



African Centre for Biodiversity (ACB) submission on the National Environmental Management: Biodiversity Bill 2024

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About ACB

The African Centre for Biodiversity (ACB) is a research and advocacy organisation committed to culturally and biologically diverse landscapes, territories and food systems in Africa, which are socially just and democratic, based on the interconnectedness and harmonious co-existence and co-creation between people and nature. ACB works to dismantle inequalities and resist corporate-industrial expansion in Africa's food and agriculture systems.

ACB's initial focus was exclusively on genetic modification (GM) and biosafety, and the organisation was established in 2003 as the African Centre for Biosafety. Over the years, this expanded into working on the interconnected issues affecting food sovereignty and biodiversity in Africa, including seed laws, farmer seed systems, agricultural biodiversity, agroecology and corporate expansion in agriculture. ACB has been deeply involved in advocacy and capacity building in the UN Convention on Biological Diversity and its Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), as well as the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). In these and other global, regional and national processes, ACB has worked closely with African government negotiators, farmers' movements, and other civil society organisations. ACB's current geographical focus is mostly Southern, West and East Africa, with extensive continental and global networks.

Key messages

- The Bill is structured similarly to the NEM: Biodiversity Act 10 of 2004, but reorganises and streamlines the 2004 Act.
- ACB supports incorporation in the Bill of important elements from the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity, 2023, in particular the duty of care, the well-being of animals, and transformation to redress past injustices including previously disadvantaged and marginalised people and groups in benefiting from and acting to protect and sustainably use biodiversity.
- ACB supports the primacy of biodiversity plans in relation to other plans (s39), as biodiversity is the foundation of life and the basis of sustainable economic activity.
- Overall ACB supports the Bill but calls in particular for strengthening of the public participation and consultation aspects of the Bill (s68, and also specifically the national biodiversity framework s34, and environmental authorisations for GMOs

s49), as well as robust and participatory monitoring and review processes, which have been watered down from the 2004 Act.

- We call for more explicit requirements to protect customary and traditional rights in Chapter 7 on bioprospecting, and access and benefit sharing.
- There is a missing element in s52 on prior informed consent, where a consent process must be approved, but there is no explicit requirement to secure actual prior informed consent from local resource holders. This oversight should be filled.
- We call for more explicit support to identify and support marginalised individuals and groups who rely on natural resources for their survival, and for their recognition in terms of s66.
- The maximum fines specified in s72 are far too low to deter people who may stand to make billions from the illegal use of biological resources. They will easily pay a R10 million fine. We propose a significant increase in the maximum base fine to R100 million. This can both operate as a real deterrent as well as generate income for biodiversity conservation, protection and sustainable use. We note with concern the record of poor compliance and enforcement which means that those who break the law frequently get away with it. We call for greater emphasis on enforcement to ensure compliance.
- We note with concern the wider public discourse on financing which seeks to find ways for environmental action and biodiversity protection to “pay for itself”. A secure environment is essential for human development and biodiversity occupies a central role. As such biodiversity restoration and conservation is a public service with value in its own right, and should be adequately supported through public funding without the imposition of market pressures. We do not support market-based instruments for biodiversity-related funding and call for safeguards for ecosystem integrity and the rights of inhabitants to be put into this law regarding issues of financing.

Comments on specific sections

Chapter 1 Interpretation, objectives and application

2. Objectives

Within the framework of the National Environmental Management Act of 1998

- Management and conservation of South Africa’s biodiversity in accordance, including animal well-being
- Sustainable use of components of biodiversity with due care, including facilitating cultural practices
- Fair and equitable benefit sharing of proceeds from indigenous resources and knowledge
- Give effect to ratified international agreements on biodiversity
- Cooperative governance of sustainable use, management and conservation of biodiversity
- Establishment and empowerment of SANBI to assist in achieving objectives of the Act
- Protection of the ecosystem as whole, including species not targeted for exploitation
- Give effect to best available science

- Equitable transformation of the biodiversity sector and addressing historical imbalances
- Climate change response, including mitigation of environmental degradation

The list of objectives in the Bill is more extensive and specific than in the 2004 Act. The first six are repeated, with some additions:

- Sustainable use in the 2004 Act referred specifically to indigenous biological resources, whereas it is extended in the Bill to encompass all components of biodiversity, as well as explicitly referencing due care and cultural practices
- Sustainable use is added to the objective on cooperative governance

Comments:

The next four objectives are newly added. These are welcome as they indicate key elements of a more integrated approach to biodiversity: protecting the whole ecosystem and not only those parts that could generate profit; social transformation and equity; a science-based approach; and integration with climate change response. These are positive additions which ACB supports. However, an objective that could be more explicitly included is recognition, and ensuring the integrity, of the relationship between ecosystems and the health of the environment and humans.

Chapter 2 SANBI

Part 1: SANBI, functions and powers

8. Functions of SANBI

The list of functions is not substantially different from the 2004 Act, although there are some revisions. There is less emphasis on monitoring and reporting on conservation status of protected and threatened species. There is less explicit emphasis on indigenous biological resources and more a blanket coverage of all biological resources. Examples of programmes that SANBI may initiate are no longer specified. Specific reference to involvement of civil society in SANBI programmes has been removed.

On GMOs, the Bill has reduced the specificity of impact monitoring, simply saying SANBI must “monitor and assess ... the environmental impacts of all categories of genetically modified organisms” (s8.1b). This replaces the more detailed clause in the 2004 Act saying that SANBI “must monitor and report regularly to the Minister on the impacts of any genetically modified organism that has been released into the environment, including the impact on non-target organisms and ecological processes, indigenous biological resources and the biological diversity of species used for agriculture” (s11.1b). This streamlining does not restrict SANBI’s role in monitoring the environmental impacts of GMOs. This is a crucial function which, however, has not received sufficient attention since the 2004 Act.

Overall, ACB supports the listed functions of SANBI. However, we would support the reintroduction of reference to civil society involvement in SANBI programmes to facilitate partnerships.

On GMOs, more attention should focus on the application of herbicides in particular as GMOs are designed especially for herbicide applications. It would serve the environment better if SANBI could respond more concretely in regard to the negative impacts on biodiversity and the wider environment of herbicides used in GM crop cultivation.

Part 5 Financial matters

ACB supports the establishment and functions of SANBI, and calls on Parliament and organs of the state to allocate sufficient funds to enable it to comprehensively meet its obligations. Biodiversity occupies a very central role in integrated environmental management, with significant interconnections with climate change, food systems, agricultural production, water, and land degradation. We are concerned about the direction of the biodiversity financing discourse towards making environment and biodiversity “pay for itself” through trying to find ways to generate profits from biodiversity conservation and restoration. A healthy environment is an essential underpinning for human civilisation and, as such, should be considered as a public good with state responsibility to ensure its effective management, protection and sustainability for present and future generations. We do not support market-based instruments for biodiversity-related funding and call for safeguards for ecosystem integrity and the rights of inhabitants to be put into this law regarding issues of financing.

Chapter 4 Biodiversity planning

34. National biodiversity framework

Contents of the framework are specified in more detail than in the 2004 Act. The latter only specifies priority areas for conservation action, establishment of protected areas, and issues related to regional cooperation. The period for review is extended from 5 years to 10 years.

ACB supports the more extensive and specific content requirements for the framework, in particular the inclusion of a duty of care and its elaboration, and the need for a transformation plan (referring to inclusion, equity, and redress of past injustice). The national biodiversity framework is one of the few substantive areas in the Bill which does not call for any element of public participation. However, this strategic level seems to be an ideal place for consultation and participation. We call for the explicit inclusion of public participation in the formulation of the national biodiversity framework, and at the minimum a requirement for a period for public comment through publication of a notice.

35. Spatial biodiversity plans

ACB welcomes the inclusion of the municipal level in biodiversity planning. We propose that an explicit review period should be reintroduced to allow for adaptation and for participatory and regular monitoring of the ongoing relevance and effectiveness of a plan.

37. Contents of biodiversity management plans

The section streamlines the corresponding section in the 2004 Act, and includes explicit reference to the duty of care and the well-being of animals. These are positive additions that ACB supports. However, ACB also proposes the inclusion of a transformation element in this section, specifically referring to the participation and inclusion of previously disadvantaged individuals and communities to ensure that management plans do not lead to dispossession or exclusion. Sections in the 2004 Act on review and amendment of plans, and on consultation processes, were removed in the Bill. While acknowledging that the NEMA principles and s68 of the Bill specify participation, ACB calls for the reintroduction of these specific elements into the Bill to strengthen accountability and inclusive involvement in assessing and adapting plans from time to time.

39. Coordination and alignment

This section simplifies the corresponding section in the 2004 Act. Importantly, it reverses the relationship between biodiversity plans and other plans. The Bill gives primacy to the biodiversity plan and insists that other plans must align with the biodiversity plans and should not be in conflict with the latter. Whereas in the 2004 Act, the other plans took precedence, so that the biodiversity plan should not be in conflict with any other plans.

Sections on monitoring and research in the 2004 Act have been removed in the Bill. There are references to monitoring, in particular under the spatial biodiversity plans and biodiversity management plans. But overall, the sense is that the monitoring element is de-emphasised in the Bill, and is only explicitly referred to in relation to specific plans or actions.

ACB supports the primacy of biodiversity plans in relation to other plans, because biodiversity restoration and conservation consolidates the material underpinning of sustainable development and, as such, should take priority. ACB calls for the explicit inclusion of a participatory monitoring framework for implementation at all levels, to ensure accountability, participation and effective planning.

Chapter 5 Ecosystems and species

Part 1 Listed ecosystems and species

ACB supports the more general application of sections 40-42 to cover all biodiversity.

Part 3 Trade in species

45. Activities involving species or ecosystems to which international agreements apply

It is not clear why Ministerial functions on monitoring, producing reports on South Africa's obligations in terms of international agreements and making these publicly available have been removed, but it reinforces the sense that the Bill weakens the biodiversity monitoring framework. A section on consultation has also been removed. As indicated above, ACB calls for the explicit inclusion of a participatory monitoring framework for implementation at all levels, accommodating all activities specified in the Bill.

Chapter 6 Alien and invasive species and GMOs

Section 49 on GMOs somewhat strengthens the Environmental Minister's authority on GMOs. The 2004 Act simply indicated that if the Minister "has reason to believe that the release of a GMO into the environment ... may pose a threat to an indigenous species or the environment" then no permit may be issued before an environmental impact assessment was conducted in accordance with NEMA Chapter 5. The onus was on the Minister to inform the GMO Council ahead of decisions on applications. The Bill puts the onus on the GMO Registrar to inform the Minister of all applications, and the Minister is empowered to prescribe the required content and type of environmental assessment if needed.

A mechanism will be needed to allow the public to make representations to the Minister of Environmental Affairs to initiate an environmental impact assessment (EIA) in terms of NEMA. The section on GMOs is one of the few substantive sections in the Bill which does not have a public consultation element. Where the Minister decides that an environmental authorisation is needed, and on proposed environmental decisions on GMO applications, there should be a requirement to call on the public for their inputs. At present the GMO Council operates very secretly, and this prevents

robust public participation in the actual and potential impacts of GMOs on the environment.

Chapter 7 Access to indigenous biological resources and indigenous knowledge, bioprospecting and benefit sharing

52. Prior informed consultation, consent process and access agreement

The Bill streamlines the corresponding section in the 2004 Act and adds some requirements. The Act only required disclosure on request from the issuing authority, with no explicit process for prior informed consultation and consent, or requirement for approval of such a process from the relevant authority. The Bill removes the explicit requirement for an issuing authority to protect the interests of the person providing access and of indigenous communities who may participate in the proposed bioprospecting or whose IK will be used in it. The Bill removes the explicit requirement for prior consent found in the 2004 Act (s82.2a, s82.3a), only requiring that a consultation and consent process took place. The terminology of “material transfer agreement” is replaced with “access agreement” which has a wider scope including fairness, compensation, and protection of customary and traditional rights.

There is a need to make explicit that the prior informed consent of the person or community giving access must actually be secured before issuing of permits. It is not enough just to have an approved process and contents of a proposed access agreement (without any explicit evidence required of effective consultation process). For example, what a potential prospector claims regarding protection of customary and traditional rights in an access agreement may just be something they made up, unless there is evidence of effective consultation and prior informed consent from the relevant persons or indigenous communities.

54. Benefit sharing agreement

This section is more general than the corresponding section in the 2004 Act, which specified elements of what should be included in a benefit-sharing agreement. These included the type of resource, the area in which they would be obtained, the quantity to be obtained, any traditional uses by an indigenous community, present potential uses of the resource, names of the parties to the agreement, extent to which the resources will be utilised, how and to what extent benefits will be shared, and allowance for regular review. In the Bill, the access agreement (s52.1b) specifies the only the nature of the access, the nature of the compensation, and protection of customary and traditional rights. However, the quantities, area from which the resources will be obtained, current and potential uses by indigenous communities, and review of agreements are not explicitly mentioned in the Bill.

The elements of protection of customary and traditional rights, quantities of a resource to be extracted, and current and potential uses of indigenous resources by indigenous communities need to be made explicit, whether located in the access agreement or in the benefit-sharing agreement. The clauses generally refer to “any other prescribed matters” which allows the Minister or any issuing authority to provide these kinds of details. But inclusion in the Act provides a more secure base for their application. ACB therefore calls for the explicit inclusion of these elements in s52 or s54.

Chapter 9 General and miscellaneous

66. Recognition of associations and organisations, and establishment of fora

Deliberate efforts should be made to identify and support organisations representing previously disadvantaged individuals and groups, and marginalised individuals and groups who rely on natural resources for their survival.

67. Norms and standards

This is similar to the section in the 2004 Act except that reference to a consultation process has been removed.

68. Public participation

As indicated in comments on other sections above, a number of specific references to consultation have been removed in the Bill that were present in the 2004 Act. This section on public participation partly recovers that, especially through indicating where the Minister must publish a notice or make prescriptions. However, key substantive sections do not call for a notice or any public input. This is most relevant for the national biodiversity framework (s34), decisions on environmental authorisations for GMOs (s49), and Regulations (s70). The public participation process is very narrowly defined. Simply commenting on documents that are already in final draft form is a thin form of consultation, compared with active participation in formulation of documents prior to their wider release. Publication of a call for comments in just one newspaper guarantees that the call will not reach the majority of the population. The requirements for public participation should be strengthened.

We call on the Department to widen the scope of public participation to work deliberately to involve relevant actors actively in early stages of processes, especially plans and strategies. This aligns with s66 on recognition of organisations. We also call for deliberate efforts to include historically marginalised groups in participatory processes, especially those dependent on natural resources for their survival. At the very least, the Department should maintain a database of relevant stakeholders and ensure that any call for comments or any processes requiring public consultation is distributed to those on the database, is made available online on the Departmental website, and that the Department makes a deliberate effort to circulate calls for comments to organisations that are known points of distribution for this kind of information.

70. Regulations by Minister

There is no requirement for the Minister to publish Regulations. This should be included.

72. Penalties

Penalties for offences listed in s71 are a fine not exceeding R10m, or 10 years in jail, or both. For offences relating to commercial exploitation, the fine may be up to three times the commercial value of the specimen or activity or the R10m fine, whichever is higher. Offences related to alien and invasive species, carry the R10m/10 year fine, or the estimated eradication or control cost, or both. If the person convicted of an offence is part of a syndicate, where the offence involves priority species, ecosystems or resources, or where they are a state employee, the fine is up to R20m, six times commercial value, or imprisonment up to 20 years, or both a fine and imprisonment.

The maximum fines are far too low to deter people who may stand to make billions from the illegal exploitation of natural resources. We call for an increase in the

maximum fine to R100m or 10 years in jail, or both, with the other fines increasing accordingly from this base. Significant fines can both deter those who illegally exploit South Africa's natural resources, and generate income which could be used for biodiversity restoration, conservation and sustainable use.