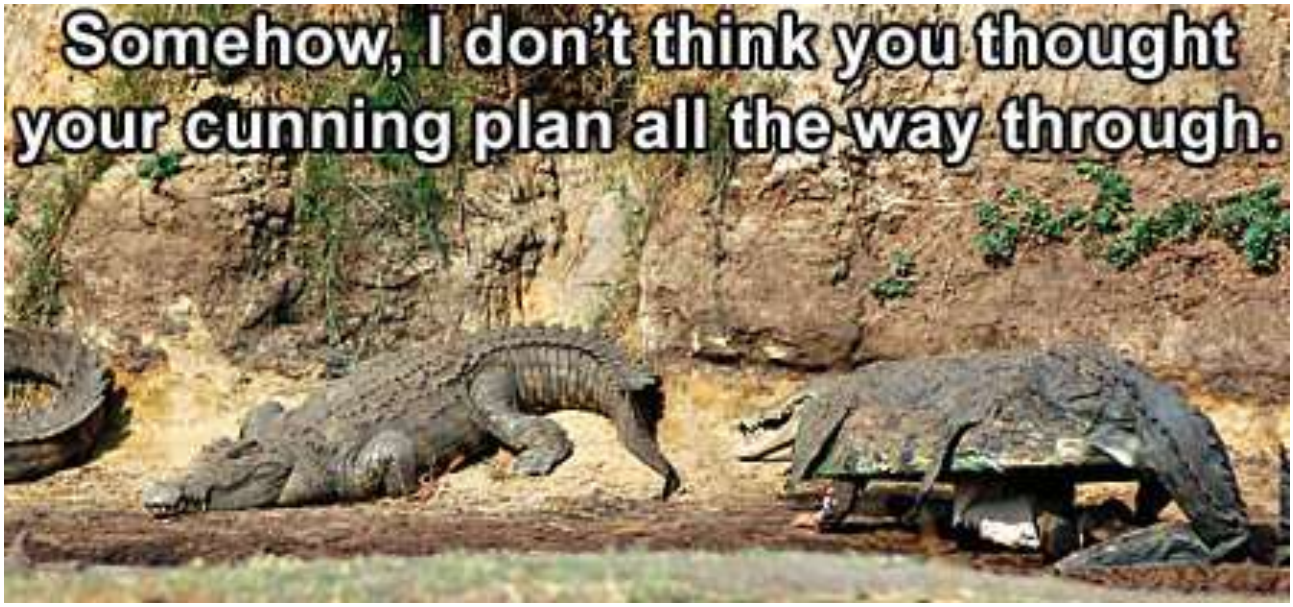
**Cunning plans and other disasters**

**By Ian Cox**




**This is a follow up on my "Joining the dots" article published in the April Bobbin. It is lengthy and fairly technical but speaks to the recently discovered National Strategy for Dealing with Biological Invasions in South Africa that was published in March 2104. Though never officially published for public comment or adopted, I argue it has nonetheless played an influential role in directing how DEA is dealing with invasive species and indeed its behavior in relation to trout. I look at the moves taking place behind the scenes and the apparent failure of the alien invasive species lists and regulations revealed in a recently published preliminary draft report. I conclude with some views on what might happen in the future.**

I wrote to the Department of Environmental Affairs ("DEA") in March 2014 asking for details of how it came to select what was then 661 species as invasive. This was necessary because I did not understand how this could be possible given the definition of invasive set out in the National Environmental Management Biodiversity Act, 1998 ("NEMBA"). I needed this information in order to be properly informed so as to make representations on what were then draft alien invasive species lists and regulations.

DEA replied saying it lacked the resources to do this and that it was unreasonable to expect them to do so. I said at the time that this constituted a fatal flaw in the prescribed public consultation process that would invalidate any AIS lists or regulations that were promulgated as a consequence of this process.

I have subsequently maintained that the Alien invasive species lists and regulation that came into force in October 2014 and which were amended in 2016 (the AIS Regulations) are unlawful and unenforceable.

What I did not know at that time, was that DEA was then in the process of finalising a National Strategy for Dealing with Biological Invasions in South Africa (the "Strategy"). This Strategy was published in glossy form on 27 March 2014. However, as DEA's Deputy Director General Dr Guy Preston pointed out to me in a recent e mail, it has never been subjected to a public consultation process nor, according to Dr Preston, has it been formally adopted.

The existence of this Strategy and its content nonetheless joins a lot of dots that I have been trying to make sense of for some time. It suggests that DEA is not only protecting its turf as I suggested in my article" "Joining the dots"

published in the Bobbin in April 2017 but has also adopted strategies that enable DEA to "invade" and hold onto new turf.

I learned of the Strategy by chance. It was referred to in the the preliminary draft report on the effectiveness of the AIS Regulations that was recently published for comment. I obtained a copy of the report which is published on the internet but is not easy to find. It is now more readily available on the DFT web site where you will also find my comments on the the preliminary draft report.

The existence of the Strategy came as a great shock to me. It was published only three days after DEA had written to me saying it lacked the resources to explain how it listed 661 species as invasive. I thought this explanation was absurd at the time but little did I know that it was also probably untrue. Indeed it seems likely that the real reason why DEA could not supply the information I had asked for could be that this would require DEA to reveal the existence of the Strategy. Dr Preston would probably dispute this, though he avoided answering questions I posed around this issue. I quote his reply to me which in full:

> "*The National Strategy is not a published document. It, together with a necessary and associated Action Plan, is still in the process of being reviewed and developed, respectively. We shall make it available for public comment in due course."*

That reply ignored this statement in my e mail to him:

> *"I see you state in the forward that you wrote to the Strategy Document that it this strategy "provides a comprehensive overview of biological invasions and their management in South Africa." The influence of this document has had on the form and approach adopted in the Preliminary Draft Report is self-evident as the role it plays in current departmental practice. The very different definition of invasive that the Strategy Document uses when compared to the applicable legislation may explain how it is so many species came to be listed as invasive and the AIS regulatory debacle that is described, albeit in preliminary form, in the Draft Report."*

Dr Preston is very good at deflecting issues that are put to him that he does not want to answer and at answering questions in a way that invites you to infer things he has not actually said. Experience has taught me that the devil often lies in the detail or, in this case, what Dr Preston does not say but rather what is being done.

Dr Preston hasn't said that the Strategy is not being used by DEA notwithstanding the fact that it has not been officially adopted. One cannot assume that he has denied this statement. I think it is far more likely that the Strategy is being used and is thus "in play" despite the fact that it is not official.

The inference that the Strategy is not in play begins to unravel when you look at it in detail.

1. It would be absurd to suggest, for example, that this is not what DEA or Dr Preston wants. For example:
    a. Why go to all the trouble of preparing a glossy publication with a picture of the Minister and Deputy minister in the front page in front of the "president's chess set" if this isn't what you want?
    b. Why praise the Strategy as Dr Preston does in the introduction if you don't like it?
    c. Why does the introduction open by saying: *"This document provides a Strategy for managing biological invasions in South Africa, at a national scale and over a time horizon of ten years. It constitutes a national-level plan for the cost effective achievement of specific objectives in an environment of uncertainty*" if this isn't what it does.
    d. Why does Dr Preston say in the forward that the Strategy provides "a comprehensive overview of biological invasions and their management in South Africa" if this was not the case?
2. It also does not explain the purpose of the Strategy. For example:
    a. The purpose is described in the introduction to the Strategy in these terms:

*"This document provides a strategy for managing biological invasions in South Africa, at a national scale and over a time horizon of ten years. It constitutes a national-level plan for the cost effective achievement of specific objectives in an environment of uncertainty"; or*

b. The Strategy also records that while a comprehensive Invasive Alien Species Act" is one of its key recommendations the Strategy also says that DEA must :

*"Continue with the implementation of existing legislation and regulations, while exploring the potential for a comprehensive Invasive Alien Species Act".*

3. The Strategy in line with its purpose of continuing with the implementation of existing legislation and regulations, also talks to things that have actually happened, like the preparation of guidelines for the preparation of invasive species monitoring and control plans.

One also cannot ignore the fact that the Strategy's call for collaborative government in place of the constitutionally enshrined cooperative government that is meant to be one of the main issues dealt with in NEMA pitched up in the budget speech of the Minister of Environmental Affairs that was delivered on 25 May 2015. The repeated references to collaboration with other government departments, in place of the legal requirement of cooperation, needs to be seen against the backdrop of the Strategy.

It is far more likely, I think, that it while the Strategy has not yet been officially adopted this is probably only because putting it in the public domain will provoke a public outcry. I think that the Strategy it is nonetheless being implemented unofficially where DEA thinks it can get away with it. After all it is not as if DEA is not pursuing any strategy at all. If this is not DEA's strategy, then what is?

I have wondered for some time now if DEA is not perusing what I call an invasive strategy. This speaks to an attack from within where officials within DEA and other environmental departments use state power not to advance the rights described in section 24 of the Constitution but rather to grow the power and reach of environmental authorities in South Africa. It is an ends justify the means approach that is pursued even at the expense of the Constitution and the rule of law.

I began to worry that this may be the case when DEA's actions did not match up either with what DEA was saying or with what the law said it must do. You may recall that I touched on these issues in April 2004 in an article entitled "Trout and Biodiversity". I wondered then if this was a case of a child not knowing what to do with an age inappropriate toy but I now think that what we are seeing is a lot more calculated than that.

There are many indications that DEA may be deliberately going about the business of increasing its reach and power.

The first is obvious. Dr Preston has spoken many times of the need to be in control because the state is the trustee of South Africa's biodiversity. Of course the state is no such thing. The heading of section 3 of NEMBA may refer to the state as the trustee of biodiversity but the text of the section does no more than describe the State's responsibilities in terms of section 24 of the Constitution. I write about this is an article titled: "The role of the state as custodian of the environment". So the section heading is misdirection.

You find lots of these when you start looking closely into this field of law and what DEA is doing. In many cases one finds that the optics and their impact on opinion are more important than the facts despite the claim that DEA's approach is science based.

Then there is the process of slow change to laws where an accumulation of individual apparently minor changes over time incrementally shift environmental laws from where they started into a space that is more supportive of DEA's objects and less supportive of the Constitution and human rights. Just look at NEMA as it was in 1998 and look at it now some 20 years later and you will see this shift starkly illustrated.

The erosion of the constitutional principle of cooperative governance is an example of how the Strategy speaks to this ongoing process of incrementally shifting legislative ground. The Strategy refers to a system of collaborative governance. One would be wrong to mistake this as being the same as cooperative governance. The major difference is that DEA's consent will be required under a system of collaborative Government DEA's where any decision of a government department or a sphere of government affects the environment. Cooperative governance on the other hand respects the mandates and powers of other departments and spheres in government.

It is not just in changes to the law. This process of incremental change also applies to how laws are applied. NEMA states that the NEMA principles must be considered in all law and decision making. There are 30 plus of these principles. However notwithstanding that Section 2 is peremptory which means that the principles must be applied, DEA has contrived with industry assistance to ignore most of them. The status quo that applies today is that notwithstanding the constitutional importance of these principles they do not apply unless DEA wants them to. I don't think this has been accidental. The Strategy only refers to one principle, namely, the polluter pays principle. I write about this in two articles, one called: "It's a human right, silly" and the other: "Are the environmental principles really that necessary"

Another strategy is the use of what has become known as Stalingrad tactics. Thus DEA introduces laws it knows to be unlawful and then uses state power to defend these laws for as long as possible. There are many examples of this. The Rhino Horn moratorium case is a recent one. I deal with these cases of obviously law breaking in my article: "The proof of the pudding". This tactic also lies behind DEA's continued defence of the warrantless search provisions contained in NEMA despite the fact that the Constitutional Court has ruled that such provisions are unlawful. This is so even when they are disguised as routine inspections.

Then there is my personal favorite, the practice of adopting definitions in implementation documents like strategies that are different to the legal definitions. This has the practical effect of the proper legal definitions being ignored when laws are implemented. I have pointed this out to DEA many times but with one exception, the complaint was been ignored. Even when the complaint is acknowledged and DEA says it will make the necessary changes it does not.

The draft biodiversity offset policy that was recently published for comment is an example of this. The Strategy refers to the polluter pays principle without actually defining it. You would think that this means that the term refers to the principle as defined in NEMA. It is very likely that you would be mistaken. The draft biodiversity offset policy describes the polluter pays principle in these terms:

> *"According to the polluter (or environmental degrader) pays principle, resource users should pay full costs of the use of resources including environmental damage and the costs of mitigating adverse effects on the environment. The failure of the market economy is widely acknowledged. Some costs are externalised, in particular the costs to biodiversity and the ecosystem services. The costs accrue to the natural economy as loss of biodiversity, and the economy of the society as costs of restoration or substitution of the ecosystem services. The costs are carried by the society as a whole, while the benefits are received by private individuals or companies."*

This controversial view of the principle proposed Finnish researcher Dr Leila Suvantola is not widely supported. It is also irreconcilable with how this principle is described in NEMA or the legal definition of pollution. That limits what is pollution to those emissions and by products of human activity that have an adverse effect on human health and wellbeing or the natural systems insofar they are necessary to sustain human health and wellbeing.

It is nonetheless what informs decision making at DEA and the approach adopted in the Strategy. But they should be the same unless of course this is another case of ignoring the NEMBA definition for one DEA prefers. This may

explain why the definition of invasive species in NEMBA was ignored when the Minister listed 559 species as invasive with effect from 1 October 2014 and the amendments to this list that were implemented in 2106.

It seems likely that DEA was in fact applying the definition of an invasive species described in the Strategy as:

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

Take DEA's attempts to list trout as invasive, for example:

1. DEA originally argued that trout were invasive because they can survive in the wild and have a tendency to spread. This by itself was seen as invasive because as far as DEA was concerned the mere existence of trout in the wild impacted on native or indigenous biota.
2. Notwithstanding the fact that trout have not been declared invasive in South Africa, this untrue statement appears on DEA's invasives.org website:

   > *"Research conducted in South Africa has conclusively found that trout eat indigenous fish, amphibians and invertebrates. Trout live in self-sustaining populations in cool waters and they have to eat to stay alive. These eating habits have a devastating impact on biodiversity.*
   >
   > *South Africa's National Environmental Management Biodiversity Act (NEMBA) seeks to protect biodiversity, and under South African law, if the spread of a species may result in environmental harm, the species is declared invasive."*

3. The above statement, albeit untrue, seeks to say that trout are invasive merely by their ability to exist in the wild and because they are predators.
   a. There is in fact no research that backs up what DEA claims.
      i. Trout exist in South Africa to a large extent as a result of careful husbandry.
      ii. Spread takes place largely because human beings introduce trout rather than by natural spread.
      iii. The areas where trout can survive in the wild are in fact diminishing.
   b. The environmental harm that the definition of invasive species speaks of in NEMBA is not the impact of a species existence but rather the extent to which a species existence may threaten species, habitats and ecosystems and the harm this does to ecosystem services. I write about this in an article called: "The meaning of environment". Trout are actually beneficial to ecosystem services.

So DEA ignores the definition of invasive species in order to claim that trout are invasive. The fact that DEA can do this is aided by the fact that the term invasive species has no fixed meaning in science..

1. South African scientists like the definition used in the Strategy. This is not surprising as it was coined by a South African scientist.
2. Other scientist prefers the definition of invasive species in the United Nations Convention on Biological Biodiversity ("CBD"). This defines a species as invasive if it threatens biodiversity.
3. Legislatures like neither of these definitions:
   a. The European Union says that an alien species is only invasive if the harms ecosystem services.
   b. NEMBA takes the same approach but DEA refuses to accept this.

This imprecision in the meaning of terms bedevils much of what is called environmental science. Indeed even that is a problem. How, for example, can you call something a science if the words used to describe the science are imprecise? This is true both of the word environment and invasive. I deal with the former in an article called: "The meaning of environment".

I think DEA is capitalizing on this confusion.

Officials like Dr Preston like to state their case by referring to a few known problem species that everyone agrees must be eradicated and then suggesting that these risks are representative of all invasive species. An example of this is Dr Preston's 2014 presentation at OECD Green Growth and Sustainable Development Forum. The Strategy is another example as is the preliminary draft report.

The confusion around what it means to be invasive enables DEA to suggest that all listed invasive species are invasive just like famine weed or lantana when this is not the case. They are only invasive because a different definition is being applied. Most species that are currently listed as invasive would not have been listed had NEMBA been applied properly.

This confusion creates a smokescreen behind which DEA can list a much wider range of species as invasive even though they don't present the same harm. It is a case of argument by analogy or guilt by association with a particular group.

Going back to trout, the politicians stepped in and insisted that the parties find a win-win solution. This was done at Phakisa back in July 2014. It was agreed that trout will be largely unregulated where they occur, regulatory control being limited to discouraging the introduction of trout from where they occur into waters where they do not occur. Trout would be listed as invasive where they could but do not occur.

The trout value chain does not accept that trout are invasive but went along with this as part of the win-win compromise.

DEA also agreed to go along with it but its officials never bought into it. Dr Preston in particular has tried to derail the Phakisa agreement ever since. He has even chosen to ignore this compromise and has suggested that trout must be invasive because the trout value chain agreed that trout could be declared invasive where they do not occur. We see the effects of official obstruction and obfuscation every day.

One example is the trout mapping exercise which started in August 2014 but was delayed by DEA for most of 2015 and into 2016. It was restarted after ministerial intervention but was again delayed when DEA ignored representations that FOSAF and Trout SA made in August 2014 and then tried to introduce regulations that were clearly unlawful. I pointed this out in January this year. The process has been delayed since then because DEA is apparently seeking legal advice. This is because, according to Dr Preston, DEA is waiting on an opinion from senior council.

Five months for a legal opinion? Really! We have seen all this before. Just was the case in 2015 when everything went quiet while DEA tried to find a way around what the mapping process showed, so we will see another hiatus. The next cunning plan is likely to be the new Biodiversity Bill or perhaps DEA will try and sneak changes to NEMBA through Parliament on the basis they are immaterial. Who knows?

But circumstances are changing. The success rate in getting cunning plans approved these days is proving less than stellar. Like the spin bowler who eventually gets found out, increasing numbers of cunning deliveries are being smacked to the boundary. Worse still, those that do get through are hitting other problems. Referees are becoming increasingly concerned about the bowler's action leading to an embarrassing number of deliveries being ruled no balls, sometimes with penal consequences.

It is all getting a bit fraught and questions are being asked. If the minutes of the last meeting of the Parliamentary Environmental Committee are anything to go by the atmosphere in parliament is getting somewhat chilly. DEA are still the good guys but doubt is creeping in. Questions are being asked.

This was not in Dr Preston's direct line of authority but as Deputy DG he would have been involved. It seems that DEA dropped some R1.5 million fighting a case, the Rhino Horn Case, which a first year law student could tell you could not be won. The other side's costs are still to come and they are unlikely to be less than R1 million rands. See my article: "Regulating the domestic trade in rhino horn".

They did so not because the thought they could win but because the wanted to delay the consequences of losing, you guessed it so another cunning plan could be hatched. Now I have submitted representations on that plan and I can tell you that it is as dumb as the first one. In fact it is so dumb that DEA having lost the Rhino horn Moratorium Case because of a lack of consultation, failed to consult properly on the draft regulations intended to replace the Moratorium. This is Keystone Cops tuff. I'm not kidding you.

The best suggestion to come out of this runaway debacle comes from the Minister Hadebe who asked why these regulations were necessary at all. I asked the same question in the submissions I made on the regulations.

But this is not the only train racing down the track. The other one is far larger and it is headed right at the Environmental Programmes Division in DEA which Dr Preston heads up. You see the preliminary draft report on the efficacy of the draft regulations I referred to earlier reveals that the AIS Regulations are not working.

It turns out that the various spheres in government responsible for their implementation lack the resources to make them work. Well no shit Sherlock! The program was so ambitious that no country in the world has the resources to make the AIS Regulations work.

It is also true that very few people are paying them any attention. Less than 0.001% of surveyed properties have complied with the obligation to notify DEA of the presence of invasive species on their properties. Only one city, Cape Town, has submitted invasive species monitoring and control plans and that is not for the whole city.

Government and citizen alike are treating the AIS regulations with the contempt they deserve. After all why should you go the cost and effort of obeying a law that disempowers you and which DEA passed by itself breaking the law. South Africans are not that stupid!

But this is what happens when your approach to environmental management is based on your faith in your ability to get away with things rather than what is in the budget or your capacity to implement. Like Napoleon and Hitler after him, Dr Preston has had his glorious summer of grabbing territory. But winter is setting in. Budgets are being slashed . The retreat will be inevitable and harsh. A wise man would not hold out and try and take the real Stalingrad that is trout but would run like hell. Live to fight another day is what has kept Britain in the game for so long. DEA would do well to do the same.

There is of course the possibility that I am wrong and that urges in the ANC to deliver on the letter of the Freedom Charter and place South Africa's natural resources in the hands of the state and the need JZ and his mates have to rent South Africa to the highest bidder, find common ground with DEA's desire to be in charge, with the result that this all goes on a bit longer. Well if that is the case the constitutional challenge is what we lawyers like to call a head shot. If the Constitutional Court fails, well does any of this really matter and more? The sustainability of your fishing will depend on which political bigwigs belong to your syndicate.

The hard part in all of this is going to be to try and chart an environmentally sustainable course for trout through the debris and confusion that is the fallout of DEA's bad behavior these past ten or so years.

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