

**NEMBA Update (by Ilan Lax)**  
**(An edited record of the talk given to the FOSAF EC AGM in 2015)**

The Chairman Brian Clark requested that Ilan Lax, FOSAF National chairman, give a summary for those not familiar with the ongoing NEMBA saga. Ilan then gave a background briefing on what FOSAF's are regarding NEMBA and the regulation of trout.

Ilan thanked all for the invite and the hospitality, and said that it was heartening to see the attendance at the meeting and the amount of energy in the Eastern Cape fly fishing fraternity which makes the work of FOSAF National worthwhile.

It all starts with the difference between science and law:

On the one hand you have the scientific ideas where you have indigenous species that must be protected from alien species. This is a mind set and a whole philosophy of science which is partly conservationist. An example would be that if you took all the food that was available in this country probably only two species would be indigenous. The fact is that alien species are needed as they are of value to us.

On the other hand you have the law. NEM:BA is the National Environmental Biodiversity Act; it is a statute that falls under NEMA - National Environmental Management Act. This is where the disjuncture occurs. The Western world sees people as separated from nature, whereas the rest of the world sees people as part of nature.

Our constitution doesn't differentiate between humans and nature.

Section 24 of the constitution which is our environmental right says that South Africans are entitled to an environment which is not harmful to our health and wellbeing. It further says that the state must protect the environment and the health and wellbeing of humans through reasonable laws that do three key things: prevent environmental degradation; prevent pollution; and promote sustainable development. This is the context of our environmental right.

Section two of NEMA has about twenty-five key principles that are about sustainable development and avoiding damaging the earth, they don't talk about much about ecology and alien species at all. It's all about how we share the earth equitably and that we can't or rather should not destroy the environment because we hold it in trust for future generations.

NEMBA is premised on a view that invasive species will potentially harm indigenous species and that the indigenous environment needs to be protected from these threats. NEMBA introduced the word invasive and this is one of the key problems that we deal with.

The scientific definition of invasive differs to that of the law. There are at least three definitions that scientists use depending on the context. The legal definition as contained in NEMBA is the most important definition. This is what defines our rights as anglers and citizens.

The first component of the definition of invasive is that it must be an alien species or an indigenous species that has been translocated and has established itself outside of its natural range;

The second component is that the species threatens or has a demonstrable potential to threaten eco-systems, habitats or other species; and

The third component is that the species causes environmental or economic or harm to human health. The key element here is harm to human health and wellbeing because the environment is defined in human centred terms.

FOSAF's argument is that you do not make a law for insignificant harm only for significant harm. FOSAF argued that trout do not fit the above components, as Trout do not pose a demonstrable threat and harm to the environment or other species. We have suggested that NEMBA should be applied to dealing only with those species that cause significant harm and in a practical way deal with them.

The DEA had initially published and passed a number of regulations that listed Trout as an invasive species. This is where FOSAF National got involved and has been opposing these regulations for almost a decade now.

Input for this campaign has come from many sources, inter alia Martin Davies, Bill Bainbridge, Jake Alletson and more recently Ian Cox.

The initial involvement of FOSAF National with the DEA was based on our view that Trout are not Invasive and the way they wanted to deal with trout was unlawful. One of the reasons was related to the definition of control. Thus NEMBA says that if a species is an invasive it needs to be controlled. Control is defined in NEM:BA as combat or eradicate. This isn't consistent with sustainable management. Furthermore if a species is invasive you then can't use it to form the basis of a value chain because you must eradicate it. This formed a basis for FOSAF's objection.

FOSAF further discovered that there was a national development plan (NDP) which consisted of 10 key elements which the government was using to take the country forward for the next ten years. In the NDP one of the key elements was Aquaculture which includes freshwater.

FOSAF approached DAFF and asked what their plans were for Aquaculture as their sister department the DEA was trying eradicate trout. FOSAF engaged with DAFF as an ally to counteract the negative attitude of the DEA, resulting in a far more pragmatic response from them.

Operation Phakisa followed. Operation Phakisa was formed to look at what was called the Ocean's Economy. Part of this was Aquaculture. The idea was to get all the stake holders together to brain storm ways to improve implementation, reduce inefficiencies and stumbling blocks. It was realized at the meeting that the key stumbling block to Aquaculture was NEMBA's alien and invasive species regulations. The DEA representative, Guy Preston and Ilan Lax were forced to sit down and come up with a solution that was workable and suitable for both parties. The outcome of their discussion was that where trout occur they will not be listed as invasive, where they don't occur they will be listed as invasive. Certain individuals within the DEA were not happy with the outcome of Phakisa, as they felt that trout would not be sufficiently regulated.

This was followed by a meeting at Kirstenbosch to discuss the implementation of the Phakisa win-win. FOSAF suggested that a mapping exercise should be done in order for all parties to see where trout currently occur. A mapping meeting of all stakeholders took place in October 2014 at Fern Hill KZN. It was realised that more info was needed. This information was then collected. It included GPS information, stocking, tourism, AA information and information from all the clubs around the country.

The mapping information was sent to the mapping facilitator (Dr. Ivey of SANBI) in February 2015 without any response to date as to whether the Provinces or DEA have objected or not.

What FOSAF found was that the maps were sent to the Provincial conservation agencies by SANBI, without clarification of the Phakisa agreement. The information upset them for the wrong reasons. What they did not understand was the win-win achieved at Operation Phakisa had nothing to do with science or law but was a simple pragmatic solution. They couldn't get past the Operation Phakisa agreement.

Another mapping meeting was scheduled to follow in October 2015. Ilan received a phone call the night before asking him and others from TSA and FOSAF not to attend the meeting. One of the reasons given was that the mapping process was in a mess and none of the government stakeholders could come to an agreement on the maps. Ilan suggested they attend the meeting anyway to assist in simplifying the process. However, he and the others were requested not to attend and reluctantly agreed to this.

Ilan found that the maps from government were colour coded in orange and red instead of the agreed green (for the existing areas) and red (for the no go areas) which led to confusion amongst all the stakeholders. What was later discovered was that the DEA wanted the confusion so that they could report back to Government that none of the provinces could agree on the mapping.

Prior to the October meeting Dr Preston sent out a new listing notice stating that where trout are currently present in dams they will not be considered invasive, but in instream dams (which most dams are) and in streams and wetlands they will be listed as invasive and will require permits, which can be refused. This was completely at odds with the Phakisa agreement and is the current stumbling block because treating trout as alien or invasive in the context of NEMBA does not create the enabling environment agreed at Phakisa.

Further to this the DEA published proposed amendments to NEMBA (60 pages) which had to go to Parliament for approval. This allowed FOSAF make a 29-page submission which summarised much of what has been said above. FOSAF's submission pointed out that their efforts to amend NEMBA did not deal with the key problem in that the environmental law isn't following the constitutional and NEMA principles, thus is unconstitutional.

Part of FOSAF's strategy was to ask the government for a rethink on the environmental laws and at the same time submitted a letter to the directors of DEA and DAFF and various provincial departments. FOSAF's letter raised concern that DEA wasn't following the Phakisa agreement which is a political process which must be politically supported.

Aquaculture has a potentially huge role to play in providing employment and feeding the Nation. Without trout hatcheries, there would be no trout fishing in SA, except in high mountain streams. FOSAF has actively promoted this linkage in our fight with the DEA. Prof Peter Britz, a fisheries scientist from Rhodes University who is respected by DAFF, has been promoting this linkage. He is writing a new fisheries policy for South Africa. The policy will have a huge impact, as all our waters and dams are fisheries not only for Aquaculture but for tourism as well.

Another strategy that Peter Britz had suggested was that FOSAF and trout producers form a commodity group. Trout is a commodity and an agricultural product. This approach would thus take account of a full value chain which includes aquaculture and fish for the table, as well as the investment in immovable property, tackle shops, tourism, etc. When seen in this light the value chain is worth billions. FOSAF and trout producers thus formed Trout SA as a commodity group under DAFF. Trout SA secures the trout value chain in its entirety; FOSAF protects our right to fish.

Trout SA and FOSAF need to be supported as both do distinctive but separate functions. FOSAF is a member of Trout SA.

Ilan said at all aspects of fly fishing need to be supported including competitive fly fishing in order to keep fly fishing unified.

Ilan urgently requested the support of all members as he sees that the government is back tracking on their agreement with FOSAF and Trout SA.

Ilan thanked all for the support for the work that that had taken the team of Ian Cox and others as well as himself countless hours to sort out, with more to come.

### Update since November 2015

#### Brief back ground:

Our interaction with government departments around the contested regulation of trout has continued. These endeavours have focussed on realising the important win-win achieved through cooperative governance at the Phakisa Ocean labs Conference in Durban in July 2014. This was followed by a meeting at Kirstenbosch (dealing with implementation) which in turn was followed by a mapping meeting held at Fern Hill (KZN) in October 2014. At this meeting the places where trout occur were largely agreed and some additional areas still needed to be added. FOSAF and TroutSA jointly submitted maps for comment by the provincial agencies and DEA in March 2015. Very little was heard back during 2015 and two scheduled mapping meetings could not take place due to a lack of consensus and readiness on the part of the state bodies.

In July 2015 we received the good news from the KZN MEC that the environmental MINMEC had endorsed the Phakisa win-win. However, our efforts to have sight of the record of this have thus far proved unsuccessful. During September 2015 a new version of the regulation of trout framework and some maps were made available by DEA. These differed substantially from what had previously been agreed.

#### Escalation to DGs

Given the lack of progress and the lack of cooperation being experienced in some provinces we thus wrote to the Directors' General of both DEA and DAFF ("the DGs") raising our concerns at the failure to progress and implement the Phakisa win-win.

In early February 2016, FOSAF, TroutSA and the DGs (and their support teams) met to discuss our concerns. The meeting confirmed that the Phakisa win-win forms the basis of the way forward and that the MINMEC endorsed this approach. Provinces have thus been consulted and need to come on board. The next steps are to finalise the mapping process as soon as possible and at the same time to harmonise the legislation (national and provincial) to facilitate the agreed enabling environment for the trout value chain.

FOSAF welcomes the support the DG's have shown for the Phakisa win-win and believes these indications of good faith are important for re-building trust between the roles players. We are grateful for this support and commit ourselves to working with the departments to implement the reasonable and practical way forward to create an enabling environment.

It is important to note that FOSAF has been successful because we have stuck to our principles and policies. This is borne out by the fact that government takes us seriously. As with all policy and legislation the devil is in the detail. We will remain vigilant but positive and will continue to keep you all posted on future developments.

14<sup>th</sup> March 2016