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## **COMMENTS ON THE REVIEWED NATIONAL BIODIVERSITY ECONOMY STRATEGY PUBLISHED IN TERM OF GN 4492 IN GOVERNMENT GAZETTE 50279 OF 8 MARCH 2024 | BIODIVERSITY LAW CENTRE AND EMS FOUNDATION NPO**

### **1. Introduction**

1.1. This comment is submitted by the BLC and EMS Foundation in response to the draft National Biodiversity Economy Strategy published under Government Notice 4492 in *Government Gazette* 50279 of 8 March 2024 (**NBES**).

1.1.1. The Biodiversity Law Centre (**BLC**) is a non-profit organisation and law clinic, registered in 2021. Our vision is flourishing indigenous species and ecosystems that support sustainable livelihoods in Southern Africa. The BLC's mission is to use the law to protect, restore and preserve indigenous ecosystems and species in Southern Africa. The BLC is particularly interested in law and policy that give effect to section 24 of the Constitution, and specifically the State's obligations to ensure the environment is protected for present and future generations, by promoting conservation, and securing *ecologically* sustainable development.

- 1.1.2. The EMS Foundation NPO is a South African social justice NGO with the primary purpose of alleviating and ending suffering, raising public awareness, empowering, providing dignity to and promoting the interests of vulnerable groups, including wild animals. The EMS Foundation has a special interest in biodiversity and supports the five interrelated principles of social justice, namely: equity, access, diversity, participation and rights. The EMS Foundation is cognisant of the entanglements of oppression and is committed to the promotion of inclusive justice, showing compassion across species and working to build a better future for all through campaigns, research, analysis, advocacy and holding government to account. The EMS Foundation sees access to information, openness, accountability and transparency as the “oxygen of democracy”.
- 1.2. The NBES epitomises the void between current legislation and the red lines dictated by the latest science. It is presented as the Department of Forestry, Fisheries and the Environment’s (**DFFE’s**) plan to stimulate economic activity, job creation, transformation, and the reduction/elimination of various barriers to entry to, *inter alia*, the wildlife ranching, hunting, aquaculture, fishing and bioprospecting industries. On the face of it the premise to formalise these industries, ensure transformation of ownership and the accrual of benefit is well overdue, particular as industries such as the wildlife ranching industry, have been operating on an ad hoc basis for many years. However, it is our view that the NBES, as it stands, is wholly inadequate as a tool to achieve these goals and it is inconsistent with existing law and policy.
- 1.3. Critically, the NBES fails to be premised on the constitutional role of “ecologically sustainable use of natural resources” as part of the broader obligation on the State to ensure that the environment is protected for the benefit of present and future generations;<sup>1</sup> ignores the self-standing obligations of conservation promotion<sup>2</sup> and prevention of ecological degradation and pollution<sup>3</sup> and the relevant statutory principles articulated in, *inter alia*, the National Environmental Management Act, 107 of 1998 (**NEMA**) and National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**) including the need to base environmental decision-making on the best available science, precautionary principle, principle of intergenerational equity and obligations towards animal well-being. The NBES also appears to be far from the legal understanding of the inter-relationship between environmental protection, animal well-being, conservation and the values of dignity, compassion and humaneness which are foundational to South Africa’s constitutional democracy. In order for any strategy pertaining to ecologically sustainable use to pass constitutional muster, it must be premised on a sound understanding of this framework – and the collection of ideas framed as “Actions” in the NBES do not do so.

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<sup>1</sup> Constitution, s 24(b).

<sup>2</sup> Constitution, s 24(b)(i).

<sup>3</sup> Constitution, s 24(b)(ii).

- 1.4. In this regard, the NBES reads as precisely that: a collection of sometimes disparate and unconnected ideas which are insufficiently developed, explained, referenced or connected to key policies (not least the White Paper on Conservation and Sustainable Use of South Africa’s Biodiversity (**White Paper**); Policy Position on the Conservation and Sustainable Use of Elephants, Leopard and Rhinoceros (**Policy Position**); and White Paper on National Environmental Management of the Ocean (**Oceans White Paper**)).<sup>4</sup> Much of the NBES is stated almost in “short-hand” which prevents meaningful consideration or comment by the wide-range of stakeholders and interested and affected parties. No links or references are provided which enable further engagement by persons seeking to understand particular Actions and the NBES is replete with unarticulated assumptions, generalisations and lack of terminological precision or explanation. This falls short of what is expected of a rational and lawful government strategy.
- 1.5. In this context, we have provided some general concerns regarding the NBES as a whole followed by comments on the specific Goals, “Cross-Cutting Imperatives” and Enablers, to the extent this is possible.

## 2. General Comments

- 2.1. The NBES mis-construes the meaning and role of “ecologically sustainable use”. Section 24(b)(iii) of the Constitution envisages ecologically sustainable use of natural resources as contributing to the overall environmental protection right which is specified in section 24(b) as the right of everyone “*to have the environment protected for the benefit of present and future generations*”. The Constitution does not permit exploitation without limits; does not make conservation and prevention of environmental harms contingent on economic factors; and does not permit “use” of natural resources where ecological sustainability cannot be “secured”. The NBES fails to adopt this approach to the biodiversity economy by unduly focusing on the economic benefits of use of natural resources without regard to the primary constitutional obligation to ensure that any use of natural resources is first and foremost sustainable over time from an ecological perspective and as a contributor to ensuring present and future environmental protection.

- 2.1.1. First, the Constitution imposes an obligation on, *inter alia*, the State to ensure that “*ecologically sustainable use of natural resources*” is “*secured*”. This is not a “permission” to use natural resources for economic purposes. Rather, it is a requirement that any use of natural resources – whether living or non-living – is always tested against the requirement of long-term ecological integrity.<sup>5</sup> This does not preclude consumptive use of natural resources – but does place key limitations on the extent to which consumption is permissible and does preclude “exploitation”. The NBES,

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<sup>4</sup> Published as GN246 in GG37692 of 29 May 2014.

<sup>5</sup> See *Kloof Conservancy v Government of the Republic of South Africa* 2015 JDR 0078 (KZD) (**Kloof Conservancy**) para 109 for a useful summary of the legal position.

as it currently reads, errs on the side of exploitation with insufficient regard to how consumptive use of terrestrial, marine and freshwater plants and wildlife is to be moderated, limited (or potentially halted) by the assessment of ecological sustainability – or the horizons in terms of which such sustainability is to be measured. Instead, the NBES appears to be premised on the question “how can the economy benefit from use of the environment”. This approach is not consonant with the constitutional imperative of section 24(b)(iii) – nor is it consonant with the approach to ecologically sustainable use expressed in the White Paper.

2.1.2. Second, the role of ecologically sustainable use in the constitutional scheme is that it must contribute to the right of everyone to have the environment protected for the benefit of present and future generations. This means that any strategy addressing economic benefit from natural resources, must be conditional on such benefit contributing to short-, medium- and long-term environmental protection. We emphasise that section 24(b)(iii) stipulates that ecologically sustainable use of natural resources and ecologically sustainable development must be “secured” while “justified” economic and social development is pursued. It is thus impermissible to conflate “economic development” with “ecologically sustainable use of natural resources” (or ecologically sustainable development). Economic developments (including the development and expansion of specific industries and their related infrastructure) must be fully assessed and justified – and cannot undermine the primary obligation of section 24(b)(iii) to ensure that the State secures the ecological sustainability of any anthropocentric environmental use.

2.1.3. Third, section 24(b)(iii) is one of three distinct obligations imposed on the State which give effect to the section 24(b) “environmental protection” right. The obligation to prevent environmental harms is a discrete obligation imposed by section 24(b)(i), while the obligation to promote conservation is imposed by section 24(b)(ii). Neither the obligation to prevent environmental harm, nor the obligation to promote conservation, should be contingent on economic benefit from environmental use. This is not clear from the formulation of the NBES.

2.2. The NBES is not aligned with Goal 2 of the White Paper which deals with sustainable use; fails to adopt an ecosystem approach; and ignores the importance of biodiversity mainstreaming. It is not clear how the NBES fits into the existing policy environment. Given that Goal 2 of the White Paper deals expressly with “sustainable use”, it would be anticipated that the NBES operates within this framework. However, this is not the case.

2.2.1. As indicated in our comments relating to specific Actions below, there are potential linkages with certain of the White Paper’s goals, however these

are not directly outlined and the Actions and Targets of the NBES do not align with the White Paper's Policy Objectives, Expected Outputs and Expected Outcomes. This is particularly troubling in relation to Goal 2 of the White Paper which states that "*The sustainable use of biodiversity enhances thriving living land- and seascapes and ecosystems, livelihoods, and human well-being, while a duty of care avoids, minimises, or remedies adverse impacts on biodiversity*". White Paper Goal 2.1 expresses the Policy Objective "*Enhance sustainable use of components of biodiversity in terrestrial, freshwater, marine and coastal ecosystems*" with Expected Output 2 being the "*Mechanisms and tools mainstream biodiversity conservation and sustainable use, and priority biodiversity economy interventions, into national, provincial, and municipal socio-economic development plans, and the District Development Model*".

2.2.2. The NBES does not reflect this approach to biodiversity mainstreaming and refers to scaling up economic consumption of wildlife, fish and plants without regard to ecosystem integrity.<sup>6</sup> Rather than recognising that ecologically sustainable use of natural resources requires that an ecosystem approach is embedded in management of biodiversity-related economic activities,<sup>7</sup> the NBES presents a self-standing strategy for apparently "new" economic developments based on use of biodiversity components. This is quite the reverse of the tenor and approach to sustainable use in the White Paper and presents a potentially exploitative model of use of natural resources without paying attention to the key policy imperative to exercise a duty of care which "*avoids, minimises, or remedies adverse impacts on biodiversity*".<sup>8</sup>

2.3. The NBES has overemphasised consumptive use and short-term economic benefit. It is essential that any "biodiversity economy" strategy focuses on Actions that are based on principles of precaution, use of best available science and that foreground restoration and ecological resilience.<sup>9</sup> It is therefore concerning that the NBES emphasises expanding consumptive use of wildlife and presents such consumption as having short-term economic benefits for "communities" and "previously disadvantaged individuals".

2.3.1. These statements are repeated throughout the NBES and are made uncritically without due regard to differences between "communities" and their relationship with the natural environment, different economic priorities,

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<sup>6</sup> See the goal of ensuring maintenance of, *inter alia*, ecosystem integrity in Decision adopted by the Conference of the Parties to the Convention on Biological Diversity 15/4, *Kunming Montreal Global Biodiversity Framework* (CBD/COP/DEC/15/4) of 19 December 2022 (GBF), Goal A.

<sup>7</sup> See GBF, Section C, para 7(m); Oceans White Paper, strategic priority 4.1.

<sup>8</sup> See also the statutory recognition of an environmental duty of care linked to the "polluter pays" principle in NEMA, s 28 read with s 2(4)(p).

<sup>9</sup> See NEMA, s 2(4)(a)(v)-(vii).

cultural and social norms and the importance of starting from a premise of ecological sustainability and justification.

- 2.3.2. It is equally problematic that the “Enablers” appear to focus on exploitation – and not the imperative of securing environmental integrity.<sup>10</sup> We note, in particular, that Enabler 4 contemplates medical tourism with respect to rhino-horn derivatives: a practice which should not be buried in the NBES as an “Enabler” of market development and which potentially runs contrary to South Africa’s commitments relating to preventing the harmful effects of the trade in rhino horn.
- 2.3.3. This overemphasis on consumptive use – and disregard for sustainability and ecological thresholds – has resulted in the NBES failing to provide a coherent approach to developing a biodiversity economy which is ecologically sustainable, humane and of benefit to indigenous peoples, the wide range of potential “communities” which may benefit from ecologically sustainable use of natural resources, and South Africa as a whole.
- 2.4. The NBES targets are unrealistic. The NBES places extensive focus on consumptive use of terrestrial, marine and freshwater wildlife and expansion and “scaling up” of informal uses to formalised, commercial enterprises and trade. This ignores existing challenges relating to the sustainability of marine and freshwater living resources, steps taken by the state to limit exploitation of wildlife and the legal and ethical imperatives of animal welfare and wellbeing. The financial growth targets set out in Goals 1 to 4 appear to rely on rapid expansion of consumptive wildlife use with no detail regarding how such targets are to be met within the ambits of the White Paper’s commitments to ecologically sustainable use, particularly the ambitions to expand landscapes and seascapes under conservation; achieve responsible sustainable use and sustainable harvesting; transform production and consumption to ensure ecological sustainability; to improve ecosystem services; and to enhance ecological integrity and resilience in and out of protected areas. It is also likely to undermine South Africa’s efforts to implement key goals and targets in the Kunming-Montreal Global Biodiversity Framework (**GBF**), including Goals A, B and Targets 1, 2, 3, 5 and 9.
- 2.5. The NBES fails to consider prevention of environmental harms, environmental safeguards and the mitigation hierarchy. The NBES fails to provide a workable risk-mitigation framework or to indicate that any risk assessment has been undertaken in respect of the proposed actions. In particular, there is no evidence of strategic environmental assessments having been undertaken in respect of the various goals; critical enablers appear to be absent in many cases (or in need of significant development before any of the Actions linked to the Goals can be undertaken) indicating that risk could not have been assessed in terms of the primary targets

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<sup>10</sup> See NEMA, s 2(4)(a)(v)-(vi).



(which in critical instances are entirely absent) and there are no caveats or conditions indicating that any Actions will be subject to environmental impact assessment or be limited by requirements of rehabilitation, restoration, mitigation or avoidance of environmental harms. This is a critical failure of the NBES which, in the absence of a clear approach to environmental protection, cannot serve as a roadmap to a biodiversity economy which is consonant with constitutional obligations and environmental management principles.

- 2.6. The emphasis on “transformation” is uncritical and fails to reflect an approach to “responsible and sustainable socio-economic development that... contributes to the conservation and sustainable use of biodiversity” or to adopt a human-rights approach. Both are requirements of the GBF<sup>11</sup> as well as South Africa’s Constitution. The NBES falls short of these standards. By way of example, while referring to “food security” in relation to Goal 3, there is inadequate attention paid to the right to a clean, healthy and sustainable environment and how ecologically sustainable use of natural resources must ensure that long-term realisation of key human needs and rights such as access to food, water and wellbeing.<sup>12</sup> In this regard, the absence of consideration of the impact of climate change on the various contemplated actions is highly problematic particularly as it pertains to water scarcity, ocean warming and the impacts on marine and freshwater biota and ecosystems.<sup>13</sup>
- 2.7. The NBES reflects critical failures in relation to transparency, public participation and accountability. The NBES was published with truncated time-periods in a period covering religious, public and school holidays when it is difficult for stakeholders to access the strategy, convene and discuss its import. We are not aware of any road-shows assisting in explaining the strategy to the public<sup>14</sup> and, overall, it reflects a top-down approach to policy making at odds with legal requirements for public participation and best practice in consensus-driven policy development based on free prior and informed consent (including the obligations flowing from the United Nations Declaration on the Rights of Indigenous Peoples).<sup>15</sup> While it is not clear in terms of which specific legislative provision or power the NBES has been published, we draw attention to the requirements of public participation in section 99 read with 100 of NEM:BA; the principles of NEMA;<sup>16</sup> section 4 of the Promotion of Administrative Justice Act, 3 of 2000; and the repeated emphasis on meaningful consultation and public participation in environmental matters by the courts.<sup>17</sup> The seriousness of the issues dealt with in the NBES and potentially wide range of stakeholders affected by

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<sup>11</sup> GBF, Section C, para 7(f)-(g).

<sup>12</sup> See also NEMA, s 2(4)(d).

<sup>13</sup> See NEMA, s 2(4)(r); *Earthlife Africa Johannesburg v Minister of Environmental Affairs* [2017] 2 All SA 519 (GP); *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk).

<sup>14</sup> See recognition of the importance of road-shows in *Kruger v Minister of Environmental Affairs* 2015 JDR 2598 (GP) (*Kruger*) para 31.

<sup>15</sup> See GBF, Section C para 7(a). See also Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity 14/16, *Methodological guidance concerning the contributions of indigenous peoples and local communities* (CBD/COP/DEC/14/16) of 30 November 2018.

<sup>16</sup> See NEMA, s 2(4)(f); (g); (k); (l); and (q).

<sup>17</sup> See *Kruger* paras 17 and 19.

the NBES' ambitions and emphasis on “communities” as well as significant stakeholder collaboration would suggest that extensive consultation would be required prior to publication of the strategy. The absence of such consultation is evident in the lack of specificity around the NBES Actions and targets; poorly formulated Enablers (which sometimes appear to be goals in and of themselves); significant risks posed to wildlife; and inconsistencies with existing policies concerning tourism, agriculture, genetic use of plants, aquaculture, ocean management and biodiversity conservation (among others) that are evident throughout the document.

- 2.8. The NBES is impermissibly vague. The NBES appears to have been hastily compiled and lacks critical definitions, references and supporting context. In some instances, sentences and framing is confusing and appears incomplete. Measurable outputs are lacking and a number of targets left blank or simply indicated as “to be determined”. Further, the NBES lacks references and/or links to documentation allowing members of the public to further understand the context for high-level statements of intent that appear in the NBES and/or to refer to examples provided in support of certain actions. Throughout, the NBES suffers from failure to provide sufficient information for the public to comment meaningfully. This is contrary to legal requirements<sup>18</sup> – and also enormously problematic in terms of ensuring success of the proposed strategic interventions.

### 3. Specific Comments regarding Goal 1

- 3.1. The Goal's formulation is confusing and unclear. We note that the formulation of this goal appears to be focused on marine-based ecotourism and “sustainable conservation land-use”. It is not clear why this ecotourism goal is framed to focus on marine ecotourism only – and not to cover ecotourism generally. In addition, it is unclear why a goal which focuses on marine-based ecotourism incorporates sustainable conservation of land. At the very least, the goal ought to be expressed in terms of sustainable conservation of marine spaces if these are to be the sites of ecotourism expansion. Moreover, this goal formulation is inconsistent with the emphasise on mega-living conservation landscapes and the increase of bed-nights in “*large Big-5 areas*” in relation to Action 1.1<sup>19</sup> and the references to land-based ecotourism in Action 1.2 to 1.5.
- 3.2. The relationship between biodiversity protections and “land use” in Goal 1 is problematic. The ultimate purpose of ecologically sustainable use of land (a non-living “natural resource”) must be to protect the environment including the biodiversity, habitats and ecosystems associated with such land. For this reason, it does not make sense to state that “biodiversity-based features” should be “leveraged” for purposes of “sustainable conservation land use”. Rather, conservation of land, as a natural resource, must be pursued in its own right, while securing its ecologically sustainable

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<sup>18</sup> See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) para 66; *Kruger* para 26.

<sup>19</sup> NBES, p 13, Action 1.1.



use as the constitutionally mandated goal. To the extent that ecotourism promotes long-term environmental protections, it is a “land-use” (or marine use) consistent with section 24(b) of the constitution. However, as currently expressed, the goal does not reflect this approach. This is partly due to the construction of the tourism sector which appears to follow a “cascade” of tourism approaches, focusing on (unspecified) “high-end”, foreign tourism without sufficient regard to the range of tourists and tourist potential in respect of the ecotourism market (and including certain tourism types which are not in fact “ecotourism” at all – but simply tourism focused on “wild” or “natural” spaces).

3.2.1. The “cascade”, structured by Actions 1.1 to 1.5 includes:

- a) Establishment of living conservation landscapes (apparently under a tourism umbrella);
- b) Prioritising development of “Big Five” tourism;
- c) Developing tourism in terrestrial and marine conservation areas that are not reliant on “Big Five” tourism;
- d) Developing themed ecotourism; and
- e) Developing TFCA infrastructure.

3.2.2. When examining the explanations accompanying these Actions, there appears to be considerable conceptual confusion between the idea of integrating different approaches to tourism across state, private and community lands and a landscape / seascape approach. For example, tourism infrastructure, business models, nature-based tourism, sensitive coasts, and tour packaging are relevant across Actions 1.1 to 1.5 – however are not shown as operating together as an integrated approach to expanding the ecotourism industry. In addition, it does not make sense to speak of living landscapes, while apparently treating “big Five” and “non Big Five” locations in silos. Moreover, the notion of OECMs, conservation landscapes and seascapes, extends well beyond “tourism” (let alone the ecotourism market) to other uses including agro-ecology, human habitation, ecologically sustainable use of range-lands, fisheries and so on.

3.2.3. We also flag that the reference to “Goal 2” in relation to Actions 1.1 and 1.2 seems contrary to the notion of seascape- and landscape-based conservation and the role of biodiversity-inclusive spatial planning and restoration of degraded land, water and marine spaces which are integral to Targets 1 and 2 of the GBF.

3.3. Goal 1 pays insufficient attention to international standards regarding biodiversity and conservation. These include the various guidelines produced by the Secretariat of the

Convention on Biological Diversity as well as other key biodiversity treaty bodies pertaining to tourism development.<sup>20</sup> We note that these guidelines include important definitions including those pertaining to “community” and “non-consumptive tourism” which challenge some of the assumptions expressed in Goal 1 regarding the scope of tourism in the context of a biodiversity framework.

3.3.1. We draw attention, for example to the 2017 Guidelines for Concessions which defines “sustainable tourism” as “*tourism that takes full account of its current and future economic, social and environmental impacts, addressing the needs of visitors, the industry, the environment and host communities*” and “ecotourism” as “*Responsible travel to natural areas that conserves the environment, sustains the well-being of the local people, and involves interpretation and education*”. These definitions are distinguished from “nature-based tourism” which includes “*all forms of tourism that use natural resources in a wild or undeveloped form – including species, habitat, landscape, scenery and salt and fresh-water features. Nature based tourism is travel for the purpose of enjoying undeveloped natural areas or wildlife*”.<sup>21</sup>

3.3.2. These definitions clearly differentiate between tourism that focuses on “being in nature” (nature-based tourism) and tourism which is expressly focused on conservation and well-being (eco-tourism) and that which is “sustainable”. The NBES appears to conflate these approaches to tourism with the result that clear definitions and standards are not possible – including those published in relation to the Convention on Biodiversity, the notion of Responsible Tourism adopted under South African Law<sup>22</sup> and standards such as those produced by the World Travel and Tourism Council and UN Tourism.

3.3.3. It is essential that this degree of precision and links to best practice standards is incorporated to avoid economic activity based on the relationship between biodiversity and tourism becoming exploitative and destructive.

3.4. Goal 1 needs integration with the policies and strategies of the Department of Tourism at a minimum and does not reflect an appropriate regard for inter-governmental

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<sup>20</sup> See Secretariat of the Convention on Biological Diversity (2004) *Guidelines on Biodiversity and Tourism Development: International guidelines for activities related to sustainable tourism development in vulnerable terrestrial, marine and coastal ecosystems and habitats of major importance for biological diversity and protected areas, including fragile riparian and mountain ecosystems*; Secretariat of the Convention on Biological Diversity (2015) *Tourism supporting Biodiversity - A Manual on applying the CBD Guidelines on Biodiversity and Tourism Development*; Spenceley, A., Snyman, S. & Eagles, P. (2017) *Guidelines for tourism partnerships and concessions for protected areas: Generating sustainable revenues for conservation and development. Report to the Secretariat of the Convention on Biological Diversity and IUCN (Guidelines for Concessions)*; Conference of Parties on the Convention on Migratory Species, *Sustainable Tourism and Migratory Species* (UNEP/CMS/Resolution 12.23) of October 2017.

<sup>21</sup> Guidelines for Concessions, p 10.

<sup>22</sup> See Tourism Act, 3 of 2014 (**Tourism Act**) s 2.

impacts. This includes insufficient regard for land use regulation and the need for co-operation at local, provincial and national level.<sup>23</sup>

- 3.4.1. At a minimum, the omission of reference to obligations under the Tourism Act to promote responsible tourism<sup>24</sup> (and to conceptualise Actions 1.1 to 1.5 with regard to the requirements of responsible tourism set out in section 2(2) of that Act) is problematic.
- 3.4.2. In line with the White Paper’s emphasis on mainstreaming of biodiversity, it would be anticipated that relevant actions would explore how to “*seek to avoid negative economic, environmental and social impacts*”<sup>25</sup> while also generating economic benefits “*for local people, [enhancing] the well-being of host communities and [improving] working conditions and access to the tourism sector*”<sup>26</sup> while also involving “*local people in decisions that affect their lives*”,<sup>27</sup> making “*positive contributions to the conservation of natural and cultural heritage and to the maintenance of the worlds diversity*”<sup>28</sup> while also providing enjoyment, greater understanding of local culture, society and the environment, being inclusive of “physically challenged” people and being culturally sensitive.<sup>29</sup>
- 3.4.3. These statutory objectives in respect of tourism obligations placed on the State, resonate with obligations relating to the objectives of integrated environmental management under NEMA as well as the scheme and emphasis of the White Paper.
- 3.4.4. It is at odds with these statutory requirements (which give important effect to constitutional environmental, cultural, associational, equality and dignity rights) to cast Goal 1 to focus on “industry growth” and “bed nights” while ignoring the Responsible Tourism strategy, initiatives relating to Green Tourism, the Tourism and Climate Change Response and Action Plan and specific actions to integrate the policy objectives relating to conservation and ecologically sustainable use derived from the White Paper with those applicable to the mandate of the Department of Tourism. We emphasise that similar planning integration is necessary at provincial and local levels not only as a practical necessity but also in line with the requirements of the constitution and the environmental management principle of inter-governmental co-ordination and harmonisation set out in section 2(4)(f) of NEMA.

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<sup>23</sup> Constitution, ss 40-41; NEMA, s 2(4)(l). See also, by way of example, the decisions in *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC); *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC).

<sup>24</sup> Tourism Act, s 2(1)(a).

<sup>25</sup> Tourism Act, s 2(2)(a).

<sup>26</sup> Tourism Act, s 2(2)(b).

<sup>27</sup> Tourism Act, s 2(2)(c).

<sup>28</sup> Tourism Act, s 2(2)(d).

<sup>29</sup> Tourism Act, ss 2(2)(e) to (g).

3.5. We set out further comments which are specific to Actions 1.1 to 1.5 in the table below.

<p>Action 1.1</p>	<p>3.5.1. We support the objective of emphasising “<i>mega living conservation landscapes</i>” as an important measure to address a legacy of fortress conservation in South Africa and promoting a form of conservation that is in keeping with long-term promotion of conservation, environmental protection and the notion of “<i>people and nature [being] part of a complex, composite, intricate and totally interdependent web of life</i>”.<sup>30</sup> It also has potential for addressing issues of lack of connectivity between Protected Areas. However, a number of critical questions remain unaddressed in the explanatory paragraph and unaccounted for in relation to the targets and impact statement relating to Goal 1 and Action 1.1. Some of these questions are set out below.</p> <p>3.5.2. How does the mega-living conservation landscape concept accommodate other uses? For example, we know mining is an existing threat to Protected Areas (with critical examples of threats to Protected Environments such as the Mabola and Moutonshoek Protected Environments), there are attempts to develop heavy industrial zones within areas mapped as Critical Biodiversity 1 (<b>CBA1</b>) areas (such as the Musina-Makhado Special Economic Zone) while the White Paper recognises “<i>Biodiversity-based enterprises must compete in their value proposition with less conservation-compatible uses, such as agriculture, mining, fishing, and housing to be a preferred land or ocean use option</i>”.<sup>31</sup> Just some of the many areas where clarity is needed are whether mega-living conservation landscapes will sterilise mining and heavy industry; whether mining will be permitted in OECMs; whether OECMs including former industrial, mining or otherwise degraded areas will require restoration to a particular standard (and if so what that standard is). How does this action give effect to the recognition, under Goal 2 of the White Paper, that “<i>socio-economic gains from use of biological resources and ecosystems may result in loss of biodiversity, including the impairment of ecosystem functioning</i>” and that the “<i>real costs and benefits</i>” of conservation and sustainable use thus need to be assessed through “<i>progress mechanisms</i>”<sup>32</sup>?</p> <p>3.5.3. To what extent are the targets and timelines for implementing this Action aligned with targets and timelines relating to climate adaptation priorities, a transition away from coal, rehabilitation of</p>
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<sup>30</sup> White Paper, p 9.

<sup>31</sup> White Paper, p 8.

<sup>32</sup> White Paper, p 21.

	<p>mining and industrial sites? How is the concept aligned with policy and timelines relating to energy, mining, oil, gas, heavy industry and agriculture? Is there an intention to transition from a coal-based / industrial economy to one based on ecotourism and OECMs by 2036?</p> <p>3.5.4. How will mega conservation landscapes give effect to the White Paper, in particular the policy objectives and expected outcomes relating to Goals 1 and 2?</p> <p>3.5.5. How will mega conservation landscapes interact with existing critical priority areas including those identified as National Freshwater Priority Areas, Strategic Water Source Areas, Key Biodiversity Areas (<b>KBAs</b>), Critical Biodiversity Areas (<b>CBAs</b>), areas identified as part of the National Protected Areas Expansion Strategy and so on?</p> <p>3.5.6. The White Paper emphasises the need for evidence-based decision making.<sup>33</sup> While examples of potential mega-conservation landscapes are listed, these are expressly “<i>underway, considered, or with potential</i>”. There is no indication of which of these areas provides evidence to inform the expansion of this idea at this scale and it is difficult to understand how these serve as a proof of concept. Moreover, the size, scope and nature of these potential areas is difficult to understand without (at a minimum) a map identifying where they are and how these interact with land-use planning tools such as CBA maps.</p> <p>a) It is equally unclear how these align with the Biodiversity Nodes identified in NBES 2016 (which are based on a different rationale and set of requirements) or the expected outputs and outcomes relating to Policy Objective 1.1 in the White Paper relating to expanding “<i>a representative system of protected and conservation areas that are effectively and efficiently managed</i>”.<sup>34</sup></p> <p>b) The difficulty with understanding these examples is exacerbated by the lack of a clear definition of what is understood by mega-living conservation landscapes or any requirements or features for identifying such areas.</p> <p>c) Still further confusion is created by reference to “landscapes” while the goal refers to “seascapes” and “sustainable conservation land-use” (as indicated in the comments</p>
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<sup>33</sup> White Paper, p 20.

<sup>34</sup> White Paper, p 28.

	<p>regarding the formulation of Goal 1 above). The various possible meanings of these terms is not aided by the list of examples which end with the reference to “<i>Northern Cape</i>” – an entire province where there are competing strategies at play, for example those relating to the development of “Green Hydrogen”, the Namaqua SEZ and Boegoebaai project – all activities that have very little, if anything, to do with the “biodiversity economy” or conservation. It is also unclear how these relate to a “<i>national co-operative programme and prioritised plan of action [which] identifies terrestrial, freshwater, marine and coastal areas that support land- and seascapes...</i>” as contemplated in Policy Objective 1.1, Expected Output 1 of the White Paper.</p> <p>3.5.7. It is clear that there needs to be a great deal of strategic planning around the mega-landscapes. This is not accounted for in the targets relating to Action 1.1. How is this planning to take place? When? With what consultation programme?</p> <p>3.5.8. Similarly, it is clear that these mega-landscapes will need proper regulation to ensure that land-use remains within the scope of what can be considered “conservation” use. How is this to be achieved? What legal frameworks allow for these areas? What regulations are in existence? Where are the legislative and/or regulatory gaps? What is the programme and timeline for ensuring that regulation, based on the best-available science, is in place? How is this to be implemented and enforced? What is meant by “<i>management arrangements</i>”? How are existing threats to conservation use to be managed? In what way is this action giving effect to the recognition, expressed in Goal 1 of the White Paper, that the “<i>complex and dynamic context</i>” in South Africa “<i>requires strong governance mechanisms for biodiversity conservation and sustainable use</i>”<sup>35</sup> or the constitutional requirements of co-operative governance recognised by the White Paper’s Enabler 1<sup>36</sup>?</p> <p>3.5.9. What mechanisms are in place to account for traditional practices such as herding / cultivation / use of biodiversity resources? There is existing land-use and infrastructure across landscapes which need to be married with conservation ideas. It is unclear what, if any, consultation has taken place regarding the notion of mega conservation landscapes (or seascapes) and whether their embedded assumptions about conservation and use of natural</p>
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<sup>35</sup> White Paper, p 20.

<sup>36</sup> White Paper, p 23.



	<p>resources has been socialised with the South African public and the communities most directly affected. It is also unclear whether it is understood or desired by the South African public and whether the approach focusing on <u>tourism</u> is an appropriate one in the context of moving away from “top-down”, fortress conservation models to those resting on integration and ground-level ownership which the mega-living landscape concept implies.</p> <p>3.5.10. What mechanisms are in place to give effect to the incorporation of “agro-ecosystems” and Protected Agricultural Areas as contemplated by Policy Objective 1.1, Expected Output 6 of the White Paper?</p>
Action 1.2	<p>3.5.11. Action 1.2 appears to be a valid action for purposes of developing ecotourism. However, it needs integration with Cross-Cutting Imperative 2 but also notions of “transformation” in the wider sense with regard to sections 9, 27, 29 and 24(a) of the Constitution – noting that infrastructure is needed in relation to basic services, education and critical basic needs. This is a clear requirement of section 24(b)(iii) of the Constitution which requires that “ecologically sustainable use of natural resources” is secured while “justified social and economic development” is also pursued. For this reason, it is particularly important that “infrastructure development” is clearly defined and attention paid to what is required for <u>ecotourism</u> purposes and what is required for critical services – particularly in rural areas which seem to be the focus of this Action.</p> <p>3.5.12. It is critical that any contemplation of development of “community areas” needs to be driven by local ownership and with clear plans that avoid the negative impacts of external concessionaire models and lack of funding which limit the economic sustainability of ecotourism enterprises. The statements regarding funding in respect of Enablers 3 and 4 are not sufficiently clear and grounded in present realities to provide any realistic sense of the viability of this particular Action. It is not clear how the emphasis on ecotourism is intended to promote OECMs or “sustainable conservation land-use” within these areas and whether there is any intersection with stewardship models, traditional use of biodiversity components, cultural or religious connections with the natural environment and so on. Critically, this Action and the related targets entirely ignore issues of free prior and informed concept, obligations placed on South Africa under the United Nations Declaration on the Rights of Indigenous Peoples (to the extent applicable), legal requirements pertaining to use of land subject to customary law and key objectives and outputs relevant to</p>

	<p>Goals 1 and 4 of the White Paper – particularly those relating to participation, custodianship and conservation areas.<sup>37</sup></p> <p>3.5.13. It is unclear whether this Action intends to give effect to Policy Objective 1.1 of the White Paper (focusing on expansion of representative system of protected and conservation areas) or on Policy Objective 1.2 (focusing on integration of conservation areas into ecological and social land- and seascapes). In this regard, it is unclear how the strategy differentiates between those “community owned reserves” and “incorporated private reserves” in respect of Action 1.2, and areas to be incorporated as part of mega-living conservation landscapes. There appears to be a confusion between the concepts of living landscapes which <u>include</u> buffer zones and conservation areas which do or do not include the “big five”. Given South Africa’s mega-biodiversity, only certain ecosystems (and thus landscapes) are appropriate habitats for big five animals – while a landscape approach to conservation is not restricted to these particular species. This conceptual confusion is important – not least for purposes of understanding how Action 1.2 gives effect to the various elements of Goal 1 and is to be understood in the context of an existing landscape of heritage sites, biosphere reserves and land-use objectives and specific Outputs expressed in respect of Policy Objectives 1.2 and 1.3 in the White Paper relating to species conservation, ecological connectivity, ecological infrastructure, ecosystem services, biodiversity offsets, management of human-wildlife conflict and conservation and rehabilitation of biodiversity. It also runs contrary to the recognition in the <i>Policy Paper</i> (defined below) which emphasises “<i>in situ conservation and sustainable use</i>” of “the five species” across Africa.<sup>38</sup></p>
<p>Action 1.3 and 1.4</p>	<p>3.5.14. Once again, the intention of developing ecotourism infrastructure in priority locations is, in principle, supported. However, in many respects, these Actions suffer from the same questions raised in respect of Action 1.2 above.</p> <p>3.5.15. In addition, there is particular concern that some of the areas referenced in the explanatory paragraph may not be appropriate for purposes of large-scale ecotourism – principally where localities include highly sensitive or vulnerable ecosystems. This is particularly relevant to coastal areas which are <u>all</u> subject to the principle of care</p>

<sup>37</sup> See for example Policy Objective 1.1, Output 5; Policy Objective 1.2, Outputs 3 and 7; Policy Objective 4.1, Output 3; Policy Objective 4.2, Outputs 3 and 4; Policy Objective 4.3, Outputs 4 and 5; Policy Objective 4.4, Outputs 1, 2 and 3; Policy Objective 4.5, Outputs 1-5; Policy Objective 4.6, Outputs 1-5; Policy Objective 4.7, Outputs 1-2.

<sup>38</sup> *Policy Position*, p 4.

	<p>identified in section 2(4)(r) of NEMA. In this regard, it is critical that ecotourism development speaks to fine-scale biodiversity planning such as that presented in CBA maps (including that for marine spaces). Moreover, insofar as coastal development / seascapes are to be “used” for purposes of ecotourism, the planning involved needs careful integration with other ocean-based and biodiversity based planning initiatives – and would benefit from nation-wide Strategic Environmental Assessment. There are significant risks arising from lack of integrated planning indicated by the existing development pressure on coastal and marine zones, the sensitivity of these areas, potential for impact of climate change and the complex legislative and planning environment relevant to coastal and marine infrastructure development. We note that any such development must itself be “ecologically sustainable” and assessed accordingly. Action 1.3 itself acknowledges that <i>“given their environmental sensitivity, development needs to be cautious.”</i> This is a particular area where “use” of biodiversity may in fact lead to harms (as anticipated in the White Paper).</p> <p>3.5.16. It is also unclear why, as with Actions 1.1 and 1.2, the targets for Action 1.3 are expressed in bed nights – when the emphasis is on infrastructure development.</p> <p>3.5.17. It is not clear how development activities such as those around Boegoebaai and Algoa Bay developments are to be married with tourism potential expressed in Action 1.3 – let alone ecotourism objectives. It is critical that ecotourism is in fact managed carefully, such that it is ecologically sustainable and provides a viable alternative to industrial development in terms of social and economic planning and “justification”.</p>
Action 1.5	<p>3.5.18. In principle, the notion of transboundary parks for purposes of expanding ecotourism is supported. However, we emphasise the importance of carrying out Environmental Impact Assessments (with particular regard to the Espoo Convention) to guard against human disturbance. Further, we emphasise the need for careful development, monitoring and revision of park management plans that have regard to South Africa, neighbouring state, regional and international conservation obligations.</p> <p>3.5.19. Related to this, the assumptions in the explanatory paragraph do not appear to have paid regard to the broader conservation and economic context presented by existing transboundary park agreements and MOUs including those with the Peace Parks</p>

	<p>Foundation, nor where South African constitutional imperatives require advocacy at regional level for the imposition of appropriate standards for ecotourism that is ecologically sustainable.</p> <p>3.5.20. We also note insufficient attention has been paid to Policy Objective E1.4 in the White Paper which includes specific Outputs related to multilateral environmental agreements – including the need for harmonisation and “synergistic” approaches in the region and on the continent.</p>
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#### 4. Specific Comments regarding Goal 2

4.1. Goal 2 is not aligned with constitutional imperatives regarding the essential links between biodiversity, conservation and animal well-being. As indicated in our General Comments above, all Goals in the NBES must adhere to the Constitution and the values it enshrines in law.

4.1.1. In this regard, and as explained above, the concept of “ecologically sustainable use” in section 24(b)(iii) of the constitution does not permit exploitation without limits. Moreover, the relevant legislative framework specifically considers the well-being of both people and animals as well as religious and cultural rights as significant aspects of the relationship between people, their environment and the wildlife which live within it.

4.1.2. The requirement that the well-being of animals is considered is among the objectives of NEM:BA,<sup>39</sup> recognised as an element of the common-law (as is recognition of animal sentience),<sup>40</sup> and integral to constitutional conservation imperatives as they pertain to biodiversity.<sup>41</sup> The important link between the well-being of individual animals, conservation imperatives and the constitutional foundation of a caring and humane society extends must define the limits of ecologically sustainable “use” wildlife and what can be tolerated within the ambit of South Africa’s constitutional democracy.<sup>42</sup>

4.1.3. Accordingly, the historic acceptance of a particular industry or approach to wildlife use does not justify its continuation if it is found to be incompatible with constitutional norms and obligations.<sup>43</sup> It is also necessary that any

<sup>39</sup> NEM:BA, s 2(a)(iiA).

<sup>40</sup> *Smuts and another v Botha* 2022 (2) SA 425 (SCA) para 24; *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 38.

<sup>41</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development (Corruption Watch Amicus Curiae)* 2016 JDR 2293 (CC) (**NSPCA**) paras 56 to 57.

<sup>42</sup> *NSPCA* para 57; *Lemthongthai v S* 2015 (1) SACR 353 (SCA) para 20; *S v Makwanyane* 1995 (3) SA 391 paras 190, 237 expressing general statements regarding the nature of the society to which South Africa aspires.

<sup>43</sup> See *South African Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism* (1900/2007) [2009] ZAFSHC 68 (11 June 2009) para 32 “The panel [of experts appointed to advise and report on

consideration of “ecologically sustainable use” of wildlife prioritises considerations of biodiversity, conservation and animal well-being prior to any consideration of economic benefit (as is reflected in the *Policy Position* discussed below).<sup>44</sup>

4.1.4. This hierarchy of considerations is not evident in the actions relating to Goal 2. Similarly the notion of “consumptive use” as the overall goal is incompatible with an approach to wildlife that foregrounds biodiversity, conservation and well-being. As the goal is currently framed, it is difficult to conceptualise any actions which could, reasonably, meet this objective while also remaining constitutionally compliant.

4.2. Goal 2 is at odds with existing policy statements in the White Paper and *Policy Position on the Conservation and Sustainable Use of Elephant, Lion, Leopard and Rhinoceros (Policy Position)*.

4.2.1. The *Policy Position* makes it clear that is focused on corrective action in respect of “*unsustainable practices*” as well as the imperatives of “*promoting conservation, sustainable use, and the well-being of the five species and providing policy direction for international commercial trade in the five species*”.<sup>45</sup> In this regard, we note that:

- a) First, the three “*conservation and sustainable use policy objectives to enhance species management*” specifically contemplate the end of intensive management and captive breeding of lions and rhinoceros for commercial purposes and to ensure that any use of leopard incentivises wild conservation. It is difficult to understand how these objectives can be pursued, while also expanding the wildlife economy in terms of the volumes contemplated in Goal 2 (particularly, the increasing of GDP contribution from R2.6 billion to R27.6 billion by 2036) – it is entirely unclear where the “wildlife” to meet the contemplated demand is to come from in the absence of commercial breeding programmes.<sup>46</sup> We note, in this regard that the *Policy*

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*hunting in buffer zones and canned hunting of large predators] stated that whilst every effort was made to ensure that its recommendations on the regulation of the hunting industry strike a balance between the economic contributions that hunting makes to the wildlife and tourism industry and the economy of South Africa and the ecological and ethical imperatives that will ensure the sustainability of the hunting industry, economic considerations may never be used to condone or ignore practices that either compromise the country’s biodiversity, undermine the humane treatment of hunted animals, or that may taint the reputation of the hunting industry in the long run.”*

<sup>44</sup> See *Policy Position*, p 4.

<sup>45</sup> *Policy Position*, p 4.

<sup>46</sup> According to the 2022 DFFE Professional Hunting Statistics (the latest year for which figures are available) approximately 36,500 wild animals were killed in South Africa by trophy hunters. By calculating the current annual increase in real terms, after removing inflation of the increase in GDP contribution including that from international hunters, this equates to a GDP contribution increase from R5-billion in 2022 to over R13-billion by 2036, an increase of 7,6 % pa in real terms. This means that international hunters will have to shoot almost 100,000 animals annually. It also means a total of almost 1 million animals during this period will be trophy hunted, which includes: over 10,000 lions, 3,000 white rhino and 30,000 buffalo. These figures cannot possibly be ecologically sustainable.

*Position* is specifically focused on ensuring that that “*practices within the sector*” which have brought South African into disrepute are terminated.<sup>47</sup>

- b) Second, the three “*international commercial trade-related policy objectives*” are inherently related to economic activity. In this regard, there is no contemplation of anything approaching “trophy hunting” – which implicitly considers an international tourism market focused on hunting of Big Five animals for purposes of obtaining “trophies” (which can only serve as such if it is possible to remove preserved animal heads / skins and so on from South Africa). We also note that the context of international rhinoceros and elephant ivory trade is not an objective but subject to vague considerations of international commercial trade – which must be read in the context of a reducing international acceptance of such economic activity, policy imperatives to prevent escalating or feeding demand and legal and treaty restrictions imposed by, *inter alia*, CITES. To the extent that any ivory-related trade can ever be permitted in South Africa, the courts have firmly established that the law does not permit economic exploitation.<sup>48</sup>
- c) Third, consonant with the constitutional requirement to foreground animal well-being, the activities linked to the above objectives are required to, *inter alia*, promote animal well-being with the aim that they “*transform practices within the wildlife industry that are not conducive to animal well-being, and promote conservation and sustainable use of biodiversity in general, and these species in particular*”.<sup>49</sup> It is entirely unclear how the emphasis on “consumption” of wildlife through hunting and ranching in the NBES can fall within the ambit of this policy statement.

- 4.3. The emphasis on trophy hunting and recreational hunting and uncritical acceptance of consumptive use of wildlife is at odds with the notion of “living in harmony with nature” embedded in international biodiversity policy as well as the White Paper. The increasing recognition that relationships between people and nature require a focus on harmony is evident in statements of the conference of parties under the Convention on Biological Diversity (CBD)<sup>50</sup> and reports by bodies such as the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES). This is also expressed in the vision of the White Paper: “*An inclusive, transformed society living in harmony with nature, where biodiversity conservation and sustainable use ensure healthy ecosystems, with improved benefits that are fairly and equitably*

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<sup>47</sup> See *Policy Position*, p 8.

<sup>48</sup> See for example, *Els v S* 2017 (2) SACR 622 (SCA) para 17, *S v Ndlovu* 2020 JDR 2894 (ECM) paras 63-64.

<sup>49</sup> *Policy Position*. p 4.

<sup>50</sup> See Decision Adopted by the Conference of Parties to the Convention on Biological Diversity XII/5, *Biodiversity for poverty eradication and sustainable development* (UNEP/CBD/COP/DEC/XII/5) of 17 October 2014 (in particular clause 9).



*shared for present and future generations*". Insufficient attention is paid in the NBES to the relationship between "consumptive use of wildlife" and such harmonious relationships – particularly in the explanatory paragraphs relating to hunting.

4.4. We provide further specific comments relating to Actions 2.1 to 2.4 in the table which follows.

Action 2.1	<p>4.4.1. It appears inconsistent to contemplate "trophy hunting" in the context of reference to South Africa's "<i>strong global reputation</i>" with the reputation-led focus on banning inhumane hunting practices in the <i>Policy Position</i>. This is more so given the <i>Policy Position's</i> Policy Objective 1 (focused on canned lion hunting) that "<i>this Policy Objective sets out to prohibit activities that do not promote well-being and humane practices, and activities towards lions, and seeks to mitigate risks from the domestication of lions</i>". It is irrational to focus on promotion of animal well-being and "humane practices" in the <i>Policy Position</i>, while contemplating "trophy hunting" as a strategic focus area in the NBES.</p> <p>4.4.2. Moreover, we note that recreational hunting generally, and trophy hunting in particular, is commonly associated with inequitable access to concession ownership, employment opportunities and financial proceeds. Further, trophy hunting is inherently associated with glorification of the hunt, human dominance over nature and killing for sport<sup>51</sup> – values inimical to the constitutionally enshrined values of compassion, care and humane conduct<sup>52</sup> and contrary to statutory obligations and policy commitments to animal well-being and recognition of the need to recognise human-nature interrelationships.</p> <p>4.4.3. While we note the reference to "fair chase" in relation to the expansion of the trophy hunting industry (and that this is a concept accepted within the hunting paradigm), we agree with the statement of the Supreme Court of Appeal that it "<i>is by no means clear... how either ethical hunting (whatever its limits may be) and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild...</i>"<sup>53</sup> It is thus entirely unclear how Action 2.1 can be consistent with objectives (including those relating to mega-</p>
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<sup>51</sup> See *Trustees for the Time Being of the Humane Society International-Africa Trust v Minister of Forestry, Fisheries and the environment* 2023 JDR 2434 (WCC) para 83; see also various studies including L Kalof and A Fitzgerald (2003) "Reading the trophy: exploring the display of dead animals in hunting magazines" in *Visual Studies* 18 (2) 113-122; Humane Society of the United States and Humane Society International (2016) *Trophy Hunting by the Numbers: the United States' Role in Global Trophy Hunting*, available online <[http://www.hsi.org/assets/pdfs/report\\_trophy\\_hunting\\_by\\_the.pdf](http://www.hsi.org/assets/pdfs/report_trophy_hunting_by_the.pdf)> .

<sup>52</sup> *Lemthongthai v S* 2015 (1) SACR 353 (SCA) para 20.

<sup>53</sup> *SA Predator Breeders Association and others v Minister of Environmental Affairs and Tourism* [2011] 2 All SA 529 (SCA) para 37.

	<p>living conservation landscapes) or consonant with notions of promoting conservation and ecologically sustainable use of wildlife. It is, moreover, likely that this approach will risk South Africa’s reputation by endorsing (and promoting) killing of animals for sport. This is increasingly rejected by the global public with a growing number of bans on trophy hunting<sup>54</sup> and is at odds with South Africa’s legal obligations towards animal well-being.</p> <p>4.4.4. There are a number of assumptions behind Action 2.1, read with Action 1.1 and 1.2 which are not made clear in terms of the expansion of the “trophy hunting” industry along with mega-living conservation landscapes and prioritisation of infrastructure and enterprise development in areas “adjacent” to “Big Five areas”, state protected areas and Private Game Reserves. We note that our questions relating to land-use referenced in relation to Action 1.1 above become particularly significant in the context of considering whether Big five-based Trophy Hunting is in fact a “conservation compatible land-use” as conceptualised in relation to Actions 1.1 and 1.2 and how the NBES conceptualises the role of “high end trophy hunting packages” and ecotourism as compatible activities – particularly within the context of conservation principles and those relating to responsible tourism. There is evidence that such hunting is <u>not</u> compatible with conservation outcomes.<sup>55</sup></p>
Action 2.2	<p>4.4.5. Provided our understanding of “plains game” which is not defined is limited to antelope species and ostrich (as contemplated in the draft Game Meat Strategy), we acknowledge the importance and value of plains game in contributing to ecotourism and food security. This, however, needs to be understood within the context of animal well-being and ecological sustainability which ought to place limits on industrial-scale ranching. Similarly, it needs to be properly regulated by the development of norms and standards applicable throughout the entire value-chain to promote animal well-being and welfare and clearly related to section 30 of the Constitution.</p> <p>4.4.6. It is not clear that “<i>more inclusive recreational hunting</i>” is a goal that is consonant with constitutional requirements pertaining to ecologically sustainable use, nor how a 25% growth in recreational hunting by 2035 is an adequate measure of the “inclusive” nature of</p>

<sup>54</sup> See for example European Parliament resolution of 5 October 2022 on the EU strategic objectives for the 19<sup>th</sup> meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) to be held in Panama from 14 to 25 November 2022 (2022/2681(RSP)), available online <[https://www.europarl.europa.eu/doceo/document/TA-9-2022-0344\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2022-0344_EN.html)>.

<sup>55</sup> See for example E Di Minin et al (2021) “Consequences of recreational hunting for biodiversity conservation and livelihoods” in *One Earth* 4, 238-259, available online <<https://doi.org/10.1016/j.oneear.2021.01.014>>.

	<p>such hunting nor whether or not it is a “<i>key driver of conservation compatible land-use</i>”.</p> <p>4.4.7. We also note that scientific evidence suggests that hunting concessions adjacent to protected areas may undermine the effectiveness of the protections offered in protected areas to species targeted by hunting. This may occur through baiting or depletion of animals in hunting areas through a “vacuum effect”: creating “space” into which animals from protected areas may move – leading to overall depletions of populations, population dynamics being disrupted and overall interference with ecosystems integrity and conservation outcomes.<sup>56</sup> It is therefore imperative that hunting of plains game is properly regulated in accordance with clear norms and standards.</p> <p>4.4.8. We would emphasise that it is <u>not</u> consonant with the obligation to promote conservation in its own right nor the objectives of the National Environmental Management: Protected Areas Act, 57 of 2003 for hunting of any sort to be regarded as “<i>a key driver</i>” of conservation compatible land-use.<sup>57</sup> Moreover, it is unclear why recreational hunting should be selected as such a driver, over other potential drivers such as: existing grazing practices; agro-ecology; reforestation; culture uses – and the obligation to conserve habitats and ecosystems in line with the existing spatial planning mechanisms provided by CBA and KBA mapping.</p>
Action 2.3	<p>4.4.9. It is unclear what is meant by an “extensive wildlife system” as no definition is provided.</p> <p>4.4.10. There is a lack of consistency with the Mission and Vision of the White Paper. Action 2.3 is disaggregated from an ecosystems approach and the objectives of ensuring healthy ecosystems, ecological integrity and connectivity. Moreover, the notion of “large scale enterprises” merely reproduces existing approaches to agriculture without taking an approach which focuses on “<i>transformative socio-economic benefits</i>” for present <u>as well as future</u> generations.</p> <p>4.4.11. Insofar as “game meat harvesting” is to be considered as at all capable of being “ecologically sustainable use”, we note that Action 2.3 seems to support a “mono-culture” approach which is</p>

<sup>56</sup> See AJ Loveridge et al (2007) “The impact of sport hunting on the population dynamics of an African lion population in a protected area” in *Biol. Conserv*, 134, 548–558, available online <<http://doi:10.1016/j.biocon.2006.09.010>>.

<sup>57</sup> See for example the objective in section 2(e) “*to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of such areas*”.

	acknowledged as an unsustainable practice and counter to agricultural best practice which integrates climate adaptation and mitigation strategies. <sup>58</sup>
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## 5. Specific comments regarding Goal 3

- 5.1. Goal 3 is internally inconsistent: We note inconsistency between the emphasis on “*consumptive use of wild and produced marine and freshwater resources*” and objective of driving “*inclusive coastal socio-economic development*”. If Goal 3 is, in fact, concerned with social and economic development of coastal areas, the role of freshwater aquaculture is unclear (if, as we assume, it refers to aquaculture as contemplated in the *Policy for the Development of Sustainable Inland Aquaculture Sector in South Africa* or draft *Aquaculture Development Bill*). This lack of clarity applies also to the role of implementation of the National Freshwater (Inland) Wild Capture Fisheries Policy (**Inland Fisheries Policy**). To the extent that the reference in the formulation of Goal 3 to “*driving coastal development*” is an error (as is suggested by the impact statement which refers to “*marine, coastal, estuarine and freshwater resources*”), this needs to be rectified. It is concerning that so fundamental an aspect of the NBES as the formulation of the goal itself is unclear and contradictory.
- 5.2. Goal 3 provides a problem statement rather than strategic direction: Read as a whole, Goal 3 appears merely to state an intention to “transform” four fisheries sectors (commercial and small-scale marine fisheries, aquaculture and freshwater fisheries). However, the statements of “development and transformation” of commercial and small-scale fisheries and “implementation” of small-scale aquaculture and freshwater fisheries strategies serve as little more than problem statements with no indication of what is entailed by the four contemplated Actions, nor how the various problems identified have been addressed (if at all) by existing policy, programmes or strategies. There is no assistance provided by Annexure A where targets for 2026 for all actions are “to be developed”, those for 2029, 2032 and 2035 left blank and 2036 NBES Outcomes little more than aspirations with no roadmap for their realisation.
- 5.3. The Actions, read as a whole, do not link biodiversity imperatives and the need to pay particular attention to sensitive water- and seascapes, and the envisaged economic activities. All four Actions repeat, in different combinations and with difference emphases, the link between a specific fisheries sub-sector and notions of “transformation”, “equity”, “barriers to entry” and “scaling up”. However, the explanatory paragraphs / problem statements beneath each Action run through a range of diverse policy, regulatory, practical and political considerations – none of which address the key biodiversity imperatives of ensuring that any “consumptive use” of marine or freshwater living resources must be premised, in the first instance, on the constitutional imperative of ecological sustainability. This omission, in turn raises

<sup>58</sup> See by way of example, the discussions and position statements published in terms of the CBD as well as by the Food and Agricultural Organisation and OECD.

questions about the absence of implementation of an ecosystems approach to fisheries in the marine sector; the threatened status of species such as abalone and west coast rock lobster; the effect of climate change and ocean warming on oceans and marine ecosystems; the slow process of marine spatial planning; the highly water-stressed nature of South Africa’s land-mass and the importance of securing water catchments and freshwater sources (including their biota); and the statutory principles requiring particular sensitivity to marine, estuarine and freshwater ecosystems.

5.4. “Transformation” requires a critical engagement with ecological outcomes in fish management. Fundamentally, it is critical that any notion of consumptive use of marine and freshwater biota is properly assessed against the requirements of ecologically sustainable use – and that notions of “transformation” take into account the need to revise historically damaging approaches to resource exploitation. This includes having regard to the damage caused by overfishing and interrogation of the procedures and guidelines which set quotas / allocations and assess the biomass of marine living resources for purposes of determining ecologically sustainable use. It is also imperative that an ecosystems approach to marine living resources as well as freshwater biota is embedded in both legislation and regulatory practice (as well as being actively pursued by all private sector actors).

5.5. We provide further comment on Actions 3.1 to 3.4 below in the table which follows.

Action 3.1	<p>5.5.1. It is not clear to us how this Action fits with existing rights allocation frameworks and processes under the FRAP / Total Allowable Catch (<b>TAC</b>) nor the obligations under Article 61 of the United Nations Convention on the Law of the Sea which not only require that South Africa determines the allowable catch of living resources within the EEZ but which also require South Africa <i>“taking into account the best scientific evidence available to it”</i> to <i>“ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation”</i> (art 61(2)) and that measures must be <i>“designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global”</i> (art 61(3)).</p> <p>a) We note that Article 62 of UNCLOS provides that coastal states’ promotion of use of living resources within the EEZ may only be “without prejudice to article 61” and follows with a range</p>
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	<p>of requirements to prevent over-fishing and ensure conservation of marine resources.</p> <p>b) Action 3.1 is not drafted with reference to these obligations, actions taken to date to fulfil these international obligations, the nature of “challenges with allocations of fishing rights”, how such challenges have been / are being address, the reasons for over-exploitation of species (let alone which species fall within this category), what has been done to address over-exploitation or the relationship between Action 3.1 and preventing “over-exploitation”.</p> <p>c) The targets relevant to Action 3.1 state only that they are “to be developed” and accordingly provide no further clarity.</p> <p>5.5.2. The <i>objective</i> of transformation of “the fishing industry” is one of the objectives and principles of the Marine Living Resources Act, 18 of 1998 (<b>MLRA</b>) expressed in section 2(j) as “<i>the need to restructure the fishing industry to address historical imbalances and achieve equity within all branches of the fishing industry</i>”. This is amplified by 2014 amendments to this Act to address the need to, <i>inter alia</i>, “<i>promote equitable access to and involvement in all aspects of the fishing industry, and in particular, to rectify past prejudice against women, the youth and persons living with disabilities</i>” (section 2(k)) and “<i>the need to recognise approach to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty</i>” (section 2(l)). This is in addition to the objectives and principles of the MLRA which emphasise principles of “ecologically sustainable development”, conservation, preservation and protection. In this context, the explanatory paragraph accompanying Action 3.1 is merely a problem statement which reflects continuing difficulties with the proper implementation of the MLRA to achieve these objectives. No action is specified which explains <u>how</u> fishers are to be rendered “sustainable” or “transformed”.</p> <p>5.5.3. We flag that the issue of lack of transformation and contestation over various government policy interventions in this regard have been dealt with in a number of cases, including the critical constitutional court judgment of <i>Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others</i> 2004 (4) SA 490 (CC), however, recent contestations over the FRAP (still to be heard) make it clear that the industry is <u>not</u> transformed. It is not clear how this Action differs from previous policy statements relating to the need to</p>
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	<p>transform the commercial fisheries industry and associated value chains – which is a requirement of law and yet has not occurred.</p> <p>5.5.4. We also note that fish and other marine living resources are, in some cases, inherently <u>not</u> capable of replenishment. This Action fails to take account of this limitation as well as the reality of climate change, biomass decline and over-exploitation of ocean / marine resources. Fundamentally, a barrier to an appropriate transformative and ecosystems approach lies in lack of mechanisms for implementation under the MLRA and absence of an ecosystem approach to fisheries. In particular, we draw attention to the White Paper’s recognition that:</p> <p><i>“In the marine environment, including the ocean, coastal areas, and estuaries, the unsustainable use of biological resources is a significant pressure on biodiversity. Fishing (including commercial, recreational, subsistence, smallscale, and illegal fishing) remains the biggest pressure on most inshore and offshore marine ecosystems, with greater impact on inshore resources than on the deep ocean systems. There are coastal threats from development, as well as from climate change, including abnormal storm surges, sea-level rise, and ocean acidification.”</i><sup>59</sup></p>
Action 3.2	<p>5.5.5. It is concerning that the NBES refers to development of estuarine harvesting. Estuaries are recognised as ecosystems requiring special consideration by section 2(4)(r) of NEMA with the need for such legal protection starkly presented in the 2018 National Biodiversity Assessment which, <i>inter alia</i>, recorded 99% of South Africa’s estuarine realm area as “threatened”.<sup>60</sup> To the extent that any development in an estuary is considered, this needs careful consideration due to the important ecological services provided by estuarine ecosystems which contribute to human well-being including those pertaining to water-quality;<sup>61</sup> their important nursery function which is critical for both local and commercial fisheries,<sup>62</sup> inherent dynamism, value in terms of climate mitigation (including, but not</p>

<sup>59</sup> White Paper, p 12.

<sup>60</sup> See L van Niekerk et al (2019) “Chapter 3: A new Ecosystem Classification for South African estuaries” in *South African National Biodiversity Assessment 2018: Technical Report*. Volume 3: Estuarine Realm. CSIR report number CSIR/SPLA/EM/EXP/2019/0062/A. South African National Biodiversity Institute, Pretoria. Report Number: SANBI/NAT/NBA2018/2019/Vol3/A (**NBA: Estuarine Realm**), pp xxix-xxx; Chapter 8, p 152.

<sup>61</sup> See NBA: Estuarine Realm, Chapter 1, p 8, Table 2; Chapter 2, pp 2-3.

<sup>62</sup> NBA: Estuarine Realm, p xxxii; xxxiii; Chapter 2, p 7; Chapter 6, p 94.

	<p>limited to the presence of mangroves and seagrass),<sup>63</sup> and often pre-existing degraded state and need for restoration.<sup>64</sup></p> <p>5.5.6. We note that Action 3.2 appears to conflate assumptions relating to small-scale harvesting for subsistence purposes (implied by references to “household livelihoods” and “traditional harvesting”); the need for transformation of “industry”; and illegal harvesting of biota such as abalone and west coast rock lobster which enter <u>commercial</u> value chains.<sup>65</sup> Similarly, the imperative of food security is stated without recognition of the relationship (or otherwise) between the subsistence and cash food economies and the differing notion of “formalised value-chains” and “capital, capacity, and distribution”.</p> <p>5.5.7. While, in principle, it is difficult to object to the idea of supporting scaling of value-chains for the benefit of impoverished and/or under-resourced communities. However, it appears that the “formalisation” and “scaling” contemplated in Action 3.2 is a response to “<i>over-harvesting, illegal harvesting and trade</i>” which seem to be grouped, uncritically, with “<i>missed opportunities</i>”.</p> <p>a) It important to clarify what precisely is meant by “missed opportunities”. It is also necessary to pay attention to localisation of rights allocations for purposes of ecologically sustainable use of sensitive resources and key species such as abalone, snoek, west coast rock lobster, geelbek and yellowtail.</p> <p>b) This is far more complex an exercise than one of “<i>access to fishing rights, capital, capacity and distribution</i>”. Instead, it requires a review of the framework which addresses a host of considerations including, but not limited to: the mechanisms for assessing biomass and species-level conservation imperatives; procedures and methods for understanding and reviewing how quota systems may or may not fall short of equality imperatives in their design and implementation; the use of offences within the regulatory framework for ecologically sustainable use of marine living resources, their formulation, applicability, relationship with international obligations and frameworks and enforcement risks; and whether there are adequate incentives to promote ecologically sustainable use and, where necessary, behavioural change to support</p>
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<sup>63</sup> NBA: Estuarine Realm, p xxxv; Chapter 2, pp 8-9.

<sup>64</sup> See NBA: Estuarine Realm, Chapter 6, p 78, Table 19 for a summary of pressures on South African estuaries.

<sup>65</sup> Compare considerations relating to illegal gillnetting outlined in NBA: Estuarine Realm, Chapter 6, pp 98-102.

	<p>ecological sustainability of marine species, ecosystems and spaces.</p> <p>5.5.8. Related to the above, the “solution” to illegal and unreported fishing is not necessarily to “formalise value-chains” or remove “barriers to entry”. This assumes a relationship between the <u>purposes</u> of unlawful fishing and subsistence without differentiating between illegal catches/harvesting for subsistence and commercial purposes. Rather, it is necessary for South Africa ensure implementation of laws governing lawful use of its EEZ; capacitation of its enforcement agencies and prosecution service; proper co-operation with international counterparts; and domestication and implementation of treaties such as the Agreement on Port State Measures.</p> <p>5.5.9. As is the case with Action 3.1, there are significant issues with the current framework and operation of the TAC/FRAP and persistent inequalities throughout the fisheries sector which go beyond “harvesting”. A key consideration includes distinctions between small-scale <u>commercial operators</u> (as opposed to “small scale fishers”) and large industry players. This is entirely distinct from barriers to entry <u>within</u> the small scale fishing sector. The NBES provides no indication that analysis has been carried out to differentiate between barriers to entry <u>to small-scale fishing</u>; barriers to entry to <u>commercial fisheries</u>; and barriers to scaling up small commercial enterprises to compete sustainably with large, existing corporations.</p> <p>5.5.10. It is not clear how development and implementation of a “<i>small-scale sustainable harvesting strategy</i>” of “<i>estuarine and coastal fish and invertebrates</i>” is understood in the context of the Policy for the Small Scale Fisheries Sector in South Africa, 2012 (<b>SSF Policy</b>);<sup>66</sup> the MLRA; the small scale fishing regulations; and existing difficulties experienced by small-scale fishers. In this regard:</p> <p>a) We note the definition of “small scale fishers” in the SSF Policy as “<i>persons that fish to meet food and basic livelihood needs, or are directly involved in harvesting / processing or marketing of fish, traditionally operate on or near shore fishing grounds, predominantly employ traditional low technology or passive fishing gear, usually undertake single day fishing trips, and are engaged in the sale or barter or are involved in commercial activity</i>”.<sup>67</sup></p>
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<sup>66</sup> Published in terms of GN474 in GG 35455 of 20 June 2012.

<sup>67</sup> SSF Policy, pp iv-v.

	<p>b) The definition adopted by the MLRA refers to “a member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish who (a) traditionally operate in near-shore fishing grounds; (b) predominantly employ traditional low technology or passive fishing gear; (c) undertake single day fishing trips; and (d) is engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector” while a “small scale fishing community” is defined as a group of persons who “(i) are, or historically have been, small-scale fishers; (ii) have shared aspirations and historical interests or rights in small-scale fishing; (iii) have a history of shared small-scale fishing and who are, but for the impact of forced removals, tied to particular waters or geographic area, and were or still are operating where they previously enjoyed access to fish, or continue to exercise their rights in a communal manner in terms of an agreement, custom or law; and (iv) regard themselves as a small-scale fishing community”.<sup>68</sup></p> <p>c) It appears that Action 3.2 is directed at this sector – including “opportunities of economic scaling from formalised value-chains”. However, it is entirely unclear how the disparate statements in the explanatory paragraph accompanying Action 3.2 relate to the SSF Policy and legal framework applicable to small scale fishers, whether it in fact adopts the definition in the MLRA, how “barriers to entry” are to be addressed or the relationship between the structure of “small scale fisheries” and notions of economies of scale and formalised value chains.</p> <p>5.5.11. We note that despite the reference to “transformation”, and the NBES listing a number of problems relating to small scale fisheries, there is no mention of issues of tenure security, coastal access, community stewardship of coastal shores and the important role of customary users of marine and coastal zones in combining ecologically sustainable use of marine resources with their conservation. In this regard, the focus on small-scale sustainable harvesting noticeably lacks reference to the FAO Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (<b>Voluntary SSF Guidelines</b>) which provide clear parameters for enhancing food security, nutrition, the right to food, sustainable fisheries management and small-scale fisheries. The guiding principles of the Voluntary SSF Guidelines need to be</p>
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<sup>68</sup> MLRA, s 1.

	<p>incorporated into the MLRA and its regulations such that the state gives effect to the rights to dignity, equality and culture while also securing ecologically sustainable use of marine living resources. This imperative is not accounted for by the NBES, nor the targets related to Action 3.2.</p>
<p>Action 3.3</p>	<p>5.5.12. Aquaculture needs to be approached with extreme caution. To the extent that the “restrictive” nature of the regulatory environment requires environmental impact assessments, case-by-case risk assessment is essential due to the sensitive environment in which aquaculture is undertaken. Beyond this, no further steps have been taken by government regarding the Aquaculture Development Bill which was gazetted for comment on 17 November 2023 and which contemplates the development of small-scale aquaculture as well as other aquaculture sectors. While we do not in this comment express any opinion on the merits or otherwise of the Bill or its specific provisions, it is problematic that it appears not to have been considered in the formulation of Action 3.3 (which seems to repeat some of the issues highlighted in the SEIAS report enclosed with the gazetted draft Bill). As with all other actions, neither the formulation of Action 3.3, nor the accompanying explanatory paragraph, add anything in terms of strategic direction or clarify the role of small-scale (or any other) aquaculture in securing ecologically sustainable use of marine or freshwater species, conservation and ecological sustainability of seascapes or waterscapes, or how any aspect of aquaculture development is to contribute to environmental protection.</p> <p>5.5.13. It is not clear whether this is about indigenous or alien species. If the latter, it needs to be extremely cautiously developed. Marine and freshwater aquaculture needs to be treated differently in terms of risks and opportunities as well as markets. In respect of the marine environment, we note that it is important to remain consistent with existing policy statements, including Priority Statement 3.3.6 of the White Paper on National Environmental Management of the Ocean <i>“Government will establish and enforce regulations controlling the introduction and beneficial use of alien marine species and minimise the threat of invasive species as contemplated in existing legislation”</i>.<sup>69</sup></p> <p>5.5.14. It is not clear which markets the action contemplates as being developed and where difficulties may lie. We also note that there is</p>

<sup>69</sup> White Paper on National Environmental Management of the Ocean published in terms of GN 426 in GG 37692 of 29 May 2014.

	<p>a certain degree of circularity between this aspect of Action 3.3 and the role of market-creation as the focus of “Enabler 4”.</p>
<p>Action 3.4</p>	<p>5.5.15. We note that the National Freshwater (Inland) Wild Capture Fisheries Policy (<b>Inland Fisheries Policy</b>) incorporates the principles of, <i>inter alia</i>, aquatic animal welfare, an ecosystem approach to fisheries, mitigation and precaution while also being concerned with ecological sustainability, equity and value-chain and developmental approaches.<sup>70</sup> We note that principle B 4.12 in the Inland Fisheries Policy which addresses “<i>The mitigation hierarchy</i>” recognises that the “<i>most likely adverse impacts of inland fisheries on biodiversity are the impact of the introduction of alien fish on indigenous species and freshwater ecosystems, and the impact of the exploitation of indigenous fish species</i>”. The former is addressed with reference to Freshwater Ecosystem Priority Areas and fish sanctuaries, while a strong permitting system is recommended to control use.<sup>71</sup> It is critical that these types of controls are in fact developed<sup>72</sup> – mindful also that the tenor of this policy focuses on localised, sustainable use of freshwater fish which are recognised in this policy’s explanatory notes as “<i>the most threatened taxonomic group in South Africa</i>”.<sup>73</sup></p> <p>5.5.16. To the extent that the NBES contemplates economic benefits derived from implementation of the Inland Fisheries Policy, we draw attention to the policy’s observation that “<i>No large-scale, mechanised commercial fishing equivalent to South Africa’s marine fisheries exist on South African inland waters as the productivity of inland waters is too low to support such operations. The few existing permitted fisheries incorrectly regarded as “commercial” fishing operations are in reality small-scale fisheries employing simple, manually operated gears such as treknets or gillnets.</i>”<sup>74</sup> In this regard, gillnets have been recognised as problematic from an ecological sustainability perspective<sup>75</sup> – and we emphasise that the framework presented by the Inland Fisheries Policy provides objectives and principles geared to an ecologically sustainable approach to small-scale and</p>

<sup>70</sup> National Freshwater (Inland) Wild Capture Fisheries Policy published in terms of GN1790 in GG 45954 of 25 February 2022 (**Inland Fisheries Policy**), pp 8-11.

<sup>71</sup> Inland Fisheries Policy, pp 10-11.

<sup>72</sup> See in the context of alien vegetation and the potential violation of the section 24 right, *Kloof Conservancy* paras 116-118.

<sup>73</sup> Inland Fisheries Policy, p 23.

<sup>74</sup> Inland Fisheries Policy, pp 4-5.

<sup>75</sup> See South African National Biodiversity Institute (2019) *National Biodiversity Assessment 2018: The status of South Africa’s ecosystems and biodiversity. Synthesis Report*, South African National Biodiversity Institute, an entity of the Department of Environment, Forestry and Fisheries, Pretoria, p 59; 114.



	<p>recreational fishing – and <u>not</u> the development of commercial operations.</p> <p>5.5.17. According to the 2022 Living Planet Report, populations of freshwater species have seen the greatest overall global decline since 1970 (83%).<sup>76</sup> Infrastructure development, pollution, and overharvesting have all contributed. These are the issues that need to be addressed in order for inland freshwater ecosystems to recover, prior to any effort to increase harvesting from these vulnerable systems. This situation applies equally to South Africa, where the White Paper indicates that among the pressure on biodiversity are “<i>Pollution, and over abstraction of water from ground water aquifers, rivers and wetlands is a case of unsustainable use of natural resources that directly threatens biodiversity, ecosystems, and human well-being.</i>”<sup>77</sup></p>
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## 6. Specific comments relating to Goal 4

- 6.1. NEM:BA requires proper consultation, however, this is not apparent in the NBES. Any strategy which engages with bioprospecting, access and benefit-sharing, must adhere to the requirements of Chapter 6 of NEM:BA and the associated regulations. An important element of this framework is the requirement that before bioprospecting permits are issued, consultation is required with, *inter alia*, “*an indigenous community or a specific individual (i) whose traditional use of the indigenous biological resources to which the application relates have initiated or will contribute to or form part of the proposed bioprospecting; or (ii) whose knowledge of or discoveries about the indigenous biological resources to which the application relates are to be used for the proposed bioprospecting*”.<sup>78</sup> Actions 4.1 to 4.6 appear to propose projects and strategic interventions with little evidence of such consultation. We caution that development of any such strategic actions in the absence of adherence to the necessary stakeholder engagement is unlawful.
- 6.2. Against this background, we provide only short notes and questions raised by the actions set out in relation to Goal 4 in the table below.

<p>Actions 4.1 and 4.2</p>	<p>6.2.1. It is important that these actions are community-led and owned and not industry-led. Action 4.1 appears to have been drafted with industry in mind, and without there having been consultation with holders of indigenous knowledge. There is a real danger of co-optation by industry at the expense of indigenous knowledge and local community benefits. Similarly, it is important that specific</p>
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<sup>76</sup> Available online <<https://www.wwf.eu/?7780966/WWF-Living-Planet-Report-Devastating-69-drop-in-wildlife-populations-since-1970>>.

<sup>77</sup> White Paper, p 12.

<sup>78</sup> NEMBA, s 82(1)(b).

	<p>consideration is paid to the ecological role of biota such as bees in the ecosystem as a whole <u>in the first instance</u><sup>79</sup> and not as primarily a biotrade / harvesting opportunity. We note that if these actions are not community-driven, there is a real risk of exploitation and lack of benefit to local communities and South Africa as a whole.</p> <p>6.2.2. Similarly, we are mindful of the difficulties with ensuring particular conservation protections of insects where ecosystems are broken up through development activities. The industrialisation of biological products needs to be carefully balanced against the role that specific biota play in the ecosystems of which they are part. We would be cautious of upscaling harvesting of key plant species, insects, insect products, kelp and other marine products in such a way that monocultures are developed and such species removed from the landscapes and seascapes in which they play a critical role. For this reason, we note that support for SMMEs and community-based initiatives is critical – as is ensuring that individuals operating within these economic and socio-cultural environments are able to engage with other stakeholders in key value chains with full free, prior and informed consent and with legal frameworks embedded environmental, cultural and equality rights.</p> <p>6.2.3. It is also critical that any bioprospecting or biotrade developments have regard to developing biodiversity reporting frameworks and metrics such as those developed by the JSE, the Task Force for Nature Related Financial Disclosures and the Fairwild Standard and EU Directives on Human Rights and Environment Due Diligence.</p> <p>6.2.4. These actions have clear implications for the fiscus as well as for competition and intellectual property regulatory frameworks. It is unclear whether there has been any attention paid to compatibility with existing regulatory frameworks.</p>
Action 4.3	<p>6.2.5. Action 4.3 raises particular risks in relation to the development of monocultures, and effects of introducing indigenous plants to landscaped and commercial spaces where they are not “locally” indigenous with effects of damaging biodiversity. Use in horticulture / landscaping needs to take account of the mega-diversity of South Africa and guard against hybridisation and dilution of indigenous, wild-growing habitats.</p>

<sup>79</sup> IPBES (2019) *Global Assessment Report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*, available online <<https://www.ipbes.net/global-assessment>>, pp 422; 667.

	<p>6.2.6. While reforestation is an important biodiversity restoration measure, this needs to be distinguished from <u>afforestation</u>, which can be counter-productive if not ecologically appropriate. This is particularly so in South Africa where rangelands serve as an important carbon sink and commercial mass cultivation of plants may not in fact support carbon sequestration or land restoration/rehabilitation.</p> <p>6.2.7. Any approach to carbon sequestration needs proper integration with (and development of) appropriate market mechanisms such as carbon markets and biodiversity credits. There is no indication, in Action 4.3, of which mechanisms are to be targeted.</p>
Action 4.4	<p>6.2.8. In the absence of a clear indication that consultation with traditional “harvesters and healers” has taken place, it is difficult to comment on the viability of this action (including whether scaled cultivation is feasible at all and if so, whether there is a reason to limit this to “community areas on natural lands” rather than urban areas). From a strategic perspective, it is imperative that the relevant parameters which render this action viable are clearly developed and specified.</p>
Action 4.5	<p>6.2.9. There is insufficient information or explanation to comment on this Action. For example, what “potential” is being considered. It is not clear, for example, whether this action contemplates developing crop wild relatives as a source of food security (and if so, what this means in terms of GMOs) or whether the idea is to use their genetic characteristics to improve existing crops. In either case, the implications of genetic modification for existing crop wild relatives, their in situ conservation and the ecosystems of which they are part is not clear from the text of the NBES.</p> <p>6.2.10. It is concerning that Action 4.5 refers to “<i>a section</i>” in the National Plan for Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture (2017) (<b>Plant Genetic Resources Plan</b>) relating to promotion of <i>in situ</i> Crop Wild Relative conservation and management and “<i>a process</i>” to identify Crop Wild Relatives “<i>but no cohesive strategy</i>”. Action 4.5 omits significant information regarding the relationship between the NBES and the Plant Genetic Resources Plan, including: how the NBES is to achieve the cohesion which has not been achieved to date; how to build on the recommendations of the Plant Genetic Resources Plan; why this plan has not been implemented (or the extent to which it has); whether this plan remains viable; and areas where the Plant Genetic Resources Plan needs review in light of the White Paper and</p>

	scientific developments subsequent to its publication, seven years ago.
Action 4.6	<p>6.2.11. Many insect populations are threatened through climate change, extensive land-use change and pesticides.<sup>80</sup> Overharvesting could result in serious additional issues including damage to ecosystem functionality, so efforts to leverage the traditional insect food potential for commercial purposes needs to be conducted in a way that ensures ecological sustainability.</p> <p>6.2.12. We note that the focus on Limpopo and reference to threats to mopani trees through illegal logging, highlights critical omissions throughout the NBES, namely, failure to consider the relationship between the actions and goals of the NBES and other economic activities. In this case, Mopane trees are among those directly threatened by plans to develop the Musina-Makhado Special Economic Zone – a matter currently subject to three separate review applications before the High Court. In this context, it is peculiar that no reference is made to threats posed by mining and industrial use, land use transformation.</p>

## 7. Comments relating to Cross-Cutting Imperative 1

- 7.1. The ultimate goal must be environmental protection. To the extent that this Imperative means that the “Biodiversity Economy” is one of the “measures” contemplated in section 24(b)(ii) of the Constitution to “promote conservation”, this is critical. We emphasise that section 24(b), read as a whole, requires that environmental protection is the ultimate objective to which ecologically sustainable use or ecologically sustainable development of natural resources must contribute. This means that economic outcomes cannot be the primary objective of ecologically sustainable use and all cross-cutting imperatives of the NBES must be construed as conservation- and environmental protection-focused.
- 7.2. It is not clear that Actions 5.1 to 5.4 are in fact focused on environmental protection. To the extent that Actions 5.1 to 5.4 can be understood as conservation-focused, these may be actions contributing to the overall constitutional obligation of ensuring ecologically sustainable use. However, it is not clear that this is what the NBES intends:

<sup>80</sup> A Hochkirch et al (2023) “A multi-taxon analysis of European Red Lists reveals major threats to biodiversity” in *PLoS ONE*, 18(11), available online <<https://doi.org/10.1371/journal.pone.0293083>>.

- 7.2.1. First, as set out in the table below, there a number of questions arising from the explanatory paragraphs and targets accompanying these actions;
- 7.2.2. Second, these actions are presented as “cross-cutting” imperatives, however, there is no indication of how these actions are to intersect with, combine with and/or frame Goals 1 to 4; and
- 7.2.3. Third, the notion of a “positive feedback loop” in the language of Cross-Cutting Imperative 1 itself, is not clarified and it is not clear how Actions 5.1 to 5.4 are to be construed if they have conservation-focused outcomes which do not support Goals such as wildlife ranching or bioprospecting.

7.3. Specific comments regarding Actions 5.1 to 5.4 are set out in the table which follows.

Action 5.1	<p>7.3.1. South Africa has committed to expanding the conservation estate to a total coverage of 30% by 2030 pursuant to Target 3 of the Global Biodiversity Framework (<b>GBF</b>). In this context, Action 5.1 must be guided by South Africa’s international biodiversity conservation obligations and not the principle of ecologically sustainable use (let alone economic exploitation). While the pursuit of a landscape and seascape approach contemplated in Action 1.1 may support this objective, it is unclear how other contemplated actions in the NBES do so. It is also unclear why the 30 x 30 target is expressed in Action 5.1 with reference 2040 – when the global obligation indicates a target date of 2030.</p> <p>7.3.2. It is critical that expansion of the conservation estate accords with fine-scale biodiversity planning i.e. it is necessary to conserve what is worthy of conservation – not merely to expand the “conservation estate” for purposes of working towards GBF targets. The purpose behind the GBF is to ensure that there is representative conservation of biodiversity and this requires proper analysis – not merely documentation and recording of “natural resource based land-use” to “up the numbers”.</p> <p>7.3.3. We flag that issues that require resolution extend well beyond those relating to land claims, and include a wide range of complex debates and areas for targeted engagement ranging from agreement on what can be considered an OECM to problems of competing development uses (an issue of key relevance to Goal 1 of the NBES).<sup>81</sup> In this regard, it is unclear whether this action has</p>
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<sup>81</sup> See for example, DFFE, *Synthesis Workshop Outputs: 30x30 Implementation Workshop 6-8<sup>th</sup> June 2023*, available online at [https://www.dffe.gov.za/sites/default/files/docs/synthesis\\_30x30implementationworkshopreport.pdf](https://www.dffe.gov.za/sites/default/files/docs/synthesis_30x30implementationworkshopreport.pdf)

	<p>accounted for the action plan relevant to South Africa’s 30 x 30 commitments, including results of consultations held to date<sup>82</sup> – particularly as they pertain to OECMs and the land-uses contemplated or implied by the Goals of the NBES.</p>
<p>Action 5.2</p>	<p>7.3.4. We support the notion that the obligation to protect the environment through conservation and ecosystem management should be “broadened” horizontally beyond the State. However, this assumes (a) that the State continues to take primary responsibility for conserving biodiversity and protecting the environment in line with its duty to hold South Africa’s environment and its biodiversity in trust;<sup>83</sup> and that (b) the private sector and communities are not already bearing responsibility for <i>in situ</i> conservation. Civil society actors, including community members and NGOs are already bearing considerable responsibility for driving conservation efforts – in many cases resulting in conflict between mining, industrial and agricultural sectors and organs of state permitting listed activities in sensitive areas. “Broadening” participation, as contemplated in Action 5.2, therefore needs specific commitments by the State to promote conservation as a mode of ecologically sustainable development with priority over competing, unsustainable developments such as mining and to ensure that policy, regulation and administrative decision-making consistently regards the conservation imperatives as relevant considerations (as understood in section 24O of NEMA).</p> <p>7.3.5. We support the notion of moving away from fortress conservation and engaging in partnerships to ensure sustainable conservation outcomes. However, for this objective to be achievable, we emphasise that the State needs to play an active role in <u>facilitating</u> bottom-up consultation while actively engaging with industrial and commercial sectors currently undertaking unsustainable economic activities to transition to business and operating models which are supportive of conservation outcomes, ecological sustainability, prevention of pollution and environmental degradation and approaches to land-use such as living landscapes and agro-ecosystems. We emphasise that this not only requires innovative funding models, and “<i>increased ease of doing business and certification schemes</i>”, but alignment of government policy and incentives across sector and government departments to phase out destructive activities such as unsustainable mining practices while</p>

<sup>82</sup> See for example, DFFE, *Workshop on the Implementation of 30x30: Workshop Summary Report*, 20 June 2023, available online < <https://www.dffe.gov.za/sites/default/files/docs/30x30implementationworkshopreport.pdf>>.

<sup>83</sup> NEM:BA, s 3(1)(a).



	<p>ensuring that competition, tax and intellectual property regulation support the mainstreaming of biodiversity conservation and best scientific practice in ecosystem management.</p>
<p>Action 5.3</p>	<p>7.3.6. In principle, the notion of biodiversity economy enterprises subsidising conservation is supported. However, <u>conservation</u> funding should not be directed at enterprises aiming purely at economic development. Such an approach would risk diluting already-limited conservation funding and initiatives to ensure environmental conservation which are pursued in their own right. Moreover, it is unclear <u>how</u> business enterprises focused on generating income for communities, private farmers, bioprospectors and so on are to “subsidise” conservation. For example, it is unclear whether special taxes are to be imposed, whether permitting fees are contemplated, whether conditions requiring investment into conservation efforts are to be imposed on various environmental uses, whether the approaches considered include rehabilitation and restoration funds, and so on.</p> <p>7.3.7. When considering income streams from the biodiversity economy, the intrinsic cultural and societal value of biodiversity and the value of ecosystem services (including but not limited to carbon sequestration and storage, rain generation, flood control and prevention of erosion) should be accounted for.</p>
<p>Action 5.4</p>	<p>7.3.8. To the extent that all actions contemplated in the NBES are subject to conditions which ensure that ecological infrastructure is improved, rehabilitated and restored, we would support this Action as an important cross-cutting imperative.</p> <p>7.3.9. However, we note that rehabilitation and restoration of ecological infrastructure cannot be dependent on the existence of activities focused on economic outcomes and needs to also be supported as part of conservation efforts and obligations to prevent pollution and ecological degradation. We also emphasise that certain activities contemplated in the NBES are incompatible with improvement and enhancement of ecological infrastructure (including but not limited to some of the wildlife uses contemplated in Goal 2, risks associated with expansion of commercial fisheries contemplated in Goal 3 and possible mono-culture consequences of linked to Goal 4).</p> <p>7.3.10. We note that Action 5.4 focuses on “land use” and query whether this is sufficient given the focus in the NBES on <u>species-level</u> use</p>

	as well as uses of biota in waterways and marine spaces and inclusion of actions relevant to “seascapes” and freshwater.
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## 8. Comments regarding Cross-Cutting Imperative 2

- 8.1. Transformation and growth are not synonymous. We note that “growth” of the biodiversity economy and its “transformation” are not necessarily objectives which can be pursued using the same strategies.
- 8.2. Cross-Cutting Imperative 2 must take a rights-based approach with regard to South Africa’s Bill of Rights. We emphasise that transformation must take account of the obligations arising from section 9 of the Constitution but also the need to ensure transformation of the “biodiversity economy” to respect, promote, protect and fulfil the rights to an environment that is not harmful to health and well-being and to have the environment protected for the benefit of present and future generations in section 24 of the Constitution, as well as important rights relating to culture, food and water security, dignity, life and the critical principles pertaining to environmental health and animal wellbeing encapsulated in South Africa’s environmental legislative framework.
- 8.3. Clarity is required regarding what is meant by “transformation” as the NBES is not necessarily “pro poor”. In this regard, we draw attention to the international guidance adopted by the conference of parties to the Convention on Biodiversity in respect of *Biodiversity for poverty eradication and sustainable development*<sup>84</sup> which provides a clear framework for pro-poor approaches to integrating biodiversity conservation and ecologically sustainable use of the living natural environment while developing poverty-eradication strategies at national and subnational levels with regard to international development indicators. While predating the sustainable development goals, the approach is consistent with the one which might ensure societal participation and development, promote the better realisation of human development needs while adhering to critical principles relating to biodiversity conservation.

Actions 6.1 to 6.3	6.1	8.3.1.	The explanatory paragraphs in relation to these two actions raise critical questions regarding viability of Goals 1 to 4 in the NBES.
		8.3.2.	For example, reference to a “game donation programme” in Action 6.1 and Action 6.2 highlights problematic assumptions in Goal 2 relating to the ability to use recreational hunting for purposes of community development. It would seem that, rather than elements of a “cross-cutting imperative”, these are specific difficulties which need to be assessed for purposes of determining whether Goal 2 is viable at all in terms of the objective of “transformation”. We flag that Action 6.2 as a whole appears as a problem statement more

<sup>84</sup> UNEP/CBD/COP/DEC/XII/5 of 17 October 2014.

	<p>properly addressed <u>prior</u> to formulating Goals 1 and 2 as part of the NBES.</p> <p>8.3.3. Similarly, Action 6.3 appears to contemplate development of economic strategies which ought to be part of the consultation process <u>prior</u> to identifying the strategic focus of the NBES as a whole. Although the explanatory statement accompanying Action 6.3 certainly carries through a consistent theme of Goals 1 to 4 on SMMEs, “communities” and PDIs, the absence of critical attention to existing transformation initiatives, analysis of existing attempts to open relevant sectors to these groups, problematic and uncritical assumptions about the target demographics and acknowledgment of a <u>lack of strategy</u> underlines the overall problem inherent in the NBES: that it has been published prematurely, remains vague at best, and is in many ways simply a collation of disparate, untested, and ununified ideas.</p>
Action 6.4	<p>8.3.4. While traditional authorities are undoubtedly an important stakeholder group, we would question whether Action 6.4 should be a self-standing action in terms of “transformation” and what type of transformation is envisaged. For example, we note that an emphasis on “chiefs” in environmental consultation processes has at times been enormously problematic and the law requires consultative processes to engage with community members directly, rather than adopting a top-down approach.<sup>85</sup> On this basis alone, and given the vagueness with which the NBES as a whole is presented, we would urge caution and a far greater level of detail than is provided in the NBES.</p>
Actions 6.5, 6.6 and 6.8	<p>8.3.5. Actions 6.5 and 6.6 appear to deal with the need to review and improve the approach to benefit-sharing agreements while Action 6.8 deals with co-management agreements. All three Actions appear to address different aspects of conservation-related agreements that have experienced difficulties to date and/or require better implementation/support. In principle, we support the improvement of tools which seek to improve conservation outcomes, ensure equitable collaboration arrangements to promote such outcomes and which secure socio-economic benefits at grass-roots level. However, it is not possible to provide meaningful comment on what is intended by Actions 6.5, 6.6 and</p>

<sup>85</sup> See for example *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) paras 92-93; *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC) paras 95-97.

	<p>6.8 insofar as the explanatory statements remain vague, there is no supporting material explaining where benefit-sharing and/or co-management agreements have been successes or failures (or how such judgments are to be made and measured).</p> <p>8.3.6. It is also concerning that there is no clear reference to international standards supporting best practice in relation to benefit-sharing and co-management agreements, nor recognition of models of community-led conservation coupled with tenure security. As such these actions are in many ways simply vague expressions of intent and “floating” actions with little clear conceptual basis which can be critically evaluated against South Africa’s legal obligations or international best practice.</p>
Action 6.7	<p>8.3.7. It is unclear what is meant by “cross-subsidisation”.</p> <p>8.3.8. Similarly, far greater detail regarding how public works programmes can be integrated across the various actions beneath Goals 1 to 4 is required for purposes of providing meaningful comment.</p>
Action 6.9	<p>8.3.9. It is not clear how Action 6.9 is a cross-cutting issue, rather than supplementary to Action 3.4.</p>

## 9. Comments regarding Enablers 1 to 4

- 9.1. We have not provided detailed comments on the “Actions” presented below the various enablers, primarily as these are difficult to assess where the Goals and Cross Cutting Imperatives are in many respects vague and much of what is stated at paragraphs 6.7 to 6.10 needs to be properly linked to specified Goals, Actions and their Targets in order to be meaningful.
- 9.2. At this stage, however, we have noted the following issues / concerns.

Enabler 1	<p>9.2.1. When considering the Game Meat Strategy, which has been approved by the Cabinet for implementation, the impact of securing and converting land for game meat production on the wider ecology, the animal welfare implications of game meat production, zoonotic diseases and the potential for increased demand for game meat to result in additional pressure on wild populations, must be taken into account.</p>
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	<p>9.2.2. Action 7.2 relating to tools to improve the environmental duty of care, animal well-being and ethical and effective practices is paramount as integral to the principles of NEMA, the policy position expressed in the White Paper and South Africa’s constitutional imperatives. However, we would question whether this “enabler” (in effect, a restatement of the constitutional and statutory obligations resting on the State) is one which supports actions such as trophy hunting, or whether these imperatives in fact indicate that certain actions contemplated in the NBES (such as trophy hunting and expansion of commercial fisheries) are inimical to best practice and South Africa’s constitutional democracy.</p> <p>9.2.3. We also note that while voluntary standards and certification schemes may be valuable:</p> <ul style="list-style-type: none"><li>a) Any certification scheme needs to be credible and independently verified.</li><li>b) We question whether norms and standards (and voluntary standards) are sufficient, or whether these need to be accompanied by strengthened regulatory, implementation and enforcement standards. Further, there is no indication whether the DFFE has examined <u>which</u> regulatory models are of most benefit and most likely to lead to behavioural change which supports a move away from unsustainable, towards ecologically sustainable, practices.</li><li>c) It is entirely unclear whether consideration has been given to the role of environmental impact assessment in the various actions contemplated in the NBES, including the various contexts in which Actions may take place with varying interrelationships between environmental, social, cultural and economic impacts – and what relationship, if any, they have to norms, standards, certification schemes or the development of such regulatory tools.</li><li>d) There is no indication as to whether strategic environmental assessment has been carried out in relation to the contemplated actions – including the development of OECMs. There is, accordingly, no indication whether upstream and downstream impacts of the proposed NBES when considered as a whole; in relation to specific Goals, Actions or in relation to other government planning and policy – and certainly no</li></ul>
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	<p>indication of critical risks, thresholds or standard-setting that may emerge from such assessment.</p> <p>9.2.4. In respect of Action 7.3, it is not clear which regulatory framework needs to be reviewed.</p> <p>a) This is problematic, as the Actions contemplated by the NBES cover a broad range of environmental laws and regulatory instruments as well as sector-specific legislation, regulations, and policy pertaining to, <i>inter alia</i>, agriculture, fisheries, threatened species and animal well-being. Moreover, these Actions have implications for a host of regulatory frameworks including, but not limited to, those relating to land-use, taxation, competition, intellectual property, traditional leadership, marine spatial planning, tourism, equality, health, food standards and employment – and an equally broad range of international regulation and South African obligations. None of these are properly specified in relation to various Actions and, as noted above, key policies are in many cases not considered (or even mentioned).</p> <p>b) We emphasise that each Action set out in relation to Goals 1 to 4 needs proper consultation, a clear detailing of the applicable regulatory frameworks and clear steps identified where legislative or regulatory reform is required. In all cases, however, this must be driven by the constitutional imperatives of section 24 of the constitution.</p> <p>c) For this reason, we note that any attempts to streamline regulation for purposes of “ease of doing business” <u>must</u> ensure proper environmental oversight is retained by the relevant environmental authorities, and that checks and balances are in place (and strengthened) to ensure that ecological and environmental sustainability and ethical business practices are pursued.<sup>86</sup></p> <p>9.2.5. Action 7.4 appears to be a truism insofar as cross-sectoral co-ordination is essential for any aspect of the NBES to prove viable. Moreover, intergovernmental co-ordination is a constitutional imperative as well as one integral to NEMA and NEM:BA. The</p>
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<sup>86</sup> See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) (*Fuel Retailers*) paras 85-86.



	<p>environmental framework requires that various organs of state must prepare various planning tools addressing their spheres of operation.</p> <ol style="list-style-type: none"> <li>a) To the extent that the NBES affects these environmental management plans and similar planning instruments, there is no indication in the NBES that consideration has been given to how integration with or amendment of such instruments is to occur, the timelines for doing so, nor how any aspect of the NBES is to support an approach to biodiversity mainstreaming across government departments and spheres of government.</li> <li>b) To date, such co-ordination in respect of land-, water- and seascapes has not occurred, been suboptimal or very slow. This is frequently a result of clashes over developmental objectives and inadequate attention paid by planners, developers and permitting authorities to critical biodiversity area mapping. It can also be attributed, in the marine and coastal spheres, to the slow pace of marine spatial planning and apparent departure from the emphasis on co-ordination expressed in the Oceans Policy.</li> <li>c) Remedying these issues requires a clear and concerted government focus and political will, not only for purposes of ensuring that any economic benefits from South Africa’s biodiversity is ecologically sustainable, but also to ensure that government adheres to its obligations to respect, protect, promote and fulfil the totality of the right to environmental protection as required by section 7(2) read with section 24(b) of the Constitution.</li> </ol>
<p>Enabler 2</p>	<p>9.2.6. Action 8.1 raises an important problem of lack of State capacity to support and drive the biodiversity economy. Across a range of environmental interventions, government has indicated lack of capacity to drive conservation efforts and ensure implementation of measures giving effect to its environmental obligations. In this regard, a heavy burden has fallen to the non-profit and academic sectors to support scientific developments. Against this background, it is difficult to see how the ambitions expressed in the NBES can possibly be realised. Far greater planning detail is required for the public to be able to comment meaningfully on whether the strategy is viable – particularly given the clear need for extensive co-ordination, consultation, reform, monitoring, enforcement and funding required to realise any one of the contemplated Actions.</p>

	<p>9.2.7. Capacity constraints have been recognised as a key factor contributing to the parlous state of many of South Africa’s provincial reserves.<sup>87</sup> This calls into question whether the NBES is in fact workable, given the significant capacity constraints already faced in the context of protected areas.</p> <p>9.2.8. We note the reliance on non-profits and the private sector in respect of capacity building. We do not regard this as a sustainable approach (while noting that cross-sectoral partnerships, public-private partnerships and various forms of collaborations are valuable in terms of mainstreaming environmental protection). Further, caution should be exercised in regarding hunting associations as appropriate bodies for developing capacity within the hunting value chain. It is not clear that this is compatible with their being largely profit-driven bodies.</p> <p>9.2.9. In respect of research initiatives, while we support the need for co-ordination of research initiatives and the importance of ensuring that all aspects of the NBES are properly scoped (including through environmental and social risk assessments), we question the meaning of a “virtual” institute and the relationship between the description of Action 8.3 and its explanatory paragraph. In particular, we note that various “communities” referenced in the NBES (rural communities, small-scale farmers/fishers, marginalised communities and so on) are, in part, excluded from the formal economy as well as economic and social opportunities <u>because</u> of lack of access to, <i>inter alia</i>, infrastructure, educational opportunities, information technology, communications and institutions of higher learning / research institutes. The variations in access to social and economic goods in South Africa are extensive; power dynamics between and within “communities” extremely diverse; and specific socio-economic barriers, problems and inequalities related to biodiversity and environmental factors manifest in vastly different ways. Without accounting for this degree of variation, the descriptive paragraph accompanying Action 8.3 risks taking an approach which is top-down and exploitative without ensuring benefits that environmental benefits flow to the “communities” which are consistently referenced in the NBES without definition, elaboration or nuance.</p>
Enabler 3	9.2.10. Generally, we support the notion of ensuring that financial support sustains conservation – and the broader obligation of ensuring long-

<sup>87</sup> See T Patel et al (2023) *The State of Provincial Reserves in South Africa, Challenges and Recommendations*, available online <<https://ewt.org.za/wp-content/uploads/2023/04/Provincial-Reserve-Management-Report-2023-FINAL-Print.pdf>>.

	<p>term environmental protection. Such support, however, is not only necessary for purposes of securing land and infrastructure (as is emphasised in the Actions detailed in relation to Enabler 3) but is necessary for purposes of ensuring education, skills-development and capacity-building within the State, private and civil society sectors; securing funding to support scientific research for purposes of ensuring that the best available science informs environmental management decision-making and strategy design; and that the burden of environmental protection does not fall to non-profits and communities.</p> <p>9.2.11. The statements in respect of Enabler 3 are insufficient to enable meaningful comment about whether the NBES envisages specific actions and strategic interventions to ensure funding, accountability, transparency and capacitation of the State authorities responsible for environmental decision-making, implementation and enforcement of environmental laws, and the practicalities of funding the ambitions expressed in Goals 1 to 4 and Cross-cutting Imperatives 1 and 2.</p> <p>9.2.12. While we support the notion of using innovative and non-consumptive funding models to support biodiversity conservation and a focus on landscapes, seascapes and mainstreaming of biodiversity protections, it is entirely unclear how the NBES, under the auspices of the DFFE, is to ensure that models such as responsible ecotourism, conservation bonds, carbon markets and biodiversity credits are to be developed, leveraged and aligned with best scientific data, principles of precaution, global markets and other infrastructure, legal architecture, regulation, and trade mechanisms which enable their development and success. In this regard, reference to consultation with organs of state such as the National Treasury, South African Reserve Bank, Johannesburg Stock Exchange, Competition Commission and South African Revenue Authority are notably absent. Similarly, engagement with the financial sector and international financial initiatives supporting international trade and novel instruments is absent from the Actions identified and described in respect of this Enabler. This raises significant questions regarding the viability of the NBES as a whole.</p> <p>9.2.13. We emphasise that all capital investment in infrastructure needs to be conditional on clear thresholds beyond which environmental impacts are not acceptable. For this purpose, a process of transparent standard-setting for all investment instruments needs to be thoroughly undertaken with due regard to international best practice, concrete measures for purposes of enabling due diligence and key environmental principles such as those focusing on</p>
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	<p>precaution, science-led decision-making, inclusive and participatory decision-making, inter-generational equity and animal well-being. It is also critical that standards consider critical needs such as climate adaptation and mitigation, while also embedding approaches focused on ensuring ecosystem integrity and connectivity; ecological sustainability; habitat rehabilitation and restoration and prevention of degradation to ecosystems through, <i>inter alia</i>, pollution, introduction of alien species and over-exploitation. Needless to say, these are complex considerations that require, at a minimum, detailed planning and development; clear policy and strategic direction; stakeholder buy-in; and proper implementation.</p> <p>9.2.14. Accordingly, any investment and financing tools must be integrated into the existing framework, in terms of NEMA, pertaining to Environmental Impact Assessment. To the extent that such standard-setting and investment instruments are to operate on a national, sector-wide, landscape or seascape basis – or any other basis at scale – we emphasise that this requires, thorough and transparent strategic environmental assessment. This in itself supports the need for clear and comprehensive strategic environmental assessment regulation which is currently absent from South Africa’s environmental framework.</p> <p>9.2.15. Much greater detail is required in respect of the “examples” itemised in respect of Action 9.4. It is not acceptable that the NBES should list such projects as “proofs of concept” without making details of these projects available to the public in an easily accessible format for purposes of consideration and comment.</p> <p>9.2.16. We note that the Biodiversity Trust Fund is already envisaged in NEM:BA. The NBES does not explain why it is necessary to “<i>lobby Treasury</i>” to approve this fund – and why this has already not been addressed as part of the obligations of organs of state, including the DFFE and National Treasury, to co-operate in relation to biodiversity interventions. Similarly, it is not possible to comment on the merits or otherwise of the proposal presented to National Treasury by SANBI without any details being provided in the NBES (or any link to the relevant documentation and/or plan). It does however remain unclear where the funds for this “Fund” are to be sourced, how it will be managed, or whether criteria for accessing the fund will be developed.</p> <p>9.2.17. The notion of linking financial mechanisms to conservation targets may have potential – however, as expressed in Action 9.6, this is little more than a “brainstorm”. It is entirely unclear how the example of</p>
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	<p>the GEF Wildlife Conservation Bond or actions of the Sustainable Finance Coalition may be pursued as no detail is provided (nor is any detail about which “iconic marine species” are being contemplated). It is also unclear whether these initiatives are at all compatible with the approach to consumptive wildlife use outlined in relation to Goal 2.</p> <p>9.2.18. The concepts of “Natural Capital Accounting”, “Payment for Ecosystem Services” and “Carbon Sequestration” are complex. They require thorough explanation and a clear indication of how feasible these systems are in terms of “unlocking finance” and Enabler 3 within the time-horizons expressed in the NBES. In the absence of any elaboration, this is another “Action” which appears little more than a brainstorm – and one on which it is impossible to comment. We note further, that there is no attempt in the NBES, to present these concepts in a manner which is accessible to non-specialist stakeholders who are interested in, or directly affected by, the “strategies” presented.</p>
<p>Enabler 4</p>	<p>9.2.19. Enabler 4 indicates a problematic circularity in the NBES: on the one hand the Goals of the NBES seek to “open” markets to “previously disadvantaged individuals” and “communities”; on the other hand, such access is seen as an “enabler”. This suggests that the actions and goals contemplated in the NBES are inherently questionable in terms of their practicability – and in many cases are little more than ambitious (at best) and rhetoric (at worst). This is enormously concerning. In order to mainstream biodiversity conservation and move away from “fortress conservation”, it is clearly necessary to ensure that all South Africans, and all sectors of society, are able to engage with natural spaces, participate in and grow conservation initiatives, and have their ecologically sustainable use of the living and non-living environment secured for present and future generations. This requires a road-map which is clear, realistic and which takes account of current uses, social and economic realities and needs and the complex exercise required by section 24(b) of the Constitution. Any notion of market-access which does not articulate <u>how</u> ecologically sustainable use is to be secured <u>while also</u> promoting social and economic development falls far short of governments obligations in terms of section 24(b)(iii). The expressions of intent in Enabler 4 read with Goals 1 to 4 and Cross-Cutting Imperatives 1 and 2 are entirely inadequate in this regard.</p> <p>9.2.20. The notion of an “integrated booking” system is potentially a good idea. However, its feasibility is questionable given existing difficulties</p>

and fragmentation of permitting, access and accommodation systems, and the wide range of problems with existing online and in-person access systems from down-time of SANPark's Wild Card system to limited ability to obtain TMNP activity permits and the on-paper and ad hoc permits required for entering smaller reserves. It is difficult to understand how this "Enabler" is to be funded, the timelines for its realisation and how this will intersect with timelines and Actions presented in the remainder of the NBES.

9.2.21. As indicated above, the descriptor below Action 10.2 places Goal 2 into question in terms of practicality and whether it is in fact appropriate at all as a "transformational" objective. We flag that "fair chase" hunting may not be culturally important to indigenous communities and, accordingly, it may be inappropriate to promote this activity as a commercial opportunity – particularly if this conflicts with local norms and priorities and constitutional conceptions of ecologically sustainable use. There is no indication in the NBES of whether this notion has been tested in the "communities" which are contemplated in relation to reaping benefits from Goal 2.

9.2.22. Proposed Action 10.4 is to "*Develop and implement a strategy for a market for regulated domestic trade in high-end parts and derivatives (e.g. rhino horn and elephant ivory) for local value-add enterprises based on processing and use of products.*" The NBES elaborates to say that "*Innovative approaches are needed to identify products, and develop the necessary local markets. For example, health clinics to administer traditional remedies using rhino horn for health tourists from the Far East, or ivory carving being done locally for local sale and export for personal use.*" Of great concern is that if such markets and products were to take hold in South Africa it would result in severe negative impacts for rhinos, elephants, and potentially other species.

- a) Legal domestic markets for wildlife parts and products from threatened species, such as rhino horn and elephant ivory, stimulate consumer demand which can result in increased poaching and illegal trade putting already threatened populations at further risk, and complicate enforcement efforts – thus undermining international efforts to reduce illegal trade and South Africa's obligations to take necessary regulatory and



	<p>enforcement measures including the adoption of “<i>internal trade restrictions</i>”.<sup>88</sup></p> <p>b) Critically, the notion of “health tourism” based on rhino horn appears to be deliberately circumventing the purpose and object of CITES and South Africa’s obligations in respect of threatened species and animal trade. Presumably, the target market is high-end tourists from countries such as China and Vietnam where rhino horn has been linked to traditional Chinese Medicinal (<b>TCM</b>). However, this appears to counter demand-reduction strategies in those countries. Moreover, the development of a medical tourism market based on use of rhino horn contradicts data (including from proponents of trade legalization) that indicates that rhino horn lacks medicinal properties; is very rarely used by TCM practitioners (if at all); may be overused or misused when not prescribed by TCM practitioners; and is increasingly associated with status and symbolism, rather than medical properties.<sup>89</sup></p> <p>c) In respect of elephant ivory, the Conference of Parties under CITES has recommended a closure of domestic markets for commercial trade in ivory while contemplating a range of measures to restrict and tightly control trade in both raw and worked ivory.<sup>90</sup> In the absence of clear measures to address existing issues with regulation of the illegal ivory trade, it is entirely unclear how Action 10.4 is to be pursued without South Africa violating its international obligations, undermining</p>
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<sup>88</sup> Conference of Parties, CITES, Resolution Conf. 9.14 (Rev. COP19) on the Conservation of and trade in African and Asian rhinoceroses, available online <<https://cites.org/sites/default/files/documents/COP/19/resolution/E-Res-09-14-R19.pdf>>.

<sup>89</sup> See for example Cheung et al (2021) “Rhino horn use by consumers of traditional Chinese medicine in China” in *Conservation Science and Practice*, 3, available online <<https://doi.org/10.1111/csp2.365>>, p 5; HN Dang Vu et al (2020) “Reference group influences and campaign exposure effects on rhino horn demand: Qualitative insights from Vietnam” in *People and Nature*, 2, 923–939, available online <<https://doi.org/10.1002/pan3.10121>>; Cheung et al (2018) “Medicinal Use and Legalized Trade of Rhinoceros Horn from the perspective of Traditional Chinese Medicine Practitioners in Hong Kong” in *Tropical Conservation Science*, 11, 1-8, available online <<https://doi.org/10.1177/1940082918787428>>, p 2; S Moneron et al (2017) *Pendants, Powder and Pathways: A rapid assessment of smuggling routes and techniques used in the illicit trade in African rhino horn*, available online <<https://www.trafficj.org/site/assets/files/1313/pendants-powder-pathways.pdf>>, p 2; Y Goa et al (2016) “Rhino horn trade in China: An analysis of the art and antiques market”, 201, 343-347, available online <<http://dx.doi.org/10.1016/j.biocon.2016.08.001>>, p 343; T Milliken and J Shaw (2012) *The South Africa – Viet Nam Rhino Horn Trade Nexus: A deadly combination of institutional lapses, corrupt wildlife industry professionals and Asian crime syndicates*, available online <[https://www.trafficj.org/publication/12\\_The\\_SouthAfrica-VietNam\\_RhinoHorn\\_Trade\\_Nexus.pdf](https://www.trafficj.org/publication/12_The_SouthAfrica-VietNam_RhinoHorn_Trade_Nexus.pdf)>, p 15; D Graham-Rowe, D (2011) “Biodiversity: Endangered and in demand” in *Nature*, 480, S101–S103, available online <<https://doi.org/10.1038/480S101a>>; American College of Traditional Chinese Medicine (2011) *Statement opposing the use of rhino horn in medicines by the American College of Traditional Chinese Medicine and Council of Colleges of Acupuncture and Oriental Medicine*, available online <<https://awsassets.panda.org/downloads/citeslixinhuangletter.pdf>>.

<sup>90</sup> Conference of Parties under CITES, Conf. 10.10 (Rev. Cop19), *Trade in elephant specimens*, available online <<https://cites.org/sites/default/files/documents/COP/19/resolution/E-Res-10-10-R19.pdf>>.

	international efforts to prevent poaching and illegal trade and to avoid reputation-damaging conduct that facilitates increased criminality.
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## 10. Conclusion

- 10.1. We hope that our comments will be constructively considered when making a decision on whether and/or how to proceed with the NBES. We request that once the DFFE has reviewed all comments, that a comments and responses table be made publicly available, evidencing the manner in which all Stakeholders' comments were evaluated and analysed by the DFFE.
- 10.2. We have crossed the ecological ceiling where nature is declining. Biodiversity is being lost at an unprecedented rate and our extractive, wasteful, and polluting linear economy is increasingly recognised as one of the main underlying causes of this crisis. Today, more than 90% of biodiversity loss is due to the extraction and processing of natural resources. To halt and reverse biodiversity loss, we need to fundamentally transform the way we produce, use, and consume. This is not only a practical necessity, but embedded in the constitutional obligation on the State to secure ecologically sustainable use of natural resources, and everyone's concomitant right to have natural resources used only in an ecologically sustainable manner for purposes of fulfilling the right to have the environment protected for the benefit of present and future generations.
- 10.3. The Constitutional Court has confirmed that no developmental activity can be built, or survive, on a "*deteriorating environmental base*".<sup>91</sup> Biodiversity is critical to this base, and has risen to the top of the global agenda as the planet faces its sixth mass extinction. The IPBES has argued that global biodiversity loss can only be tackled through transformative economic, social, political, and technological changes.
- 10.4. As we have demonstrated, the NBES falls short of such transformational approaches – including those which promote inclusivity, equity and societal wellbeing. Moreover, it fails to satisfy the constitutional obligation to "*secure ecologically sustainable use of natural resources*" and is inconsistent with existing biodiversity policy, including the White Paper and the *Policy Position*.
- 10.5. Critically, the NBES is removed from South Africa's legal understanding of the inter-relationship between environmental protection, animal well-being, conservation and the values of dignity, compassion and humaneness which are foundational to our constitutional democracy. For any strategy pertaining to ecologically sustainable use to pass constitutional muster, it must be premised on a sound understanding of this

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<sup>91</sup> *Fuel Retailers* para 44.

framework – and the collection of ideas framed as “Actions” in the NBES do not do so.

- 10.6. Accordingly, we request that the NBES is withdrawn, amended substantially and made subject to widespread and meaningful consultation to bring it in line with the constitutional imperative of “*securing ecologically sustainable use.*”

Yours faithfully,



**BIODIVERSITY LAW CENTRE NPC**  
**Per Kate Handley and Nina Braude**



**EMS FOUNDATION NPO**  
**Per Michele Pickover**