Draft National Environmental Management: Biodiversity Bill 2024

Preferred template for the submission of comments

NAME OF COMMENTER AND ORGANISATION: **Custodians of Professional Hunting & Conservation South Africa**

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Abbreviations

- **Bill** means the Draft National Environmental Management: Biodiversity Bill, 2024
- **Minister** means the national cabinet member responsible for the environment
- **NEMA** means the National Environmental Management Act, 1998 (Act No. 107 of 1998)
- **NEMBA** means the National Environmental Management: Biodiversity Act, 2004 (Act No. 4 of 2004)
- **SEMA** means a specific Environmental Management Act as defined in NEMA
- **White Paper** means the White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity (2023)

NAME & ORGANISATION	GENERAL COMMENT OR REGULATION NUMBER	COMMENT and SUGGESTION
	General Comment	REASONS FOR REPEAL AND REPLACEMENT OF THE NEMBA The State has not provided clear and rational reasons to the public or the regulated community to clarify why there is a need to repeal and replace NEMBA, rather than pursue an amendment of the existing NEMBA? The repeal of NEMBA is a major legislative change, which seems to have been initiated unilaterally by DFFE, rather than in response to calls from civil society or pressures from the regulated community. We would like to highlight that legislation such as NEMBA is enacted to fulfil the rights of the public in terms of section 24 of the Constitution – *"everyone has the right* *a) to an environment that is not harmful to their health or well-being; and* *b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—* *(i) prevent pollution and ecological degradation;* *(ii) promote conservation; and* *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."* Any legislation enacted by the State to give effect to the right enshrined in terms of section 24 of the Constitution, must be for the **benefit of the public** and must **protect the interests of the public**. We emphasize the above because begs an important question – why has the State unilaterally proposed the repeal and replacement of NEMBA? The Socio-Economic Impact Assessment (SEIA) prepared by the DFFE for the draft Bill and provided to the public, is particularly interesting in this regard, as it essentially reveals (in summary) DFFE's purported motivation for the repeal and replacement of NEMBA. According to the department, the current legislative blockages include "excessive permitting requirements", "over-regulation", "inflexible regulatory approach in NEMBA". DFFE goes on to record the aims of the Bill and the problems in the current NEMBA that the aims intend to address. Of the 6 aims listed, the following 3 are worth noting: - *The proposal [Bill] also aims to streamline the permitting systems for bioprospecting and biotrade, including the associated benefit sharing models.* - *The proposal provides a more **flexible regulatory** approach that will enable the Minister and MECs responsible for environmental affairs to **exercise greater discretionary powers**, will result in simpler implementation of the provisions and more effective compliance with international agreements; and*

		- *A more **flexible regulatory approach** will further enable **growth of the biodiversity economy** and participation in the **biodiversity value chain** by previously excluded groups"* There is a very clear and intentional agenda that is revealed by the national department, namely – enabling the Minister to exercise greater discretionary powers for the purposes of accessing the economic opportunities in the biodiversity sector including the biodiversity value chain. What appears to be the overriding motivation recorded in the SEIA report is the intention of the State to regulate the commercial benefits that are associated with the use of biological recourses and to do so by giving the Minister unfettered powers to enact regulations on
		EXCESSIVE POWERS GIVEN TO THE MINISTER WITHOUT FETTERED DISCRETION The approach adopted in the Bill appears to be overly weighted in favour of the powers that the Minister may exercise, with very little restriction on such powers or guidance on how the Minister may exercise these powers. In fact, the list of matters for which the Minister may make regulations in terms of section 70(1) spans more than 4 pages of the Bill, and includes more than 60 individual matters to exercise powers. DFFE is requested to clarify how the Minister's power are to be restricted in the Bill, and where the Bill requires the Minister to act in the interests of the public?
		CONSULTATION AND COMPLEXITY OF THE BILL - Chapter 7 of the Bill is incredibly complicated and difficult to understand. The terminology used does not take the ordinary meaning of certain phrases such as "bioprospecting" and "biotrade", which is misleading and confusing to the public and private sector trying to comment on the new regime. The technicality of the permitting requirements in Chapter 7, coupled with the various types of agreements, how these differ, and the purposes they each serve is hard to follow. This is made even more frustrating by the lack of substantial information provided in the Bill relating to these agreements, for instance: the following definitions provide no clarity on the substance: • "**access agreement**": *means a written agreement concluded with a person giving access to an indigenous biological resource or indigenous knowledge for bioprospecting"* • "**benefit-sharing agreement**": "*means a written agreement between an applicant for a commercial bioprospecting permit and—*

		(a) a person giving access; or *(b) an organ of state,* *to regulate the commercial exploitation of an indigenous biological resource or indigenous knowledge"* - Given that Chapter 7 essentially purports to nationalize Indigenous Biodiversity Resources (IBR) (under the guise of trusteeship in the Public Trust Doctrine), the public are entitled to fully understand and appreciate the gravity of the proposal. This requires transparency, accountability, and disclosure. However, as illustrated by the examples above, the Bill makes use of convoluted terms, linguistically circular definitions and indistinguishable agreements, which simply undermine the purpose of the consultation process. - The Bill was published for comment just prior to the national elections in May 2024, and barely one week before the comments are due, are the public advised of virtual 'workshops' held by DFFE to further clarify the Bill to the public. - The Bill is complex, and too vague for the public to meaningfully prepare representations. - The SEIA report contains superficial statements about reducing over-regulation, addressing the problems regarding the absence of empowering provisions to enable effective "transformation", and promises that the "regulated community" will benefit in a "reduction in associated costs to conduct business", none of which can be seen in the Bill as there is simply not enough detail provided. The DFFE is specifically requested to provide the public with responses to all the queries, before any decision is taken on the Bill.
		POSITIVE NOTES ON THE BILL - The inclusion of stricter penalties for wildlife trafficking is welcomed, along with the clarity on the definition of "wildlife trafficking".
CHAPTER 1 – INTERPRETATION, OBJECTIVES AND APPLICATION		
	Section 1 DEFINITIONS Definition of "**alien species**" – "*means a species that is not an indigenous species"* Read with definition of "indigenous species" - *means a species that occurs, or has historically occurred, naturally in a free state*	Definitions must be implementable and therefore measurable. Our proposal is therefore that all definitions with immeasurable components, be reviewed and amended. Whether or not a species is "alien" depends on the definition of "indigenous species", the definition of which is equally as cryptic. The use of the term "historically occurred" is likely to create confusion and lack of certainty, because it is not founded in scientific research. For instance: the timeframe for "historically occurred" is not quantifiable. Species may have been introduced over 300 years ago possibly by human intervention, but we have no evidence dating this far back to prove this. The implication is that legal

	in nature within the borders of the Republic, and that has not been introduced in the Republic as a result of human intervention, and includes migratory species;	obligations may apply to a species regarded as 'alien' but the basis for such categorisation is without any scientific evidence to prove the position. An example of this is may be a particular plant species –we cannot know whether the particular species was introduced into South Africa by human intervention 2000 years ago, or whether a seed blew over the border from Mozambique, or was transported across boundaries by migratory bird species. Whether or not the plant ever occurred naturally or whether it arrived as a result of human intervention are two things that cannot be lawfully verified. Moreover, the public is deprived of any legal certainty if no list of alien species is published for the purposes of the Bill. There is no fair way for the public to know whether the species is alien or not. Consequently, in the absence of the Minister publishing a list of alien species for the purposes of Bill, the provision relating to alien species will be impossible to enforce.
	Definition for **"components"**	Our proposal is to include the term "biomes" into the definition.
	Section 1(1) Definition of "**conservation**" and "**conservation areas**"	These definitions are not necessary and only confuse matters further. As an example: Conservation: "Intrinsic value" is not measurable and can therefore not be regulated. "For the benefit of present and future generations": The question remains how benefit will be measured in future notices / regulations Intrinsic value and benefit cannot be regulated. Our proposal is to delete the definitions, but to retain it as part of the vision / goals.
	Section 1 Definition of "**domestication**" *"means a process whereby wild plants and animals are subject to human-controlled directional selection over time to alter reproductive, physical, physiological or behavioural characteristics for human use, potentially leading to maladaptation to natural*	What is the relevance of the "domestication" definition into the Act? This definition is legally unenforceable. It is too vague and lacks scientific evidence. The term is not used in the Bill, save for mention in the Minister's powers to make regulations in section 70(1)(f)(xi) which gives the Minister to make regulations relating to the "sustainable use of components of biodiversity including – "*to mitigate any risk of domestication of faunal components of biodiversity*". This is beyond the objective of the Bill. References to "domestication of wildlife" creates unnecessary negativity towards South Africa as a preferred hunting destination, creating the impressions that wildlife is tame in South Africa. There is a difference between "domestication" and "taming", where "taming" is bred into a species over hundreds of years, as with dogs.

	environments and dependency on humans for survival"	
	Section 1 Definition of "**duty of care**" *"means reasonable measures to prevent harm to biodiversity and when those harms cannot reasonably be avoided or stopped, are minimised and remedied."*	Duty of Care It is unfortunate that duty of care is linked to the definition of sustainable use. Hunting is a recognized form of sustainable use of renewable resources and references to duty of care in the hunting scenario does not make sense and should be removed. In the SEIA report, the DFFE makes numerous references to the strengthening of the "duty of care" empowering provisions in the Bill, as one of the primary aims of the Bill. Reference to this duty of care is contained in many parts of the Bill, with the thrust of the legal force being included in Section 70(1)(f)(i) which empowers the Minister to publish regulations relating to the sustainable use of components of biodiversity including "*ensuring a duty of care towards all components of biodiversity*". The problem is that no law can impose this duty. Irrespective of any personal views, one needs to take into account that the Bill proposed as a national piece of legislation enacted to give effect to constitutional rights, including everyone's right to an environment that is not harmful to one's health or well-being. Our legal system is anthropocentric, and accordingly only recognises human rights. As a result, even the environmental right is premised on people having the right to an environment that does not negatively impact human health and well-being. The problem is that the duty of care seeks to protect the environment (or biodiversity) from the people, rather than protecting the environment (biodiversity) for the people.
	Definition of "**ecological community"**	The term is not used in the Bill and therefore there is no reason for including the definition.
	Definition for "**extra-limital species"**	We need clarity on the intention for including this definition and also how it will be regulated.
	definition of "**humane practices**" *"means any activities, methods, or actions involving wild animals that **avoid** or minimise pain, stress, suffering, or distress, and consider their well-being"* Read with the definition of "**Well-being**" (which we propose to be deleted):	The SEIA (page 13) states the following in relation to how these terms will be implemented: *"The adoption of provisions relating to well-being will empower the Minister to prohibit or regulate activities that may have a negative impact on the well-being of wild animals. This measure will compel permit holders to conduct practices in a humane manner."* The above excerpt from the SEIA report seems to be referring to the powers of the Minister under section 40 of the Bill. Section 40(1)(d) of the Bill allows the Minister to publish a list of species that "***require additional consideration to promote animal well-being and humane practices, actions and activities***". Section 40(2)(b) and (c) of the Bill then allows the Minister to "*impose prohibitions or restrictions*" or "*identify activities which require a permit*", in respect of any species identified in the list published by the Minister.

	"means the holistic circumstances and conditions of an animal or population of animals which are conducive to their physical, physiological, and mental health and quality of life, including their ability to cope with their environment"	Please refer to our comments to *definition: Well-being*, whereby we propose that the definition be removed. The definition of "humane practices" is expressly provided as being limited to "wild animals" in its application. Therefore, an obligation or duty relating to "humane practices" can only be enforced in respect of "wild animals". However, there is no definition for "wild animals" in the Bill. As a result, in the absence of any definition of what constitutes a "wild animal", it is not clear to what extent the Minister may enforce "humane practices" in terms of section 40(1) and (2) to. The Bill must include a definition of "wild animals", acknowledging and taking into consideration, the role and value of the private wildlife sector, for the above provisions to be enforceable. Moreover, the use of the term "**avoid**" [pain] in the definition of "humane practices" implies a prohibition of activities such as hunting, rather than regulatory of practices. The suggestion is that the definition exclude the term "avoid" ensuring practical implementation that is fair and just.
	Definition for **"indigenous species"** *"means a species that occurs, or has historically occurred, naturally in a free state in nature within the borders of the Republic, and that has not been introduced in the Republic as a result of human intervention, and includes migratory species"*	As the term "historically occurred" refers to a specific time frame, which can in many instances not be identified or confirmed, we propose that the wording "historically occurred" be removed from the definition. Refer to our comments under the section definition: *"alien species"*, above.
	Definition for **"invasive species"** ***"invasive species"*** *means any alien or extra-limital species that—* *(a) Threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species or cause any other environmental harm; or* *(b) may result in adverse*	We propose that the definition be amended to read: "means any alien or extra-limital species where it is scientifically proven that - …."

	economic or socio-economic impacts or harm to human health;	
	NO definition for self-administration.	The current NEM-BA definition for self-administration has been removed. With the provision in this Bill for Associations to be recognised, and referring to section 70 (1) (s), it would be important to include a definition for self-administration. Section 70 (1) : The Minister may make regulations relating to – (s) self-administration within the biodiversity sector. The current definition in NEM-BA reads as follows: "self-administration means the introduction of measures to facilitate compliance with provisions of the Act and standards set by Associations or organisations recognised through the system contemplated in terms of section 59(f) of the Act, but excludes measures that relate to the issuance of permits in terms of Chapter 7 or functions of environmental management inspectors. Section 59(f) of the NEM-BA refers to the compulsory or voluntary registration of persons….. and the recognition of associations relating to these persons, operations or facilities.
	NO definition for "stakeholder"	Persons and industries directly affected by the Bill, should be stipulated as stakeholders. There is a clear distinction between general public with no vested interested, and persons / industries directly affected by legislation.
	Section 1 Definition of "**sustainable use**" *"means the use of any component of biodiversity in a manner that—* *a) is ecologically, economically, and socially sustainable;* *b) does not contribute to its long-term decline in the wild, or disrupt the genetic integrity of the population;* *c) does not disrupt the ecological integrity of the ecosystem in which it occurs;*	The proposed definition of "sustainable use" is too broad, vague and overly complex, for effective implementation by the state in a manner that is just and fair for the public. Moreover, the use of the conjunction "and" means that to meet the definition of "sustainable use", such use must meet ALL of the criteria set out in subparagraphs (a) to (e). Put plainly, any person making use of a biological component, whether for commercial or non-commercial reasons, may only do so if such use meets all the criteria set out in subparagraphs (a) – (e). This is unduly onerous, especially insofar as subparagraphs (d) and (e) are concerned, as set out below. With specific reference to – - **subparagraph (a): Whose inputs would be considered as to whether the use would be socially sustainabnle?** - **subparagraph d):** the inclusion of a requirement that the use of a biological component must "ensure continued benefits to people that are fair, equitable.." suggests that the State intends to apply criteria to the use of biological resources based on economic factors. This is already included under Objective 2 (c) and we propose that it be deleted from the definition. - **subparagraph (e):** reference to "thriving people and nature" as a criteria for using biodiversity sustainably, is subjective and impossible to quantify. This is already included under Objective 2 (c) and we propose that it be deleted from the definition.

	d) ***ensures continued benefits to people that are fair, equitable and meet the needs and aspirations*** *of present and future generations;* ***and*** *e) ensures a* ***duty of care*** *towards all components of biodiversity for* ***thriving people and nature****"*	- **Subparagraph (e):** reference to duty of care does not make sense within the concept of hunting as a method of wildlife management and sustainable use of renewable resources. The term "sustainable use" is used throughout the Bill, but the weight of the implications of the term is seen in section 70(1)(f) of the Bill, which gives the Minister the power to publish regulations relating to "the **sustainable use** of components of biodiversity, including – (i) ensuring the duty of care towards all components of biodiversity; (iv) criteria for the equitable allocation of permits which enables and facilitates transformation;…" The definition needs to be revised to reflect a legally enforceable standard.
	Definition of **"well-being"** *"means the holistic circumstances and conditions of an animal or population of animals which are conducive to their physical, physiological, and mental health and quality of life, including their ability to cope with their environment;"*	Although the components of the definitions are not necessarily problematic, we query the need to define the term "well-being" With specific reference to hunting – - **Physical:** Prohibited hunting methods are already published in TOPS. - **Mental**: The mental health of an animal plays no role in fair chase hunting. **We propose** that as far as hunting is concerned, to include the agreed-upon Responsible Hunting definition as drafted by DFFE and industry, and accepted by DFFE, around 2010. **We further propose that the definition be deleted** and only components, where necessary, be used. E.g. It could be expected to consider the physical condition of wildlife whilst being translocated.
	Section 2(a) Within the framework of NEMA, the objectives of this Act are to- provide for the management and conservation of biological diversity within the Republic and of the components of that biological diversity, including animal well-being	Refer to comments under: Definition "well-being" **Proposal:** To delete the wording "including animal well-being".
	Section 3 (1) *"In fulfilling the rights contained in section 24 of the Constitution of the Republic of South Africa, 1996, the State, through its*	[STATE'S TRUSTEESHIP OF BIOLOGICAL DIVERSITY] Section 24 of the Constitution provides – *"everyone has the right*

	functionaries and institutions implementing this Act, must— *(a) act as the trustee of the Republic's biodiversity and its components and genetic resources; and* *(b) take reasonable steps to achieve the progressive realisation of those rights."*	*c) to an environment that is not harmful to their health or well-being; and* *d) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—* *(iv) prevent pollution and ecological degradation;* *(v) promote conservation; and* *(vi) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."* Section 2(4)(o) of NEMA provides for the following: "The 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." The State as "trustee" is couched in the Public Trust Doctrine, which role is to fulfil the public's rights enshrined in section 24 of the Constitution. The public are the holders of this right. The State, as the trustee, does not acquire ownership rights of the Republic's IBR. The State merely administers the public's use of these resources. The State cannot benefit from the administration, as it is not a beneficiary of the right. Section 3(1)(a) of the Bill must be read with section 2(4)(o) of NEMA, in that the Republic's biodiversity, its components and genetic resources are held in public trust, for the benefit of the people. Insofar as the Bill states that the State must "act as the trustee", it does so in an administrative capacity. Section 3(1)(a) of the Bill cannot be used or understood as elevating the State's role to one of custodian or owner of the resources. In simple terms, the State does not own the Republic's biodiversity, its components and genetic resources, and may not benefit from revenue derived from such biodiversity, its components and genetic resources. The provisions of Chapter 7 of the Bill appear to reflect a position that the State acts as the custodian of the Republic's biodiversity, its components and genetic resources.
	Section 5 *"In the event of any conflict between a section of this Act and other **national** legislation relating to **biodiversity**, this Act prevails."*	CONFLICTS WITH OTHER LEGISLATION This is not sufficient and could be used abusively. Section 5 of the Bill does not provide for conflicts with provincial legislation or municipal legislation. This is likely to give rise to confusion and challenges, especially in instances of concurrent jurisdiction (Schedule 4 and 5 of the Constitution) and exclusive jurisdiction, falling into provincial and local spheres of government. Furthermore, insofar as the Bill provides for conflicts with a provision of national legislation, the proposal that the Bill will prevail if the conflicting provision relates to "biodiversity", is likely to give rise to confusion, duplication and uncertainty. - First, the term "biodiversity" is not only very broad and generic in nature, but also one that is frequently used in other legislation. Consequently, the term "biodiversity" as the trigger for the Bill to prevail over conflicts would cast an unduly wide net over other national legislation.

		- Second, the National Environmental Management Act (NEMA) is national legislation, which gives effect to the objectives of the Bill. If a provision of the Bill conflicts with a provision of NEMA relating to biodiversity, section 5 directs that the section of the Bill will prevail over NEMA. This is not in line with section 6 of the Bill, nor section 2 of NEMA. - Third, the Bill defines the "Act" as including "*any regulation or notice made or issued under this Act*." This means that even a regulation published under the Bill will prevail over other national legislation where the conflict pertains to "biodiversity". Given that the Bill seeks to give wide unfettered powers to the Minister to make regulations in section 70(1), it is unclear the extent to which this section 5 will permeate through other legislation. **An example** of a potential conflict between a provision of the Bill and another provision of national legislation relating to "biodiversity" is section 36 of the Bill and section 38 of NEMPAA. Section 36 of the Bill relates to Biodiversity Management Plans, and section 36(1)(a) of the Bill empowers the Minister/MEC to publish a BMP in relation to an ecosystem (listed or not listed but warrants conservation attention). Section 36(2) of the Bill requires the Minister/MEC to identify a suitable person, organisation or organ of state that will be responsible for the implementation of the BMP. However, section 38 of NEMPAA provides for the assignment of a management authority for protected areas. The assigned management authority of a protected area is responsible for implementing the Protected Area Management Plan. CONFLICT: If a BMP is published for an ecosystem that falls within a declared protected area (which is likely due to the biodiversity characteristics of a PA and the ecosystems listed/protected by the BMP), the result is that there will be two different entities responsible for implementing different plans over the same area - an assigned management authority under NEMPAA and the person identified by the Minister/MEC responsible for implementing the BMP. This would likely lead to a duplication of functions, and create a scenario which would significantly compromise the ability of the Management Authority under NEMPAA to exercise its rights and duties to adequately manage the area under its jurisdiction. **An example** of another potential conflict is in relation to section 67(1)(a)(i) and (b) of the Bill with NEMPAA management indicators and the Norms and Standards for the Management of Protected Areas in South Africa (GG 39878 GN 382 of 31 March 2016) ("NEMPAA Norms and Standards"). Section 67(1)(a)(i) and (b) of the Bill provides for the Minister's powers to issue norms and standards for "management and conservation of the Republic's biodiversity and its components" and "set indicators to measure compliance with those norms and standards". Section 71(3) of the Bill provides that a person is guilty of an offence if that person "(e) fails to comply with a norm or standard issued in terms of section 67(1)(a)". However, section 43 and 44 of NEMPAA related to management performance and for the termination of the management authority's mandate in the event that the management authority fails to properly manage the protected area. The Minister has published the NEMPAA Norms and Standards for the Management of Protected Areas, which include indicators to measure compliance by the management authorities. Since the purpose of the NEMPAA Norms and Standards are to "*prescribe norms and standards for the management and development of protected areas, with particular reference to section 2(c) to effect a national system of protected areas in South Africa as part of a strategy to* ***manage and conserve its biodiversity*** ", it is highly likely that, in the event that the Minister issues norms and standards under the Bill for the "management and conservation of the Republic's biodiversity and its components" in terms of section 67(1)(a)(i), a conflict will arise with the NEMPAA norms and standards. In this instance, section 5 of the Bill directs that the provisions of the Bill will

		prevail. However, notwithstanding the fact that the Bill will prevail, the conflict does not absolve the non-compliance with the NEMPAA Norms and Standards. This is an example where section 5 of the Bill and the "biodiversity" threshold for conflict is unworkable. Notwithstanding, the Bill as it is currently drafted, includes issues that go beyond the management of biodiversity. This will be discussed in more detail at the relevant sections below, but for the purposes of section 5, the proposal that the Bill must prevail over any other provision of national legislation relating to biodiversity, is questioned..
	Section 6(3) *"The application of this Act must be guided by the national environmental management principles set out in section 2 of the National Environmental Management Act,* ***as well as the principles set out in the White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity."***	It is legally incorrect to include policy into legislation in the manner proposed. The White Paper is not law, was not developed to be implemented as the law, and the public was not advised to comment on the proposal that the White Paper would be used as a fundamental part of the law. The White Paper was developed through a different process, with different objectives. Inclusion of the White Paper in section 6(3) of the Bill effectively elevates the White Paper, to the status of forming part of the Act. Since the White Paper can be changed, repealed and replaced at any time, by the executive, this would be undermine Parliament's legislative function and powers. We therefore strongly recommend that the reference to the White Paper is deleted, and the provision read as follows: *"The application of this Act must be guided by the national environmental management principles set out in section 2 of the National Environmental Management Act."*
CHAPTER 4: BIODIVERSITY PLANNING		
	Section 37 (c) *A biodiversity management plan must –* *(c) promote well-being and humane practices, actions and activities, towards wild animals*	Refer to comments under *Definitions: Well-being and humane practices*, proposing for the definition to be deleted . We propose that specific components applicable be used instead of referring to well-being and humane practices.
	Section 40 (1) *The Minister may, after consultation with the relevant MEC, by notice in the Gazette, publish a national list of species or ecosystems that –* *(a) Are threatened;* *(b) In need of conservation or protection;*	We interpret s40 and s42, as the Bill splitting what we know as the TOPS species, into two categories. Section 42 is species of "priority", whereas section 40 is the species of "concern". The species of "concern" are the ones where the list can "promote" "humane practices", but only for "wild animals". We once again do not support references to "humane practices". Please refer to our comment under *Definition: Humane Practices*

	(c) Require careful consideration when promoting access for traditional, cultural or spiritual use; or *(d) Require additional consideration to promote animal well-being and humane practices, actions and activities*	(c) Please provide us with the rationale why specific species should be **listed** for these specific species. (d) Please provide us with the rationale why species should be **listed** specifically for well-being and humane practices.
	Section 48(1) *"The management authority of a protected area preparing a management plan for the area in terms of the Protected Areas Act, must incorporate invasive species control strategies into that management plan."*	INVASIVE SPECIES CONTROL PLANS The use of the word "must" impute an obligation on the management authority to include these strategies into the management plan. Given that the "invasive species control strategies" is neither defined nor explained in the Bill, it is not clear how management authorities can be expected to comply without clarity on the substance. Further, there are no transitional arrangements for this obligation. While existing management plans under NEMPAA do incorporate invasive species management, without further context to "invasive species control strategies", it will be impossible for management authorities to comply with the provision with certainty. In addition, management plans are approved by the MEC or Minister in terms of section 39 of NEMPAA. If clarity on the substance of "invasive species control plans" is provided, the Bill needs to also provide clarity on whether any amendment of the management plan to address this obligation in section 48(1) of the Bill will necessitate the MEC/Minister approval, and the procedures applicable.
	Section 49 (2) and (4) *(2) The Minister must notify the Council if an applicant in subsection (1) is required to—* *(a) apply for an environmental authorisation in terms of the National Environmental Management Act; or* *(b) undertake any other environmental assessment as may be prescribed.* *(4) No person may release a genetically modified organism into the environment without an authorisation contemplated in subsection (2), if required.*	Section 49 of the Bill relates to Genetically Modified Organisms ("GMOs") and whether an environmental authorisation must be obtained before an applicant may be issued a permit in terms of the GMO Act. The wording of Listed Activity 29 of Listing Notice 1, states - "*The **release** of genetically modified organisms into the environment, where **assessment** for such release is required by … the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004)."* In other words, LA 29 of LN 1 is applicable if the Biodiversity Act requires an assessment for the release of a GMO to the environment. Section 49(4) of the Bill prohibits the release of a GMO without an environmental authorisation contemplated in subsection (2) "if required". However, the provisions of section 49(2) provide in both instances for an "assessment" to be done. Meaning that, regardless, the release of a GMO will always require an EA.
CHAPTER 7 – ACCESS TO INDIGENOUS BIOLOGICAL RESOURCES AND INDIGENOUS KNOWLEDGE, BIOPROSPECTING AND BENEFIT-SHARING		

	GENERAL COMMENT 1	INDIGENOUS KNOWLEDGE ("IK") REMOVED FROM CHAPTER 7 ENTIRELY AND STRUCTURE OF COMMENTS See discussion at section 51 below for explanation as to why IK should be removed from the Bill entirely. For the purposes of clarity on the structure of the comments below, save for the discussion at section 51, the comments hereunder have been prepared on the basis of IK being excluded/ removed from the ambit of the Bill. Accordingly, the comments only address the IBR parts of each provision proposed. The fact that the comments do not relate to the IK component of a provision must not be misconstrued as meaning acceptance. As such, for ease of reference, and to ensure that the comments are understood in this context, reference to IK has been highlighted in each provision in **red text and with a strike through.** **For example**: "*nature and extent of the access to the indigenous biological resource or ~~indigenous knowledge~~ which has been requested".*
	Section 50 *"person giving access" means—* *a) an indigenous community or the person representing that community who is authorised to give access to an indigenous biological resource **owned by that community** ~~or indigenous knowledge belonging to that community~~;* *b) the **owner of land** on which an indigenous biological resource occurs;* *c) a person who is **lawfully authorised** or **lawfully entitled** to give access to an indigenous biological resource or indigenous ~~knowledge~~; or* *d) the **Minister**, on behalf of the State, as trustee for purposes of section 54(2)"*	Definitions The definition of "person giving access" is legally problematic and may lead to constitutional challenge. In addition, the definition does not provide clarity where the "person giving access" could be two or more instances set out in (a) – (d). The problems identified in subsections (a) – (c) are canvassed below: - First, with respect to subsection (a), the wording makes it difficult for a community to establish this right and capacity. For instance: where the indigenous community is not the registered owner of the land, how does an indigenous community establish that it "owns" an indigenous biological resource? How is this ownership proven/certified? The consequence is that the difficulties in subsection (a) may result in the owner of the land being identified as the "person giving access", which in most cases, will be the State (as per the below instance). - Second, the person described in subsection (b) fails to acknowledge the reality of land ownership and tenure in South Africa. This is because it is not uncommon for land to be owned/held by the State (in trust) for the benefit of a community or other beneficiary. An illustration of this is where an organ of state such as Public Works owns the land (per the title deed), but the rights to the land have been vested in a particular community. Although the community has been vested the rights to the land, given that the community is not the legal owner of the land, the State or organ of state, would be identified as constituting the "person giving access" and would enjoy the benefits of such status. This position runs directly in conflict with the objectives of the Bill. - Third, the owner of the land may not be the owner of the indigenous biological resources occurring on the land. For instance: a nature reserve may comprise of a number of different properties (unfenced) and separately owned, but the game ownership is structured so that all game is owned by one entity/company, and landowners each hold a proportional share in such entity. In this instance: the "person giving access" as the owner of the land, is not the owner of the biological resources. - Fourth, the Bill fails to take into account private contractual arrangements that may lawfully be concluded between the owner and another party, in terms of which real rights over the land (where indigenous biological resources occur) are held

		by that other party. For instance: the owner of land may have concluded a lease agreement in terms of which the lessee holds the exclusive real right to occupy the land for the purposes of eco-tourism. Subsection (d) of the definition is a major concern that calls into question the intention behind the proposed repeal of the existing NEMBA altogether. Subsection (d) identifies the Minister as the "person giving access" with reference to section 54(2) of the Bill. The effect and scope of subsection (d) initially appears innocuous, until one gives proper consideration to the wording of section 54(2). Section 54(2) of the Bill states that – *"An applicant for a commercial bioprospecting permit relating to an indigenous biological resource **located on land owned by the applicant must conclude a benefit-sharing agreement with the Minister** who, on behalf of the State, acts as **trustee of the Republic's indigenous biological resources** and any money resulting from that agreement must be transferred to the suspense bank account referred to in section 59(1)."* (Note[1]) The curious feature of subsection (d) is that it defines the Minister as a "person giving access", for the "purposes of section 64(2)". The Bill does not clarify if "the purposes of section 54(2)" is limited to a BSA, or where the applicant is the owner of the land. For instance: section 56 provides for Biotrade agreements, and section 56(3) provides for the financial benefits that is payable to the "person giving access". It is unclear if the Minister's inclusion in subsection (d) as a "person giving access" is intended to be applied so that the Minister is the beneficiary of such benefits by virtue of being the "person giving access" when an applicant is the owner of the land? DFFE is requested to specifically clarify whether the intention is for the Minister to benefit as the "person giving access" in any way (in addition to section 54(2) of the Bill)?
	Section 51(1)(b) *(1) This Chapter applies to—* *(b) the use of indigenous knowledge, where the Indigenous Knowledge Act is not applicable.* *(2) Where indigenous knowledge has been registered in terms of the Indigenous Knowledge Act, the processes and provisions of that Act applies and this Chapter does not apply."*	[APPLICATION OF THE CHAPTER – "indigenous knowledge"] It is unclear why the Bill has sought to govern and regulate the use of IK at all. The protection, development and regulation of IK is governed by other legislation and policy such as the Indigenous Knowledge Act 6 of 2019. There legislation in existence is already complex, inconsistent and difficult to enforce as it is without the Bill. Moreover, the Bill seems to actually create more confusion. Considering the wording of section 51(1)(b) and (2), it is important to clarify the scope of application of the Indigenous Knowledge Act. Section 2 of the Indigenous Knowledge Act provides for the "Application of Act", and states – *"This Act applies to all—* *(a) persons in the Republic, including the State; and*

[1] Our detailed comments on Section 54(2) of the Bill are more fully set out in the relevant section below.

		(b) indigenous knowledge registered under this Act." Accordingly, based on the above, the Indigenous Knowledge Act only applies to registered indigenous knowledge. However, Section 9(1) of the Indigenous Knowledge Act further clarifies that "*This Act protects registered indigenous knowledge*". Section 10(1) provides that "*Indigenous knowledge is protected for as long as it meets the eligibility criteria set out in section 11*[2]" and section 10(2) states that "*If indigenous knowledge ceases to meet the eligibility criteria set out in section 11, it falls into the public domain from the date of proven ineligibility".* Based on the above, there is no clarity on whether the Indigenous Knowledge Act is limited to only registered IK, or IK that is protected based on eligibility under section 11, and when IK falls into the public domain. The problem arising is that there does not appear to be any clear scenario where the use of IK clearly falls into the scope of section 51 of the Bill, nor within the scope of the other national legislation. Ultimately, it is not clear who would be the "person giving access" to the IK where the IK is not registered and protected. The concern that although the Bill is silent on the matter, the technical, vague and unqualified assumptions may culminate in the State believing it can exercise rights over IK that 'slips through the cracks' of the legislative maze regulating IK. The Bill should be confined to matters that fall within the mandate of biodiversity. IK should be removed entirely from the Bill. Any reference to IK has been removed in the information below.
	Section 52(1) *Before applying for a discovery-phase bioprospecting permit or a commercial bioprospecting permit, an applicant must first apply to the Minister for written approval of—* *(a) the prior informed consultation and consent process, and must address the following criteria in that application:* *i. the nature and extent of the access to the indigenous biological*	[PRIOR INFORMED CONSULTATION, CONSENT PROCESS AND ACCESS AGREEMENT] Section 52(1) applies to any person wanting to apply for a bioprospecting permit. For the current purposes, our concern focuses on the requirement to obtain the Minister approval in terms of section 52(1) in an application for a "commercial bioprospecting permit" (which is regulated in terms of section 55 of the Bill). Our comments on section 55(1) of the Bill are set out in detail in the relevant part below and should be read with these comments relating to "prior informed consultation, consent process and access agreements". Section 52(1) involves obtaining the Minister's approval of contractual terms that regulate how parties "access" IBR, and the consultation process to be followed to secure consent to access the IBR. First, it is very concerning that the State is seeking, through section 52(1) of the Bill, to control and regulate "access" to IBR. The meaning of access is so broad that it is unclear to the extent to which the Bill will apply, and related to this, how this concerns biodiversity protection. The Bill states that IBR means "any component of biodiversity, whether gathered from the wild or accessed

[2] *Section 11: The protection of indigenous knowledge contemplated in section 9 applies to indigenous knowledge, which—*
(a) has been passed on from generation to generation within an indigenous community;
(b) has been developed within an indigenous community; and
(c) is associated with the cultural and social identity of that indigenous community.

	resource or ~~indigenous knowledge~~ which has been requested; *ii. the details of all material information relating to the proposed bioprospecting which will be disclosed to the person giving access;* *iii. whether or not the person giving access or the applicant will be required to sign a written non-disclosure agreement to protect any intellectual property belonging to any party to that agreement;* *iv. the cultural and historical characteristics, customs, rules and practices of the person giving access and how this information will be acquired;* *v. the nature of the consultation process to be undertaken; and (vi) any other matter relating to the prior informed consultation and consent process which may be prescribed; and* *(b) the contents of an access agreement and must address the following criteria in that application:* *i. whether or not the terms of that agreement are fair towards the person giving access;* *ii. the nature of the access to indigenous biological resources ~~and indigenous knowledge~~ given to the applicant;* *iii. the nature of the compensation the person giving access will receive for that access;* *iv. how the customary and traditional rights of the person giving access*	<u>from any other source</u>….." While it is clear that access in the ordinary sense would involve the provision of an IBR as a **raw material**, the reference to IBR being "accessed from any other source" creates an infinite scope of possibilities. **For example**: access to IBR from any source could logically include: hunting, game drives, virtual game drives; wildlife photography; ecotourism; local documentaries about South Africa's landscapes/game/biodiversity etc. If this is the case, then any person/business wanting to pursue any of the above opportunities for commercial gain, may fall within the scope of accessing IBR, and may need to first comply with section 52(1) – which involves the Minister's approval of how access to the IBR is negotiated, the nature of such access, the compensation, and importantly the terms of an access agreement. Second, bearing in mind the above examples, section 52(1)(b) is essentially a provision that empowers the Minister to interfere with and decide on the terms and conditions of the contractual arrangements between parties regarding "access" to IBR. For instance, in section 52(1)(b)(i) the Minister considers whether the terms of the "access agreement" are "fair towards the person giving access"; In section 52(1)(b)(iii) the Minister considers the "compensation" paid to the person giving access. If the Minister feels the terms are not fair towards the person giving access, or feels the compensation is too low, then it follows that the Minister will not provide the approval needed under section 52(1)(b). These factors are very subjective in nature and not based on economic or contractual factors. For instance: if the Minister feels that the compensation is too low and should be increased, this may compromise the economic viability of the project. On the other hand, without the Minister's approval of the terms of the access agreement, the applicant cannot apply for a bioprospecting permit and cannot pursue the project altogether. Third, access to IBR is not a subject matter that should be regulated through statute and especially not one that should be subject to the Minister's discretion. In other words, why should the state have the power to decide how and on what terms IBR can be purchased and sold. Why should the State have the power to dictate what terms, and what compensation should be paid? Moreover, the Bill fails to take into account private contractual arrangements that may lawfully be concluded between the owner of the land and another party, which have access rights included therein. For example: the owner of land may conclude a traverse agreement with another party, e.g. a hunting outfitter, in terms of which that party may access the land to undertake hunts with international hunting tourists, in exchange for compensation payable to the owner. These traverse agreements are common in the professional hunting sector and represent a fundamental economic component of the business operations of each party. Where existing contractual agreements relate to access to IBR, how will the Bill be applied and in particular – - **Will the "access" requirements in section 52(1) of the Bill now override (ie: supersede) these existing agreements (ie: making them unenforceable)? If so:** • how will the Bill make provision for this, especially if agreements are endorsed on title deeds? • How will Bill clearly provide for the transitions arrangements to give effect to this? • How does this fall within the mandate of protection of the Republic's biodiversity?

	are adequately protected in terms of that agreement; and *v. any other matter relating to an access agreement which may be prescribed.*	• Since the owner of land has the exclusive right to the use and enjoyment of their land, how does the Bill recognise this right? - **Alternatively, will the Bill require that parties to such agreements now also comply with section 52(1)? If so:** • how will the Bill and the Minister resolve inconsistencies between the "access agreement" and traverse/other agreement? • How does this protect the rights of the parties? • How does this position fall within the mandate of protecting the biodiversity? While there is need for the State to provide certain parties with support, protection and guidance in concluding such transactions, this is not the basis for the State to initiate national regulation over all negotiation between private parties. The reference to international obligations as the premise for having to control these negotiations is without merit. Section 52(1) requires revision to the extent that it is not appropriate to suggest amendments in this document.
	Section 52(2) *"Subsection (1) does not apply to an applicant who owns the land on which the indigenous biological resource is located, ~~except if the applicant intends to utilise indigenous knowledge~~."*	This provision should be revised to remove reference to using IK, and to clarify that an access agreement is not required in the circumstances at all. Currently, the requirement not to comply with subsection (1) only clarifies that an applicant does not need to obtain the Minister's approval of the access agreement and consent process. It does not establish the position that the applicant does not need to conclude an access agreement altogether (see discussion at section 50 definition of "person giving access"), and given that section 55(3)(b) of the Bill refers to the requirement for an access agreement to be concluded before a commercial permit is issued, it is not clear whether the Bill intends to be applied in a manner that is not clear and transparent in this regard.
	Section 54(1) *"An applicant for a commercial bioprospecting permit must—* *a) conclude a benefit-sharing agreement; and* *b) obtain the Minister's written approval of the benefit-sharing agreement,* *prior to applying for a permit."*	[BENEFIT-SHARING AGREEMENT] The wording of section 54(1) does not record the party with whom the applicant must conclude a benefit-sharing agreement. It simply states that a benefit-sharing agreement must be concluded. This is in and of itself a critical omission requiring revision of the section wording. In the absence of any revision, it is not clear who signs the Benefit-Sharing Agreement with the applicant and consequently, who will enjoy the benefits arising therefrom? It seems to be an unusual omission given the fact that the equitable sharing of benefits arising from bioprospecting is one of the objectives of the Bill and primary reasons furnished by the department motivating the need to repeal and replace the existing NEMBA. Notwithstanding the omission in section 54(1) (to disclose the person/party who signs (and benefits from) a Benefit-Sharing Agreement), the definition of a "Benefit-Sharing Agreement" (provided in section 50 of the Bill) provides both insight and further cause for concern. Section 50 of the Bill defines a Benefit-Sharing Agreement as – *"means a written agreement between an applicant for a commercial bioprospecting permit and—* *(a) a person giving access; or*

		*(b) an **organ of state**,* *to regulate the commercial exploitation of an indigenous biological resource ~~or indigenous knowledge~~"* The above reveals that the applicant would conclude a Benefit-Sharing Agreement with EITHER the "person giving access" or "an organ of state". The immediate question is why a Benefit-Sharing Agreement would be concluded with "***an organ of state***"? The definition clearly states, through use of the term "or", that the BSA is signed with either a "person giving access" or "an organ of state" – meaning that "an organ of state" in this context is not the "person giving access", otherwise there would be no need to include "organ of state" as a separate category. The next question is why would an "organ of state" be a party to the BDA and not the "person giving access"? The Bill provides no clarity on this situation and as a result, there is no safeguards in the Bill to prevent an organ of state from taking the place/benefits of a BSA, instead of the "person giving access". Given the omission in section 54(1), and the lack of safeguards in the definition, there is reason to question the agenda of the Bill as being a conduit through which the State benefits financially. In addition to the confusion regarding parties to the BSA, the above definition does not clarify the substance, purpose and objectives of a BSA. The reference in the definition that the BSA is "to regulate the commercial exploitation of an indigenous biological resource", does nothing but muddy the waters further. The only other provision in the entire Bill that provides a semblance of insight into a BSA is in section 54(4) which states the most glaring and linguistically obvious feature of a BSA, being that a BSA "*may provide for monetary and non-monetary benefits*". Ultimately, the public is left completely in the dark with respect to anything about a BSA and must now formulate comments on a subject that is so vague yet critical that it seems to intentionally render the commenting process *fait accompli*. This is another unusual omission by the authors of the Bill, given that the equitable sharing of benefits arising from bioprospecting is one of the objectives of the Bill (section 2(d) of the Bill), a new feature of the definition of "sustainable use" in the Bill and has been identified as one of the primary reasons in the SEIA report motivating the need to repeal and replace the existing NEMBA. What is further concerning is that the SEIA report refers frequently to "benefit-sharing models" but there is no mention of these in the Bill. The public cannot be requested to comment on a proposal, in terms of the which the State withholds the necessary disclosure of what the implications and extent of application will be.
	Section 54(2) *"An applicant for a commercial bioprospecting permit relating to an indigenous biological resource located on land owned by the applicant must conclude a benefit-sharing agreement with the Minister who, on behalf of the State, acts as **trustee of the Republic's indigenous biological resources** and any money resulting from that agreement must be*	This provision is deeply concerning and brings into y question the intention of the Bill and interests it purports to protect. There are numerous problems with this provision. The salient issues have been identified below:

	transferred to the suspense bank account referred to in section 59(1)."	**First**, the State's role as "trustee" is couched in the Public Trust Doctrine, which role is to fulfil the public's rights enshrined in section 24 of the Constitution[3]. Section 3(1)(a)[4] of the Bill confirms this function. Section 3(1)(a) of the Bill must be read with section 2(4)(o) of NEMA which states: *"The 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."* The public are the holders of this right. The State, as the trustee, does not acquire ownership rights of the Republic's IBR, but merely serves an administrative function. The State cannot benefit from the administration, as it is not a beneficiary of the right. Therefore, on this basis alone, the provisions of section 54(2) of the Bill are unlawful. An explanation is required from DFFE to fully explain the intention, purpose and legal basis of section 54(2). The memorandum does not include any reference to section 54(2) nor does it make any mention to this scenario at all. **Second**, notwithstanding the above, the manner in which the provision has been phrased and the reason for doing so requires some clarity from DFFE into the intention for this provision. In an application for a commercial bioprospecting permit where the applicant owns the land on which the IBR occurs, the **Minister** is both the issuing authority and the beneficiary to a BSA. The fact that the Minister can only issue the permit after the BSA is concluded, means that this process is fundamentally flawed. Furthermore, why does section 71(1)(a) only identify the failure to conclude a BSA terms of section 54(2) as an offence, but not the failure to conclude a BSA in terms of section 54(1)? In other words, why is it only an offence when the beneficiary is the Minister?
	Section 55 (1) – (2) *"(1) No person may—* *a) undertake the commercial exploitation of an indigenous*	[COMMERCIAL BIOPROSPECTING PERMIT] The term "*commercial exploitation of an indigenous biological resource ~~or indigenous knowledge~~*" is defined in section 50 to mean "an activity listed in section 55(2)." As such, a permit will only be required under section 55(1) for those activities listed by the Minister in terms of section 55(2).

[3] *Section 24 of the Constitution provides –*

"everyone has the right
a) to an environment that is not harmful to their health or well-being; and
b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
(i) prevent pollution and ecological degradation;
(ii) promote conservation; and
(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[4] *In fulfilling 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—*
- *act as the trustee of the Republic's biodiversity and its components and genetic resources*

	biological resource ~~or indigenous knowledge~~; *b) export ~~indigenous knowledge or~~ an indigenous biological resource in order to undertake the commercial exploitation of that resource; or* *c) undertake the commercial exploitation of an indigenous biological resource ~~or indigenous knowledge~~ outside of the Republic,* *without a permit issued by the Minister"* *"(2) The Minister must, by notice in the Gazette, list activities that are activities for the commercial exploitation of an indigenous biological resource ~~or indigenous knowledge~~ for purposes of commercial bioprospecting."*	It is relevant to first address section 55(2). This provision gives unreasonably wide, unfettered powers to the Minister, without any limitation to or criteria for the exercise of such powers. The unlimited scope of the powers in section 55(2) are concerning when compared to how the powers set out in section 24 of NEMA empowering the Minister to list activities that require an environmental authorisation. The problem with the approach used in section 55(2) is that it means that the Minister is entirely free to list any activity whatsoever, as one requiring a commercial bioprospecting permit, regardless of the reasons or motives for listing any such activity, its impact to biodiversity (or lack of impacts entirely), or the absence of any standardised/ consistent criteria used to identify activities as listed. For instance: the Minister may list activities solely based on the economic potential or revenue generating capacity. For example: While we would hope that the above analogy is nothing more than an extreme example, and that the drafters of the Bill have not intentionally excluded the limitations or restrictions on the Minister's powers, there are two reasons that undermine any assurance that the above example is not altogether unrealistic. These are: 1. First, in the SEIAS Report prepared for the Bill, the National Department records the aims of the Bill and the problems in the current NEMBA that the aims intend to address. Of the 6 aims listed, the following 3 are worth noting: - *The proposal [Bill] also aims to streamline the permitting systems for bioprospecting and biotrade, including the associated benefit sharing models.* - *The proposal provides a more **flexible regulatory** approach that will enable the Minister and MECs responsible for environmental affairs to **exercise greater discretionary powers**, will result in simpler implementation of the provisions and more effective compliance with international agreements; and* - *A more **flexible regulatory approach** will further enable **growth of the biodiversity economy** and participation in the **biodiversity value chain** by previously excluded groups"* There is a very clear and intentional agenda that is revealed by the national department, namely – **accessing the economic opportunities in the biodiversity sector** (specifically: benefit-sharing, growth of the "biodiversity economy" and participation in the "biodiversity value chain"). To achieve this, the national government confirms that a more flexible regulatory approach to the bioprospecting/biotrade permitting system is needed, to enable the Minister to exercise greater discretionary powers. This suggests an economic interest may inform the activities listed in section 55(2) of the Bill. 2. Second, the fact that the Bill has been published for comment without any draft notices of proposed listed activities for section 55(2), and without a memorandum that provides an indication of the type of activities one can expect to be listed, means that the public has no means to contextualise or understand the effect or extent of the powers proposed in section 55(2). This compromises the ability of the public to formulate meaningful and informed comments on the Bill. When one reviews the Memorandum provided, one cannot help but question the value of such memorandum in providing clarity to the public who may not fully appreciate the legal complexities inherent to legislation. In fact, the major areas of concern

		are not even mentioned in the memorandum (e.g.: section 54(2)), which suggests a level of secrecy has been intentionally adopted. Since the Bill purports to fulfil the public's rights enshrined in section 24 of the Constitution, it follows that one would have expected the consultation process on the Bill to be informative, clearly explained in ordinary language, detailed about the powers by authorities and rights of the public and intentionally transparent. Yet, it is clear that the Bill might not be intended to serve and protect the interests of the public – and that a superficial consultation process was followed. After all, the disclosure of adequate information to the public facilitates the public's ability to question why the Bill provides the Minister with such wide, unfettered powers. Importantly, if these questions are not raised during the commenting period, the provisions are not revised or addressed, and ultimately retained in the final version of what becomes the Act that is then in force – at that stage, when the Minister is able to fully exercise the unfettered powers, the ability of the public to challenge the empowering provision is difficult, and as a result, it becomes near impossible to judicially review any decision or administrative action taken in terms of the empowering provisions, because the decision just needs to be taken in terms of the statute. The unlimited power of the Minister in section 55(2) again raises concern around the Bill and the rights the Bill purports to protect. Section 55(1) then identifies three instances where an 'activity' listed by the Minister in subsection (2) will require a permit. To the extent that section 55(1)(c) prohibits the undertaking of the activity outside the Republic, the provision is unenforceable. The Bill expressly records at section 4(1)(a) that it applied "within the Republic". The Bill cannot therefore regulate commercial use outside the Republic. The suggestion to do so would be unreasonable and unlawful. In conclusion, the public cannot reasonably be expected to comment on a provision without being given the information necessary to understand how it would be applied. Moreover, there are no limitations on what activities the Minister may list for the purposes of section 55(2), meaning that the legislature must amend the provision to provide for the necessary guidance on the exercise of the Minister's powers in this regard.
	Section 56 *"(1) No person may engage in biotrade unless they have concluded a biotrade agreement with the Minister."* *"(2) The Minister may prescribe the requirements, contents and process for the conclusion of a biotrade agreement."*	[BIOTRADE AGREEMENT] This is provision requires the public to understand what "biotrade" is under the Bill? The definition of Biotrade is confusing and circular[5]. It seems biotrade represents the "biodiversity value chain". **We question** the effect that this will have on the NBES game meat strategy For instance: if a person intends to use game meat on someone else's land, for the purposes of producing biltong to sell, that person must apply for a commercial bioprospecting permit, which requires that an access agreement (section 52) and benefit-sharing

[5] *Biotrade: "means the trade in an indigenous biological resource or indigenous knowledge by any person who lawfully obtains permission to use an indigenous biological resource or indigenous knowledge from the holder of a commercial bioprospecting permit"*

	"(3) The Minister must, by notice in the Gazette, determine a financial benefit, as a percentage of the financial value of any right, ingredient, product or resource sold as part of biotrade that is payable to the person giving access, and that financial benefit percentage may apply to different – *(a) areas or categories of areas;* *(b) persons or categories of persons;* *(c) indigenous biological resources or categories of indigenous biological resources;* *~~(d) indigenous knowledge or categories of indigenous knowledge~~; or* *(e) products or categories of products"*	agreement be concluded with the "person giving access", in terms of which compensation for the raw materials and agreement on sharing of benefits arising from any sale of the biltong are recorded. However, if that person sells the biltong to a larger butchery/retailer who intends to sell the biltong to the public, the retailer must conclude a Biotrade agreement with the Minister. The Bill is not transparent on the details of biotrade, but if the above understanding is correct on the principles of biotrade, this is how the Bill intends to regulate and control the "biodiversity value chain". It is not clear how and why the DFFE believes it has a mandate to control the biodiversity value chain. DFFE is requested to provide a clear legal explanation as to why the Minister should be permitted to control the biodiversity value chain through the obligation on a person to conclude a Biotrade agreement with the Minister? Moreover, the fact that the Biotrade regulation is by means of an "agreement" with the Minister, is cause for concern. The Minister exercises statutory power, and an agreement is contractual in nature. It is therefore totally unclear what agreement will be signed and the content/obligations arising from this agreement. The SEIA report provides some insight into the concept of a biotrade intention: *"Biotrade depends on labour intensive supply of raw materials from the wild. The Bill makes provisions for the Minister to determine standardise pricing through consultative process on annual basis. Currently there is no standard pricing of raw wild and cultivated materials."* Having regard to section 56(3), in terms of the which the Minister will publish by gazette notice, the financial benefit payable to the "person giving access". Ultimately, it seems the agreement with the Minister is intended to secure the "biodiversity value chain" with the "person giving access" potentially by including conditions relating to labour or supply of raw materials? Notwithstanding, the fact that it is a contractual agreement creates legal complexities, especially since the agreement cannot bind third parties. The funds that are payable to the "person giving access" are proposed to be gazetted by the Minister. The value and criteria for valuation of the financial benefits payable are totally within the Minister's powers to decide. This is unconstitutional. Moreover, the provisions of section 59 require that the funds arising from a biotrade agreement, payable to the person giving access, be paid into the suspense account administered by the State. This arrangement is unusual as there is a contractual element, but the contract is not with the person giving access. The Bill does not make provision for breach of contract remedies, or other economic factors. This raises the serious question as to how and why the State is seeking to regulate the biodiversity value chain and the failure of the State to adequately disclose the full spectrum of information relating to this proposal.
	Section 59 *(1) The following funds must be paid into a suspense bank account administered by the*	[COLLECTION AND PAYMENT OF BENEFIT SHARING FUNDS] At the heart of it, this provision provides for the State's control of all funds arising from the biodiversity economy. It centralises the concentration of all funds arising for all agreements into a suspense account that is created, controlled and administered by the State. There is no rational basis for this level of control – in fact, this provision ultimately gives control of the entire the biodiversity

	Department and set up specifically for the administration of those funds: *a) Funds arising from an access agreement, which are lawfully owed to any party to that agreement, except for funds lawfully owed to the applicant who is party to that agreement;* *b) funds arising from a benefit-sharing agreement, which are lawfully owed to any party to that agreement, except for funds lawfully owed to the holder of a commercial bioprospecting permit who is a party to that agreement;* *c) funds arising from a biotrade agreement, which are lawfully owed to a person giving access in terms of that agreement; and* *d) any other funds which the Minister, by agreement with the Minister of Finance, may deposit into that account.* *(4) The Director-General must pay, from the suspense bank account, funds arising from an access agreement, benefit-sharing agreement or biotrade agreement, to any party who is lawfully owed funds in terms of any of those agreements, except to—* *a) an applicant in the case of an access agreement;* *b) the holder of a commercial bioprospecting permit; or* *c) any person who concluded a biotrade agreement with the Minister in terms of section 57.*	economy to the State. However, the funds paid to the suspense account are funds arising from contractual agreements. This creates cause for concern in relation to liability, breach, mismanagement of the account by the State without statutory oversight and safeguards. This entire provision is worded that it immediately raises concern. For instance: the fact that the DG is prohibited expressly from paying monies lawfully owed to the applicant / holder / party who concluded a biotrade agreement with the Minister is unusual. While it is understood that funds owed to the applicant / holder / party who concluded the biotrade agreement with the Minister are not required to be paid into the suspense account in the first place, the issue is rather where the applicant / holder / party to the biotrade agreement is required to pay all monies upfront (as security, as contemplated in section 70(1)(q)(ix) of the Bill) and the repercussions for any breach or future breakdown. In this event, the money paid by the applicant / holder / party to the biotrade agreement cannot be returned by the DG. Who then would keep the funds? This wording in section 59 of the Bill is cause for concern especially given the undue control that the State will purport to have over the entire biodiversity economy.
CHAPTER 8 – ISSUING OF PERMITS AND EMERGENCY INTERVENTIONS		

	Section 64(1) *"(1) The Minister may, by notice in the Gazette, declare an emergency intervention for —* *a) the control or eradication of an alien species or a listed invasive species, if that alien species or listed invasive species constitutes a significant threat to the environment;* *b) the protection or management of a listed species or listed ecosystem or any other species or ecosystem managed in terms of this Act, if that species or ecosystem is under or may be under significant threat from natural or human impacts or activities* *c) any indigenous biological resource regulated by Chapter 7, where that resource is required for **immediate research, distribution or use**, or for the **protection of human health or the environment**;* *d) the protection and management of any other species or ecosystem not mentioned in paragraphs (a), (b) or (c)."*	[EMERGENCY INTERVENTION] First, this provision provides powers to the Minister to intervene but does not place any obligation on the State to take any steps following the intervention. This provision therefore has no purpose given that the same objectives can be met by using the existing provisions in NEMA (section 30 and 30A). Second, the circumstances listed under section 64(1)(a) – (d) are so broad and all-encompassing, that there is essentially no limitation on the circumstances that must exist for the Minister to exercise this power. The Bill does not provide a definition for what would constitute "a significant threat" for the purposes of subsection (a) and (b). This provides unfettered powers to the Minister to declare an intervention for anything that the Minister may subjectively view as being a "significant threat". Notwithstanding, the inclusion of subsection (d), which is essentially a 'catch-all clause', which allows the Minister to exercise the same powers without having to justify any "significant threat" or otherwise. For this type of provision to pass constitutional muster, not only must the circumstances be individually defined in detail, but all circumstances must be further subject to a general definition for what constitutes an "emergency" for the purposes of this section (similar to how section 30 and 30A of NEMA provide definitions for "incident" and "emergency situation"). Third, the circumstance set out in subsection (c) is not only irrational and likely to be unconstitutional, but clearly drafted in a deceptive manner. Chapter 7 regulates bioprospecting and the use of IBR for commercial exploitation. Why refer to the words "Chapter 7" in subsection (c) instead of the words "commercial use" or "commercial exploitation" of IBR "listed by the Minister"? Notwithstanding the deceptive phrasing, the substance of subsection (c) is also of some concern. There are two separate instances (bolded in the left column and separated by "or" in green highlighter) in terms of which the Minister may declare an emergency intervention in terms of subsection (c). There is no possible reason why the Minister should be able sterilize or expropriate a person's commercial rights in a resource UNLESS it is for the protection of human health or the environment. The consequence of this subtle wordplay in subsection (c) is that the Minister may acquire someone's commercial rights without it being for the purpose of protecting the environment or human health. What is the agenda of such a provision being worded in the manner? In what way would this intervention be *bona fide* if it was not for the protection of human health or the environment?
	Section 64(3) *"When publishing a notice in terms of subsection (1), the Minister must follow an appropriate consultation process having regard to the nature of the emergency but does not have to comply with the process contemplated in section 61."*	The consequences of a declaration of an emergency intervention are vast and potentially economically devastating for those affected. It is therefore considerably alarming that subsection (3) allows the Minister to deviate from the already minimal consultation process set out in section 68 of the Bill. This is again another instance where the Bill seeks to remove all shackles of limitations on how the Minister may exercise powers. It is difficult to understand how the Minister's obligation to follow an "appropriate consultation" can be meaningfully enforced by "having regard to the nature of the emergency". This is too subjective, too simplistic and fails to appreciate the context of the provision. The point of departure here is that subsection (3) relates to extent to which the Minister must consult **those affected** by the proposed

	[note: it seems reference to section 61 is an error and was meant to refer to section 68 (public participation)]	intervention. Therefore, the nature of the **consequences** of the proposed emergency intervention must inform the consultation process adopted by the Minister. The fact that the Bill makes it an offence (section 71(3)(e) of the Bill) for any person failing to comply with a provision or restriction imposed by an emergency intervention, reinforces the submission that the **consequences** of the proposed intervention must inform the consultation process adopted by the Minister in section 64(3).
	Section 64(4) *"An intervention may provide for, but is not limited to, the following:* *a) The suspension of all or any activity or authorisation, or any specified part of it;* *b) the restriction or prohibition of any activity in relation to any species, ecosystem or resource;* *c) the restriction of the number of persons in a particular area or areas of operation; or* *d) a declaration that an area is closed and may not be accessed by the public until such time as the circumstances giving rise to the intervention have been adequately resolved."*	The intervention 'actions' identified in subsection (4) (a) to (d) do not align with the reasons for which an emergency intervention can be declared. The actions identified only involve a cessation of conduct by those that may be affected, but nothing about what steps must be taken to resolve the emergency. For instance: management of a listed ecosystem under threat under section 64(1)(b) requires active steps be taken by the State following the intervention. It follows that the Notice must stipulate what steps the State must take to resolve the emergency. The ecosystem is not going to manage itself simply by closing the area off to the public. The State cannot give itself powers to intervene but then not actually want to bind itself to any intervening actions.
	Section 64(5) *"The Minister may, by notice in the Gazette, amend, withdraw or suspend an intervention issued in terms of subsection (1)."*	It is assumed that the publication of this Notice is not subject to a consultation process prescribed in section 68. It would be irrational to make provision for by-passing consultation for the Minister to exercise the powers (as per section 64(3) of the Bill), but insist on a full consultation process for withdrawing the same decision, which would lift the intervention?
CHAPTER 9 – GENERAL AND MISCELLANEOUS		
	Section 65 *(1) The Minister or an MEC may appoint any member of the public who they deem fit as a biodiversity officer.* *(2) The Minister or an MEC may—*	[BIODIVERSITY OFFICERS] It is unclear what "duties and responsibilities" can be assigned to a Biodiversity Officer, especially since BOs are appointed from "members of the public"? How are BOs different to EMI's? It is assumed that this provision is intended to recognise individuals such as "honorary" rangers, but the provision is too vague to avoid exploitation and abuse by those making such assignments. This provision should be removed.

	a) *prescribe the responsibilities and duties of biodiversity officers;* b) *clearly define the responsibilities and duties of each biodiversity officer in their letter of appointment; and* c) *issue each biodiversity officer with an identity card that confirms their appointment.*	Please indicate what qualifications would be a relevant consideration for an appointment?
	Section 66(1) *The Minister may recognise any industrial body, association or organisation which, in the opinion of the Minister, is representative of any part of the biodiversity sector and may prescribe the application process, requirements and any other criteria.*	Please provide us with clarification. As NEMBA is NATIONAL legislation, we understand that recognition will also only pertain to national associations.
	Section 68 *(1) Before publishing or amending a notice in terms of this Act, the Minister must follow an appropriate consultation process and consider any comments by the general public, relevant biodiversity stakeholders and affected organs of state.* *(2) For purposes of subsection (1), the Minister must publish a notice—* a) *in the Gazette inviting members of the public to submit written representations or objections within a minimum period of 30 days from the date of that publication; and*	[PUBLIC PARTICIPATION] The proposed consultation process in this provision only contemplates consulting the general public, but does not make provision for proper consultation with those that would be directly affected by the administrative action proposed. The distinction between consulting the general public and consulting a person affected by the administrative action is defined in sections 3 and 4 of PAJA, namely – - Section 3 of PAJA provides for "Procedurally Fair Administrative Action Affecting any Person"; and - Section 4 of PAJA provides for "Administrative Action Affecting Public". While section 68 of the Bill may serve the purpose contemplated in terms of section 4(1)(d)[6] of PAJA, section 68 cannot be used for the purposes of section 3(5)[7] of PAJA. Consequently, notwithstanding the provisions of section 68, any person that would be adversely affected by an administrative action taken in terms of an empowering provision in the Bill must be consulted in terms of the provisions of section 3 of PAJA.

[6] *Section 4(1)(d) of PAJA: "In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether –*
(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure"
[7] Section 3(5) of PAJA: "Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure"

	b) in at least one newspaper distributed nationally, or if the exercise of the power affects only a specific area, in at least one newspaper distributed in that area.	In addition to the above, section 68 does not provide the necessary obligations on the Minister to ensure the consultation is meaningful and defensible. For instance: - the provision does not require what information must be included in the gazette notice and newspaper advert in order for the notices to contain 'sufficient information' to enable the public to prepare meaningful representations. - The provision does not protect the rights of certain parties to present representations orally. - The provision states the timeframes are reckoned from the date of publication of the gazette notice, but in most cases, if not all, the newspaper adverts are published after the gazette notice. The commenting period must be calculated based on the date on which both requirements of section 68(2) have been met, which means the later date of publication. - The provision does not stipulate whether public holidays are excluded, or if the days are calendar or business days. Given that the minimum timeframe proposed has been reduced to 30 days, it would be unreasonable to use calendar days. It would also be unreasonable to include public holidays in the calculation of timeframes. - The provision does not acknowledge that the periods between 15 December and 5 January of each year must be excluded from the reckoning of days in the consultation process, to ensure that a robust consultation process is facilitated without exploiting the festive season to serve the interests of the State.
	Section 69(1) *"The Minister may, **in writing** or by notice in the Gazette, exempt any person or group of persons **or organ of state** from a provision of this Act, provided that the exemption does not conflict with the objects of the Act."*	[EXEMPTIONS] This provision is legally contradictory and open to abuse. First, organs of state should not be eligible for exemption by the Minister. Section 4(2) of the Bill states unequivocally that the Bill "binds all organs of state". Organs of state form part of the Executive branch of government, and are mandated to enforce the legislation. It follows that those that enforce the legislation should not be exempt from having to comply with it. There is no justifiable, rational basis for the Minister having the power to exempt an organ of state from compliance with national legislation that is enacted to safeguard the public's constitutional right to the environment, enshrined in section 24 of the Constitution. The suggestion that the Minister can exempt an organ of state from a provision of the Bill flies in the face of the Bill of Rights, the Rule of Law and the Doctrine of the Separation of Powers. Second, the reference to the Minister being able to grant an exemption "**in writing"** as an alternative to granting an exemption by notice in the Gazette creates a concern. There are two reasons why an exemption must only be granted by notice in the Gazette. - The first reason is that a Minister may delegate powers in terms of section 42 of NEMA. The Minister may delegate any powers in terms of NEMA or a SEMA to the DG, who may further delegate such powers to a "holder of an office in the Department", and allow that person to further delegate the powers (section 42(1) (3) and (4) of NEMA). Meaning that ultimately, the power to grant an exemption may be exercised by officials delegated. However, the Minister may not delegate the power to publish a notice in the Gazette (in terms of section 42(2C)(b) of NEMA). If the words "in writing" are not removed from the Bill, the power to grant an exemption will be capable of being exercised by various delegated officials.

		- The second reason is that a notice in the gazette will require the Minister to follow the consultation process in terms of section 68(1). This consultation process will ensure that any exemption decision is transparent. On the other hand, if the Minister is able to grant an exemption just "in writing", the public may not even know that such decision has been made, or whether the decision was procedurally fair. Third, the Minister should not have the power to issue an exemption from the requirement to obtain a permit. This approach would align with NEMA, and the restrictions imposed on the Minister's power in terms of requirement to obtain an environmental authorisation.
	Section 70 ANNEXURE A	[REGULATIONS BY THE MINISTER] Section 70(1) lists the matters in terms of which the Minister may make regulations. The list of matters for which the Minister may publish regulations extends for more than 4 pages! To compare, the entire chapter governing alien and invasive species management (Chapter 6) is barely more than two pages in the Bill. The Bill is effectively a skeleton framework, within which the Minister is given unfettered legislative powers to enact regulations without which the Bill is toothless to the point of being entirely unimplementable. In short, the concern that the Bill is merely a conduit through which the legislative powers of Parliament are given, unfettered, to the Minister appears to have substance. This is especially so since the Bill provides no guidance on how the Minister must exercise these powers, generally or specifically. For example: Section 70(1)(q) provides that the Minister may make regulations in relation to - *"(q) the procedure to be followed for <u>anything</u> in terms of this Act, including –* *(iii) the <u>powers</u> of issuing authorities when considering and deciding applications;* *(iv) the <u>factors</u> that must be taken into account when deciding applications;"* The above example illustrates how the Minister may, by regulations, define the powers of an issuing authority as well as what must be taken into account by the issuing authorities. Since the Minister is an issuing authority, the Minister is essentially given the power to define the Minister's own powers. This is in violation of the Doctrine of Separation of Powers. Compare the content of section 70(1)(q)(iv) of the Bill to section 24O of NEMA, titled "Criteria to be taken into account by competent authorities when considering applications", under which the criteria are comprehensively listed. It is noted that some of the powers given to the Minister are not necessary for achieving the policy objectives of the Bill. For instance: section 70(1)(o) refers to regulations relating to "biosecurity" and the "sale of immovable property". How is this related to the objects of the Bill?

		In other cases, there are no provisions in the Bill or powers in section 70(1) that give effect to the objectives in section 2 of the Bill. For instance: the objective of mitigating climate change in section 2 (?) does not feature anywhere in the Bill, nor does the Minister have powers to enact regulations to this effect? The overly exhaustive list needs to be balanced appropriately with limitations on the Minister's powers. The provision needs to substantially revised, and subject to another consultation process. We have not provided specific comments on each subsection of section 70(1), due to volume. The failure to provide itemized comments should not be construed as acceptance of same, but rather an indication that section 70(1) required revision in its entirety. **Concluding remark:** **It seems the regulations intend to extensively regulate the hunting industry, but the structure of section 70(1) does not clarify how this will be implemented. Therefore, in order to provide certainty and reasonableness, Section 70(1) should be revised, at least, to group all those aspects that will regulate hunting, into one subsection of section 70(1). This will enable our industry to consider the proposal properly and formulate meaningful comments.**