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**ANIMAL LAW REFORM**  
**SOUTH AFRICA**



**SUBMISSION IN RESPECT OF  
THE DRAFT NATIONAL  
BIODIVERSITY OFFSET  
GUIDELINE**

**26 May 2022**



**ANIMAL LAW REFORM**  
**SOUTH AFRICA**

To: **The Director-General**  
c/o **Department of Forestry, Fisheries and the Environment**  
(hereinafter the “Department” or “DFFE” or “DEA”)

For the Attention of: **Ms Pamela Kershaw**  
Per e-mail: [pkershaw@environment.gov.za](mailto:pkershaw@environment.gov.za)

26 May 2022

Dear Honourable Representatives,

**RE: COMMENTS ON NATIONAL BIODIVERSITY OFFSET GUIDELINE**

Please find herewith the submission (the “**Submission**”) by Animal Law Reform South Africa (“**ALRSA**”) in response to the call for submissions in GN 1924 published in *Government Gazette* number 46088 of 25 March 2022 in respect of South Africa’s National Biodiversity Offset Guideline Published for Public Comment in Terms of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (the “**Draft Guideline**”).

Kindly confirm receipt of this Submission and address further correspondence to the email address: [amywilson@animallawreform.org](mailto:amywilson@animallawreform.org).

We look forward to receiving a response to our Submission and are available to engage on any queries, comments, concerns which you may have in respect of the Submission.

Please note that this Submission is non-exhaustive and does not represent all the responses or objections to or comments on the issues and matters raised herein. We reserve the right to provide any further or additional information on aspects raised herein or in respect of this submission and related subjects.

**Organisational Background and Declaration of Interest**

This Submission is ALRSA<sup>1</sup>, a non-profit company and a registered NPO (Number 238-234 NPO). We have a substantial interest in the issues to be considered by the Department. We have, for years, consistently expressed interest in these issues to DFFE, other government departments, NGOs, the South African public and other stakeholders – both privately and within the public domain.

We have furthermore requested engagement with and feedback from the relevant authorities in respect thereof. We have provided various formal submissions, sent letters, emails, and other correspondence, attended presentations and meetings, and otherwise engaged on these matters (where such engagement has been possible). We are interested stakeholders and representatives of

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<sup>1</sup> Animal Law Reform South Africa Website: <https://www.animallawreform.org/>



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vulnerable populations within South Africa, including human as well as nonhuman animals. We have, within our core focus, concepts of social justice and appreciate the need for intersectionality in our approach.

ALRSA is composed of compassionate legal professionals and envisages a society and legal system that adequately protects both humans and nonhuman animals. We work on connecting three core focus areas: Animal well-being, Social Justice and Law. We focus on a few key areas that we believe will bring about the most change. These focus areas include: Legislative and Policy Reform; Litigation and Legal Services and Education and Research.

Our individual members, founders and directors of our organisations have collectively decades of experience working on matters relating to law; human rights; animal welfare; conservation; international and foreign relations and various other relevant experiences.

At the outset, we wish to note that we have provided extensive comments on the Draft National Biodiversity Framework (2019 – 2024) in May 2021, in our submission together with the EMS Foundation.<sup>2</sup> There are a number of comments raised in that submission that apply equally to the Draft Guideline. We hereby incorporate by reference hereto our submission and comments on the aforementioned Framework. We note that to date, the final policy has not been published and we have not received responses to our submissions.

We welcome the opportunity to make such Submission and look forward to it being properly considered by the Department more broadly.

We look forward to engaging further on the issues contained herein.

Yours sincerely,



**Amy P. Wilson**

*Executive Director*

*Animal Law Reform South Africa*

[amywilson@animallawreform.org](mailto:amywilson@animallawreform.org)

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<sup>2</sup> <https://www.animallawreform.org/wp-content/uploads/2021/05/EMS-ALRSA-Biodiversity-Framework-Submission-Final.pdf>



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### PART I: OVERARCHING COMMENTS

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#### I. BACKGROUND AND CONTEXT

The National Biodiversity Offset Guideline’s purpose is to indicate when biodiversity offsets are likely to be required as mitigation by any competent authority (CA); to lay down basic principles for biodiversity offsetting and to guide offset practice in the environmental authorisation (EA) application context.

The Draft Guideline has been published in terms of section 24J of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (“**NEMA**”) and must therefore be read together with the provisions of NEMA, including the national environmental management principles in section 2 of NEMA, as well as the Environmental Impact Assessment Regulations, 2014 (“**EIA Regulations**”) and other guidelines published under section 24J of NEMA. Of importance, the Draft Guideline must be read in the context of the mitigation hierarchy provided for in section 2(4)(a)(i) of NEMA as well as the referenced “Overall Policy on Environmental Offsetting”.

As a result, the Draft Guideline falls within the parameters of Section 24 of Chapter 2 of the Constitution,<sup>3</sup> and other relevant rights impacted, while being subjected to other relevant considerations such as the provisions of just administrative action (Section 33 of the Constitution), the right to information (Section 32 of the constitution) and legislation such the Promotion of Administrative Justice Act (“**PAJA**”)<sup>4</sup> and the Promotion of Access to Information Act (“**PAIA**”).<sup>5</sup> Furthermore, the Guideline must be considered in light of recent developments and interpretations by the Constitutional Court and other courts relevant to the interpretation of Section 24 including in relation to biodiversity, conservation and animals – such as recognition of animals’ sentience, intrinsic worth and consideration of their welfare (as set out in further detail below).

It is on this basis that we present our Submission in respect to what we believe are issues, gaps, shortfalls of and relevant considerations in respect of the current draft version of the National Biodiversity Offset Guidelines.

At the outset, we wish to record that we welcome a codified national guideline in respect of the issue of biodiversity offsetting in South Africa. The lack of an overarching national offset policy has resulted

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<sup>3</sup> Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the “**Constitution**”). Government Website: <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>.

<sup>4</sup>Promotion of Administrative Justice Act, 2000 (No. 3 of 2000): <https://www.ecolex.org/details/legislation/promotion-of-administrative-justice-act-2000-no-3-of-2000-lex-faoc093033/>

<sup>5</sup>Promotion of Access to Information Act, 2000 (No. 2 of 2000). <https://www.ecolex.org/details/legislation/promotion-of-access-to-information-act-2000-no-2-of-2000-lex-faoc093032/>



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in the development of inconsistent approaches to offsetting on the provincial level without a unified set of common rules.<sup>6</sup> This has tended to result in the development of inconsistent approaches to offsetting at local levels, without a set of common rules.<sup>7</sup> To this effect, the efforts taken in respect of enacting and implementing of a national biodiversity offset guidelines. What follows below, are some proposals and considerations in respect to this document.

We commend the Department for the recognition of biodiversity offsets as a means for the implementation of various principles contained throughout NEMA, most notably the polluter pays principle.<sup>8</sup> The protection of biodiversity ensures the longevity of sustained life with the supply of oxygen, clean air and water, pollination of plants, pest control and wastewater treatment to name just a few. Consistent evaluation of current measures along with the coordination and alignment of the efforts of various organisations and individuals in the conservation and management of South Africa's biodiversity under the auspices of sustainable development remains a pivotal measure in the protection of biodiversity.

To paraphrase a sentiment made in *Chu v The State*<sup>9</sup>

*If we do not take measures... these magnificent creatures would be decimated from earth. Our Flora and Fauna would be poorer for it. South Africa would no longer be the safe home of the 'Big Five', as it is known all over the world.*<sup>10</sup>

We are in support of the inclusion of desired outcomes of biodiversity offsets, specifically the insurance of biodiversity as being secured in the long term through the protection and appropriate management of ecosystems and species and contribution to the expansion of South Africa's protected area network. Furthermore, we commend the express prohibition of the cumulative impacts of the authorised activities resulting in *inter alia* the loss of irreplaceable biodiversity, status changes from vulnerable or least concern becoming endangered, or endangered ecosystems becoming critically endangered.

We are in support of the recognition of the international commitments South Africa is a signatory to in respect of the area of conservation and related commitments. This is required by section 39(1)(b)(iii) of NEMBA. These international commitments are aligned with the NBSAP and must be evident throughout the Draft Guidelines, supporting the international movement towards conservation

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<sup>6</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [https://www.fauna-flora.org/app/uploads/2017/12/FFI\\_2015\\_Biodiversity-Offsets-South-Africa.pdf](https://www.fauna-flora.org/app/uploads/2017/12/FFI_2015_Biodiversity-Offsets-South-Africa.pdf) (accessed on 22 April 2022).

<sup>7</sup> Ibid.

<sup>8</sup> Lukey P et al (2017) *Making biodiversity offsets work in South Africa - A governance perspective* Ecosystem Service 27 281-290 available at [http://www.idakub.com/academics/wp-content/uploads/2017/02/2017\\_J\\_Lukey\\_S-Africa\\_BiodiversityOffsets.pdf](http://www.idakub.com/academics/wp-content/uploads/2017/02/2017_J_Lukey_S-Africa_BiodiversityOffsets.pdf) (accessed on 25 April 2022).

<sup>9</sup> [2012] ZAGP JHC 204 (13 March 2012).

<sup>10</sup> Para 20



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measures. As aforementioned, such international commitments should include South Africa’s climate commitments as well as its commitments to future generations as these are interconnected to biodiversity.

At the outset, we note that as per the introduction of the Draft Guideline:

*“This guideline is an implementation guideline contemplated in section 24J of the National Environmental Management Act, 1998 (NEMA). Guidelines published in terms of that section give guidance on, inter alia, “the implementation, administration and institutional arrangements of [the Environmental Impact Assessment Regulations, 2014 (EIA Regulations) or subsequent regulations regarding the environmental impact assessment process].”*

Furthermore, we commend the inclusion of the core principles of Biodiversity Offsets namely additionality, which provides biodiversity offsets must deliver conservation gains beyond those achieved by ongoing or planned activities that are not part of the offset; equivalence, which provides that an offset should conserve the same biodiversity values as those lost to the original project and permanence, the longevity of an offset should at least persist for the duration of the adverse biodiversity impact suffered by an activity.<sup>11</sup> The formal biodiversity offset regime would, if properly implemented, play a valuable role in South African environmental law.<sup>12</sup>

South Africa has over 95 000 known species, making it the third most biologically diverse country in the world, including three of the 34 global biodiversity hotspots.<sup>13</sup>

As South Africa’s population grows and human-interest increases, the reliance on more land for development and agricultural use seemingly results in the protection of biodiversity becoming less imperative and the preservation of species becoming merely a means to serve human needs. For instance, the Cost-Benefit Analysis in its response to the preservation of endangered species provides for a balancing between the cost to humans only and the tangible benefits to humans. The result of this reasoning is that as long as a species’ benefit to humans (usually in the form of higher financial income) outweighs the costs of having them, these species would continue to be preserved.<sup>14</sup>

ALRSA submits that the draft National Biodiversity Offsetting guidelines represents a “business as usual” approach to biodiversity conservation that fails to recognise that biodiversity is not just “under pressure” but in **a global crisis of extinction** that is part of and interconnected with the climate

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<sup>11</sup> World Bank Group (2016) Biodiversity Offsets: A User Guide page 11-12 available at <https://www.cbd.int/financial/doc/wb-offsetguide2016.pdf> (accessed on 22 April 2022).

<sup>12</sup>Midgley D (2015) *Biodiversity Offset: Towards an Effective legal framework in South Africa* The University of Cape Town available at [Biodiversity offsets: Towards an effective legal framework in South Africa](#) (accessed on 25 April 2022)

<sup>13</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [BIODIVERSITY OFFSETS: LESSONS LEARNT FROM POLICY AND PRACTICE](#) (accessed on 22 April 2022).

<sup>14</sup> Cruise, Adam (2020). *\_The Value of Being Wild: A Phenomenological Approach to Wildlife Conservation\_*. Dissertation, University of Stellenbosch at 37 <https://philpapers.org/archive/CRUTVO-2.pdf>



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crisis. Current biodiversity management measures allow for a plethora of negative consequences - including zoonotic disease transmission, which is a critical consideration in the wake of a global pandemic. The current paradigm has failed us and led to a state of crises. **We must make transformative changes to the way biodiversity is managed in order to address these crises. We have previously made detailed submissions as to this in our submission on the Draft National Biodiversity Framework.**<sup>15</sup> There are a number of comments raised in the aforementioned submission that have equal application to the Draft Guideline. We hereby incorporate by reference hereto our comments on the aforementioned Framework. We note that to date, the final policy has not been published and we have not received responses to our submissions.

NEMA requires that these guidelines must be consistent with any relevant international agreements binding on the Republic and as South Africa is a party to the Convention on Biological Diversity (“**CBD**”), the Draft Guideline must respond to the need for transformational changes identified by the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (“**IPBES**”). IPBES defines transformative change “as a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values.”<sup>16</sup>

It is on this basis that we provide the below considerations.

## II. Recognition of Sentience and Intrinsic Value of Individual Animals

At the onset, ALRSA submits that the constitutionally protected environmental right includes the recognition of both the sentience and the intrinsic value of animals. According to judgment from the Constitutional Court<sup>17</sup>, we are required to re-examine our relationship with and laws relating to animals. This recognition is omitted throughout the National Biodiversity Offset Guideline with **no mention of the intrinsic value** of biodiversity, the value of individual animals, sites nor uniqueness and contributions of individual animals nor sites. The subsequent true ‘value’ and contributions of these sites in the larger ecosystem and to our country is overlooked throughout this document.

Intrinsic value is the value that an entity possesses of itself, for itself, regardless of the interest or utility of others. Intrinsic value of individual organisms manifests itself into distinct, albeit related forms namely good-of-its-on and a good-of-its kind.<sup>18</sup> It is alarming to note that the intrinsic value of biodiversity is not mentioned in the Draft Guidelines, neither as a consideration nor as a principle leading the relevant parties to the biodiversity offset process.

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<sup>15</sup> <https://www.animallawreform.org/wp-content/uploads/2021/05/EMS-ALRSA-Biodiversity-Framework-Submission-Final.pdf>

<sup>16</sup> [https://ipbes.net/sites/default/files/decision\\_ipbes-7\\_1\\_en.pdf](https://ipbes.net/sites/default/files/decision_ipbes-7_1_en.pdf)

<sup>17</sup> *NSPCA v Minister of Justice and Constitutional Development and Another* 2017 (4) BCLR 517 (CC). <http://www.saflii.org/za/cases/ZACC/2016/46.html> at para 57.

<sup>18</sup> Schaffner, Joan, Value, wild animals and law in Scholtz, Werner, *Animal Welfare and International Environmental Law: From Conservation to Compassion* (2019) at 10.



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The Constitutional Court has recognised the importance of intrinsic value and welfare of biodiversity. The *NSPCA* case<sup>19</sup> recognised that the rationale behind protecting animal welfare has shifted from the safeguarding of the sensibilities of humans to placing intrinsic value on animals as individuals. In the *Lemthongthai*<sup>20</sup> case it was further held that constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general. *Lemthongthai* further confirmed that animal welfare and section 24(b) of the Constitution are connected and the integrative approach linking the suffering of individual animals to conservation.<sup>21</sup>

The result of these and other judgments; represents a departure from the position of the Department, which held the view that it does not have the legislative mandate to regulate matters of welfare.<sup>22</sup> The National Biodiversity Offset Guideline presents an opportunity for the Department to be guided by and recognise the intrinsic value and welfare considerations of biodiversity.

We propose that there be an express inclusion and guiding principle in the Guideline regarding the intrinsic value of animals and biodiversity.

### III. Inclusion of Welfare of Animals and Animals Protection Act

The Department must throughout the Draft Guideline and in the implementation of biodiversity offsets, include animal welfare as an integral component. An issue which is of seminal importance and which is completely lacking from the Draft Guideline is the mention of animal welfare and therefore the welfare of animals must be explicitly incorporated into the Draft Guideline.

Furthermore, critical legislation that relates to the protection of animals – such as the Animals Protection Act, 1962 must be explicitly referenced and considered in all relevant activities relating to nonhuman animal/ faunal biodiversity.

As referred to in the “Intrinsic Value” section above, the Constitutional Court, Supreme Court of Appeal<sup>23</sup>, the Supreme Court and the High Court<sup>24</sup> **have connected biodiversity to animal welfare**. This is no longer outside of the Department’s domain and must be tangibly incorporated into the Draft Guideline as the Draft Guideline relates directly to biodiversity.

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<sup>19</sup>*NSPCA v Minister of Justice and Constitutional Development and Another 2017 (4) BCLR 517 (CC)* para 54-7.

<sup>20</sup>*S v Lemthongthai [2014] ZASCA 131* para 20.

<sup>21</sup>*Lemthongthai* at para 58.

<sup>22</sup> Scholtz, Werner Trading rhinoceros horn for the sake of conservation: dehorning the dilemma through a legal analysis of the emergence of animal welfare in Scholtz, Werner, *Animal Welfare and International Environmental Law: From Conservation to Compassion* (2019) at 256. Also see Department of Environmental Affairs ‘Norms and Standards for the Management of Elephants in South Africa to be Amended’ (24 September 2014). Retrieved from [https://www.environment.gov.za/mediarelease/normsandstandards\\_managementofelephants](https://www.environment.gov.za/mediarelease/normsandstandards_managementofelephants) accessed 02 April 2021.

<sup>23</sup> *Lemthongthai v S (849/2013) [2014] ZASCA 131*; 2015 (1) SACR 353 (SCA) (25 September 2014).

<sup>24</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs*



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In August 2019, the High Court<sup>25</sup> confirmed that welfare must be considered as integral to conservation. More specifically, the court said that:

*“In addition and from an environmental perspective the treatment of lions in captivity as an environmental issue and its relationship with the commercial activities that arise from the operations of lion breeders in this case the export of lion bone) **is inextricably linked to the constitutional issue of what may constitute the elements of the right to an environment** and the right to have it protected for the benefit of this and future generations that Section 24 of the Constitution articulates.”<sup>26</sup> (emphasis added)*

The court further stated:

*“While it may be correct that the welfare mandate for lions in captivity may substantially reside with DAFF **there is a difference in law in having responsibility for the welfare mandate and taking welfare considerations into account. The latter does not depend on the legal responsibility to set and enforce standards but rather on an understanding that even if the mandate does not reside with the decision maker, this does not preclude the decision maker from considering them if indeed they are relevant.** Relevance cannot be a matter of formalism determined by the rigid application of the law. Rather whether something is relevant falls to be determined by the relationship and connection between it and the decision that is to be made. My view is that the Minister erred in concluding that since she was not seized with the welfare mandate for lions in captivity, she was not obliged to give consideration to welfare issues relating to lions in captivity (if they were relevant) when determining the quota.”<sup>27</sup>*

*“When one then has regard to the connection between welfare interests of animals and conservation as reflected in the judgments of both the Supreme Court of Appeal and the Constitutional Court in Lemthongthai and NSPCA respectively, then it is inconceivable that the State Respondents **could have ignored welfare considerations** of lions in captivity in setting the annual export quota. What in essence occurs is that the quota is a signalling to the world at large and the captive lion industry in particular that the state will allow exports in a determined quantity of lion bone. It cannot be correct to assert that such signalling can occur at the same time as indicating to the world at large and to the same industry that the manner in which lions in captivity are kept will remain an irrelevant consideration in how the quota is set. It is illogical, irrational and against the spirit of Section 24 and how our courts have included animal welfare concerns in the interpretation of Section 24. Simply put if as a country we have decided to engage in trade in lion bone, which appears to be the case for now, **then at the very least our constitutional and legal obligations that arise from Section 24, NEMBA and the Plan require the consideration of animal welfare issues.**”<sup>28</sup>*

We believe many of the sentiments raised in the aforementioned case(s) find equal application to the Draft Guidelines. Accordingly, the welfare of animals impacted by the Draft Guidelines and all activities and issues contemplated therein **must** be taken into account by the Department.

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<sup>25</sup>National Council of The Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others (86515/2017) [2019] ZAGPPHC 367; [2019] 4 All SA 193 (GP) (26 August 2019)

<sup>26</sup> Ibid at paragraph 45.

<sup>27</sup> Ibid at para 67.

<sup>28</sup> Ibid at para 74.



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Amendments to the National Environmental Management Act, 107, of 1998 proposed in Bill 14/2017 (“**NEMLA**”) and the subsequent legislative mandate of the DFFE to deal with welfare and wellbeing must also be considered in this context. Once in force, which we understand will be imminent, the Department must incorporate wellbeing into all decisions, policies, legislation, regulations, guidelines and other matters. This includes the Draft Guidelines.

As aforementioned, in the landmark 2016 Constitutional Court case brought by the NSPCA,<sup>29</sup> the Constitutional Court referred with approval to the earlier statements of the Supreme Court of appeal in the *Lemthongthai*<sup>30</sup> case that “[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general”. It held that “[a]nimal welfare and animal conservation together reflect two intertwined values.”

This case was referred to with approval in a new case brought by the NSPCA in the North Gauteng High Court in which the Court, referring to captive lions stated that “[e]ven if they are ultimately bred for trophy hunting and for commercial purposes, their suffering, the conditions under which they are kept and the like **remain a matter of public concern** and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part of.

#### IV. Exclusion of Offshore Marine and Estuary Ecosystems

As stated by the introduction of the Draft Guideline:

*“This guideline is applicable in the terrestrial and freshwater realms. It is therefore not applicable in the offshore marine realm and estuarine ecosystems.”*

This is an extremely concerning omission. We note that the impacts of activities have an impact on **all environments** (which are covered by NEMA) and are aware that biodiversity offsets can be implemented in terrestrial, freshwater or marine ecosystems. It is unclear and problematic that the Draft Guidelines specifically exclude offshore marine or estuarine ecosystems.

**Aquatic environments and all environments for which there will be impacts on biodiversity must, out of necessity, be included in the Draft Guidelines.**

#### V. Guidelines vs. Regulations

We note that the Draft Guideline is in the form of a Guideline and not regulations. We do note that this is done in terms of section 24J of NEMA, however we are of the view that in order for this to have the requisite impact and achieve the purposes which it seeks, it must out of necessity be made into a regulation.

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<sup>29</sup>National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (CCT1/2017).

<sup>30</sup> *S v Lemthongthai* [2014] ZASCA 131; 2015 (1) SACR 353 (SCA).



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Biodiversity protection is a critical tool to ensure that the South African environmental right (in Section 24 of the Bill of Rights) is achieved and thus these provisions must be legally binding as an absolute on any entity undertaking activities which impact on the environment.

Furthermore, ALRSA would like to seek a reasoning as to the hard-law nature of this document in its totality. Guidelines do not provide hard and firm provisions for respective provinces to adhere to. In order for the efficient and effective implementation of offsetting, the Department must develop and implement standard operating procedures and systems for the design, evaluation, monitoring and reporting of offsets authorized. This should be done in a policy context as opposed to guidelines.

#### **VI. Requirements for Independence, Review and Auditing**

We are in support of the establishment of the National Biodiversity Offset Register as a means of record keeping to ensure specific activities being up to the standard set out in the Draft Guideline. However, a number of the provisions of the Draft Guideline leaves room for abuse. In many instances the entity undertaking harmful activities prepares or pays for the preparation of documents, reports, submissions and other documents required. This is problematic from a number of perspectives.

We propose that an independent and impartial body be established to advise on offsets - their appropriateness, the adequacy of offset proposals and additional provisions such as the provision for implementation.<sup>31</sup>

In addition, we propose that an entity or organisation must independently review and audit documentation submitted to ascertain its correctness. Biodiversity offset reports should be independently verified. This would ideally be a non-profit entity established acting in the interests of the broader public, communities, biodiversity, animal protection, environmental protection and conservation sectors which would scrutinise and be required to independently verify any reports or submissions or plans as required by the Draft Guideline. This is one mechanism of achieving independence but others may be proposed.

Without such a mechanism of impartiality and independent review and scrutiny, the Draft Guideline is open to abuse.

In addition, all documents should be subject to audit if raised by a member of the public or an entity acting in the public interest.

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<sup>31</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa Business & Biodiversity Programme Fauna & Flora International available at [https://www.fauna-flora.org/app/uploads/2017/12/FFI\\_2015\\_Biodiversity-Offsets-South-Africa.pdf](https://www.fauna-flora.org/app/uploads/2017/12/FFI_2015_Biodiversity-Offsets-South-Africa.pdf) (accessed on 22 April 2022).

## VII. Lack of Common understanding of the concepts

As stated by the National Biodiversity Guidelines:

*Biodiversity offsetting is a relatively novel practice in South Africa. Unfortunately, it has not always been implemented in a defensible and consistent manner.*

The novelty of the concept in South Africa is only further disadvantaged by the fact that no common understanding of the theory and practice of biodiversity offsetting exists.<sup>32</sup> This is further confirmed by the South African National Biodiversity Institute (SANBI) stating that there is currently little understanding, clarity or agreement amongst role-players involved in development, planning and EIA processes on what the best approaches to designing and implementing offsets and the responsibilities for securing and managing them.<sup>33</sup>

To this end, the Department must, as a minimum, contextualise the concept of biodiversity offsetting within the broader South African environmental law framework; clearly articulate the objectives of offsetting as a means to address ecological deficit and clarify definitions relating to offsets.<sup>34</sup>

The Department must initiate a program for training, education and building capacity for biodiversity offsetting. Furthermore, the Department has the obligation to make it clear that certain landscapes, ecosystems and biodiversity at large is irreplaceable and inherently different from their like-for-like counterparts and to this effect must be protected and maintained.

## VIII. Inadequate Offsets

In South Africa, it is possible to create provincial policy based on clear, scientifically verified conservation goals for individual ecotypes due to the country taking long-term, systematic and comprehensive research into the types and statuses of its species and habitats.<sup>35</sup> Due to inconsistencies in respect of biodiversity offsetting, proposed offsets can often be too small in size, legality, financial sustainability and ultimately be considered inadequate as a form of combat or

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<sup>32</sup> Lukey P et al (2017) *Making biodiversity offsets work in South Africa - A governance perspective* Ecosystem Service 27 281-290 available at [http://www.idakub.com/academics/wp-content/uploads/2017/02/2017\\_J\\_Lukey\\_S-Africa\\_BiodiversityOffsets.pdf](http://www.idakub.com/academics/wp-content/uploads/2017/02/2017_J_Lukey_S-Africa_BiodiversityOffsets.pdf) (accessed on 25 April 2022).

<sup>33</sup> South African National Biodiversity Institute, 2012. Draft National Framework for Biodiversity Offsets, May 2012. South African National Biodiversity Institute, Pretoria.

<sup>34</sup> Lukey P et al (2017) *Making biodiversity offsets work in South Africa - A governance perspective* Ecosystem Service 27 281-290 available at [http://www.idakub.com/academics/wp-content/uploads/2017/02/2017\\_J\\_Lukey\\_S-Africa\\_BiodiversityOffsets.pdf](http://www.idakub.com/academics/wp-content/uploads/2017/02/2017_J_Lukey_S-Africa_BiodiversityOffsets.pdf) (accessed on 25 April 2022).

<sup>35</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [https://www.fauna-flora.org/app/uploads/2017/12/FFI\\_2015\\_Biodiversity-Offsets-South-Africa.pdf](https://www.fauna-flora.org/app/uploads/2017/12/FFI_2015_Biodiversity-Offsets-South-Africa.pdf) (accessed on 22 April 2022).



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compensation in respect of the anticipated biodiversity damage from the original development project.<sup>36</sup>

The solution to this could be scaling up the size of respective offset proposals, investments and financing. Furthermore, in respect of highly significant biodiversity impact activities, stricter legal protection and provision for biodiversity offsetting authorization.

#### **IX. Damages that cannot be offset**

Certain activities that result in biodiversity damage that are too significant areas stated to not be able to be offset. This is commendable on the part of the Department in respect to conservation and environmental damage, however presents a problem, specifically with the threshold of ‘significance’. This remains inconsistent and seems to be assessed on a case-by-case basis without specific threshold.

Although in such cases, the only effective way to avoid severe biodiversity loss would not be to proceed with the original project, without significant amendment to the proposed activity.<sup>37</sup> This however does not deal with the specific threshold of significance.

#### **X. Application of the mitigation hierarchy**

The National Biodiversity Framework provides that:

*In some cases, following avoidance and mitigation, there is still residual damage to biodiversity as a result of a development. In such cases, ecological sustainability may be achieved through a biodiversity offset<sup>38</sup>*

The NBF recognises the role of biodiversity offsets in South Africa and that their implementation should be considered once the mitigation hierarchy has been applied.<sup>39</sup> This however operates under the assumption that the mitigation hierarchy is properly applied prior to the implementation of a biodiversity offset.

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<sup>36</sup> World Bank Group (2016) Biodiversity Offsets: A User Guide page 13 available at <https://www.cbd.int/financial/doc/wb-offsetguide2016.pdf> (accessed on 22 April 2022).

<sup>37</sup> World Bank Group (2016) Biodiversity Offsets: A User Guide page 13 available at <https://www.cbd.int/financial/doc/wb-offsetguide2016.pdf> (accessed on 22 April 2022).

<sup>38</sup> National Biodiversity Framework GN 813 in Government Gazette 32474 of 3 August 2009.

<sup>39</sup> Midgley D (2015) *Biodiversity Offsets: Towards an Effective Legal Framework in South Africa* The University of Cape Town available at [Biodiversity offsets: Towards an effective legal framework in South Africa](#) (accessed on 25 April 2022).



## XI. Inclusion of Stakeholders in biodiversity offsetting process, Consultation and Transparency

There are a number of stakeholders which have an interest in biodiversity protection and accordingly biodiversity offsetting. These stakeholders are largely omitted from the Draft Guideline, despite this interest.

The Draft Guideline and activities contemplated thereunder therefore have a broader impact than just as between the relevant corporate entity and Government. These are direct and indirect interests. As such, these stakeholders must be allowed the opportunity to be involved in these processes at relevant stages.

Such stakeholders may include:

1. Communities impacted by Biodiversity Offsets;<sup>40</sup> (both where activities occur and new areas)
2. Non-governmental stakeholders such as civil society groups representing animal and biodiversity protection, social justice groups and others; and
3. The involvement of independent experts has been demonstrated in South Africa to be critical for improving the quality and feasibility of offset design.<sup>41</sup>

Representatives of these groups and interests must be given the opportunity to make submissions in respect of biodiversity offsetting process.

As such all relevant documentation and information applicable to projects must be made publicly available and must be advertised as appropriate in order to allow for such participation. The national biodiversity offset register needs to include more comprehensive information than currently contemplated. Transparency must be an essential component on all activities which have the potential to impact on biodiversity.

Currently, the only reference to “I&APs” or “interested and affected parties” is with regard to the audit reports. However, it is not only in respect of monitoring that such parties should be involved, but throughout the process. In addition, there must be a process by which such audit reports and any other documentation can be challenged by the I&APs.

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<sup>40</sup> <https://news.mongabay.com/2020/02/raze-here-save-there-do-biodiversity-offsets-work-for-people-or-ecosystems/>

<sup>41</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [https://www.fauna-flora.org/app/uploads/2017/12/FFI\\_2015\\_Biodiversity-Offsets-South-Africa.pdf](https://www.fauna-flora.org/app/uploads/2017/12/FFI_2015_Biodiversity-Offsets-South-Africa.pdf) (accessed on 22 April 2022).



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## XII. Financing of biodiversity offsets

A large contributor of biodiversity offset is compensation and long-term financing for the proposed activity. Payment for biodiversity offsets be made in full prior to the impact being authorised by the Department. The rationale behind this is that without these safeguards, significant risks are raised on the ground in respect of biodiversity impacts occurring whilst the project goes forth.<sup>42</sup> ALRSA concurs with the position raised by ENVASS

*“As per the Draft National Biodiversity Offset Policy (DEA, 2017), NEMA (Act no. 107 of 1998) and the MPRDA (Act no. 28 of 2002) (if applicable), legal and financial provision must be in place to ensure that the offset sites are legally protected and effectively managed to maintain their value as an offset. The ideal scenario will be that the offset sites receive statutory protection using mechanisms such as the National Environmental Management: Protected Areas Act (Act no. 57 of 2003), Section 12 of the NWA (Act no. 36 of 1998) and/or Section 49 of the MPRDA (Act no. 28 of 2002). This must be stipulated within the closure plan relevant to the proposed development (DWS & SANBI, 2016).”<sup>43</sup>*

## XIII. The express inclusion of highly significant sectors in relation to biodiversity offsetting

**Animal use industries such as animal agriculture and fishing must be properly provided for as a key threat and risk to biodiversity and must be properly provided for as such with specific application provisions contained within the Biodiversity Offset Guideline or the Overall Policy on Environmental Offsetting.**

Animal agriculture<sup>44</sup> (terrestrial and aquatic) as well as fishing have major impacts on biodiversity, from indirect impacts such as to their habitat, and driving climate change, to direct killing of wildlife. These industries and activities must be expressly provided for in the Draft Guidelines or the Overall Policy on Environmental Offsetting. This can be done through express mention as a highly significant residual impact activity or a stand alone provision contained within the Draft Guideline.

Biodiversity forms the foundation of agriculture, as it is the source of all variety in our crops and livestock. The CBD states that globally agriculture produces an average of 23.7 million tons of food per day and provides livelihoods for 2.5 billion people.<sup>45</sup> Despite the benefits of the agriculture industry, agriculture poses an unprecedented threat to biodiversity worldwide. The current practices

<sup>42</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [BIODIVERSITY OFFSETS: LESSONS LEARNT FROM POLICY AND PRACTICE](https://www.biodiversityoffsets.org/summaries/south-africa) (accessed on 22 April 2022).

<sup>43</sup> <https://www.envass.co.za/biodiversity-offset-programmes-explained/> (accessed on 26 April 2022)

<sup>44</sup> For purposes of this Submission, animal agriculture includes both terrestrial animal agriculture and aquaculture. Emphasis is on industrialised and intensive systems rather than smaller extensive animal agriculture.

<sup>45</sup> CBD (2019) *Agriculture must be part of the solution, not the problem* <https://www.cbd.int/article/food-2019-12-11-16-49-46>



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of the agriculture industry causes tremendous environmental impact through the conversion of natural habitats to monocultures, soil degradation, unsustainable consumption of water, and unsustainable use of pesticides and fertilizers.

With the recognition of South Africa being one of the smaller countries hosting more than two thirds of the world's biodiversity while only having a landmass of 1.21 million km<sup>2</sup> and 1.1 million km<sup>2</sup> of surrounding seas,<sup>46</sup> the increased clearing of biodiversity in order to facilitate animal agriculture, factory farming and agricultural activities presents a tremendous threat towards the conservation of biodiversity.

Apart from direct impacts on biodiversity, we wish to point out the extreme and undeniable negative environmental impacts which animal agriculture more broadly has on the environment,<sup>47</sup> which indirectly impacts biodiversity. These have been well documented and include but are not limited to huge amounts of resources required (including water and land); soil pollution, reduction in quality and contamination; water pollution and contamination; air pollution and contamination; greenhouse gas emissions; environmental justice issues; harmful chemicals and antibiotics; and various others.

While other countries in the world are looking at reducing their reliance on animal agriculture and investing in alternatives – including plant-based agriculture, South Africa is actively promoting and attempting to increase it.

Reports indicate that “meat, aquaculture, eggs, and dairy use ~83% of the world's farmland and contribute 56-58% of food's different emissions, despite providing only 37% of our protein and 18% of our calories”.<sup>48</sup> Current animal agricultural farming systems have a major and harsh impact on the environment.<sup>49</sup> Studies show that a further consequence of the intensive farming of animals is the huge amount of greenhouse gas emissions associated therewith.<sup>50</sup> As the association of increased greenhouse gas emissions impacts climate change and environment.

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<sup>46</sup> Department of Environmental Affairs National Biodiversity Assessment (2018) [http://opus.sanbi.org/bitstream/20.500.12143/6376/3/NBA2018\\_Vol7\\_GeneticDiversity.pdf](http://opus.sanbi.org/bitstream/20.500.12143/6376/3/NBA2018_Vol7_GeneticDiversity.pdf)

<sup>47</sup>Some examples (non-exhaustive) of this include: <https://www.sciencedirect.com/science/article/pii/B9780128052471000253> and <https://www.humanesociety.org/sites/default/files/docs/hsus-report-agriculture-global-warming-and-climatechange.pdf> and <https://www.nationalgeographic.com/environment/2019/01/commission-report-great-foodtransformation-plant-diet-climate-change/>.

<sup>48</sup>Poore, Joseph and Thomas Nemecek. 2018. “Reducing food's environmental impacts through producers and consumers” *Science* 360 (6392): 987-992. DOI: 10.1126/science.aaq0216.

<sup>49</sup>Clark, Michael and David Tilman. 2017. “Comparative analysis of environmental impacts of agricultural production systems, agricultural input efficiency, and food choice.” *Environmental Research Letters* 12(6): 1-11. Retrieved July 20, 2019 (<https://iopscience.iop.org/article/10.1088/1748-9326/aa6cd5/meta>).

<sup>50</sup> Supra note 48. *Poore*



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It has been well-documented that the effects of global warming (a major driver of which, is animal agriculture) will be felt by poorer members of society:<sup>51</sup> This is not remotely mentioned in respect of the biodiversity offset guidelines. “While wealth and excess of the planet’s rich drive the pollution responsible for global warming, it is the economically marginal that will be hardest hit by the environmental shocks that are the inevitable fallout of that pollution”.<sup>52</sup>

#### **XIV. Climate Change**

South Africa’s climate change obligations must be properly acknowledged in the National Biodiversity Offset Guideline and the express recognition of climate change legislation and regulations be utilised as an imperative consideration in relation to the Environmental Authorization and subsequent Biodiversity Offsetting procedure. Activities that have significant climate change impacts (including activities such as animal agriculture, aquaculture, fishing, destruction of natural habitats, etc) should be considered as high impact in the biodiversity offset guideline hierarchy.

Environmental degradation and the impacts on sustained life for all on Earth has become a global concern. Climate change is one of the Anthropocene effects on continued life for both humans and non-humans. Climate change is having a detrimental impact on the biodiversity and structure of global ecosystems.<sup>53</sup>

The cumulative effects of climate change have already begun to take hold in Africa.<sup>54</sup> Various international and national assessments and research papers have stated that South Africa is likely to be vulnerable to the adverse effects of climate change.<sup>55</sup>

South Africa remains committed to making a fair contribution towards addressing GHG emissions however this is done subject to its developmental objectives in light of poverty elimination and the eradication of inequality.<sup>56</sup>

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<sup>51</sup>Goldenberg, Suzanne. 2014. “Climate change: the poor will suffer most.” The Guardian, March 30, 2014. Retrieved July 20, 2019 (<https://www.theguardian.com/environment/2014/mar/31/climate-change-poor-suffer-most-un-report>).

<sup>52</sup>*Ibid* Goldenberg.

<sup>53</sup> Imbert J et al, Synergies between Climate Change, Biodiversity, Ecosystem function and Services, Indirect Drivers of Change and Human Well-being in forests (2020). Retrieved from [www.link.springer.com/chapter/10.1007/978-981-15-7301-9\\_12](http://www.link.springer.com/chapter/10.1007/978-981-15-7301-9_12).

<sup>54</sup>Intergovernmental Panel on Climate Change Synthesis Report (2014:90)

<sup>55</sup>Midgley G ‘Scientific Aspects of Climate Change and their Impacts in South Africa’ in Humby et al ‘Climate Change, Law and Governance in South Africa’ (2016) 2-1.

<sup>56</sup> South Africa’s Intended Nationally Determined Contribution 2. Also see Kotze L et al ‘Climate Change Law and Governance in South Africa – Setting the Scene’ in Humby T et al ‘Climate Change Law and Governance in South Africa’ (2016) 1-24.



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South Africa has announced that it would act voluntarily to reduce domestic GHG emissions.<sup>57</sup> This is evident from the statement that the country will contribute its fair share towards the common responsibility for the future and commit itself to having its actions be measurable, reportable and verifiable.<sup>58</sup>

South Africa refers to climate change as an ongoing trend of change in the Earth's general weather conditions as a result of an average rise in the temperature of the Earth's surface often referred to as global warming.<sup>59</sup> Climate change seriously threatens to undermine many of the sustainable development advances being made in South Africa.<sup>60</sup> The state has expressed its vulnerability to the impacts of climate change, particularly in respect of water and food security as well as health, human settlements, infrastructure and ecosystem services.<sup>61</sup>

South Africa has stated that the key challenge for South Africa is to drive, at an economy-wide scale, financing of and investing in the transition to a low carbon and climate resilient economy and society.<sup>62</sup> The strengthening of domestic institutions in developing countries is imperative towards addressing climate change and its effects.<sup>63</sup>

In light of the urgency in addressing climate change as well as the legislative measures, both nationally and internationally, climate change be regarded as an urgent pressure in relation to South Africa's biodiversity. All of the relevant climate change legislation, obligations and policies must be included in these guidelines – including the Nationally Determined Contribution (NDC).

If we are to halt the sixth mass extinction, we require at least half of the world's land to be conserved under protected areas. Ecological recovery is remarkable if natural systems are protected from extraction. The biggest threats to most wildlife species at present are habitat destruction and fragmentation.

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<sup>57</sup> Statement by South Africa to the UNFCCC COP 13 Plenary, 12 December 2007 available at [www.environment.gov.za](http://www.environment.gov.za) accessed (07 March 2020).

<sup>58</sup> Official letter to the UNFCCC dated 29 January 2010 available at [https://unfccc.int/files/meetings/cop\\_15/copenhagen\\_accord/application/pdf/southafricacphaccord\\_app2.pdf](https://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/southafricacphaccord_app2.pdf) accessed (07 March 2020). Also see Brown DA, Glider A & Kotze L 'South Africa and Climate Change Ethics' in Humby T et al 'Climate Change Law and Governance in South Africa' (2016) 7-6.

<sup>59</sup> The National Climate Change Response White Paper, 2011 8.

<sup>60</sup> Midgley G 'Scientific Aspects of Climate Change and their Impacts in South Africa' in Humby et al 'Climate Change, Law and Governance in South Africa' (2016) 2-12.

<sup>61</sup> South Africa Intended National Contribution to the UNFCCC p1 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>62</sup> South Africa Intended National Contribution to the UNFCCC p8 available at <https://www4.unfccc.int> (accessed 25 March 2020)

<sup>63</sup> Wang X et al 'Research and scholarship on climate change law in developing countries' in Farber DA and Peeters M (eds.) 'Climate Change Law' (2016) 122.



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It is critical that the new conservation model for South Africa emphasises the importance of creating migratory corridors between currently fragmented properties. To this effect, we posit that the National Biodiversity Offset Guideline encompasses the vision of the abovementioned intrinsic value of biodiversity and mitigation of climate change as one of its key concerns.

**XV. Transparency and Accountability**

Overall, there needs to be much stricter responsibilities and accountability on the part of the applicants / entities to be responsible for undertaking activities and causing harm. The provisions of NEMA, NEMBA relating to transparency, consultation and other relevant aspects, as well as the overarching Constitutional right to Environment for present and future generations and its interpretation are key considerations in any harm and all activities potentially impacting on these rights must be severely scrutinised and, if relevant, prohibited.

**XVI. Overall Policy on Environmental Offsetting**

We note that mention is made of an Overall Policy on Environmental Offsetting to be released in the near future. While we have not seen this document, we submit that many of the same comments provided for in this submission will be relevant and should be considered in the policy.

## **Part II: Selected Objections to and Issues with the National Biodiversity Offset Guideline (Non-exhaustive)**

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For purposes of this Part II, we have included more specific comments on the National Biodiversity Offset Guideline. We have not reiterated the considerations from Part I herein as these apply to various portions of the National Biodiversity Offset Guideline and should be incorporated throughout as appropriate. Failure or omission to comment on a specific issue does not indicate acceptance or approval of such provision.

### **1. Schedule of the National Biodiversity Offset Guidelines**

As stated by the Schedule:

*“Biodiversity offsetting is an underutilized mitigation option in South Africa, and where it is utilised, it often does not result in tangible biodiversity outcomes. Several provinces have therefore adopted biodiversity offset guidelines to assist competent authorities, environmental assessment practitioners and other stakeholders in implementing biodiversity offsets in practice. However a response on a national level is also necessary to promote consistency in biodiversity offsetting practice in the country.”*

To this effect, we welcome the recognition of the need for national guidelines in respect of biodiversity offsetting in order to guide provincial implementation of guidelines as done by several provinces. We would like clarity as to how the Draft Guidelines interact with the specific provincial guidelines. Will there be a process of alignment whereby the provincial guidelines are aligned to the Draft Guidelines?

We submit that it should be an obligation placed on all provinces within the country, to have biodiversity offsetting regulations (not guidelines) in place or applicable to them at a national level. These must be aligned and standardised across the provinces to ensure consistency with respect to biodiversity within the country and ensure consistent implementation of biodiversity offset in practice.

### **2. Background of National Biodiversity Offset Guideline**

As stated in the background:

*“Biodiversity is fundamental to the health and well-being of people, as well as economic activity and socio-economic upliftment. The National Biodiversity Assessment (2018) (NBA 2018) states that South Africa’s biodiversity assets and ecological infrastructure contribute significantly towards meeting national development priorities.”*

This provision is an example of the anthropocentric / human-centered approach which remains problematic throughout the Draft Guidelines. The background of a document with the purpose of



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protecting biodiversity is required to at the very least recognise the intrinsic value of the biodiversity it is protecting. Furthermore, the express recognition of the welfare of animals as contemplated above should not be an optional inclusion, but a constitutional necessity.

An additional example contained in this background is:

*“Ecosystem services are essential for human well-being and support economic activities.”*

This is once again purely an anthropocentric / human-centered approach towards the rationale behind conservation of biodiversity. This, we urge, should be remedied to properly take into account the intrinsic value of biodiversity and animals as acknowledged by South Africa’s highest court.

Lastly, to quote the background’s final paragraph:

*“Biodiversity offsetting is a relatively novel practice in South Africa. Unfortunately, it has not always been implemented in a defensible and consistent manner.”*

This raises a number of critical issues, two of which have been expanded on below and which we urge the National Biodiversity Guidelines address:

A. Training, Education and Capacity Building

Adequate provision be included within the guideline to either (a) promote biodiversity offsetting training on a national level throughout the country or (b) provide biodiversity offsetting training to specialists on a provincial level taking into account the natural resources contained in the province/area respectively.

B. Enforcement and Penalties in light of Contravention

Stringent measures be taken in order to ensure the proposed biodiversity offsetting be implemented in a consistent manner throughout the timeframe required by the authorisation, with firm penalties in place in respect of failure to comply with offset conditions. An approach of “slap on the wrist” is not sufficient for crimes against nature and in breach of fundamental human rights.

**3. Legislative Framework**

There are key pieces of legislation which have been omitted from this section. This section must reference all relevant legislation, including but not limited to:

- A. The Animals Protection Act, 1962 (APA)
- B. National Environmental Management: Biodiversity Act, 2004 (NEMBA)



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- C. National Environmental Management Laws Amendment Bill, 2017 (NEMLA)
- D. Threatened or Protected Species Regulations and Lists (both terrestrial (2007, 2020) and Marine (2017); TOPS
- E. Norms and Standards relating to the Management of Elephants, 2008; and
- F. Others as applicable to matters covered by the Draft Guidelines.

#### **4. Outcome Statement and Principles**

As stated by the Outcome Statement and Principles:

*“The outcome statement and principles in this chapter serve as the general framework within which it must be determined if a biodiversity offset is required and within which a biodiversity offset must be designed and implemented. The outcome statement and principal should also guide decision-making and, as relevant, the setting of conditions regarding biodiversity offsets.”*

Although ALRSA welcomes the recognition of the desired outcomes of biodiversity offset, most notably the security of long term protection of biodiversity, ecosystems and species as well as the expansion of protected area networks and ecological infrastructure, the recognition of the intrinsic value of animals, the sentience of animals, and animal welfare must be included in order to meet the most recent recognition of the above in the environmental right.

#### **5. Principles of Biodiversity Offsetting**

As stated by the Principles for biodiversity offsetting:

***“Residual impacts on irreplaceable biodiversity cannot be offset –***  
*... Ecological compensation for residual impact which cannot be offset should only be considered only in highly exceptional circumstances, when there are imperative reasons for override public interest”*

We oppose that ecological compensation for residual impact which cannot be offset. If a residual impact cannot be offset it should not be allowed to take place at all. This is an absolute requirement.

This is in light of the provision of the ***Reasons for overriding public interest***. Although we commend the significance of this provision in the Draft Guideline, we maintain that a *truly exceptional* circumstance remains vague in execution and should either be more specific or, be completely prohibited.

Furthermore, as per the above-mentioned subheading:

***“The quality and quantity of residual impacts on biodiversity must be considered in decision making involving biodiversity offsetting - When considering the significance of the residual impact to be***



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*counterbalanced by an offset intervention, the nature of the impacted biodiversity (e.g. whether it is part of a priority area), its threat status and protection level, ecological condition and the size of the impacted area must be considered at the very least.”*

We believe a key consideration is omitted from consideration being the continued protection of, promotion of and improvement of animal welfare. The terms *animal welfare* or similar terms be included in the list of consideration as highlighted above.

### **Integrated landscape scale interventions**

As per this section of the guideline:

*“A ‘patchwork’ of small-scale, isolated offset interventions poses a number of challenges including, among others: the high risk of failure if upstream or bordering degradation is not addressed in some way; increased demands on ecological management, enforcement and compliance monitoring capacity; the potentially limited environmental **value** of small, unconnected pockets of natural features; and reduced opportunities for maximising the benefits that could be accrued by integrated, landscape-scale interventions.”*

Throughout the Draft Guideline, reference is made to the concept of value of biodiversity. As stated above, it is constitutionally recognised that biodiversity has intrinsic value which is to be protected by the State in the fulfilment of the environmental right. As such, ALRSA request the Department to provide a method of calculating the value of these *potentially limited, small unconnected pockets of natural features*.

### **6. Securing the Biodiversity Offset Site**

As stated by the above provision:

*“Ideally, the biodiversity offset site should be secured by the declaration of the site as a protected area in terms of the National Environmental Management: Protected Areas Act 2003, or by the registration of a conservation servitude in respect of such land if the declaration of a protected area is not possible under the circumstances.”*

Although we commend the further recognition and protection of these imperative protected areas. This creates an instance of only priority and these significant areas receiving protection at the expense of other ‘less significant areas’ being subject to environmental degradation. This provision must be made to obligate parties to consider biodiversity offset and additional measures in respect to the surrounding areas in which these developments occur. This can take the form of eco-landscaping, etc.

Furthermore, ecosystems functions be an imperative consideration in the selection and securing of an offset site. Ecosystem functions are the range of functions that result from ecosystem processes and benefit life, such as supporting food chains and providing refuge and nursery grounds for species. Just

because an area is the right size and habitat does not mean it will perform the right function in the landscape comparable to the landscape which will be affected.<sup>64</sup>

## **7. Preparing Biodiversity Offset Conditions for an Environmental Authorisation**

In the *pre-application studies and engagement* section, it provides:

*“... In addition, given the short time frames within which to conduct the assessments necessary to prepare a Biodiversity Offset Report in the EIA phase, these would be a risk of a CA refusing an EA application on the basis of insufficient information in a Biodiversity Offset Report to justify granting EA subject to a biodiversity offset condition.”*

This admission of insufficient information can run both ways as an EA application could also be accepted without sufficient information being available in a Biodiversity Offset Report. As such, we propose that sufficient information be provided in respect of a Biodiversity Offset Report with an extension of the allocated time frame be provided on a case-by-case basis. Furthermore, in the spirit of fairness, that neither an approval nor refusal to grant an EA be provided until such time that all the necessary information be provided.

## **8. The Roles and Responsibilities of the Different Role-Players in the Biodiversity Offsetting Process**

One of the key role players listed in terms of the Draft Guidelines is that of a specialist. The provision states that a specialist

*“... must have experience and expertise in biodiversity offset design and implementation, and must be registered with the South African Council for Natural Scientific Professions and/or the Environmental Assessment Practitioners Association of South Africa. As part of the process of preparing Biodiversity Offset Reports, specialists engage the owners of land that could be selected as candidate biodiversity offset sites or biodiversity offset sites.”*

Furthermore, as noted when contemplating the proponent/applicant:

*“... the applicant should also appoint appropriately qualified specialists to compile relevant documentation for review by the CA, including but not limited to biodiversity specialist reports, Biodiversity Offset Reports, Biodiversity Offset Management Plans and Biodiversity Offset Implementation Agreements”*

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<sup>64</sup> Jenner N and Balmforth Z (September 2015) Biodiversity offsets: Lessons learnt from Policy and Practice Country Summary Report: South Africa *Business & Biodiversity Programme Fauna & Flora International* available at [https://www.fauna-flora.org/app/uploads/2017/12/FFI\\_2015\\_Biodiversity-Offsets-South-Africa.pdf](https://www.fauna-flora.org/app/uploads/2017/12/FFI_2015_Biodiversity-Offsets-South-Africa.pdf) (accessed on 22 April 2022).



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This is problematic as these specialists are appointed and paid for by the applicant with no measure of autonomy or independence in respect of the compilation of the offset reports. This is further alarming taking into account the discretion awarded to these specialists as indicated by the below exert:

*“In this step, the proponent’s EAP, or a relevant specialist or specialists, assesses whether it is likely that there would be unavoidable significant residual negative impacts on biodiversity which could require a biodiversity offset.”*

There needs to be a level of independence from the applicant which cannot be properly achieved if hired by and paid for by the applicant. It is submitted that any reports should be independently verified.

As a proposal, there may be a non-profit entity established acting in the interests of the broader public, biodiversity and conservation which may be paid to independently verify any reports or submissions or plans as required by the Draft Guideline. This is one mechanism of achieving independence but others may be proposed.

## **9. When Biodiversity Offsets are Required**

The significance criteria are too low and unclear. We are concerned by the qualifications as follow:

- A. Medium: “unless reasons why it should not be required”. **This must be required – regardless of “reasons”** In any event the term “reasons” is unnecessarily vague and problematic and open to abuse.
- B. High: “unless compelling reasons why it should not be required”. **This must undoubtedly be required and cannot be reasoned out of**
- C. Very High: “Ecological Compensation if exceptional circumstances lead to EA approval.” If there are to be very high residual impacts – an **activity must be prohibited from happening. This is a very problematic framing.**

## **10. Impact Significance**

At the onset, we commend the position taken in the guidelines that:

*“Biodiversity offsets are not appropriate when an activity, or activities will have residual impacts on biodiversity of very high significance, including when residual negative impacts will result in loss of irreplaceable biodiversity.”*

This is however undermined by the implications for mitigation and offset table in respect of very high significance rating which provides:

*“Activity should not be authorised except in exceptional circumstances. If an application is authorised, ecological compensation is required unless there are reasons why ecological compensation should not be required.”*



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This position is very problematic. We posit that either (a) activity should not be authorised as an absolute rule or (b) conceding to the first position, compensation must always be required. In respect of such compensation it must be punitive along the lines of the “polluter pays” principle. Such payment must be punitive in nature and not minimal.

Through this provision, an applicant could have a very high significance rating, provide exceptional circumstances, and provide reasons in order to avoid any ecological compensation. This is wholly undermining of the environmental right, as well as the duty of the Department to uphold said right and act to protect the environment for present and future generations.

A similar position is highlighted in activities that have a high significance rating namely:

*“Biodiversity offsets are likely to be required, unless there are compelling reasons why a biodiversity offset should not be required.”*

This should not be the case. In an instance of high biodiversity impact, there should be no compelling reason as to why biodiversity offset should not be required. It should be regarded as an absolute that biodiversity offset be required. This should be done, once again, in the protection of biodiversity resources for present and future generations.

We are concerned with Table 1 and the thresholds provided for therein. Again, we do not believe that these adequately account for the potential far reaching harm of activities; the recognition of the intrinsic value of individual animals and biodiversity; do not properly account for animal welfare and are misaligned with the Right to Environment as contained in the Constitution.

-----**END**-----