

Trading rights for permits

By Ian Cox

Dr Preston's [unsigned letter of 10 July 2017](#) purportedly reverses the decision taken by cabinet not to declare trout invasive where they already occur. It reneges on the agreement reached at Phakisa Ocean Labs conference in July 2014 to this effect. It means that thousands of man hours and hundreds of thousands of rands that have been spent mapping the whereabouts of trout have probably been wasted.

The allegation that this was done because litigation was threatened is simply not true. I pointed out in January 2017 that DEA's attempts to regulate trout were unlawful I reported on this in the February 2017 Bobbin in an article "[A bridge too far](#)". It seems that the senior advocate that the Department of Environmental Affairs (DEA) briefed agreed with me.

This is not surprising given the point I made should have been obvious to any employed at a senior level in the civil service. It certainly should have been obvious to Dr Preston.

The point is that DEA has apparently reneged on its agreement because it never intended to honor that agreement in the first place. It was acting in bad faith from the very start. It only agreed that trout should not be listed as invasive because its officials believed that it could achieve the same thing through the back door. When I pointed out that the back door did not exist, DEA revealed its true colors. It reverted to type.

This is in truth not a fight about trout. It is a fight for control. DEA is waging war on trout because if it cannot control the trout value chain then it is unlikely to be able to control anyone else. We have become a test of the official will. Law, legality, the Constitution, human rights and even basic decency have nothing to do with it. DEA must win lest the whole pack of cards come tumbling down.

This need for control exists at many levels.

- First and foremost is the clash of cultures that exists between DEA's nature first approach and the people first approach that the Constitution requires. This feeds naturally into the game warden mentality which sees human beings as the enemy to be controlled by permit as if as if they are living in a nature reserve.
- This mentality naturally feeds the instinct one finds in nearly every official (sorry Andrew and Laurence) to be able to be in control.
- The third issue is political. One must never forget that the Freedom Charter requires government to take control of the economy and the country's resources.
- The fourth is corruption. A permit driven control regime makes it much easier for politicians and officials to corruptly sell the privilege a permit confers.

This need for control also needs to be seen in the context of the madness that seems to have befallen government. We see this madness in the idea that officials can renege on ones deals. What trust can there be in government's word or intent if it treats agreements like Indian treaties to be discarded when it is convenient to do so? What does it say about the lack of respect these selfsame officials have for simple human decency? It seems that these are not values you can expect to find in government. Different rules apply in what the Gupta e mails are revealing as the cesspool that masquerades as government in this country. While there is no evidence I am aware of any evidence that links DEA or its officials to the Guptas it hard to ignore the stench given what DEA is doing.

It was against this backdrop, and a couple of weeks after Dr Preston's letter, that two fly anglers connected with government met in a private capacity with a member of the FOSAF executive to suggest that a deal might be struck. Now neither of the two gentlemen concerned was authorized to deal on behalf of government though it was intimated that their approach was officially sanctioned. Nor was the FOSAF member in any position to agree or disagree in any official capacity on what they proposed. No agreement was in fact reached.

I occupy no official capacity and was not there. What follows is my take on the written report of that meeting.

The two emissaries repeated what Dr Preston said in his letter, namely that Phakisa is well and truly dead. They suggested that if the trout value chain accepts this on the basis that trout are invasive throughout South Africa then DEA was prepared to negotiate (note only negotiate) for long term permits in green areas on the basis of some unspecified self-regulated regime. This would apply to regularly stocked rivers as well.

Apparently government does not have the resources to deal with the paperwork that will be entailed in managing trout as if they are invasive and consequently would like someone else to take on this burden.

But this is exactly the same position articulated in Dr Preston's letter. It is what he says he is going to do anyway so where is the deal? The truth is that there is no deal. It seems there never was. There is only what DEA always had in mind which is a great deal of hardship for the trout value chain. That is if we let them get away with it.

In any event what trust can you put in any deal promised by government if they have just reneged on their last deal?

The devil and boy do I mean the devil, lies in the lack of detail.

They spoke of trout in so called green areas. But Green areas does not mean areas where trout already occur, it means areas which the officials say can be green. It is not clear what these green areas will be at the moment. This is because the current mapping exercises see <http://dea.maps.arcgis.com/apps/Viewer/index.html?appid=30be26c5ec54432189d9368df8cdc75c> identified where trout occur. It did not identify where DEA and other provincial officials do not want trout to be. You need to go back to the maps which DEA produced in April 2014 to see what those areas might be. You may recall that the picture was not a pretty one. See my article "[Trout and biodiversity](#)" published in the April 2014 Bobbin.

They talk of long term permits but the National Environmental Biodiversity Acts (NEMBA) Alien and Invasive Species Regulations (AIS Regulations) say that permits can only be issued for a maximum of five years. That is hardly long term.

They also omit to say that permits are issued to human beings and not in respect of properties. So any change in ownership means that a new permit must be applied for.

The circumstances in which these permits can be issued are also very limited. NEMBA says that permits may only be issued authorizing the use of invasive species where "the relevant species has been found to have negligible or no invasive potential". This begs the obvious question, if the risk to biodiversity is negligible in green areas, why are trout being listed as invasive in those green areas. The idea that this must be so is inherently irrational. You do not need a PhD in environmental science or a law degree to work that out.

But no matter DEA has determined in its infinite wisdom that trout are invasive so the trout value chain must accept that this is so, no matter how crazy this may be. This is about officials being able to exert control over

people more than anything else. I deal with in Part 16 of my series of articles dealing with Conservation and the law. (See: [NEMBA and the struggle for control](#))

DEA cannot accept that the list of species that can lawfully be listed as invasive is limited to the very small list of species that harm human health and wellbeing and which must consequently be controlled through a process of eradication or prevention. I deal with this Part 18 of my series of articles dealing with Conservation and the law. (See: [What does it mean to control invasive species?](#))

The impossible permitting situation I have described above arises because DEA wants to manage species it says are invasive rather than control species which are actually invasive as the term is defined in law.

The truth is that trout are not invasive as the term is defined in law.

The idea that trout are invasive has always been and still is absurd. DEA say this is a scientific finding that that is simply not true. The truth is that very little research has been done on the invasiveness of trout in South Africa. The other problem is that there is no agreement among scientists as to what invasive actually means. Hell they cannot even agree on what the word species means! Add this to the fact that DEA adopted a definition of invasive that is completely incompatible with the legal definition and you get the kind of mess we are dealing with at the moment.

See my article in last month's Bobbin, [Cunning plans and other disasters](#) I deal also with this in my series of articles Law and Conservation. See in particular: [Part 14: Invasive Species](#).

So where do we go now?

Trout SA and FOSAF are taking this news to the presidency, which runs the Phakisa office, to see if it is in fact true. This is necessary, both as a matter of process and as a precautionary measure. They are also preparing representations to be put before parliament that speaks to the improper way DEA is applying NEMBA and the possibility that these amendments will encourage this behavior. I am involved in drafting these representations which are at an advanced stage. I will write about them and the catch 22 that they present for DEA in a later article.

Dr Preston claims that he has the necessary support to list trout as invasive and he may be telling the truth.

The awful truth that is emerging and which I alluded to at the beginning of this article is that our present government has declared war on the Constitution. We are seeing attempts like this one to replace rights with penal command and control permitting regimes in other sectors of government. The proposed Aquaculture Bill is one example and closer to home we have the draft KZN Business Bill which is another. This will make it a crime to carry on any business without a license issued by government. I enclose [representations](#) I filed on that proposal so that you can get an idea of the extent of this threat.

This is the true evil that lies behind what is being proposed. We are being asked to give up constitutionally protected rights in return for vague and unenforceable promises that we will be given permits. We are being asked to do this in circumstances where government has already broken its word. It is a case of being told we must give up human rights in the hope some official may give you a permit.

I warned in an article published in the May 2017 Bobbin, titled "[Joining the dots](#)" that:

"What is clear is that as strong as the case for trout is in law, it is possible that the fight may be lost. This is after all more than just trout. The stakes are huge. It is a war on the Constitution, its values and ultimately how the rule of law works in a constitutional democracy.

It is increasingly becoming clear that it is as the president said just over a year ago:

“If you just give me six months to be a dictator, things will be straight. Right now, to make a decision you need a resolution, decision, collective, petition. Yoh! It’s a lot of work.”

Maybe Dr Preston has stepped out of line and is again trying to build a bridge too far. Maybe he will be reeled in and we will return to the negotiating table to try and make a constitutional dispensation work in conjunction with a government that has declared war on the Constitution. Maybe less a less avaricious more constitutionally aligned government will replace the one that is in power?

This won’t happen by itself. It won’t happen if we give up rights for favours.

Talk we must but we must also not forget that the Constitution and the rights that stand between South Africans and bloodshed and anarchy are at stake here. It is as I said in [“Joining the dots”](#)

“However if the Constitution and democracy wins, then the scandal of this attack within government, this treason if you like, will have to be addressed. Officials who have waged war against the Constitution and democracy may have to account personally for their actions just like defenders of the constitution and democracy will double be made to account if they lose. “

“Of course if the Constitution and democracy lose then our environment will become a lot more dangerous. Corruption will thrive and with it the kind of ecological depredation that DEA officials want to prevent. “

It should not come as a surprise therefore that I responded to the e mail advising on this approach saying that in my view we should decline this offer and fight on. After all it is no longer just about trout. If DEA is worried that it can never win unless it wins the trout fight, the converse is also true. Trout anglers will lose their rights as will all South Africans if we cannot oppose something as simple and obvious that trout are not invasive.

The good news is that the legal arguments that support our cause are overwhelmingly in our favour. We just need to present those arguments to a court if and it seems increasingly likely when the need arises.
