a form recommended by FOSAF[44]. FOSAF's questions were not trout specific. FOSAF asked the following questions. I asked a number of questions that were broadly similar. FOSAF asked:

(i) Our law requires that such notices must be accompanied by sufficient information to enable the public to consult on an informed basis, why is it that you have not given the public this information?

(ii) Please tell me in sufficient detail why it is each of the species mentioned in the draft list are invasive. In particular, please advise why these species pose ecological threats in the areas and in the manner you want the Minister to list them as invasive and why this threat causes harm or is likely to cause harm to human health and wellbeing.

(iii) Kindly explain what considerations the Minister weighed up in arriving at an intention to list each species as proposed in the Notice?

(iv) Kindly also advise what policy guided the Minister's considerations if any?

(v) Please tell me why the existing AIS regulations are being replaced by new ones and how they are different to the old regulations and why the changes are necessary?

(vi) The National Environmental Management Act says that the environmental principles set out in section 2 of that Act must be applied to all environmental decision making including the listing of species of invasive and the making of regulations. How were these principles applied in the process that resulted in the Draft AIS Lists and Regulations?

[44] http://www.fosaf.org.za/read-Current-239.php

22.2 DEA replied in various ways to these requests:

(a) In some cases DEA sent a copy of its press release of 19 May 2015[45] . This press release which referred to a different attempt to list trout as invasive created a great deal of confusion.

(b) In others it replied non-specifically in the following terms:

> Please find a response to your questions below:
>
> 1. Receipt and collation of comments is the responsibility of the branch. Subsequent to which the inputs together with recommendations on how best to deal with them is submitted to the Minister for approval.
>
> 2. The detailed lists and the regulations are sufficient information - if there is anything that is not clear please advise what additional information you would require.
>
> 3. The listing process was, in some cases, informed by the risk assessment process whereas with some, the precautionary approach based on the invasiveness of that particular species elsewhere in the world in areas with similar climatic conditions was adopted. Some were informed by outcomes of stakeholder engagements and surveys conducted by various specialists. Some are adopted as in an effort to align our legislation with other relevant pieces of legislation so as to avoid contradicting information, which might ultimately confuse our various stakeholders.
>
> 4. Since there were a number of amendments to the regulations it is common drafting practice to rather replace the old set of regulations with a new one as this makes it easier for the public to peruse the regulations as a whole without having to work through a cumbersome amendment document. As with any amendments to laws the changes are to improve implementation and clarify any ambiguities and improve wording where necessary or insert new clauses where required. The public has an opportunity to comment on the full document and provide comments on any section which would be welcomed.
>
> 5. It is clear that listing invasive species fulfils a number of NEMA principles including the precautionary approach, protection of the environment for present and future generations, the environment held in trust, the polluter pays principles to name but a few, and to the extent that you are of the view these draft Lists and regulations do not concur with any NEMA principles you are invited to make these comments which will be considered together with all other comments.
>
> As much as I appreciate your need to get as much information as possible, I request that you note that we are receiving a number of inputs from other stakeholders and it will prove a bit difficult for me to engage people on an individual basis. Please, therefore, note that we

[45] See note 18.

are busy capturing all inputs received and will respond to all comments in a systematic way (after the closing dates for inputs) rather than engaging people on an individual basis, due to the number of comments received this would not be practical.
I trust you will find this in order.
Regards
Nomahlubi."

(c) This response does not address the questions that were put to DEA nor does it set out the information required in terms of section 100(2) of NEMBA.

22.3 DEA did not always respond in standard form. For example:

(a) DEA responded to a similar set of questions sent in the chairman of the Natal Fly Fishers Club, Mr Andrew Fowler, by:

(i) alleging that the Draft Lists and Regulations contained sufficient Information;

(ii) referring to an inapplicable appeal process set out in the repealed section 94 of NEMBA; and

(iii) attaching two so called risk assessments that were undertaken on behalf of DEA in 2015.

(b) In another case DEA referred to the definition of invasive in these terms:

"Please note that the criteria for listing of an invasive species are not only threats to human health and well-being. A proper reading of the current definition of invasive species which is quoted below for your convenience, quite clearly includes the aspect of environmental harm. These concepts are separated by an 'OR' and do not all have to be present for a species to be listed. In other words a species can pose a threat to human health 'OR' cause environmental harm. As you will note from the risk assessments there is a clear risk to the environment.

"invasive species" means any species whose establishment and spread outside of its natural distribution range-

(a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and

(b) may result in economic or environmental harm or harm to human health;"

(c) I deal with the legal definition of invasive at paragraph 3. Ilan Lax, Professor Peter Britz and I also dealt with the same issue in an article published in the legal journal De Rebus in an 2015 article entitled "Biodiversity law and the weeding out

of alien species[46]" The fact is that DEA misinterprets environmental harm to mean ecological harm rather than harm to ecosystem services which is what the legislature intended. This is because they ignore the fact that they must apply the definition of environment as set out in NEMA.

22.4 The ecosystems services approach to environmental management that is being followed internationally is thus ignored in this country for an approach based on biocentric preservation.

22.5 The purpose of this approach is state control over all biological resources.

22.6 Trout are in the way.

22.7 Allegations of invasiveness are a tool not a fact. These responses did not cure the defects in notices publishing the Draft 2018 AIS Lists and Regulations and merely served to add to the general sense of confusion.

23. **DEA's Press release of 7 March 2018**

23.1 DEA responded further by publishing a press release on 7 March 2018[47]. This press release:

(a) is substantially different to the press release that DEA published on 19 May 2015 and which it had sent to some members of the public a short while previously.

(b) Does not address the questions that were put to DEA; and

(c) does not cure the defects in notices publishing the Draft AIS Lists and regulations.

23.2 I deal with the press release by commenting in red against the text of the press release which is quoted verbatim below.

(a) "The Department of Environmental Affairs (DEA) has responded to stakeholder comments on the listing of rainbow trout and brown trout as invasive species." [DEA has responded inadequately and these responses do not cure the defects in the notices publishing the Draft AIS Lists and Regulations for comment}

(b) "Following the amendment to the National Environmental Management: Biodiversity Act's Alien and Invasive Species Regulations to list Rainbow Trout and Brown Trout, there has been a petition against the listing of these species that is misleading stakeholders. The department has responded as below:" [There has been no petition, I am aware of. Interested parties have written in requesting information. There is also nothing misleading about these requests. The accusation that stakeholders have been misled is a boot that best fits DEA.]

[46] http://www.derebus.org.za/biodiversity-law-and-the-weeding-out-of-alien-species/
[47] https://www.environment.gov.za/mediarelease/rainbowtrout_browntrout_invasivespecies

(c) "Trout are invasive in suitable waters in South Africa and there is no scientific evidence to the contrary." [This has been extensively dealt with elsewhere in this objection.

(i) There is no scientific evidence that trout are invasive where they occur or might occur in South Africa as legally defined.

(ii) The science, such as it is based on a different definition of invasive to the one used in law. The application of a scientific definition is inconclusive because in many area trout cannot establish in the wild as is required in terms of that definition.]

(d) "The risk assessments for the species are clear, and they are on the basis of the decision to list the species." [The risk assessments in fact make it clear that trout are not invasive as the term is defined in NEMBA. There is in fact a great deal wrong with the risk assessments. Problems include inter alia:

(i) They were not carried out by independent environmental assessment practitioners qualified and registered as such in terms of the Natural Scientific Professions Act, 2003 (Act No. 27 of 2003).

(ii) The persons who carried out the assessment were not independent but were informed by the conviction that operates at DEA that trout are invasive. They were produced during the 2014 consultation process to justify DEA's claim that trout are invasive.

(iii) The definition of invasive that was used is not the one used in NEMBA. The risk assessment only looks at impact on native species rather than if trout threaten existing ecosystems habitats or species.

(iv) No regard was had to the benefits that arise because of trout and the trout value chain. No socio economic impact assessment was undertaken and the NEMA principles were ignored.

(v) They are desk top generalisations based on international studies often in cases where there is a risk of interbreeding with native strains of trout. There is no such risk in South Africa.

(vi) The distribution range as in where trout have established is mischaracterised being far greater than it actually is. The fact that trout have not invaded these areas should be proof that trout are not invasive as is the fact they cannot establish themselves in these areas. Trout were extensively stocked into South African waters by government the intention at the time being to stock trout wherever possible. . They established in some areas but not in others. The risk of trout establishing where they have not already established is minimal if it exists at all.

(vii) There is no evidence proving that trout re invasive in South Africa and the risk assessments and the studies referred to in the risk assessments confirm this. The judgement that trout are invasive is an opinion of some scientists based on criteria that are not disclosed. Other scientists have a different view. It not a demonstrable fact.]

(e) "Therefore the DEA, the Department of Agriculture, Forestry and Fisheries (DAFF), the Department of Water and Sanitation (DWS), provincial authorities, supported by national and international ichthyologists, as well as the Operation Phakisa: Oceans Economy secretariat, recommended that trout be listed as invasive species." [I do not know if DEA has the support it claims but I do point out that DEA and the Phakisa office are acting unlawfully, DEA in its attempts to list trout as invasive in this way and the Phakisa Office in failing to apply its own dispute resolution procedures and deal with the complaint lodged by Trout SA last year[48]. None of these other departments has consulted the value chain in relation to the lists or the regulations.]

(f) "It should be noted that the decision to list a species, or change its listing, goes through a long process that involves various role players." [DEA has not involved the trout value chain in its decision to list trout as invasive. The decision that was taken at the Phakisa Ocean labs Conference in July 2014 was that, save for certain protected areas, trout would not be declared invasive where they occur. DEA's engagements with the trout value chain subsequent to that agreement have been directed at mapping the whereabouts of trout. DEA has not engaged with the trout value chain at all since reneging on that decision and deciding to list trout as invasive, The Phakisa office has also failed to engage with Trout SA and Aquaculture SA on this issue despite being obliged to do so in terms of its own procedures.]

(g) It has been proposed that the two trout species be listed as Category 2 species. Category 2 means that the species can be utilised, with a permit. This category is there to recognise that there are invasive species that have value, and can be utilised under conditions. [NEMBA does not authorise the Minister to create this category 2. Chapter 5 of NEMBA obliges landowners to take steps to control (as in eradicate or prevent where eradication is not possible) listed invasive species. Permits for restricted activities may only be issued where the risk of harm is minimal.]

(h) "For example, the forestry industry is not prevented from growing Category 2 pines, wattles or gums." [This is a misleading example as these trees are exempt in plantations where they occur. This is not the same as trout.]

(i) "Rather, areas are agreed upon where these Category 2 species may be grown, and they are given permits to conduct their work. The Department's focus is to

[48] http://www.durbanflytyers.co.za/Articles/171005_Escalation_Letter_Final.pdf

stop invasions of the species outside of the demarcated areas in which these Category 2 species may be utilised. There is no difference with respect to trout, or any other Category 2 species. Accusations that this categorisation of trout as Category 2 species will destroy the industry are untrue." [DEA cannot make this statement as DEA has not done the required SEIA investigation or any other investigation for that matter on of the effect listing trout as invasive will have on the trout value chain. The fact is that the trout value chain is concerned about the effects that the listing of trout will have and has explained these concerns only to have them dismissed out of hand by DEA.]

(j) "In the case of fish species like trout, there is also a recognition that most invasions are a fait accompli. It is hugely expensive – and often highly improbable – to try to recover from such invasions in rivers. This is why the focus is on trying to contain the spread and allow catch-and-release in the area in which such species are caught." [If the invasion is a fait accompli as DEA alleges then trout are not invasive as there is no risk of the spread that is required in terms of the definition of invasive. The listing of trout as invasive in these circumstances will result in fruitless and wasteful expenditure by DEA.]

(k) "In these circumstances, it is intended that the following will happen:

(i) Trout will be listed as Category 2 species.

(ii) Trout hatcheries will need to apply for permits. These are likely to be long-term permits (40 years is currently being considered), allowing hatcheries to breed, sell and distribute (live) trout. [Permits may only be issued for up to ten years in terms of the Drat AIS Regulations.]

(iii) Those acquiring the live trout will have to have a permit for the trout. [Risk assessments will have to be carried out before permits can be issued]

(iv) "We see no reason to inhibit the further growth of the hatchery industry in the demarcated areas (based on the work done by the specialists, with input from the industry), providing conditions are met. There can be concerns about water quality, for example, that would need to be addressed." [There are no demarcated or prescribed areas and no details have been given about what conditions will have to be met. The threat of listing trout as invasive is already inhibiting the growth of the fresh water trout production industry.]

(v) "Operation Phakisa has set transformation in the intended growth of the aquaculture industry in general, and for trout in particular." [It is an abuse of process not to mention also being unlawful to list a species as invasive in order to aid transformation.]

(l) As there is no intention to remove trout species from dams within the areas mapped by the authorities, scientists and industries as "trout waters", the regulation of these will be done to reduce both administrative and regulatory burden. [This avoids the reality that trout will be removed from dams if permits to stock are refused as is likely to be the case given what NEMBA says about permitting restricted activities.]

(m) It is felt that a long-term permit might be the most efficient, and that these might even be able to be issued as through a self-administrative process with the industry. [There is no provision for this in the draft AIS Lists and Regulations and it is would be unlawful in terms of NEMBA.]

(n) Note that these dams include private instream dams, even though that water does not belong to the owner of the dam. However, it forbids the introduction of trout into waters outside of these demarcated areas (except were there to be a permit justified by a risk assessment considered by the Department). [This is misleading as no demarcated areas have been prescribed. A proper application of NEMBA and the AIS Regulations will require a risk assessment to be undertaken in every case.]

(o) A permit will also be required for the introduction of trout into rivers, streams, wetlands, natural lakes and other bodies. These waters do not belong to any individual, so they have no right to stock it with trout, should they so wish to do so – just as they cannot put poison or sewage or any other material into that water body. [Trout are not poison or sewerage and the idea that they might be speaks the truth to DEA's real intentions and attitudes regarding trout[49].]

(p) "As experts in invasion biology, we are aware of the risks of other invasions – bass, carp and other invasive fish; extra-limital invasions such as by sharp-tooth catfish, and invasive pathogens. It is only through regulating such species that their spread into the so-called "trout waters" may be prevented. In other words, bass will destroy many trout waters, if their movement is not controlled." [This is an irrational argument. It is no reason to list trout as invasive. It is in fact a good reason not to list trout as invasive.]

(q) "Thus, notwithstanding what has been portrayed by some sectors of the industry, there is no threat to responsible trout aquaculture, or to the "value chain". There is no reason why a responsible trout hatchery in a demarcated area should be inhibited in any way to grow its business. The same is true of a farmer with a dam with live trout, in a demarcated area, provided s/he takes the necessary responsibility. The same is true of a fly-fisher in a river, providing that they do not stock the river without a permit to do so. If trout die off in any numbers in South Africa, it will be because of other invasive, or habitat destruction." [This statement is vague and untrue. The claim that the trout value chain won't be

[49] See the remarks of Dr Preston quoted at paragraph 17.2

affected is not supported by any facts. No indication is given as to what responsible means or in relation to what it will apply. The reality is that the regulatory regime is a penal one that imposes a high degree of risk on anyone who stocks water to trout.]

(r) "It is the considered view of the Department and its partners (and the Senior Council who assessed the options for the Department) that the brown trout and rainbow trout are correctly listed as Category 2 invasive species. It is further our collective view that this listing poses no threat to trout aquaculture and the trout value-chain. Indeed, the invasive legislation – and its vigorous enforcement – is pivotal to sustaining these industries." [This is the problem. DEA's view is not a considered one. If it was DEA would be able to explain its reasoning in relation to its legal obligations under NEMBA. But it cannot do this. Although DEA has been invited to share the opinion upon which this approach is based it has failed to do so or to explain the approach.]

(s) "Get both assessments here:

(i) Brown trout risk assessment

(ii) Rainbow trout risk assessment."

[As noted above these risk assessments are flawed.]

24. **Dr Preston's letter of 8 March 2018**

24.1 Dr Preston wrote a letter dated 8 March 2018 to some members of the public who had written to DEA requesting further information. I was not a recipient of this letter though I was sent a copy over the weekend of 10/11 March 2018 by someone who did receive it.

24.2 It is DEA's fourth attempt to explain itself and it is materially different from the explanations that have gone before. I am steeped in this matter and can therefore see through the confusion. But it must be terribly confusing for the ordinary members of the public to make any sense of this.

24.3 DEA is sending out mixed messages and it appears that it may be doing so deliberately.

24.4 Dr Preston's response to requests for information is broadly that no information is required because the notices are obvious even though this is clearly not the case.

(a) Even more worrying is the fact that he seems to think that DEA can ignore the judgement in the Rhino Horn Moratorium Case and not supplying the required information.

(b) The prevailing view in DEA seems to be that they are the experts and that the public must accept their judgment on matter such as this and that no further elucidation or enquiry is necessary.

24.5 This is attitude is not only arrogant, it is also the antithesis of the participatory government and, if one applies the rationale of the Constitutional Court in the Doctors for Life Case, it is also destructive of the foundations that underpin the right to vote[50].

24.6 Equally worryingly is the fact that the contempt that this sort of attitude, which is sadly deeply embedded in the culture and value systems that drive DEA, is also the hallmark of State Capture, the corruption of legitimate purpose and ultimately a general failure within government.

24.7 The state capture we are seeing here may not be of the Gupta variety but it is real nonetheless.

(a) It is characterised by the refusal of those within our environmental authorities to give up their old ways that were informed by fundamentalist biotic nativism for the new way that is the sustainable development people based ecosystem services approach required in terms of the Constitution and NEMA.

(b) It is demonstrated by the passionate determination of officials like Dr Preston to replace our constitutional rights based system of government based on the rule of law with a Police State where officials rule by dictat backed by a penal regime of discretionary permitting control.

24.8 Dr Preston likes to respond to this sort of criticism by denouncing his critics as "anti-regulation". But this is not true.

(a) I am a lawyer and as such am by no means ant-regulation. Laws and regulation are our bread and butter. I am pro regulation but I do insist that regulations be lawful and effective. Neither is true of the current AIS Lists and Regulations or the Draft 2018 AIS Lists and Regulations that will amend or replace them.

(b) I am aware that many other members of the public and stakeholder groups see things the same way. The complaint is not that DEA is trying to regulate, it is that DEA is not consulting members of the public when doing so, often with the result that the ensuing law is ineffective and even unlawful.

24.9 As I did with the press release, I deal with this letter by commenting in red against the text of the letter which is quoted verbatim below.

TO WHOM IT MAY CONCERN

RESPONSE TO REQUEST FOR INFORMATION PERTAINING TO THE PROPOSED LISTING OF TROUT UNDER THE NEMBA ALIEN AND INVASIVE SPECIES REGULATIONS

[50] See Note 24

I refer to your email that you sent to the Department of Environmental Affairs (DEA) pertaining to recently published NEMBA Regulations and Alien and Invasive Species Lists.

Please find, in bold text, DEA's response to your email:

1. Why must we address our representations to you rather than the Director General as is normally the case? Have you the requisite delegated legal authority to deal with this important matter?
Receipt and collation of comments is the responsibility of the Branch. Subsequent to which the recommendations on how best to deal with the comments are submitted to the Minister for approval.[Dr Preston does not deal with the fact that submitting comments to him rather than the director general is abnormal nor does he answer the question whether he has the requisite delegated authority to do this.]

2. Given that our law requires that notices such as this must be accompanied by sufficient information to enable the public to consult, why is it that you have given the public no such information?
The detailed Lists and the Regulations are sufficient information. There is sufficient evidence of the invasiveness of the species to warrant the listing, but it would be impractical to provide that in the request for public comment of every invasive species that needs to be controlled. The Department does engage with stakeholders, where concerns are raised (and this follows consultation with stakeholder representatives, where appropriate, prior to amendments being made to the Regulations and Notices). The Department has issued a statement on its regulation of brown trout and rainbow trout, as well as the Risk Assessments that were undertaken for the two species. The statement and the risk assessments are attached for your convenience.
[I have dealt with much of this already in the body of this objection but the statement that the lists and regulations contain reasonably sufficient information in order to enable members of the public to submit representations or objections is patently untrue and ignores the contrary determination of our courts in the Rhino Horn Moratorium Case. The request was also not directed at trout but all the species listed as is apparent from the questions quoted under point 3 below.]

3. Please tell me in sufficient detail why it is that each of the species mentioned in the draft list are invasive. In particular please advise why these species pose ecological threats in the areas and manner you want the Minister to list them as invasive and why this threat causes harm or is likely to cause harm to human health and wellbeing. Kindly explain what considerations the Minister weighed up in arriving at an intention to list each species as proposed in the Notice? Kindly also advise what policy guided the Minister's consideration, if any?

The listed species are those that have been assessed to be invasive in our country. The impacts of invasive species do vary, and this is why first the then National Department of Agriculture, Forestry and Fisheries introduced the three categories of invasive species in their 2001 amendment to the Conservation of Agricultural Resources Act (Act No. 43 of 1983). In consultation with DAFF and other Departments, including all of the Provinces, and guided by scientific expertise, DEA has amended this to have four categories (essentially splitting Category 1, so as to focus on the emerging species). Where species have utility, as is the case with the two trout species, there is a consideration of placing them in Category 2. This allows for utilization under certain controls. What can play a role in determining the category into which an invasive species is placed, is the ability to control the invasion. When it comes to most invasive fish species, control of the species in areas in which it has already invaded, is functionally difficult, if not impossible. That is why the silver carp, for example, is placed in Category 3 (no sale, translocation, breeding - but there is not a requirement for its control in areas in which it has invaded, as would be the case if it was in Category 1b).
[This answer avoids the question. He says that tense species have been assessed to be invasive but cannot say how this assessment took place. All he can tell us is that this is the opinion of experts but he cannot say how the experts arrived at their opinion or what, what facts they relied on or what rules they applied in forming these opinions. He is reduced to talking in generalities about what is a patently unlawful system of categorising invasiveness. He is also factually wrong and therefore misleading in the case of grass carp. Grass carp are only listed as category 1b in in certain protected areas. They are listed as category 2 or 3 otherwise.]

4. Please tell me why the existing AIS regulations are being replaced by new ones and how they are different to the old regulations and why the changes are necessary?
Since there were a number of amendments to the regulations it is common drafting practice to rather replace the old set of regulations with a new one as this makes it easier for the public to peruse the regulations as a whole without having to work through a cumbersome amendment document. [It is normal to show the changes in draft through a track change system of drafting which enables members of the public to immediately pick out the changes. The failure to do so meant that the public will have to go through the laboriously and technically complex process of comparing and contrasting each section of the old regulations with the new. This is the only way one can pick up the fact of an amendment, let alone its importance in the absence of other explanation. So the methodology adopted by DEA in fact makes it harder for the public to comment rather than easier as is alleged.]

As with any amendments to laws, the changes are to improve implementation and clarify any ambiguities and improve wording where necessary or insert new clauses where required. The public has an opportunity to comment on the full document and provide comments on any section. The Notices are part of the Regulations, and these need to be updated as further information becomes available about the invasiveness of different species. Updated information has seen species being added to the Lists; moved to different categories; have different controls; or, being removed from the Lists. Invasion biology is a complex field, and is being made more so by climate change and habitat destruction. Whilst the precautionary principle can be used in terms of the law, every effort is made to balance the considerations when an invasive species has already had a widespread impact in the country. For species not yet introduced into the country, the precautionary principle is particularly important in weighing up risk assessments of potentially invasive species.
[In the absence of any explanation as to how a species is listed as invasive the public unable to comment on whether they think it is necessary. The result is an opaque system where officials avoid accountability by giving answers such as this one. The fact that something may be complex does not government of its obligation to give reasons. It actually increases that obligation.

5. Given that the National Environmental Management Act says that the environmental principles set out in section 2 of that Act must be applied to all environmental decision making including the listing of species of invasive and the making of regulations, how were these principles applied in the process that resulted in the Draft AIS Lists and Regulations?
It is clear that listing invasive species fulfils a number of NEMA principles including the precautionary approach; protection of the environment for present and future generations; the environment held in trust; and, the polluter pays principles, to name but a few. To the extent that you are of the view these draft Lists and Regulations do not concur with any NEMA principles, you are invited to make these comments which will be considered together with all other comments.
[Dr Preston's assurance that "it is clear that listing invasive species fulfils a number of NEMA principles" is not clear at all. How can it be in the absence of any information as to how these principles were applied? He also misses the point that the NEMA principles do not just apply conceptually in regard to the idea of invasiveness generally. They must all be applied in cases of environmental decision making such as the decision making that occurs when the Minister decides to list a species as invasive. The dismissive (even arrogant) suggestion that members of the public must tell DEA why the Ministers decision does not conform concur with any NEMA Principle demonstrates that Dr Preston does not understand how just decision making works in a constitutional democracy such as South Africa. This is

worrying given the seniority of his position government. Just law making requires that Government justify its decisions within the conspectus of the applicable law. This means that the Minister must be able to tell members of the public how she applied the NEMA principles in arriving at her decision. It is as the Constitutional Court ruled in United Democratic Movement v Speaker of the National Assembly and Others [2017] ZACC 21[51]:

> "[7] Public office, in any of the three arms, comes with a lot of power. That power comes with responsibilities whose magnitude ordinarily determines the allocation of resources for the performance of public functions. The powers and resources assigned to each of these arms do not belong to the public office-bearers who occupy positions of high authority therein. They are therefore not to be used for the advancement of personal or sectarian interests. Amandla awethu, mannda ndiashu, maatla ke a rona or matimba ya hina (power belongs to us) and mayibuye iAfrika (restore Africa and its wealth) are much more than mere excitement generating slogans. They convey a very profound reality that State power, the land and its wealth all belong to "we the people", united in our diversity. These servants are supposed to exercise the power and control these enormous resources at the beck and call of the people. Since State power and resources are for our common good, checks and balances to ensure accountability enjoy pre eminence in our governance system."]

Yours sincerely
Dr. Guy Preston
Deputy Director-General: Environmental Programmes.

25. **General remarks**

25.1 A DEA official responded to one request for further information is these terms:

> "At the moment there is no indication that the deadline for comments will be moved. But what happens after the comments stage is that we formally start engaging the stakeholders that provided comments with the aim of finding a practical way forward. In some cases, these engagements lead to us changing what we published as proposed amendments but not in all cases. Once these engagements have been concluded, stakeholders are then officially notified on how the department plans to move forward in relation to their comments. This is then submitted to the Minister and NCOP for approval. Once approval is obtained, we then publish for implementation."

[51] http://www.saflii.org/za/cases/ZACC/2017/21.html

25.2 This is not in fact correct. DEA should proactively engage with stakeholders before laws are published for comment. This is a legal requirement and that this is so was confirmed by the judgement in the Rhino Horn Moratorium Case[52].

(a) There is an obvious reason for this, quite apart from the legal one quoted above, which is that it avoids the need to republish the notice as a result of the material changes that will inevitably arise from the consultation process.

(b) DEA did not engage with stakeholders before publishing the Draft 2018 AIS Lists and Regulations for comment. They have in effect put the cart before the horse. Thus is unlawful.

25.3 The press release does not provide information that is reasonably required in terms of section 100(2) of NEMBA in order to enable the public to make representations or objections. It does not cure the defects in the notices published in terms of sections 99 and 100 of NEMBA.

PART E: CONCLUSION

26. **Conclusion**

26.1 The conclusions are easy to draw.

(a) Notices calling for comments on the Draft 2018 AIS Lists and Regulations are hopelessly defective to the point where they are unlawful.

(b) They are also premature given that the imminent publication of the SANBI AIS Status report will provide members of the public valuable information necessary to enable them to make meaningful representations and/or objections on changes to the AIS Lists and Regulations.

(c) The Minister has denied South Africans their constitutional right to make meaningful representations or objections by withholding the information reasonably sufficient and required in order to do this. The failure to provide this information is particularly egregious in the case of the trout value chain as it is in direct contravention of the judgement in the Rhino Horn Moratorium Case[53].

(d) The Draft 2018 AIS Lists and Regulations are themselves unlawful in many respects and in this regard build on the unlawful foundations of the unlawful 2014 AIS Lists and Regulations and the unlawful 2016 AIS Lists.

(e) This is part of a pattern of illegality that has tainted the implantation of NEMBA since its inception. It is part of a pattern of illegality that is not being remedied. DEA is "doubling down" as the Americans like to describe it.

[52] see paragraph 8.4(c) and paragraph 34 of that judgement quoted there.
[53] See note 23

26.2 The solution is equally clear.

(a) The Minster and DEA need to put a halt to any further law making under NEMBA and immediately embark on a policy making process that will result in a law that can work.

(b) If the Minister and DEA do not do so, then it is only a matter of time before the courts or the Public Protector makes them do so.

Signed I. A. Cox - 12 March 2018

THE FEDERATION OF SOUTHERN AFRICAN FLYFISHERS

FOSAF

C/O 62 Roberts Road
Pietermaritzburg 3201

18 March 2018

The Deputy Director-General Environmental Programmes
Per Email to: NembaRegs@environment.gov.za

Attention: Dr Guy Preston

Dear Dr Preston

Re: Draft Amendments to the Alien and Invasive Species Lists and Regulations 2018 promulgated in terms of the National Environmental Management: Biodiversity Act, No. 10 of 2004 ("NEMBA").

FOSAF noted with serious dismay the fact that the Minister of Environmental Affairs ("the Minister") published the Draft 2018 Alien and Invasive Species Regulations and Draft Alien and Invasive Species Regulations respectively in GN 115 and GN 112 in Gazette 41445 on 16 February 2018 (the "Draft 2018 Lists and Regulations").

As noted in the letter to the Minister by the Consortium of Interested and Affected Parties, it is FOSAF's respectful view that the Draft 2018 Lists and Regulations are fatally defective, amongst other things because of noncompliance with the peremptory requirements of section 100 of NEMBA. In the circumstances the notices will be challenged in court if the Minister does not withdraw them. FOSAF is a party to the letter to the Minister and associates itself with and supports the views expressed therein.

FOSAF is aware of the many representations and submissions made to the Department of Environmental Affairs ("DEA") on behalf of various organisations and individuals expressing objections and opposition to the Draft 2018 Lists and Regulations. Amongst such representations and submissions we have read, we refer specifically to those made by:

The Natal Flyfishers Club;
The Durban Fly Tyers Club;
Wildlife Producers Association;
Mr Ian Cox; and
WRSA Eastern Cape.

FOSAF associates itself with and supports the gravamen of these representations and submissions and expresses its categorical opposition to the regulatory framework being proposed and the proposed amendments to the AIS lists.

FOSAF wishes it to be placed on record that contrary to your and the DEA's characterisation of our organisation as "anti-regulation", nothing could be further from the truth.

FOSAF's constitution includes objectives that encourage the organisation and its members to, amongst other things:

- provide flyfishers and flyfishing with a platform for negotiation and representation with higher authorities.
- promote conservation and research into marine and fresh water ecology.
- promote, guide and encourage the angler to perform a monitoring role to aid the professional conservationist.

FOSAF's on-going commitment to work with the DEA in good faith and it's enormous and continued investment of resources, time and energy in the mapping process and the other engagements required following on the matters agreed to between DEA, DAFF and representatives of the trout value chain at the Phakisa Ocean Labs Conference that took place in July 2014 in Durban, manifest our on-going desire and commitment to find workable regulatory solutions. Kindly therefore desist from making such false and misleading allegations.

FOSAF has repeatedly called on the DEA to remedy its failure to engage in good faith with the trout value chain in relation to the proposed regulatory aspects. Requests for meetings and information in relation to such matters have repeatedly been ignored or rejected. This is unfortunate as such engagements could have provided appropriate opportunities for the sharing of ideas and the finding of workable solutions and would have avoided the situation that now pertains. The Draft 2018 Lists and Regulations have been published in breach of agreed processes and without lawful compliance with:

- the required consultation provisions in that DEA unilaterally terminated and failed to properly continue consultations already commenced;

- the notices are not properly in line with the required legal time and publication requirements;

- the duty to supply sufficient information, including convincing evidence of significant harm and reasons for the decisions to list the species proposed in the listings to enable the public to object and/or comment thereon and to the proposed regulations;

- a suitable policy framework having been adopted after a lawful public consultation process.

It is FOSAF's respectful view that the interpretations of the applicable definitions in NEMBA as applied to the proposed and existing regulatory framework by DEA are unlawful because the DEA relies upon a bio-centric as opposed to an anthropo-centric approach. This results in outcomes that breach the Constitution, NEMA and NEMBA.

As regards trout and all the other species which the Minister intends listing, FOSAF is of the respectful view that the Minister's decisions must be made by first applying NEMBA correctly and then weighing up such proposed decisions holistically in the light of the NEMA principles. We do not believe that trout can be lawfully listed as invasive if the Minister had followed such a decision making process. The same can be said of a number of other species proposed for listing. Our views in this regard are supported by the fact that no information providing the basis upon how these decisions were made by the Minister and what factors the Minister intends relying upon in this regard, has been made available to the public.

FOSAF also notes that the publication of Draft 2018 Lists and Regulations are premature because the overdue SANBI assessment of the AIS framework should be considered by the DEA and especially the Minister before any changes are considered. In addition, the assessment and its recommendations are a relevant and key part of the information required to be made available to the public to enable informed objection and/or comment.

Accordingly FOSAF and the public are denied the opportunity and cannot thus comment on or adequately motivate objections to such matters due to the insufficiency of the information provided. This failure undermines the purpose of consultation as intended by section 100 of NEMBA and is an abuse of the public's rights and is accordingly unlawful.

The matters noted above are all elaborated upon in the representations and submissions referred to above and in the interests of brevity, it is requested that such elaborations are noted as if also made by FOSAF in support of its objections to the Draft 2018 Lists and Regulations.

Kindly acknowledge receipt hereof.

Yours faithfully

ILAN LAX
National Chairperson
FOSAF