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

Comments on the proposed

Alien and Invasive Species List

and Regulations

Submitted on behalf of

Trout SA

And

The Federation of Southern African Fly Fishers

(FOSAF)

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1. **Executive Summary**

1.1 FOSAF has over the last 8 years engaged in good faith with the Department of Water and Environmental Affairs or the DEA by offering comment and alternative formulations on the numerous iterations of the draft alien and invasive species lists and regulations under the National Environmental Management: Biodiversity Act No. 10 of 2004 or the NEM:BA .

1.2 Trout SA has more recently joined with FOSAF in making these representations. FOSAF and Trout SA are together referred to as the parties.

1.3 The parties believe that:

(a) The proposed implementation of the NEM:BA is flawed and does not properly align with the Constitution of the Republic of South Africa Act No 108 of 1996 or the Constitution, the National Environmental Management Act No 78 of 1998 or the NEMA or the United Nations Convention on Biological Diversity or the CBD.

(b) This partly explains why it has taken so long to implement the NEM:BA and why so many iterations of the lists and regulations have been produced without success.

1.4 While this present version of the lists and regulations represents a pragmatic attempt to find practical implementation modalities in respect of trout, the lists and regulations contain fundamental errors of principle that continue to bedevil the implementation of the NEM:BA. For example:

(a) There is a failure to appreciate that South African environmental law is anthropocentric in its orientation and implementation.

(b) There is a misunderstanding regarding what the definition “invasive species” entails and how it should be applied resulting in useful species such as trout being listed as invasive without any justification for this.

(c) There is a misunderstanding regarding what the definition “control” entails and how it should be applied.

(d) There is a lack of policy to guide the appropriate implementation of the NEM:BA in relation to the above aspects generally and aquatic freshwater environments in particular.

(e) There is a lack of proper consultation. For example, the body of evidence relied upon by the Minister in arriving at the decision to list certain species has not been made public despite requests for this to be done.

(f) The lists and regulations are unclear and ambiguous and so complex so as to make them incomprehensible, impractical and unworkable.

(g) The lists and regulations require the Minister to exercise powers that the NEM:BA does not give the Minister and that only Parliament may exercise.

(h) The lists and regulations require the application of resources and capacity that the DEA does not have.

2. Introduction

2.1 On Wednesday 12 February 2014 the Minister of Water and Environmental Affairs (the Minister) published the following notices, namely

(a) Notice 78 of 2014 setting out drafts of the lists (the Lists) contemplated in sections 66(1), 67(1), 70(1)(a), 71(3) and 71a of the NEM:BA,

(b) Notice 79 of 2014 setting out draft Alien and Invasive Species Regulations (the Regulations).

The two notices, 78 and 79 are referred to as the Notices.

2.2 Members of the public were invited to submit written comments to the Minister within 30 days of the publication of the Notices. That time period expires on Friday 14 March 2014.

2.3 The parties submit, for reasons that are dealt with in more detail in paragraph 9.5, that the DEA ought to have notified FOSAF and Trout SA that these Notices had been published.

2.4 The DEA held informal stakeholder meetings at the SANBI education centre in Pretoria on 5 March 2014. The parties attended one of those meetings. The DEA was given a preliminary discussion draft of this submission two days prior to that meeting.

2.5 The parties discussed some of the issues outlined in this submission at that meeting notably the DEA's failure to properly consult, and the DEA's failure to properly apply the definition of "invasive" and "control". The DEA agreed that there had been failures in the consultation process, notably around:

(a) the publication of the fish sanctuary area maps referred to in articles 1and 4(1) of the Regulations; and

(b) the Minister's failure to supply any reasons for each listing.

2.6 The DEA deliberately avoided debating these issues saying that its role in the meeting was to listen and to respond later in writing. However the discussion that took place around these issues did inevitably reveal some of the DEA's thinking, especially with regard to the interpretation of "invasive". This approach will be examined later.

2.7 The parties questioned the legality of the Notices in their preliminary submission. In particular they questioned if the Notices had been published in a national newspaper as is required in terms of section 100 of the NEM:BA. This query was repeated in an e mail addressed to the DEA's Dr Preston on 3 March 2014.

2.8 Dr Preston replied to that e mail but did not address this query. It was only after the parties raised the issue again at the informal meeting on 5 March 2014 that the DEA conceded that the Notices had not been published in a newspaper.

3. **The consequences of the failure to properly publish the Notices**

3.1 Section 100 of the NEM:BA requires the Minister to notify the public of the proposed exercise of the powers necessary to promulgate the Lists and the Regulations by publication:

- *in the Gazette; and*
- *in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.*

3.2 The purpose of this publication is to enable the public participation process required in section 99 of the NEM:BA.

3.3 A failure to comply with this obligation renders the Notices invalid[1].

3.4 The DEA suggested at the hearing that this could be rectified merely by publishing the notice in the newspaper and extending the notice period by a further 30 day period from the date of that publication. The parties submit that this is incorrect.

(a) Section 100(2)(a) states

> *The notice must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power.*

(b) The Minister cannot extend the notice period by way of a publication in a newspaper as the 30 day period runs from the date of publication in the Gazette.

(c) It follows therefore that the two notices must be published at the same time for there to be compliance.

3.5 **The parties submit that the process currently under way is fatally defective and will need to be started again in order for the Minister to comply with the public participation process required in terms of section 99**.

3.6 **The parties also submit that that the Minister must, when republishing the Notices, also make available the fish sanctuary area maps and the reasons for each proposed listing. A failure to do means that the Notices will not *contain sufficient***

[1] See Shalaka vs Klerksdorp Town Council and Another [1969] 2 ALL SA 52(T) and the cases summarised therein.

***information to enable members of the public to submit meaningful representations or objections* as is required by section 100(2)(b) of the NEM:BA**.

4. **Trout SA**

4.1 Trout SA is a commodity association that was formed at the instance of the trout farming and processing industry with the support of FOSAF and others including Professor Peter Britz and aquaculture specialist Mr Martin Davies who are members of the Rhodes University Department of Ichthyology and Fishery Science or DIFS, to represent the trout industry's interests.

4.2 The trout industry is very large and as is pointed out in paragraph 7 extends from the trout farming and processing industries to the numerous businesses from tackle manufacturers, dealers and shops, all the way through to trout fishing destinations and developments that exist either in whole or in part because a large number South Africans and a growing number of foreign tourists fish in this country for trout.

4.3 The establishment of Trout SA forms part of the implementation of the National Aquaculture Policy Framework[2] being led by the Department of Agriculture, Forestry and Fisheries or DAFF. This requires the aquaculture sector to form representative commodity associations to facilitate the efficient development of the sector. In keeping with DAFF policy, the aquaculture sector includes the entire value chain based on cultured fish. In the case of trout, Trout SA was thus formed to represent farmers, processors, suppliers, fishers, trout lodges and any trout associated business. Trout SA will be represented as a sub-sector within the pinnacle sectoral body Aquaculture SA, which along Agri SA, Forestry SA and Fish SA represent the primary production sectors through DAFF's commodity group system.

4.4 **FOSAF**

4.5 FOSAF is a voluntary association of Southern African Fly Fishers that was formed on 1 March 1986 to represent and champion the interests of all fly fishers in Southern Africa. (See www.fosaf.org.za)

4.6 No accurate figures exist regarding the exact number of trout anglers in South Africa. Tackle dealers estimate that approximately 100 000 fly rods are sold a year in South Africa. They also say that very few fly anglers do not fish for trout.

4.7 The vast majority of those fly anglers do not belong to clubs or associations such as FOSAF preferring instead to pursue what is largely a leisure activity in private.

4.8 FOSAF is respected as a senior voice in matters relating to fly fishing especially in connection with the DEA and other departments and the various attempts to regulate trout and more recently to list trout as an invasive species.

[2] Government Gazette, GN763 11 October 2013

5. **Nature and scope of this submission**

5.1 This submission focuses primarily on:

(a) the proposed listing of *Oncorhynchus mykiss* or rainbow trout and *Salmo trutta* or brown trout (collectively referred to in the rest of this document as trout) as category two invasive in some areas in South Africa; and

(b) The Regulations insofar as they apply to trout.

5.2 A small number fly anglers target bass and carp which have also been listed as Category 1b invasive species in some areas. However the parties make no representations specific to these species. This does not mean that the parties take any position on the proposed listing of carp or bass.

5.3 The parties' comments will nonetheless have relevance to the Lists and Regulations insofar they affect other alien and invasive species.

5.4 The definition of invasive under the NEM:BA requires an assessment of the impact that species have on the health and wellbeing of human beings. The parties will therefore describe what it calls the trout industry. This is dealt with in paragraph 7.

5.5 The nature of the parties' objection requires the Lists and Regulations to be placed in their relevant Constitutional and legislative framework. It is therefore necessary to deal extensively with that framework. The parties do this in paragraph 8.

5.6 The Lists deal with alien species on the one hand and invasive species on the other. The parties will follow this scheme when commenting on them.

5.7 The parties will comment first on the Notice 2 which lists those alien species which will be exempted. In dealing with that list the parties will:

(a) first, address the NEM:BA as it applies alien species (This is dealt with in paragraph 10);

(b) second, address the detail of the list itself (This is dealt with in paragraph 11); and

(c) third, make recommendations regarding those lists (This is dealt with in paragraph 12).

5.8 A similar scheme is adopted when commenting on Notice 3 and the list of invasive species. Thus the parties will:

(a) first, address NEM:BA as it applies to invasive species (This is dealt with in paragraph 13);

(b) second, deal with applying the test for invasive (This is dealt with in paragraph 14);

(c) third, address the detail of the list itself (This is dealt with in paragraph 14); and

(d) fourth, make recommendations regarding those lists (This is dealt with in paragraph 16).

5.9 The parties will then deal with Notice 1.

5.10 The parties note the listing of other trout and salmon species as prohibited but do not comment on List 4.

5.11 Finally the parties will deal with the Regulations.

5.12 Quotes are italicised and for reasons of formatting sub sections of legislation are sometimes differentiated using bullet points.

6. **The trout industry**

6.1 <u>The nature of the industry</u>

(a) Trout is much more than just recreational fishing. There are two principal drivers to this industry, namely:

(i) the trout farming and trout processing industries, including the sizable research and development components at Rhodes University and the University of Stellenbosch; and

(ii) the numerous businesses, from tackle manufacturers, dealers and shops, all the way through to trout fishing destinations and developments, that exist either in whole or in part because many South Africans and a growing number of foreign trout tourists fish in this country for trout.

(b) The only study undertaken into the number of people who fly fish that the parties are aware of is a 2001 study that FOSAF commissioned from Markinor[3]. That study estimated that there were 1.2 million fly anglers in South Africa who fly fished at least once a year. That study did not break down that number in terms of the number of trout anglers. The two largest tackle dealers who between them account for nearly 90% of fly fishing tackle sales say that nearly all fly anglers fish for trout but put the number of fly anglers much lower than the Markinor survey[4]. Tackle dealers estimate that approximately 100 000 fly rods are sold a year in South Africa. However even though the number is uncertain it is at least in the hundreds of thousands.

[3] Project Schubert
[4] Stealth estimate the number to be 100 000 and Xplorer at 500 000.

(c) The two sides of this industry (trout farming and processing on the one side and recreational and subsistence fishing and the businesses this supports on the other) are interdependent. Thus:

(i) although the majority of trout and salmon products processed in this country are imported, South Africa's processing industry still relies on locally produced trout to survive;

(ii) most recreational trout fishing and thus the businesses it supports depend on trout farms to regularly restock their waters with trout; and

(iii) trout farms rely on both trout processing and the stocking of trout waters for recreational trout fishing in order to survive.

6.2 <u>The makeup of recreational trout fishing industry</u>

(a) Just as recreational fishing needs a healthy trout farming industry to survive, so too do the many industries that rely on recreational fishing.

(b) The range of these industries is diverse and surprisingly large. It includes:

(i) The tackle dealers and the approximately 350 retail outlets that those dealers supply. The South African tackle industry is remarkably diverse including tackle dealers and importers, locally based rod and reel manufacturers, fly tying factories of varying sizes, manufacturers and importers of fly tying materials, fly tying vice manufacturers, artists and craftsmen. Some of the locally manufactured brands such as Shilton reels and the J Vice enjoy an international reputation for excellence and as a consequence are exported all over the world. Local specialist fly fishing brands like Xplorer and Stealth are large businesses who each sell tens of thousands of trout rods every year. Yet they are just two amongst a dozen or so other tackle dealers who supply fly fishing equipment in South Africa. The proprietor of a 100 square metre fishing shop in Durban, for example deals with over ten different tackle dealers who supply fly fishing equipment and accessories. The number of products available to fly anglers runs into the thousands.

(ii) Recreational fly fishing also supports two specialist fly fishing magazines, the *Complete Fly Fisherman* which is a monthly publication and the bi monthly *Flyfishing*. These publications are supported by a substantial readership. In addition, there are widely read electronic media in the form of web sites and blogs. Some of these like Dr Tom Sutcliffe's "*The Spirit of Fly F*ishing" enjoys a substantial following both locally and internationally. There are seldom less than 200 visitors on his site at any time. His guest list is often far larger than that.

(iii) This trout publishing industry also drives a robust literary and artistic endeavour. South Africa boasts a substantial oeuvre of trout fishing literature which continues to grow at a rate of about two to three books a year. Trout art such as that produced by Dr Tom Sutcliffe, Peter Briggs, Chris Bladen, Tony Kietzman and others commands good prices. This feeds into the initiatives of rural communities in trout fishing areas to promote art and crafts in their areas as an additional income generator.

(iv) But the biggest industry by far is the business of giving trout anglers the trout fishing they want. It is in this regard that trout fishing is unique. Unlike other recreational fisheries, trout fisheries do not just exist. They must be developed and this has spawned an enormous trout tourism industry.

(v) This industry covers everything from day ticket fishing on publically, communally and privately owned waters, offering a massive variety of trout fishing getaways, ranging from camping and farm stayaways to luxury lodges that cost tens of thousands of rand per night. Property prices in rural towns like Dullstroom, Waterval Boven and Clarens have increased because of the availability of trout fishing.

(vi) One other aspect of the trout industry relates to the guiding of fly anglers. There are many trained guides who earn a living from such activities. Increasingly members of poorer rural communities are being trained as fly fishing guides.

(vii) Previously disadvantaged communities in rural areas have long engaged is subsistence trout fishing and are increasingly exploiting the benefits this industry offers in their areas, by way of job and wealth creation. Ever increasing numbers of these initiatives are being developed as ecotourism facilities. An example is the Umgano Project of the Mabandla Traditional Council which is planning to provide fly fishing opportunities as a tourism attraction for its fledgling community-based ecotourism initiative, as an additional form of income.

6.3 <u>The size of the trout fishing industry</u>

(a) No studies have been done into the size of the trout tourism industry but it is very visible. One cannot drive any distance in South Africa's trout fishing areas without seeing these trout waters or signs advertising their availability. The phrase "trout fishing destinations in South Africa" generates 318 million hits on Google. The phrase "bass fishing destinations in South Africa" by way of contrast generates a relatively measly 74 500 hits. "Game viewing destinations in South Africa" generates some 89 million hits. "Ecotourism destinations in South Africa" generated 716 000 hits. This

gives some indication of the size of the tourism industry that is either wholly or partially dependent on the desire to catch trout in this country.

(b) Trout fishing is an important economic driver and job creator in a number of rural communities situated in:

(i) The Mpumalanga highlands;

(ii) Gauteng;

(iii) The KwaZulu Natal Midlands and Drakensberg;

(iv) The highlands of the Eastern Cape;

(v) The highlands of the Eastern Free State;

(vi) The highlands of Limpopo; and

(vii) The Western Cape.

(c) Very little work has been done in investigating the extent of this contribution.

(i) A study by Du Preez, and Lee, in 2010 calculated that fly fishing in the Rhodes district alone accounted for 38% (R5.7 million per annum) of the Rhodes economy and contributed R13.5 million to the South African economy. They estimated that the destruction of Rhodes trout economy would reduce tourism in the area by 89% and reduce employment in the village by 46%. [5]

(ii) The parties have been informed that similar studies with similar conclusions have been undertaken in the Underberg Himeville area of KwaZulu Natal by KwaSani Tourism Authority and in Dullstroom, Mpumalanga. Full details of the studies are currently unavailable. A study undertaken in 2007 and completed in 2008 by Leibold, and van Zyl into the economic impact of sport and recreational angling in South Africa estimated the economic impact of fly fishing in general at R3.5 billion. Recreational fishing itself amounted to in excess of R18 billion which is more than rugby and cricket combined. These figures could be adjusted for cost of living increases over the intervening period.

(d) There can be no doubt that the presence of trout in South Africa drives a very large and valuable industry that contributes billions of rands to the South African economy and accounts for thousands of job opportunities and that caution should thus be required when balancing the various interests to determine the invasiveness of trout.

[5] See also the study by Nicholson B, (2013) Economics (Hons) Rhodes University, which showed similar findings for the Winterberg and Somerset East areas.

6.4 Trout Aquaculture

(a) South Africa's 50 or so trout farms are key to the trout industry. Not only do they produce about 30% of South Africa's demand for trout and salmon based foods, but they also stock South Africa's trout waters, most of which would cease to hold trout were this stocking to stop.

(b) South African trout farms produce about 1 500[6] tonnes of trout a year generating a turnover which Martin Davies[7] estimates to be about R85 million per annum. The parties have established that this estimate is supported by South Africa's two largest trout farming businesses as the revenue at the "farm gate" i.e., sold fresh and unprocessed.

(c) South Africa's trout farming industry is much smaller than it should be both given the size of the South African market, international trends in freshwater aquaculture and trout based aquaculture in particular. South Africa imports about 3000 tons of trout and processed trout products per annum.[8] This is in addition to salmon and processed salmon products. South Africa's two largest trout farming businesses, agree that the uncertainty regarding trout's status in South Africa, arising from the risk of trout being declared invasive, has limited investment and thus prevented the industry from achieving its potential.

(d) This stands in stark contrast to Europe and the United Kingdom where rainbow trout, although alien to that continent, are exempt from European and British invasive species laws in order to protect their thriving trout based aquaculture industry.

(e) The academic research and teaching that is being undertaken at Rhodes University and the University of Stellenbosch is substantially trout-based and is underpinned by the trout hatcheries and farms that are run by both universities. That teaching and research is key to the success of South Africa's nascent aquaculture industry.

(f) South Africa's trout farming business must also be seen in the context of the priority the State is placing on the promotion of aquaculture.

(i) Aquaculture is seen by government as a potent job and income generator in marginalised communities both in this country and elsewhere in the world. The growth of freshwater aquaculture in

[6] South Africa's Aquaculture Yearbook 2012, DAFF.
[7] DIFS at Rhodes University.
[8] Britz, P.J. 2014. Final Report. Technical support to the DAFF in the overall development of the freshwater aquaculture sector in South Africa, to provide a comprehensive market and policy analysis, to determine the public understanding of aquaculture and to develop a framework for a five-year aquaculture awareness programme. Food and Agriculture Organisation of the United Nations. Technical Cooperation Programme TCP/SAF/3401/2. 236p.

particular has been prioritised to create rural livelihood opportunities and decent jobs[6].

(ii) Aquaculture has been identified as an important development area in the National Development Plan, the Industrial Policy Action Plan (IPAP2) of the Department of Trade and Industry and the Cabinet approved National Aquaculture Policy Framework. Aquaculture is now the third ranked fishery sub-sector in terms of value and employment, and is the only one with the potential to grow fish supply and create new livelihood opportunities.

(iii) The development of marine and freshwater aquaculture enjoys priority in South Africa's development agenda, with DAFF as the lead agent responsible for coordinating the implementation of the National Aquaculture Framework Policy.

(g) South Africa's trout farming industry accounts for over 50% of South Africa's freshwater aquaculture production. It is also the incubator of the skills and experience that drive Lesotho's thriving trout export market. Freshwater aquaculture, with the exception of trout, is a still nascent industry in this country.

6.5 <u>The environmental and ecosystem service benefits of trout fishing</u>

The value chain is not only commercial. The trout industry also offers very considerable environmental benefits.

(a) Trout survive in cold well oxygenated and unpolluted water. This is why their presence acts as an important indicator species for water quality in many places, especially in the mining compromised highlands of Mpumalanga and other areas where land is compromised by poor farming and other practices.

(b) Although the trout industry is primarily a farming enterprise it is one that impacts minimally on the environment when compared to other agricultural land uses. Thus the pollution caused by trout farms is regarded as minimal[9] and few incidents of note have been recorded in this regard.

(c) Trout tourism is successful because it offers guests an enjoyable and fulfilling trout fishing experience. That isn't possible if the land is farmed intensively to livestock, especially dairy or crops.

(d) Trout require clean water and tourists want to fish for trout in natural surroundings. Intensive agricultural activities, especially in their modern industrialised forms, are not compatible with this.

[9] According to tests undertaken by Mr Alletson

(e) The result is that land used for trout tourism fisheries and destinations is either not farmed at all or farmed in a manner that does not impact negatively landscape quality, on the quality of the fishing or tourism experience. It also does not impact negatively on water quality of the waters in which trout are found. The development of trout fisheries thus promotes biodiversity conservation by limiting transformative land uses. It is a simple fact that many landowners are able to afford to leave their land undisturbed and thus available for biodiversity and watershed conservation type land-uses which promote conservancies and other biodiversity stewardship endeavours largely as a result of the revenue generated from such ecotourism activities. It is also self-evident that such land uses are consistent with improved delivery of environmental goods and services or ecosystems services in particular water resource conservation. Accordingly, landowners engaged in such land uses such as the stabilisation of stream flow and flood attenuation to the benefit of down-stream water users should be encouraged and incentivised to promote such uses rather than be made subject to the proposed penal provisions.

(f) Again no studies have been undertaken identifying the extent of the contribution to biodiversity conservation and ecosystems services that such land uses make. Despite this it is no exaggeration though to say that tens of thousands of hectares of land is involved. The contribution to biodiversity conservation and ecosystems services will also be massive.

(g) The parties are concerned that the ecosystems services value flowing from the fact that large areas of land remain undisturbed and thus available for biodiversity conservation type land-uses will be put to other uses if the trout-based fisheries and related tourism were to be negatively impacted by listing trout as invasive.

6.6 <u>Trout fishing and land values.</u>

(a) No studies have been undertaken into the extent trout fishing enhances the value of the property on which it takes place but there can be no doubt that it is considerable. Some indication of the economic benefit of trout in this regard can be gleaned by what happened when news of the listing of trout on 19 July 2013 as invasive broke. One sale at Mount Anderson in the Lydenberg district collapsed as a result of this news and two others were only saved by reducing the price for the properties by nearly R500 000.00 each. That represented about 40% of the value of these properties before trout were listed as invasive.

(b) The fact remains that huge investments in land for tourism and trout fishing are premised on the use of trout. These investments and the related tourism and fishing interest represent a significant economic contribution to South Africa's economy.

7. **Constitutional Environmental and Administrative issues affecting the NEM:BA**

7.1 Introduction

(a) The parties submit that the Minister has misconstrued the schemes that the NEM:BA prescribes in respect of the definition and control of invasive species.

(b) The parties contend that in doing so the Minister has gone beyond the powers granted to her under the NEM:BA and is acting without authority.

(c) The nature of this complaint requires the NEM:BA to be understood both as Constitutional legislation and in the context of other legislation intended to give effect to the rights set out in Chapter 2 of the Constitution such as the NEMA and the PAJA.

(d) This is particularly important given the anthropocentric nature of this legislation and the impact that it has on the application of the NEM:BA especially as it applies to invasive species.

7.2 The Constitutional right

(a) The environmental right enshrined in section 24 of the Constitution is a human right and not a right enjoyed and protected for the benefit of the environment *per se*. Section 24 states:

> *Everyone has the right—*
>
> (a) *to an environment that is not harmful to their health or well-being; and*
>
> (b) *to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—*
>
> (i) *prevent pollution and ecological degradation;*
>
> (ii) *promote conservation; and*
>
> (iii) ***secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development****. (our highlighting)*

(b) **The environmental right is anthropocentric (human centred) in its orientation**.

(i) **Human beings are part of the environment**; and

(ii) **The constitutional imperative that the environment must be protected applies only insofar this is necessary to benefit present and future generations of human beings**.

(c) The right does not exist in isolation. Chapter 2 of the Constitution lists 27 other so called human rights. They too are anthropocentric and many of them will be materially and adversely affected if the Minister lists trout as an invasive species. Affected rights include:

(i) The right to human dignity - section 10;

(ii) The right to life - section 11;

(iii) Freedom of trade occupation and profession - section 22;

(iv) Environment - section 24;

(v) Property – section 25;

(vi) Health care, food, water and social security - section 27;

(vii) Language and Culture - section 30; and

(viii) Just administrative action – section 33.

(d) These rights will inevitably conflict with one another. The constitutional scheme for doing this does not prioritise rights. Section 36 states:

> *1 The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:*
> *a. the nature of the right;*
> *b. the importance of the purpose of the limitation;*
> *c. the nature and extent of the limitation;*
> *d. the relation between the limitation and its purpose; and*
> *e. less restrictive means to achieve the purpose.*
>
> *2 Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.*

7.3 <u>The NEMA</u>

(a) **This anthropocentricity is also central to the NEMA**. The NEMA is the framework law that sets out the principles, structures and processes intended to ensure that all spheres of government are aligned in developing South Africa sustainably as contemplated in section 24 of the Constitution.

(b) A key feature of the NEMA is section 2 which sets out principles *applicable throughout the Republic to the actions of all organs of state that may significantly affect the environment, guide the interpretation, administration and implementation of this Act.*

(c) Section 2 goes on to state that these principles *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 Chapter2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination, and any other law concerned with the protection or management of the environment.*

(d) Section 2 sets out three key principles starting with:

(i) ***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***.[10]

(ii) *Development must be socially, environmentally and economically sustainable.*[11]

(iii) Sustainable development requires the consideration of all relevant factors including those listed in section 2(4)(a) of the NEMA. [12]

(e) The environment is not about species ecosystems and habitats or for that matter the impact alien and invasive species have on them. The environment is defined anthropocentrically 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.*

(f) Sustainable development must therefore be considered in this light which is why the phrase is described in section 2(4) in terms that are largely defensive. It would be well to remember, given the context of this submission, that:

(i) The NEMA is development orientated;[13]

[10] Section 2(2) of the NEMA
[11] Section 2(3) of the NEMA
[12] Section 2(4) of the NEMA

(ii) Decisions must take into account *the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge*.[14]

(iii) The *social, economic and environmental impacts of activities, including disadvantages and benefits must be considered, assessed and evaluated and decisions must be appropriate in the light of such consideration and assessment*.[15]

(g) **Inter departmental cooperation in government is essential to this**. Section 2(4)(a) of the NEMA states .

There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.

7.4 The NEM:BA

(a) The NEM:BA is one of four environmental management laws that sits under the NEMA framework.

(b) Its purpose is inter alia *within the framework of the National Environmental Management Act, to provide for the management and conservation of biological diversity within the Republic and of the components of such biological diversity.*[16]

(c) Section 4 of the NEM:BA states that the Act applies inter alia to human activity affecting South Africa's biological diversity and its components.

(d) *Section 7* of the NEM:BA states that its *application must be guided by the national environmental management principles set out in section 2 of the* NEMA.

(e) The NEM:BA contemplates that *management and conservation of biological diversity* will be achieved by the process of biodiversity planning and monitoring prescribed in Chapter 3. This must be done by a process of integrated and coordinated planning[17] within the national biodiversity framework prescribed in sections 38 and 39 of the NEM:BA.

(f) Critically section 40 of the NEM:BA authorises the Minister or the MEC to prepare bioregional plans. A bioregion is a geographic region determined by the Minister which contains whole or several nested ecosystems and is

[13] Section 2(3) and 2(4) of the NEMA
[14] Section 2(4)(g) of the NEMA
[15] Section 2(4)(i) of the NEMA
[16] Section 2(a)(i) of the NEM:BA
[17] See section 37(a) of the NEM:BA.

characterised by its landforms, vegetation cover, human culture and history.

(g) Section 41 states that a bioregional plan must-

(a) contain measures for the effective management of biodiversity and the components of biodiversity in the region;

(b) provide for monitoring of the plan; and

(c) be consistent with-

(i) this Act;

(ii) the national environmental management principles;

(iii) the national biodiversity framework; and

(iv) any relevant international agreements binding on the Republic.

(h) These bioregional plans drive the biodiversity management plans that in terms of section 45(a) of the NEM:BA must *be aimed at ensuring the long-term survival in nature of the species or ecosystem to which the plan relates*.

(i) The development of this integrated system is not the work of the moment. It will take years, decades even, before South Africa's biodiversity is mapped and the management of that biodiversity is encapsulated in a series of integrated plans.

(j) This reality is recognised in Part 2 of chapter 5 of the NEM:BA which deals with the identification and control of invasive species. Section 70(1) states:

> *The Minister must within 24 months of the date on which this section takes effect, by notice in the Gazette, publish a national list of invasive species in respect of which this Chapter must be applied nationally.*

(k) It is clear that the Legislature contemplated that these lists would be published before the biodiversity planning and monitoring prescribed in Chapter 3 was in place.

(l) The parties submit that:

(i) In the context of what is set out above and given the definition of control, that the Minister may only list those so called noxious species which clearly and uncontroversially result in economic or environmental harm or harm to human health.

(ii) The Minister may only list other species as invasive, whether by area or otherwise, after:

- the bioregional plans that are necessary to give context and meaning to those listings are in place; as are
- the policies prescribed in section 9 of the NEM:BA setting out norms and standards for so called restricted activities.

(iii) **Until this is done the Lists and the Regulations are a case of putting the cart before the horse and as such are unenforceable**.

8. **Administrative law:**

8.1 Just administrative action

(a) Just administrative action is a human right protected under section 33 of the constitution. Section 33 states:

1. *Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
2. *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.*
3. *National legislation must be enacted to give effect to these rights, and must:*
    - *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
    - *impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
    - *promote an efficient administration*

(b) The PAJA was enacted to give effect to this right.

8.2 Administrative action and the PAJA

(a) The PAJA regulates administrative action. Administrative action under the PAJA includes regulation making, the issue of Ministerial proclamations, as well as the impositions of restrictions and the granting of exemptions and permits, insofar they materially and adversely affect the rights or legitimate expectations of any person or the public[18].

[18] See Minister of Heath and Another vs New Clicks South Africa (Pty) Ltd and Others

(b) The Lists and the Regulations are administrative action so defined and as such must comply with the rules pertaining to such action under the PAJA in addition to any procedures that may be required in terms of the NEM:BA.

(c) This means that the action must be reasonable and procedurally fair. Thus the Minister must comply with:

(i) Section 4 of the PAJA insofar the action which materially and adversely affects the rights or legitimate expectations of any person;

(ii) Section 5 of the PAJA in cases where an administrative action materially and adversely affects the rights of the public; and

(iii) Section 6 in that the Minister must give reasons to any person whose rights have been materially and adversely affected by administrative action and who asks for them.

(iv) To the extent that the Minister's action must be reasonable this entails that it must be objectively verifiable in the sense that the reasons for coming to a particular conclusion or decision must be objectively speaking rational and justifiable.

(d) The parties submit that the Lists invoke all three sections. The parties further submit that the Minister has failed to comply with sections 4 and 5 of the PAJA. This will be dealt with in greater detail in the parties' submissions regarding the lists themselves.

8.3 <u>Subordinate law making</u>

(a) Ministers have no original legislative power. Such law making powers that Ministers do have, such as the power to issue proclamations or make regulations, is normally prescribed in the statute concerned, in this case the NEM:BA.

(b) These submissions deal with the exercise of that power by the Minister in terms of sections 66(1), 67(1), 68, 70(1), 71(3), 72 and 97 of the NEM:BA.

(c) The Constitutional Court held in Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others,[19]:

> *"The legislative authority vested in Parliament under s37 of the Constitution* (the Judge was referring to the interim constitution) *is expressed in wide terms – 'to make laws for the Republic in accordance with this Constitution'. In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all*

[19] [1995] ZACC 5

such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making. It is implicit in the power to make laws for the country and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including, as s16A does, the power to amend the Act under which the assignment is made."

(d) The power to make subordinate legislation may be express, such as for example is the case in section 97 of the NEM:BA which gives the Minister specific powers to make regulations, or this power may be implied. Professor Cora Hoexter deals with the administrator's implied power to make subordinate legislation in her book Administrative Law in South Africa[20].

(e) She says at page 42 that implied powers can be implied in the sense that they are ancillary to an express power or implied in the sense that they are reasonable and necessary consequences of the express power. Quoting the 1948 decision of Bloemfontein Town Council vs Richter[21] she characterised the position thus:

Just as the power to make omelettes must necessarily include the power to break eggs so the power to build a dam must include the power to expropriate property or remove silt.

(f) Professor Hoexter goes on to record that the courts take the following factors into account when deciding if a power to make subordinate legislation can be implied.

(i) The language of the legislation.

Language is important. If a power to make laws is expressed in peremptory language a court will be more likely to imply a power if it is necessary to give effect to the instruction.[22]

(ii) The breadth of the express power.

A court will be more inclined to find an implied power where the express power is of a broad, discretionary nature - and less inclined where there is a narrow closely circumscribed power.[23]

[20] Professor of Law at University of the Witwatersrand
[21] 1938 AD page 195
[22] Administrative Law Page 43

(iii) The context of the provision.

The act as a whole and the purposes for which it was enacted may indicate whether further powers are reasonably incidental to the express authority which has been given.[24]

(iv) The nature of the action.

Where the power is coercive oppressive or likely to have far reaching effects it is less likely that a court will find an implied authorisation for it. Thus it is often said that *the power to regulate does not include the power to prohibit.*[25]

(g) A key aspect of all the considerations referred to above is that a power cannot be implied in the absence of another power. Thus, for example the power to break eggs requires the power to make an omelette!

(h) **The parties will detail instances where the Minister attempts to break eggs without the power to make an omelette by engaging in subordinate law making without authority and in circumstances where this amounts to the usurpation of the plenary legislative power of Parliament**.

8.4 <u>The lists are not regulations</u>

(a) The lists of exempt alien species, prohibited alien species, invasive alien species and exempt or prohibited activities pertaining to those invasive species are not regulations though like regulations they constitute administrative action.

(b) The Minister derives power to make regulations under the NEM:BA from section 97 which allows regulations to be made regarding the matters listed in that section.

(c) The power to issue what are in effect proclamations derives elsewhere, in this case in terms of sections 66(1), 67(1), 70(1) and section 71(3).

(d) The lists will come into effect on the date upon which they are proclaimed unless the Minister provides that they should come into force on some other date. The legal effect of the Regulations is not automatically delayed pending the Regulations that deal with them or which are necessary for their implementation coming into force.

(e) It is essential and prudent that the lists are only brought into effect once the Regulations and necessary infrastructure are in place to ensure that the

[23] Administrative Law Page 43
[24] Administrative Law Page 43
[25] Administrative Law page 44.

processes that arise as a consequence of listing are in place and fully operational.

(f) This was not the case in July last year where the lists were proclaimed and this became law before the Regulations and their attendant infrastructure were in place.

8.5 Inter Departmental Cooperation under the NEMA

(a) The DAFF and its National Aquaculture Policy Framework seeks to grow freshwater aquaculture production for sustainable livelihoods based on South Africa's natural resource endowment.

(b) The DEA must harmonise its management of biodiversity and alien species in general and the listing of invasive species and the control thereof with the objectives of government departments, in this case the DAFF and its National Aquaculture Policy Framework.

(c) **The parties submit that the absence of any DEA policies dealing with the management of freshwater biodiversity makes such harmonisation impossible**.

8.6 Consultation under the NEM:BA.

(a) Part 4 of Chapter 5 of the NEM:BA requires the Minister to consult when exercising the powers described in sections 66(1), 67(1), 68,70(1), 71(3) or 72. The nature of those consultations is set out in sections 99 and 100.

(b) Sections 99 and 100 repeat in form the processes required in respect of administrative action affecting the public under section 5 (but not section 4) of the PAJA where consultation takes the form of an invitation to the public to comment.

(c) Section 100 requires the Minister to:

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

(ii) that invitation must contain sufficient information to enable members of the public to submit meaningful representations or objections.

(d) The parties record that section 100(1) of the NEM:BA which provides for the manner of the publication of the notice does not override section 5(3)(a) of the PAJA which enjoins the Minister to *take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them*.

(e) The obligation to consult has been exhaustively canvassed by the constitutional court in a number of cases. The principles that apply should be well known by the DEA. This is how the Constitutional Court described the obligation in Matatiele Municipality and Others v President of the Republic of South Africa and Others[26]

> *The importance of the rights conferred on citizens and the corresponding obligation imposed upon provincial legislatures by section 118(1) were underscored by this Court in Matatiele II. In that case the Court said:*
>
> > *"Our Constitution contemplates a democracy that is representative, and that also contains elements of participatory democracy. As the preamble openly declares, what is contemplated is "a democratic and open society in which government is based on the will of the people". Consistent with this constitutional order, section 118(1)(a) calls upon the provincial legislatures to "facilitate public involvement in [their] legislative and other processes" including those of their committees. As we held in Doctors for Life International v Speaker of the National Assembly and Others, our Constitution calls for open and transparent government and requires legislative organs to facilitate public participation in the making of laws by all legislative organs of the State."*
> >
> > *(Footnotes omitted.)*
>
> *However, the meaning and scope of the obligation to facilitate public participation were defined in Doctors for Life. While accepting that Parliament and provincial legislatures have a discretion to determine how best to facilitate public participation in a given case, this Court laid down what is required in order to comply with the duty. The Court said:*
>
> > *"What is ultimately important is that the Legislature has taken steps to afford the public a reasonable opportunity to participate effectively in the law-making process. Thus construed, there are at least two aspects of the duty to facilitate public involvement. The first is the duty to provide meaningful opportunities for public participation in the law-making process. The second is the duty to take measures to ensure that people have the ability to take advantage of the opportunities provided. In this sense, public involvement may be seen as a continuum that ranges from providing information and building awareness, to partnering in decision-making. This construction of the duty to facilitate public involvement is not only consistent with our participatory*

[26] [2006] ZACC 12

democracy, but it is consistent with the international-law right to political participation. As pointed out, that right not only guarantees the positive right to participate in public affairs, but it simultaneously imposes a duty on the State to facilitate public participation in the conduct of public affairs by ensuring that this right can be realised."

(Footnote omitted.)

(f) The parties submit that this process does not comply with the consultations process described above or as required under the NEM:BA and the PAJA because:

(i) Proper notice was not given *to those likely to be materially and adversely affected by the administrative action contemplated in the Lists and Regulations*.

(ii) Insufficient information has been provided by the Minister to enable members of the public, including the parties, to submit meaningful representations or objections.

(g) The parties will deal with these submissions in more detail but point out that the form and length of this submission has been determined largely because of the Minister's failure to provide sufficient information.

(h) This is especially problematic for anyone wanting to make representations regarding fresh water aquatic species as Government has not issued any policy documents regarding the implementation of NEM:BA in relation to aquatic freshwater ecosystems and habitats and the biodiversity and species dependent thereon or how the definitions of invasive, control or restricted activities are to be applied.

(i) **This lack of the policies necessary for the proper implementation of the NEM:BA or any consultation regarding those policies means that the current attempts to implement the NEM:BA are unstructured, lack transparency and are incapable of being integrated in any system of planning**.

(j) This lack of a publically-consulted-upon policy has been drawn to the DEA's attention for as long as the various iterations of the lists and regulations have been proposed.

8.7 Rules of Interpretation

(a) Subordinate legislation like the Lists and the Regulations must be clear and unambiguous. Subordinate legislation that is not clear and unambiguous is invalid and as such unenforceable.

(b) **The parties will detail many instances where the Lists are not clear and unambiguous and are accordingly invalid**.

9. **Alien species: Comments on the law**

Alien species are dealt with in Part 1 of Chapter 5 of the NEM:BA. The commencement date of these sections was 1 April 2005.[27]

9.1 The definition of an alien species

(a) An alien species is defined under the NEM:BA as:

- *a species that is not an indigenous species; or*
- *an indigenous species translocated or intended to be translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention.*

(b) The definition of alien is a very broad one. This is because aliens are defined in the negative as any species that is either not indigenous or although indigenous has been translocated outside its natural distribution range.

(c) Indigenous species are nonetheless considered alien to an area if they have been translocated outside their natural distribution range. They are referred to in the lists and the Regulations as "extra limital" species.

(d) The reference to a "natural distribution range in nature" is not defined in the NEM:BA which means that the term must be given its ordinary meaning. The ordinary meanings of "natural" and "in nature" both define a state in terms that exclude human impacts. Thus the ordinary meaning of:

(i) "natural" is *existing in or derived from nature; not made or caused by humankind*[28]; and

(ii) "in nature" is *the phenomena of the physical world collectively, including plants, animals, the landscape, and other features and products of the earth, as opposed to humans or human creations*[29].

(e) Alien as "manmade" or "caused by man" is underscored by the definition of "indigenous species" which refers to the term "in nature". Thus an indigenous species is defined as *a species that occurs, or has historically occurred, naturally in a free state in nature within the borders of the Republic, but excludes a species that has been introduced in the Republic as a result of human activity*.

[27] Proc. No. 47, Gazette No. 26887
[28] Oxford dictionary see http://www.oxforddictionaries.com/definition/english/natural?q=natural
[29] Oxford Dictionary see http://www.oxforddictionaries.com/definition/english/nature?q=in+nature#nature__21

(f) **It follows that a species is alien if it was introduced into South Africa or into an area within South Africa as a result of human activity**.

9.2 Alien Species and control

The NEM:BA does not oblige South Africans to control alien species in the sense that control is defined under the NEM:BA.

(a) The NEM:BA does not oblige South Africans to control alien species in the sense that control is defined under the NEM:BA.

(i) There is for example no equivalent in Part 1 of Chapter 5 for section 75 which deals with the control and eradication of listed invasive species.

(ii) Section 69 limits the duty of care that is owed in respect of alien species to complying with a permit and take all required steps to prevent or minimise harm to biodiversity rather than the positive duty to eradicate or prevent invasive species that is imposed by section 73(2) of the NEM:BA.

(b) Alien species must be managed in the general sense of that word while invasive species are subject to control. That is not to say that control is not a form of management. "Control" is simply one form management. The type of management is very narrowly defined and thus the legally permitted scope of management action is constrained.

9.3 Restricted activities and alien species

(a) Section 65(1) prohibits a person from carrying out *a restricted activity involving a specimen of an alien species without a permit issued in terms of Chapter 7*. Section 67(1) authorises the Minister to *list of those alien species in respect of which a permit mentioned in section 65(1) may not be issued*.

(b) Restricted activities are defined very broadly in relation to alien species and invasive species as follows under the NEM:BA:

(i) *importing into the Republic, including introducing from the sea, any specimen of an alien or listed invasive species;*

(ii) *having in possession or exercising physical control over any specimen of an alien or listed invasive species;*

(iii) *growing, breeding or in any other way propagating any specimen of an alien or listed invasive species, or causing it to multiply;*

(iv) *conveying, moving or otherwise translocating any specimen of an alien or listed invasive species;*

(v) *selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of an alien or listed invasive species; or*

(vi) *any other prescribed activity which involves a specimen of an alien or listed invasive species;*

(c) Restricted activities are also defined in relation to a specimen of an alien species or invasive species. The term specimen is defined to include all specimens dead and alive including seeds, eggs, gametes or propagules *or part of an animal, plant or other organism capable of propagation or reproduction or in any way transferring genetic traits.*

9.4 Alien species and exemptions

(a) **It is important to note that exemptions apply to an alien species rather than to a restricted activity pertaining to that species**. **The converse is true with invasive species where the exemption applies to the restricted activity rather than the species**. (Note this matter is canvassed in detail in relation to invasive species in paragraph 13.6.)

(b) Recent amendments to the NEM:BA have given the Minister wide powers to differentiate when making an exemption.

(i) The Minister may in issuing a notice differentiate by species of alien or a category of such species and even by person.[30]

(ii) The notice may also apply generally or be defined by area or persons or species including categories of the above. [31]

9.5 Offences and penalties

(a) The civil and criminal penalties for failing to comply with these sections are very severe.

(i) Carrying out a restricted activity without a permit is an offence in terms of section 101 and is punishable by a fine up to R10 million or a period of imprisonment of up to 10 years.[32]

(ii) The duty of care imposed in terms of section 69 is very broad. A person who carries out a restricted activity without a permit or fails to exercise proper care is liable to a competent authority for any costs incurred in the control and eradication of that species should it establish itself in nature as a result of that failure.

(b) The State bears the onus of proving an offence beyond all reasonable doubt.

[30] Section 66(4)(a) of the NEM:BA
[31] Section 66(4)(b) of the NEM:BA
[32] Sections 101 and 102 of the NEM:BA

9.6 Alien species in agriculture

(a) Most agriculture activity undertaken in South Africa involves restricted activities in respect of species that are alien to this country.

(b) The DAFF has identified the following indigenous food crops, namely pearl millet, grain sorghum, cow pea, bambara ground nut, mung bean, cleome, amaranth, black jack, jew marrow, marama bean, marula, red milkwood, mobola plum, wild medlar, num num, Kei apple and monkey orange.[33]

(c) All other food crops including staples such as such as maize, wheat, rice, potatoes, cabbage, spinach, carrots, sugarcane and livestock such as cattle, sheep, goats and poultry that are essential to our existence and wellbeing are classified as alien under the NEM:BA.

(d) The fact that they are classified as alien makes them subject to a penal command regime of restriction and control prescribed in sections 101, 102 and Part 1 of Chapter 5 of the NEM:BA.

9.7 Alien species in culture and everyday life.

(a) South Africans interact with alien species every day and in a multitude of ways. Many if not most of these interactions involve restricted activities and are thus criminal unless exempted or authorised by a permit.

(i) African cultural associations with cattle are an example as cattle are aliens to this country. So too are madumbe and umfino.

(ii) Our love of dogs is another. Dogs are also alien.

(iii) Nearly every gardener engages in restricted activities when gardening either because the garden contains species that are alien to South Africa (exotic) or are alien to the area and thus extra limital. Nearly all so called indigenous gardens are in fact alien in terms of the NEM:BA.

(iv) South African fresh water fishing is largely focused on fishing for alien species.

(b) The contribution that many alien species make to the health, wellbeing and general happiness of South Africans is fundamental and inestimable. Yet the NEM:BA characterises them as all bad and as such subject to a penal system of control unless the Minister says otherwise.

[33] See http://www.nda.agric.za/docs/Brochures/Indigfoodcrps.pdf Note: The same publication also identifies cassava and amadumbe as indigenous but they are not. Amadumbe comes from the East. See http://www.daff.gov.za/docs/Brochures/Amadumbe_1.pdf Cassava coms from the America's. See http://www.cgiar.org/our-research/crop-factsheets/cassava/

9.8 Alien species, the NEM:BA and the Constitution

(a) The parties submit that Part 1 of Chapter 5:

(i) Is an unwarranted invasion of the rights guaranteed to all South Africans under the Constitution and as such is liable to be challenged and set aside.

(ii) Is oppressive and destructive of human dignity and the values the Constitution seeks to protect.

(iii) Makes South Africans aliens in their own country and subject to the control and oversight of ministerial and departmental discretion by making a range of activities essential to basic human existence, restricted activities.

(b) The parties urge the DEA to take urgent steps to amend Part 1 of Chapter 5 of the NEM:BA so that:

(i) **South Africans' right to use and enjoy alien species generally is not subject subjected to the exercise of a ministerial discretion**.

(ii) **Legislation controlling alien species is limited and deals with those species in a manner that is proportionate to the environmental threat they may pose to human health and wellbeing**.

(c) The notion of subjecting all alien species including extra limital species to a penal system of command and control contravenes a number of rights guaranteed to all South Africans under the Constitution. These include:

(i) The right to human dignity - section 10;

(ii) The right to life - section 11;

(iii) Freedom of trade occupation and profession - section 22;

(iv) Environment - section 24;

(v) Health care, food, water and social security - section 27;

(vi) Language and Culture - section 30.

(d) This scheme cannot be justified under section 36 of the Constitution or indeed the NEMA which has as a core principal, when making law, of placing people and their needs, at the forefront of its concern.

(e) **Criminalising ordinary human activity cannot be justified as reasonably necessary in an open and just society. The treatment of alien species under the NEM:BA is wholly disproportionate to the threat posed by alien species in the general sense**.

(f) **Humans should be free to interact with the environment they live in when going about their ordinary business without any fear of criminal sanction. Criminal sanctions should be limited to exceptional circumstances where alien species pose a real environmental risk to human health and wellbeing**.

(g) **The classification of a species as alien should not make human existence subject to the approval of the Minister and the DEA. This is tantamount to licencing the right to live with dignity**.

10. **Notice 2: Exempt alien species**

10.1 Referencing the Notice

(a) Notice 2 refers to 8 categories of alien species that are exempted in terms of the Notice. Each category will be referred to by its number on the list.

(b) If a category is not referred to then it means that the parties make no comment regarding that category.

10.2 Reasons for the Exemptions

(a) The Minister has not given interested parties any information why it has been decided to exempt alien species in this way or what policy or other considerations were taken into account.

(b) The media release that was published on 17 February (the Media Release) describes their purpose *as being to prevent the illegal introduction of alien and potentially invasive species into the country, and to regulate listed invasive species*.

(c) The parties submit that:

(i) The Lists have a material impact on the rights of the public and should therefore have been accompanied by a detailed memorandum explaining why these exemptions are necessary, what they are intended to achieve and who is likely to be affected by them.

(ii) The Minister's failure to do so is a procedural irregularity under the PAJA and under the NEMA.

(iii) The Media Statement erroneously refers to the Lists as "regulations". (The parties explain why this is not so in paragraph 9.4)

10.3 Category 1: Dead alien species

This is important because no similar provision exists in relation to invasive species, thus making dead invasive species subject to control. (See paragraph 15.8(e).)

(a) A species does not have to be alien in order to be invasive as that term is defined under the NEM:BA.

(b) If dead invasive species are to be exempted, then the Minister must do so specifically in terms of section 71(3) of the NEM:BA.

10.4 Category 2: Legally introduced alien species - failure to exempt trout

(a) Trout are defined under the NEM:BA as being alien to South Africa.

(b) The list of exempt alien species does not exempt trout which accordingly remain alien and as such subject to the penal system of command and control described in paragraph 10.

(c) Category 2 exempts:

> *Any alien species that has been legally introduced into South Africa, or introduced into South Africa before a requirement to be legally introduced, prior to the commencement of the Regulations and that is not a listed invasive species in terms of section 70(1)(a) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), including any species imported for agricultural purposes.*

(d) Trout are listed as invasive in Notice 3.[34] The proviso - *that is not a listed invasive species* - accordingly applies to them with the result that they are not exempted alien species.

(e) A similar problem exists in respect of the 532 other species that have been listed as invasive in certain areas.

(f) This appears to be an error which the parties submit must be rectified.

10.5 Category 4: Veterinary certificates

(a) Category 4 states:

> *Exempted specimens or combined groups of specimens must nevertheless be accompanied by either Veterinary Health certificates or Phytosanitary certificates as proof that the specimens have been treated as potential vectors of invasive diseases, pathogens and other problems.*

(b) The literal meaning of this qualification is that all exempt species must nonetheless be accompanied by either *Veterinary Health certificates or Phytosanitary certificates as proof that the specimens have been treated as potential vectors of invasive diseases, pathogens and other problems.*

(c) No reason is given why this is necessary nor is it apparent why this is necessary. The parties submit that this is unwarranted especially given what

[34] List 6 Items 12 and 16.

it says about the way the NEM:BA deals with alien species in general. (See paragraph 10.)

(d) The qualification is unclear.

10.6 Category 5: Extra limital species

(a) Extra limital species are indigenous species found outside their natural distribution ranges and therefore classified as alien species.

(b) Because they are alien species they will be subject to the penal system of command and control described in paragraph 10.2 unless they are exempted.

(c) Notice 2 exempts indigenous mammal species and then only from the Regulations for a period of two years from the date upon which the Regulations take effect.

(d) Other extra limital species are only exempted if they are not invasive.

(e) Category 5 further states that during this two year period:

(i) Distribution maps of these species will be finalised, and potential listing as invasive species will be considered.

(ii) During this period, for these extra-limital mammal species:

- *all species listed in terms of section 56(1) of the National Environmental Management Biodiversity Act, 2004 (Act No. 10 of 2004), will be regulated in terms of the Threatened or Protected Species (TOPS) Regulations; and*

- *all species not listed in terms of section 56(1) of the National Environmental Management Biodiversity Act, 2004 (Act No. 10 of 2004), all existing permits in terms of Provincial Ordinances will be valid for the period indicated on the permit, up to a maximum of two years, and new permits (up to a date not exceeding two years after these Regulations take effect) may be applied for in terms of the Provincial Ordinances.*

(f) The drafting of Category 5 like Category 2 is unclear and ambiguous.

(g) The parties ask:

(i) Why is it necessary to limit the exemption of extra limital mammal species to two years given that section 66(3) of the NEM:BA requires the Minister to regularly review an exemption notice and section 79(1) requires the Minister to consult before amending or repealing that notice?

(ii) Why is it necessary to state that protected species will be regulated by the TOPS regulations if that is in fact the legal position?

(iii) What will the position be in respect of permits issued under Provincial Acts given that the category only refers to ordinances?

(h) The parties also submit that the Minister lacks the authority to invalidate administrative action lawfully undertaken in terms of a Provincial Ordinance or for, for that matter, a Provincial Act. This is dealt with in the next paragraph.

10.7 Category 5: The invalidation of provincial permits

(a) The reference in the Lists to Ordinances is either archaic or unclear and ambiguous.

(b) Most Provinces have legislated Acts in addition to or in replacement of the ordinances which were passed by Provincial councils prior to the Interim Constitution taking effect in April 1994. For example Mpumalanga passed the Mpumalanga Nature Conservation Act 10 of 1998 which deals with the issue of permits in respect of inter alia, indigenous mammal species.

(c) Ordinances are legislation enacted by a provincial authority and have the status of legislation under the Constitution in terms of section 2(1) of schedule 6.[35]

(d) The NEM:BA is notable in that it does not contemplate the repeal of any provincial legislation which will to all intents and purposes continue to apply as if the NEM:BA never existed nor have any of the provinces repealed that legislation.

(e) There is a considerable risk of a conflict arising between the NEM:BA and provincial legislation given that agriculture and nature conservation, excluding national parks, national botanical gardens and marine resources are listed as shared legislative competencies in schedule 5 to the Constitution.

(f) However the issue of conflict per se does not arise with regard to what the Minister intends doing to provincial permits. At issue is the question whether the Minister can effectively modify a permit lawfully issued by a provincial authority by limiting its term?

(g) The parties submit the Minister cannot do this.

(i) The authority to make laws reposes in the relevant Legislature and subject to cases of conflict and challenges under the Constitution,

[35] Section 2(1) states: *All law that was in force when the new Constitution took effect, continues in force, subject to any amendment or repeal and consistency with the new Constitution.*

the power to unmake those laws also reposes in that Legislature.[36]

(ii) Conflict in the case of schedule 5 laws is resolved by a court applying the principles set out in section 146 of the Constitution.

(iii) The Constitution does not give the National Legislature or a member of the National Executive such as the Minister the power to resolve the conflict by amending a provincial law or decisions validly taken in terms of that law.

(iv) It follows that if the Minister cannot amend provincial legislation, administrative action lawfully undertaken in terms of that legislation cannot be amended either.

(v) **It seems the Minister assumes that since the NEM:BA is necessary for the environment and since section 146(2)(c)(vi) states that such laws take precedence over provincial ones in the case of a conflict, the Minister must somehow have the power to intrude in the legislative process as is contemplated. This is incorrect**.

(h) The parties submit that Minister has no right to override the lawful acts of a provincial authority. The proviso *all existing permits in terms of Provincial Ordinances will be valid for the period indicated on the permit, up to a maximum of two years, and new permits (up to a date not exceeding two years after these Regulations take effect) may be applied for in terms of the Provincial Ordinances* is ultra vires the Minister's powers and is unenforceable.

11. **Recommendations**

The parties recommend that:

11.1 Urgent steps are taken to redraft part 1 of Chapter 5 of the NEM:BA in terms that do not offend the Constitution and the values it enshrines;

11.2 In the meantime:

(a) Category 2 of Notice 2 must be redrafted to delete the passage differentiating between alien species and alien invasive species (highlighted in bold between "**[ ]**");

(b) paragraph 15.6 regarding alien spread.

(c) the words highlighted in bold and underlined are inserted.

11.3 The amended exemption will thus read:

[36] Section 43 of the Constitution.

2. Any alien species that has been legally introduced into South Africa, or introduced into South Africa before a requirement to be legally introduced, prior to the commencement of the Regulations ***as well as Indigenous species that are also extra-limital species (outside their natural distribution ranges and therefore classified as alien) [and that is not a listed invasive species in terms of section 70(1)(a) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004),]*** *including any species imported for agricultural purposes.* ***This exemption does not apply to:***

- ***Salmo trutta (brown trout)***
- ***Oncorhynchus mykiss (rainbow trout)***
- ***include in this list any other appropriate species.***

in river catchment systems where they did not occur prior to the commencement of the Regulations.

11.4 Point 5 to 8 are deleted in favour of the general exemption contained in the draft set out in paragraph 12.3.

11.5 The mapping exercise should be introduced when the time is ripe by way of an amendment to the notice, and after a proper consultation process.

12. **Invasive species generally**

Invasive species are dealt with in Part 2 of Chapter 5 of the NEM:BA.

12.1 The process of identifying invasive species

(a) Unlike alien species which are alien because they fall within the definition of alien by their origin, invasive species must be identified as such by the Minister applying the definition of an invasive species under the NEM:BA.

(b) Section 70(1)(a) says the Minister must publish a national list of invasive species in respect of which this Chapter must be applied nationally within 24 months of the section taking effect. That section was not specified so it took effect two years after the NEM:BA came into effect, namely, 1 September 2006.

(c) Section 70(3) obliges the Minister to regularly review this list.

(d) The parties submit:

(i) This power to list and amend those lists cannot be interpreted or applied in isolation as the parties have pointed out in paragraph 8.3(f)(iii).

(ii) It must be interpreted and applied in the context of the NEM:BA as a whole taking into account the principles set out in the NEMA and the process of planning and research that feeds into and informs a system of integrated planning.

(iii) The consultation which is essential to the proper operation of the NEM:BA as well as the requirement in terms of the CBD that the public be educated so as to become more environmentally aware cannot take place without this.

(iv) Serious consequences can flow from categorising a species as invasive. It can materially affect the rights of persons and the public insofar they may benefit from that species. These consequences cannot be identified or understood without that process.

(v) This is not to say that the process of identifying and listing invasive species must be placed on hold until the framework to properly identify these impacts is in place. Section 70 recognises the need to list species as invasive in the short term by requiring the Minister to publish national lists within two years of the section coming into force.

(vi) This is not an invitation to list species haphazardly or randomly. The fact that the species may or must cause economic harm, environmental harm or harm to human health is essential to a listing as invasive.

(vii) But it is also true that there are many species where this is obvious and uncontroversial. Section 70 was an invitation to list those species inside the two year time frame set out in the NEM:BA. It is an invitation that the DEA has ignored or failed to take up for nearly eight years.

(e) The process of making these lists is administrative action and as such must comply with the PAJA as well the procedures prescribed in the NEM:BA and the NEMA principles.

(f) The PAJA requires the Minister's administrative decision making to be lawful, reasonable and procedurally fair.

(g) The parties submit that this duty is particularly onerous under the NEM:BA both because of the consequences of such a listing and the way in which invasive species are defined and regulated under Part 2 of Chapter 5 of the NEM:BA.

12.2 <u>The definition of invasive</u>

(a) It is important that the definition of invasive species is properly understood. This is especially so given that the definition is not the same as that used in the CBD.

(b) This has created and still creates a great deal of confusion. For example the DEA continues to maintain on the basis of what is alleged to be "good science" that trout are an invasive species though there is no basis in terms

of existing knowledge to make that assertion in terms of the definition of invasive under the NEM:BA.

(c) The term "invasive species" is defined under the NEM:BA in the following terms:

> *"invasive species" means any 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; and*
> - *may result in economic or environmental harm or harm to human health.*

(d) This definition can be seen in three parts:

(i) A factual/scientific enquiry as whether the species in question is established or spread outside its natural distribution range;

(ii) The factual/scientific enquiry into threats whether they be real or potential, to species, ecosystems or habitats; **AND** (emphasis added)

(iii) A human rights based enquiry into the impact of those threats (harm) on human health and wellbeing and the economy.

(e) The definition of invasive refers to four definitions, three from the NEM:BA and one (the definition of "environment") from the NEMA. They are:

> ***"ecosystem"*** *means a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit.*
>
> ***"habitat"*** *means a place where a species or ecological community naturally occurs.*
>
> ***"species"*** *means a kind of animal, plant or other organism that does not normally interbreed with individuals of another kind, and includes any sub-species, cultivar, variety, geographic race, strain, hybrid or geographically separate population.*
>
> *"**environment**" means the surroundings within which humans exist and that are made up of the land, water and atmosphere of the earth:*
>
> *(i) micro-organisms, plant and animal life:*
>
> *(ii) any part or combination of (i) and (ii)and the interrelationships among and between them: **and***

(iii) the physical chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

(f) A proper appreciation of the meaning of the definition of "environment" under the NEMA is critical to a proper understanding and application of the definition of "invasive".

(g) **The definition of environment is distinguishable from those of ecosystem and habitat in that**:

(i) **ecosystems and habitats are defined scientifically; whereas**

(ii) **environment is defined anthropocentrically in relation to how the *physical chemical, aesthetic and cultural properties and conditions* of what are in effect ecosystems *influence human health and well-being***.

(h) This definition is much broader in its scope than say the definition of environmental health as defined by the World Health Organisation. It is not just about those aspects of the human health and disease that are determined by factors in the environment.

(i) Health and wellbeing is a much broader more metaphysical concept that includes issues such as human happiness and prosperity.

(j) This sense of the environment is corroborated by its use in conjunction with economic harm or harm to human health.

(k) **The test for invasive cannot be seen in isolation. The NEM:BA is constitutional legislation dealing with a human right. That right has to be protected in the context of what are often other competing human rights. A balance must be achieved that protects the right and other rights in a manner which is *reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom***.[37]

(l) The determination of what is invasive is thus a complex process requiring a constitutional balance to be achieved in the application of a three part test.

(i) First, the species must have spread outside its natural distribution range.

(ii) Second, it must threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species.

(iii) Third, this threat must be of such a magnitude that it may result in economic or environmental harm or harm to human health.

[37] Section 36 of the Constitution.

(m) All three elements of the test must be satisfied in order for a species to be classified as invasive. Thus a species that:

- has spread outside its natural distribution range; and
- which also threatens ecosystems, habitats or other species or has demonstrable potential to do so;

is not invasive under NEM:BA, unless the threat is one that may result in economic or environmental harm or harm to human health.

(n) It follows that:

(i) Alien species have by definition spread outside their natural distribution range.

(ii) The application of the test in such a way that only considers some but not all the factors outlined in the definition (such as for example ecosystems, habitats or other species) above is incorrect.

(o) Thus the notion that trout are invasive merely because they are alien and prey upon on other species, is a gross over simplification of the above definition and the balancing act required under the NEM:BA. It is thus plainly wrong.

12.3 Invasive species and control

(a) **Invasive species unlike alien ones are subject to control under the NEM:BA**.

(b) "Control" is often confused with "manage" when used in its general sense under the NEM:BA. This misunderstanding can be seen in the Media Release where the Minister states the *Regulations provide for the categorisation of invasive species into four categories, to allow for the prioritized management of……* This is incorrect. The NEM:BA does not allow invasive species to be managed in the general sense of that word. Management of invasive species is limited to control as it is defined in the NEM:BA.

(c) The NEM:BA defines control in relation to alien species and invasive species in these terms:

*"**control**", in relation to an alien or invasive species, 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, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species.*

(d) Although control as defined applies to both alien species and invasive species no such obligation is in fact imposed in respect of alien species.

(e) Section 75(1) says control *must be carried out by means of methods that are appropriate for the species concerned and the environment in which it occurs*.

(f) Section 73(2) requires a permit holders and landowners which a listed invasive species occurs to:

- *notify any relevant competent authority, in writing, of the listed invasive species occurring on that land;*
- *take steps to control and eradicate the listed invasive species and to prevent it from spreading;* ***and***
- *take all the required steps to prevent or minimise harm to biodiversity.*

(g) Section 73(3) and (4) entitle a competent authority to direct that landowner to do so and if this is not done to intervene and do it themselves and recover that cost from the landowner.

(h) Any person may request an authority to issue that directive to a landowner. If the competent authority fails or refuses to do so that person may apply to court for an order compelling the authority to do so. This is in terms of section 74.

(i) Landowners must bear the cost of this work though the obligation on the State to incentivise this is implicit in the CBD and the Minister's obligation is *to ensure the coordination and implementation of programmes for the prevention, control or eradication of invasive species*.[38]

(j) Section 76 requires organs of state to prepare and regularly update and audit invasive species monitoring plans for land under their control, detailing inter alia, what invasive species occur in the areas in question, what eradication and control measures have been undertaken and what progress has been achieved. This is no small undertaking given that ten separate lists describe as invasive:

- 381 plant species;
- 40 mammalian species;
- 14 species of birds;
- 24 reptile species;
- 7 amphibian species;

[38] Section 75(4) of the NEM:BA

- 17 fish species;
- 23 terrestrial invertebrate species;
- 8 fresh water invertebrate species;
- 13 marine invertebrate species; and
- 7 microbial species.

12.4 The application of "occur on land' to aquatic environments

(a) Section 73(2) of the NEM:BA imposes obligations on a person who is the owner of land on which a listed invasive species occurs. This poses particular difficulties in respect of aquatic environments that exist in water rather than occurring "on land".

(b) Though landowners own the land on which water flows or is impounded they do not necessarily own the water. Our common law protects the concept of public water and the rights everyone enjoys on account of that fact[39].

(c) The National Water Act 36 of 1998 effectively nationalised private water. This placed all water under the control of the State in trust for all South Africans. Section 3 states;

> *As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.*

(d) It is thus doubtful that the obligation section 73(2) imposes on private landowners extends to invasive species in freshwater habitats because they don't occur on land. Moreover the water they do occur in is under the control of the State.

(e) These anomalies further highlight the consequences of a lack of any policy dealing with aquatic environments.

12.5 Invasive species and restricted activities

(a) **The prohibition against restricted activities is separate and distinct from the obligation to control**.

(b) The same list of defined restricted activities applies to both alien species in terms of section 66 and invasive species in terms of section 71. (See paragraph 10.3(b) for the list of restricted activities).

[39] Butgereit and Another v Transvaal Canoe Union and Another [1988] 2 All SA 84 (A)

(c) The list is very broad and on the face of it refers to activities that are essential to the control of an invasive species. The right to dispose is one obvious example of a restricted activity that the parties submit clearly can't apply to the control of an invasive species. That would require a landowner, for example, to obtain a permit before disposing of invasive species on that landowner's property. The parties submit that activities that might otherwise be restricted cannot be regarded as such if they are carried out in order to control an invasive species.

(d) The regime that applies to invasive species is very similar to that which applies to aliens species, in that like sections 65 and 67:

(i) Section 71(1) prohibits a person from carrying *out a restricted activity involving a specimen of a listed invasive species without a permit issued in terms of Chapter 7.*

(ii) Section 71A authorised the Minister to list species in respect of which restricted activities cannot be permitted.

12.6 Exemptions.

(a) Section 71 of the NEM:BA was recently amended to give the Minister apparently wide powers to exempt restricted activities concerning invasive species.[40]

(b) The Minister did not have the power to exempt restricted activities in respect of invasive species before this amendment which the parties submit is additional corroboration for the fact that the purpose of listing a species is not management but rather eradication and prevention.

(c) **This power to exempt is different to that which applies in the case of alien species because this exemption applies only to restricted activities whereas the exemption that applies in the case of alien species applies to the species itself**.

(d) In both cases:

(i) the Minister may differentiate by species of alien or a category of such species and even by person; and

(ii) the notice may also apply generally or be defined by area or persons or species including categories of the above.[41]

(e) The parties submit that the apparently wide power to issue exemptions is illusory.

[40] The NEMLA 14 of 2013
[41] See sections 70 and 71 of the NEM:BA

(i) An exemption, even one pertaining to all restricted activities does not mean that the species is exempt. Landowners owe a duty to control invasive species on their land. The power granted to the Minister to relax by exemption the range of restricted activities that require a permit does not extend to modifying or removing the obligation every landowner has in terms of section 74 to either eradicate invasive species or where this 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*.

(ii) The exemption must apply to a restricted activity and not the species itself. Moreover it must be recognised that an exemption that applies to all restricted activities raises the question whether the listing itself is justified. Exemptions pertain to permits and in terms of section 91(b) of the NEM:BA permits can only be issued where the relevant species has been found to have negligible or no invasive potential. If that is the case why list it as invasive in the first place?

(f) **The parties submit the Minister cannot use permits and exemptions to engage in a scheme of managing invasive species which is at variance with the obligation to control prescribed under the NEM:BA**.

13. **Applying the test for "invasive"**

13.1 <u>How the DEA applies the test for "invasive"</u>

(a) It is unfortunate that section 70 provides no guidance to the Minister in the exercise of this power nor has the Minister issued any guidelines as to how the listing of a species as invasive has been arrived at. A lot of time, confusion and consequent loss would have been avoided had this not been so.

(b) FOSAF's chairperson has asked the DEA many times and over a period of some eight years to disclose how the DEA interprets the definition of invasive and the requirement of control as set out in the NEM:BA.

(c) DEA's director of law reforms and appeals wrote to FOSAF's chairperson on 3 February 2014 in response to this request. That is less than 10 days before the draft lists and the Regulations were published for comment. A copy of that letter (the Letter) is **attached**.

(d) The parties summarise the DEA's response as follows:

(i) Invasive

- Trout are established in 75% of the major South African river catchments including headwaters and tributaries in

the Western Cape, Eastern Cape, Mpumalanga and KwaZulu Natal.

- Little research exists regarding the spread and impact of non-native fish in South Africa and that which does exist is ad hoc driven by researcher interests rather than national information needs.

- What little research has been done on the impact of alien fish species focusses on their impact on the native biota in the ecosystems they occupy.

- International studies have shown that trout introductions have resulted in a loss of biodiversity including a loss of range or range contractions in America and New Zealand with loss of amphibian diversity in Australia.

- There is anecdotal "evidence" of the negative impacts of trout.

- Trout contribute to the national economy but no peer review study has been done at a national level on these economic benefits.

- The trout aquaculture industry is worth apparently R37 million rands.

- Trout must therefore be actively managed to limit further impact as well as to maximise social and economic benefits from the resource areas that are already invaded.

- Trout areas requiring cool headwater streams with relatively low anthropogenic (human) impacts which are also the focus of National Freshwater Environmental Priority Areas.

(ii) Control

- NEM:BA is environmental legislation and as such must be applied having regard to the principles set out in section 2 of the NEMA.

- The NEMA guides the interpretation and implantation of environmental management acts such as the NEM:BA with the result that section 75 must be read in this context.

- The obligation to control does not limit government to one solution. NEM:BA when read with the NEMA requires

that where economic and social benefit may be derived from invasive species, where eradication is not possible, control can be effected by managing the population numbers and impacts of invasive species on the environment and confining control areas within which control measures can be taken. This is still control as defined.

- NEMA requires that decisions must not be taken in isolation but that all aspects of the environment and those who benefit from the environment both socially and economically are considered.

- Thus the department can manage the utilisation of an alien species or an invasive species where its eradication is not possible.

(e) The DEA added a further argument at the informal stakeholder meeting that took place on 5 March 2014. The DEA argued that "environmental" must not be interpreted with reference to the NEMA but must be given its ordinary meaning as in relating to the natural world and the impact of human activity on its condition. Moreover this must be applied in the context of the objects listed in section 64.

13.2 <u>Comments on the DEA's approach</u>

(a) The parties submit that the approach adopted by the DEA in listing trout and indeed other species as invasive is fatally flawed as is its interpretation of control.

(b) The DEA cannot interpret "environmental" in the sense described in paragraph 14.1(e) as that definition:

(i) would make the second part of the definition of invasive superfluous; and

(ii) ignores the anthropocentric essence of both section 24 of the Constitution and the NEMA.

(c) Section 64, does not differentiate between alien species and invasive species. The reference to "prevent", "manage", "control" and "eradicate" in that section have to be interpreted in the context those terms are applied elsewhere in the Act. Thus, for example,:

(i) The reference to manage and control alien species and invasive species in section 64(1)(b) does not create another right to manage invasive species in addition to the right contained in Part 2 of Chapter 5.

(ii) Manage in that section must be seen in the context of the control that Part 2 of Chapter 5 prescribes for invasive species.

(d) It is also not a licence to ignore the imperative set out in sections 6 and 7 of the NEM:BA.

(i) Section 6(1) of the NEM:BA states *this Act must be read with any applicable provisions of the National Environmental Management Act*.

(ii) Section 7 of the NEM:BA states The application of this Act must be guided by the national environmental management principles set out in section 2 of the National Environmental Management Act.

(e) The NEM:BA is Constitutional legislation and as such must put people first. DEA has not done this preferring to put indigenous species, ecosystems and habitats first by adopting the "trout are predators and thus invasive" argument referred to earlier. This is not a proper application of the definition or the required considerations.

(f) The idea that the trout industry does not exist or that the fact of its existence need not be taken into account because it has not been validated scientifically by a process of peer review articles is absurd. South Africans live in the real world and not the ivory towers of academia. South Africans have a constitutional right to expect South Africa's laws to speak to that real world. The application of laws is not a scientific process which must be judged against scientific norms and standards. It is a human process that must be judged in terms of rules and standards that predate modern science by millennia. Far too much of our history has been blighted by the unreal legislation of ideas that ignored the real South Africa.

(i) The benefits of trout are real and there for everyone to see.

(ii) There is no evidence to suggest that they may cause economic or environmental harm or harm to human health. The opposite is in fact true. Trout have done South Africans a lot of good in the 125 years since Mr Charles Parker first introduced salmo trutta (brown trout) into the Bushmans River in KwaZulu Natal.

- The trout industry is substantial. It makes a positive difference to thousands of South Africans every day in countless ways.

- The trout industry is now expanding into communal areas. Fly anglers and Government are helping these communities to benefit from trout based ecotourism. This is providing a platform on which other ecotourism ventures can be built.

- The potential for growth in fresh water trout-based aquaculture is also there, provided South Africa's laws and government give that industry a chance at a future. That future will be threatened as long as the DEA ignores the definition of invasive under the NEM:BA for the one that holds that trout are invasive because they are alien and prey on indigenous species.

- The contribution the trout industry makes to ecosystems services and biodiversity conservation are set out in paragraph 7.5. Suffice it to say that large swathes of land are able to be left undisturbed and thus contribute these benefits due to trout-based tourism land use. A shining example of this kind of scenario is the Mount Anderson Catchment Reserve in Mpumalanga. Numerous other examples can be cited if required.

- Similarly, land investments for trout-based tourism developments contribute significant economic benefit to South Africa's economy. (See paragraph 7.6.)

(g) The Minister has misdirected herself in applying the definition of trout in a way that:

(i) Attaches undue weight to what is acknowledged to be insufficient research and anecdotal evidence.

(ii) Does not give proper regard to the requirement that trout must cause economic harm, environmental harm or harm to human health or that there must at least be a probability of such harm before trout can be listed as invasive.

(iii) Fails to give due weight to the fact that the listing of a species as invasive affects human rights and must therefore be applied in a way that puts people and their needs at the first. The Minister has in fact done the exact opposite.

(iv) Fails to recognise the full extent of the duty placed on the executive to consult when making a decision such as this and to properly inform interested and affected parties so that they can participate meaningfully.

(h) The DEA also erroneously believes that interested parties must prove that a species is not invasive. That misunderstands the nature of administrative action.

(i) It is not a matter of who bears the onus of proof. It is a matter of reasonable and just decision making.

(ii) The Minister must act reasonably in exercising subordinate legislative powers and the Minister must be able to give reasons for doing so. If reasons are given, then a court must judge the reasonableness of the action taking those reasons into account. If no reasons are given then the action is presumed to have been taken without good reason.

(i) The decision to list trout as invasive cannot be justified on the basis described in the letter or indeed any other rational basis.

(j) The Minister has failed to make publically available, the basis upon which each proposed listing is being considered or has been decided upon. This does not allow members of the public to be in an informed position as to the basis for such a proposed action, nor to consider whether such action is justified, nor to propose alternatives or other solutions to the perceived problems that the decision is intended to address.

(k) Control

(i) The parties agree that the NEMA must be considered when interpreting the NEM:BA. Section 2(1)(e) of the NEMA states:

> *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 guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.*

(ii) The parties have applied this principle to its interpretation of the NEM:BA and in particular the definition of invasive.

(iii) However the NEMA does not entitle the Minister to depart from the plain wording of the NEM:BA nor does it contemplate the Minister substituting the scheme for managing invasive species enacted by the Legislature for one the DEA is proposing to implement.

(iv) The NEM:BA is very clear as to what must be done with invasive species in terms of control. If control as defined in the NEM:BA is not required or desirable in respect of a species then it follows that such species should not be listed as invasive.

The approach the Minister has adopted in relation to control is incompatible with the NEM:BA and as a result many of the actions contemplated in the Lists and the Regulations are ultra vires and unlawful.

14. **The invasive species lists: List 6 and trout**

(a) The lists that were published for comment on 12 February 2014 are the third attempt on the part of various Ministers to do this. The parties say attempts because, although the second attempt did result in the publication of lists on 19 July 2013, these lists were not preceded by the requisite consultation process and were thus unlawful.

(b) The published lists being commented on herein are intended to replace the lists that were published on 19 July 2014 in their entirety.

14.2 The categories

(a) The new invasive species lists contemplate a framework comprising of four categories, 1a, 1b, 2 and 3.

(i) Regulation 2 describes Category 1a as Listed Invasive Species which must be controlled.

(ii) Regulation 3 describes Category 1b as listed invasive species which must be contained by land owners to prevent the increase in the geographical area and density of the listed invasive species.

(iii) Regulation 4 describes Category 2 as listed invasive species which require a permit to carry out a restricted activity within the area specified in the notice.

(b) Regulation 5 describes Category 3 as listed invasive species in respect of which restricted activities are either exempted or prohibited.

(c) It would seem that Notice 1 is intended to summarise how the exemptions and prohibition of restricted activities apply to such species. The parties will deal with Notice 1 later.

14.3 Some observations on the legality of the categories

(a) The categories proposed in the Regulations all speak to the nature of the control that must be exercised by landowners, permit holders and the relevant authorities in respect of invasive species.

(b) This must comply with the general scheme of control as it is legislated under the NEM:BA. This is because the Minister's power to make regulations does not extend to amending legislation passed by parliament.

(c) The legislative scheme for control is a simple one:

(i) eradicate; or

(ii) if that is not possible, prevent, as far as may be practicable, the recurrence, re-establishment, re-growth, multiplication, propagation, regeneration or spreading of an alien or invasive species.

(d) Category 1(a) lists invasive species that must be controlled as required by the NEM:BA. Category 2 refers to invasive species that are listed by area as opposed to across the whole country. Category 3 deals with permits, prohibitions and exemptions. All three categories are compatible with the legislative scheme for control prescribed by the NEM:BA and as such are enforceable.

(e) The parties submit this is not the case with Category 1(b). Category 1(b) introduces a new control measure in addition to those prescribed by the NEM:BA. But NEM:BA does not give the Minister the power to amend the definition of control nor the measures prescribed in section 75, nor is there any provision in section 97 (the regulations) that allows this.

(i) Section 75(4) authorises the Minister to *ensure the coordination and implementation of programmes for the prevention, control or eradication of invasive species*.

(ii) Section 75(5) authorises the Minister *to establish an entity consisting of public servants to coordinate and implement programmes for the prevention, control or eradication of invasive species.*

(f) Indeed the NEM:BA explicitly confines the Minister in exercising such subordinate legislative powers to control as this is defined. Section 75(3) states:

> *The methods employed to control and eradicate a listed invasive species must also be directed at the offspring, propagating material and re-growth of such invasive species in order to prevent such species from producing offspring, forming seed, regenerating or re-establishing itself in any manner.*

(g) The Minister does thus not have the power to regulate such a Category 1(b) and this is thus unlawful.

(h) The parties submit that :

(i) All references to category 1(b) should be deleted from the Lists and the Regulations.

(ii) Categorising invasive species in relation to 4 lists is overly complex and unclear and confusing. Ordinary members of the public are not going to understand the complex matrix that is 532 invasive species regulated in relation to 12 restricted activities by a system of permits and exemptions. In the mind of the public:

- Species are either invasive or they are not.

- Invasive species are bad and must be eradicated or if that is not possible prevented from spreading or multiplying.

- Sensible people have nothing to do with invasive species.

(iii) Public perception around what is invasive aligns with the scheme of control set out in the NEM:BA. The Minister should apply that scheme taking care not to besmirch species that contribute to human health and wellbeing by listing them as invasive.

(iv) The manner of control must be dealt with on a case by case basis in terms of a policy that drives programs managing the control of invasive species and the issue of directives. This will allow such initiatives to be aligned to the resources available to do the necessary work in a transparent manner that can be understood and thus supported by the public.

14.4 <u>Some observations regarding the form of the listing - general layout.</u>

(a) Trout have been listed as invasive in category 2 in the following terms:

CATEGORY / AREA	**SCOPE OF EXEMPTION FROM THE PROVISIONS OF SECTION 71(3) / PROHIBITION IN TERMS OF SECTION 71A(1)**
2 in National Parks, Provincial Reserves, Mountain Catchment areas and Forestry Reserves specified in terms of the Protected Areas Act and Fish Sanctuary Areas. 2 for introduction into rivers. Not listed for other parts of the country, and may only be introduced into dams within fresh-water systems in which it is has been formally documented to occur.	Catch and release is prohibited in National Parks, Provincial Reserves, Mountain Catchment areas and Forestry Reserves specified in terms of the Protected Areas and Fish Sanctuary Areas, except if done in accordance with an existing permit (where it must then be in the same area in which it was caught). Catch and release is allowed in the rest of the country.

(b) The scheme adopted in the listing is that trout are listed as Category (2) and by area in the left hand column and any exemptions or prohibitions in relation to restricted activities are described in the right hand column.

14.5 Some observations on listing trout as invasive

The parties have dealt with the process that the DEA says the Minister adopted in listing trout as invasive in paragraph 14. The parties point out that the method adopted by the Minister is not permissible under the NEM:BA and that trout should be deleted from these lists.

14.6 Listing in protected areas

(a) Trout have nonetheless been listed as invasive in *National Parks, Provincial Reserves, Mountain Catchment areas and Forestry Reserves specified in terms of the Protected Areas Act 57 of 2003 or the NEM:PA.*

(b) The parties submit that there is no basis for this and no basis has in fact been given for this listing by the Minister. The DEA has told the parties that this represents a pragmatic solution to the problems that arise from trout being "economically useful". But this misses the point. If trout benefit human health and wellbeing they are not invasive. They are only invasive if the DEA can show that they harm human health and wellbeing or may do so. The DEA have been unable to do this even in protected areas which after all were stocked with trout by National and Provincial Departments in Government, which were responsible for what was once called nature conservation.

(c) It does not follow automatically that the fact that an area has been proclaimed as a protected area means that alien species are invasive in that area.

(i) The NEM:PA does not impose any special rules regarding the protection of biodiversity in protected areas. There is no rule, for example, under the NEM:PA that prohibits the propagation or exploitation of alien species in protected areas. On the contrary, section 6 of the NEM:PA states that the NEM:BA will apply in protected areas. Chapter 4 of the NEM:BA creates mechanisms which enable the Minister to protect threatened or protected ecosystems or species.

(ii) The parties submit that the Minister should utilise these mechanisms rather than attempt to use the back door that is an invasive species listing.

(d) It also does not follow that all protected areas are reserves of indigenous biodiversity. The Jonkershoek reserve in the Western Cape is not only home to the Jonkershoek hatchery which is a national monument, it is also a functioning pine plantation farmed as such by the State.

(e) Many reserves have been established around dams which are artificial/man made environments, in some cases, artificial environments that are particularly suitable to community-based trout aquaculture.

(f) It must be remembered that not all protected areas are established on State owned land.

(i) Many protected areas have been established on private land for the purposes of enabling the landowner to better utilise the land. The Minister must take great care when exercising such powers under the NEM:BA to not unfairly prejudice the rights of such land owners.

(ii) The parties do not know how many privately owned protected areas will be affected if the Minister were to go ahead and list trout as invasive in such areas. The parties are aware that the Mount Anderson Reserve in Mpumalanga has been proclaimed as a Mountain Catchment Reserve in terms of the Mountain Catchment Reserves Act, 1970 and as such is a protected area as defined in the proposed regulations. That reserve is a commercial undertaking whose value and revenue depend on the trout fishing that is available there. The landowners in that reserve consequently invest heavily in trout. The parties have been told that one land owner lost R1 000 000.00 in two property transactions on account of the Minister listing trout as invasive on 19 July 2013. That loss represents a 40% loss on what was the market value of those properties before that listing.

(g) The parties submit that section 3 of the PAJA applies to the listing of trout in privately owned protected areas. The DEA must accordingly notify landowners in those reserves who are likely to be affected by the decision. The DEA has not done so which makes any listing in a privately owned protected area unlawful.

(h) The proposed listing of trout as invasive in protected areas does not only adversely affect privately owned protected areas. Trout have been established in protected areas owned by the State in some cases for over 100 years. The fact of their existence has become an important part of the physical, psychological, developmental, cultural and social interests of the communities these protected areas serve.

(i) In some instances, notably the Western Cape, they offer all the trout fishing or nearly all the trout fishing that is available in that region.

(ii) Important partnerships have developed between Provincial conservation authorities and trout fishing organisations, notably the Cape Piscatorial Society, as a result.

(iii) The fact that trout fisheries exist is an important contributor to the health and wellbeing of the trout anglers in the region and beyond.

(iv) The rivers of the Western Cape hold an iconic status worldwide as trout fisheries. This is not only a significant income generator but also key to the generation of trout related literature and art well beyond the Western Cape. Western Cape resident and internationally celebrated trout fishing author and artist Dr Tom Sutcliffe draws much of his inspiration from the streams of the Western Cape. So too do internationally recognised bamboo rod makers Steve Boshoff and Steve Dugmore. The celebrated sculptor Chris Bladen is another example.

(i) The same is true in many other areas, such as in KwaZulu Natal, though to perhaps to a lesser extent. There are nonetheless protected areas in KwaZulu Natal whose commercial viability depends to a material extent on the fact that trout fishing is offered in those areas. Kamberg, Highmoor and Royal Natal National Park are but three examples.

(j) The DEA has not considered these matters even though the definition in the NEM:BA requires it to do so. Because the DEA has not considered them it also has made no assessment of how these factors weigh up against other factors influencing human health and wellbeing.

14.7 <u>Fish Sanctuary Areas</u>

(a) The parties' submissions in respect of protected areas also apply to so called "fish sanctuary areas".

(b) Trout are listed in these areas. These are defined in the draft regulations in these terms:

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

(i) The reference to fish sanctuary areas is misleading as there is no law outside the Marine Living Resources Act that allows the establishment of such an area. However section 52(1) of the NEM:BA allows the Minister to publish a national list of ecosystems that are threatened and in need of protection.

(ii) The Minister has not yet exercised this right nor has any Provincial MEC done so. The requisite policies and bioregional plans are also not in place.

(iii) The listing of a species as invasive in order to protect an ecosystem which has not been proclaimed as threatened is unlawful.

(iv) The South African Water Research Council has no authority to proclaim a fish sanctuary area. The Minister cannot do so by regulation.

(v) The Minister has not given the parties any information justifying why trout must be regarded as invasive in these areas. It seems that the DEA assumes that this must be so merely because the South African Water Research Commission has called them fish sanctuary areas. This means that the parties are unable to consult as is required in respect of this aspect of the Lists and regulations.

(vi) This inability to properly consult is exacerbated by the fact that the Water Research Commission in Report TT500/11 is not readily available. It cannot, for example, be accessed by searching the South African Water Research Commission's web site.

(vii) Such maps that the parties have been provided are too indistinct to be interpreted. Better maps were promised by the DEA but have not been provided.

(viii) It is in any event not competent to make law or regulation by reference to documents that do not themselves have the force of law. The maps in *Water Research Commission in Report TT500/11* are not legislation. Neither were they the product of a public consultation process involving interested and affected parties. Accordingly, any reference to such maps or the report is unlawful.

(c) The parties submit that there is no legal basis to list trout as invasive in so called fish sanctuary areas or indeed to make reference to such areas in the regulations. The parties recommend that all references to such areas are deleted from both the lists and regulations.

14.8 <u>Fishing Permits in protected areas</u>

(a) The parties submit that it is manifestly absurd to prescribe that invasive species can only be hunted or fished for with a permit where they are listed as invasive. There can be no rational connection between the need to control an invasive species by a process of eradication and prevention on the one hand and the obligation to have a permit to catch fish (which is a form of eradication) on the other.

(b) As the parties have pointed out earlier (see paragraph 13.5(c)) the definition of restricted activities cannot apply to those activities necessary for and incidental to the control of an invasive species. That would mean that an owner of land would need to apply for a permit in order to dispose of the invasive species on that land. This would be patently absurd.

(c) The parties submit that fishing and hunting are legitimate means of control and as such should not be subject to a permit under Chapter 5 of the NEM:BA.

(d) Restricted activities in relation to trout in protected areas require a permit save for the following which are prohibited.

(i) Conveying or moving trout in those areas;

(ii) Selling trout in those areas;

(iii) Releasing or otherwise introducing trout into any waterway in that area.

(e) These prohibitions are problematic because the specimens are defined under the NEM:BA to include dead ones. Given that catch and release of trout is prohibited in protected areas except under a permit and that *conveying, moving or otherwise translocating any specimen of a listed invasive species* is a prohibited restricted activity, what is an angler to do with the trout he or she catches?

(f) The notion that provincial permits will continue to apply to fishing in these areas is also problematic as the requirement that trout anglers have a licence to catch trout has not been applied or enforced in most Provinces for many years. Such permits are no longer available in many provinces. There is consequently no legal basis upon which a trout fishing permit can be issued other than in terms of a permit issued under the NEM:BA.

(g) Section 71(2) states that permits can only be issued after an environmental impact assessment has been undertaken. The Minister may grant an exemption in respect of this but has not done so.

(h) It is unlikely that DEA is going to be in a position to issue these permits if the Lists and Regulations are promulgated as law.

14.9 <u>The listing of trout for introduction into rivers</u>

(a) It is proposed that trout are listed as invasive for introduction into rivers but *not listed for other parts of the country, and may only be introduced into dams within fresh-water systems in which it is has been formally documented to occur*.

(b) This listing is made unclear and ambiguous by the definition of "introduction" which if applied literally means that the listing must apply to all rivers including those where trout already exist. Introduction is defined under the NEM:BA as the:

> *introduction by humans, whether deliberately or accidentally, of a species to a place outside the natural range or natural dispersal potential of that species.*

(c) It is not clear if this is what the Minister intends. The Media Release suggests that this is not intended. This is what that statement records on this issue.

Critically, no fish species may be introduced into a catchment system in which it does not occur, without a permit, and there must be documented proof that they exist in the catchment system. A risk assessment may need to be done at the applicant's expense to inform whether a permit should be issued. The regulation of fresh-water fish and invertebrates is nuanced, recognizing the value of these species for food security and recreational (and tourism) pursuits.

(d) The parties support this statement but submit that listing a species as invasive in order to achieve this incorrectly applies the NEM:BA and would be unlawful. It is also very difficult to do as is demonstrated by the complex and ambiguous way the Lists have been drafted.

(e) The parties submit that the proper way to protect biodiversity areas, where trout do not exist, is to recognise that trout are alien and to draft the alien exemption that will apply to trout so that those areas are excluded. The parties have suggested how this can be done in paragraph 12.3.

14.10 <u>Some observations regarding the language of the listing - The proviso</u>

(a) The listing of trout as invasive contains this curious proviso:

Not listed for other parts of the country, and may only be introduced into dams within fresh-water systems in which it is has been formally documented to occur.

(b) The alternative is that trout are indeed listed as invasive outside those areas which leads to absurd, and the parties submit, unintended consequences.

14.11 <u>Some observations regarding the language of the listing - The proviso - formally documented to occur</u>

(a) The phrase "formally documented to occur" is part of the proviso that the parties submit is superfluous. (See paragraph 15.10.)

(b) It is in any event unclear what is meant by "formally documented to occur". Trout either occur in an area or they do not.

(c) For the most part trout were introduced into South African fresh water systems by the State.

(i) This has taken place over a period of 125 years.

(ii) The parties do not know what the state of that record keeping is like in this regard. It is likely that much of the formal documentation has been either destroyed or lost. For example the documents that ecologist Mr Jake Alletson used to describe the pioneering efforts of Mr John Clarke Parker in introducing trout into KwaZulu Natal over 100 years ago and which were in the

possession of Ezemvelo KZN Wildlife, have disappeared. Does this mean that the stocking of these streams is not formally documented?

(d) The parties are concerned that this term may be abused by the DEA to deny the existence of trout where they do occur and have done so for many years on the basis that this is not formally documented. This is not an unwarranted concern. The parties note that the DEA discounts the presence of what is a substantial trout industry because this has not been scientifically analysed by a process of peer review (see the Letter).

(e) The parties submit that the proper enquiry is whether trout actually occur in a river system. If they do, the next enquiry is whether it is desirable that they remain there, assuming, that it is feasible to remove them.

(f) It would be highly artificial to presume that trout do not exist where they in fact do because this has not been established in terms of whatever "formally documented" may mean.

(g) The parties thus require clarity on what "formally documented" is intended to mean and reserve the right to comment further once this has been clarified.

(h) Clarity was sort on this issue at the informal stakeholder meeting that took place on 5 March 2011. This request merely highlighted the confusion with various explanations being tendered as to what the phrase will mean in practice.

14.12 Catch and release

(a) Catch and release is prohibited in the notice unless this is authorised in terms of a permit.

(b) The qualified exemption against catch and release is nonetheless problematic.

(i) The part of the notice that deals with catch and release in relation to trout lies under the heading ***SCOPE OF EXEMPTION FROM THE PROVISIONS OF SECTION 71(3) / PROHIBITION IN TERMS OF SECTION 71A(1)***. In other words restricted activities described under that heading are either exempted in terms of section 71(3) or prohibited in terms of section 71a(1).

(ii) Catch and release is not a restricted activity as defined under the NEM:BA. It is a creation of the draft regulations which define catch and release as:

> *the catching and release of a live fresh-water animal in the same area in which it was caught*.

(iii) Article six of the Regulations goes on to list eight additional restricted activities of which catch and release (article 6(f) is one.

(iv) The parties dealt with this issue in detail when discussing restricted activities and Notice 1 (see paragraph 17). Suffice it to say that the parties submit that catch and release is not a restricted activity and the Minister lacks the authority to make it so.

15. **Submissions and recommendations regarding the listing of trout.**

15.1 Submissions

The parties submit that

(a) There is no basis in law to list trout as invasive either in the areas identified by the Minister or at all.

(b) There is no rational connection between a species being invasive and an area being protected under the NEM:PA.

(c) Fish sanctuary areas do not exist in law.

(d) There is no basis in law to list a species with reference to maps that are not themselves legislation and accessible as such.

(e) The methodology applied by the Minister in listing trout as invasive is incompatible with the NEM:BA and in particular the definition of invasive and the obligations that the NEM:BA imposes in respect of the control of invasive species.

(f) The scheme of control adopted in the Lists and the Regulations:

(i) Is overly complex, unclear and ambiguous;

(ii) Is incompatible with the NEM:BA and in particular the obligations that the NEM:BA imposes in respect of the control of invasive species;

(iii) Requires the exercise of powers the Minister does not have.

(g) The Minister has not given members of the public sufficient information to consult meaningfully regarding the lists. In particular the Minister has failed to divulge:

(i) the norms and standards (if any) that were applied when listing a species as invasive;

(ii) what factors were identified; or

(iii) how these factors were applied.

(h) The parties submit that the listing of trout is unlawful as is the listing of any other species which the Minister classified as invasive using the same methodology as that which was used in the case of trout.

15.2 Recommendations.

The parties recommend that:

(a) Trout are not listed as invasive and that instead trout's status as aliens remains non-exempt in areas where trout do not already occur.

(b) The parties submit that this can be achieved in the manner set out in paragraph 12.

(c) Trout are managed in protected areas under the NEM:PA.

(d) The invasive species lists are withdrawn.

(e) Until the policies and planning are in place only those species which can be listed by the Minister across the whole country because of the fact that their invasiveness is undisputed and uncontroversial are listed as such.

16. **Notice 1: Restricted activities**

16.1 The list of restricted activities

(a) Five restricted activities are listed in the definition of restricted activities under the NEM:BA. Article 6 of the Regulations creates another eight they are:

(i) *spreading or allowing the spread of any specimen of a listed invasive species;*

(ii) *releasing any specimen of a listed invasive species;*

(iii) *the transfer or introduction of specimens of alien and listed invasive fresh-water species from one discrete catchment system in which it occurs, to another discrete catchment system in which it does not occur; or, from within a part of a discrete catchment system where it does occur to another part where it does not occur as a result of a natural or artificial barrier;*

(iv) *release of water through an inter-basin transfer scheme, through which alien and listed invasive species may be transferred;*

(v) *discharging of or disposing into any waterway or the ocean water from an aquarium, tank or other receptacle that has been used to keep a prohibited alien species or a listed invasive species;*

(vi) *the catch and release of fresh-water listed invasive animal species;*

(vii) *the introduction of any alien or listed invasive species to off-shore islands; and*

(viii) *the introduction of a listed invasive fish specimen, or listed fresh-water invertebrate specimen, into a river system.*

(b) The parties note that the NEM:BA does not contain any power authorising the Minister to prescribe additional restricted activities.

(i) Sub section (vi) of the definition of a restricted activity includes:

> *any other prescribed activity which involves a specimen of an alien or listed invasive species.*

(ii) This does not in itself grant a power to prescribe. All it says is that any other prescribed activity involving a specimen of an alien or listed invasive species will be deemed to be a restricted activity.

(iii) Section 97 (regulations) similarly does not give the Minister the right to prescribe restricted activities.

(c) Section 97(1)(i) which authorises the Minister make regulations pertaining *to any matter that is necessary or expedient to achieve the objectives of the Act* confers a wide power on the Minister to make regulations providing the Minister can show this is necessary and expedient to *achieve the objectives of the Act.*

(d) This is obviously not so.

(i) The additional restricted activities are not necessary to give effect to the Act, they are necessary to give effect to the Regulations. The Regulations as the parties have pointed out, have been drafted to allow for the management of invasive species rather than the control that is prescribed by the NEM:BA.

(ii) Though the power to make regulations that are necessary and expedient is a broad one, restricted activities are coercive and have severe consequences for anyone engaged in them. A person who carries out a restricted activity commits an offence which could result in a criminal conviction carrying a maximum sentence of ten years or a fine of up to R10 million or to both. The NEM:BA is complex and confusing enough without creating additional crimes in the Regulations.

(e) The parties submit that the Minister does not have the power to create additional restricted activities.

16.2 <u>The Scope of Notice 1.</u>

(a) Notice 1 is not easy to understand. The parties submit that:

(i) It applies only to listed invasive species and then only to the extent of their listing as such. This is common sense. It is also the natural consequence of section 71 (1) which states *a person may not carry out a restricted activity involving a specimen of a listed invasive species without a permit issued in terms of Chapter 7*.

(ii) Its purpose is to list those exempt restricted activities and prohibited restricted activities that apply to species that have been listed as invasive.

(iii) It does this with reference to the restricted activity on the one hand and the category in which the species has been listed on the other.

(iv) The result is a bewildering matrix in which twelve so called restricted activities cross reference to four categories of invasiveness and at least three possible outcomes, exempt, prohibited or permit required in relation to 532 species.

(v) This matrix is made more complicated as in some cases the right to a permit or the grant of an exemption is subject to conditions. Furthermore any exemptions or prohibitions recorded in the invasive species lists take precedence over this list.

(b) The parties record that these lists, like the others, document the ordinary activities of ordinary South Africans trying to go about their everyday lives without breaking the law. Very few of them are highly educated scientists with the skills and training to comprehend the complex and abstruse regulatory framework the Lists and Regulations create.

(c) The parties submit that it is just absurd to subject ordinary South Africans to such a complex set of command and control measures with criminal implications concerning what in many cases will be their ordinary day to day existence.

17. **The Regulations**

17.1 Regulation 6 - Restricted activities

The Minister cannot extend the list of restricted activities by regulation.

17.2 Regulation 10 - Invasive species research

Making an obligation to report and divulge findings a condition of the grant of a permit required for that report places the intellectual property arising from that research at risk and is likely to discourage privately funded research taking place in this country.

17.3 Regulation 18 - Alien species with invasive potential

Given the problems that have arisen around trout it is suggested that regulation 18(4) is amended to make it clear that these investigations include an investigation of economic and sociological impacts, risks and benefits as well.

17.4 Regulation 26 - Duration of permits

Five years would be too short if trout farms were obliged to obtain permits to operate as such, but it seems that this is not the case as they are located in areas where trout are listed. The same applies in respect of areas where trout fishing is offered as part of a commercial activity. This is because five years is not enough time to ensure a reasonable return on the investment necessary to set up and carry on these ventures.

17.5 Regulation 27 - Amendment of permits

The wide powers granted in terms of this regulation would place too much risk on any commercial operation that is subject to such a permit and would render it unviable.

17.6 Regulation 34 - Limitation of liability

It is not competent for the Minister to limit liability to those involved in implementing the NEM:BA. No such provision is contained in the NEM:BA and if it were it would be incompatible with the duty of care imposed by the NEM:BA.

17.7 Regulation 36 - Transitional arrangements

(a) The NEM:BA prohibits the granting of any permit unless a risk assessment has been carried out and sets out strict requirements that must be met before a permit can be issued in terms of NEM:BA.

(b) There is no provision in the NEM:BA that allows the Minister to deem another permit to have been issued in terms of the NEM:BA if that permit does not comply with the NEM:BA and in particular chapter 7.

(c) The parties submit that this regulation is unlawful.

18. **Conclusion**

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

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

18.3 Despite the concerns and issues raised and the failure of the Minister to consider previous submissions made, as is evident from the form and content of the lists and regulations as published, the parties remain committed to proper consultation in good faith with the Minister and/or the DEA and its officials.

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