BIODIVERSITY LAW CENTRE
LAW FOR NATURE

Date: 25 July 2024

TO:	**The Director-General: Department of Forestry, Fisheries and the Environment**	
	Att: Ms Magdel Boshoff	biodiversitybill@dffe.gov.za
COPY TO:	**Office of the Minister for Forestry, Fisheries and the Environment**	
	Ms Lee-Anne Levendal	llevendal@dffe.gov.za
FROM:	**BIODIVERSITY LAW CENTRE**	kate@biodiversitylaw.org nina@biodiversitylaw.org
Total pages:	70	Our ref: BLC/Comments/BioBill

COMMENTS ON THE NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY BILL [B-2024] PUBLISHED IN TERMS OF GN 4887 IN *GOVERNMENT GAZETTE 50706* OF 24 MAY 2024 | BIODIVERSITY LAW CENTRE

1. Introduction

1.1. This comment is submitted by the Biodiversity Law Centre (**BLC**) in response to the National Environmental Management: Biodiversity Bill published in terms of Government Notice 4887 in *Government Gazette 50706* of 24 May 2024 (**the Bill**).

1.2. The 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 preventing pollution and ecological

DIRECTORS
Kate Handley (Executive)
Cormac Cullinan
Nicole Loser
Ian Little
Alexander Paterson

biodiversitylaw.org
18A Ascot Road, Kenilworth 7708
www.biodiversitylaw.org

Biodiversity Law Centre NPC
Reg No. 2021/631341/08
NPO No. 264 246 NPO
PBO No. 930072892
Law Clinic registered with the Legal Practice Council

degradation; promoting conservation, and securing ecologically sustainable development.

1.3. Below, in paragraph 3, we present our general comments on the Bill. We follow these general and thematic considerations with comments directed at the definitions as well as chapter of the Bill in paragraphs 4 to 0. In respect of each chapter, we include a table including clause-by-clause comments. We enclose, with this submission, a Word document which reproduces our comments on the Comment Form issued by the Department of Forestry, Fisheries and the Environment (**DFFE**).

1.4. Before addressing the Bill itself, we outline the constitutional context in paragraph 2. We do so, as this is the basis on which the validity of any biodiversity Bill must be measured. Further, we draw on our expertise as biodiversity attorneys, experienced in interpreting and applying legislation with regard to these constitutional imperatives. It is our hope that the DFFE and Minister consider our comments given our legal and biodiversity expertise.

1.5. In particular, we urge the DFFE and Minister to consider carefully whether an overhaul of the National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**) is in fact necessary, or whether targeted amendments to NEM:BA and careful review of its regulations would better resolve implementation difficulties identified by the DFFE and achieve alignment with the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (**White Paper**), South Africa's constitutional and international biodiversity obligations and key legal developments including the legal recognition of animal sentience and well-being and recognition of the inter-relationship between environmental and cultural rights.

2. The proper constitutional context

2.1. At the outset, it is critical to situate biodiversity legislation within its proper constitutional context, namely the legislative function of Parliament and section 24(b) which requires that legislation and other measures provide the means through which *"everyone has the environment protected for the benefit of present and future generations*". The concomitant obligation on Parliament, is to promulgate legislation that ensures that biodiversity is protected both in the present and into the future i.e. with a view to both immediate measures and impact and long-term measures and impacts. While the Bill is generated by the executive for introduction to Parliament, it must consider the scope and mandate of the legislative function (as well as that of the executive) in meeting the State's section 24(b) obligations.

2.2. Legislation that gives effect to protection of biodiversity must fulfil three separate obligations enshrined in sections 24(b)(i), 24(b)(ii) and 24(b)(iii) of the Constitution. These three, separate, obligations each require attention. However, there is some degree of priority in their ordering and content.

2.2.1. First, section 24(b)(i) requires that the environment (including biodiversity) is protected by "***preventing*** *pollution and ecological degradation*". This means that legislation must include duties, powers and functions aimed at stopping harm to existing biodiversity. Such preventative measures may take the form of, *inter alia*, pro-active regulation relating to planning, species and ecosystem management or incentives for avoiding harm to biodiversity. Legislation may also include reactive measures such as administrative or criminal penalties for harming biodiversity. Given the role of biodiversity legislation as a specific environmental management act (**SEMA**) which is bound by the principles of the National Environmental Management Act, 107 of 1998 (**NEMA**), "prevention" must also consider the mitigation hierarchy.[1]

2.2.2. Second, section 24(b)(ii) requires that biodiversity conservation is ***promoted***. Accordingly, biodiversity legislation must contain measures that pro-actively improve and enhance the integrity, stability, resilience, well-being and thriving of biodiversity. The promotion of conservation is an obligation that all branches of the state, including Parliament, must respect, protect, promote and fulfil.[2] Consequently, biodiversity legislation must include measures that empower state as well private parties to take action and make decisions to ensure that biodiversity flourishes.

2.2.3. Third, section 24(b)(iii) requires that legislation *"**[secures]** ecologically sustainable development and use of natural resources"*. The requirement to "secure" ecological sustainability of development and use of natural resources is a strong constitutional directive to the State to create careful and considered regulation that safeguards "*ecological sustainability"*. This means that no development or use of natural resources may be contemplated without measures that ensure vulnerable species and ecosystems are provided with guaranteed safeguards. Further, it means that the State may only enable development and use of natural resources, if such safeguards are in place (and disallow development and use of natural resources where they are not).[3] The obligation to "secure" is a high bar and section 24(b) makes it clear that legislation (as well as other

[1] NEMA, section 2(1)(e) read with section 2(4)(a)(i)-(iv) and (viii). See also *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and others* 2020(2) SA 325 (CC) para 38 which provides the following helpful summary of presumptions relating to legislative drafting and interpretation: "*It is a well-established canon of statutory construction that 'every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature'. Statutes dealing with the same subject matter, or which are* in pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the Legislature is consistent with itself. In other words, that the Legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system*" (footnotes removed).

[2] Constitution, s 7(2).

[3] This approach is also consistent with NEMA, s 2(4)(a)(v)-(vi).

measures) must provide this security. Legislation that seeks to remove safeguards is unlikely to meet this constitutional standard.

2.3. Critically, section 24(b)(iii) addresses the obligation to *"secure ecologically sustainable development and use of natural resources"* as a contributor to the primary obligation in section 24(b) of "environmental protection".

2.3.1. This is separate from the obligation to "*[promote] justified economic and social development*".

2.3.2. There are a wide range of ways in which such "*economic and social development"* may be justified. In the constitutional context, justification most obviously arises where economic and/or social development gives effect to the rights contained in sections 22, 23 or 25-29 of the Constitution. We emphasise, however, that whether or not such justification exists is a separate enquiry from the question of whether a statute meets the legislative obligation to *"secure ecologically sustainable development and use of natural resources"* in order to "*have the environment protected for the benefit of present and future generations"*. Biodiversity legislation should thus focus, in the first instance, on securing the ecological sustainability of development and use of natural resources – not on providing justifications for social or economic development.

2.4. Accordingly, biodiversity legislation cannot overemphasise or prioritise economic (or social) development based on use of biodiversity resources.

2.5. What such legislation must do is, clearly and unequivocally, provide measures that can reasonably achieve:

2.5.1. prevention of harm to biodiversity including, but not limited to, pollution or degradation of ecosystems / habitats; threats to species survival; and threats to the well-being of animals and the environment; and

2.5.2. promotion of the conservation of biodiversity including, but not limited to, measures that promote the integrity, stability, resilience, well-being and thriving of biodiversity; and

2.5.3. safeguarding and a high standard of scrutiny in respect of ensuring the long-term ecological sustainability of any development or use of natural resources (mindful of constitutional obligations to promote social and economic development).

2.6. We have addressed our comments with this constitutional framework in mind – while also cognisant of:

2.6.1. the role of NEMA as environmental framework legislation containing, *inter alia*, the key environmental management principles in section 2, the structure and objectives for integrated environmental management in Chapter 5 and compliance and enforcement provisions of Chapter 7;

2.6.2. South Africa's international obligations in respect of biodiversity protection;[4]

2.6.3. the constitutional principles of separation of powers and inter-governmental co-operation as well as the specific roles of the legislative and executive branches set out in Chapters 4 to 7 of the Constitution and the constitutional requirements of the Public Administration, Traditional Leaders and Finance set out in Chapters 10, 12 and 13 respectively; and

2.6.4. applicable case-law and policy.

3. General Comments and overarching concerns

3.1. Positive amendments. We commend the DFFE for taking pro-active steps to ensure alignment of Chapter 7 of the Bill with the Nagoya Protocol and, as we understand it, to attempt to ensure alignment with the full scope of functions of the South African National Biodiversity Institute (**SANBI**) and interaction with the Genetically Modified Organisms Act, 15 of 1997 (**GMO Act**).

3.2. The Bill risks being an "economic" bill at the expense of constitutional environmental protection obligations – but contains curious omissions.

3.2.1. Little guidance on the rationale for the Bill is provided in the explanatory memorandum. However, the accompanying Socio-Economic Impact Assessment System Form (**SEIAS Form**) includes specific reference to the 2016 Biodiversity Economy Lab highlighting "*that one of the main constraints of NEMBA is the fact that it focuses on biodiversity protection and conservation, and although sustainable use is reflected in section 2 of NEMBA as one of its objectives, it does not contain provisions that promote sustainable use. An initiative with a detailed implementation plan was then developed for the amendment of NEMBA in order to unblock the legislative challenges*".[5] This statement provides critical insight into what

[4] Including but not limited to, those under the Convention on Biological Diversity (**CBD**) with specific regard to the Kunming-Montreal Montreal Biodiversity Framework (**GBF**), Nagoya and Cartagena Protocols; Convention on International Trade in Endangered Species of Wild Fauna and Flora (**CITES**); the Convention on the Conservation of Migratory Species and Wild Animals (**CMS**); Agreement on the Conservation of African-Eurasian Migratory Waterbirds (**AEWA**); United Nations Convention on the Law of the Sea (**UNCLOS**); the International Treaty on Plant Genetic Resources for Food and Agriculture; Convention on Wetlands (**Ramsar Convention**); World Heritage Convention (**WHC**); and International Plant Protection Convention (**IPPC**).

[5] SEIAS Form, p 2. See also SEIAS Form, p 4 "*The key economic problem that is sought to be solved in general relates to the costs of permits to especially new entrants to the biodiversity economy, due to the excessive*

is meant by "*implementation challenges*" and "*a revised regulatory approach*" alluded to in Government Notice 4887 in terms of which the Bill has been published for comment (**the Government Notice**).

3.2.2. As indicated in paragraph 2 above, the Constitution requires that the Bill's overarching focus and objective is biodiversity protection as an instance of the constitutional right to have the environment protected. Moreover, the primacy of prevention of harm to biodiversity and promotion of conservation are essential to ensuring the constitutionality of the Bill as well as putting measures in place to secure ecologically sustainable development and use of natural resources. It is thus entirely inappropriate to premise whole-scale legislative re-enactment on the complaint that protection and conservation "block" sustainable use of plants and animals for economic purposes.

3.2.3. As elaborated further in the remainder of our submissions, it does appear that the extensive removal of obligations on the Minister and other organs of state in respect of biodiversity protections flows from this worrying premise. This approach runs counter to the constitutional framework, but is also inconsistent with the policy justification for the Bill. Goal 2 of the White Paper (labelled "Sustainable Use") recognises the potential harmful impacts of consumptive and non-consumptive use of biodiversity and explains that *"The intention of this goal is to ensure that the sustainable use of all that is valued in nature avoids, or minimises and remedies, adverse impacts on biodiversity, and enhances thriving living land- and seascapes and ecosystems, livelihoods and human well-being"*.[6] This is an approach consistent with the obligation to prevent ecological degradation and the role of the mitigation hierarchy in doing so. It is also consistent with the obligation to promote conservation of biodiversity. It is not consistent with privileging economic exploitation and consumptive use.

3.2.4. In this context, it is notable that the Bill makes no reference ecosystem services, nor how these should be assessed, protected and integrated into spatial planning. While "OECMs" are referenced in the context of the National Biodiversity Framework (**NBF**), the Bill provides no substance regarding application of an ecosystem approach to biodiversity management, assessment of ecosystem fragmentation, the importance of ecological corridors and networks and the interrelationship or specific obligations to link biodiversity assessment of where such corridors and

number of permits that are often required to conduct a business, as well as insufficient financial resources for conservation authorities to do inspections and to monitor compliance with permits and conditions".

[6] White Paper, p 21.

networks are necessary to spatial planning and the protected areas system.[7]

3.2.5. Similarly, it is puzzling that there is no reference (or cross-reference) to the mitigation hierarchy, nor any attempt to integrate the tools and measures in the Bill with proper regulation of biodiversity offsets (currently regulated for the terrestrial and freshwater realms the by National Biodiversity Offset Guidelines[8] read with section 2(4)(a)(i) of NEMA and the EIA Regulations[9]).

a) Critically the National Biodiversity Offset Guidelines make it clear that while they are primarily implementation guidelines applicable to environmental impact assessments (**EIAs**) and the authorisation of environmental authorisations in terms of section 24, they may also find application in contexts which may require biodiversity offsetting as part of mitigation measures including "*section 24G of NEMA, emergency directives contemplated in section 30A of NEMA, applications for licences under the National Water Act, 1998, the National Forests Act, 1998 and the National Environmental Management: Waste Act, 2008, applications for development rights in terms of the Spatial Planning and Land Use Management Act, 2013* [(**SPLUMA**)] *and requests for the de-proclamation, or the withdrawal of declarations, of protected areas in terms of provincial legislation or [the National Environmental Management: Protected Areas Act, 57 of 2004 (**NEM:PAA**)]*".

b) This suggests that any legislative amendment to biodiversity legislation which contemplates furthering a landscapes / seascapes approach and integrating biodiversity planning tools with spatial planning mechanisms under SPLUMA or NEM:PAA, should at least acknowledge biodiversity offsetting and properly situate it within the framework of biodiversity protection.

c) To be consistent with the constitutional requirements to prevent ecological degradation and secure ecologically sustainable development and use of natural resources, this should include legislative provision for biodiversity offsets only to be used when they

[7] See Conference of the Parties to the Convention on Biological Diversity Decision 14/18 (30 November 2018) Voluntary Guidance on the Integration of Protected Areas and Other Effective Area-Based Conservation Measures into wider land- and seascapes and mainstreaming across sectors to contribute, inter alia, to the Sustainable Development Goals (CBD/COP/DEC/14/8) Annex I, paras 1-5, available online < https://www.cbd.int/doc/decisions/cop-14/cop-14-dec-08-en.pdf >, accessed 12 July 2024.
[8] DFFE, *National Biodiversity Offset Guideline issued under section 24J of the National Environment Management Act, First Edition (January 2023)* published under GN3569 in *GG 48841* of 23 June 2023.
[9] GNR 982 in *GG* 38282 of 4 December 2014.

will result in "no net loss" of biodiversity – with a strong preference for achieving "net biodiversity gain". Moreover, such legislation should clarify biodiversity offsetting as a compensatory measure underpinned by the "polluter pays" principle;[10] the importance of establishing clear thresholds for unacceptable biodiversity impacts and excluding offsets in instances of biodiversity vulnerability[11] or irreplaceability as well as the principles of equivalence, additionality, permanence; methodologies for monitoring, reporting, verification, compliance and enforcement;[12] and the possibility of voluntary biodiversity offsetting as an incentive for improved conservation measures.[13]

3.3. <u>The justification for a legislative re-enactment is unclear: amendment is more appropriate</u>

3.3.1. The White Paper concludes with steps to develop an "Implementation Plan" through a public consultation process.[14] The second process to be set out in the anticipated Implementation Plan is "*Review and reform of key legislation and strategies to align with the goals and objectives of the White Paper".*[15] To date, we are not aware of any public participation process to develop an Implementation Plan, nor any systematic process of reviewing NEM:BA (or any other "key legislation" dealing with biodiversity). As such, it would appear that the Bill is <u>premature</u>.

3.3.2. This is particularly so as existing measures under NEM:BA instruments (including the alien and invasive species as well as TOPS and TOPSM lists and regulations) have taken significant time to produce, are now in place and ripe for review and improvement. Going back to the drawing board and introducing an entirely new regulatory regime (as the Bill proposes) will undermine the cost, resources, expertise and energy already expended in getting the current regime in place and would detract from improvements to ensure effective implementation and regulatory clarity. Moreover, urgent attention is needed to update and publish the successor to the current NBF – which covers the period ending in 2024 and is a significant task for the DFFE. In this context, it is odd that the executive would expend financial and human resources on legislative overhaul in circumstances where amendment would be imminently more appropriate.

[10] See NEMA, s 2(4)(p).
[11] See NEMA, s 2(4)(f).
[12] See NEMA, s 2(4)(e).
[13] See generally, OECD (2016) *Biodiversity Offsets: Effective Design and Implementation*, OECD Publishing, Paris, available online <http://dx.doi.org/10.1787/9789264222519-en> , accessed 12 July 2024.
[14] White Paper, p 42.
[15] White Paper, p 42 para 2.2.

3.3.3. This said, to the extent that the White Paper identifies policy imperatives that are consistent with section 24 of the Constitution and which are not catered for by NEM:BA (or the amendments recently enacted through the National Environmental Management Laws Amendment Act, 2 of 2022 (**Act 2 of 2022**)), or where alignment is needed with international obligations, an amendment would be the appropriate response. This is certainly the case in respect of the provisions of Chapter 7 of the Bill which go a long way in presenting an approach to "*Access to indigenous biological resources and indigenous knowledge, bioprospecting and benefit-sharing*" aligned with the Nagoya Protocol.

3.3.4. The substance of the Bill makes it clear that amendment is more appropriate than re-enactment. While the Government Notice suggests a changed "regulatory approach", there is little that has in fact shifted from the previous model of "command and control". Significantly, despite the economic focus of the Bill, there is no contemplation of financial or social incentives as contemplated by Article 11 of the CBD and required by Target 19 of the GBF. Moreover, the Bill is silent on the role of financing mechanisms such as biodiversity credits[16] or any indication of how they may be integrated into controls over trade, bioprospecting, biodiversity threats and biodiversity management. There is also nothing that gives effect to Enabler 2 of the White Paper (and Target 14 of the GBF) which requires biodiversity mainstreaming (beyond the confusing circularity regarding planning integration discussed at paragraph 8.3.3 to 8.4.4 below).

3.4. <u>Attempts at "simplification" and "flexibility" create practical difficulties and legal uncertainty</u>

3.4.1. What is really meant by a changed regulatory approach is indicated at page 6 of the SEIAS Form which states that the "*regulatory approach"* is amended "*from an all-encompassing approach where permits are required for every restricted activity involving every specimen of listed species, to an approach where the specific activities requiring permits will be specified, either by notice in the Gazette, or prescribed in regulations"*.

[16] The Biodiversity Credit Alliance defines a biodiversity credit as "*a certificate the represents a measured and evidence-based unit of positive biodiversity outcome that is durable and additional to what would have otherwise occurred" (*Biodiversity Credit Alliance (2024) *Definition of a Biodiversity Credit,* Issue Paper No. 3, May 2024, available online < https://www.biodiversitycreditalliance.org/wp-content/uploads/2024/05/Definition-of-a-Biodiversity-Credit-Rev-220524.pdf>, accessed 12 July 2024). See also Advisory Committee on Resource Mobilisation under the CBD (5 March 2024) Exploration of the biodiversity finance landscape (CBD/RM/AC/2024/1/2) paras 130-131, available online https://www.cbd.int/doc/c/8d7f/55df/1d2dbb096d00be743f006a05/rm-ac-2024-01-02-en.pdf>, accessed 12 July 2024. See also Australia's Nature Repair Act, 121 of 2023 for an example of a statutory instrument creating a domestic biodiversity market and which demonstrates the need for clear and proper regulation, available online <https://www.legislation.gov.au/C2023A00121/asmade/text>, accessed 12 July 2024.

This is echoed in the Explanatory Memo referring to NEM:BA being "restrictive" and "inflexible".

a) As we elaborate at 3.5 below, the attempts at "de-regulation" do not in fact constitute a change in regulatory approach – but rather an impermissible delegation of legislative function to the executive and a removal of specificity and legal certainty.

b) There is no guarantee that the discretionary provisions of Chapters 4, 5 and 6 will lead to "fewer" or "reduced" permit requirements or facilitate economic transformation as is assumed in paragraph 1.4 of the SEIAS Form (p 7).

c) The Bill thus fails to present a regime capable of meeting its own objectives.

3.4.2. Relatedly, it is doubtful that the Bill in facts "simplifies" the regulatory regime or addresses the "implementation challenges" mentioned in the Government Notice. Such challenges are not specified / elaborated (although some insight has been provided during the online presentations held during the week of 15 July 2024). We question whether the cure is to attempt to remove guidance and specificity from empowering legislation – rather than to address issues of capacitation of administrators, researchers and enforcement agencies and to ensure that there is proper funding for implementation.[17]

3.4.3. In sum, we urge the DFFE to publish the list of implementation difficulties they have identified and to use these as a tool in the public consultation process envisaged by the White Paper's Implementation chapter[18] – which contains steps that should be initiated as a matter of urgency.

3.5. <u>Over-reliance on national executive authority</u>

3.5.1. In seeking to create greater "flexibility", the Bill removes obligations, details, criteria and procedures aimed at regulating species, ecosystems, alien and invasive species, and the trade in species. Instead, it relies on future development of detailed regulation which "may" be made by the Minister (clause 70).

a) Many of the sub-clauses describing regulatory scope are cast in extremely wide terms. In some instances, they become almost meaningless while also appearing to place almost no limits on

[17] See White Paper, p 9.
[18] White Paper, p 42.

executive power to legislate (e.g. "*any measures necessary for the management or well-being of an animal or any species, ecosystem or other component of biodiversity managed in terms of this act"*; "*the systems and requirements for the compulsory or voluntary registration of persons, institutions, facilities or operations"*).

b) In other cases, the regulations purport to prescribe (or perhaps delegate) functions or powers to individuals or bodies which are creatures of statute (e.g. the "*functions*" of the Scientific Authority in clause 70(1)(e) or "*the powers of issuing authorities when considering and deciding applications"* in clause 70(1)(q)(iii)). While sub-ordinate legislation has an important role in defining the detailed procedures pertaining to these bodies, it is necessary that powers and functions are provided in the primary legislation. This applies particularly to SANBI, the Scientific Authority and Biodiversity Officers.

c) Critically, the regulations purport to grant the Minister the power to legislate matters such as permitting, restrictions, prohibitions on use of biodiversity, criteria for risk assessments, relevant factors for deciding applications, incentives and disincentives for conservation and national security. These types of regulations have the potential to limit a range of rights (in addition to imposing a range of duties). However, they appear in the Bill without the necessary legislative guidance to ensure that any limitation of rights is justifiable and that the provisions in question are consistent with the Constitution and subject to the standard of specificity and clarity required by the rule of law.[19]

3.5.2. Problematically, this means that critical aspects of the biodiversity legislative framework are delegated to the executive without the legislature exercising its power to determine legislative policy as part of the democratic expression of lawmaking.[20] In some cases, matters relating to the use of natural resources is entirely left to executive discretion – from the criteria for such use, to limitations and permissions to use, to the procedural mechanisms and powers to determine access to the natural resources in question. This leaves important questions to executive discretion that ought to be open to the rigour of public, provincial, and traditional interests which are constitutionally the role of the National Assembly, National Council of Provinces and House of Traditional

[19] *Dawood v Minister of Home Affairs and Others* 2000 (3) SA 936 paras 46-48.
[20] *Economic Freedom Fighters v Speaker of the National Assembly* 2016 (3) SA 580 (CC) (***EFF I***) para 22.

Leaders.[21] In doing so, the principles of dignity and pluralism inherent in Parliament's legislative processes are ignored.[22]

a) Noting that this version of the Bill has been prepared by the executive, we question the extent to which the executive has sought to assume legislative power for itself through the ability to create such widely-cast and extensive subordinate regulation.

b) Not only is the extent of the subject matter deferred to executive law-making potentially a breach of the principle of separation of powers, and a removal of the critical role of Parliamentary oversight over executive conduct,[23] but it also places a burden on the executive that is illogical given the difficulty of "implementation" expressed with the NEM:BA. It is entirely unclear how the executive is to both manage the process of legislating and implementing the complex requirements of biodiversity conservation measures.

3.5.3. In addition, the centralising of control in the Bill may create implementation challenges through bottlenecks. The White Paper recognises the difficulty of "*Fragmented conservation responsibilities, duplication of efforts and underfunded conservation mandates*".[24] However, the solution to fragmentation and duplication of effort is not centralisation of control – but rather clearly delineating institutional responsibilities.

a) This includes matching national, provincial and municipal biodiversity responsibilities to the appropriate scale of biodiversity protection, in line with each sphere of government's competencies as enshrined in Schedules 4 and 5 of the Constitution. It requires that national, provincial and municipal departments tasked with biodiversity protection are capacitated and funded. This in turn may require amendments to relevant legislation – including the Local Government: Municipal Systems Act, 32 of 2000. There is no indication that this has been considered in the Bill or accompanying memo.

b) An additional issue is lack of clarity regarding the lines of institutional responsibilities of SANBI, the Scientific Authority and the DFFE. This limits the ability of the relevant Parliamentary portfolio committee to exercise the necessary oversight over these bodies.

[21] *Doctors for Life International v Speaker of National Assembly* 2006 (6) SA 416 (CC) para 29.
[22] *Doctors for Life International v Speaker of National Assembly* 2006 (6) SA 416 (CC) para 115.
[23] Constitution, s 92(2); *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 111.
[24] White Paper, p 9.

c) While the White Paper indicates that the responsibility for giving effect to the White Paper lies with "*a range of stakeholders, including, but not limited to, the state, traditional leaders, traditional health practitioners and communities, private landowners, industry, academia, non-government organisations, and civil society*",[25] the roles of these stakeholders are not clearly articulated.

d) There is a notable omission of areas where co-operation between the Minister responsible for agricultural and Minister responsible for environmental affairs is required. This is compounded by a significant watering-down of the consultation requirements which currently appear in section 99 of NEM:BA.[26]

3.6. Key objections not met and conceptual incongruence with constitution, white paper and other environmental statutes

3.6.1. First, the Bill weakens, rather than strengthens obligations pertaining to well-being and duty of care through vagueness and an absence of clear statutory controls and obligations. This is contrary to an express purpose of the Bill articulated in the Government Notice. Moreover, it means the Bill remains largely silent on key necessary conditions for society "*living in harmony with nature*". In this material respect, then, the Bill runs contrary to the White Paper, in particular:

a) the problem statement in the White Paper regarding "*Inappropriate and illegal practices, activities, or actions that compromise animal well-being and ecosystem and genetic diversity, have negatively affected South Africa's reputation as a world leader in biodiversity conservation"*;[27]

b) the three Expected Outputs associated with Goal 1.6 of the White Paper ("*Promote well-being and humane practices, actions, and activities towards wild animal"*), namely: (1) "*Well-being of individual animals and populations of animals integrated into biodiversity policy, legislation, tools, and practice*"; (2) "*ethical practices and standards incorporate into wildlife management and use in South Africa"*; (3) "*Education, capacity building, and awareness of animal well-being and associated concerns builds collaboration across the sector"*; and

[25] White Paper, p 10 (para 1.4).
[26] See NEMA, s 2(4)(l).
[27] White Paper, p 10.

c) integration of the principles of *Ubuntu* which is specifically linked to biodiversity conservation and its relationship to improving "*the well-being of people and nature"* as contemplated in Goal 4.6.

3.6.2. Second, the reference to "sustainable use" in the Bill should be amended to reflect the constitutional recognition of "***ecologically*** *sustainable use"* and the right to inter-generational equity.

a) We emphasise that "ecologically sustainable use" is the term elected by the constitutional framers, given meaning by the courts and included in the mission of the White Paper. It is misleading to exclude the modifier ("*ecologically*") that explains the type of sustainability required to meeting the obligations in section 24(b)(iii) of the Constitution.

b) The legal interpretation of this obligation requires consideration of the enduring and ongoing obligation to ensure economic, social and environmental sustainability of all development.[28] This long-term view is tied to notion of inter-generational equity which is invoked by the right to have the environment protected for the benefit of "*future generations".* While inter-generational equity is included in the vision and mission of the White Paper, it is inadequately integrated into the notion of "sustainable use", "benefit" or "protection" in the Bill. This is a critical omission.

3.6.3. Third, the Bill inadequately provides for a landscapes and seascapes approach.

a) The Bill fails to address the White Paper's impact statement indicating that conservation efforts will "*include abandoned crop fields, rangelands, near natural areas, extensive wildlife systems, and wilderness that provides ecosystem services that sustain human health, fuel the economy, prevent environmental degradation and promote conservation of wildlife heritage, including water source areas"*.[29] As alluded to in paragraph 3.2.4 above, the passing reference to OECMs in clause 34(1)(b) does not cover the spectrum of this impact statement.

b) Realisation of the vision in this impact statement requires conceptual integration into the spatial planning provisions of the Bill. However, no such guidance is provided and landscapes and seascapes are not

[28] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) paras 78-79.
[29] White Paper, p 10.

defined. Relatedly, there is also no reference to support of existing mixed-use conservation areas such as biosphere reserves, nor intervention in relation to human-wildlife conflict as contemplated in Goal 1.2 of the White Paper.

c) In addition, this impact statement suggests that a Bill to implement a landscapes / seascapes approach would require consequent amendments to the primary conservation planning instrument, being the NEM:PAA as well as other planning instruments to ensure biodiversity mainstreaming.[30] It is puzzling that the Bill has not envisaged any such consequent amendments.

3.7. Reduction in public participation and equitable access

3.7.1. The "public participation" clause in the Bill is reduced to a notice and comment procedure. This is inappropriate given the legal requirements for public participation and fair procedure in the environmental sphere emphasised by the courts.[31]

3.7.2. This is concerning given the statement in the White Paper that "*Transformation will require conservation and sustainable use that redresses discrimination and unfair disadvantage, and enables and capacitates previously disadvantaged individuals, such that 'people living in harmony with nature' can be achieved. Partnerships need to be built that promote respect and dignity for people and nature"*[32] as well as the specific challenge of lack of transformation identified as a policy focus.[33] Further, it is contrary to the recognition of the White Paper's impact statement of "Thriving People and Nature" which recognises that "*An integrative, collaborative, inclusive, and participatory approach will be the primary framework for action to address threats to biological diversity, and to establish priorities for its conservation"*.[34]

3.7.3. At a public meeting on 18 July 2024 we were advised that the public participation provisions of the Bill provide a "bare minimum" requirement in terms of what consultation should entail, and that the process adopted is to be determined in each instance by the Minister. This is again an

[30] White Paper, p 9.
[31] *Kruger v Minister of Water and Environmental Affairs* [2016] 1 All SA 565 (GP) para 17; 36; *Federation of South African Fly Fisheries v Minister of Environmental Affairs* (62486/2018) [2021] ZAGPPHC 575 (10 September 2021) para 66; *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) paras 92-93; 100-101; 125. See also *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) (15 October 2004) para 114. See also NEMA, s 2(2), s 2(4)(b); (f)-(h); (q)-(qA) and section 23(2)(d).
[32] White Paper, p 8; 10 (para 1.3.3(a) and (d)).
[33] White Paper, p 9.
[34] White Paper, p 10 (para 1.3.3(a) – see also (d)).

instance of insufficient content being provided in the primary legislation, and a delegation to ministerial determination of what Parliament should be legislating.

3.7.4. The omission of the power of public bodies and individuals to submit biodiversity management plans in terms of section 43 of NEM:BA is similarly, contrary to this approach to participatory governance – as well as contrary to existing practice where the DFFE relies extensively on the academic and NGO sector to conduct necessary scientific and conservation work.

3.7.5. We note that the White Paper identified "*complicated processes and procedures, and lack of resources, access, and awareness, hinder the unlocking of the genetic potential of biodiversity, and associated traditional and indigenous knowledge, into biotechnology value chains"* as an element of lack of transformation.[35] However, the Bill does not provide for the obligation to undertake development and implementation of a National Biodiversity Transformation Framework (including ensuring community access, meaningful participation and community-based development of biodiversity-based opportunities"). There is also no specific mechanism for ensuring that "*perspectives, approaches, needs and aspirations of designated groups [are] incorporated into biodiversity conservation and sustainable use"*[36] or that a baseline of the current status of designated groups in biodiversity conservation and sustainable use is conducted. Essentially, the Bill omits all the expected outputs relevant to Goal 4.4 ('*Promote participation and influence of designated groups (PDIs, youth, women, and people with disabilities) in biodiversity conservation and sustainable use"*).

3.7.6. We also note that there is no reference to the empowering of Traditional Authorities to conserve biodiversity as contemplated by Goal 4.7 of the White Paper. There is also no reference to notions such as community rangers contemplated as EO7 in relation to Policy Objective E1.3 ("*Improve compliance with biodiversity legislation"*).

3.7.7. **We submit** that the existing structure of sections 99 and 100 of NEM:BA need to be retained. We would supplement this by requirements to

[35] White Paper, p 9.

[36] See the standards of free prior and informed consent in *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Limited and Another* 2019 (2) SA 1 (CC); *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP); *African Commission on Human and Peoples' Rights v Republic of* Kenya (Application No. 006/2012), Judgment on Merits, 26 May 2017, paras 209-210; The *Matter of the African Commission on Human and Peoples' Rights v Republic of Kenya* (Application No. 006/2012), Judgment on Reparations, 23 June 2022, para 142; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (Application No. 276/2003), 25 November 2009, paras 281-297.

ensure that notices and public consultations are published on the DFFE website – noting that, increasingly, consultations are held online and that is a valid mode of public communication, alongside in-person meetings, newspaper publications and radio and television announcements catering for those without internet connectivity and with regard to varying degrees of literacy and the need to ensure accessibility in all official languages (including sign language).

3.8. Questionable implementation process behind drafting of the Bill

3.8.1. We note that section 8 of the White Paper ("*Implementing the Policy*") refers to development of "*a detailed implementation plan based on engagements with relevant stakeholders, including broad consultation with key stakeholder groupings and the general public, to develop the programme of work*". We are not aware of any such process, nor development or publication of a "detailed implementation plan" since publication of the White Paper in 2023. Critically, this plan was intended to, *inter alia,* enable the "*Review and reform of key legislation and strategies to align with the goals and objectives of the White Paper*".[37] No such review has been published and the absence of careful review as well as public participation in this process is evident in the full-scale republication of the Bill without due consideration to where amendments are in fact required to NEM:BA, where amendments to legislation such as the Marine Living Resources Act, 18 of 1998 (**MLRA**), National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (**NEM:ICMA**), National Water Act, 36 of 1998 (**NWA**), National Forests Act, 84 of 1998 (**NFA**) or agricultural legislation is required, where financial legislation needs to be amended or developed to allow for, *inter alia*, biodiversity credits and where legislative amendments in planning legislation is necessary to enable biodiversity mainstreaming as contemplated by Enabler 1.

3.8.2. In sum, it appears that this Bill has been published prematurely and without the requisite (and cabinet-approved) approach to implementation. Accordingly, we call for withdrawal of the Bill and a commencement of the implementation plan as per the White Paper.

3.9. Missed Opportunities for innovative reform

3.9.1. In addition to the omissions of transformative approaches to conservation through under-development of what a seascapes / landscapes approach means, we note that there are a number of key areas where innovations

[37] White Paper, p 42 (para 2.2).

enhancing public engagement with biodiversity conservation, good biodiversity governance and accountability could be incorporated.

3.9.2. First, we note that during the public meetings held during the week of 15 July 2024, the DFFE indicated concerns that NEM:BA currently does not cater for all relevant biodiversity treaties to which South Africa is a party. We agree that there are significant weaknesses in NEM:BA in this regard and, subject to what we state in relation to international commitments in at paragraph 5 below, we consider that it would be valuable to include provision for biodiversity targets (which could be suitably accommodated in the NBF) including measures for monitoring such targets and reporting on them. A key benefit of including provision for target-setting and reporting in the Bill is that it creates a clear relationship between domestic planning and international obligations. Moreover, it has the potential to improve transparency and public accountability in respect of such targets, while also having benefits such as providing an unequivocal statutory basis for budgeting and financially supporting the actions necessary to meet targets.

3.9.3. Second, and following from the State's trusteeship obligations, contemplated in clause 3(1)(a), it would be appropriate to follow the pattern of the NWA[38] to establish a legislative requirement for a national information system on biodiversity, with equivalent provisions for public access together with a duty to make certain information publicly available (including permits). Not only is this appropriate to a move away from "fortress" conservation, but it is aligned with the environmental principles of NEMA, critical to ensuring transparency and accountability and recognised as supportive of section 24 of the Constitution.[39]

4. Specific Comments on Chapter 1 (Clause 1): Definitions

4.1. We set out key considerations relating the definition section here while addressing additional implications as definitions arise in our submissions in paragraphs 5 to 0. Following from these comments, we note two critical definitional omissions:

4.1.1. "Local community" – which we submit has relevance to Chapter 7; and

4.1.2. "Restricted activity" – which we submit should be re-introduced as explained further in our comments relating to Chapters 5 and 6 below.

4.2. Specific comments and queries relating to additional definitions are as follows:

[38] NWA, Chapter 14, Parts 2 and 3.
[39] *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022) paras 11-12; 38-43.

"biological diversity"	1. We note that the definition is inconsistent with the CBD in that the phrase "*within species, between species and of ecosystems*" has been replaced by "*at genetic, species, and ecosystem levels*". We do not understand a substantive difference between these phrases, while using the CBD text aids interpretation and clarifies domestication of CBD obligations. Accordingly, the reason for the inconsistency with the international text is unclear.
"bioprospecting"	2. The definition appears to be circular. 3. Commercialisation is no longer defined – instead, clause 55(2) empowers the Minister to list activities that constitute commercial exploitation of an indigenous biological resource (the definition of which has been removed). As a result, the definition of "bioprospecting" becomes entirely unclear. This has practical implications for distinguishing between the discovery and commercialisation phases – in turn making implementation unworkable.
"buying"	4. We question the use of the word "money" rather than "consideration" or "financial instruments". "Money" is too narrow and excludes financial instruments given as consideration and which are not covered by "barter" or "in kind" exchange. 5. The same comment applies to the definition of "selling" below.
"conservation"	6. If the Bill seeks to align with the White Paper, we query replacing "*to improve the well-being of people and nature*". We read the phrasing in the White Paper as incorporating the rights reflected in both section 24(b) and 24(a), inclusive of the judicial and legislative recognition that well-being of animals (and nature) is a constitutional imperative linked to these rights as well as the right to dignity. To the extent that the Bill would constitute a SEMA applicable to biodiversity, we support this phrasing. 7. This said, we note that the definition in the Bill appears to seek alignment with the language of section 24(b) of the

	Constitution. If this is to be accurately achieved, "*ecologically sustainable development and use*" should replace "*sustainable use*" (noting, however, that the Constitution treats "conservation" and "ecologically sustainable development and use of natural resources" as two separate obligations – and these should not be conflated).
"conservation areas"	8. We note that the definition used also appears in the White Paper. However, the definition is circular. 9. Moreover, it is not clear what a "conservation area" is relative to the types of protected areas contemplated in section 9 of NEM:PAA.
"duty of care"	10. We commend the attempt to draft a biodiversity-specific duty of care. 11. However, **we submit** that the definition should remain consistent with section 28 of NEMA with the necessary modifications i.e. "*reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or in so far as such harm to [biodiversity[is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of [biodiversity]*".
"environmental management inspector"	12. This is not used in the Bill. Accordingly it is not clear why it is defined.
"issuing authority"	13. The definition references clause 65 rather than clause 61. 14. Further explanation for sub-clause (c) of the definition is required as the use of "issuing authority" in the Bill does not seem to warrant this part of the definition (although this is entirely unclear).
"listed invasive species"	15. It is unclear why there is a distinction between "listed invasive species" and "invasive species" for purposes of Chapter 6. Listing creates certainty in terms of consequences e.g. control plans as well as conditions and

	so on.
"migratory species"	16. The term is not used in the Bill although **we submit** that including this in the listing categories of Chapter 5 would be helpful in providing for full domestication of treaties concerning migratory species including the CMS, AEWA and the various species-specific conventions and protocols including those applicable to tuna, albatrosses and petrels. 17. With this in mind, the definition that has been provided simplifies the CMS definition, but loses some of its import – particularly as this relates to population dynamics. This, in turn, has implications for the authorities being specifically empowered to act in relation to obligations under the CMS as well as other applicable conventions.
"Minister"	18. **We submit** the definition should refer to "environmental affairs" not "environmental management" to remain consistent with the definitions of "Department" and "MEC".
"other effective area-based conservation measure (OECM)"	19. We note that this reflects the definition in the decision of the Conference of Parties under the CBD, Decision 14/8 *Protected areas and other effective area-based conservation measures*.[40] **We submit** the principles need to be followed-through in the body of the Bill.
"selling"	20. As for the definition of "buying" above, "money" is too narrow and excludes financial instruments given as consideration and which are not covered by "barter" or "in kind" exchange. Accordingly, **we submit** "money" should be replaced by "consideration" or "financial instruments".
"sustainable use"	21. The terminology used should be "ecologically sustainable use" not "sustainable use".
"transformation"	22. "Community" needs to be defined.

[40] CBD/COP/DEC/14/8 of 30 November 2018, available online <https://www.cbd.int/doc/decisions/cop-14/cop-14-dec-08-en.pdf>, accessed 12 July 2024.

	23. **We submit** that the definition in the White Paper should be used.
"wildlife trafficking"	24. We would recommend that "wildlife trafficking" is replaced by "trafficking" to clarify the inclusion of wildlife / animals as well as plants.

5. Specific Comments on Chapter 1 (Clauses 2 to 6): Interpretation, Objectives and Application

5.1. We provide comments on clauses 2 to 6 of the Bill in the table which follows.

Clause 2(a)	Well-being 1. We note that Act 2 of 2022 introduced a self-standing objective of NEM:BA in section 2(a)(iiA) as "*the consideration of the well-being of animals in the management, conservation and sustainable use thereof*". It is not clear why this objective of integrating considerations of animal well-being has been rolled into clause 2(a) which reads "*provide for the management of conservation of biological diversity within the Republic and of the components of that biological diversity, including animal well-being"*. 2. **We submit** that a self-standing objective should be included which reads "*provide for the well-being of animals including in the management, consideration and ecologically sustainable use of biodiversity and its components"* for the following reasons. a. Providing for animal well-being (in the language of clause 2(a)) goes further than merely considering animal well-being (which is the language of section 2(a)(iiA) of NEM:BA). In this respect, the language of clause 2(a) thus better reflects the legal position endorsed by the courts which specifies that safeguarding animal well-being is a necessary component of biodiversity conservation and, moreover, an expression of the constitutional value of dignity.[41]

[41] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC) paras 1; 56-58; *Lemthongthai v S* 2015 (1) SACR 353 (SCA) para 20; *S v Els* 2017 (2) SACR 622 (SCA) paras 18-19; *S v Ndlovu* [2019] 2 All SA 820 (ECG) paras 25-26. See also *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) paras 32-33.

	b. However, providing for animal-wellbeing should be a self-standing objective, given the legal recognition of the inter-relationship between animal well-being and biodiversity which should infuse all biodiversity management decision-making as well as the approach conservation and ecologically sustainable use of biodiversity.
Clause 2(c)	<u>Sustainable use, duty of care and cultural practices</u> 3. Clause 2(c) refers to providing for "*the sustainable use of biodiversity with <u>due care</u>, including <u>facilitating cultural practices</u>".* In addition to what is stated above regarding the need to address the language of "ecologically sustainable use", this objective contains two issues: (1) use of the term "due care" instead of "duty of care"; and (2) the approach to "facilitating cultural practices". 4. <u>To avoid interpretative confusion, the term "duty of care" should be retained</u>. This is because the reference to "due care" rather than "duty of care" is inconsistent with the language of Objective 2 of the White Paper; section 28 of NEMA; and the language used in the remainder of the Bill. 5. <u>The reference to "facilitating cultural practices" without qualification is inappropriate and misconstrues the legal and policy position.</u> a. The courts have recognised that certain cultural practices are inconsistent with the Constitution and thus are impermissible (let alone capable of being "facilitated").[42] For this reason it is inconsistent to refer to "facilitating cultural practices" as an objective without qualifying this facilitation as being subject to ecologically sustainable use of such resources, absence of harm and consideration of well-being. b. At the same time, "facilitating cultural practices" in the context of the objective of "sustainable use" misconstrues the manner in which the White Paper, following domestic and international jurisprudence and best practice,[43] aims to "*adopt*

[42] *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC).
[43] See *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* 2018 (2) SACR 367 (SCA); *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (2) SA 585 (ECG); *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy*

	an integrated conservation approach that is in line with the principles of Ubuntu". It does so by linking biodiversity conservation to "*well-being of people and nature"*; integrating ubuntu into conservation and ecologically sustainable use; and promoting "*African perspectives, approaches, needs, and aspirations"*; "*culture, local knowledge and traditional practices associated with conservation and sustainable use*"; and "*living in harmony with nature"* through cultural, traditional and spiritual practices.[44] **6. <u>We submit that:</u>** a. clause 2(c) should be amended to read "*provide for the ecologically sustainable use of components of biodiversity subject to the duty of care"*; and b. a self-standing objective should be included which reads "*promote cultural, traditional and spiritual practices which prevent biodiversity degradation, promote biodiversity conservation and secure ecologically sustainable development and use of natural resources"*.
Clause 2(e)	7. <u>No operative provision giving effect to international agreements.</u> The language of section 5 of NEM:BA has been omitted i.e. "*This Act gives effect to ratified international agreements affecting biodiversity to which South Africa is a party, and which bind the Republic"*. a. The enactment in section 5 of NEM:BA is critical for purposes of enabling domestication of biodiversity treaties, ratified or otherwise binding on South Africa. b. In the absence of such language, each new ratification / binding instrument will need to be separately and specifically domesticated and referenced in the Bill as the relevant implementation instrument. c. When regard is had to the lengthy process in domesticating, *inter alia*, annexes to the MARPOL 73/78 convention,[45] we

and Others 2022 (6) SA 589 (ECMk). See also *African Commission on Human and Peoples' Rights v Republic of* Kenya (Application No. 006/2012), Judgment on Merits, 26 May 2017, paras 187-189

[44] White Paper, Goal 4.6 and Expected Outputs 1 to 5. See also pp 13, 20-21.

[45] International Convention for the Prevention of Pollution from Ships, 1973 as modified by the Protocol of 1978. See the history of the passage through parliament of the Marine Pollution (Prevention of Pollution from Ships)

	identify this omission as leading to inefficiencies and exacerbating difficulties with reconciling South Africa's international obligations with empowering provisions to ensure they are implemented. d. Further, this omission is inconsistent with Policy Objective 1.4 of the White Paper ("*Effective participation in, and implementation of Multilateral Environmental Agreements"*). Relevant Expected Outputs (**EOs**) include maintaining, strengthening and harmonising South Africa's participation in multilateral and bilateral agreements; and effective participation, enactment and implementation of international biodiversity instruments and their obligations at national, provincial and local levels. These require specific recognition in the Bill. 8. **We submit that** the language of section 5 of NEMBA needs to be reintroduced, rather than obliquely referring to giving effect to international agreements as an objective.
Clause 2(i)	9. Lack of definition of "biodiversity sector" impedes transformation objective. Clause 2(i) states that an objective is to "*address historical imbalances, enable and facilitate transformation and to achieve equity within all branches of the biodiversity sector".* This sector is not defined which renders this objective vague. a. This vagueness results in uncertainty in relation to clause 34(1)(f) concerning a plan to facilitate transformation of the biodiversity sector in the NBF; clause 66(1) empowering the Minister to recognise representatives of "*any part of the biodiversity sector"*; and clause 70(1)(s) contemplating regulations for self-administration of the biodiversity sector. b. The term is used without explanation in the Explanatory Memo. However, the SEIAS Form seems to contemplate the biodiversity sector as anything from pharmaceuticals to hunting, invasive species management and fisheries. While potentially over-inclusive, this approach seems broadly

Amendment Bill (B5-2022), available at <https://pmg.org.za/bill/1059/>, accessed 12 July 2024. Similarly, see the history of the (now lapsed) Marine Oil Pollution (Preparedness, Response and Cooperation) Bill (B10-2022), available online < https://pmg.org.za/bill/1059/>, accessed 12 July 2024. Note that while both Bills have been introduced by the Department of Transport, these have implications for biodiversity regulation and obligations to prevent biodiversity threats.

	consistent with the definition of "biodiversity sector" in NEM:BA which reads "*any sector or sub-sector that carries out restricted activities involving indigenous biological resources, whether for commercial or for conservation purposes*" (emphasis added). c. If this is in fact intended, **we submit** the definition should be included.
Clause 2(j)	10. Climate change: We commend the inclusion of climate change among the objectives of the Bill. However, the Bill fails to include specific provisions addressing climate adaptation and resilience. Specifically, the Bill does not appear to contemplate the relationship between climate change as a biodiversity threat on the one hand, and biodiversity as a contributor to climate resilience on the other. a. This results in Chapter 4 failing to integrate biodiversity planning tools with climate change planning measures contemplated in the Climate Change Act, 22 of 2024 (**Climate Change Act**). b. However, it also overlooks key considerations in biodiversity management relevant to Chapter 5 such as identification of vulnerability of particular ecosystems or species to climate change; related obligations tied to the United Nations Convention to Combat Desertification and the need to protect particular ecosystems, for example, due to their importance as carbon sinks.
Clause 3(1)(a)	11. Clause 3(1)(a) states "*in fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity, must (a) act as the trustee of the Republic's biodiversity its components and genetic resources…*" Problematically, clause 3(1) does not explain the scope of the fiduciary duties associated with this trusteeship (contrasting with section 3(1)(b) of NEM:BA which read "*management, conserve and sustain South Africa's biodiversity and its components and genetic resources*"). 12. **We submit** that it is necessary (and helpful) to define the scope of the State's duties as trustee over biodiversity for the following reasons.

	a. NEM:BA (and thus the Bill) is part of a suite of legislation which places South Africa's natural resources under the trusteeship of the State. This is emphasised by section 2(4)(o) of NEMA which articulates the principle that *"that environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage*". b. The scope of the State's fiduciary duties in respect of natural resources are clearly articulated in the NWA; the NEM:ICMA and amendments to the NFA as follows: i. NWA, s 3(1): *"As the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate*". ii. NEM:ICMA, s 12: "*The State, in its capacity as the public trustee of all coastal public property, must (a) ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations*". iii. NFA, s 2A (yet to commence): "*The National Government, as the public trustee of the nation's forestry resources, acting through the Minister, must ensure that these resources, together with the land and related ecosystems which they inhabit, are protected, conserved, developed, regulated, managed, controlled and utilised in a sustainable and equitable manner, for the benefit of all persons and in accordance with the constitutional and developmental mandate of government*". c. Noting these obligations regarding water, land and forest ecosystems which fall to the State as a whole and/or the National Government, **we submit** that the Bill should include language to clarify the role of the State as trustee of biodiversity such that it can reconcile such obligations with

	the environmental management principle articulated in s 2(4)(o) of NEMA and the trusteeship obligations as articulated in the NWA, NEM:ICMA and the NFA. Moreover, such obligations must be considered against the constitutional obligations set out in section 24 as they pertain to biodiversity, and the obligations placed on the State by section 7(2) of the Constitution to "*respect, protect, promote and fulfil*" rights in the Bill of Rights. Accordingly, we submit that clause 3(1)(a) of the Bill should be amended to read: *"act as the public trustee of the Republic's biodiversity, its components and genetic resources by ensuring that they are protected, conserved, regulated, managed, controlled, enhanced and used in an ecologically sustainable and equitable manner, for the benefit of present and future generations and in the interests of the whole community"*
Clause 3(1)(b)	13. Clause 3(1)(b) reads "*In fulling the rights contained in section 24 of the Constitution of the Republic of South Africa, 1996, the State, through its functionaries and institutions implementing this Act must… take reasonable steps to achieve the progressive realisation of those rights"*. This constitutes an impermissible limitation of Constitutional rights for the reasons which follow. 14. Clause 3(1) is framed as an instance of fulfilling the rights in both sections 24(a) and 24(b) of the Constitution. 15. Neither of these rights is a "progressively realisable right". a. The immediately realisable nature of section 24(a) has been confirmed in *The Trustees for the time being of Groundwork Trust and another v The Minister of Environmental affairs and others (the United Nations Special Rapporteur on Human Rights and the Environment Amicus Curiae)* 2022 JDR 1012 (GP). b. The right to have the environment protected for the benefit of present and future generations provided in section 24(b) is a right to be realised through "*reasonable legislative and other measures"* and the right to have such legislation and measures in place and the concomitant obligations in section 24(b)(i)-(iii) are not of the character of being "progressive realisable". They need to be put in place immediately so that their objectives can be implemented in the present and future.

	16. **<u>Accordingly, we submit</u>** section 3(1)(b) is an impermissible restriction on the right which should be removed. If retained, it should be amended to read "*take reasonable steps to achieve those rights"* (which would be consonant with the language of section 24(b)).
Clause 4(1)	17. We read clause 4(1)(b) as expressing the intention that the Bill applies to all persons, whether or not South African persons in the territory defined in clause 4(1)(a). If so, we commend the language of "*all persons"* as being consonant with the language of section 3(1)(a) of the MLRA which makes that legislation applicable "*to all persons, whether or not South African persons, and to all fishing vessels and aircraft, including foreign fishing vessels and aircraft, on, in or in the airspace above South African waters"*. However, **<u>we would encourage</u>** the drafters to consider the clarificatory language of section 3(1)(a) of the MLRA. 18. Further, we note that the language of section 4(1)(b) of NEM:BA made it applicable "*to human activity affecting South Africa's biological diversity and its components"*. This language enabled NEM:BA to have extraterritorial effect to the extent that conduct <u>outside</u> South African borders which affected biodiversity <u>within</u> South African borders would fall within the scope of the legislation. It was also consonant with Article 4(b) of the CBD which reads "*In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction <u>or beyond the limits of national jurisdiction</u>"* (emphasis added).[46] a. This provision is important insofar as ecosystems, species and effects on biodiversity cross borders and the activities of persons in and outside South Africa may impact on South Africa's biodiversity. It is also important insofar as South Africa should (and should be able to) exercise jurisdiction over its own nationals, vessels, aircraft, infrastructure, vehicles and so on who engage in conduct affecting biodiversity outside South Africa. b. It is not unprecedented for South African environmental legislation to have extraterritorial application. Section 3(2) of the MLRA does so expressly in stating that "*This Act,*

[46] See also African Convention on the Conservation of Nature and Natural Resources, 2003, Article I(2) read with the obligation of Parties to adopt and implement all measures to achieve Convention objectives in Article III.

	including any applicable regulation, shall have extraterritorial application".[47] c. **We submit** that language consonant with Article 4(b) of the CBD should be incorporated into clause 4 of the Bill to give full effect to South Africa's obligations regarding biodiversity including in relation to cross-border trade,[48] impacts on migratory species,[49] ecosystems and species that cross borders[50] and to ensure both full accountability is possible in respect of environmental harms, and that a remedy is available for violation of the section 24 right as required by international human rights instruments.[51]
Clause 4(2)	19. It is not clear why reference to section 146 of the Constitution has been removed. While such constitutional provision applies by operation of law to resolution of all conflicts between laws, the clarity is helpful in terms of interpretation of the Bill. **We submit** that reference to section 146 should be retained.
Clause 5	20. We note that clause 5 provides only for conflicts between "*this Act*" and other national legislation relating to biodiversity. We note in this regard that clause 1 defines "*this Act"* as "*any regulation or notice made or issued under this Act*". It is not clear whether the drafters intended that regulations made under the Bill take precedence over primary legislative acts made by the national Parliament (which would be unusual, if not highly irregular). We note the necessity for this provision, however, given that the detail of almost all biodiversity controls have now been relegated to regulation. This is another reason why the reliance on executive legislation has gone too far.

[47] See also section 4(2) of NEM:ICMA which enables it to regulate dumping and incineration at sea by South African aircraft and vessels when outside the Republic (thus enabling Chapter 8 of NEM:ICMA to give effect to South Africa's obligations under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention, 1972)).
[48] i.e. CITES.
[49] See for example CMS, Art II(1); Art III(4). See also Convention for the Conservation of Southern Bluefin Tuna, Art 15; Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, Art 4; International Convention for the Conservation of Atlantic Tunas, Art I; The Amended Nairobi Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, 2015 and its Protocols; Agreement on the Conservation of Albatrosses and Petrels
[50] See for example the co-operation requirements under the Ramsar Convention, Art 3(2).
[51] See in this regard, the discussion in *SERAP v Nigeria*, Ruling, Suit No. ECW:CCJ:APP:08:09 and RUL. No:ECW:CCF:APP:07:10) (ECOWAS, Dec.10, 2010) underlining the limitations of absence of extraterritorial jurisdiction. See with reference to extraterritorial jurisdiction in respect of civil and political rights, *Delia Saldias de Lopez v. Uruguay*, Communication No. 52/1979, U.N. Doc. CCPR/C/OP/1 at 88 (1984).

	21. **We submit** that the language of section 8 of NEM:BA provides a clear and constitutionally coherent hierarchy of legislative enactments with the necessary clarity to ensure that the appropriate legislative instrument prevails within the context of South Africa's constitutional scheme and the precedence of sources of law recognised in South Africa. We do so, mindful that the Bill needs to remedy the difficulties regarding the removal of substantive obligations from the primary legislation.
Clause 6	22. We welcome the clarity provided by clause 6 of the Bill.

6. Comments on Chapter 2: South African National Biodiversity Institute (SANBI)

6.1. We provide limited specific comments on clauses 7 to 31 of the Bill in the table at paragraph 6.2. We do so, noting that the provisions relating to SANBI largely follow those of NEM:BA and with regard to the character of SANBI as a creature of statute (thus limited by the powers and functions granted by legislation) as well as an organ of state (and thus subject to the relevant constitutional principles and requirements of transparency as well as administrative and financial accountability). In this regard, we note with concern the exclusion of an equivalent provision to section 30 of NEM:BA which clarified that "*The Institute is a public entity for the purposes of the Public Finance Management Act, and must comply with the provisions of that Act*".

6.2. Our specific comments are as follows:

Clause 8(1)(i)	1. With reference to the management, control and maintenance of national zoological gardens, **we submit** that this provision should include the requirement that zoological gardens must include programmes to further *ex situ* conservation. In respect of our motivation for this inclusion, see paragraph 7 below.
Clauses 8(1)(p)-(q)	2. Our reading of the functions of SANBI in clause 8 is that SANBI is to be the primary repository and implementor of scientific knowledge production, dissemination and advice to government. Causes 8(1)(p)-(q) suggest that SANBI is also to "house" or serve as the secretariat for the Scientific Authority.[52] **We submit that** it would assist if this function were set out in express terms, particularly if regard is to be had to budget considerations and the

[52] See the de facto position reported in the Revised National Biodiversity Framework 2019-2024 published under GN2386 in *GG 46739* of 19 August 2022, Section 4, Table 7.

	extensive obligations of the Scientific Authority required for South Africa to meet its obligations under CITES.
Clause 8(2)(a)	3. We note that when providing advice in relation to matters "*relating to the marine or coastal environment*" SANBI "*must provide that advice in consultation with the Department's relevant research components".* It is not clear why marine and coastal issues are singled out in this manner. 4. First, clause 8(2)(a) refers to all advice relating to the marine or coastal environment. In terms of clauses 8(1)(e) and (f) this could well involve providing advice to DFFE branches and research functions engaged in marine and coastal research themselves. It would not make sense for SANBI to provide advice to DFFE: Branch Oceans & Coasts in terms of these functions, if also required to consult with those branches of the DFFE for purposes of providing advice. 5. Second, this requirement potentially removes SANBI's independence when advising the Minister in relation to clause 8(1)(t). It is conceivable that the Minister may seek such advice for a number of purposes – including in combination with the obligation to assist the Minister in performance of their functions and exercise of their powers as contemplated in clause 8(1)(s). This could well require a degree of independence from departmental research functions to facilitate Ministerial decision-making. 6. **We submit** that this requirement should be removed.
Clause 9(h)(ii)	7. We note that SANBI may charge fees for any work performed or services rendered by it. We question how this is regulated in instances where SANBI is obliged to provide advice to the Minister in the performance of their functions and exercises of their powers – and in respect of other functions specified in clause 8(1) which are peremptory. Clarity would be welcome.
Clause 9(h)(iii)	8. While acknowledging that SANBI may charge fees for access to results of, or other information in connection with, its research, **we submit** that this should be subject to the provisions relevant to public bodies in the Promotion of Access to Information Act, 2 of 2000.

Clause 12(3)	9. We note that the Minister is empowered to "*appoint any other suitable persons"* to the SANBI Board when a nomination list generations persons that are "*inadequate"*. We question whether this provision may withstand scrutiny in terms of the principles of accountability and transparency as well as being consonant with proper administrative procedure.
Clause 12(5)	10. The Minister is empowered to appoint persons to the SANBI Board with "*a broad range of appropriate expertise in the field of biodiversity or another relevant field"*. It is not clear what is meant by "*another relevant field"*. If this is to enable appointees with expertise in, for example financial management or governance, **we submit** that these competencies should be specified.

7. Specific comments relating to Chapter 3: National Botanical Gardens and National Zoological Gardens

7.1. We note that Chapter 3 has included both national botanical and national zoological gardens within the purview of SANBI. Our comments on Chapter 3 are focused on the role of zoological gardens in respect of South Africa's biodiversity legislation and obligations and the critical disconnect between:

7.1.1. on the one hand, the inclusion of zoological gardens in Chapter 3, clause 29(1)(e) empowering the Minister to identify land for new, or extensions to, zoological gardens[53] as well as the Minister's discretionary powers to regulate, *inter alia,* "captive keeping, breeding and use";[54] mitigate risk of domestication of "faunal components of biodiversity";[55] regulate "*any industry sector, including, but not limited to… aquaria, zoos, captive breeding, or rehabilitation facilities"*;[56] and all matters pertaining to captive keeping, breeding or use of alien species;[57] and

7.1.2. on the other hand, major weaknesses in state and private zoo regulation include those identified by the High-Level Panel of Experts for the Review

[53] We note that SANBI has produced a National Botanical Garden Expansion Strategy 2019-2030 (GN706 in *GG* 43981 of 22 December 2020). This strategy is drafted with regard to the National Development Plan, 2030; the National Biodiversity Strategy and Action Plan: 2015-2025; (with particular regard to *ex situ* conservation targets and ensuring protected and conservation areas include a representative sample of ecosystems and species); National Strategy for Plant Conservation, 2016; National Biodiversity Framework 2009; Global Strategy for Plant Conservation; and International Agenda for Botanic Gardens in Conservation, 2012. If zoological gardens are to contemplated for expansion, a similar strategy inclusive of scientifically and legally supportable justification.
[54] Bill, clause 70(1)(f)(ix).
[55] Bill, clause 70(1)(f)xi).
[56] Bill, clause 70(1)(g).
[57] Bill, clause 70(1)(n).

of policies, legislation and practices on matters of Elephant, Lion, Leopard and Rhinoceros Management, Breeding, Hunting, Trade and Handling (**High Level Panel**).[58]

7.2. While including zoological gardens in Chapter 3 appears to remedy a regulatory gap and reflect the *de facto* position in relation to SANBI's management of the National Zoological Gardens of South Africa and Mokopane Biodiversity Conservation Centre,[59] we question the continued authorisation of zoological gardens without specific requirements limiting their purposes to *ex-situ* conservation (as understood in Article 9 of the CBD)[60] or education, research and public awareness (as understood in Article 13 of the CBD)[61] and with particular regard to the emphasis on management of threatened species, reduction of extinction risk and ensuring genetic diversity of wildlife and domesticated species as contemplated Target 4 of the GBF.[62] **We submit** that such limitations must be included in the Bill insofar as zoological gardens managed by SANBI (or any other party) are included.

7.3. **We further submit** that any zoological gardens, whether public or private, must be managed with particular regard to the constitutional obligations of promoting conservation and preventing ecological degradation; the imperative of ensuring animal well-being; publication of (and provision for) regulations entrenching stringent requirements relating to animal well-being; and with due regard to the role of animals in the ecosystem as a whole. In particular, we draw attention to the IUCN's *Five-Step Decision-Making Process to decide when ex situ management is an appropriate conservation tool*[63] *and "One Plan Approach"* integrating *in situ* and *ex situ* conservation.[64] This approach would be consistent with Goal 1.7 of the

---

[58] High-Level Panel of Experts for the Review of policies, legislation and practices on matters of Elephant, Lion, Leopard and Rhinoceros Management, Breeding, Hunting, Trade and Handling (**High Level Panel**) p 156; 171. We note that there seems to also be inadequate resolution of the potential conflict with what appears to be the continued application of the Cultural Institutions Act, 119 of 1998 to the National Zoological Gardens of South Africa.

[59] Clause 73(3) contemplates the National Zoological Gardens of South Africa but omits the Mokopane Biodiversity Conservation Centre.

[60] See White Paper, p 10 (para 1.3.3(f)).

[61] See White Paper, Goal 1.7, Expected Output 10.

[62] "*Ensure urgent management actions to halt human induced extinction of known threatened species and for the recovery and conservation of species, in particular threatened species, to significantly reduce extinction risk, as well as to maintain and restore the genetic diversity within and between populations of native, wild and domesticated species to maintain their adaptive potential, including through in situ and ex situ conservation and sustainable management practices, and effectively manage human-wildlife interactions to minimize human-wildlife conflict for coexistence*. "

[63] IUCN Species Survival Commission (29 August 2014) *Guidelines on the Use of Ex situ Management for Species Conservation Version 2.0*, Gland, Switzerland, available online <https://portals.iucn.org/library/sites/library/files/documents/2014-064.pdf>, accessed 12 July 2024.

[64] IUCN Species Survival Commission (2023) *Position Statement on the role of Botanic Gardens, Aquariums, and Zoos in Species Conservation*, Gland, Switzerland, available online < https://www.iucn.org/sites/default/files/2023-10/2023-position-statement-on-the-role-of-botanic-gardens-aquariums-and-zoos-in-species-conservation.pdf >, accessed 12 July 2024; IUCN Resolution WCC-2020-Res-079-EN *Linking in situ and ex situ efforts to save threatened species*, available online < https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2020_RES_079_EN.pdf>, accessed 12 July 2024; IUCN (2023) *Global Species Action Plan supporting implementation of the Kunming-Montreal Global*

White paper and in particular Expected Output 6 ("*Zoological gardens and aquaria play a role in supporting species conservation plans for indigenous animals through ex-situ conservation"*) and Expected Outcomes 1 and 2 i.e. to have "*Tangible in-situ biodiversity conservation and sustainable use benefits provided through indigenous species biobanks, botanical and zoological gardens"* and "*Threatened species successfully conserved and protected through ex-situ conservation interventions*".

7.4. We note that Expected Output 2 relevant to Goal 1.7 requires "*a comprehensive national strategy to characterise, evaluate, curate to international standards, and cost-effectively manage and utilise South Africa's indigenous ex-situ genetic resource collections"*.

7.5. A key implication of the aforegoing is that it is insufficient merely to accept the public management and oversight of existing national zoological gardens. Accordingly, **we submit**:

7.5.1. First, it is necessary to assess whether the current zoological gardens in fact meet *ex situ* conservation objectives.[65]

7.5.2. Second, the White Paper indicates that risks to biodiversity and ecosystem services include climate change and invasive species "*which require consideration of risk-based assessments of ex-situ conservation and the use of species/biodiversity"*.[66] Such risk assessment needs to be contemplated in the Bill which should provide for the development, monitoring, revision and enforcement of risk assessment guidelines in respect of conservation risks pertaining to zoological gardens in addition to risks posed to individual animal well-being.

7.5.3. Third, zoological gardens (including private zoological gardens, if permitted at all), should be subject to the requirements of furthering *ex situ* conservation and public awareness as well as stringent minimum standards based on ethical codes (potentially published as SANS Codes / SABS standards) consonant with conservation objectives and best practice.[67] We submit that this is appropriately situated within the context of biodiversity legislation without relying purely on oversight by the

---

Biodiversity Framework, Gland, Switzerland, Target 4, Action 4.4, available online <https://portals.iucn.org/library/sites/library/files/documents/2023-029-En.pdf>, accessed 12 July 2024.

[65] We would also question the continued existence and operation of zoological gardens under provincial or municipal control such as the Johannesburg Zoo without specific incorporation into the provisions of the Bill. As organs of state, there should be clear consistency between all zoological gardens under state management and control – and all should be limited to purposes of *ex situ* conservation and public awareness as submitted in this comment.

[66] White Paper, p 20.

[67] See World Association of Zoos and Aquariums (2023) *WAZA Code of Ethics*, available online < https://www.waza.org/wp-content/uploads/2024/03/FINAL_WAZA-Code-of-Ethics-and-Complaints-Process.pdf >, accessed 12 July 2024. We note that the National Zoological Gardens hold membership of WAZA. See also High Level Panel p 330; 333.

department responsible for agriculture and the National Society for the Prevention of Cruelty to Animals.

7.6. Our sole clause-specific comment in respect of Chapter 3 follows:

Clause 34(6)	1. We note the omission of an equivalent to section 33(4) of NEM:BA which requires declared national botanical gardens to be included in a schedule to NEM:BA. It is unclear why this provision has been removed, particularly, as the current botanical (and zoological) gardens constitute a finite list – and public scrutiny over any new declarations is warranted by the risks and national significance associated with these institutions. 2. **We submit** that clause 32(6) should be amended to read "*The Minister must maintain and publish a register of all existing national botanical gardens and national zoological gardens, as well as any declaration made in terms of subsections (1) or (4).*

8. Specific comments relating to Chapter 4: Biodiversity Planning

8.1. Exclusion of objectives, monitoring and research. It is unclear why the purpose of Chapter 4 has not been included, as was the case in section 37 of NEM:BA. It is similarly problematic that Chapter 4 removes the intersection between planning, monitoring and research that is the substance of Chapter 3 of NEM:BA.

8.1.1. The inclusion of chapter objectives is not only a critical interpretative aid,[68] but key to embedding the obligations relating to Biodiversity Planning as self-standing statutory requirements.

a) This is essential given the nature of the planning obligations in Chapter 4 which, without specific objectives, may be little more than empty "framework" provisions without clear and specific links to the objectives of the statute as a whole.

b) In respect of the specific objectives set out in section 37(a)-(c) of NEM:BA, and which should be included in Chapter 4 of the Bill, we note that these provide a clear planning framework requiring: (1) co-ordination and integration; (2) monitoring; and (3) research.

[68] See *Cool Ideas 1186 CC v Hubbard* and another 2014 (8) BCLR 869 (CC).

Accordingly, these objectives provide the necessary clarity regarding minimum contents of all biodiversity planning instruments so that they are in fact grounded in best available science as well as monitored for purposes of efficacy, enabling adaptive management (where applicable) and ensuring accountability and transparency.[69] **We submit** that chapter objectives should be included.

8.1.2. It is concerning that Chapter 4 is labelled "Biodiversity Planning" – omitting the importance of monitoring (and reporting) as a key practical element of planning as well as an accountability measure.[70] Accordingly, there is no obligation in clause 34 for the Minister to ensure that the NBF is monitored and no specific obligations in respect of monitoring of spatial biodiversity plans (**SBPs**), biodiversity management plans (**BMPs**) or biodiversity management agreements. This absence of monitoring is a critical flaw in ensuring that the Bill provides for accountability, review and relevance of biodiversity planning instruments. **We submit** that mandatory monitoring provisions should be inserted for all planning instruments.

8.1.3. Relatedly, we question the omission of the obligation on the Minister to provide an annual report to Parliament regarding the monitoring of biodiversity as contemplated by section 49(3) of NEM:BA. This is essential for purposes of ensuring transparency and accountability as required by sections 55(2)(a)-(b), 92(2) and 92(3)(b) of the Constitution. **We submit** that this Ministerial reporting obligation cannot be omitted.

8.1.4. The weaknesses in the omission of an equivalent to section 50 of NEM:BA addressing research, are particularly acute insofar as section 50 requires the Minister to play an active role in "promoting" SANBI as well as other institutional research. This is an essential element of ensuring that Ministerial conduct "promotes and fulfils" those elements of the right to environmental protection that necessarily embed the principles of adherence to the best available science and ensure that such data is available for purposes of supporting lawful and rational environmental decision-making. **We submit** that this obligation should be included as a necessary means of ensuring that the principle of use of best available science is pro-actively fulfilled by the executive.

8.2. Exclusion of public participation and consultation We question the omission of the consultation requirements that appear in section 47 read with sections 99 and 100 of NEM:BA from the Bill with reference to our concerns with the weakening of public participation and consultation requirements addressed in paragraph 3.7 above.

[69] See particularly, Constitution, s 1(d); section 195(1)(f)-(g) read with section 195(2).
[70] See particularly, Constitution, ss 1(d); 41(1)(c); 55(2); 92(2)-(3); 133(2)-(3); 152(1)(a) and (e); section 195(1)(f) read with section 195(2).

8.3. Hierarchy of planning instruments and circularity of scheme in Bill. Chapter 4 of the Bill creates a circular relationship between biodiversity planning tools on the one hand, and planning tools provided for by Chapter 3 of NEMA, IDPs produced by municipalities, land-use planning tools and other national and provincial planning tools on the other. It also creates a hierarchy in which SBPs take precedence over BMPs.

8.3.1. The hierarchy between planning instruments occurs as a result of the following:

a) Clause 35 deals with SBPs. The mandatory contents of SBPs are provided for in clause 35(4). Among these requirements, SBPs must "align" with any national spatial biodiversity plan or provincial spatial biodiversity plan catered for by clause 35(4)(e) and (f). There is no reference to alignment with, or giving effect to, any BMP that may be of relevance. This suggests that the contents of other planning tools take precedence over SBPs.

b) Clause 36 deals with BMPs while clause 37 deals with the mandatory contents of such plans. Clause 36(e)(iii) requires that a BMP must "*take into consideration… any applicable spatial biodiversity plan".* We read this to create a hierarchy in which the contents of SBPs supersede and take precedence over BMPs.

8.3.2. This is problematic, given that BMPs (focused on species / ecosystem level planning and interventions) may in fact need integration into spatial planning to ensure that spatial planning is based on best available science and is in fact giving effect to biodiversity protection objectives. Moreover, if other planning tools take precedence over SBPs, it is unclear how they can possibly be effective in "*[providing] measures for the management and conservation of biodiversity priority areas"* as contemplated in clause 35(4)(c).

8.3.3. The circularity in this Chapter is created as a result of the following:

a) Clause 37(e)(i) states that a BMP must "*take into consideration any plans issued in terms of Chapter 3 of the National Environmental Management Act"*. However, clause 39(1)(a) read with clause 39(1)(d)(i)-(iv) states that "*The preparation of an environmental implementation or environmental management plan in terms of chapter 3 of the National Environmental Management Act… must…(i) be aligned with any biodiversity planning tool; (ii) incorporate into that plan those provisions of any biodiversity planning tool that specifically apply to it; (iii) demonstrate how any biodiversity planning tool may be implemented; (iv) align with the provisions relating to any listed ecosystem or listed species.*"

b) Clause 37(e)(ii) states that a BMP must "*take into consideration any municipal integrated development plan".* However, clause 39(1)(b) read with clause 39(1)(d)(i)-(iv) states "*an integrated development plan in terms of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).. must …(i) be aligned with any biodiversity planning tool; (ii) incorporate into that plan those provisions of any biodiversity planning tool that specifically apply to it; (iii) demonstrate how any biodiversity planning tool may be implemented; (iv) align with the provisions relating to any listed ecosystem or listed species.*"

c) Clause 37(e)(iv) states that a BMP must "*take into consideration any other plans prepared in terms of national or provincial legislation that are affected".* However, clause 39(1)(d)(i)-(iv) states "*any other plan prepared in terms of national or provincial legislation that is affected must - (i) be aligned with any biodiversity planning tool; (ii) incorporate into that plan those provisions of any biodiversity planning tool that specifically apply to it; (iii) demonstrate how any biodiversity planning tool may be implemented; (iv) align with the provisions relating to any listed ecosystem or listed species.*"

8.3.4. This circularity is problematic as it results in lack of clarity regarding how planning is to be integrated; how biodiversity objectives are to be integrated into planning instruments; and how to avoid the side-lining of species or ecosystem-led planning, based on best available science.

8.3.5. The hierarchy of planning instruments and simultaneous circularity in Chapter 4 is of concern not only in terms of practicalities and the risk of the Bill failing to render biodiversity planning useful and meaningful, but also in terms of potential lack of constitutionality. Planning tools under different legislation inevitably give effect to different land-use and developmental purposes and the relevant planning authorities are obliged to adhere to their specific legislative and institutional mandates which do not necessarily foreground biodiversity.[71] Accordingly, this legislative structure mitigates against biodiversity legislation ensuring that organs of state engaged in planning are provided with a clear legislative scheme to ensure compliance with the constitutional obligation in section 24(b)(iii) to "*secure ecologically sustainable development and use of natural resources while promoting justified social and economic development"*.

8.3.6. In this regard, we note the absence from the Bill of any contemplated amendments to legislation empowering different municipal, provincial and other planning authorities to ensure that SBPs (or any other biodiversity

[71] See *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (7) BCLR 690 (CC).

planning tools) are integrated into various spatial planning instruments. As indicated in paragraph 3.6.3 above, this is problematic in terms of biodiversity mainstreaming and also in terms of giving effect to the White Paper's vision of a landscapes / seascapes approach to conservation.

8.4. **We submit** the following as a statutory biodiversity planning scheme and drafting structure. We note that the various planning instruments grouped in Chapter 4 have fundamentally different purposes. In addition to clarifying the objectives behind the planning chapter, the object of each planning tool must be clarified to ensure that planners understand the scope of each instrument, their inter-relationship and each tool can be assessed in terms of its suitability for purpose. For this reason we recommend dividing Chapter 4 into parts and including the amendments as follows.

8.4.1. Part 1 – "*National biodiversity planning*"

a) Purpose of the National Biodiversity Framework as an integrated, co-ordinated and uniform planning instrument.

b) Contents to incorporate objectives and key actions included in BMPs for specific species and ecosystems, as well as fine-scale biodiversity spatial planning at the level of Critical Biodiversity Areas mapping (**CBA maps**); National Biodiversity Strategy and Action Plan and targets required under the CBD and National Action Plan required in terms of the UN Convention to Combat Desertification (and any similar planning obligations and targets).[72] This should be incorporated into the language of clause 34(1).

c) Publication requirements (as contemplated in clause 34(2)).

d) Monitoring requirements.

e) Review and update period.

f) Obligation to integrate national biodiversity management planning into national spatial planning instruments.

8.4.2. Part 2 – "*Biodiversity management plans"*

a) Purpose of BMPs is to address specific biodiversity interventions required of species / ecosystems listed in Chapter 5.

b) Contents to reflect clause 37(a) to (d).

c) Monitoring requirements.

[72] See recognition of these instruments in the White Paper, p 16-17.

d) Review and update period.

e) BMPs must inform SBPs at national, regional and local level and be incorporated into the NBF – recognising that BMPs will not be limited by political jurisdictional boundaries.

8.4.3. Part 3 – "*Spatial biodiversity planning*"

a) The purpose of SBPs should be to serve as the key link between biodiversity planning and other land / ocean-use / environmental planning tools and enable such planning at national, municipal and local level (i.e. with regard to political boundaries).

b) The contents should, following the description of elements of National Spatial Outcome Five, be those consonant with CBA maps and set out the relevant appropriate and inappropriate land uses as provided for through the CBA mapping process.[73]

c) A national SBP should be mandatory. Provinces and municipalities should develop SBPs at the relevant scale and ensure that ecosystem-level needs are incorporated into spatial planning.

d) Monitoring should not only be provided for as contemplated in clause 35(4)(d), but should also be a self-standing obligation which is catered for expressly.

e) Review and update period.

f) SBPs must take account of BMPs insofar as they are relevant to a particular spatial area.

g) SBPs must be incorporated into other spatial planning instruments including IDPs, instruments under the Marine Spatial Planning Act, Climate Change Act etc.[74] This would be consistent with National Spatial Outcome Five ("*The national ecological infrastructure and natural resource foundation are well-protected and managed, to enable sustainable and just access to water and other natural resources, both for current and future generations")*.[75] It would also

[73] See National Spatial Development Framework 2022, pp 103-104 which not only refers to the need for formal protection and "*sound spatial planning and land-use management to avoid incompatible land uses that disrupt the ecological functioning of these [ecological] assets…"* but also indicates that national ecological and biodiversity management areas consisting of protected areas, Strategic Water Source Areas and Critical Biodiversity Areas*"* should be recognised as nationally important, well-managed and "*where not yet the case, formally protected"*. See also p 141.
[74] See National Spatial Development Framework 2022, pp 57-58.
[75] National Spatial Development Framework 2022, p 103.

be consistent with Goal 1.8 of the White Paper ("*Adopt climate resilient approaches to biodiversity conservation and management to restore and maintain ecological infrastructure"*). In addition, it would be consistent with the approach of the National Spatial Development Framework, 2022[76] produced by the Department of Agriculture that emphasises:

> "*Should we… choose to continue along the economic trajectory that disregards our natural resource base, and continues to damage and destroy our natural resources and ecological infrastructure, we will in the very near future become even more aware of and be confronted with the following realities: (1) dwindling water security and availability, wetland destruction, severely degraded water catchments and over-utilised and polluted groundwater sources, especially in our mining and commercial agricultural production areas; (2) highly contaminated and toxic waterbodies and waterways; (3) toxic levels of air pollution through highly noxious industrial activities, such as the conversion of coal to liquid fuels, and the generation of energy through coal-fired power stations; (4) the loss of the very small extent of high-value agricultural land we once had; (5) irreparably damaged ecological infrastructure and loss of the services and benefits this infrastructure provides for people; and (6) a long and rapidly growing list of threatened ecosystems and species".*[77]

8.4.4. Part 4 – "*Implementation*":

a) The provisions in clause 38 and 39 dealing with biodiversity management agreements and co-ordination should remain – subject to the need to include the consultation and public participation requirements that are currently included in sections 99 and 100 of NEM:BA as well as Ministerial research obligations as discussed above.

8.5. We provide comments on clauses 34 to 39 in the table which follows.

Clause 34(1)	1. Obligation to prepare: It is not clear why clause 34(1) has removed the obligation placed on the Minister to "*prepare and adopt*" the NBF as is the case under section 38(1) of NEM:BA. 2. Landscapes and Seascapes absent: We note that clause 34(1)(a) and (b) refer to the identification of "*priority areas*" and "*the*

[76] Department of Agricultural, Land Reform and Rural Development, National Spatial Development Framework in terms of section 13(5) of the Spatial Planning and Land Use Management Act, 16 of 2013, published as GN1594 in GG 47999 of 1 February 2023.
[77] National Spatial Development Framework 2022, p 55.

	establishment of protected areas, conservation areas, and Other Effective area-based Conservation Measures". The Bill does not, however, provide for implementation of clause 34(1)(a) and (b) through declaration under NEM:PA which is the instrument specifically required to give effect to protected areas. Further, clause 34(1) does not appear to properly situate the establishment of <u>spatial</u> areas relevant to biodiversity protection within a landscapes or seascapes approach as reflected in expected output 1 of Policy Objective 1.1 of the White Paper.[78] 3. <u>Integration with national planning</u>: While clause 39(1)(d) appears to require "alignment" and "incorporation" of NBF planning into other instruments, it is necessary to provide for <u>obligations</u> to incorporate "priority areas", "protected areas", conservation areas and OECMs into IDPs, municipal spatial planning and zoning instruments but also into National and Sector Adaptation Strategies and Plan envisaged by sections 21 and 22 of the Climate Change Act and marine spatial planning tools envisaged by section 6 of the Marine Spatial Planning Act, 16 of 2018. a. Incorporation into climate adaptation planning is essential to give meaning to the objectives of the Bill. b. Incorporation into marine spatial planning process is essential to give effect to the objectives of the Marine Spatial Planning Act (section 2). Such incorporation is also necessary to give effect to the principle of precaution (section 5) and the requirement that marine spatial planning must have regard to: i. *"the advancement of an ecosystem and earth system approach to ocean management which focuses on maintaining ecosystem structure and functioning within a marine area"* (section 5(1)(d)); and ii. "*adaptive management, which takes into account the dynamics of ecosystems and the evolution of knowledge and of activities in South African waters"* (section 5(1)(e)). 4. <u>International obligations and targets</u>: It is not clear why clause 34(1) omits certain of the requirements of the contents of the NBF

[78] *"A national co-operative programme, and prioritised plan of action [which] identifies terrestrial, freshwater, marine and coastal areas that support land- and seascapes, ecosystems, habitats, species and populations which contribute, or could contribute to South Africa's system of representative protected and conservation areas".*

	contemplated in section 39 of NEM:BA including the requirement of integration in respect of all spheres of government, NGOs, the private sector, communities, and other sectors; consistency with international agreements (section 39(1)(b)(iii)); and reflection of regional co-operation on biodiversity management (section 39(1)(d)). a. These requirements should be included within the scope of the NBF to ensure that the NBF in fact reflects international obligations and targets as well as consideration of priorities where ecosystems / species cross borders or are found in multiple jurisdictions / subject on multi-lateral or bilateral ecosystem or species management obligations. b. While omission of these provisions may enable South Africa to adopt an NBF that is progressive, guided by best available science and reflective of biodiversity leadership, on balance, we consider that it is necessary to include provision for the NBF to be consistent with South Africa's international obligations as well as bilateral, multi-lateral and regional biodiversity protection obligations. c. We say so, as such consistency provides a minimum standard beyond which South Africa may still invoke the norms of international law pertaining to use of the best available science and adherence to the precautionary principle to adopt measures that go further than international instruments in relation to prevention of degradation of biodiversity; conservation of biodiversity; ecologically sustainable use of biodiversity and biodiversity protection.
Clause 34(3)	5. Review period: A ten-year review period is unreasonably long and does not support adaptive management unless coupled with obligations for ongoing monitoring, reporting and the possibility of interim amendments. 6. **We submit** that the Constitutional obligation on the Minister to report annually to Parliament, provides a basis for ongoing monitoring of the NBF (as well as enabling co-ordination with annual reporting required of, for example, CITES). This should be clearly specified with provision made for publication of an annual monitoring report. This should be coupled with: a. Either a five-year review period or the possibility of annual

	amendment following the findings of the monitoring report. We submit that a five-year review period provides a greater degree of certainty and is more practical in terms of enabling integration of the NBF with planning tools of other Government Departments. However, it is sufficiently regular to enable amendment in light of changes to BMPs or SBPs as well as scientific and contextual developments. b. Review, monitoring and amendment periods would also better align with the requirements of the National Biodiversity Strategy and Action Plan (**NBSAP**) under the CBD and CBD reporting requirements. In this regard, we note that the Bill does provide for NBSAP obligations – making it difficult to assess how the DFFE might streamline its CBD obligations with internal planning documents – and how public participation can better be incorporated into the NBSAP process as contemplated by the relevant CBD guidelines.[79]
Clause 35	7. While clause 35 addresses three levels of spatial planning (i.e. national, provincial and municipal), it is not clear what criteria should be used for purposes of identifying a geographical area warranting biodiversity spatial planning. Accordingly, clause 35 suffers from omission of the specificity that is provided by section 40(1)(a) of NEM:BA which states that the Minister or MEC may "*determine a geographic region as a bioregion for the purposes of this Act if that region contains whole or several nested ecosystems and is characterised by its landforms, vegetation cover, human culture and history*". 8. **We submit** that clause 35 should be amended to require the publication of a SBP at national level. And that: a. The MEC must, publish a SBP which is aligned with the boundaries of that province and identifies the geographic biodiversity priority areas within that province, based on the best available science and to provide greater specificity to the national SBP; b. A Municipality must publish a SBP which is aligned with the

[79] See for example Conference of Parties to the Convention on Biological Diversity (2022) *Decision 15/16 Mechanisms for planning, monitoring, reporting and review* (CBD/COP/DEC/15/6) of 19 December 2022, available online < www.cbd.int/doc/decisions/cop-15/cop-15-dec-06-en.pdf> , accessed 12 July 2024. We note that there are similar cyclical reporting requirements under other biodiversity treaties such as the UN Convention to Combat Desertification (four-year cycles); AEWA (three-year cycles).

	boundaries of that municipality, identifies a set of geographic biodiversity priority areas within that municipality based on the best available science and which provides greater specificity to the provincial SBP. c. All SBPs must provide measures for the management and conservation of the biodiversity priority areas they identify; provide for monitoring of the plan; and comply with any other requirement prescribed by the Minister. 9. We note that clause 35 lacks provision for review and amendment of SBPs. **We submit** that these powers need to be provided for in relation to the Minister, MEC and municipalities. 10. **We submit** that SBPs should be prepared within two years of the commencement of the Bill with a specified review period.
Clauses 36(1) and 36(3)	11. Given the purpose of BMPs, it is unclear why an MEC would be in a position to publish a BMP. Having said this, we acknowledge that there may be species of particular conservation concern which predominate a specific province and warrant intervention at this level. 12. While clause 36(1) grants the Minister or MEC the power to "publish" a BMP, the powers to develop, monitor, amend and update a BMP are absent and need to be provided. a. Clause 36(3) does contemplate that the MEC "develops" a BMP, however, this power is not clearly established as one prior to publication in clause 36(1) (i.e. it is an implied power only). No equivalent power of "development" is granted to the Minister. 13. In general, the clause needs to clarify the separate powers involved in generating, publicising, authorising, implementing, monitoring and updating BMPs and the persons and/or organs of state empowered to exercise each of these separate powers. In this regard **we submit that**: a. The power of the MEC to develop a BMP as contemplated in clause 36(3) is valuable. b. In addition, the Minister's power to develop a BMP should be specified.

	c. We note with concern the removal of the ability of "*Any person, organisation or organ of state desiring to contribute to biodiversity"* to submit a draft BMP for approval as we contemplated in section 43(1) of NEM:BA. This is particularly so, given the extensive biodiversity expertise that rests with NGOs and organs of state such as SANBI and the provincial management authorities. Accordingly, we would recommend reinserting this language into clause 36 with reference to the powers to develop a BMP. d. We note with concern the omission of the need for consultation in the development of BMPs. e. It would be sensible to retain the Ministerial power to approve and publish a BMP – particularly to ensure that there is no conflict with existing national-level BMPs. Such power of approval should include a narrow discretion, subject to all procedural steps having been concluded (including consultation), fulfilment of the requirements for BMPs set out in clause 37 and consistency with any relevant national BMPs. Moreover, it should include the power (and duty) to gazette amendments or updates. f. In respect of implementation, monitoring and updates, see our comments regarding clause 36(2) below. 14. Clause 36(3) itself lacks specificity in referring to "*<u>any</u> biodiversity management plan published by the Minister".* This wide language could lead to absurdity. If the intention is to ensure alignment with national BMPs concerning the same species / ecosystem, **<u>we submit</u>** the language should be amended to state "*a biodiversity management plan published by the Minister concerning the same species or ecosystem"*. Alternatively, "*any relevant biodiversity management published by the Minister"*.
Clause 36(2)	15. We query why the obligation to identify a suitable person, organisation or organ of state to be responsible for implementation of a BMP has been changed from an obligation ("must") as contemplated in section 43(2) of NEM:BA, to "may" as contemplated in clause 36(2) of the Bill. 16. **<u>We submit that</u>** clause 36(2) should read "*Before approving a biodiversity management plan, the Minister or MEC <u>must</u> identify…"* to ensure effective implementation and consistency

	with clause 37(d). 17. **<u>Further, we submit that</u>** clause 36(2) refer to "*the implementation, monitoring and updating of the plan"*.
Clause 37	18. The contents of a BMP should include a minimum period after which it must be updated. **<u>We submit that</u>** an additional sub-clause should be inserted requiring that a BMP must provide for the date of review and updating. Review and update periods can thereby be determined as appropriate to a particular species / ecosystem and the relevant monitoring plan. At the same time, this would provide an accountability mechanism to ensure that BMPs are in fact reviewed and updated so that they remain effective and continue to reflect the standard of using the best available science and conservation practice in light of scientific, ecological and conservation developments as well as with regard to changing threats including climate adaptation requirements. 19. **<u>We further submit that</u>** clause 37(d) should be amended to read "*provide for the responsible person, organisation or organ of state to <u>implement, monitor, report on progress with implementation and update</u> the plan"*. 20. As a consequence of our submission in paragraph 8.4 above, **<u>we submit that</u>** paragraph (e) should be omitted to ensure that an appropriate hierarchy of planning instruments is preserved as one led by conservation priorities in relation to ecosystems and species. However, it is helpful to include the requirement that a BMP is consistent with: a. "*this Act;* b. *"the environmental management principles set out in section 2 of NEMA; and* c. *"the objectives of this Chapter*" (noting what is stated above in relation to the necessity to include chapter objectives).
Clause 38	21. We note that the requirement of "suitability" which appears in section 44 of NEM:BA has been removed from clause 38. **<u>We submit</u>** that it is necessary to include this requirement for a party to a biodiversity management agreement.

Clause 39	22. We consider that it is appropriate that the planning instruments referenced in clause 39(1)(a), (b), (c) and (d) are made subject to the requirements of (i)-(iv). This accords with what we state in paragraph 8.4 above regarding the proposed planning scheme. 23. However, **we submit that** two amendments are necessary to ensure clarity: a. two categories of instruments should be added to the list provided, namely the Adaptation Strategy and Planning instruments contemplated in sections 21 and 22 of the Climate Change Act and specific planning instruments in terms of the Marine Spatial Planning Act; b. amending the drafting of clause 37(a) to (d) so that clauses (i) to (iv) of clause 37(1) are clearly applicable to all of clauses 31(a)-(d).

9. Specific comments relating to Chapter 5: Ecosystems and Species

9.1. Need for inclusion of objectives: As above, we consider the omission of the objectives for the chapter (previously provided in section 51 of NEM:BA) to be problematic. This is particularly the case given the current drafting of clauses 40 to 42 which appear to provide wide discretion to the Minister in respect of listing and management of species and ecosystems. The absence of statutory obligations to be read with these apparently discretionary powers is particularly concerning given that legislative measures to identify and conserve species and ecosystems are at the heart of the State's obligations to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources as these obligations relate to biodiversity. **We submit** that chapter objectives should be included.

9.2. Attempts at simplification create practical difficulties and absurdity. Clauses 40 and 42 both require listing – however, it is not clear what the difference is meant to be. Further, with the removal of "*Restricted Activities*" from the Bill, the effect of listing becomes entirely unclear. Clause 41 does not assist. Instead, one of the unintended consequences of the drafting of Chapter 5 is that it may become unworkable: the Minister needing to publish conditions / prohibitions/ restrictions / permit requirements for each and every individually listed species and ecosystem under clause 40 and clause 42. This is entirely unworkable. Accordingly, **we submit:**

9.2.1. the definition of "*Restricted Activities"* should be reinserted into the Bill and the language of section 57 of NEM:BA should be retained; and

9.2.2. to the extent that the DFFE has identified the need for permits for certain "Restricted Activities" as unnecessary, these specific activities should be removed through legislative amendment to part (a) of the definition of Restricted Activities in NEM:BA (or necessary modifications to the list of Restricted Activities defined in part (a) of the definition included in the Bill).

9.3. **We submit** that the current listing system should be retained but amended to clarify alignment with IUCN threat categories; enable accommodation of classification in accordance with the Appendices of CITES, the CMS, AEWA and other relevant environmental treaties; and to enable the flexibility to list species in need of protection for other contextual reasons (whether cultural, economic or on other grounds). Our submission rests on the following recommendations:

9.3.1. First, we should not lose sight of the existing listings of protected and threatened species under the TOPS and TOPSM listings, nor the difficulties in, and length of time it has taken to draft, these lists and the associated regulations (let alone update them). Rather than entirely replacing this system, we would recommend improving and building upon it by retaining the existing listings subject to amendment based on:

a) Alignment of the category of "threatened" species with IUCN listing categories of "near threatened", "vulnerable", "endangered", and "critically endangered", employing the same criteria as those used by the IUCN (which should be referenced in the definition of a "threatened" species under the Bill);

b) Incorporation of a residual category of species "*otherwise in need of conservation*" to accommodate species not categorised by the IUCN but in need of conservation (and thus eliminating the need for clause41 of the Bill).

c) Specifying criteria for species "otherwise in need of conservation" which should include: (i) species that are not classified as threatened by the IUCN, but are listed in the appendices of CITES, CMS, AEWA or any other international instrument; (ii) species which are not globally threatened but need protection in the context of traditional / cultural / spiritual use;[80] (iii) species which are not globally threatened need protection to facilitate traditional / cultural / spiritual use while

[80] See *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC).

securing ecological sustainability;[81] (iv) species which are not threatened but which require specific protection to secure well-being / humane practices due to particular uses (such as the hunting of leopard / lion); (v) species particularly vulnerable to organised crime / wildlife trafficking (and not otherwise listed).

9.3.2. Second, ecosystems should again be classed as "threatened" (with reference to IUCN criteria, as were used in the 2018 National Biodiversity Assessment) with a residual category of "*otherwise in need of conservation"* (eliminating the need for clause 41 of the Bill) with specified criteria for the class of "*otherwise in need of conservation"* including:

a) ecosystems essential to ensure survival or well-being of threatened species;

b) ecosystems with particular importance for climate mitigation, adaptation, resilience;

c) ecosystems critical for the provision of ecosystem services;

d) ecosystems which require a heightened degree of conservation in the context of cultural / traditional / spiritual practices;

e) ecosystems which require a heightened degree of conservation due to ecologically unsustainable use through cultural / traditional / spiritual practices; and

f) ecosystems particularly vulnerable to organised crime or wildlife trafficking (such as the succulent Karoo).

9.3.3. Third, it is necessary that provision is made for the classification of ecosystems to be incorporated into the NBF and SPBs.

9.4. We address further specific considerations in the table below.

Clause 40(1)	1. Publication of listed species is a requirement for South Africa to meaningfully address its international and national obligations in relation to threatened species and the illegal trade in wildlife (and plants). For this reason, **we submit that** the obligation to "list" should be obligatory with the language of clause 40(1) reading "*The Minister must, publish a national list of species or*

[81] See *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk).

	ecosystems…". This language is proposed subject to: a. what is said in this submission about the approach to listing; and b. the necessity for proper consultation as addressed in paragraph 3.7 above, and currently contemplated in section 63 read with section 52(1) of NEM:BA. 2. We note that section 40(1)(b) groups "conservation" and "protection". If regard is had to the structure of section 24(b) of the Constitution described in paragraph 2 above, <u>all</u> species or ecosystems that fall within the categories contemplated in paragraphs 40(1)(a) to (d) require environmental "protection". **<u>We submit that</u>** such consistency would be promoted by stating that that "*The Minister <u>must</u>… by notice in the Gazette, publish a national list of <u>protected</u> species or ecosystems that (a) are threatened…. or (d) <u>are otherwise in need of conservation</u>"*. 3. We have concerns relating to the approach to spiritual, cultural and religious use as articulated in clause 40(1)(c). In particular, clause 40(1)(c) does not appear to address the issue of transformation – nor the "root causes" identified at p 5 of the SEIAS Form. In particular, there is no indication of how this provision is intended to enable the exercise of rights and inclusive participation by traditional leaders and traditional health practitioners, previously disadvantaged individuals and indigenous people and local communities. Given the variability of cultural, traditional and spiritual practice and belief in South Africa, it is also unclear how such a list is to be compiled. **<u>We submit that</u>** it may be advisable to remove this provision and notion of "cultural" listing of ecosystems or species, and rather including a list of criteria which may inform what is "otherwise in need of conservation" to address: a. species / ecosystems which need particular conservation in order to <u>facilitate</u> traditional / cultural / spiritual use that is ecologically sustainable; and b. species / ecosystems which need a heightened degree of protection due to practices which lead to use which is <u>not ecologically sustainable</u>. 4. Similarly, it is not clear that a specific listing is practical in relation to species or ecosystems which require "additional" consideration to promote animal well-being and humane

practices, actions and activities. We note the admirable intention to include a heightened degree of scrutiny in respect of animal well-being and humane practices and commend the drafters in this regard. This would certainly be applicable to animals which were, for example, placed in national zoological gardens or subject to hunting / illegal trade. It would also, however, be applicable to (for example), estuarine ecosystems which provide unique nursery / fish spawning grounds; or plants and animals which form a key element of the diet of a threatened species. Accordingly, **we submit that** as with clause 40(1)(c), the objectives of clause 40(1)(d) may be better and more practically realised by including these among criteria for listing ecosystems / species as "*otherwise in need of conservation*".

5. **In sum, we submit that** the text of clause 40(1) could be replaced with text along the following lines:

> "(1) *The Minister must, after consultation with the relevant MEC, by notice in the Gazette, publish a national list of species that are –*
>
> *(a) near threatened;*
>
> *(b) vulnerable;*
>
> *(c) endangered;*
>
> *(d) critically endangered; or*
>
> *(e) otherwise in need of conservation.*
>
> *(2) In determining which species are otherwise in need of conservation, the Minister must have regard to –*
>
> *(a) species or ecosystems which are not classified as threatened by the IUCN, but are listed for special protection in CITES, CMS, AEWA or any other international instrument to which South Africa is a party;*
>
> *(b) species or ecosystems which are not globally threatened but require protection in the context of traditional, cultural, spiritual or commercial use;*
>
> *(c) species which are not globally threatened but which require specific protection to secure animal well-being;*
>
> *(d) species which are not globally threatened but which face population-level threats or require specific conservation management interventions in South Africa; and*
>
> *(d) species particularly vulnerable to organised crime or trafficking".*

	a. This language needs some further refinement and would need to be accompanied by definitions of "threatened" as including the IUCN categories of "near threatened", "vulnerable", "endangered" and "critically endangered" – while each of those terms would need definition with reference to IUCN categories / methodologies. The relevant treaties would also need definition. 6. We note two further concerns: a. It is not clear why there should be consultation with "*the relevant MEC"*, how such relevance is understood in this context, and why the wider consultation requirements currently included in Chapter 4 of NEM:BA are omitted. b. The obligations to review listings have been removed – as has the ability of provincial MECs to develop provincial lists. We question these omissions given the nature of listings – as well as the need to ensure that lists are scrutinised and realigned with shifts in, for example, conservation status. **We submit** that review obligations should be included.
Clause 40(2)	7. We appreciate the intention of simplifying the process of linking listings of species and ecosystems of concern to the relevant conditions, restrictions and so on. However, combining the process of listing species / ecosystems with the notice imposing conditions / identifying prohibitions or restrictions / identifying activities which require a permit / identifying any other measures is only likely suited to notices identifying single ecosystems or species. **We submit that** it may be necessary to consider delinking clauses 40(1) and (2) into separate clauses / sections to allow for practical implementation which does not require an entire overhaul of the TOPS and TOPSM listings. In saying this, we note that the requirements for TOPS and TOPSM listings should be clearly articulated and published in regulation with regard to the categories set out in clause 40(1) as we have submitted above. 8. We also note that the permissive nature of clause 40(2) ("*may*" rather than "*must*") has the effect that the Minister has no obligation to impose conditions / prohibitions or restrictions / identify activities which require a permit / identify any other measure. If this is the case, the purpose and object of listing becomes unclear. Accordingly, **we submit that** the Minister

	should bear the obligation to specify these consequences of species / ecosystem listing. 9. **<u>We submit</u>** that there should be a statutory relationship between the provisions of section 40(2)(c) and the requirement for environmental authorisation contemplated in section 24 of NEMA. Ideally, where ecosystems or species are identified as in need of protection in terms of section 40(1), we submit that environmental authorisation in terms of section 24 of NEMA should be mandatory for listed activities that are proposed in relation to that species / ecosystem (as is currently the case for listed activities in threatened ecosystems).
Clause 42	10. It is not clear why "priority species" are differentiated from threatened species. This is particularly as clause 43 (dealing with the Scientific Authority) refers to section 40 rather than clause 42 even though clause 42 refers to vulnerability to wildlife crime trafficking or organised crime. As indicated above, **<u>we submit</u>** that the categories contemplated in clause 42 should be incorporated as criteria for listing species in a category of "*otherwise in need of conservation*" and that the considerations in clause 42(1)(a)-(d) are included, to the extent necessary, as criteria for such listing. 11. To the extent that clause 42 has been included with the intention of providing flexibility to the DFFE and Minister to seek further funding / resources as indicated during the public meeting of 19 July 2024, clause 42(1)(c) does not necessarily resolve the difficulty – particularly as this may require specific interaction with National Treasury / the Minister responsible for financial matters, the requirements of the PFMA and so on. In the circumstances, **<u>we submit that</u>** this matter needs to be specifically legislated and not embedded in a composite clause such as clause 42. It may be that this is better legislated outside the Bill and in legislation governing the relationship between the DFFE, allocation of annual budgets, and financial accountability. 12. We note that the reference to wildlife trafficking and organised crime omits the illegal trade in plant matter and specimens outside of organised crime (which is nowhere defined). As indicated in paragraph 4 above, **<u>we submit that</u>** "Wildlife Trafficking" is replaced by "Trafficking".

	13. We read clause 42 as an attempt to replace those provisions of section 57 of NEM:BA which give effect to specific obligations in terms of CITES. However, Part 3 of Chapter 5 addresses trade in species. Accordingly, this does not explain the role of clause 42 or its practical application. This requires clarity.
Clause 44	14. We recommend clarifying which body in South Africa is responsible for initiating the process of engaging with the CITES COP regarding listing of Appendix I-III species. In this regard, **we submit that** the Bill should consider the role of the Scientific Authority in advising the Minister in respect of any necessary uplisting or re-categorisation. 15. We note that a key function of the Scientific Authority is the making of non-detriment findings. While clause 44(1)(c) indicates that this function should be carried out "as prescribed", clause 70(1)(e) provides that the Minister "may" make regulations pertaining to "*the composition, operating procedures and functions of the Scientific Authority including the making of non-detriment findings*" (emphasis added). a. **We submit** that there ought to be no discretion – or any lack of clarity – regarding the Scientific Authority's function in making non-detriment findings. This is required by CITES. Further, it is unclear what the Minister is to prescribe in terms of this "function". b. Accordingly, **we submit** that the Minister's regulatory function should be restricted to procedural matters concerning the matter of non-detriment findings while the function of making, issuing and publicising non-detriment findings should be clearly articulated in clause 44. Moreover, the regulatory function of the Minister may best be encapsulated in obligations to regulate procedures for implementation and enforcement of international trade obligations pertaining to species as is currently the case in NEM:BA.[82] c. In this regard, we note that the courts have emphasised the importance of publication and consultation as part of the

[82] See section 97(1)(b)(iv) NEM:BA which empowers the Minister to make regulations regarding "*the facilitation of the implementation and enforcement of an international agreement regulating international trade in specimens of species to which the agreement applies and which is binding on the Republic*".

	non-detriment findings process. Omission of such consultation and public-participation provisions is an impermissible retrogressive step (see the provisions of section 62 read with section 61(2) of NEM:BA).[83]
Clause 45(1)	16. We question whether the Bill provides for the degree of scrutiny and necessary jurisdictional facts in respect of the issuance of export, import, re-export or introduction from the sea of CITES specimens of species listed in Appendix I as contemplated in Art III(2); (3); (4) and (5) respectively; as contemplated in Art IV (2)-(6) in relation to Appendix II species; or as contemplated in Art V(2) in respect of Appendix III species. This difficulty is not solved by clause 61(1)(c) designating the Minister as the issuing authority and there is no reference to regulation modifying or tailoring such permits to the requirements of CITES in clause 45 or 61 (which should be the case, noting clause 70(1)(c)). 17. **We submit** that if such requirements are to be left to regulation, the Minister's obligation to publish such regulation should be mandatory and not couched in the permissive language reflected in clause 70(1) read as a whole. 18. We also note that there is an absence of alignment with the provisions of Article VII of CITES – and no explanation for why this is the case. 19. Critically, there is no express provision relating to the requirement of maintaining records of trades in Appendix I-III specimens as required by Art VIII(6); nor the reporting requirement / obligation in Art VIII(7) read with (8). It is not clear why these are omitted from the text of the Bill itself (as the obligations themselves should be contingent on regulation).

10. Specific comments relating to Chapter 6: Alien and Invasive Species and Genetically Modified Organisms

10.1. Omission of chapter objectives is, once again, problematic. This is particularly so when interpreting the role and purpose of clause 49.

[83] [2022] 3 All SA 616 (WCC) para 37; *NSPCA* para 23. We note that clause 44(2) reproduces section 61(2) of NEM:BA, however, there is no equivalent of section 62 – a critical omission.

10.2. Oversimplification creates legal uncertainty and greater regulatory complexity. This is because simplifying the provisions in the Bill means that greater specificity will be necessary in the regulations.

10.2.1. We understand the attempt to move from a default position of prohibition (coupled with exemptions) to a system which allows for bespoke regulation. However, clauses 46 and 47 fail to achieve this objective and simply result in lack of legal certainty.

10.2.2. In particular, vagueness of the provisions in clauses 46 to 49 do not provide a clear regulatory framework for management of alien and invasive species; give little to no indication of how the scheme will work; do not effectively domesticate or enable compliance with South Africa's international obligations under, *inter alia*, articles 8(g)-(h) of the CBD.[84] There is no indication of how adherence to these obligations will be achieved – other than vague reference to Ministerial discretion to provide regulations which could be in terms of clause 70(1)(a), (c), (f), (h), (i), (j), (k), (l), (m), (n), (o), (q), (t), (u) or (v).

10.2.3. We note that the "complexity" involved in alien and invasive species regulation currently lies primarily in the Alien and Invasive Species Regulations, 2020[85] – rather than the language of NEM:BA. It appears that the detail regarding implementation of Chapter 6 will, similarly, lie in regulations – and there is no indication that these will reduce complexity.

10.2.4. In the circumstances, to the extent that the DFFE has experienced implementation difficulties with the current Alien and Invasive Species Regulations, 2020, **we submit that** these difficulties need to be identified, clarified, publicised and result in amendments of the regulations – not a whole-scale replacement of NEM:BA.

10.2.5. Similarly, we understand from the public presentations by the DFFE during the week of 15 July 2024, the DFFE has experienced difficulties with implementation of the Exemptions provisions of section 66 of NEMBA. To

[84] We draw attention to Guiding Principles provided in CBD COP 6 Decision VI/23. See extensive guidance in CBD decisions here: https://www.cbd.int/invasive/cop-decisions.shtml. These need to be considered and refer, *inter alia*, to the International Plant Protection Convention and standards set by the World Trade Organisation and Food and Agricultural Association. We note that South Africa has designated the Department of Agriculture as reporting body in relation to IPPC, however, co-ordination remains important in the context of Chapter 6 of the Bill. Similarly, we note, in respect of introduction of alien species into the sea, the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 is a key IMO treaty which has been ratified by South Africa. However, the Ballast Water Management Bill, introduced in 2013 by the Department of Transport has stalled and no domestic provisions appear to be in place. We urge the DFFE to consider the need to incorporate elements of the BWM into the Bill. Further, we note that this is a key instance of the need for specific co-operative governance provisions drafted into NEM:BA in relation to threats to biodiversity – including those relating to alien and invasive species.

[85] GNR1020 in *GG 43735* of 25 September 2020.

the extent that this has occurred, we question why the DFFE cannot clearly articulate these difficulties and effect the necessary amendments to section 66. Again, this does not appear to warrant a wholescale replacement of NEM:BA.

10.3. Omission of statutory basis for realising White Paper Goal 1.4 (*"Identify and manage harmful, and potentially harmful, invasive alien species, their potential and existing introduction pathways and biological invasions"*. Goal 1.4 includes 12 expected outputs. A number of these require a statutory basis in order to be achieved:

10.3.1. Expected Output 7 refers to "*A national policy on the overall management of biological invasions developed, including for movement and transfer of species"*. This needs an authorising provision.

10.3.2. Expected Output 8 states "*Landowners incentivised to control or eradicate invasive species"*. Such incentives to not appear to have been catered for in the Bill and the "command and control" approach remains.

10.3.3. Similarly, the statutory basis for other important expected outputs appears lacking, in particular, Expected Outputs 9 (improvement and expansion of biological and other control methods); 10 (public education and awareness); 11 (integrated approach with neighbouring countries); and 12 (integrated cross-sector approach and practices).

10.4. Omission of duty of care requirements. We note that there is no equivalent of section 69 or section 73 of NEM:BA included in the Bill. While we appreciate that the definition of "duty of care" in the Bill applies to biodiversity generally (and, laudably, is incorporated in the provisions of Chapter 4), no such duty appears to lie in relation to the holders of permits under Chapter 6, nor to the development of invasive control plans in section 48, nor in relation to genetically modified organisms (**GMOs**). We see this as a critical omission.

10.5. Our further specific comments are as follows:

Clause 46(2)	1. We note the omission of reference to a "prescribed" risk assessment. 2. **We submit** that the requirement for regulation in this regard is necessary to ensure uniformity and that the necessary risk assessment takes account of the jurisdictional facts linked to relevant international as well as domestic requirements for permitting. Further, this is necessary if conditions, prohibitions, restrictions and requirements considered in terms of clause 46(3) are intended to govern such risk assessment (although it is not clear that this is intended).

Clause 47	3. The key difficulty arising from the drafting of clause 47 is that the consequences of a species being listed as an invasive species is not clear and that the Minister / DFFE is required to develop bespoke conditions in respect of all listed invasive species. This seems to create an undue burden on the DFFE given the definition of invasive species as an alien or extra-limital species that causes the harms specified in the definition provided in clause 1. 4. To remediate this difficulty, **we submit** that it would be helpful to include a "baseline" of consequences once a species is listed as an "invasive species". a. The first set of consequences should relate to activities that are prohibited or restricted. Here, the list of activities provided under part (b) of the definition of "Restricted activities" in NEM:BA appears to be a reasonable list of problematic activities in respect of harm-causing species. Accordingly, we would recommend retaining this part of the definition of "restricted activities" in the Bill and providing, in clause 47, that "restricted activities" are prohibited for listed invasive species. If coupled with provision of exemptions, this should provide the requisite degree of certainty (and we would anticipate that exemptions should be the exception rather than the norm given the core harm-causing aspect of the "invasive species" definition). b. The second set of consequences should relate to pro-active steps to prevent the harmful effects of invasive species. Here, the provisions of section 75 of NEM:BA, as amended by Act 2 of 2022 appear to provide a sensible set of interventions. We would submit that provisions to this effect should be incorporated into clause 47.
Clause 48	5. The removal of the requirements of a control plan from the body of the Bill is problematic (see section 76(4) of NEM:BA). **We submit** the certainty provided by such a list is necessary to ensure uniformity and the efficacy of invasive control plans and, moreover, gives meaning to the obligation to prepare such a plan. 6. We note that the absence of a reporting requirement prevents proper oversight by the DFFE / Minister. Accordingly, **we**

	submit that monitoring and reporting obligations should be incorporated for management authorities and other organs of state required to prepare invasive species control plans. This obligation should be along the lines of section 77 of NEM:BA.
Clause 49	7. As clause 49 currently reads (together with the revised heading of Chapter 6), the inclusion of the GMO provisions do not serve an obvious purpose. However, following from the purpose of section 78 of NEM:BA, it was clear that the relevance of GMO regulation to biodiversity regulation lay in any potential threat to biodiversity. **We submit** that this relationship should be clarified in clause 49. 8. We commend the DFFE for attempting to align the practical procedures relevant to GMO environmental risk assessments with the provisions of the GMO Act. However, we note that this may not have been effectively achieved. In particular, clause 49(2) requires the Minister to notify the Council if an applicant for a permit under GMO Act requires an environmental authorisation or must undertake any other environmental assessment. However, regulation 6 of the regulations published under the GMO Act (**GMO Regulations**)[86] currently provides for the possibility of environmental impact assessments being required and states, in regulation 6(2) that "*the Council may on a case-by-case approach make a recommendation to the Minister of Environmental Affairs on whether an environmental impact assessment will be required*". There is thus a conflict between the obligations placed on the Minister by the Bill, and those placed on the Council by the GMO Regulations. Ordinarily, regulations would need to conform with primary legislation. In this case, however, **we submit** the Bill should align with the GMO Regulations. 9. We also note that the conditions under which an environmental authorisation or any other environmental assessment are not clear as the pre-conditions are not provided (as was the case in section 78(1) of NEM:BA). Moreover, absence of an equivalent of section 78(2) has removed clarity about the timing of the need for an EIA / EA / environmental assessment in relation to the decision-making process of the permitting authority under the GMO Act. Similarly, it is not evident how removal of the

[86] GNR120 in *GG32966* of 26 February 2010.

	definition of "release" in section 78(3) is beneficial – as it, again, ensures clarity as well as alignment with the processes and interpretative scheme of the GMO Act. **We submit** that the specificity of section 78 should thus be incorporated in the Bill.

11. Specific comments relating to Chapter 7: Access to Indigenous Biological Resources and Indigenous Knowledge, Bioprospecting and Benefit Sharing

11.1. We commend the substantial revision of the provisions relating to access to indigenous biological resources, indigenous knowledge, bioprospecting and benefit sharing. Given that these provisions were drafted before the adoption of the Nagoya Protocol, amendment was necessary to ensure alignment with and successful implementation of the Nagoya Protocol. We regard this as a necessary set of amendments.

11.2. The SEAIS Form recognises that NEM:BA is inadequate insofar as it relates to fair and equitable sharing of benefits derived from bioprospecting or biotrade involving commercial utilisation of indigenous biological or genetic resources and/ or their associated traditional knowledge. The Bill goes a long way in addressing this deficiency.

11.3. In particular, we support the inclusion of rigorous, standalone provisions to address prior informed consent, including the conclusion of an access agreement which, together with the prior informed consultation and consent process, must be approved by the Minister. We also support the requirement of both a discovery-phase bioprospecting permit, as well as a commercial bioprospecting permit in order to better protect the custodians of indigenous biological resources and indigenous knowledge.

11.4. We note however that the Bill contains several omissions, which are material to its alignment with the Nagoya Protocol:

11.4.1. While the Bill provides that no person may undertake non-commercial research outside the Republic utilising an indigenous biological resource or knowledge without a permit, the Bill does not make provision for non-commercial research in the Republic.

a) Article 8(a) of the Nagoya Protocol requires parties to "*create conditions to promote and encourage research which contributes to the conservation and sustainable use of biological diversity, particularly in developing countries, including through simplified measures on access for non-commercial research purposes*."

b) The Bill needs to include provisions relating to access for non-commercial research. In NEM:BA, this is dealt with in terms of section 86 by means of exemption provisions.

c) **We submit** that the same approach should be adopted in the Bill, namely the inclusion of a clause 58A which reads "*the Minister may by notice in the Gazette declare that this Chapter does not apply to certain categories of research involving indigenous biological resources or commercial exploitation of indigenous biological resources*."

11.4.2. The Bill also fails to accommodate Article 9 of the Nagoya Protocol, namely that users and providers are required to direct benefits arising from the utilization of genetic resources towards the conservation of biological diversity and the sustainable use of its components. **We submit** that this needs remedy.

11.5. Specific comments relevant to clauses 50 to 59 follow:

Clause 54(4)	1. We submit that the terms of the benefit sharing agreement must align with Article 6(3)(g) of the Nagoya Protocol which requires legislation to: (*g) Establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, inter alia:* *(i) A dispute settlement clause;* *(ii) Terms on benefit-sharing, including in relation to intellectual property rights;* *(iii) Terms on subsequent third-party use, if any; and* *(iv) Terms on changes of intent, where applicable.* 2. **We submit** that the above requirements should be included in clause 54 of the Bill.
Clause 55	3. **We submit** that what constitutes "commercial exploitation" for the purpose of commercial bioprospecting should be set out in the definition section, and not be subject to listing by the Minister. This creates an unnecessary legislative burden.
Clause 59	4. Greater clarity behind the rationale for the suspense bank account is required in the explanatory memorandum. We

	question whether the holding of funds by the State may have the effect of disempowering other parties to access agreements / benefit-sharing agreements / biotrade agreements – particularly where the applicant is not a beneficiary community. This would be contrary to the transformation and equity objectives embedded in Chapter 7, the Bill and the Nagoya Protocol. **We submit** that there should, at a minimum, be the possibility of parties to such an agreement either "opting in" to such an arrangement or "opting out". 5. We question the replacement of the Bioprospecting Trust Fund with the suspense bank account (as this has not been explained). We note that the accountability requirements are particularly important (and have been retained insofar as the PFMA remains applicable). However, it appears that the structure of a trust fund provided a greater degree of protection for beneficiaries than that of a suspense account. This said, we note that there is no readily accessible reporting on the current status of the Bioprospecting Trust Fund or any indication that it is functioning / experience difficulties and so on. We call upon the DFFE to clarify its thinking in this regard.

12. Specific comments relating to Chapter 8: Issuing of Permits and Emergency Interventions

12.1. Specific comments follow in respect of clauses 60 to 64.

Clause 60	1. We note the omission of the equivalent of sections 88(3) of NEM:BA providing that permit conditions must comply with the listed legislative and policy instruments, and section 88(5) of NEM:BA providing that where an issuing authority rejects a permit application, written reasons must be provided to the applicant. 2. While both these provisions apply by operation of law, it is helpful for purposes of ensuring clarity for applicants and accountability by the issuing authority, to include equivalent provisions in clause 60. **We recommend such inclusion**. 3. We note that the specific powers to issue and refuse permits have been omitted. This is a flaw in terms of granting the relevant powers to the issuing authority. **We submit** such provisions should

	be included. 4. We note that clause 60(1) provides full discretion in the attachment of validity periods (as well as conditions) for permits. It is not clear why the imposition of a validity and renewal period is discretionary. **We submit that**, in order to ensure proper oversight, it would appear sensible to ensure that all permits "*must*" include validity periods, a renewal period – and also clarify the purpose of the permit (as provided for in section 90(1)(a)(i)-(ii) of NEM:BA). With respect to oversight, transparency and publicity, see also our comments at paragraph 3.9.3 above. 5. We note the absence of the availability of integrated permits from the Bill. Given the emphasis on reducing costs of permitting and complexity of permitting procedures, this omission is odd. **We submit** that such provision should be included.
Clause 61(1)	6. It is unclear what is meant by a permit "*for a specimen of a marine species"* – simply as a permit is presumably for an activity of some sort. The language of clause 61(1)(a) is thus unclear (and it is unclear how this is properly distinguished from actions taken pursuant to the rights and permits issued under the MLRA). The language of section 67A(1)(a)(ii) of NEM:BA makes it clear that the permits in question were for "restricted activities" relating to "*marine species"*. Moreover, by referring to "species", section 67A(1)(a)(ii) engages population-level actions, while clause 61(1)(a) seems to refer to individuals only. **We submit that** both species and specimens should be contemplated, together with clarifying language around the purpose or kind of permits covered by this provision. 7. It is equally unclear why clause 61(1)(b) includes only "specimens" of listed species / ecosystems or species managed in terms of section 41(1) – rather than a "species or specimen". This seems to preclude permitting that involves management actions affecting a particular population, rather than individuals. 8. It is not clear why clause 61(1)(c) read with clause 61(2) differentiates between the origin of specimens from a national protected area and other protected areas in the context of a permitting provision clearly designed to give effect to CITES which operates in the international domain. It would appear consistent with the powers of national authorities to issue permits for import, export, re-export or introduction from the sea of all specimens

	regardless of the area from which they originate. **We submit** that clarity in this regard (and potential amendment) is necessary.
Clause 62	9. There is a need for guidelines for situations in which an issuing authority may require a risk assessment, including what this should contain. **We submit** that this is necessary to ensure uniform application of the rules – particularly as there are 10 different issuing authorities contemplated (including the Minister and 9 MECs). Accordingly, we recommend provision for guidelines to be issued within a specified period after commencement of the relevant clause.
Clause 63	10. We question the omission of the cost-recovery provisions that are provided in section 93(2) of NEM:BA in relation to permit cancellations (now revocation).
Clause 64	11. It is not clear what is meant by the "*process in section 61*" referred to in clause 64(3). Clause 61 does not contain a process. 12. Generally, we welcome the inclusion of clause 64, noting its potential to provide for intervention in the context of activities posing risks to individual or populations of animals and/or plants. However, **we submit** that it is helpful to include principles or criteria that must serve as "relevant considerations" when making decisions under this section, including adherence to the objects of the Act. 13. In addition, **we submit** that provision should be made for emergency intervention to secure animal wellbeing.

13. Specific comments relating to Chapter 9: General and Miscellaneous

13.1. We set out specific comments regarding clauses 65 to 75 below.

Clause 65	1. We recognise the potential benefits of the Minister or MEC being empowered to appoint any member of the public as a biodiversity officer. 2. However, **we submit** that there is a need for clarity in the legislation itself regarding the functions and powers that a

	biodiversity officer may exercise. This is particular so given the definition of administrative action in section of the Promotion of Administrative Justice Act, 3 of 2000 (**PAJA**) and the legal certainty required for both biodiversity officers themselves and those with whom they engage in terms of how they may be held accountable, the principles and standards governing their conduct and what they may do. 3. **We further submit** that it would also be helpful to include the criteria which must be satisfied for a person to qualify as a biodiversity officer. The Minister and MEC's discretion should not be unlimited in this regard. 4. Relatedly, **we submit** that clause 65(2) should require the Minister or an MEC to take the steps outlined in this clause ("must" rather than "may").
Clause 66	5. The purpose of clause 66 is unclear. **We submit** it is particularly important to specify the roles of recognised industrial bodies, associations or organisations contemplated in clause 66(1) and the fora contemplated in clause 66(2) to ensure that these are not used to limit the scope of relevant stakeholders for purposes of consultation (already weakened under the Bill).
Clause 67	6. We note that the definition of "this Act" includes "notices", and clause 67(1) indicates that norms and standards are created through notices. However, **we submit that** it would be helpful if the definition of "this Act" expressly refers to norms and standards for the sake of clarity – particularly given the offence created in clause 71(3)(f). 7. We question the omission of public consultation requirements from this clause.
Clause 68	8. We have addressed our concerns regarding the weakening of public participation and inter-governmental consultation provisions in the Bill in paragraph 3.7 above.
Clause 69	9. Clause 69(1) allows for exemptions "*in writing or by notice in the Gazette"* (emphasis added). It does not appear appropriate for exemptions to be possible without publication. Accordingly, **we submit** that clause 69(1) should read "*in writing and by notice in*

	the Gazette". 10. **We submit** that the clause requires inclusion of: a. Express public consultation requirements (at a minimum through notice and comment); b. Express obligations on the Minister to review exemptions at stipulated regular intervals; and c. Express powers amend and withdraw exemptions to ensure absolute legislative clarity.
Clause 70	11. The key difficulty with clause 70(1) is that the scheme created by the Bill requires regulation so that it has substance and can have meaningful effect. For this reason, it is inappropriate that all potential regulations flows from the Minister's discretion to regulate (i.e. "may" rather than "must"). **We submit** that at a minimum, the Bill should distinguish between those regulations which are necessary for its operability and those which are, in fact, adding detail to obligations which are otherwise clear from the text of the primary legislation. 12. We are particularly concerned at the framework that the Bill seeks to create given the removal of the requirements for public consultation and submission to Parliament contained in sections 97(3) and 97(3A) of NEM:BA. **We submit** these provisions are even more essential in the context of the Bill which assumes extensive legislative power for the executive through clause 70(1). 13. We also note the omission of equivalent limitations to those provided in section 98(2) and 98(3) of NEM:BA. **We submit** these are essential legislative provisions where a member of the executive is granted the powers to create offences and penalties – particularly given the seriousness of criminal consequences and the rights enshrined in section 35 of the Constitution. While the list of regulations in clause 70(1) do not appear to include regulation of penalties or offences (and these seem to be dealt with uniformly in clause 72(1)), clause 42(1)(c) and (d) appear to contemplate more stringent penalties. It is not clear how this scheme is meant to work – and how executive powers are to be granted, exercised and properly limited.

Clause 71	14. It is not clear why an offence is created in terms of clause 54(2), but not clause 54(1). Similarly, it is not clear why no offence is created in terms of clause 59(1) (which also carries no administrative penalty).
Clause 72	15. Clause 72(2) raises a number of practical problems in terms of calculation of a penalty in relation to commercial value. To the extent that a particular trade is illegal, it is difficult (if not impossible) to calculate commercial value. Moreover, it is not clear at which point in time value is to be calculated i.e. at the point in time when the specimen / species was exploited or at the time of the imposition of sentence. **We submit that** this needs to be clarified to avoid calculation difficulties. The same clarification is required in relation to clause 72(3)(i). 16. Clause 72(3) does not correspond with an offence under the Bill.
Clause 73	17. Clause 73(1) provides that anything done in terms of NEM:BA "*which may or must be done in terms of this Act"* must be regarded as having been done. However, the change in the schemes relating to species and ecosystems in Chapter 5 and alien and invasive species and genetically modified organisms in Chapter 6 make the existing listings and regulations difficult to apply. **We submit** it is necessary to be specific about which regulations and/or sections and definitions of NEM:BA persist until they are replaced by regulation under the Bill.
Clause 74	18. We note the repeal of the Seabirds and Seals Protection Act, 46 of 1973. However, key prohibitions (particularly those of section 3) and the police powers in section 10 find no replacement in the Bill and should continue. **We submit** that at the very minimum, this Act should remain in force until regulation under the Bill can replace the relevant prohibitions and permitting system (requiring inclusion in the transitional provisions). 19. We also note that certain of the jurisdictional areas applicable to conduct / prohibited conduct under the Seabirds and Seals Protection Act differ from those in the Bill while key policies published under this Act remain extant. **We submit** this needs to be accounted for in the transitional provisions of the Bill.

14. Conclusion

14.1. We trust that the DFFE will receive our comments in the spirit in which they are provided, namely, to ensure that biodiversity legislation is both workable and constitutionally compliant. We are mindful that the proper protection of biodiversity is an enormous and complex undertaking requiring a high level of scientific and administrative expertise as well as extensive co-ordination between government departments in all spheres of government. In this context, we note the importance and potential difficulties of giving effect to the White Paper's vision of "*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 shared for present and future generations".*

14.2. However, we urge the DFFE to recall its primary mandate in respect of biodiversity which is to ensure its protection as a fundamental South African right to be realised immediately and for all perpetuity. The importance of this task cannot be underestimated and, to this end, we would welcome engagement with the DFFE to find solutions to the implementation problems they have identified and ensure "*Thriving people and nature"*.

Yours faithfully,

BIODIVERSITY LAW CENTRE NPC

***Per* Kate Handley and Nina Braude**