

**MEMORANDUM ON THE OBJECTS OF THE NATIONAL ENVIRONMENTAL
MANAGEMENT: BIODIVERSITY BILL,**

1. BACKGROUND

1.1 The National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (“NEM: BA”) was published in the *Gazette* on 7 June 2004 and, with the exception of a few provisions, commenced on 1 September 2004.

1.2 In 2016, the then Department of Environmental Affairs and the Department of Tourism jointly hosted the Biodiversity Economy and Tourism Lab, as part of government’s Operation Phakisa. Legislation was highlighted as one of the challenges that hamper transformation of the biodiversity sector and growth of the biodiversity economy. The regulatory approach created by the empowering provisions of NEM: BA is restrictive and inflexible, leading to over-regulation and an excessive administrative burden. This has resulted in challenges in achieving conservation, economic and socio-economic goals connected with the biodiversity sector. This Bill, while replacing NEM: BA as an Act, also amounts to a substantial changing of the primary regulatory system in NEM: BA by creating a more flexible enabling legislative environment geared towards economic growth for all economic sectors involved in biodiversity, while at the same time addressing challenges relating to the effective implementation of existing subordinate legislation.

2 PURPOSE

2.1 The Bill seeks to repeal NEM: BA and replace it by changing the primary regulatory system which consists of a rigid, individualised activity-based permitting system in NEM: BA, to a more flexible, enabling legislative environment suited to regulate a dynamic and ever-evolving biodiversity sector. The Bill retains NEM: BA's overall objective of preservation and conservation of biodiversity. The Bill creates the regulatory framework based on principles and objectives set out in its various provisions, while enabling the Minister to adopt appropriate instruments such as regulations to address the current challenges relating to the effective implementation of existing provisions and objectives in terms of the current NEM: BA and the regulations made in terms of it.

2.2 CLAUSE BY CLAUSE EXPLANATION

2.2.1 Clause 1 - Definitions

This clause contains the definitions used in the Bill. Certain definitions have been updated and new ones added as to what is contained in NEM: BA. Existing definitions that have been updated include “indigenous species” and “migratory species”. New definitions include “conservation”, “biodiversity planning tool”, “extra-limital species”, “human practices”, “other effective area-based conservation measure (OECM)”, “transformation” and “wildlife trafficking”.

2.2.2 Clause 2 - Objectives of Act

The objectives of the Bill are, among others, 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;

- provide for the protection of the ecosystem as a whole, including species which are not targeted for exploitation;
- provide for the sustainable use of components of biodiversity with due care, including facilitating cultural practices;
- provide for the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources and protecting indigenous knowledge;
- give effect to ratified international agreements relating to biodiversity which are binding on the Republic;
- provide for cooperative governance in the sustainable use, management and conservation of biodiversity;
- give effect to the best available science;
- provide for a South African National Biodiversity Institute to assist in achieving the objectives of this Act;
- address historical imbalances, enable and facilitate transformation and to achieve equity within all branches of the biodiversity sector; and
- provide for appropriate response measures to climate change, including the mitigation of environmental degradation.

2.2.3 Clause 3 - State trusteeship of biological diversity

This clause confirms that the State acts as the trustee of South Africa's biodiversity and its components and genetic resources and in implementing this Bill, will take reasonable steps to achieve the progressive realisation of the rights contained in

section 24 of the Constitution of the Republic. The clause further provides that the Minister may, by notice in the *Gazette*, specify the species and the circumstances under which the State remains the custodian of faunal components of biodiversity that escape from land under its control.

2.2.4 Clause 4 - Application of Act

This clause sets out the application of the Bill. The Bill will apply to all areas of the Republic including its territorial waters, exclusive economic zone and its continental shelf, as well as the Prince Edward Islands. The Bill will also apply to all persons, vessels and aircraft on, or in the airspace above or the territorial waters of the Republic and will bind organs of state.

2.2.5 Clause 5 - Conflicts with other legislation

This clause confirms that in the event of any conflict between a section of this Bill and other national legislation relating to biodiversity, this Bill prevails.

2.2.6 Clause 6 - Application of National Environmental Management Act

The clause confirms that the Bill must be interpreted and applied in conjunction with the National Environmental Management Act and its application be guided by the principles set out in the White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity. The Bill also states that it is a specific environmental management Act as defined in section 1 of the National Environmental Management Act.

2.2.7 Clause 7 - South African National Biodiversity Institute

This clause provides for the continuation of the South African National Biodiversity Institute as established in terms of section 10 of NEM: BA.

2.2.8 Clause 8 – Functions of Institute

This clause sets out the South African National Biodiversity Institute's functions:

In terms of the Bill, the Institute, among others—

- (a) must develop national biodiversity indicators in order to assess and monitor the status and trends in biodiversity at an ecosystem, species and genetic level;
- (b) must monitor and assess the status and trends in biological invasions and the environmental impacts of all categories of genetically modified organisms, and may assess the status and trends related to other threats and pressures on biodiversity;
- (c) must report to the Minister on all its functions as contemplated in this Act;
- (d) must co-ordinate and promote the management of biodiversity information in the Republic, including—
 - (i) establishing and maintaining a national biodiversity information system; and
 - (ii) disseminating biodiversity information to enable research, in order to support better management and conservation of biodiversity;
- (e) must, when requested, provide advice and decision support to organs of state involved in managing and conserving biodiversity, based on the best available science, and have regard to indigenous knowledge, where applicable;
- (f) may provide advice to other stakeholders engaged in or impacting on

biodiversity, based on the best available science, and have regard to indigenous knowledge, where applicable; and

- (g) must co-ordinate and promote the taxonomy of South Africa's biodiversity, and upon request by an organ of state, must confirm, in writing, that the identification of a specimen of an indigenous biological resource is taxonomically accurate, where scientifically possible.

2.2.9 Clause 9 – Powers of Institute

This clause sets out the South African National Biodiversity Institute's general administrative powers. These powers include the power to—

- (a) appoint its own staff, subject to section 26;
- (b) obtain, by agreement, the services of any person, including any organ of state, for the performance of any specific act, task or assignment;
- (c) acquire or dispose of any right in or to movable or immovable property, or hire or let any property;
- (d) open and operate its own bank accounts;
- (e) establish a company which has as its object the production and supply of goods or the rendering of services on behalf of the Institute, subject to the Public Finance Management Act;
- (f) invest any of its money, subject to section 28;
- (g) borrow money, subject to section 66 of the Public Finance Management Act; and
- (h) charge fees for access to a national botanical garden or a national zoological garden, herbaria and other places under its control, for any work performed or services rendered by it and for access to the results of, or to other information

in connection with, any research performed by it.

2.2.10 Clause 10 – Composition of Board

This clause describes the composition of the management of the South African National Biodiversity Institute. It sets out that the Institute is to be governed by a Board. The clause further sets out the composition of the Board and that the Board takes all decisions in the performance of the duties and exercise of powers of the Institute.

2.2.11 Clause 11 - Qualifications

This clause sets out the requirements, including qualifications, pertaining to the members of the Board of the South African National Biodiversity Institute. The clause also sets out who is disqualified from being a member of the Board.

2.2.12 Clause 12 - Appointment procedure

This clause sets out the appointment procedure for members of the Board of the South African National Biodiversity Institute and that the Minister has the power to appoint members of the Board subject to the procedure.

2.2.13 Clause 13 - Chairperson

This clause describes that the Minister must appoint a chairperson and may appoint an acting chairperson of the Board of the South African National Biodiversity Institute.

2.2.14 Clause 14 - Term of office

This clause sets out the term of office for members of the Board of the South African National Biodiversity Institute.

2.2.15 Clause 15 - Conditions of appointment

This clause describes that the Minister must determine the conditions of employment of members of the Board of the South African National Biodiversity Institute and that the Minister may, by agreement with the Minister of Finance, determine the terms and conditions of employment of members of the Board who are not in the employment of the government.

2.2.16 Clause 16 - Conduct of members

This clause sets out specific rules and standards that members of the Board of the South African National Biodiversity Institute must adhere to. The clause also confirms that a member of the Board who contravenes or fails to comply with a rule or standard is guilty of misconduct.

2.2.17 Clause 17 - Termination of membership

This clause sets out when a member of the Board of the South African National Biodiversity Institute ceases to be a member.

2.2.18 Clause 18 - Removal from office

This clause sets out the Minister's powers and the grounds on which the Minister may suspend or remove a member of the Board of the South African National Biodiversity Institute.

2.2.19 Clause 19 - Filling of vacancies

This clause regulates how vacancies on the Board of the South African National Biodiversity Institute may be filled where there is an instance of a vacancy.

2.2.20 Clause 20 - Meetings

This clause describes that the Chairperson of the Board of the South African National Biodiversity Institute decides when and where the Board meets, but a majority of the members may request the Chairperson, in writing, to convene a Board meeting at a time and place set out in the request. The clause also describes who presides over meetings of the Board.

2.2.21 Clause 21 - Procedures

This clause confirms that the Board of the South African National Biodiversity Institute may determine its own procedures subject to the provisions of this Bill.

2.2.22 Clause 22 - Quorum and decisions

This clause regulates what constitute quorums of the Board of the South African National Biodiversity Institute and how decisions are passed by the Board.

2.2.23 Clause 23 - Committees

This clause empowers the Board of the South African National Biodiversity Institute to appoint one or more committees in the performance of its duties or the exercise of its powers. The clause sets out the Board's powers in respect of the appointment of committees.

2.2.24 Clause 24 - Delegation of powers and functions

This clause empowers the Board of the South African National Biodiversity Institute to delegate its powers. The clause also sets out which powers and functions may not be delegated by the Board.

2.2.25 Clause 25 - Appointment of Chief Executive Officer

This clause regulates the appointment of the Chief Executive Officer of the South African National Biodiversity Institute. The clause also deals with the Chief Executive Officer's term of office and terms and conditions of employment. The clause also sets out the Chief Executive Officer's primary responsibilities.

2.2.26 Clause 26 - Employment of staff

This clause sets out who may appoint staff of the South African National Biodiversity Institute and the rules for the appointment of that staff.

2.2.27 Clause 27 – Funding

This clause sets out the composition of the funds belonging to the South African National Biodiversity Institute.

2.2.28 Clause 28 - Investments

This clause confirms that the South African National Biodiversity Institute may invest any of its funds that it does not immediately require, subject to any investment policy that may be prescribed in terms of section 7(4) of the Public Finance Management Act. The clause also confirms that the Minister may direct the manner in which the

Institute invests its funds.

2.2.29 Clause 29 – Powers of Minister

This clause describes the Minister's supervisory powers over the South African National Biodiversity Institute.

2.2.29 Clause 30 - Absence of functional Board

This clause confirms that in the event of absence of a functional Board of the South African National Biodiversity Institute, the powers and duties of the Board revert to the Minister who, in such a case, must exercise those powers and perform those duties until the Board is functional again.

2.2.30 Clause 31 – Winding-up or dissolution of Institute

This clause describes the process for the winding-up or dissolution of the South African National Biodiversity Institute. The Institute may not be wound-up or dissolved, except by or in terms of an Act of Parliament.

2.2.30 Clause 32 - Declaration of national botanical garden and national zoological garden

This clause describes the power of the Minister and the process to declare national botanical gardens and national zoological gardens.

2.2.31 Clause 33 - Amendment or withdrawal of declarations

This clause describes the Minister's powers to amend and withdraw declarations made in terms of clause 32.

2.2.32 Clause 34 - National biodiversity framework

This clause describes the Minister's obligation to prepare and adopt a national framework for biodiversity conservation within the Republic.

2.2.33 Clause 35 - Spatial biodiversity plans

This clause sets out that the Minister, MEC or any municipality may, by notice in the *Gazette*, publish a spatial biodiversity plan. A spatial biodiversity plan must, among others, align with the boundaries of a municipality or a province, identify a set of geographic biodiversity priority areas within the municipality or province, based on the best available science, and provide measures for the management and conservation of biodiversity in the priority areas identified.

2.2.34 Clause 36 - Biodiversity management plans

This Clause sets out the Minister or any MEC's power to publish biodiversity management plans. A biodiversity management plan may be adopted for a listed ecosystem or any other ecosystem which warrants special conservation attention, or a listed indigenous species or any other indigenous species which warrants special conservation attention.

2.2.35 Clause 37 – Contents of biodiversity management plans

This clause describes the contents of biodiversity management plans. A plan must, among others, be aimed at ensuring the long-term conservation and effective management of the species or ecosystems to which the plan relates and provide for the responsible person, organisation or organ of state to monitor and report on

progress with implementation of the plan.

2.2.36 Clause 38 – Biodiversity management agreements

This clause describes that the Minister or an MEC may enter into a biodiversity management agreement with a person, organisation or organ of state, regarding the implementation of any biodiversity planning tool or a matter relating to biodiversity management.

2.2.37 Clause 39 - Co-ordination and alignment of biodiversity plans

This clause describes that environmental implementation or environmental management plans in terms of the National Environmental Management Act, integrated development plans in terms of the Local Government: Municipal Systems Act, 2000, any spatial development frameworks in terms of legislation regulating land-use management, land development and spatial planning and any other plans prepared in terms of national or provincial legislation that are affected must, among others, be aligned with any planning tool prepared in terms of this Bill.

2.2.38 Clause 40 - Species and ecosystems of concern

This clause provides the Minister with the power to list species and ecosystems which are threatened, in need of conservation or protection, require careful consideration when promoting access for traditional, cultural or spiritual use, and require additional consideration to promote animal well-being of individuals or populations, and humane practices, actions, and activities. The clause also provides for powers to regulate those species and ecosystems in the listing notice, including prohibitions, providing for permits and regulating specific activities relating to those species.

2.2.39 Clause 41 - Management of species and ecosystems

This clause provides for the same powers as in clause 40 above, whereas these powers relate to those species and ecosystems which are not necessarily threatened, but which need to be managed in some specific manner to ensure that the species or ecosystem does not become threatened or vulnerable. This clause also caters for species which have an economic value like hunting to ensure that activities are carried out in a sustainable and responsible manner.

2.2.40 Clause 42 - Listing of priority species or ecosystems

This clause is specific to those species which are vulnerable to poaching and have links to wildlife trafficking and organised crime. The clause also provides for the listing of priority ecosystems and priority specimens. The clause allows for the Minister to list those high value species, priority ecosystems and priority specimens, which then automatically attracts higher penalties for criminal offences and allows for more specific interventions and operations relating to these listed species to try and mitigate the impact of poaching.

2.2.41 Clause 43 - Establishment of Scientific Authority

This clause obliges the Minister to establish the Scientific Authority, which is an advisory committee, to advise the Minister on international trade in specimens of species to which an international agreement regulating international trade, and trade of species listed in Clause 40, applies.

2.2.42 Clause 44 - Functions of Scientific Authority

This clause sets out the functions of the Scientific Authority, which include monitoring legal and illegal trade in specimens, making non-detrimental findings as required under CITES and various other advisory functions relating to the implementation of the Bill.

2.2.43 Clause 45 - Activities involving species to which international agreements apply

This clause determines that a permit is required for any CITES listed species that are imported, exported or re-exported into or out of the Republic. It also provides for the Minister to be able to provide for specific measures relating to any other species managed under any other international agreement.

2.2.44 Clause 46 - Management of alien species

This clause provides that no alien species may be imported into the Republic without a permit and that a permit can only be considered after a risk assessment has been conducted.

2.2.45 Clause 47 - List of invasive species

This clause obliges the Minister to list, by notice in the *Gazette*, invasive species and further provides for powers to regulate each species on that list, including prohibitions, restrictions, control measures and whether permits would be required for specific activities.

2.2.46 Clause 48 - Invasive species control plans

This clause makes it compulsory for a protected area management authority to

include an invasive species control strategy in their protected area management plan, and also gives the Minister powers to prescribe when other organs of state or any other person would be required to have a control plan in place for the management of listed invasive species.

2.2.47 Clause 49 - Genetically modified organisms

This clause requires the Registrar for Genetically Modified Organisms, prior to every meeting of the Council, to provide the Minister with copies of all applications submitted for authorisation in terms of the Genetically Modified Organisms Act, 1997 (Act No. 15 of 1997). If the applicant, in that instance, is required to apply for an environmental authorisation in terms of the National Environmental Management Act, or to undertake any other environmental assessment as may be prescribed, the Minister must notify the Council, in which case the Council must notify the applicant of that requirement.

2.2.48 Clause 50 – Definitions (Chapter 7)

This clause contains definitions that are only applicable to the chapter dealing with access to indigenous biological resources and indigenous knowledge and benefit sharing (i.e. Chapter 7).

2.2.49 Clause 51 - Application of Chapter

This clause sets out that where indigenous knowledge has been registered in terms of the Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 (Act No. 6 of 2019), the processes and provisions of that Act applies, and this Bill does not apply. This Bill only applies where the indigenous

knowledge has not yet been registered in terms of that Act.

2.2.31 Clause 52 – Prior informed consultation and consent process and access agreement

This clause explains that any person wanting to obtain a discovery-phase bioprospecting permit or a commercial bioprospecting permit must first obtain the Minister's written approval of the prior informed consultation and consent process and of their access agreement and sets out the criteria for each.

2.2.32 Clause 53 – Discovery-phase bioprospecting permit

This clause sets out that no person may undertake the discovery phase of bioprospecting without a permit issued by the Minister and sets out that the Minister may issue that permit if the applicant's prior informed consultation and consent process and their access agreement has been approved.

2.2.50 Clause 54 – Benefit-sharing agreement

This clause sets the requirement that an applicant must conclude a benefit-sharing agreement and that the Minister must approve that agreement prior to applying for a commercial bioprospecting permit. The clause also sets out the criteria applicable to the Minister's power to approve a benefit-sharing agreement.

2.2.51 Clause 55 - Commercial bioprospecting permit

This clause sets out that no person may undertake the commercial exploitation of an indigenous biological resource or indigenous knowledge without a commercial bioprospecting permit. The clause also describes that the Minister must, by notice in

the *Gazette*, list the activities which will be activities for the commercial exploitation of an indigenous biological resource or indigenous knowledge.

2.2.52 Clause 56 – Biotrade agreement

This clause sets out that any person who engages in biotrade must conclude a biotrade agreement with the Minister. The clause also describes how 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 to that resource.

2.2.53 Clause 57 - Import of indigenous biological resources from other countries

This clause describes that no person may import or utilise, within the Republic, an indigenous biological resource or indigenous knowledge from another country, unless that person declares, in writing, that the regulatory requirements from the country in which the resource or knowledge is located, were complied with.

2.2.54 Clause 58 – Non-commercial research

This clause sets out that no person may undertake non-commercial research outside the Republic utilising an indigenous biological resource or indigenous knowledge, without a permit.

2.2.55 Clause 59 - Collection and payment of benefit-sharing funds

This clause sets the requirement that all funds pertaining to the administration of bioprospecting and the sharing of benefits must be administered by the Department through a suspense bank account.

2.2.56 Clause 60 - Permits

This clause sets out the general provisions for applying for any permits in terms of the Act and guides conditions and decision-making for such permit applications.

2.2.57 Clause 61 - Issuing authority

This clause determines who the issuing authority is in terms of the Bill for the various types of permits mentioned in the Bill.

2.2.58 Clause 62 - Risk assessments and expert evidence

This clause provides that the issuing authority may require any person applying for a permit in terms of the Bill to undertake a risk assessment or obtain expert evidence. The specifics of these provisions and when they are required will be prescribed by regulation by the Minister.

2.2.59 Clause 63 - Amendment, revocation and suspension of permits

This clause provides for circumstance when a permit issued in terms of the Act may be amended, revoked or suspended. These include where the permit holder has not complied with permit conditions, where circumstances have changed from when the permit was originally issued or to meet international obligations.

2.2.60 Clause 64 - Emergency intervention

This clause allows the Minister to publish a notice in the *Gazette* declaring an emergency intervention for specific situations, including for 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, and for the protection or management of a listed species or listed ecosystem or any other species or ecosystem managed in terms of the Bill, if that species or ecosystem is under, or may be under, significant threat from natural or human impacts or activities, as well as for any indigenous biological resource regulated by Chapter 7.

When publishing the emergency intervention notice, the Minister is required to list the species or biological resource to which the emergency intervention relates, provide a brief summary of the reasons for the intervention, and provide the details relating to the intervention.

2.2.61 Clause 65 - Biodiversity officers

This clause provides that the Minister may appoint biodiversity officers to assist with implementation of the Act. They generally complement the functions of conservation officials.

2.2.62 Clause 66 - Recognition of associations and organisations and establishment of fora

This clause provides for the Minister to recognise any industry body, association or organisation in any of the biodiversity sectors as a body representing a particular group of persons or facilities. The clause also allows for the Minister to set up fora to assist with the management of biodiversity.

2.2.63 Clause 67 - Norms and standards

This clause allows the Minister to publish norms and standards in the *Gazette* after consulting the relevant MEC, which norms and standards may relate to any aspect

of biodiversity management, including general management and conservation measures and restrictions on activities.

2.2.64 Clause 68 – Public participation

This clause provides that an appropriate consultation process must be undertaken when publishing or amending a notice in terms of the Bill.

2.2.65 Clause 69 - Exemptions

This is a general exemption clause which allows for the Minister to exempt any person, group of persons or organ of state from a specific provision of the Bill under certain circumstances, provided that the decision to exempt is consistent with the objectives of the Bill.

2.2.66 Clause 70 - Regulations by Minister

This clause sets out the various issues for which the Minister can make regulations.

2.2.67 Clause 71 - Offences

This clause sets out the various offences for contravention of the specific provisions of the Act or regulations.

2.2.68 Clause 72 - Penalties

This clause determines the penalties that may be imposed by a court if a person is convicted of an offence in terms of the Bill or regulations, including fines and imprisonment and determining higher penalties for certain offences relating to wildlife trafficking, organised crime and offences committed by officials.

2.2.69 Clause 73 - Savings and transitional arrangements

Since this Bill will be replacing NEM: BA, transitional arrangements are provided for the preservation of all permits, authorisations, regulations, and other regulatory measures adopted under NEM: BA and deems them to have been done in terms of the Bill. This ensures a smooth transition from the old law to the new one.

2.2.70 Clause 74 – Repeal of legislation

This repeals the current National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004), which will be replaced by this Bill in its entirety. The Bill also provides for the repeal of the Sea Birds and Seals Protection Act, 1973 (Act No. 46 of 1973) as NEM: BA and the regulations made in terms of that Act already provides a new regulatory framework for the protection of marine species, including sea birds and seals. The 1973 Act is therefore redundant and has been overtaken by the current legislative regime.

2.2.71 Clause 75 - Short title and commencement

This clause gives the Act its short name and indicates when it will commence and become law.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- Department of Agriculture, Land Reform and Rural Development
- National conservation entities
- Provincial environmental departments and conservation authorities via MINMEC process

- The Department of Planning, Monitoring and Evaluation
- Organised industry organisations

4. IMPLICATIONS FOR VULNERABLE GROUPS

Improves the regime for bio-prospecting to ensure that indigenous communities benefit when their knowledge and tradition relating to indigenous biological resources is utilised.

5. FINANCIAL IMPLICATIONS FOR STATE

None.

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Forestry, Fisheries and the Environment are of the opinion that the proposed Bill falls within the ambit of section 76(3) of the Constitution as it deals with a functional area listed in Schedule 4, namely the environment, nature conservation and to some extent trade. As such, the Bill must be dealt with in accordance with the procedure established in terms of sections 76(1) or (2) of the Constitution.

6.2 The State Law Advisers are of the opinion that, in view of Chapter 7 of the Bill, which deals with indigenous knowledge as it is defined in the Indigenous Knowledge Act, it is necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39 of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it contains provisions pertaining to customary law or customs of traditional communities.