

**PORTFOLIO COMMITTEE ON ENVIRONMENTAL AFFAIRS**

**BRIEFING NOTES ON THE SUBSTANTIAL REVIEW OF THE THREATENED OR PROTECTED SPECIES (TOPS) REGULATIONS AND SPECIES LIST**

1. **PURPOSE**

To provide the Portfolio Committee on Environmental Affairs (PCEA) with information on:

1. The need for the substantial review of the TOPS Regulations and species list;
2. The process of the review of the TOPS Regulations and species list to date;
3. Key issues that necessitated the re-publication of the TOPS Regulations and species list for public participation;
4. Collaboration with the Department of Agriculture, Forestry and Fisheries relating to the regulation of activities involving TOPS; and
5. The way forward to finalise the revised TOPS Regulations and species list for implementation.
6. **THE NEED FOR THE SUBSTANTIAL REVIEW OF THE TOPS REGULATIONS AND SPECIES LIST**
   1. The TOPS Regulations and species list were promulgated in terms of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA), and took effect on 1 June 2007.
   2. Species were listed in terms of section 56(1) of NEMBA as:

(a) critically endangered, being any indigenous species facing an extremely high risk of extinction in the wild in the immediate future;

(b) endangered, being any indigenous species facing a high risk of extinction in the wild in the near future, although they are not a critically endangered species;

(c) vulnerable, being any indigenous species facing an extremely high risk of extinction in the wild in the medium-term future, although they are not a critically endangered species or an endangered species; and

(d) protected, being any species which are of high conservation value or national importance.

* 1. A permit is required in terms of section 57(1) of NEMBA for the carrying out of any restricted activity involving a specimen of a listed threatened or protected species.
  2. Restricted activities in relation to TOPS are defined in NEMBA as:

*“(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;*

*(ii) gathering, collecting or plucking any specimen of a listed threatened or protected species;*

*(iii) picking parts of, or cutting, chopping off, uprooting, damaging or destroying, any specimen of a listed threatened or protected species;*

*(iv) importing into the Republic, including introducing from the sea, any specimen of a listed threatened or protected species;*

*(v) exporting from the Republic, including re-exporting from the Republic, any specimen of a listed threatened or protected species;*

*(vi) having in possession or exercising physical control over any specimen of a listed threatened or protected species;*

*(vii) growing, breeding or in any other way propagating any specimen of a listed threatened or protected species, or causing it to multiply;*

*(viii) conveying, moving or otherwise translocating any specimen of a listed threatened or protected species;*

*(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; or*

*(x) any other prescribed activity which involves a specimen of a listed threatened or protected species;”.*

2.5 The terms “specimen” and “derivative”, as defined in NEMBA in 2004, are of key importance, as these formed the basis for the need of a substantial review of the TOPS Regulations:

“***“specimen”*** *means-*

*(a) any living or dead animal, plant or other organism;*

*(b) a seed, egg, gamete or propagule or part of an animal, plant or other organism capable of propagation or reproduction or in any way transferring genetic traits;*

*(c) any derivative of any animal, plant or other organism; or*

*(d) any goods which-*

*(i) contain a derivative of an animal, plant or other organism; or*

*(ii) from an accompanying document, from the packaging or mark or label, or from any other indications, appear to be or to contain a derivative of an animal, plant or other organism;*

***“derivative”****, in relation to an animal, plant or other organism, means any part, tissue or extract, of an animal, plant or other organism, whether fresh, preserved or processed, and includes any chemical compound derived from such part, tissue or extract;*”.

2.6 At the time of implementing the TOPS Regulations in 2007, there was no provision in NEMBA to exempt a person from a permit requirement. The implication was that a permit would be required for the carrying out of any restricted activity, involving any specimen or derivative of a listed species. This situation was quite impractical and created a substantial administrative burden to issuing authorities, especially considering that NEMBA permits needed to be issued in addition to permits in terms of provincial conservation legislation (due to the concurrent competence). An enabling provision for the exemption of a person from the permit requirements relating to TOPS was included in NEMBA as part of the National Environmental Laws Amendment Act, 2009 (Act No. 14 of 2009), which commenced on 18 September 2009.

2.7 The revised TOPS Regulations and a notice providing for exemptions will give effect to the amended exemption provision. The species list also required amendment, as the scientific basis for the inclusion of species in the particular categories was questioned and in terms of Section 56(2) of NEMBA the Minister must review the lists published in terms of Section 56(1) at least every five (5) years.

2.8 Other areas requiring substantial review were already identified during a national TOPS workshop held on 18 and 19 June 2008. Some of the key issues included:

1. amending the definitions for gin traps, rehabilitation facilities, controlled environment and hunting client, and providing additional definitions for nurseries, catch and hybridization;
2. providing for the registration and standing permits for importers/ exporters and freight agents, falconers and professional hunters. These categories of persons undertake restricted activities on a continuous basis and obtaining individual ordinary permits become time-consuming and an administrative burden;
3. providing for the following cases to be punishable offences:
   * non-marking of elephant tusks and rhino horns
   * fraudulent alteration or tampering with a game farm hunting permit, nursery possession permit or personal effects permit, by the person undertaking the restricted activity authorized by the said permit; and
4. removing the requirement of a Biodiversity Management Plan as the only means to allow for restricted activities involving cycad species, and to amend the relevant regulation to list the prohibited activities in the regulations rather than the BMP.
5. **THE PROCESS OF THE REVIEW OF THE TOPS REGULATIONS AND SPECIES LIST**
   1. The Department of Environmental Affairs (DEA) appointed Envolve Consulting (Pty) Ltd (trading as Envolve) in October 2010 as a Service Provider for the substantial review of the TOPS Regulations. The DEA requested the South African National Biodiversity Institute (SANBI) to assist the department with the review of the TOPS list. The two processes ran concurrently and involved a complete re-draft of the regulations and species list.
   2. To initiate the process of reviewing the species list, SANBI developed scientific criteria for the listing of the species in the different categories, namely critically endangered species, endangered species, vulnerable species and protected species, as envisaged by section 56(1) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA).

3.3 A discussion document in respect of the TOPS Regulations was developed. This document, together with the criteria for the categorisation of species and matrices for exemption from permit requirements (in terms of section 57(4) of NEMBA) and prohibitions relating to the carrying out of restricted activities (in terms of section 57(2) of NEMBA), was discussed during a series of workshops:

* 18 – 19 January 2011: TOPS Regulations with provincial conservation authorities;
* 16 February 2011: TOPS Regulations with members of the Wildlife Forum;
* 25 February 2011: species list with experts in the different taxonomic groups;
* 04 March 2011: TOPS Regulations with industry stakeholders; and
* 23 – 24 May 2011: species list, prohibitions and exemptions with industry stakeholders.

The purpose of these workshops was to identify key areas that required inclusion in the TOPS Regulations, and the review of the species list in accordance with the pre-determined criteria.

3.4 In April 2011, the DEA consulted with the Chief State Law Advisors (CSLA) to clarify certain areas of uncertainty, especially the regulation of welfare and ethical matters in terms of the TOPS Regulations, the exemption of persons from NEMBA permit requirements under certain conditions, and the sub-categorisation of species. Based on the CSLA’s advice, it was clear that it would not be possible to implement a proper system for exemptions and prohibitions, without a further amendment to NEMBA, as the enabling provision for exemption did not make provision for the conditional exemption of persons from permit requirements. The enabling provision relating to exemptions was then amended during a follow-up amendment of NEMBA, as part of the National Environmental Laws Amendment Act, 2013 (Act No. 14 of 2013), which was promulgated on 24 July 2013.

3.5 The first draft of the TOPS lists on plants, mammals, invertebrates, birds, amphibians, fish and reptiles, together with the matrices, was submitted to DEA by SANBI in July 2011. Based on the discussions during the stakeholder workshops referred to above, Envolve developed a draft revised TOPS Regulations prior to the expiry of their contract in October 2011 (the contract was not extended and the process to revise the TOPS Regulations continued in-house). The draft regulations and species lists were discussed with provincial conservation authorities during a workshop convened on 5 October 2011 and with members of the Wildlife Forum during a workshop convened on 18 and 19 October 2011.

3.6 Due to a transfer of certain functions in terms of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (MLRA) to the Department of Agriculture, Forestry and Fisheries (DAFF) and the latter’s intention to amend the MLRA at the time, a decision was taken by the Department of Environmental Affairs that the protection and conservation of marine species would be dealt with under NEMBA and the TOPS Regulations, until the Branch: Oceans and Coast (O&C) has developed its own policy and legislation for matters relating to these species. To give effect to this decision, the provisions of the Management of Boat Based Whale Watching and Protection of Turtles Regulations, 2008, and the Regulations for the Management of White Shark Cage Diving, 2008, were incorporated in the draft revised TOPS Regulations. Marine species were also included in the draft revised TOPS list.

3.7 To ensure that the draft provisions of the TOPS Regulations relating to boat based whale and dolphin watching, as well as white shark cage diving, were not in conflict with NEMBA, the draft TOPS Regulations were referred to the Office of the CSLA for input.

3.8 Since the complexity of the provisions of the TOPS Regulations were raised as defence on numerous occasions during criminal proceedings, the National Prosecuting Authority (NPA) had also been consulted on the draft revised TOPS Regulations and the various Notices relating to the species list, prohibition of restricted activities and exemption of restricted activities.

3.9 As part of the inter-governmental approval process, the draft revised TOPS Regulations and species list were approved by Working Group 1 (WG 1) in April 2012, by MINTECH in May 2012, and by MINMEC in June 2012, for publication thereof for public participation.

3.10 The inputs from the CSLA referred to in Paragraph 3.7 were received on 31 July 2012 and resulted in a number of changes to the draft revised TOPS Regulations and species list, subsequent to the MINMEC meeting of June 2012. Most of the concerns from the CSLA related to the lack of enabling provisions in NEMBA, especially in respect of provisions relating to boat based whale and dolphin watching, and white shark cage diving. The CSLA further indicated that the exemption and prohibition of restricted activities could not be included in the TOPS Regulations and had to be addressed in Notices separate from the regulations. The necessary changes were made to the draft revised TOPs Regulations and species list, and enabling provisions were then included at a later stage of the NEMBA review process referred to in Paragraph 3.4.

3.11 The legal vetting of the draft revised TOPS Regulations and species list was completed in January 2013, after which the draft documents were published in the *Gazette*, Notice No. 36375, on 16 April 2013 for public participation for a period of 60 days.

3.12 Due to the approach to indicate exemptions and prohibitions in table format, it was acknowledged by DEA that it might, on face value, appear to be complex to the general public; therefore the DEA facilitated two workshops, on 7 May 2013 with members of the Wildlife Forum and on 10 May 2013 with broader industry stakeholders respectively, to assist with the interpretation of the draft documents.

3.13 A consolidated document for assessment of all comments was developed, after which the DEA facilitated two further workshops on 22 – 24 October 2013 and 13 – 14 November 2013, to address questions and concerns raised during the public participation process.

3.14 Due to substantial amendments to the draft revised TOPS Regulations subsequent to the public participation process in 2013 (discussed in more detail in Paragraph 4), and upon advice from the Chief Directorate: Law Reform and Appeals, principle approval was obtained through the inter-governmental structures in 2014 to re-publish the revised draft documents for public participation.

3.15 The vetting of the revised TOPS Regulations and species list was completed on 17 February 2015, after which they were published in the *Gazette*, No. 38600, on 31 March 2015 for public participation for a period of 30 days.

3.16 A consolidated document was developed, comments assessed, and the draft TOPS Regulations and species list revised based on comments received. Principle approval was provided at the WG 1 meeting of 16 July 2015 to publish the final draft TOPS Regulations and species list for implementation. However, concerns were raised at the MINTECH meeting of 7 August 2015 on specific regulatory provisions. The DEA consulted with the relevant conservation authorities on 13 August 2015 in an attempt to resolve the issues before the MINMEC meeting of 21 August 2015. It was clear that the concerns were of substantial nature and could not be resolved, and the DEA therefore proposed to meet with all relevant conservation authorities on 15 – 16 September 2015. Opportunity was provided to submit concerns on existing provisions, which were discussed at the workshop.

3.17 A number of amendments were made to the draft revised TOPS Regulations based on discussions during the above-mentioned workshop. The revised documents were re-submitted to WG 1 on 16 October 2015, where conservation authorities requested further opportunity to peruse the final draft documents, due to the length and complexity of the documents.

1. **KEY ISSUES THAT NECESSITATED THE RE-PUBLICATION OF THE TOPS REGULATIONS AND SPECIES LIST FOR PUBLIC PARTICIPATION**

*4.1 Key issues that necessitated the re-publication of the TOPS list:*

4.1.1 The key general issues that had been addressed in the draft revised TOPS list subsequent to the public participation process referred to in Paragraph 3.11 included, but were not limited to, the following:

* The new format of the revised list including the different columns for the species, exemptions, prohibitions and permit requirement was not user-friendly, and difficult to interpret and understand; therefore the regulated column was removed;
* A provision was included to clarify the use of scientific names of species in the case of a change in the taxonomy of a species; and
* Clarification has been provided for the sub-categorisation of protected species.

4.1.2 Sub-categories within the Protected category had been created specifically for the mammal taxonomic group. The DEA deemed it necessary to sub-categorise mammal species listed as Protected, as follows:

a) Species of a high conservation value or of national importance, based on the following criteria:

(i) evaluated as Near Threatened according to the IUCN 2001 Red List system AND threatened by direct use; OR

1. in need of regulation/management as current utilization may result in a significant decline in wild populations of the species (Least concern).

This sub-category will include species such as Southern white rhino, African elephant, leopard and black-footed cat;

b) Species listed to ensure that they are managed in an ecologically sustainable manner;

This sub-category includes species that are likely to hybridize, such as blue and black wildebeest; blesbok and bontebok; and

c) Species included in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), and which are not already listed in any of the other categories.

The purpose for providing this sub-category is explained in Paragraph 4.2.5.

4.1.3 A number of species have been moved between categories, especially species of the avian and plants taxonomic groups. This was the result of the latest Red List assessment for birds, and also the re-assessment of the *Harworthia genus*. In addition to the movement between categories, several species were removed from the list entirely due to the lack of scientific evidence to motivate their inclusion in accordance with the listing criteria, or due to new information on the revision of the mammal Red List. Further, a number of game species have been removed from the list. These include species such as bushbuck, nyala, Southern reedbuck, grey rhebok and Sharpe's grysbok, due to the fact that there is no scientific evidence motivating their inclusion, or they were previously included for protection as a result of habitat destruction (and not because of threats caused by direct use).

4.1.4 During the process of evaluating comments, and following a meeting with officials from the Environmental Impact Assessment section of DEA, and having obtained an internal legal opinion, it was realised that the TOPS Regulations would not be the best tool to address the impact of habitat destruction on critically endangered species, as the absence of maps indicating where populations of these species occur, would make enforcement of the TOPS Regulations as far as it relates to risks assessments, extremely difficult. The listing of species as critically endangered to address habitat destruction would also be contrary to the intention of listing of species in terms of section 56 of NEMBA. This led to the exclusion of all species threatened by habitat destruction, and which are not affected by other restricted activities, from the revised draft species list.

* 1. *Key issues that necessitated the re-publication of the TOPS Regulations:*

**4.2.1 New provision made for semi-extensive wildlife systems:**

The TOPS Regulations, 2007 make provision for an extensive wildlife system (meaning an area of sufficient size for populations to be self-sustainable, with minimal human intervention in the form of e.g. providing food and water), which generally refers to natural systems such as protected areas, and for a controlled environment (meaning an enclosure where a specimen of a listed TOPS is kept that prevents it from escaping and where intensive human intervention is required), which is aimed at the keeping of specimens in captivity. However, most of the game farms are a combination of these two areas; therefore a definition has been included to make provision for semi-extensive wildlife systems, meaning an area of sufficient size for populations to be self-sustainable, but where a degree of intensive human intervention may occur.

* + 1. **Amendment of the regulations relating to compulsory risk assessments:**

The TOPS Regulations, 2007 make provision for a compulsory risk assessment for the carrying out of restricted activities involving specimens of listed critically endangered species. Additional circumstances, in which a risk assessment would be compulsory, were included in the draft revised TOPS Regulations, e.g. when a captive-bred or artificially propagated specimen is released into a national protected area, or when a restricted activity is carried out in a listed threatened ecosystem. Subsequent to the assessment of comments, provision has been made for the exclusion of SANBI, SANParks, provincial conservation authorities or protected areas of local municipalities from the requirement of a risk assessment, when a restricted activity is necessary for the conservation of a critically endangered species.

* + 1. **New provision included relating to an assessment of risks:**

An assessment of risks is not as comprehensive as a risk assessment involving listed critically endangered species and may be done by any person, provided that such person must have adequate knowledge of NEMBA. The minimum information to be provided is prescribed in the regulations. In addition to circumstances in which an assessment of risks will be compulsory, e.g. when listed fish species are introduced in dams in private land within the natural distribution range of the species, or when listed game species are moved from a semi-extensive wildlife system to an extensive wildlife system, an issuing authority may require an assessment of risks as it deems necessary.

* + 1. **New provisions included relating to the carrying out of restricted activities involving live specimens of listed fish species:**

Due to the complexities relating to fish species and the difficulties to prevent their spread in natural water systems, the general proposed approach is that most of the restricted activities would be prohibited, except for low-risk escape research facilities or provincial conservation authorities, and then generally only for conservation purposes:

* + Transport is permissible:
    - Within the same catchment of the species;
    - To private land with closed waters within the natural distribution range;
    - By registered low-risk escape research facility (in or outside the natural distribution range);
    - across different catchments within the natural distribution range by a provincial conservation authority for conservation purposes;
  + Possession/ keeping is permissible:
    - In an exhibition facility for educational purposes;
    - By a registered low-risk escape research facility, inside or outside the natural distribution range;
  + Breeding is permissible in a low-risk escape breeding facility, if bred for conservation purposes;
  + Catching and killing is permissible, if done by a low-risk escape research facility, for conservation purposes;
  + Release is only permissible, if released immediately alive in the same water from which it has been caught (permit for catch then not required).
    1. **New provisions included relating to Protected species that are also listed as CITES Appendix I species:**

4.2.5.1 According to the provisions of CITES, a specimen of a species included in Appendix I may not be imported for commercial purposes (such imported specimen may not be sold), unless the specimen is imported for commercial purposes and originates from a commercial captive breeding facility that has been registered with the CITES Secretariat. Since the CITES Regulations do not regulate restricted activities subsequent to the importation of specimens of species included in the CITES Appendices, provision needs to be made in the TOPS Regulations to regulate the possession (to prove legal acquisition) and selling of imported specimens and/ or its off-spring. The TOPS regulations thus now provide for the following:

* + An imported specimen, or the off-spring of an imported specimen, may not be kept/ possessed without a permit;
  + An imported specimen may not be sold, unless it originates from a commercial captive breeding facility that is registered with the CITES Secretariat, in which case a permit is required;
  + The off-spring of an imported specimen (regardless the origin), may be sold/ donated without a permit, provided that it was kept legally (authorized by a permit);
  + A permit for the exportation of a specimen of a species listed as Protected that are also included in Appendix I of CITES, will not be required in the case that the exportation is authorized in terms of a CITES permit.

4.2.5.2 Ports of entry and exit have been included in the TOPS Regulations, in order to be aligned with the CITES Regulations.

**4.2.6 Other amendments subsequent to the public participation process:**

4.2.6.1 Rehabilitation facilities and temporary translocation facilities (bomas) have previously been lumped under temporary keeping facilities. For clarification purposes, provision has been made for the separate registration of these facilities, and definitions have been for these facilities;

4.2.6.2 The validity period of permanent possession permits have been reduced from 50 years to 10 years. The reason is that dead specimens are proposed to be exempt from permit requirements (excluding elephant ivory and rhinoceros horn); there is thus no longer a need for such long periods of validity;

4.2.6.3 In addition to current marking requirements relating to rhinoceros horn (by means of a microchip and a ZA serial number), the CAS number of confiscated horns also needs to be indicated on the horns by means of indelible ink.

1. **COLLABORATION WITH THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES RELATING TO THE REGULATION OF ACTIVITIES INVOLVING TOPS**
   1. On 4 May 2007 the South African Predator Breeders Association launched a High Court application to review certain parts of the TOPS Regulations, among others the prohibition of the put and take hunting as far as it relates to lion. At the time, a “put and take animal” was defined in the TOPS Regulations as being “*a live specimen of a captive bred listed large predator, or a live specimen of Ceratotherium simum (White rhinoceros) or Diceros bicornis (Black rhinoceros) that is released on a property irrespective of the size of the property for the purpose of hunting the animal within a period of twenty four months*”. The Supreme Court of Appeal of South Africa, in its judgment delivered on 29 November 2010, questioned the legislative purpose of prohibiting the put and take hunting of lion. It further stated that it was not clear “*how ethical hunting and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild, and, more especially in relation to captive bred predators that are not bred or intended for release in the wild*”.
   2. Following the above judgment, the DEA requested a legal opinion from the CSLA in order to clarify the legal mandates of the Minister of Environmental Affairs, and the Minister of Agriculture, Forestry and Fisheries. The CSLA indicated that, whatever legal mandate the Minister of Environmental Affairs has, it must always be exercised within the objectives of NEMBA. However, the two key findings of the CSLA in relation to relevant mandates, were the following:
2. the welfare of specimens of listed TOPS in captivity falls within the ambit of the Animals Protection Act, 1962 (Act No. 71 of 1962) or the Performing Animals Protection Act, 1935 (Act No. 24 of 1935); and
3. based on the current legislation, the regulation of ethical matters does not fall within the objectives of NEMBA, whether expressly or impliedly.

6.3 Canned lion hunting, which is perceived to be the hunting of a lion in a small enclosure where it does not have a fair chance to escape the hunter, the hunting of a lion that is a put and take animal, or the hunting of a lion that is under the influence of a tranquiliser, contains elements of both welfare and ethics. The Department therefore recognises the need to collaborate with the Department of Agriculture, Forestry and Fisheries to ensure that welfare matters relating to wild animals, including threatened or protected species are addressed in terms of the Animals Protection Act. The Department participates in processes led by DAFF, including the development of measures for the welfare of captive lions in South Africa, and the revision of the welfare legislation.

* 1. A second consideration in terms of mandates involves the concurrent national and provincial legislative competence, as far as it relates to nature conservation. The professional hunting industry is currently regulated in terms of provincial conservation legislation, where a person is required to obtain a permit to operate as a professional hunter, hunting outfitter or director of a professional hunting school (trainer). However, the DEA has developed national Regulations for the registration of professional hunters, hunting outfitters and trainers, which will soon be published in the *Gazette* for implementation. These regulations will provide for an overarching national registration process, whereas permits will continue to be required in terms of relevant provincial acts/ ordinances to operate within a particular province.

1. **WAY FORWARD** 
   1. The following processes are outstanding and will be done as soon as the final draft documents have been approved by MINTECH and MINMEC:
2. Legal vetting;
3. Socio-economic impact assessment;
4. Approval by the Minister of Environmental Affairs; and
5. Submission to Parliament (required in terms of section 97(3A) of NEMBA).