



**ENDANGERED  
WILDLIFE TRUST**  
Protecting forever, together.

25 July 2024

Department Forestry, Fisheries and the Environment,  
The Director – General: Department Forestry, Fisheries and the Environment  
Attention: Ms Magdel Boshoff  
Per email: [biodiversitybill@dffe.gov.za](mailto:biodiversitybill@dffe.gov.za)

Dear Ms Boshoff

**RE COMMENTS BY THE ENDANGERED WILDLIFE TRUST ON THE DRAFT NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY BILL**

1. The Endangered Wildlife Trust (EWT), established in 1973, is a registered Non-profit Organization, whose mission is to conserve threatened species and ecosystems in southern Africa, to the benefit of all.
2. We hereby submit written comments on the Draft National Environmental Management: Biodiversity Bill as published in Government Notice 4887 in Government Gazette 50706 on 24 May 2024 (the Bill), with the deadline for comments being 25 July 2024, as confirmed in the meeting of 15 July.
3. Our comments are set out from page 2 onwards in the template requested by the Department of Forestry, Fisheries and the Environment.
4. Further to our own comments, we have reviewed and hereby endorse the comments of the Biodiversity Law Centre where they address aspects not raised in our own comments.

We trust you find these comments useful in your deliberations and we look forward to reviewing a revised draft of the Bill, should the process for the Bill continue.

Should you have any questions please contact our point of contact, our Wildlife and Law Project Manager, Ashleigh Dore, [ashleighd@ewt.org.za](mailto:ashleighd@ewt.org.za).

Yours sincerely

**THE ENDANGERED WILDLIFE TRUST**

Yolan Friedmann: CEO

**Draft National Environmental Management: Biodiversity Bill 2024**

**Preferred template for the submission of comments**

**NAME OF COMMENTER AND ORGANISATION:** The Endangered Wildlife Trust, Yolán Friedmann

**CONTACT DETAILS (PHONE AND EMAIL):** Ashleigh Dore, +27836601480 and ashleighd@ewt.org.za

NAME & ORGANISATION	GENERAL COMMENT OR SECTION NUMBER	COMMENT <u>and</u> SUGGESTION
The Endangered Wildlife Trust	General	Overall, the Draft National Environmental Management Biodiversity Bill published in Government Notice 4887 in Government Gazette 50706 on 24 May 2024 (the Bill) provides less legal clarity and certainty than the current National Environmental Management Biodiversity Act 10 of 2004 (NEMBA). Where legislation is repealed and replaced with new legislation, the new legislation should be stronger and address inherent weaknesses in the original legislation. We do not believe the current Bill does this. We would instead propose that NEMBA is reviewed and amended, as opposed to repealed, in order to bring in new beneficial / supported provisions.
	General	We question whether the Bill gives effect to section 24 of the Constitution, specifically section 24(b)(ii) and (iii). Section 24 provides: <i>Everyone has the right -</i> <i>a. to an environment that is not harmful to their health or well-being; and</i> <i>b. to have the environment protected, for the benefit of present and future generations, through <b>reasonable legislative and other measures</b> that -</i> <i>i. prevent pollution and <b>ecological degradation</b>;</i> <i>ii. <b>promote conservation</b>; and</i> <i>iii. <b>secure ecologically sustainable</b> development and <b>use</b> of natural resources while <b>promoting</b></i>

		<p><b><i>justifiable economic and social development</i></b> [our emphasis].</p> <p>The Bill continues to refer to sustainable use as opposed to ecologically sustainable use (and this is reflective in the revised definition of sustainable use provided in the Bill, discussed and critiqued below). Further all the foundational guidance for the regulation of biodiversity in South Africa has been removed in the Bill and is instead, proposed to be outsourced to subordinate legislation. Considering that the requirements to promulgate these additional laws is a discretionary and not mandatory requirement, this poses a risk that the Bill may not be able to be implemented effectively and may not properly give effect to section 24(b) of the Constitution.</p>
	General	<p>As above, the Bill relies extensively on regulations being drafted and published for the effective regulation of critical aspects of biodiversity conservation and (ecologically) sustainable use but makes the publication of such regulations discretionary. This fundamentally undermines the effective regulation of biodiversity, whereas the Bill should provide sufficient guidance for the regulation of biodiversity which can then be expanded on but not wholly reliant on regulations.</p> <p>Further, as raised by the EWT in the public participation meeting on 15 July 2024, there is a risk that (1) the required regulations and other subordinate legislation are not promulgated and (2) that the provinces may choose to not implement them (as is currently the case in Mpumalanga and the Western Cape). In either of these instances the Bill will not be able to be applied as law as it is completely reliant on subordinate legislation.</p>
	General	<p>Overall, the Bill is vague, the definitions section needs to be substantially improved to ensure legal certainty, examples of terms which require definitions include but are not limited to “GMO”, an “independent risk assessment”, “threatened” and “management”.</p>
	General	<p>The Bill follows very much a command and control approach without any express incentive provisions provided for. We do recognise the Minister is empowered to make regulations in this regard, but the lack of incentive provisions in the Bill itself that guide this is an oversight. This is a weakness of the current NEMBA that remains unresolved in the Bill.</p>
	General	<p>Overall, conservation and protection of critically endangered, endangered and vulnerable species should be strengthened to address / respond to the number of environmental authorisations granted impacting these species. The Bill is silent on this a critical aspect that should be addressed.</p>

	General	The Bill is also silent on biodiversity offsets, an oversight that should be addressed to ensure holistic, effective and responsible regulation of the environment as a whole. Specifically, biodiversity offsets should be included in the planning tools provided for in chapter 4 and section 70 should be amended to empower the Minister to promulgate regulations on biodiversity offsets.
	General	We note, with concern, that in all the consultations undertaken in preparation of this Bill, as confirmed in the public participation meeting on 15 July 2024, conservation NGO's do not appear to have not been engaged with, yet seemingly other stakeholder groups have. It was also clear in the public participation meeting on 15 July 2024 that the provinces have not be consulted with (or adequately consulted with) nor has the Wellbeing Forum, oversights that must be addressed.
	Section 1	<p>We reject the inclusion sustainable use within the definition of conservation. We recognise that there will be many instances where ecologically sustainable use and conservation may be used simultaneously, and which may be mutually reinforcing. However, we hold that ecologically sustainable use and conservation are two approaches (as identified in the Constitution) that support environmental protection.</p> <p>We propose the following revised definition of conservation:</p> <p><i>Under the imperative of protection of the Environment</i></p> <p><i>(a) Sustained Protection, custodianship, care, maintenance, rehabilitation, restoration, and recovery, of biological diversity and its components;</i></p> <p><i>(b) In a manner that, where justifiable, secures equitable and ecological sustainability, access, and sacred appreciation;</i></p> <p><i>(c) Of the benefits and values thereof that present and future generations derive from nature's contribution and;</i></p> <p><i>(d) To improve the well-being of people consistent with Ubuntu.</i></p>
	Section 1	We support the mandate given to the Minister to publish regulations that <i>inter alia</i> , mitigate the risk of domestication of species.
	Section 1	We do not support the removal of the definition of "Restricted Activity". It is critical for legal certainty to retain a definition of what activities are regulated in relation to listed threatened or protected species and alien and invasive species. While we recognise that there cannot be a definition of term if the term itself is not used, we strongly oppose the removal of provisions relating to restricted activities in the Bill. We note the justification

		<p>given for this approach, as raised by in the public participation meeting of 15 July 2024, that over-regulation is a key challenge within the biodiversity sector, however, this could be addressed by providing a general rule within the Bill that stipulates that permits are required for restricted activities unless the activity is prohibited or exempt in relation to the listed threatened or protected species in subordinate legislation.<sup>1</sup></p> <p>We engage on this above and will engage further on this below at section 40.</p>
	Section 1	<p>The revision to definition of sustainable use in both the White Paper and the Bill is of concern. A duty of care towards the system as a whole is fundamentally different to ensuring the well-being of the individual animal in instances where that animal is under ones control. This revision weakens the advancements made to wildlife well-being and should be reviewed and amended in favour of the following definition:</p> <p><i>Ecologically sustainable use, in relation to the use of any component of biodiversity, means the use of such components in a responsible way, and that:</i></p> <p><i>(a) contributes to its long term viability in the wild and promote the integrity of the population;</i></p> <p><i>(b) [promotes] the ecological integrity and resilience of the ecosystem in which it occurs;</i></p> <p><i>(c) In taking a systems approach that ensures continued benefits to people that are responsible, equitable and meets the rights and needs of present and future generations and;</i></p> <p><i>(d) In case of animals, is humane and [ensures] their well being.</i></p> <p>This definition is aligned with section 24 of the Constitution and promotes a systems approach, as required by the High-Level Panel.<sup>2</sup></p>
	Section 1	<p>The inclusion of a definition of wildlife trafficking, as well as dedicated provisions relating thereto is welcomed and supported.</p>
	Section 2(g)	<p>We fully support science-led decision-making but also recognise the need to facilitate other information sources in decision-making, particularly when this objective is read with section 2(i). This objective would be strengthened by acknowledging and creating a space for science-led decision-making to be supported,</p>

<sup>1</sup> Further we believe the challenge of over regulation stems from the 9+1 challenge discussed below at our comments at section 5 of the Bill.

<sup>2</sup> See page 276 of [https://www.dffe.gov.za/sites/default/files/reports/2020-12-22\\_high-levelpanel\\_report.pdf](https://www.dffe.gov.za/sites/default/files/reports/2020-12-22_high-levelpanel_report.pdf): A systems approach to sustainability should be followed, where this recognizes that the economic system, socio-political system and ecosystem are embedded within each other, underpinned by an integrated governance system that holds all the systems together within a responsive regulatory framework.

	supplemented or challenged by other sources of knowledge.
Section 2(j)	The inclusion of a climate change objective is welcome and supported, however the Bill itself is silent on how this objective will be met.
Section 3	Section 24 is an absolute right not a progressive right, reference to “the progressive realisation” must therefore be removed from section 3(b).
Section 4	It is a missed opportunity in the Bill to not consider an extraterritorial application, using the USA Lacey Act as an example. In terms of the Lacey Act, it is illegal <i>inter alia</i> to import, export, transport, sell, receive, acquire, or purchase fauna and flora taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or foreign countries. <sup>3</sup> When one considers the global nature of wildlife trafficking a Lacey type provision would be incredibly valuable.
Section 5	Conflict between national legislation, specifically NEMBA and its regulations and the provincial legal framework relating to conservation has been confirmed by DFFE and cabinet in the approval of HLP goal 9.3.6 <sup>4</sup> and this section instead of resolving or seeking to resolve this conflict actually weakens approach by completely ignoring the provincial legal framework.  This section needs to be substantially amended to provide constructive guidance to the 9+1 challenge in South Africa. Schedule 4 of the Constitution creates a concurrent legislative mandate for <i>inter alia</i>

<sup>3</sup> Dore, A (2018) *Saving Africa's Giants from Anthropogenic Driven Extinction Through Legal Reform in Supply and Demand Countries. A critical assessment of the South African and Japanese legal and governance frameworks, as pertaining to African Elephants to identify potential inadequacies and propose solutions to save this iconic species* unpublished LLM Dissertation. University of Cape Town pages 53 and 54.

<sup>4</sup> Goal: Legislation, policy, roles and responsibilities, of state actors at different levels in the wildlife sector are integrated, rationalised, and redefined, where appropriate, and fully understood and acted on by all involved, such that issues of concurrent competency do not continue to compromise their conservation and sustainable use.

Recommendations:

1. The implementation of biodiversity related legislation is revised, to ensure the efficient, effective, coordinated, coherent, and unified, where appropriate, administration and governance of the five iconic species as flagships for all species.
2. Minister to use all tools and processes at her disposal to enhance cooperative governance, including those in NEMA 24C(3)(a), and, where appropriate, should consider mandating national state agencies, with province based offices as needed, responsible for each of their administration, management, and/or oversight for the five iconic species.
3. Recognising that national legislation prevails over provincial legislation where there is a conflict, as an immediate priority, to review and revise, and where applicable, rationalise national and provincial legislation to streamline and simplify processes, and ensure a law and policy framework that is standardised and consistent across the country for the five species

	<p>conservation. The result is that South Africa has a complex and sometimes contradictory biodiversity legislative framework, with multiple laws seeking to regulate the same thing. This has become known as the 9+1 challenge. The Constitutional Court has confirmed</p> <p><i>It is rather odd that – 20 years into our constitutional democracy – we are left with a statute book cluttered by laws surviving from a bygone undemocratic era remembered for the oppression of people; the suppression of freedom; discrimination; division; attempts to break up our country; and military dictatorships.... [South Africans] – and indeed our much-valued vultures and other wildlife – deserve to be guided and protected by democratically elected Legislatures through clearer laws on a cleaner statute book.<sup>5</sup></i></p> <p>This section must be substantially revised, and such revision should not be limited to only resolving conflicts, efforts should be focused to ensure South Africa has a holistic and rational biodiversity legislative framework.</p>
Section 6	<p>We recognise and support provisions in the Bill that seek to resolve conflicts, however it is a missed opportunity that the Bill is not more proactive around specific biodiversity considerations that other organs of state should apply in taking decisions involving biodiversity. We therefore propose that the principles established in section 2 of the National Environmental Management Act 107 of 1998 (NEMA) be expanded through the development of specific biodiversity principles in the Bill.</p>
Section 32(2)(a)	<p>The purpose, scope and function of a National Botanical Garden and the purpose, scope and function of a protected area (declared in terms of section 9 of the National Environmental Management Protected Areas Act 57 of 2003) should not be confused, which section 32(2)(a) seems to do. Clarity is sought (and required to be included in this provision) as to what distinguishes a National Botanical Garden from a protected area, conservation area or OECM.</p>
Section 32(2)(c)	<p>It is unclear why a National Botanical Garden would be declared to “provide horticultural potential with suitable areas of arable soil”. Clarity is therefore sought as to the scope and purpose of National Botanical Gardens providing horticulture benefits beyond nurseries that support responsible and ecologically sustainable use of legally protected plants.</p>
Section 32(2)(d)	<p>Provisions for the promotion of cultural heritage exist within the National Heritage Resources Act 25 of 1999. To ensure an integrated environmental legal framework, where regulation for an aspect already exists, the legislation in question (i.e. this section) should rather cross reference to the relevant section (as done in</p>

<sup>5</sup> *Khohliso v S and Another* [2014] ZACC 33 para 53

	section 6 of this Bill) as opposed to duplicating regulation and provisions, which seems to be the case in this instance. This will ensure the environmental legal framework is fully implemented and proactively addresses potential conflicts or confusion in the implementation of legislation.
Chapter 4	All provisions included in NEMBA for the review, revision and periods applicable thereto for the planning tools have been removed in the Bill, and this is rejected. Legislation overall needs to support adaptive, responsive governance based on current and reliable information, removing the provisions that require review does not facilitate this.
Section 34(3)	The period to review the national framework being every 10 (ten) years is unjustifiably long and will not result support adaptive management needed in relation to climate change in South Africa. Legislation overall needs to support adaptive, responsive governance based on current and reliable information. The National Biodiversity Framework should be reviewed annually and updated at least once every five years based on the annual review findings.
Section 40(3)a(ii) Section 40(3)b(ii) Section 41(2)a(ii) Section 41(2)b(ii) Section 46(4)b Section 47(3)b Section 69(1) Section 70(f)xiii	The wording “to all persons or only to <b>a specified category of persons</b> ” and similar wording in the other highlighted sections is concerning. Although it is assumed not to be the intent of this wording, as currently construed these provisions can be applied in potentially discriminatory ways. These sections must be expanded on to better clarify what is meant by “specified category of persons” and other similar wording in the other listed sections, and/or that a definition for “specified category of persons” is included in section 1.



Section 40	<p>We have grave concerns with the approach taken in the Bill to remove the general requirement for permits covering restricted activities involving specimens of a listed threatened or protected species in favour of section 40(2) which allows the Minister to impose conditions, identify prohibitions or restrictions and identify activities that require permits. The permit requirements, even in their current ‘simplified’ form are confusing to the average citizen, upwards of three different approaches being applicable in regulations or published lists we believe will not support or promote legal compliance.</p> <p>There are a number of risks we foresee with the listing approach proposed in section 40, these include but are not limited to (1) knowledge of unlawfulness may be impacted as the new system proposes different approaches for different specimens and the average South Africa may not be able to access the various lists or understand their application to him / her. Therefore people may unknowingly undertake criminal acts and be criminally liable in respect thereof, (2) the lists may not be promulgated, leaving species that require protection under the law without protection, (3) further there is no time period provided for the Minister to publish the lists therefore if they are published there may be a period where species in need of protection are not legally protected<sup>6</sup> and (4) the lists may not be implemented universally across the country (as is the current case with the regulation of threated or protected species in Mpumalanga and the Western Cape Province).</p> <p>We propose a middle ground be taken by establishing a uniform rule in the Bill and allow deviations from there in regulations thus creating uniformity and legal certainty while at the same time adaptive management and easing some of the permitting burden.</p>
Sections 41 and 42	<p>We support the approach taken in the Bill to regulate methods / activities involving species that are not listed as threatened or protected. This challenge has been very clear in relation human wildlife conflict where the wild animal is not listed as threatened or protected. However, this section is vague as manage / management is not defined, and greater clarity is therefore required to ensure that the operation of this section is aligned to the spirit and purpose of the section as confirmed in the public participation meeting on 15 July 2024. This applies equally to section 42, terms like “preferential protection” must be clarified.</p> <p>Further while the legislation may provide for strong penalty provisions (and these provisions should remain), it is important to note that this fails to address underlying motivations for crime and harsh sentences have been</p>

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<sup>6</sup> We do not believe the transitional provisions in section 73 adequately addresses this as the Lists of Critically Endangered, Endangered Vulnerable or Protected Species (the TOPS List) and Threatened or Protected Species Regulations are not connected to any empowering provision of this Bill.

	shown to be ineffective in deterring people from crime when not coupled with a reasonable certainty of conviction. <sup>7</sup>
Section 44	The importance of a non-detriment finding (NDF) to support effective decision-making in relation to CITES App I and II species cannot be overstated. We are however, aware of capacity limitations that impact the drafting and publication of NDF to address this provision should be included to allow registered scientists to support these processes.
Section 45(2)	The caveat that permits are not needed for transshipment must only apply where the animals' well-being is provided for (in addition to all necessary documentation). EMI's must be empowered inspect species being transhipped and hold shipments where animals' well-being is not provided for.
Chapter 6	Overall, this chapter suffers from the same vagueness noted in other chapters of the Bill and revision is required to ensure that provisions of the Bill promote legal certainty. As above, we reject the removal of a general provision relating to restricted activities applicable to alien and invasive species.  Further the removal of the express duty of care in relation to alien and invasive species (currently provided for in sections 69 and 73 of the current NEMBA), is opposed, as it results in the removal of the ability to request that a directive be issued. This must either be corrected, or a general duty of care towards biodiversity must be created in the Bill (similar to that provided for in section 28 of the NEMA or section 12 of the National Water Act 36 of 1998). We propose that a general duty of care be created in the Bill.
Section 46(1)	As currently worded, this section does not specify whether it is only applicable to wild animals or wild and domesticated animals. This requires clarity as we support the regulation of alien species, especially those that have the potential to become established invasive species, but the regulation of companion animals (dogs, cats and horses) or livestock (cattle, sheep) where the animals do not pose a risk to wild populations, is better served under different legislation. Clarity is therefore sought as to what species or groups of species this section refers to.
Section 46(1)	Should the reference to section 63 actually refer to section 61, section 63 deals with the amendment and renewal of permits?

<sup>7</sup> Edwin Cameron 'The Crisis of Criminal Justice in South Africa' (2020) 137 *South African Law Journal* 32–71 and Ashleigh Dore, Annette Hubschle & Mike Batley 'Towards environmental restorative justice in South Africa: how to understand and address wildlife offences' in *The Palgrave handbook of environmental restorative justice* (2022).

	Section 46(2)	<p>This section should be expanded to provide a standard structure and/or stipulated minimum requirements for such a risk assessment. For example, it is unclear whether the importer is allowed to conduct this required risk assessment themselves, or who is to undertake this risk assessment? We propose that there must be minimum competencies required by the person(s) undertaking the risk assessment.</p> <p>We recognise that this may be addressed in regulations, but the publication of the regulations is discretionary in terms of section 70 resulting in legal vagueness if or until such regulations are drafted and published.</p>
	Section 48(1)	<p>Many areas have endangered / threatened species nesting in invasive species – such as Martial Eagles that are endangered and nest in Eucalyptus trees. In addition, other species like Amur Falcons are also dependent on alien trees for roosting in summer.</p> <p>We propose this section be revised as follows:</p> <p>The management authority of a protected area preparing a management plan for the area in terms of the National Environmental Management Protected Areas Act 57 of 2003, must incorporate invasive species control strategies into that management plan. Such control strategies must consider and mitigate the impact that controlling the invasive species will have on indigenous species.</p>
	Section 49(1)	<p>The term “GMO” is not defined anywhere in the Bill. In light of this, we recommend that either a definition for GMO is included in the definitions section, or that this abbreviation is written out in full in section 49(1).</p>
	Chapter 8	<p>The absence of a timeframe within which the competent authority should issue a permit, or provide written representation as to why a permit will not be issued, should be included in the Bill and not left for regulations or other laws to address.</p> <p>Furthermore, the conflict between national and provincial legislation and the requirement for integrated permits is not adequately addressed.</p> <p>Finally we note that the actual power to issue a permit is absent in the Bill.</p>
	Section 61(d)	<p>It is unclear whether this section also applies to exotic pets and livestock?</p>
	Section 64	<p>The provisions around emergency interventions are supported. However, the public participation and consultative processes applicable thereto are unclear and must be addressed in the section.</p>

	Sections 65 and 66	These sections are supported in principle, but are vague in their current framing. More detail is required for processes for approval, powers and benefits.
	Section 68	<p>We have substantial concerns with the approach taken in the Bill to consultation and public participation. <i>Kruger and Another v Minister of Water and Environmental Affairs and Others</i> [2016] 1 All SA 565 (GP) confirms consultation and public participation are not the same process and should not be confused – which the Bill does by consolidating the processes into one provision.</p> <p>Further we oppose the reduction in time periods to provide comments on notices published in terms of the, as per section 68(2)(a) the 30 day minimum period commences on publication in the government gazette only, not the date of publication in the government gazette and newspapers, which every is the latter. This ignores the fact that most South Africans do not have immediate access to the government gazette and will be unfairly prejudiced by this.</p>
	Section 69	This section is rejected in its entirety due to concerns with transparency, as not all exemptions are required to be published in a government gazette.