

## **FOSAF & Trout SA's response to the DEA press article of May 19.**

### **FOSAF response to the DEA Media release.**

1. Contrary to the picture being painted by the DEA, FOSAF has always supported the principle of regulating the trout industry in South Africa. In this spirit we have been in discussions with the provincial conservation authorities and the DEA since our formation in March 1986. To suggest that FOSAF is anti-regulation is simply not true.
2. FOSAF has consistently and transparently asked for the Minister's formal reasons for the listing of trout as invasive. Despite agreement to provide these in line with the legal duty to do so, the DEA has failed to produce these. We now understand from the media release that a risk assessment has been done. This has never been made public and FOSAF and as far as we are aware, no other stakeholders, were involved or consulted in the process of undertaking or drafting that risk assessment. A risk assessment is not the same as reasons.
3. It is important to differentiate between the risk assessment and a risk and benefit assessment: The former deals only with risks; The latter in contrast measures all the relevant considerations legally required to be taken into account before a decision to list a species as invasive is taken. FOSAF has consistently drawn attention to the fact that no norms and standards or policy framework have been formally adopted to guide this decision-making process as is required by the law.
4. Contrary to the picture being painted by the DEA, FOSAF remains committed to transparently engaging the DEA, other authorities and stakeholders to achieve a workable set of principles and regulations that can achieve the DEA's stated intention to "support[s] a growth in aquaculture using trout, within Permit conditions (in catchments in which they occur)". We urge the DEA to reopen communication with us - something they broke off without explanation.
5. The proposal now being put forward by the DEA requires much clarification within the context of the NEM:BA and the revised regulations. The devil is always in the detail. Unfortunately these have not yet been made public.
6. To the extent that there are differences in legal interpretation, we have consistently requested discussion around these matters but have been told bluntly "We will see you in court!". This is not the way to resolve such matters and we again urge the DEA to open discussions with the trout industry to achieve a win-win scenario.
7. The DEA say "the biggest threat that may lead to needing to strengthen this legislation in the future is if more waters become invaded by trout." This demonstrates a lack of trust in the trout industry. FOSAF has consistently indicated that we do not support new introductions of trout to new waters unless these are supported by proper risk and benefit assessments. It is regrettable that FOSAF's consistent support for indigenous fish species is largely ignored and that the DEA fails to acknowledge the balanced approach we have taken since our formation.

Responding to the DEA's summary of its media release:

1. "There is no threat to trout that are legally in waters in South Africa."

FOSAF awaits the detail of the proposal. There are many ambiguities that require clarification. We remain open to discussion on these.

2. "There is no threat to the trout industries as a result of the proposed legislation."

FOSAF's view is that unless the legalities can be clarified and agreed upon the threat cannot be wished away.

3. "Government supports a growth in aquaculture using trout, within Permit conditions (in catchments in which they occur)."

FOSAF welcomes this statement and would need to see the detail to clarify the implications.

4. "Government and the Department are patently not intent on "destroying this multi-billion Rand industry" and the associated jobs, as has been disingenuously claimed by the anti-regulation lobby."

FOSAF welcomes this statement and again stresses that we would need to see the detail to clarify the implications.

5. "On the contrary, this legislation is vital to the trout industry, if together we are to stop "trout waters" being invaded by invasive fish species that will themselves out-compete trout."

FOSAF is not aware of any basis for giving special protection to an invasive species. FOSAF has never asked for special status for trout in relation to other species. We argue that if trout are beneficial and useful they cannot be invasive as defined in NEM:BA and therefore should be treated as other useful aliens.

6. "The biggest threat that may lead to needing to strengthen this legislation in the future is if more waters become invaded by trout."

FOSAF finds this veiled threat and lack of trust regrettable. Our commitment to acting lawfully, our record of sound environmental activities and our published principles speak for themselves.

In conclusion FOSAF reiterates that we remain willing and open to reasonable discussions with the DEA and other stakeholders in order to find a workable and lawful way forward.

#### Trout SA

#### Amended Press Release 20 May 2014

#### Preliminary response to the DEA's press release of 19 May 2014.

The Department of Environmental Affairs (DEA) issued a press release late this afternoon announcing substantial changes to the draft invasive species lists published on 12 February this year proposing that trout be listed as invasive across most of South Africa's trout waters. Trout SA has not had an opportunity to convene and study this press release in detail. It notes that the DEA must

publish these new lists for comment before they are promulgated as law. We thus reserve the right to deal with this new proposal more fully at that time.

Some of the flaws in what the DEA appear to be proposing are so glaring that Trout SA can say at this early stage that the proposed new listing of trout does not protect the industry, is so vague that it can mean almost anything the DEA wants it to mean. As such it is as doomed to failure as the DEA's previous four attempts to list trout as invasive. This is regrettable as the continued uncertainty brought about by eight years of misapplication of the National Environmental Management: Biodiversity Act (the NEM:BA) has done the industry considerable harm.

Trout SA notes that the DEA says that it does not want to harm the trout industry or freshwater aquaculture in South Africa. This is to be welcomed. However, Trout SA is concerned that despite this sentiment the DEA has not involved these industries in any of the planning processes that inform its decision to declare trout as invasive. For example, mention is made in the press release of a risk assessment prepared by SAIAB. Trout SA agrees that a full scientific, economic and social analysis of the risks and benefits of the trout and its value chain (this is the trout industry) must be undertaken before listing the species as invasive. It is surprising that we have seen four attempts to list trout as invasive in the absence of such an assessment or that it is again being proposed before that assessment is published and can be commented on. This is not how our participatory democracy is meant to work nor is it in line with what the NEM:BA requires. These are failings we have raised time and again.

Trout SA point out that this approach requires a policy and norms and standards against which the risks and benefits can be measured but none of this exists at present. Furthermore no such risk assessment had been done at the time the invasive species lists were published in February this year. This is not surprising given the above. It follows that the risk assessment must have been undertaken since then. Stakeholders in the industry have not been involved or consulted in the process of undertaking or drafting that risk assessment. Trout SA is concerned that it may be a rushed and, given the above, incomplete job but nonetheless looks forward to the opportunity to comment on it once it has been published.

Trout SA disagrees that the new proposed lists and regulations mean that trout are no longer at risk. If anything the risk may be greater. For example, it is proposed that trout be listed as invasive in all rivers and lakes but be left unregulated in dams that are not lakes. This begs the question what is the difference between a dam and a lake. The Oxford dictionary defines a lake as *a large area of water surrounded by land* so a dam is also a lake. It follows applying first principles of legal interpretation that trout are to be declared invasive in all dams as well as rivers. That means all of South Africa's trout waters. Furthermore most dams are on rivers and these are continuous ecosystems. If there are fish in the dams and fish in the rivers what would be the point of regulating the stocking of the waters? So on the face of it we are back where we were in July last year. This is hardly the clarity that the trout industry has been asking for.

Making trout invasive for the purposes of aquaculture is inherently problematic and is a radical departure from what was proposed in the February draft lists and regulations. Trout are unique amongst the so called invasive species in this regard. Much has been made of the invasive characteristics of pine and gum trees but they are specifically exempted in plantations which are where they are farmed. This decision has been taken without any consultation with trout based Aquaculture who complain that they cannot survive such if this proposal becomes law. Trout based aquaculture will not survive.

The problem with what the DEA is trying to do with these lists and regulations is that is trying to fit a square peg into a round hole. It is trying to achieve through the listing of invasive species something that was never intended. It is trying to use the invasive species regime to manage a species where the law says that invasive species must be controlled by combating or eradicating them or where that is not possible by preventing their spread regrowth or propagation. This is not synonymous with management.

If the DEA wants to manage a species then it should do so because they are alien rather than trying to shoe horn them into the definition of invasive. As pointed out in the DEA's press release the trout industry is not opposed to the management of trout as an alien species provided this is done in a way that does not discriminate against trout when compared with the biodiversity impacts of other alien species.

The regime of control prescribed by the NEM:BA is very harsh and imposes the risk of financial ruin and lengthy periods of imprisonment on anyone who transgresses that regime. Business cannot flourish in the regime that the NEM:BA prescribes for invasive species and nor is it intended that it should do. That would be contrary to what is meant by control.

That regime is not friendly to government who faces a huge and expensive regulatory burden if the DEA has its way. And it is scant comfort that the DAFF has apparently approved this given the problems it is experiencing with the regulation of saltwater fisheries. Ms Peterson and her department is to be commended for recognising that these issues are legally complex and as such require expert legal advice. The DEA needs to reach the same conclusion.

This failure to understand the law extends to the definition of invasive which contrary to the DEA's protestations cannot be interpreted as they propose. We live in a constitutional state built on the protection of human rights that puts the needs of human beings first even in an environmental context. That is what is explicitly stated in the National Environmental Management Act (NEMA). Where the requirement may result in economic or environmental harm or harm to human health is essential if a species is to be declared invasive. But environmental harm does not mean what the DEA think it does. This law needs to be interpreted in line with the constitutional guarantee of an environment that is not harmful to our health and wellbeing. Environment is defined in the 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** [emphasis added]*
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.*

So again it is not so much the environment that is important when looking at environmental harm as its impact on human beings. Thus the idea that a human rights approach to biodiversity would result in the extermination of Rhino is without any merit at all. Rhino are a massively valuable resource whose existence underpins most of South Africa's game farming industry not to mention a number of nature reserves. The game farming industry is driven in large part by hunting especially the trophy hunting of species such as rhino. That is the reason why South Africa's game populations have quadrupled while Kenya who has banned hunting are experiencing declining populations of wildlife.

Furthermore the emphasis on the aesthetic and cultural properties of our environment make what the DEA contend legally untenable even if Rhino were not a valuable resource.

So Trout SA still say that the DEA has got it wrong in adopting a science based approach that ignores the imperative of putting human needs first and the laws that require that this be so. We are concerned by the tone of the DEA's reasoning. It is never a good idea when attempts are made to argue the interpretation of laws by analogy but this makes up the bulk of the DEA's reasoning sometime even emotive reasoning. It is also unfortunate that the DEA has sought to play the man rather than the ball by demonising the messenger. Trout SA's arguments and those of FOSAF are extensive and closely reasoned. They merit a similar response. To do this it would be important to see the changes noted in the press release within the full context of a revised listing and regulations. Furthermore Trout SA's legal team is not alone in advising that what the DEA is trying to do is unlawful. For example similar representations have been made in application papers filed on behalf of the Kloof Conservancy.

This of course all misses the point. If the DEA is serious about promoting the trout industry and the jobs it creates then it should be working with the industry to find another way of dealing with its concerns than listing trout as invasive. The label invasive is not a good foundation on which to build a business or a sound basis on which to invest. Sensible people will shy away from risking their futures in a venture on something that is listed as invasive. One does not need to debate this. It is just common sense. So if the industry says that the proposed legislation is problematic the DEA should be listening and asking how they can address this. That question has not yet been asked and we are now ten years down the road since the NEM:BA became part of our law.

Trout SA urges the Minister of Environmental Affairs to intervene with fresh minds if needs be. Eight years and four failed attempts tell their own story. The jobs that the trout industry supply in areas where decent work is in short supply and the contribution that this industry can make in growing South Africa's aquaculture industry are too important to be put at risk in pursuit of what at the end of the day is nothing more than environmental purism.

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