Legal Framework for Protected Areas:

South Africa

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Information concerning the legal instruments discussed in this case study is current as of 1 January 2009.

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Abstract

This case study considers South Africa's contemporary protected areas regime, as principally reflected in the National Environmental Management: Protected Areas Act 2003. It commences with a discussion of the key challenges which compelled the government to rethink its approach to protected areas including: poor conservation planning; the adoption of an exclusionary approach to conservation; exceedingly fragmented institutional and legislative frameworks; inconsistent declaration and protection procedures; inadequate management procedures; and resource constraints. The analysis then turns to discuss the key components of the nation's contemporary protected areas regime and considers the manner in which it seeks to overcome many of these challenges through the prescription of clear and comprehensive procedures for: identifying and declaring areas worthy of conservation; incorporating, within a hierarchical structure of protected areas, state, communal and private land; enabling state, communal and private landowners to manage these areas; providing incentives to private and communal landowners contracting land into, or managing, protected areas; and enabling various forms of community-based natural resource management within and adjacent to protected areas.

Contents

Acronyms and abbreviations

DEAT	Department of Environmental Affairs and Tourism
EIA	environmental impact assessment
EMI	environmental management inspector
GG	Government Gazette
GN	Government Notice
GNR	Government Notice Regulation
IUCN	International Union for Conservation of Nature
MEC	Minister of the Executive Council
NEMA	National Environmental Management Act
SANBI	South African National Biodiversity Institute
SANParks	South African National Parks

1 Introduction

Protected areas have been used for decades in South Africa as a valuable tool for conserving the nation's natural and cultural heritage. Currently, approximately 6 per cent of the terrestrial environment and 20 per cent of the marine environment is incorporated in over 400 terrestrial and 23 marine protected areas.[1] Notwithstanding its protracted and extensive use, numerous flaws were identified in the legal framework that provided for the identification, declaration and management of the majority of these areas: divided administrative responsibilities; a profusion of laws; the lack of coordination; outdated regulatory approaches; inadequate planning; insufficient resource allocation; and a failure to link conservation imperatives with the needs of local inhabitants.[2] These flaws significantly undermined the effective functioning of South Africa's protected areas regime. 1

In an attempt to overcome these challenges, the South African government overhauled the country's national conservation regime towards the beginning of 2003. One of the new laws to emerge from this reform process was the National Environmental Management: Protected Areas Act 2003.[3] The express objectives of the Protected Areas Act reflect a clear attempt to overcome the above challenges and give effect to the government's commitments under various international environmental instruments of relevance to protected areas, such as the Convention on Biological Diversity, the Durban Accord and the Durban Action Plan. These objectives include providing a national framework for the declaration and management of protected areas; entrenching cooperative governance; integrating protected areas within broader national planning instruments; providing for a representative network of protected areas on state, private and communal land; promoting the sustainable utilization of protected areas for the benefit of the people; and promoting local community participation in the management of protected areas. 2

This case study focuses on the innovative regime inherent in the Protected Areas Act. It is divided into two main parts. The first part briefly discusses the key challenges which faced, and in many instances continue to face, South Africa's protected areas regime. This provides the necessary background for the second part, which considers key components of the Protected Areas Act and the extent to which they cumulatively seek to overcome these challenges and provide a more workable and equitable legal framework for South Africa. These components include the scope of the legal framework; policy and planning; establishment, amendment and abolishment; management regimes; regulation of activities; compliance and enforcement; and financing options. Interspersed within the latter analysis are a number of examples, presented in boxes, illustrating how South Africa's conservation authorities have sought to give practical effect to the nation's new protected areas regime. Owing to the relative novelty of the protected areas framework, these examples are somewhat sporadic and are predominantly drawn from generic national initiatives and developments in the Western Cape Province, which has during the course of the last few years arguably taken the lead in 'experimenting' with the implementation of the new protected areas regime. 3

1 Van Schalkwyk, 2008a. See further Department of Environmental Affairs and Tourism (DEAT), 2003; and DEAT, 2005a.

2 These flaws were highlighted in DEAT, 1997; and Kumleben et al., 1998.

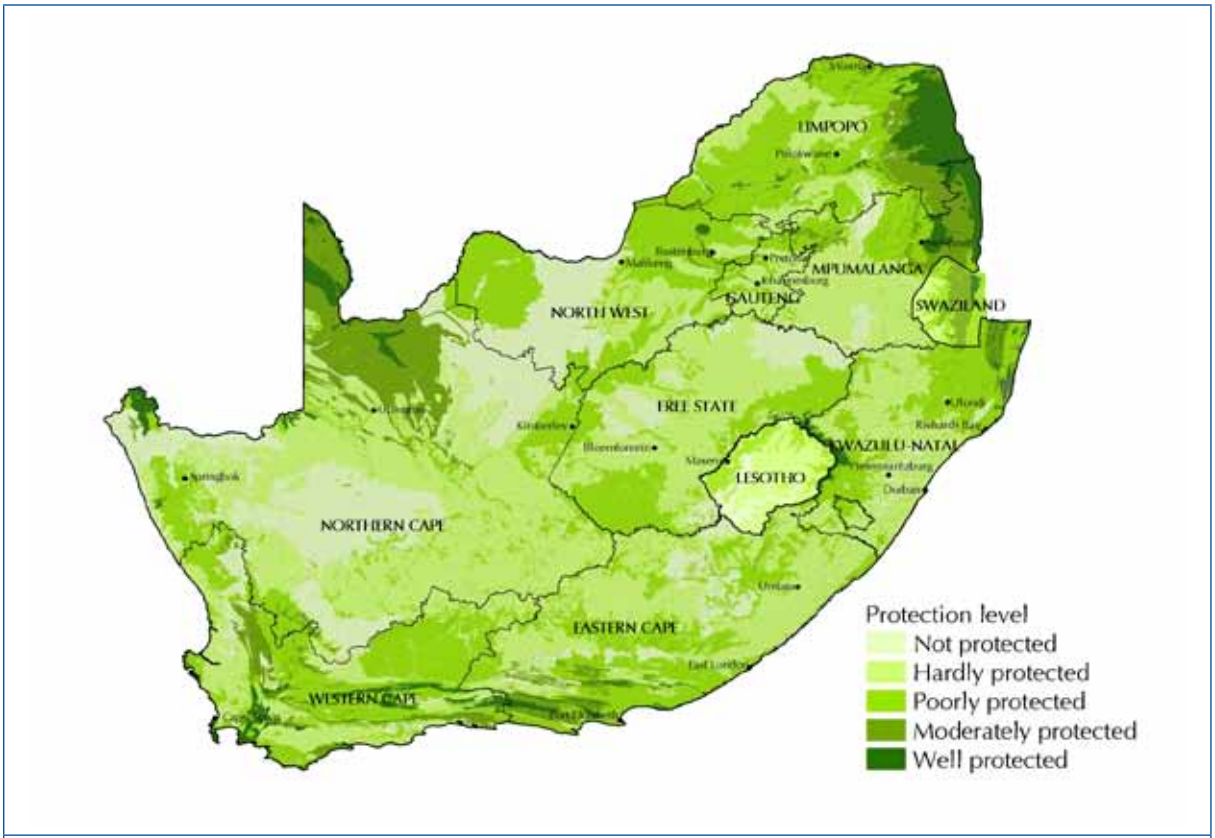
3 Amended by the National Environmental Management: Protected Areas Amendment Act 2004. The Act commenced on 1 November 2004.

2 Summary of the challenges facing protected areas in South Africa

2.1 Poor conservation planning

4 Prior to 2000, planning was wholly inadequate within South Africa's conservation sector and the country's protected areas network accordingly arose in a largely ad hoc manner. No general conservation strategy or coherent planning framework existed for identifying, declaring and managing areas of natural and cultural significance.[4] Many protected areas were constituted on land marginal for agriculture and under the guise of conservation when in reality they were established solely for recreation and tourism purposes.[5] Consequently, the network of protected areas did not optimally incorporate a representative sample of all ecosystems and certain hot spots of natural and cultural significance.[6] This remains the case today and is clearly reflected in Figure 1, which shows the current level of ecosystems protection in South Africa. Land-based protected areas, for example, include only four of the nine biomes and 34 per cent of vegetation types.[7] Many of the existing protected areas are too small for meaningful conservation, isolated from one another and managed as conservation 'islands' rather than as part of a holistic land use policy.[8] Their administrative boundaries frequently do not coincide with ecological boundaries, thereby undermining effective conservation.

Figure 1: Protection level of ecosystems in South Africa



Source: Department of Environmental Affairs and Tourism, State of the Environment Report (2008).

4 Kumleben et al., 1998, p. 8. See further Geach and Peart, 1998, p. 20.
5 Kumleben et al., 1998, p. 22. See further DEAT, 2005b, p. 16.
6 Kumleben et al., 1998, p. 3. See further DEAT, 2005b, p. 15.
7 DEAT, 2005b, p. 15.
8 DEAT, 1997, p. 28.

From a broader planning perspective, the absence of a coherent national conservation strategy meant that conservation concerns were not satisfactorily integrated into broader policies and programmes. Although conservation was promoted within certain protected areas, degradation occurred freely outside them.[9] There was accordingly consensus on the need to develop and entrench a comprehensive conservation planning framework for informing the selection, reappraisal and management of protected areas in South Africa. 5

2.2 Exclusionary approach to conservation

Historically, many African countries have pursued policies which alienate conservation from the people.[10] This exclusionary approach similarly plagued South Africa's protected areas regime. Protected areas were often established on land formerly owned or occupied by local communities.[11] These communities were frequently displaced, denied access to the resources upon which they were dependent and seldom benefited from the establishment of such areas. Conservation therefore came to be regarded as an elitist concern, the "preserve of the privileged members of society",[12] and protected areas, the "playgrounds for the privileged elite".[13] There was accordingly consensus on the need to develop a more human-centred approach to natural resource management in South Africa which afforded all sectors of society the opportunity to participate in the formation and management of protected areas, and to enjoy the economic, social, cultural and other benefits derived from them. 6

2.3 'Non-cooperative' governance

Prior to the commencement of the Protected Areas Act, 11 national laws,[14] 5 provincial Acts[15] and 3 provincial Ordinances[16] provided for the designation of over 25 different types of protected areas[17] administered by numerous national departments, provincial environmental departments, local authorities, statutory authorities and private landowners. (See Figure 2, which depicts the location and array of protected areas in South Africa.) These laws prescribed different criteria and procedures for designating, establishing and managing protected areas. Fragmentation further permeated the terrestrial and marine divide as each was generally subject to distinct regulation.[18] 7

With effectively 20 laws prescribing distinct criteria for selecting areas worthy of protection, and distinct declaratory and management regimes, consistent and coordinated implementation became impossible. This further resulted in confusion as well as unnecessary overlap and duplication, the 8

9 Geach and Peart, 1998, p. 5.

10 Kiss. 1990, p. 5.

11 Kumleben et al., 1998, p. 42. See further Summers, 1999, p. 188.

12 Kumleben et al., 1998, p. 42.

13 DEAT, 1997, p. 33.

14 These laws include the Mountain Catchment Areas Act 1970; Sea Birds and Seals Protection Act 1973; Lake Areas Development Act 1975 (now repealed); National Parks Act 1976 (now repealed in part); Forests Act 1984; Environment Conservation Act 1989 (now repealed); Marine Living Resources Act 1998; National Forests Act 1998; National Heritage Resources Act 1999; World Heritage Convention Act 1999; and National Environmental Management: Biodiversity Act 2004.

15 These laws are the Kwazulu-Natal Nature Conservation Management Act 1997; Mpumalanga Nature Conservation Act 1998; Western Cape Nature Conservation Laws Amendment Act 2000; Limpopo Environmental Management Act 2003; and Provincial Parks Board Act 2003 (Eastern Cape).

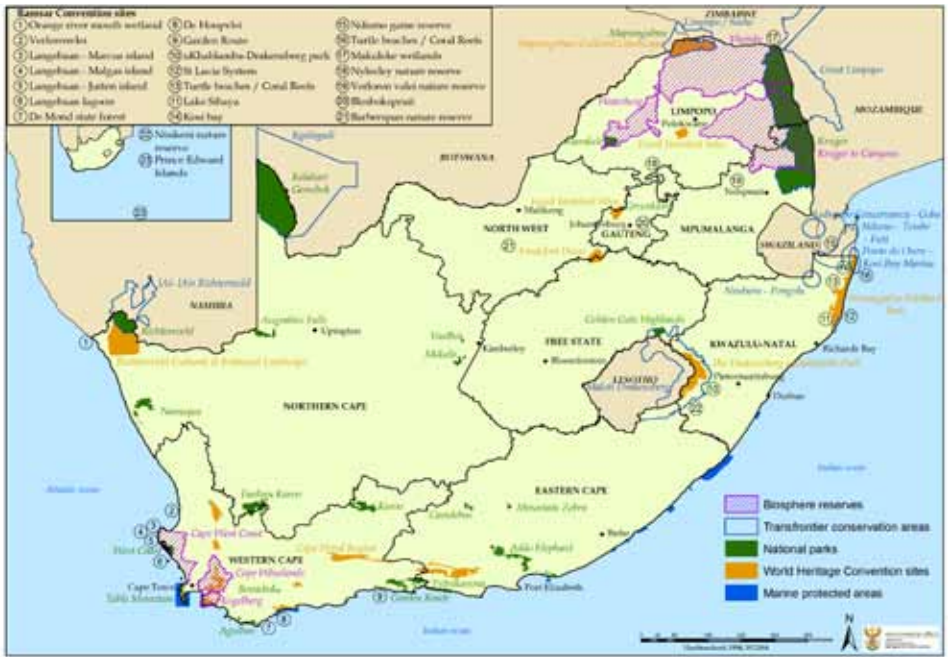
16 These Ordinances are the Nature Conservation Ordinance 1969 (Orange Free State); Nature and Environmental Conservation Ordinance 1974 (Cape); and Nature Conservation Ordinance 1983 (Transvaal).

17 For a comprehensive list of these areas see Glazewski and Paterson, 2005, p. 325.

18 Marine protected areas are generally administered under the Marine Living Resources Act, and the Sea Birds and Seals Protection Act. Terrestrial protected areas are generally administered under the laws listed in n 14, n 15 and n 16 above.

latter highly problematic considering the budgetary and resource constraints which plagued, and continue to plague, South Africa's conservation sector. Commentators were therefore uniform in their call for the prescription of a national policy and legislative framework aimed at entrenching cooperative governance within the nation's protected areas regime.[19]

Figure 2: Location of South Africa's protected areas



Source: Department of Environmental Affairs and Tourism, South African Environmental Outlook (2006).

2.4 Inconsistent declaration and protection procedures

9 Legislative fragmentation resulted in an inconsistent approach to regulating declaration, withdrawal and alienation transactions across the types of protected areas.[20] Authority to approve these transactions was vested in Parliament,[21] national ministers,[22] provincial ministers[23] or local authorities.[24] In some instances, no formal authority was required and provision for public participation was entirely absent.[25]

19 Hanks and Glavovic, 1992, pp. 712–714. See further DEAT, 1997, p. 30.

20 Kumleben et al., 1998, pp. 26–27.

21 Examples of such transactions included the alienation, exclusion or detachment of land situated within a national park (National Parks Act, s 2(3)); and the withdrawal of state land situated within a special nature reserve or altering the boundaries of such an area (Environment Conservation Act, s 18(3)).

22 See, for example, protected forest areas which require approval of the Minister of Water Affairs and Forestry, in addition to a parliamentary resolution, prior to withdrawal, alienation or the grant of servitude over the protected area (National Forests Act, s 10(2)).

23 See, for example, protected natural environments which require approval of the relevant provincial Member of the Executive Council (MEC) prior to the exclusion or withdrawal of land (Environment Conservation Act, s 16(1A)); and provincial nature reserves and private nature reserves which require the permission of the relevant provincial MEC prior to the abolition or the alteration of boundaries (Western Cape Nature Conservation Laws Amendment Act, ss 6(1) and 12(5), respectively).

24 See, for example, local nature reserves which require the approval of the local authority and relevant provincial MEC to alter the boundaries or abolish the reserve (Western Cape Nature Conservation Laws Amendment Act, s 7(7)).

25 No formal procedures govern transactions of this nature undertaken in respect of private land situated within special nature reserves.

Transactions subject to approval were exceptionally disparate, ranging from withdrawal and alienation to exclusion and the redefinition of boundaries, and generally did not extend to cover the grant of other limited real rights such as servitudes, leases, and prospecting and mining rights. In the majority of instances, no provision was made for the mandatory registration of these limited real rights against the title deeds of the property, thereby precluding a valuable additional tier of potentially perpetual protection.[26] Procedural requirements for undertaking these transactions were inconsistent and no legislative provision was made to subject such transactions to prior mandatory and impartial assessments. These inconsistencies led to a call for the standardization of the existing regime with respect to the range of transactions requiring approval, approval procedures and the authorities empowered to manage these processes.[27] 10

2.5 Management conundrums

Legislative fragmentation also created inconsistencies and deficiencies in the management of South Africa's protected areas. There was no uniform regime for managing protected areas or appointing the requisite management authorities. Management approaches ranged from the prescription of formal and stringent requirements,[28] and the imposition of discretionary requirements,[29] to the absence of any form of statutory management regime.[30] In addition, there was no coherent framework for selecting, appointing and holding management authorities to account. The result was that many areas were poorly managed. Where present, management was often poorly coordinated between a range of institutions, resulting in variable and often conflicting policies and practices being applied.[31] In addition, protected areas were frequently managed in isolation from adjacent buffer areas and very little provision was made for sharing management responsibilities with surrounding landowners and local communities. There was accordingly a need to develop a coherent management regime, prescribing an overarching coordinated system for appointing management authorities and implementing diverse but coordinated and appropriate levels of management from the national to the provincial and local levels.[32] 11

26 Additional protection would come in the form of compliance with the provisions of the Deeds Registries Act 1937, regulating the removal or alteration of these title deed conditions and restrictions. The World Heritage Convention Act is one exception to the general rule in that it empowers the Minister to register, by notarial deed, conditions over land forming part of a world heritage site to the effect that such land may not be separately alienated, leased or encumbered without the prior consent of the Minister (s 31(1)).

27 Kumleben et al., 1998, pp. 26–27 and 64.

28 See, for example, world heritage sites declared under the World Heritage Convention Act where provision is made for the formal appointment of management authorities (ss 8 and 9) and the preparation of integrated management plans (ss 21–28); national parks declared under the National Parks Act where management was assigned to South African National Parks (SANParks) whose management functions and responsibilities were comprehensively defined (s 12); and local nature reserves declared under the Western Cape Nature Conservation Laws Amendment Act where provision is made for the mandatory appointment of an advisory board whose task it is to make recommendations regarding the management of the area (s 8).

29 See, for example, private nature reserves declared under the Western Cape Nature Conservation Laws Amendment Act where provision is made for the authorities to prescribe conditions relating to management of the area (s 12(3)); protected natural environments declared under the Environment Conservation Act where, although no provision is made for the preparation of management plans, authorities have discretion to issue directives over any land so incorporated to ensure its protection (s 16(2)); special nature reserves declared under the Environment Conservation Act where the preparation of a management plan appears to be discretionary (s 18(4)(b)); and national heritage sites and provincial heritage sites declared under the National Heritage Resources Act where provision is made for the voluntary conclusion of heritage agreements between landowners and authorities which effectively regulate the management of the area (s 42).

30 See, for example, protected areas declared under the National Forests Act (s 8, read with s 11) and marine protected areas declared under the Marine Living Resources Act (s 43) where no formal management mechanism is prescribed. Examples of non-statutory areas include conservancies, biosphere reserves, and transfrontier conservation areas and parks.

31 DEAT, 1997, p. 30.

32 Ibid.

2.6 Resource constraints

12 Finally, the absence of sufficient funds to extend and properly manage South Africa's protected areas network was, and remains, a key challenge. This challenge is compounded by the fact that conservation funding imperatives have had to compete against pressing housing, health, education, security and welfare needs. The result has been a decrease in the budgetary allocation for conservation, which has in turn thrown many conservation agencies into crisis. Consequently, management responsibilities have in certain circumstances been neglected and the continued viability of several protected areas is in jeopardy. The proper funding of protected areas, particularly those under provincial management, has been identified as a matter requiring urgent attention.[33] Given competing socio-economic imperatives and, accordingly, the unlikelihood of increased budgetary allocations to the conservation sector, it was recognized that the government needed to create alternative mechanisms and incentives to encourage land incorporation within protected areas and to share management costs with willing conservation organizations, local communities and individuals.[34]

3 Dissecting South Africa's contemporary protected areas framework

13 It was against this backdrop that the government formulated South Africa's new protected areas regime. The Protected Areas Act, embodies a significant shift in approach towards the regulation of protected areas. The government is appointed as the trustee of the nation's protected areas[35] and the Act's objectives reflect a clear attempt to overcome the challenges discussed above. These objectives include: prescribing a national framework for the declaration and management of protected areas; providing for cooperative governance with regard to declaration and management; entrenching a national system of protected areas as part of a broader strategy to manage and conserve biodiversity; entrenching a representative network of protected areas on state, private and communal land; promoting the sustainable use of protected areas for the benefit of all; and promoting the participation of local communities.[36] The Protected Areas Act contains a diverse array of provisions for achieving these objectives. These are discussed in detail below.

3.1 Scope of the legal framework

14 The geographic and substantive ambit of South Africa's contemporary national protected areas regime is exceptionally broad when compared to its predecessor, the National Parks Act 1976.

15 Geographically, the Protected Areas Act applies to South Africa's terrestrial and marine environment, including the exclusive economic zone and that part of the continental shelf claimed as part of South Africa's territory under the United Nations Convention on the Law of the Sea.[37] It therefore feasibly creates a seamless legal framework that traverses the traditional divide between the terrestrial and marine context. This is in stark contrast to South Africa's prior legal framework which prescribed distinct legal regimes for regulating marine and terrestrial protected areas. It is interesting to note, however, that all portions of the marine environment that have been declared as protected areas since

33 Geach and Peart, 1998, p. 24. See further Kumleben et al., 1998, p. 37.
34 Crowe, 1996, p. 35.
35 National Environmental Management: Protected Areas Act 2003, s 3.
36 S 2.
37 S 4.

the commencement of the Protected Areas Act have been so declared in terms of the Marine Living Resources Act 1998[38] and not the Protected Areas Act. This is even the case where these marine protected areas are situated directly adjacent to terrestrial protected areas. It therefore appears that for the foreseeable future the distinct regulation of marine and terrestrial protected areas will remain, notwithstanding the broad geographical ambit of the Protected Areas Act.[39] See Box 1 for a brief description of South Africa's marine protected areas regime.

Some may argue that given the diversity of resources, areas, threats and stakeholders involved, it is both impossible and undesirable to prescribe a single law to regulate the identification, declaration and management of all forms of protected areas. However, given South Africa's historical legacy of fragmented governance, and the inconsistency and confusion this creates for government authorities and the public alike, perhaps it would be wise to rationalize the current legislative framework and use South Africa's more contemporary and rigorous protected areas regime, namely the Protected Areas Act, as the statutory vehicle for declaring both terrestrial and marine protected areas. 16

Substantively, the Act identifies a broad array of purposes for which protected areas can be declared. These include the following: 17

- To protect ecologically viable areas representative of South Africa's biological diversity, and its natural landscapes and seascapes, in a system of protected areas;
- To preserve the ecological integrity of those areas;
- To conserve biodiversity in those areas;
- To protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa;
- To protect South Africa's threatened or rare species;
- To protect an area which is vulnerable or ecologically sensitive;
- To assist in ensuring the sustained supply of environmental goods and services;
- To provide for the sustainable use of natural and biological resources;
- To create or augment destinations for nature-based tourism;
- To manage the interrelationship between natural environmental biodiversity, human settlement and economic development;
- Generally to contribute to human, social, cultural, spiritual and economic development; and
- To rehabilitate and restore degraded ecosystems, and promote the recovery of endangered and vulnerable species.[40]

The Protected Areas Act provides for the proclamation of protected areas to facilitate the conservation of both biological resources (focusing on species-, habitat- and ecosystem-related conservation, and the conservation of specific site values) and cultural values. 18

The ambit of the Act is also exceptionally broad regarding the forms of land that can be incorporated within protected areas. The Act specifically recognizes that its objects can only be achieved if it is implemented in partnership with the people,[41] an essential element in the South African context where 19

38 Marine Living Resources Act (s 43), read together with the Marine Living Resources Regulations 1998, provide for the establishment of marine protected areas and closed areas in which various activities are restricted and prohibited.

39 The only current exception to this rule is the Tsitsikamma National Park situated on the Southern Cape coast. Although declared under the National Parks Act, which regulates terrestrial protected areas, the boundaries of the Park extend 0.5 nautical miles offshore.

40 Protected Areas Act, s 17.

41 S 3(b).

Box 1: Marine protected areas

South Africa's marine protected areas are principally regulated under the Marine Living Resources Act. This Act enables the Minister of Environmental Affairs and Tourism, by way of proclamation in the Government Gazette, to declare any portion of "South African waters" as a marine protected area (s 43). South African waters are broadly defined to include the seashore, internal waters, territorial waters, the exclusive economic zone, and tidal lagoons and rivers (s 1).

Marine protected areas can be declared for three main reasons: for the protection of fauna and flora or a particular species of fauna or flora and the physical features on which they depend; to facilitate fishery management by protecting spawning stock, allowing stock recovery, enhancing stock abundance in adjacent areas, and providing pristine communities for research; or to diminish any conflict that may arise from competing uses in that area (s 43(1)). Once these areas have been proclaimed by the Minister, no person may undertake the following activities in the area without the written permission of the Minister: fish or attempt to fish; take or destroy any fauna and flora other than fish; dredge, extract sand or gravel, discharge or deposit waste or any other polluting matter, or in any way disturb, alter or destroy the natural environment; construct or erect any building or other structure on or over any land or water within a marine protected area; or carry on any activity that may have an adverse impact on the ecosystems of the area (s 43(2), read with s 43(3)).

Government notices providing for the designation of such areas vary but generally set out the following: the objectives for which the area is declared; the boundaries of the area; zoning (providing for restricted zones and controlled zones); the prohibition or control of activities in these zones; permitting processes; the preparation of management plans; and the prescription of offences. Responsibility for managing these areas is predominantly assigned to the Marine and Coastal Management branch, falling under the Department of Environmental Affairs and Tourism (DEAT). On occasion, management is delegated to another management authority where the marine protected area adjoins a terrestrial protected area.

This scheme is complemented by a series of closed areas designated in Marine Living Resources Regulations 1998, promulgated by the Minister under the Act. The Regulations define the boundaries of such areas and the types of activities restricted within them. These range from prohibiting fishing for certain species to prohibiting certain fishing methods. No provision is made for the appointment of management authorities to manage these areas or for the preparation of management plans for these areas. As with marine protected areas, enforcement in closed areas is generally the preserve of the Marine and Coastal Management branch. Approximately 20 per cent of South Africa's coastline is incorporated in either marine protected areas or closed areas. South Africa's marine protected areas are shown in Figure A.

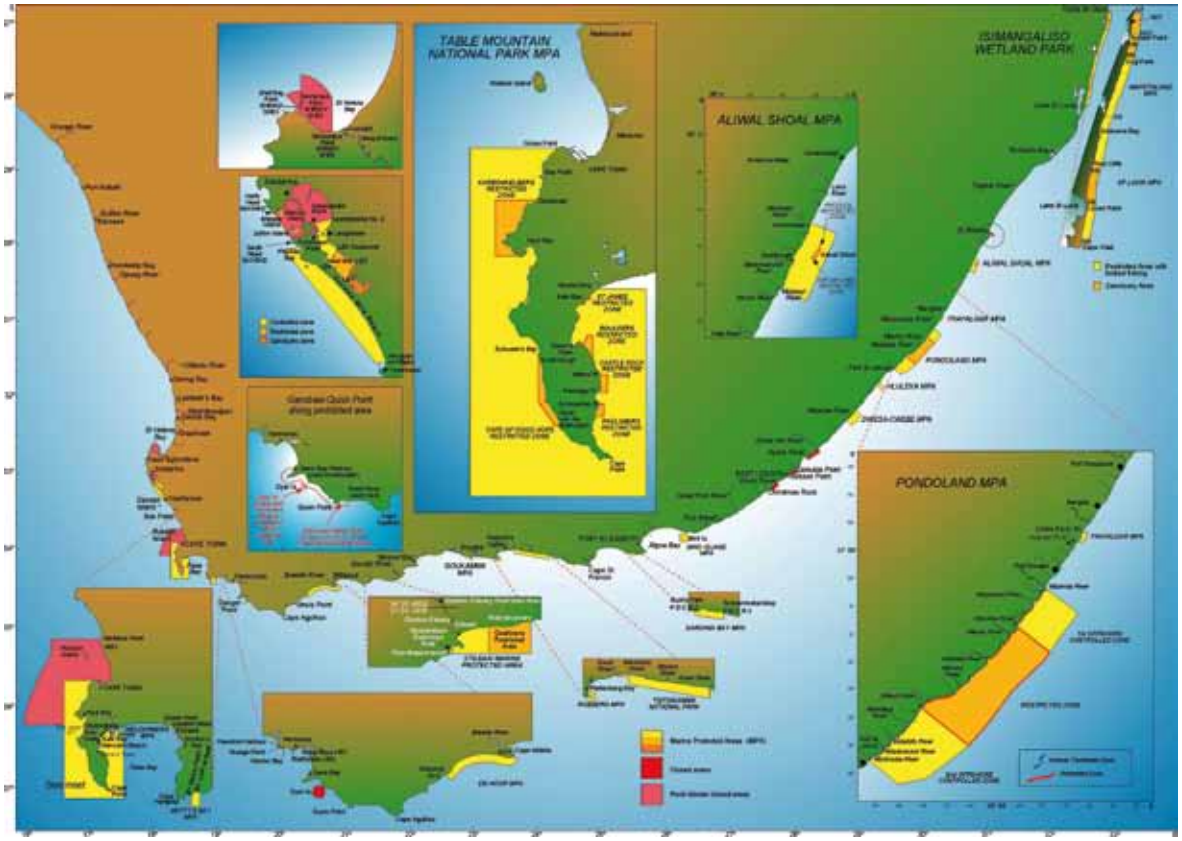


Figure A

Source: Department of Environmental Affairs and Tourism.

84 per cent of land is privately owned. In an effort to ensure the practical realization of this partnership, the Protected Areas Act specifically provides for the incorporation of private, communal and state-owned land within all forms of protected areas prescribed under the Act.[42] It thereby effectively provides for a broad array of governance options including state-owned protected areas, privately owned protected areas and community-owned protected areas. These governance options are further diversified as the Act provides for a range of management categories and management options for protected areas.[43] In order to demystify these options and facilitate their practical uptake by private and communal landowners, the national and provincial conservation authorities have implemented various stewardship programmes (see Box 2).

Box 2: Biodiversity stewardship programmes

Pioneered in the Western Cape Province by CapeNature (the provincial conservation agency), working in close collaboration with Cape Action for People and the Environment (CAPE) and the Botanical Society of South Africa, the CAPE Stewardship Programme aims to create innovative alternative mechanisms for securing additional private and communally owned land for biodiversity conservation. The objectives of the Programme are: to ensure that private and communally owned areas with high biodiversity value receive secure conservation status and are linked to a network of other conservation areas in the landscape; to ensure that landowners and communities who commit their property to a stewardship option enjoy tangible benefits for their conservation actions; and to expand biodiversity conservation by encouraging commitment to, and the implementation of, good biodiversity management practices on private and communally owned land in such a way that the landowners become empowered decision makers.

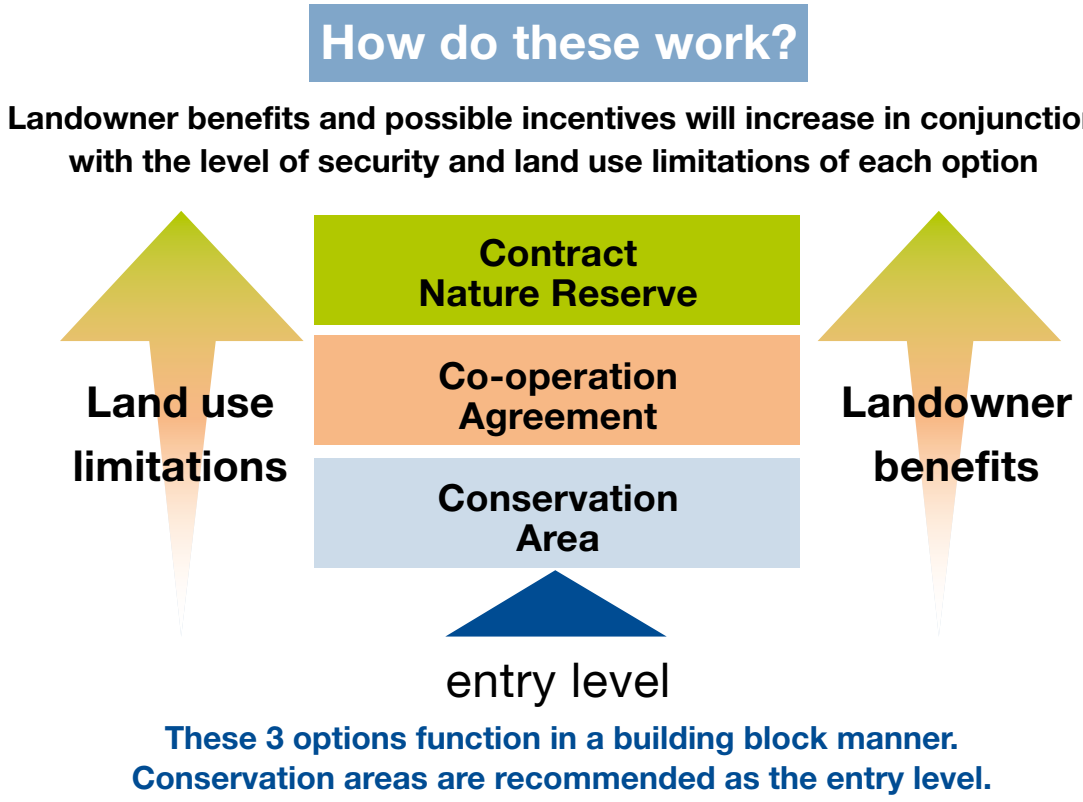


Figure B

Source: CapeNature (2007).

42 S 18(3) (special nature reserves); s 20(3) (national parks); s 23(3) (nature reserves); and s 28(3) (protected environments).

43 These are discussed in 3.6 below.

The Programme generally promotes three main stewardship options which vary with respect to the degree of formal protection, the duration of protection and the level of potential benefits accruing to landowners who enter it. These are: contract nature reserves (constituted by legally recognized contracts or servitudes on private land to protect biodiversity in the long term); biodiversity agreements (negotiated legal agreements between the conservation agency and a landowner for conserving biodiversity in the medium term); and conservation areas (flexible options with no defined period of commitment, including conservancies). The relationship between these three stewardship options is depicted in Figure B.

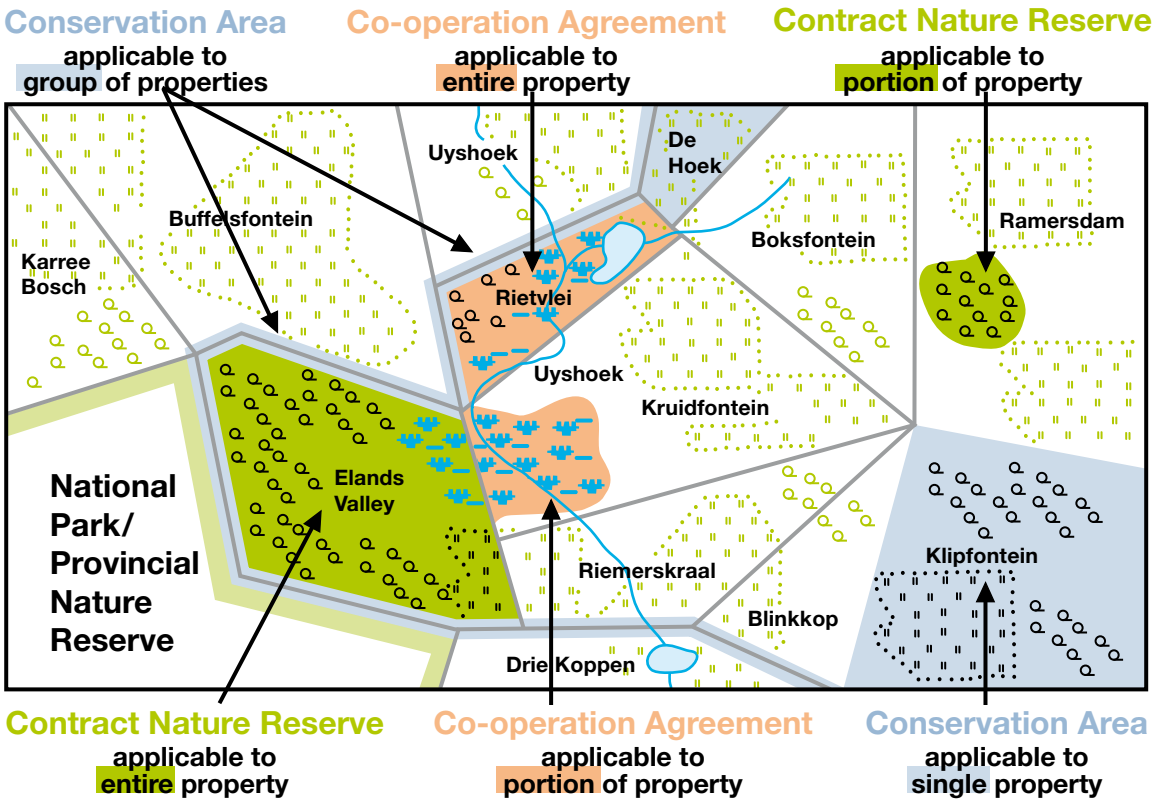


Figure C

Source: CapeNature (2007).

The diverse array of stewardship options affords conservation authorities and landowners alike a great degree of flexibility to tailor conservation solutions to a specific context (see Figure C, illustrating how stewardship options are implemented). In the Western Cape, for example, CapeNature has successfully concluded a total of 21 contract nature reserves, 16 biodiversity cooperation agreements and 12 conservancy agreements with private landowners during the course of the last few years. This effectively expands the protected areas estate in the Western Cape for priority threatened habitats by 42,437 hectares.

The Greater Cederberg Biodiversity Corridor and the Gouritz Initiative corridor project (see Box 6 below) have also secured conservation land in the above categories using the stewardship methodology. Owing to its success, similar stewardship initiatives have now filtered through into many other provinces including KwaZulu-Natal, Mpumalanga and the Northern Cape. It has also led to the establishment of Biodiversity Stewardship South Africa, initiated by the DEAT, an umbrella programme that seeks to facilitate and harmonize the various provincial stewardship programmes and align them with DEAT-associated programmes such as the National Protected Areas Expansion Strategy and the Community-Based Natural Resource Management Programme.[1]

1 For further information on the relevant stewardship programmes see CapeNature, web site; Ezemvelo KZN Wildlife, web site; and Stewardship, web site.

3.2 Policy and planning regime

20 As mentioned above, South Africa's historical ad hoc approach to protected areas can largely be attributed to the absence of a comprehensive policy framework and planning regime. When one considers the Protected Areas Act in isolation from other recent legislative reform, it appears to perpetuate the

problem as it does not itself prescribe an overarching policy or planning framework. The Act must however be read, interpreted and applied in conjunction with the National Environmental Management: Biodiversity Act 2004,[44] which prescribes a comprehensive array of planning tools. These include: the prescription of a national biodiversity framework;[45] the declaration of bioregions and associated bioregional plans;[46] the identification of threatened and protected ecosystems and species;[47] and the preparation of biodiversity management plans[48] for these ecosystem and species. The express purpose of these planning instruments is to identify resources and areas requiring priority attention; ensure that a representative portion thereof is adequately conserved; and prescribe an integrated, coordinated and uniform approach to their regulation. Many of these statutory planning frameworks must be periodically reviewed to ensure that they remain current and relevant.[49] These instruments cumulatively provide the necessary planning framework missing in the Protected Areas Act, and guide the identification, declaration and management of South Africa's protected areas regime.

These statutory planning frameworks are complemented by an array of non-statutory planning frameworks and programmes (Box 3). While non-statutory in nature, the initiation of these planning frameworks predated their statutory counterparts, informed their current content and will inform their subsequent revision. 21

The Protected Areas Act must also be interpreted and applied in accordance with the rights enshrined in the Constitution of the Republic of South Africa 1996[50] and the national environmental management principles prescribed under South Africa's framework environmental law, the National Environmental Management Act (NEMA) 1998.[51] These principles, founded on the tenet of sustainable development,[52] include many other international environmental principles such as the 22

44 See Protected Areas Act, s 6.

45 The Minister must prescribe a national biodiversity framework which provides for an integrated, coordinated and uniform approach to biodiversity management; and identifies priority areas for conservation action and the establishment of protected areas (ss 38 and 39). The framework was prescribed in the draft National Biodiversity Framework for South Africa 2007.

46 The Minister or relevant provincial MEC may determine a geographical region as a bioregion and publish a plan for managing the biodiversity within the region (ss 40 and 41). These are yet to be prescribed but the Government has published the draft Guidelines Regarding the Determination of Bioregions and the Preparation and Publication of Bioregional Plans 2007.

47 The Minister or relevant provincial MEC may respectively publish lists of national and provincial ecosystems that are threatened and in need of protection (s 52). The Minister may, in addition, publish lists of species that are threatened and in need of protection (s 56). A national list of threatened and protected species, and regulations for their protection have been published (see Publication of Lists of Critically Endangered, Endangered, Vulnerable and Protected Species 2007; and Threatened or Protected Species Regulations 2007).

48 Any person, organization or organ of state wishing to assist with the conservation of listed ecosystems and species can prepare a biodiversity management plan aimed at ensuring the long-term survival of the listed ecosystem and species (ss 43 and 45). No such plan has yet been submitted for approval. The government has however published the draft National Norms and Standards for the Development of Biodiversity Management Plans for Species 2007.

49 The National Biodiversity Framework must be reviewed at least every five years (s 38(1)(c)). Bioregional plans must be reviewed at least every five years (s 42(1)). Biodiversity management plans must be reviewed at least every five years (s 46(1)).

50 Constitution of the Republic of South Africa 1996, Chapter 2. These rights include: the environmental right (s 24) which sets the constitutional framework for all environmental regulation in South Africa; the property right (s 25) which sets the constitutional framework for regulating the expropriation and deprivation of property rights; and locus standi (s 38) which grants broad standing to people acting in their own interest, on behalf of another, in a class or group interest, or in the public interest. In addition to the above, the Constitution contains a right of access to information (s 32) which provides extensive access to information, the rules and procedures for which are codified in the Promotion of Access to Information Act 2000. Finally, the Constitution contains a right to just administrative action (s 33) which provides the constitutional framework for challenging administrative action. It has been codified in the Promotion of Administrative Justice Act 2000 which sets out what constitutes fair administrative action, a right to written reasons, grounds for reviewing administrative action and the remedies available to the courts when hearing review application.

51 See specifically Protected Areas Act, s 5.

52 National Environmental Management Act (NEMA) 1998, s 2(3) read with s 2(4).

preventative principle,[53] the precautionary principle,[54] public participation,[55] access to information[56] and the public trust doctrine.[57] The principles also recognize the rights of indigenous and local communities to access and share the benefits derived from the use of the nation's natural resources.[58] The practical tools for giving effect to these principles are considered in detail below.

Box 3: Non-statutory biodiversity strategies, plans and programmes

National Spatial Biodiversity Assessment (NSBA): Commissioned by the DEAT and the South African National Biodiversity Institute (SANBI), and published in 2005, the NSBA provides the first comprehensive assessment of biodiversity in South Africa. It covers four main components: terrestrial, river, estuary and marine. With respect to each of these components, it identifies broad spatial priority areas for conservation action; makes recommendations concerning options for conservation action in each priority area; and provides a national context for conservation plans at the sub-national level. The NSBA will be updated every five years, or more frequently as new data becomes available.[1]

National Biodiversity Strategy and Action Plan: Officially launched by the DEAT in 2006 and informed by the NSBA, the National Biodiversity Strategy and Action Plan highlights five primary strategic objectives, specifies a range of activities to realize each these objectives, and sets short-term (5-year) and long-term (15-year) targets and outcomes for each of these objectives. The five strategic objectives are: enhanced institutional effectiveness and efficiency ensuring good governance in the biodiversity sector; an enabling policy and legislative framework integrating biodiversity management objectives into the economy; integrated terrestrial and aquatic management across the country minimizing the impact of threatening processes on biodiversity, enhancing ecosystem services and improving social and economic security; human development and well-being enhanced through the sustainable use of biological resources and the equitable sharing of benefits; and a network of conservation areas conserving a representative sample of biodiversity and maintaining key ecological processes across the landscape and seascape.

Cape Action for People and the Environment: CAPE is a partnership of government and civil society, aimed at conserving and restoring the biodiversity of the Cape Floristic Region and the adjacent marine environment, while delivering significant benefits to the communities living in the region. It has 23 signatory partners (including government departments, municipalities, non-governmental and community-based organizations, and conservation agencies). In addition to coordinating and providing strategic direction to conservation functions, it enables donor funding to be channelled into new areas of work and approaches to conservation. The following specific areas of work are targeted: landscape initiatives; conservation stewardship; business and biodiversity; fine-scale planning; catchment management; conservation education; and strengthening institutions. A number of task teams coordinate work in these areas.[2]

Succulent Karoo Ecosystems Programme: This programme is also a partnership of government and civil society, aimed at implementing a 20-year strategy to conserve the sensitive Succulent Karoo Ecosystem. It focuses on the following four strategic areas: increasing local, national and international awareness of the unique inherent biodiversity of the Succulent Karoo; expanding protected areas and improving conservation management; supporting the creation of a matrix of harmonious land uses; and improving institutional coordination.[3]

Subtropical Thicket Ecosystem Project: This project, initiated in 2000 and coordinated by SANBI, aims to: provide a conservation planning framework and implementation strategy for the conservation of subtropical thicket; suggest and prioritize explicit conservation actions; provide spatial biodiversity information for incorporation into regional, provincial and national land use planning frameworks; provide a capacity building service in the application of spatial conservation planning products; and create an awareness of the value and plight of the thicket biome.[4]

National Grasslands Programme: The Grasslands Programme, originally conceived in 2002 and currently administered by SANBI, is a national initiative that aims to sustain and secure the rich biodiversity and ecosystem services of the grasslands biome. It comprises a partnership between all spheres of government, the private sector and civil society. The Programme is currently preparing for full-scale implementation of its initial five-year phase (2008–2012).[5]

1 Driver et al., 2005.
2 For further information see Cape Action for People and the Environment, web site.
3 For further information see Succulent Karoo Ecosystems Programme, web site.
4 For further information see Subtropical Thicket Ecosystem Project, web site.
5 For further information see the Grasslands Programme, web site.

53 Ss 2(4)(a)(i)–(iv).
54 S 2(4)(a)(vii).
55 Ss (2)(4)(f)–(g).
56 S 2(4)(k).
57 S 2(4)(o).
58 Ss 2(4)(d),(f) and (g).

Figure 3: Nothern land claim settlement regions

3.3 Institutional frameworks

An organogram detailing the key authorities and institutions that have a role to play in administering South Africa's protected areas regime is shown in Figure 3. In summary, responsibility for fulfilling the role as trustee of South Africa's protected areas is largely shared between the National Minister of Environmental Affairs and Tourism (Minister) and the Provincial Ministers of the Executive Council (MECs) to whose portfolio environmental affairs has been allocated. The Minister has the power to declare all forms of protected areas under the Protected Areas Act, namely: special nature reserves, national parks,

23

nature reserves and protected environments.[59] The power of MECs, however, is somewhat limited in this regard as they may only declare nature reserves and protected environments.[60] Once a protected area has been declared, the authority that issued the initial declaration is responsible for regulating all aspects related to the management of that area including: assigning management of the protected area to a management authority;[61] approving the management plan for the area;[62] establishing indicators for monitoring the management of a particular area or all protected areas falling under their jurisdiction;[63] possibly appointing external auditors to monitor the performance of a management authority;[64] and terminating a management authority's mandate should it fail effectively to fulfil its management functions.[65] In addition, the Minister is responsible for developing a protected areas register,[66] and prescribing norms and standards for the management and development of protected areas.[67] These management mechanisms are considered in detail in 3.6 below.

24 As mentioned above, the biodiversity planning framework informing the implementation of the Protected Areas Act is prescribed in the Biodiversity Act. Therefore, the institutional arrangements prescribed in the Biodiversity Act are also relevant to the implementation of the Protected Areas Act. Fortunately, the institutions are very similar, which facilitates the coordinated implementation of the two Acts. The same Minister is responsible for prescribing the national biodiversity framework,[68] and for scrutinizing and approving biodiversity management agreements.[69] The Minister and MECs can identify bioregions,[70] prescribe bioregional plans,[71] and list threatened and protected ecosystems and species.[72] The Minister also has the authority to declare an array of other forms of protected areas under other sectoral laws including marine protected areas,[73] heritage sites and protected areas,[74] and world heritage sites.[75]

25 Although the above powers are predominantly vested in the Minister and the provincial MECs, actual functions are performed by the relevant government departments, assisted by an array of statutory authorities. At the national level this mainly involves two branches of the DEAT: the Marine and Coastal Management Branch (in the context of marine protected areas), and the Biodiversity and Conservation Branch (in the context of terrestrial protected areas).[76] These branches are assisted by two key statutory authorities, South African National Parks (SANParks)[77] and the South African National Biodiversity Institute (SANBI),[78] which report directly to the Minister. The constitution, structure, powers

59 See special nature reserves (s 18(1)), national parks (s 20(1)), nature reserves (s 23(1)) and protected environments (s 28(1)).
60 See nature reserves (s 23(1)) and protected environments (s 28(1)).
61 S 38.
62 S 39.
63 S 43.
64 S 43(4).
65 S 44.
66 S 10.
67 S 11.
68 S 38.
69 S 44.
70 S 40.
71 Ibid.
72 Ss 51–63.
73 These are declared under the Marine Living Resources Act.
74 These are declared under the National Heritage Resources Act.
75 These are declared under the World Heritage Convention Act.
76 For further information see DEAT, web sites.
77 SANParks is regulated under Chapter 5 of the Protected Areas Act.
78 SANBI is regulated under Chapter 2 of the Biodiversity Act.

and functions of these two statutory authorities are comprehensively prescribed under their respective enabling legislation, and are briefly discussed in Box 4.

Box 4: SANParks and SANBI

SANParks is created under the auspices of the Protected Areas Act. It is afforded a broad array of powers which predominantly relate to national parks. These powers include: managing national parks and other protected areas assigned to it in terms of the Act; protecting, conserving and controlling these national parks and the activities taking place within them; undertaking and promoting research within national parks; and, on the Minister's request, providing advice on any matter concerning the conservation and management of biodiversity generally, the proposed establishment or extension of a national park, or the exclusion of land from an existing national park (s 55). SANParks currently administers 21 national parks in South Africa.[1]

SANBI, on the other hand, is created under the Biodiversity Act. Whilst its primary functions do not encompass the day-to-day regulation of protected areas, many of them are of relevance to biodiversity conservation within these areas. These functions include: monitoring and regularly reporting to the Minister on the status of the country's biodiversity, the conservation status of all listed threatened or protected species, the status of all listed invasive species, and the impact of any genetically modified organism released into the environment; acting as an advisory and consultative body on biodiversity-related matters to organs of state and other biodiversity stakeholders; managing South Africa's national botanical gardens; establishing and maintaining collections of plants in national botanical gardens and in herbaria; establishing facilities for horticulture display, environmental education, visitor amenities and research; establishing collections of animals and micro-organisms in appropriate enclosures; collecting, generating, processing, coordinating and disseminating information about biodiversity and the sustainable use of indigenous biological resources; establishing and maintaining databases containing such information; promoting research on indigenous biodiversity and the sustainable use of indigenous biological resources; coordinating programmes for the rehabilitation of ecosystems and the prevention, control or eradication of listed invasive species; assisting the Minister in the exercise of their powers, including providing advice on listed ecosystems, the implementation of the Act and any international agreements, the identification of bioregions and the contents of any bioregional plans, other aspects of biodiversity planning, the management and conservation of biological diversity, the sustainable use of indigenous biological resources, and the management of, and development in, national protected areas (s 11).[2]

1 For a full description of its mandate, structure, programmes and activities see SANParks, web site.
2 For further information see SANBI, web site.

These are not the only two statutory authorities that assist the Minister and MECs in managing South Africa's protected areas. Heritage areas are generally administered by national and provincial heritage authorities, namely the South African Heritage Resources Agency[79] (national heritage areas) and provincial heritage resources agencies (provincial heritage areas). Forest nature reserves, wilderness areas and mountain catchment areas are generally administered by a different ministry and administration, namely the Minister of Water Affairs and Forestry, and the Department of Water Affairs and Forestry. Within the provincial sphere, an array of provincial environment departments and statutory conservation authorities assist MECs in fulfilling their functions. Currently, the two predominant provincial conservation authorities are CapeNature[80] (Western Cape Province) and Ezemvelo KZN Wildlife[81] (Kwazulu-Natal Province). 26

There remains a complicated and somewhat fragmented array of statutory authorities and government departments that support the Minister and MECs in the exercise of their powers and functions under the Protected Areas Act. It is not, however, only government authorities that have a role to play in the management of South Africa's protected areas. As elaborated in 3.6 below, the relevant authority must appoint a management authority for each protected area. The array of entities that can be so appointed include "suitable persons, organizations and organs of state".[82] Accordingly, provision is made to 27

79 For further information see South African Heritage Resources Agency, web site.
80 For further information see CapeNature, web site.
81 For further information see Ezemvelo KZN Wildlife, web site.
82 Protected Areas Act, s 38.

delegate the responsibility of managing these areas to private and communal landowners, community organizations, non-government organizations, commercial entities and government authorities. The one exception to this general rule is that SANParks must be appointed as the management authority for all national parks. Management authorities also have discretion to contract others to assist them in fulfilling their management functions, in that they are enabled to enter into co-management agreements with another "organ of state, a local community, an individual or other party".[83]

3.4 Forms of protected areas

28 The term, 'protected area', is defined under the Protected Areas Act to include the following: special nature reserves, national parks, nature reserves and protected environments declared under the Act and the relevant provincial legislation; world heritage sites declared under the World Heritage Convention Act 1999; marine protected areas declared under the Marine Living Resources Act; specially protected forest areas, forest nature reserves and forest wilderness areas declared under the National Forests Act 1998; and mountain catchment areas declared under the Mountain Catchment Areas Act 1970.[84] The Protected Areas Act, whilst recognizing protected areas declared under an array of other national and provincial laws, simultaneously provides for the declaration of four specific management categories of protected areas. The purposes for which these four categories can be declared are as follows:

- Special nature reserve[85]
  - to protect highly sensitive, outstanding ecosystems, species or geological or physical features in the area; or
  - to make the area primarily available for scientific research or environmental monitoring.
- National park[86]
  - to protect the area if the area is of national or international biodiversity importance, or is or contains a viable, representative sample of South Africa's natural systems, scenic areas or cultural heritage sites; or
  - to protect the ecological integrity of one or more ecosystems in the area;
  - to prevent exploitation or occupation inconsistent with protection of the ecological integrity of the area;
  - to provide spiritual, scientific, educational, recreational and tourism opportunities that are environmentally compatible; or
  - to contribute to economic development, where feasible.
- Nature reserve[87]
  - to supplement the system of national parks in South Africa;
  - to protect an area if the area—
    - has significant natural features or biodiversity;
    - is of scientific, cultural, historical or archaeological interest; or
    - is in need of long-term protection for the maintenance of its biodiversity or for the provision of environmental goods and services;
  - to provide for a sustainable flow of natural products and services to meet the needs of a local community;

83 S 42(1).
84 S 1 read with s 9.
85 S 18.
86 S 20.
87 S 23.

  - to enable the continuation of such traditional consumptive uses as are sustainable; or
  - to provide for nature-based recreation and tourism opportunities.
- Protected environment[88]
  - to regulate the area as a buffer zone for the protection of a special nature reserve, national park, world heritage site or nature reserve;
  - to enable owners of land to take collective action to conserve biodiversity on their land and to seek legal recognition therefor;
  - to protect an area if the area is sensitive to development due to its
    - biological diversity;
    - natural characteristics;
    - scientific, cultural, historical, archaeological or geological value;
    - scenic and landscape value; or
    - provision of environmental goods and services;
  - to protect a specific ecosystem outside of a special nature reserve, national park, world heritage site or nature reserve;
  - to ensure that the use of natural resources in the area is sustainable; or
  - to control change in land use in an area if the area is earmarked for declaration as, or inclusion in, a national park or nature reserve.

It is clear that the legislators chose not to strictly incorporate the definitions and categories contained in the IUCN Guidelines for Protected Areas Management Categories.[89] There are, however, some direct and indirect overlaps between the management categories: special nature reserves largely equate to IUCN category Ia; national parks equate to category II; nature reserves loosely equate to categories III, IV and V; and protected environments loosely to categories V and VI. In order to keep proper account of the range and number of protected areas in South Africa and to provide ready access to such information, the Minister, as required by the Protected Areas Act, is developing a Protected Areas Register (see Box 5). 29

Box 5: Creating an online register of protected areas

The Protected Areas Register, managed by the DEAT, is an online resource which seeks to provide national and provincial conservation authorities, and members of the public, with instant access to a diverse array of information relating to each of South Africa's protected areas. This information includes the following: the physical location of protected areas; their classification; their purpose; the management authority; their management plan; the existence of co-management arrangements; maps of the area; activities regulated in the area; tourism opportunities; and infrastructure. It also provides online access to formal documents including initial proclamations, management plans, co-management agreements, and internal rules and procedures. The Register serves as a 'one-stop-shop' for information on South Africa's protected areas and has a range of search engines to facilitate easy navigation. It is still in the process of development.[1]

1 A draft version can be accessed at the Protected Areas Register, web site.

3.5 Establishment, amendment and abolishment of protected areas

3.5.1 Establishing protected areas

In addition to the planning instruments and selection criteria highlighted above, the Protected Areas Act prescribes a comprehensive procedure for constituting special nature reserves, national parks, nature reserves and protected environments. The authority to declare these areas is generally the preserve of 30

88 S 28.

89 IUCN, 1994; followed by Dudley, 2008.

the Minister and, in various circumstances, the relevant provincial MEC.[90] The origins of this division are founded in the Constitution, which sets out the legislative and administrative competences of the spheres of government. National parks are an issue of national competence, while the environment (which includes the other forms of protected areas) falls within the concurrent competence of the national and provincial governments. The rationale behind this division was partly a political compromise and partly based on an attempt to promote regional regulation.

31 Although the formal declaration must be undertaken by these authorities, the declaration of private land as any one of the four protected area categories can be initiated by landowners acting individually or collectively.[91] Where private land (as opposed to government-owned land) is to be incorporated within a protected area, the landowner (whether an individual or community) must generally have consented to the declaration by way of a written agreement entered into with the Minister or relevant provincial MEC.[92] These written agreements with respect to private land must be recorded in notarial deeds and registered against the title deeds of the property.[93] An exception exists in the case of protected environments, where the mere consent of the private landowner need be secured prior to declaration.[94]

32 Extensive provision is made for intergovernmental and public consultation. This includes mandatory consultation with all relevant organs of state, communities and beneficiaries affected by the proposed declaration;[95] and a comprehensive public participation procedure involving mandatory notice and comment procedures,[96] and discretionary oral hearings.[97] In brief, the Minister or MEC must publish the intention to establish a protected area in the Gazette and in at least two national newspapers distributed in the area in which the area to be declared is situated. The publication must: invite members of the public and interested and effected persons to submit to the Minister or MEC written representations on, or objections to, the proposed notice within 60 days from the date of publication in the Gazette; contain sufficient information to enable members of the public to submit meaningful representations or objections; and include a clear indication of the area that will be affected by the declaration. The Minister or MEC may in appropriate circumstances allow any interested person to present oral representations or objections to the Minister or MEC but such representations or objections must be allowed where the proposed notice will affect the rights or interests of a local community. The Minister or MEC must give due consideration to all representations or objections received or presented.

33 On completion of this process, the Minister or MEC must notify the registrar of deeds of any declaration, and it must be recorded on the title deeds of the relevant property in terms of the Deeds Registries Act 1937.[98] The final step in the declaratory process is to publish a formal notice in the Government Gazette.[99]

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90 Special nature reserves (s 18(1)) and national parks (s 20(1)) are declared by the Minister, while nature reserves (s 23(1)) and protected environments (s 28(1)) can be declared by both the Minister and the relevant provincial MEC.

91 Protected Areas Act, s 35.

92 S 18(3) (special nature reserves), s 20(3) (national parks) and s 23(3) (nature reserves).

93 S 35(3)(a) read with: s 18(1) (special nature reserves), s 20(1) (national parks) and s 23(1) (nature reserves).

94 S 28(3). No formal written agreement is required in respect of private land declared as a protected environment.

95 Ss 31, 32 and 34. In terms of s 31, the Minister is compelled to consult with all national organs of state, MECs and local authorities affected by the proposed declaration. In terms of s 32, the MEC must similarly consult with all national organs of state, provincial organs of state and local authorities affected by the proposed declaration. The form of consultation is largely left to the discretion of the relevant Minister or MEC, but must be "appropriate in the circumstances".

96 Ss 33 and 34.

97 S 33(3)).

98 S 36.

99 S 18(1) (special nature reserves), s 20(1) (national parks), s 23(1) (nature reserves) and s 28(1) (protected environments).

Box 6: Protected areas declared under the Protected Areas Act in the Western Cape Province

Following the commencement of the Protected Areas Act some five years ago, the national Minister and the provincial MEC for the Western Cape have frequently invoked the powers afforded to them under the Act to proclaim new protected areas and amend the boundaries of existing ones. The Minister formally declared the new Mokala National Park (Kimberly) in 2007, proposed the proclamation of a new Garden Route National Park (to be situated along the South Western Cape Coast) in 2008, and extended the boundaries of the following national parks in 2008: Agulhas National Park (Bredasdorp); Karoo National Park (Beaufort West); Table Mountain National Park (Cape Town); and Tankwa Karoo National Park (Calvinia, Ceres and Sutherland).

Provincial MECs have also shown an increasing tendency to rely on the Protected Areas Act, as opposed to outdated provincial Nature Conservation Ordinances, to proclaim nature reserves in their provinces. This is evidenced by the fact that the following new provincial protected areas have all been proposed under the Protected Areas Act in the past two years, to be declared as nature reserves: Ann de Klip Heuwel (Caledon); Bontekop Ridge (Paarl); De Rust (Clanwilliam); Dwarsrivier (Clanwilliam); Eaglerock (Caledon); Elandsberg (Wellington); Foxenberg (Paarl); Heidehof (Bredasdorp); Klein Ezeljagt (Caledon); Renosterkop (Paarl); Vogelgat (Caledon); and Wolweklip (Ladismith). This trend, which is likely to continue in the future, is largely a result of the fact that the declaratory and management regimes prescribed under the Protected Areas Act are far clearer and more comprehensive than their provincial counterparts.

34 The declaratory approach entrenched in the Protected Areas Act is far superior to its predecessor in many respects. It is comprehensive and clear. The endorsement of the relevant title deeds should in theory promote the protection of these areas in perpetuity. The comprehensive consultation and public participation procedures should promote open, transparent, participatory and cooperative governance. Allowing landowners to initiate the incorporation of private or communal land within the protected areas framework is vital and the Protected Areas Act prescribes clear procedures to facilitate this process. These procedures effectively provide for the introduction of the notion of a conservation servitude, a mechanism that has been extensively and successfully used abroad to overcome the limitations of common law servitudes. The fee waiver granted by the Deeds Office in respect of these transactions removes another potential obstacle to incorporation.

3.5.2 Raising resources to acquire private land and land rights

35 The Protected Areas Act provides an array of procedures for acquiring private or communal property for incorporation where the owner does not wish to enter into an agreement or provide the requisite consent of the nature discussed in 3.5.1 above. The Minister and relevant MEC, acting with the concurrence of the relevant members of their respective Cabinet or Executive Council,[100] may acquire land or any right in or to land (including a mineral right) for inclusion in a protected area by purchasing the land or right, exchanging the land or right for other land or rights, or expropriating the land.[101] If the parties fail to agree on a purchase price for the land or property right, the price must be determined in accordance with the relevant statutory framework.[102] SANParks, operating with the approval of the Minister, may similarly acquire private land or property rights by purchasing the land or right or, if the land or right is donated or bequeathed to it, by accepting the donation or bequest.[103]

100 At the national level, these could include the Minister of Land Affairs, Minister of Minerals and Energy, and Minister of Public Works. At the provincial level, these could include the MECs responsible for land affairs and public works.

101 Protected Areas Act, ss 80, 82 and 84.

102 Ibid. This statutory framework is the Expropriation Act 1975, read together with the Constitution, s 25 (the property rights clause).

103 Protected Areas Act, ss 81 and 83.

Box 7: Western Cape's first community conserved area

One hundred and forty hectares of the Romansrivier farming estate, belonging to a single landowner, was recently purchased by a group of 116 farm workers. In terms of the deal, a black empowerment company was formed (called Fynbos Vrugte en Wyn Boerdery) which is owned as follows: 60 per cent by farm workers, 10 per cent by the Bergsig Estate (of which the farm workers also own 15 per cent), and 10 per cent each by three of the original owner's sons. The area in which the farming estate is situated is of relatively high conservation value, as home to one of the last remaining geometric tortoise populations in the upper Breede River valley. For this reason, the farming estate originally formed part of a provincial nature reserve, proclaimed in 1980. The proclaimed area was leased from the original landowner but was de-proclaimed in the late 1980s.

In order to conserve the last remaining populations of this species, classified as 'endangered' in the IUCN Red List, and to preserve the near-pristine Breede Alluvial Fynbos vegetation of which more than 60 per cent has been lost through transformation by agriculture, CapeNature, the provincial conservation agency, sought to acquire portions of the farming estate for conservation. Through its Biodiversity Stewardship Programme, it succeeded in entering a biodiversity cooperation agreement with the company in June 2008. According to the terms of the agreement, farm workers retain ownership of the land, 40 hectares of which has been set aside for managing the endangered species located there. The voluntary agreement is legally binding on both parties for 15 years.

This approach illustrates the importance and value for provincial conservation agencies in South Africa of working not only with individual landowners but also with emerging farmers who are the beneficiaries of land reform projects and black economic empowerment deals. It also illustrates the importance of adopting a flexible and creative approach to securing land for conservation, and the need to complement formal protected areas schemes with innovative alternate conservation mechanisms.[1]

1 For further information on the agreement see Cape Action for People and the Environment, 2008.

36 The Minister is empowered in terms of the Protected Areas Act to finance such transactions from money specifically appropriated for this purpose by Parliament, or from the National Parks Land Acquisition Fund.[104] This Fund, established under the now repealed National Parks Act and administered by SANParks, consists of: voluntary contributions, donations and bequests received by SANParks; money appropriated by Parliament for the purpose of the Fund; proceeds of land sold by SANParks; income derived from investing any credit balances in the Fund; and money borrowed by SANParks for the express purpose of acquiring land.[105] SANParks may finance similar transactions from its own funds or from the National Parks Land Acquisition Fund.[106]

3.5.3 Amending and abolishing protected areas

37 With regard to the withdrawal of land from a protected area or the alteration of its boundaries, the Protected Areas Act adopts a largely uniform approach across all four protected area categories, with a National Assembly resolution required in the majority of instances.[107] This must be preceded by a public consultation process similar to that described above.[108] It would therefore appear that the Protected Areas Act takes important strides towards prescribing a coherent national framework for declaring and preserving the status of protected areas in South Africa.

104 S 85(1).

105 S 77.

106 S 85(2).

107 Land may only be withdrawn from a special nature reserve (s 19), national park (s 21) or nature reserve (s 24) by National Assembly resolution or by a resolution of the relevant provincial legislature. The withdrawal of land from a protected environment requires a declaration by the Minister or relevant MEC (s 29).

108 The consultation process set out in Part 5 of the Protected Areas Act applies both to the declaration and withdrawal of protected areas status (ss 31–33).

3.6 Management regime

3.6.1 Management authorities

One of the most significant reforms introduced by the Protected Areas Act is the prescription of a comprehensive management framework for protected areas. As mentioned above, once a protected area is constituted, the Minister or relevant provincial MEC must assign its management to a management authority.[109] The range of authorities to whom such assignment can be made is broadly defined to include "suitable persons, organizations and organs of state", thereby ensuring that management responsibilities can be devolved to the most appropriate person, organization or institution. Where private land is involved, the consent of the owner is generally required prior to the management authority being appointed.[110] 38

3.6.2 Management plans

A management authority is required to prepare and submit a comprehensive management plan to the Minister or relevant provincial MEC for approval within 12 months of its being established.[111] Public consultation with the relevant municipalities, organs of state, local communities and interested parties must precede submission.[112] 39

The object of the management plan is to ensure the protection, conservation and management of the protected area.[113] The protected area must be managed in accordance with the management plan, which must include: planning measures, controls and performance criteria; programmes for the implementation of the plan and its costing; procedures for public participation; and the implementation of community-based natural resource management where appropriate.[114] Discretionary content includes: provisions aimed at developing economic opportunities within and adjacent to the protected area; the development of local management capacity; and financial and other support necessary to ensure the effective administration and implementation of the management plan.[115] Additional issues which must be considered in preparing management plans are contained in the Protected Areas Regulations 2005,[116] which also provide for the prescription of "guidelines issued for the preparation and presentation of management plans by the Minister".[117] These are yet to be prescribed. 40

The DEAT and SANParks have taken significant strides in recent years to practically implement these management provisions. A review of all existing national park management frameworks commenced in 2004[118] and was completed towards the end of 2007.[119] These efforts are, however, largely limited to national parks and a concerted effort is required to ensure that similar initiatives are undertaken 41

109 S 38.

110 Ss 38(1)(b) and 38(2)(b) in respect of protected environments. The Protected Areas Act does not include a similar express provision in respect of special nature reserves, nature reserves and national parks as the identity of the management authority for these areas is dealt with in the written agreements providing for the incorporation of private land.

111 S 39.

112 S 39(3).

113 S 41(1).

114 S 40(1)(b)(i) compels the management authority to manage the area in accordance with the management plan. The mandatory content is prescribed in ss 41(1) and 41(2).

115 S 41(3).

116 Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites (Protected Areas Regulations) 2005, promulgated under the Protected Areas Act; regulation 57(2).

117 Regulation 57(3).

118 SANParks, 2005b.

119 SANParks, 2007, p. 5.

by conservation authorities with respect to the other types of protected areas regulated under the Protected Areas Act.

3.6.3 Co-management agreements

42 What is noteworthy regarding the prescribed content of management plans is the emphasis placed on public participation and community-based natural resource management. The inclusion of these aspects represents an express recognition of the need to move towards a more human-centred approach to conservation and to manage protected areas within their broader socio-economic context. This is reinforced by enabling a management authority to conclude agreements with organs of state, local communities or individuals to co-manage the protected area or regulate human activities affecting it.[120] The content of co-management agreements must be consistent with the provisions of the Protected Areas Act and may provide for a broad range of matters including the following:

- Co-management of the area by the parties;
- Regulation of human activities that affect the environment in the area;
- Delegation of powers by the management authority to the other parties to the agreement;
- Apportionment of any income generated from the management of the protected area, or any other form of benefit sharing between the parties;
- Use of biological resources in the area;
- Access to the area;
- Occupation of the protected area or portions of it;
- Development of economic opportunities within and adjacent to the protected area;
- Development of local management capacity and knowledge exchange; and
- Financial and other support to ensure effective administration and implementation of the co-management agreement.

43 The potential ambit of these co-management provisions is exceedingly diverse and can range from agreements with communities to facilitate community-based natural resource management, to concession agreements with private commercial entities to manage various components of protected areas. The DEAT set a target of having at least 20 agreements of the former nature in place by the end of 2006 but there are currently no clear statistics available to determine whether this objective has been achieved.[121] What is interesting is that this emphasis on co-management preceded the introduction of the Protected Areas Act, where it was used as the principal mechanism for attempting to achieve the difficult balance between South Africa's land reform and conservation agendas (see Box 8 below).

3.6.4 Cooperative and integrated management planning

44 The Protected Areas Act entrenches a more cooperative and integrated approach to planning and management, in that management plans prepared by a management authority must be aligned with an array of other relevant planning frameworks such as integrated development plans[122] and biodiversity

120 Protected Areas Act, s 42.

121 DEAT, 2006b.

122 Protected Areas Act, s 39(4). The Local Government: Municipal Systems Act 2000 requires all municipalities to adopt integrated development plans (IDPs). These IDPs must contain a spatial development framework which provides basic guidelines for the development of municipal land use management systems. IDPs are the main planning instruments which guide and inform all municipal planning and development (see generally chapter 5 of the Act).

management plans.[123] This approach has been reinforced by way of regulation.[124] In addition, so as to promote consistency, the Minister may prescribe norms and standards for managing protected areas, establish indicators to measure compliance with these norms and standards, and require a management authority to report on these indicators.[125] These three aspects can be prescribed on a national, regional or local basis, thereby affording the government flexibility to promote consistency at varying levels of specificity. However, the prescription of this valuable mechanism is discretionary in nature and may accordingly be undermined by inaction or delay.[126]

Box 8: Co-management as a tool for balancing land reform and conservation

Following South Africa's transition to a constitutional democracy in the mid 1990s, the country embarked on a massive land reform programme to redress past inequalities. One component of this programme was land restitution, whereby persons previously dispossessed of land for political reasons were enabled to reclaim such land in terms of the Restitution of Land Rights Act 1994. Approximately 79,000 claims were lodged, several of which related to land incorporated within existing national parks (including the Augrabies National Park, Kgalagadi Transfrontier Park, Kruger National Park, Richtersveld National Park, Tsitsikama National Park and West Coast National Park) and nature reserves (including the Dwesa-Cwebe Nature Reserve, Hluhluwe-Mfolozi Nature Reserve, Mkhambati Nature Reserve and Ndumo Nature Reserve).

The principal mechanism used to settle the majority of these claims was as follows. Communal land rights were granted back to the communities on condition that they agreed: not to reside in the park; to retain the conservation status of the area; to enter into a contractual park agreement with the conservation authorities; and to enter into a co-management agreement with the conservation authorities. The land is generally held in a communal trust and leased back to the conservation authorities in exchange for due remuneration. The duration of these agreements ranges from 15 to 50 years. Interestingly, the majority of these agreements were concluded prior to the commencement of the Protected Areas Act but were nonetheless in line with the country's policy of promoting community-based conservation. Following the commencement of the Protected Areas Act, the DEAT, which is responsible for administering South Africa's protected areas, and the Department of Land Affairs, responsible for administering the country's land restitution programme, entered into a memorandum of understanding in 2007 whereby co-management was identified as the key mechanism through which to settle all future land restitution claims within protected areas.

Approximately 20 co-management arrangements of this nature have been concluded to date. While some have been lauded as a great success, most notably the Makuleke claim in the northern Pafuri area of the Kruger National Park, the majority have been subject to increasing criticism in that: they have largely failed to achieve an equitable balance between conservation and land reform imperatives; local communities are frequently excluded from accessing the resources situated in the protected area and participating in its management; and few resources or benefits have flowed back to local communities. Commentators have argued that the authorities have been misguided and inflexible in the application of co-management, and that the entire process has been driven by an underlying exclusionary conservation agenda.

This growing criticism and dissatisfaction on the part of successful land claimants is possibly the reason for the existence of approximately 70 validated but unsettled claims for land situated within protected areas. These claims are extensive and have the potential to significantly affect South Africa's protected areas regime, if one considers for instance that approximately one third of South Africa's world-renowned Kruger National Park is still subject to land restitution claims. What is interesting in this regard is that the government appears to be reconsidering its previous reliance on co-management. In a statement released by the Commission on the Restitution of Land Rights in February 2009, it was stated that 'equitable redress' and not 'co-management' is the only model for resolving these outstanding land claims in the Kruger National Park. This equitable redress appears to amount to the granting of alternate land to the claimants or paying them equitable compensation. This approach would appear to be at odds with the country's requisite policy and statutory framework, which expressly recognizes the need to foster community-based natural resource management and implement the protected areas framework in partnership with the people. Notwithstanding these tensions, conservation authorities continue their efforts to improve the current co-management arrangement and their relations with local communities (see Box 10 for a description of some of these initiatives). What is clear at this stage, however, is that the current co-management model which has been almost universally applied to resolve the current land reform and conservation interface appears to require some rethinking in the very near future.

123 Protected Areas Act, s 41(2)(a). The Biodiversity Act provides for the declaration of bioregions and the publication of biodiversity management plans regulating the management of biodiversity and its components within such a region (s 40(1)).

124 See Protected Areas Regulations, regulation 57.

125 Protected Areas Act, s 11.

126 No such measures have been prescribed to date.

3.6.5 Management accountability

45 Accountability is an essential element of any management regime. If the management authority of a protected area is not performing its duties in terms of the management plan for the area, or is underperforming with regard to the management of the area or the biodiversity of the area, the Minister or relevant provincial MEC, as the case may be, is compelled under the Act to notify the management authority in writing of its failure to perform its duties or of its underperformance, and to direct the management authority to take corrective steps set out in the notice within a specified time.[127] If the management authority fails to take the required steps, the Minister or relevant MEC may terminate the management authority's mandate and assign another organ of state as the management authority for the area.[128] The Minister and the relevant MEC implement this section in relation to national protected areas and provincial protected areas respectively.[129] These powers are yet to be invoked.

46 The Protected Areas Act also empowers the Minister or relevant provincial MEC to establish indicators for monitoring the management of protected areas.[130] Once so prescribed, a management authority must monitor its area against these indicators and report annually thereon to the Minister or relevant MEC.[131] To ensure objectivity, the Minister or MEC can appoint external auditors to monitor the performance of a management authority.[132] Failure to meet the prescribed level of performance can lead to the termination of the management authority's mandate.[133]

47 SANParks has developed, and is in the process of implementing, a state of biodiversity management reporting system for national parks.[134] This system would appear to be of the nature anticipated under the Protected Areas Act but has not been formally prescribed under it. The Minister and MECs should draw from this valuable SANParks initiative and implement similar national and provincial reporting systems across other national, provincial and local protected areas. Finally, the Protected Areas Regulations enable the management authorities of special nature reserves, national parks and world heritage sites to appoint ad hoc advisory committees.[135] No such committees have been appointed to date.

3.6.6 Buffer zones and connectivity corridors

48 The Protected Areas Act does not expressly provide for the establishment of buffer zones outside protected areas or for connectively corridors between them. There are, however, various statutory tools contained within the Act itself and in other laws which can be used to designate buffer zones around protected areas and connectivity corridors between them. Firstly, if one considers the purposes for which protected environments can be declared under the Protected Areas Act, they effectively include creating a buffer zone for, or a link between, special nature reserves, national parks or nature reserves

127 Protected Areas Act, s 44(1).

128 S 44(2).

129 S 44(3).

130 S 43.

131 S 43(3).

132 S 43(4).

133 S 44. This procedure is phased and provides initially for the issuing of a directive calling on the management authority to take certain corrective steps. Failure to comply with such a directive may result in termination of the management authority's mandate and the assignment of this functions to another management authority.

134 SANParks, 2006b.

135 See Protected Areas Regulations, regulations 50–55, regarding the composition, appointment and functioning of these committees.

declared under the Act.[136] Secondly, the designation of bioregions, the prescription of bioregional plans and biodiversity management plans, and the conclusion of biodiversity management agreements under the Biodiversity Act are all used to effectively create buffer zones for protected areas and connectivity corridors between them. Thirdly, zoning schemes, prescribed under provincial planning legislation, are used to retain buffer zones around protected areas or some form of connectivity corridor between them. Finally, co-management agreements concluded under the Protected Areas Act include provisions for cooperatively regulating the development of economic opportunities adjacent to protected areas.[137] Cumulatively, the above provide a diverse array of tools for setting aside the land adjacent to protected areas, whether state or privately owned, to act as a buffer for the protected area core or serve as a link between protected areas. See Box 9 for a description of how these tools have been used to implement various corridor initiatives in the Western Cape.

3.6.7 Assessment of the new management regime

The Protected Areas Act appears to prescribe a comprehensive management regime which promotes public participation, integration, consistency, accountability and community-based resource management. Owing to the novelty of the scheme and its limited practical implementation to date, it is probably a little premature to assess its merits and demerits. 49

Nonetheless, there are various aspects that do appear to warrant criticism. As with the Act's declaratory regime, the management regime unfortunately applies uniformly across all four tiers of protected areas declared under the Act, and retrospectively to a number of other forms of protected areas declared prior to its commencement.[138] Although promoting consistency, this uniformity undermines the ideal of prescribing a tiered approach to regulation. This may in turn hinder the incorporation of private and communal land within base tiers of the hierarchy, as compliance with the comprehensive management formalities for these areas appears to be inappropriately onerous, costly and time-consuming. The prescription of a management regime differentiating in the formal requirements across the hierarchy of protected areas would have been preferential. 50

Furthermore, owing to the exclusion of a number of types of protected areas from the ambit of the Protected Areas Act's management regime, their management remains subject to inconsistent regulation under a fragmented array of laws[139] and, in certain circumstances, to no regulation at all.[140] Their exclusion is somewhat inconsistent as several of these areas are subject to other provisions of the Act of relevance to management.[141] In the interests of promoting consistency and coherence, it would have surely been preferential to include all protected areas within the ambit of the Protected Areas Act with provision being made for differential management formalities for different areas. 51

136 Protected Areas Act, s 28(2)(a).

137 S 42(2)(f).

138 These areas are provincial nature reserves, local nature reserves and private nature reserves declared under provincial legislation prior to the commencement of the Protected Areas Act; special nature reserves, nature reserves and protected natural environments declared under the Environmental Conservation Act; and lake areas declared under the Lake Areas Development Act (s 37).

139 These include marine protected areas declared under the Marine Living Resources Act; world heritage sites declared under the World Heritage Convention Act; specially protected forest areas, forest nature reserves, and forest wilderness areas declared under the National Forests Act; and mountain catchment areas declared under the Mountain Catchment Areas Act.

140 These include non-statutory protected areas such as conservancies, biosphere reserves and transfrontier conservation areas.

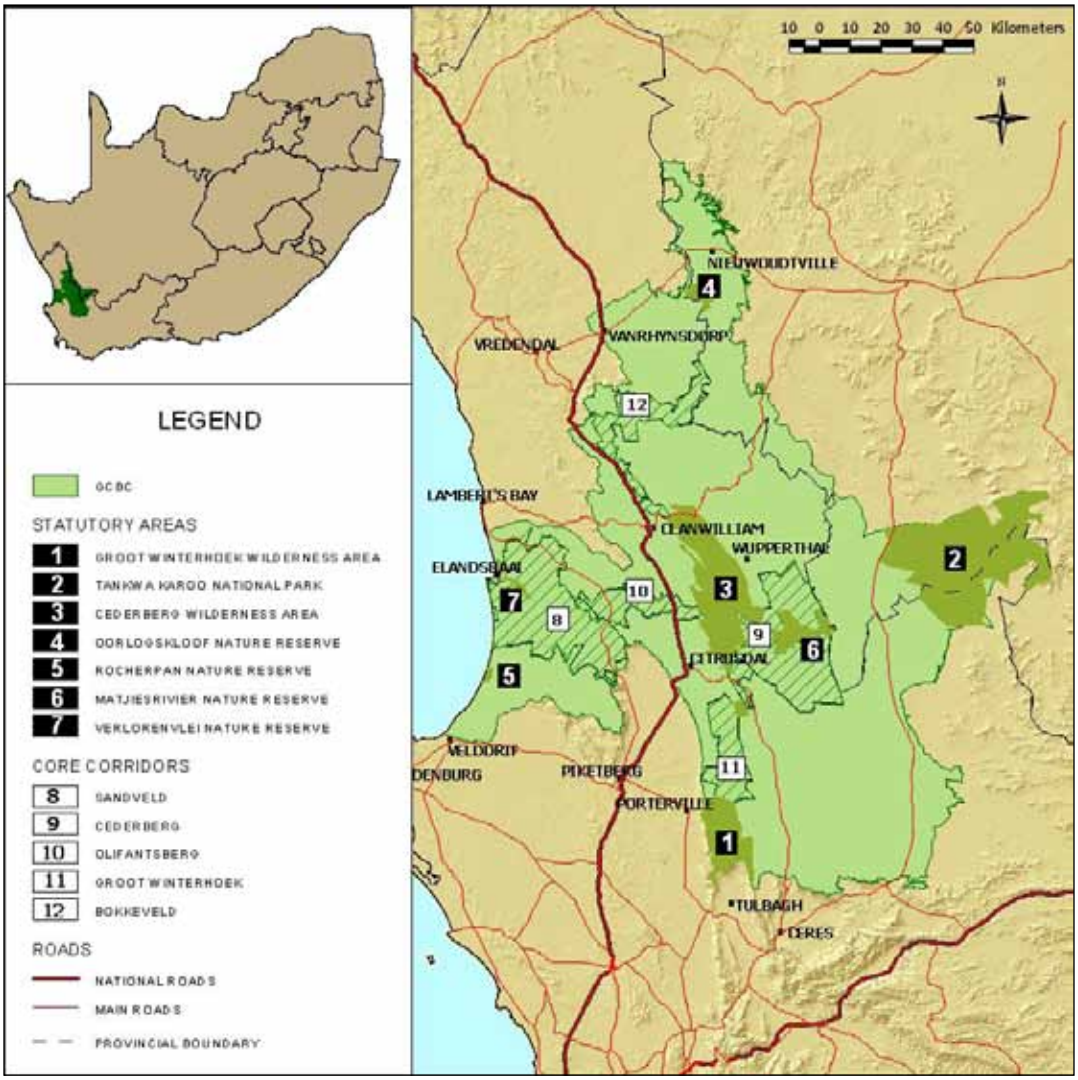
141 Norms and standards prescribed by the Minister, which can include management indicators and reporting requirements, can apply to marine protected areas and world heritage sites (s 11(1)(a)).

Box 9: Corridor initiatives in the Western Cape

Several corridor landscape initiatives have been launched in the last few years in the Cape Floristic Kingdom, declared a world heritage site in 2006. The Greater Cederberg Biodiversity Corridor (GCBC) initiative is one such example. Implemented in the Greater Cederberg region, which covers an area of over 1.8 million hectares and is home to globally significant biodiversity, the GCBC initiative aims to secure corridors of continuous natural habitat across the landscape; conserve species and critical habitats situated within and between these corridors; create a mechanism to enable the area to adapt to and prepare for the effects of global climate change; and ensure that benefits arising from the establishment of such corridors are equitably shared with the local communities residing in the area. Its ambit is depicted in Figure D.

The GCBC is a partnership project implemented under the auspices of CAPE, co-financed by the Global Environment Facility through the World Bank. The implementing and coordinating agency for the GCBC is the provincial conservation agency, CapeNature, which provides support to ensure that lasting partnerships are built between conservation agencies, landowners, community leaders, municipalities, national and provincial government departments, non-governmental organizations, and interested parties.

A steering committee with representation from 22 organizations meets quarterly to review progress and make decisions. A broad range of options are used to secure the aims of the initiative including securing land for incorporation in statutory protected areas; incorporating land within non-statutory protected areas, such as conservancies; and raising awareness of, and encouraging the adoption of, sustainable land use practices by landowners in the area.[1]



Source: Greater Cederberg Biodiversity Corridor.

1 For further information see Greater Cederberg Biodiversity Corridor, web site. For information on a similar corridor project undertaken in the South Western Cape see Gouritz Initiative, web site.

3.7 Regulation of activities

52 The Protected Areas Act contains several provisions aimed at regulating access to and activities undertaken within protected areas declared under the Act. Access to special nature reserves is regulated by the management authority in consultation with the Minister,[142] while regulating access to national parks, nature reserves and world heritage sites is left to the discretion of the management authority alone.[143] The use of aircraft in special nature reserves, national parks and world heritage sites is prohibited at certain altitudes (less than 2,500 ft) and subject to the written permission of the management authority.[144] Commercial prospecting and mining activities are prohibited in special nature reserves, national parks and nature reserves[145] but allowed, subject to the written consent of the Minister, in protected environments.[146]

53 Commercial and community activities undertaken within national parks, nature reserves and world heritage sites are also subject to strict regulation, and are generally prohibited unless written approval of the management authority has been granted.[147] The management authority for such an area may, subject to the management plan, carry out or allow commercial activities in the area. It may also enter into written agreements with local communities residing inside or adjacent to the protected area to allow members of the community to use, in a sustainable manner, the biological resources situated within the protected area. The management authority is empowered by the Act to set norms and standards for any activity so allowed. In allowing such activity the management authority is, however, obliged to ensure that the activity does not negatively affect the survival of any species in, or significantly disrupt the integrity of, the ecological systems inherent in the protected area. Furthermore, the management authority must establish systems to monitor the impact of activities allowed in the protected area, compliance with any agreement allowing such activity, and adherence to any prescribed norms and standards.

54 The regulation of activities taking place in special nature reserves, national parks and world heritage sites is further enunciated in the Protected Areas Regulations which contain detailed provisions concerning the following: the use of biological resources; access; the collection of data; admission; entrance and accommodation fees; staying overnight; times of entry and travel; the use of vehicles; commercial and communal activities; the use of water areas, land and airspace; community-based natural resource management; prohibited activities; interference with soil and substrata; littering; pollution of water; removal from and dumping in water areas sand, soil, stones and other material of any kind; general prohibitions; the use of firearms; prohibition or restriction of the use of biological resources; prohibition or restriction of land use; and the entry of pets. These activities are regulated by an array of prohibitions, and permitting and licensing requirements administered by management authorities. Provision is made for management authorities to prescribe their own rules to regulate similar activities, which affords them discretion to tailor regulation to suit local imperatives.[148]

55 Whilst the Protected Areas Act contains no express provision requiring an environmental impact assessment (EIA) prior to conducting various activities within protected areas, EIA is comprehensively regulated under South Africa's framework environmental law, NEMA, read together with its EIA

142 Protected Areas Act, s 45.
143 S 46.
144 S 47.
145 S 48.
146 S 47.
147 S 50.
148 Protected Areas Act, s 52, read with Protected Areas Regulations, regulation 54.

Regulations.[149] NEMA's EIA Regulations list a myriad of activities which require an environmental authorization issued by the Minister or relevant MEC. Prior to granting such an authorization, the applicant must submit either a scoping report or a full EIA to the authorities. These Regulations apply irrespective of whether the activity takes place within or adjacent to a protected area.

56 Activities undertaken within protected environments are generally subject to less stringent regulation. The Minister or the MEC may by notice in the Government Gazette restrict or regulate in a protected environment under their jurisdiction development that may be inappropriate for the area, given the purpose for which the area was declared, and the carrying out of other activities that may impede such a purpose.[150] No notices of this nature have been promulgated to date.

3.8 Community-based natural resource management

57 The Protected Areas Act recognizes the need to shift away from the traditional exclusionary approach towards a more human-centred approach to conservation, both within and adjacent to South Africa's protected areas. This is reflected in the Act's objectives[151] and the purposes for which protected areas can be declared.[152] Where private land is incorporated within a protected area, issues of access, use and benefit sharing will largely be regulated by the written agreements providing for the land's incorporation. In many instances, however, individuals and local communities situated on land adjacent to or earmarked for incorporation in a protected area are not its owners and could be significantly prejudiced by its incorporation within a protected area. The Protected Areas Act fortunately prescribes an array of additional mechanisms to cater for these circumstances. Firstly, the range of persons and organizations that can be appointed as management authorities is exceptionally broad and includes local communities, and communal and private landowners residing within or adjacent to the protected area.[153] Secondly, in the event that a third party is appointed as the management authority, provision is made for the conclusion of co-management agreements with local communities or individuals.[154] The express purpose of these agreements is to facilitate co-management of the area or regulate human activities that affect it. They can also provide for the apportionment of income generated from the management of the area or benefit sharing between the parties; the use of biological resources; access; occupation; and the development of economic opportunities within and adjacent to the area.[155] Thirdly, management plans must contain procedures for public participation, including participation of the owner, any local authority or other interested party, and, where appropriate, provision for the implementation of community-based resource management.[156] Finally, provision is made for the management authorities of certain protected areas[157] to enter into written agreements with local communities residing within or

149 Regulations in terms of chapter 5 of the National Environmental Management Act 2006; List of activities and competent authorities identified in terms of sections 24 and 24D of the National Environmental Management Act 2006; and List of activities and competent authorities identified in terms of sections 24 and 240 of the National Environmental Management Act 2006.

150 Protected Areas Act, s 51.

151 Ss 2(e) and 2(f).

152 These purposes include: to provide for the sustainable use of natural and biological resources; to create or augment destinations for nature-based tourism; to manage the interrelationship between natural environmental biodiversity, human settlement and economic development; and to contribute to human, social, cultural, spiritual and economic development (ss 17(h)–(k)).

153 These include suitable persons, organizations and organs of state (s 38).

154 S 42.

155 S 42(2).

156 Ss 41(2)(e) and (f).

157 These are national parks, nature reserves and world heritage sites (s 50(1)). No provision is made for similar agreements for special nature reserves and protected environments.

adjacent to a protected area, to regulate their use of biological resources in a sustainable manner.[158] The formal procedures for doing so within national parks and world heritage sites have been prescribed by way of regulations.[159] No similar formalities have unfortunately been prescribed in relation to other types of protected areas.

As with many provisions contained in the Protected Areas Act, practical implementation of the Act's provisions aimed at facilitating community-based natural resource management is in its infancy. See Box 10 for information on recent initiatives aimed at giving effect to these provisions. Cumulatively, they theoretically provide many mechanisms to facilitate public participation in the management of protected areas, the sustainable use of resources within them and the sharing of benefits derived from such use. Individuals and local communities appear to be well placed to protect their interests where they own the land in question or are appointed as the management authority. However, where they are not, their ability to do so is very tenuous, as the use of the majority of these mechanisms falls within the discretion of the management authority.[160] Furthermore, where a management authority does elect to use the mechanisms, existing power imbalances may undermine the ability of individuals or local communities to protect adequately their interests, as public and governmental oversight occurs only in limited circumstances.[161] A final potential constraint to their success is a lack of awareness regarding the nature, availability and virtues of the above mechanisms amongst the relevant conservation authorities and local authorities. 58

3.9 Enforcement

If one considers the Protected Areas Act in isolation, the regime would appear to fail to provide for the designation of officers responsible for enforcing the rules and regulations governing protected areas. The Protected Areas Act is, however, defined as a "specific environmental management Act" under NEMA and the latter provides for the designation, by the Minister or relevant provincial MEC, of environmental management inspectors (EMIs).[162] These EMIs are drawn from the ranks of national, provincial and local government departments, statutory authorities, and conservation agencies such as SANParks and CapeNature. 59

Their role is to enforce compliance with specific environmental management Acts, such as the Protected Areas Act, and their function is to monitor and enforce legal compliance, and to investigate any act or omission in respect of which there is a reasonable suspicion that it might constitute an offence in terms of the law or a breach of a term or condition of a permit, authorization or other instrument issued in terms of the law.[163] EMIs have a broad array of powers including: questioning people; inspecting or questioning a person about a document, book, record or electronic information; copying or making extracts of such information; requiring persons to deliver any records to the authorities; inspecting 60

158 S 50(1)(b).

159 The Protected Areas Regulations specifically empower a management authority to grant access by way of a license, permit or agreement (regulation 5 read with regulation 31). Any access granted must comply with any relevant management plan or co-management agreement (regulation 32), and management authorities must keep a register of all such rights granted (regulation 33) and report annually thereon to the Minister (regulation 7).

160 These include the content of management plans; the conclusion of co-management agreements; and the conclusion of agreements regulating community activities within national parks, nature reserves and world heritage sites.

161 Management plans, which must provide for public participation and where appropriate the implementation of community-based natural resource management, must be approved by the Minister or relevant provincial MEC (s 39(2)). In addition, management authorities must consult the public when developing these plans (s 39(3)).

162 NEMA, ss 31B and 31C.

163 S 31G.

or questioning a person and if necessary removing any specimen, article and substance; and taking photographs, recordings and samples.[164] In addition, EMIs are empowered to seize items;[165] stop, enter and search vehicles, vessels and aircraft;[166] undertake routine inspections;[167] and issue compliance notices, a failure to comply with which constitutes a criminal offence.[168] Members of the South African Police Services (SAPS) are afforded the same powers as EMIs.[169] See Box 11 for further information on EMIs.

Box 10: Efforts to facilitate community biodiversity and natural resource management in South Africa's protected areas

The government, particularly through SANParks, has implemented an array of non-statutory initiatives to complement and raise awareness about the link between people and conservation. A dedicated People and Conservation division, falling under SANParks, was established in 2003. It is responsible for administering the People and Parks Programme, also established in 2003. The People and Parks Programme aims to expand local community involvement in the management and use of protected areas, and to build improved stakeholder liaison structures between conservation authorities and local communities. These initiatives are complemented by the People and Parks Forum, which comprises representatives from the relevant government departments, conservation authorities and community members. It met for the first time in 2004 and convenes a People and Parks Conference on a biannual basis to review and reflect on the implementation of the Programme.

At its most recent Conference, held in September 2008, it was noted that the objectives of the Programme are yet to be realized.[1] At the Conference it was resolved to: prepare coherent guidelines informing the conclusion of co-management agreements; implement the terms of a Memorandum of Understanding concluded between the Department of Land Affairs and the DEAT which sets out the respective roles and responsibilities of these departments when dealing with land claims by local authorities within protected areas; develop a national capacity programme for management authorities to enable them to better understand their role in facilitating co-management; and create provincial People and Parks Coordinating Committees.

Efforts have also been undertaken in the last few years to establish individual national park forums. These forums include representatives from SANParks, surrounding communities, local stakeholders, and other interested and affected parties. Their purpose is to encourage active participation in the management of the park, and to act as a discussion forum for issues affecting the national park and surrounding communities. To date, 70 per cent of national parks have established national parks forums but there is a need to establish similar forums for the remaining forms of protected areas declared under the Protected Areas Act. These initiatives should go some way towards shifting the conservative conservation ideology which underpinned the formation and management of protected areas in the past.

1 The proceedings of the conference are available at the People and Parks Conference, web site.

61 Owing to the complexities associated with compliance and enforcement in the biodiversity context, largely as a result of the increasing prevalence of organized crime syndicates, various initiatives aimed at improving collaboration with key players have been launched by conservation agencies. In the Western Cape, for example, CapeNature established a Biodiversity Crime Unit in 2001, which as of 2006 had finalized 102 criminal cases relating to the illegal trade in game, the collection of spiders and beetles, and the harvesting of flora such as succulents, hoodia and fynbos species. A similar initiative has been implemented in Kwazulu-Natal where a Wildlife Crime Working Group was set up in 2002. It is comprised of representatives from the provincial conservation agency (Ezemvelo KZN Wildlife), SAPS KwaZulu-Natal, and the KwaZulu-Natal Director of Public Prosecution. This initiative has formalized a strategy for a combined and focused approach to reduce the impact of wildlife crime in KwaZulu-Natal.

164 S 31H.
165 S 31I.
166 S 31J.
167 S 31K.
168 S 31L read with s 31N.
169 S 31O.

Box 11: Environmental management inspectors and their inspectorate

All EMIs fall under the Environmental Management Inspectorate, established in May 2005, which is effectively a branch of the DEAT. The Inspectorate can be described as a network of environmental enforcement officials from different spheres of government, mandated to monitor compliance with and enforcement of a designated array of environmental laws including the Protected Areas Act. As of January 2008, 867 EMIs had been designated in the DEAT, SANParks, the Greater St Lucia Wetlands Park Authority, provincial environment departments and provincial parks authorities. A further 32 were awaiting designation by provincial MECs, and 104 officials were completing the requisite training for EMI designation, including the first 27 local government officials. Whilst these numbers remain insufficient, significant strides have been made during the course of the last three years to increase the number of EMIs and their skills base. This focus on more effective compliance and enforcement through the Inspectorate has resulted in the creation of additional capacity within many national and provincial government departments and a realignment of some institutional structures. Whereas in the past some officials were tasked with both processing permit applications and undertaking compliance monitoring and enforcement, DEAT and many provincial environment departments and conservation agencies now have designated positions dealing solely with environmental compliance and enforcement.[1]

1 For a full discussion, see Craigie et al., 2009.

3.10 Penalties

The Protected Areas Act, read together with its Regulations, provides for an array of offences which generally relate to illegally accessing protected areas or undertaking various activities within a protected area without the requisite permission of the management authority.[170] A person convicted of an offence under the Act is liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both.[171] The Protected Areas Act does not differentiate regarding the seriousness of the offence, or whether it relates to threatened species or ecosystems. The quantum of the fine is left to the discretion of the judiciary. 62

The above is but the tip of the iceberg, as offences committed under the Protected Areas Act potentially trigger an array of additional penalties under NEMA.[172] These penalty provisions include: civil penalties for damage to persons or property; civil penalties equal to the cost of rehabilitation undertaken by the government; civil penalties equal to the cost of prosecuting the offence; civil penalties equal to the value gained as a result of the commission of the offence; vicarious liability; employee liability; and director liability. It would appear that the above penalty provisions, coupled with the improved compliance and enforcement effort initiated through the EMI, provide sufficient deterrent to would-be offenders. 63

3.11 Incentives

One of the most significant reforms affected in South Africa's environmental regime during the course of the last decade is the shift towards an incentive-based approach to regulation. Nowhere is this more evident than in the biodiversity sector, where several incentives have been recently implemented to encourage particularly private and communal landowners to voluntarily assume conservation activities and practices on their land. The fundamental rationale underlying the introduction of these incentives is to try and increase the percentage of South Africa's diverse landscapes subject to formal protection, and to share the responsibility and costs of such protection with private and communal landowners. 64

170 Protected Areas Act, s 89(1), read with Protected Areas Regulations, regulation 61.

171 S 89(2) read with regulation 64.

172 This is owing to the fact that the Protected Areas Act appears in Schedule 3 of NEMA and accordingly all the criminal proceedings provisions prescribed in s 34 of the latter Act also apply to offences committed under the former Act.

Given that 84 per cent of land in South Africa is privately and communally owned, the government was forced to turn to these landowners and co-opt their support. These incentives, which largely take the form of an array of tax deductions and exemptions, are not prescribed in the protected areas legislation itself but rather in tax legislation such as the Income Tax Act 1962 and the Local Government: Municipal Property Rates Act 2004. For a discussion of these tax incentives see Box 12.

Box 12: Property tax and income tax benefits for protected areas

Under the Municipal Property Rates Act, no property tax can be levied on "those parts of a special nature reserve, national park or nature reserve within the meaning of the Protected Areas Act […] which are not developed or used for commercial, business, agricultural or residential purposes" (s 17(1)(e)). No similar exemption is allowed in the case of protected environments declared under the Protected Areas Act. This property tax exemption should feasibly encourage private and communal landowners to contract land of high conservation value into these forms of protected areas in order to avoid rapidly escalating property tax liabilities. Interestingly, provision is made for retrospectively recouping all property tax which would have been due, should the landowner withdraw from any contractual arrangement entered into under the Protected Areas Act.

The Municipal Property Rates Act identifies a specific range of categories of property which may be subjected to differential rating, rebates and reductions. These categories include farm properties and small holdings held for non-commercial purposes; "protected areas" (defined as "an area that is or has to be listed in the register referred to in section 10 of the Protected Areas Act" (s 1)); and properties used by "public benefit organisations" for various "public benefit activities" (s 8(2)(q)) which include conservation-related activities. The majority of South Africa's 284 municipalities are still in the process of formulating municipal property tax policies which will inform the implementation of these property tax benefits. However, these property tax benefits should cumulatively facilitate the contracting of private land within the protected areas framework.[1]

Income tax incentives are similarly granted to landowners who forgo development opportunities on their land in the interest of biodiversity conservation. These incentives, prescribed under the Income Tax Act and to be formally implemented in 2009, are generally differentiated according to the degree to which a landowner is willing to voluntarily assume restrictions on their land use rights, the duration of such limitations and any costs incurred in managing the land in the interests of biodiversity conservation.

Three broad distinctions generally exist. Landowners who agree to contract their land into a national park or nature reserve for a minimum period of 99 years can, for the purpose of determining their taxable income, annually deduct 10 per cent of the market value of their land (less the value of any land use rights retained), and deduct any costs incurred in implementing the management plan for the area. Landowners who agree to contract their land into a national park, nature reserve or protected environment for a minimum period of 30 years can for the purpose of calculating their taxable income annually deduct any costs incurred in implementing the management plan for the area. Finally, landowners who incur conservation and maintenance expenses in implementing the terms of a biodiversity management agreement with a minimum duration of three years can deduct these expenses for income tax purposes. Although the latter agreements do not formally constitute protected areas, as mentioned above, biodiversity management agreements concluded under the Biodiversity Act provide a very useful tool for creating buffers around, and connectivity corridors between, formally proclaimed protected areas.[2]

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1 For a full discussion of these tax incentives see Paterson, 2005a, pp. 97–121; and Paterson, 2005b, pp. 182–216.
2 For a full discussion of these tax incentives see Cumming and Botha, 2008.

3.12 Financial resources

65 Prescribing a comprehensive regime to regulate protected areas is worthless unless adequate resources are set aside to implement it. This is perhaps one of the greatest challenges facing South Africa's protected areas regime. Resources are urgently required to manage existing protected areas and extend the overall protected areas network. Various options exist for overcoming the current dire resource constraints.

66 Firstly, the government could allocate a larger slice of the annual budget to conservation. This is however very unlikely to occur in the near future, given competing socio-economic imperatives. Although the

DEAT has, through its National Parks Land Acquisition Programme,[173] committed a greater portion of its budget to acquire land for inclusion in the protected areas network, these funds are but a drop in the ocean of need. This is evident if one considers that, against the backdrop of the government's 2010 target of 3 million hectares,[174] this Programme has translated into the purchase of only an additional 78,000 hectares for incorporation in the last two years.[175] Reliance on this as the sole strategy for extending the protected areas network therefore appears unworkable and alternate complementary strategies require consideration.

Secondly, the government could continue its efforts to secure additional international and domestic donor funding. However, given the rather fickle and short-term nature of this source of funding, reliance on it would appear ill-advised.[176] 67

Box 13: Protected areas concessions

One of the key financial models, adopted particularly by SANParks to improve the financial sustainability of South Africa's national parks, is to enter into concession agreements with private commercial entities to operate certain components of the tourist infrastructure situated within protected areas. As of March 2009, some 30 concessions have been awarded in national parks to private entities to operate lodges, camps, restaurants, shops and car rental services. This has generated some 252 million rand for SANParks, predominantly through lodge concessions. The granting of these lodge concessions has resulted in an increase of annual occupancy rates, from 28 per cent in 2004 to over 52 per cent in 2009. Owing to the success of this financial model within national parks, various provincial authorities are now consulting SANParks with a view to adopting similar concessionary agreements in provincially administered protected areas.[1]

1 See SANParks, 2009, pp. 14–16.

Thirdly, the government could attempt to enable protected areas to become financially self-sufficient and even income-generating. Surplus funds could in theory be spent on land acquisition and management. The Protected Areas Act has expressly recognized the need to allow development and the sustainable use of natural resources within protected areas, and has prescribed necessary mechanisms to facilitate and regulate these activities.[177] The economic track record of several of South Africa's national parks over the course of the last few years is impressive, with a significant portion of their income being generated through various concessionary agreements entered into with private operators to run lodges and other commercial enterprises (see Box 13).[178] Few, however, are self-sufficient and those that currently generate a significant portion of their required operational budget are generally the most well-developed and lucrative of South Africa's protected areas, namely the national parks. The majority of protected areas are dependent on government funding. This funding generally covers just the operational budgets of the conservation and management authorities tasked with administering the protected area. It therefore appears highly unlikely that self-generated funding alone will provide a viable source for managing and extending South Africa's protected areas network. 68

173 In terms of this programme, the DEAT set aside 123 million rand for land acquisition for national parks during 2004–2007, and has sought to source an additional 160 million rand per year from local and international donor funding for similar purposes (Van Schalkwyk, 2004).

174 DEAT, 2005a, p. 50.

175 In 2004–2005, 27,698 hectares were incorporated into the national parks system (SANParks, 2005a). A further 27,236 hectares were incorporated into the national parks system in 2005–2006 (SANParks, 2006a). In 2007, 24,321 hectares were incorporated into national parks (SANParks, 2007, p. 4).

176 Emerton et al., 2006, pp. 30–34.

177 S 50 specifically prescribes that the management authority of a national park, nature reserve or world heritage site may, subject to the management plan of the park, reserve or site, carry out or allow commercial activity in the park, reserve or site, or an activity in the park, reserve or site aimed at raising revenue.

178 SANParks, for example, currently generates approximately 76 per cent of its total required revenue through tourism, retail and concession income (National Treasury, 2007, p. 549). See further SANParks, 2006a.

Box 14: National Protected Areas Expansion Strategy

South Africa's lead environmental agency, the DEAT, is currently in the process of finalizing a new National Protected Areas Expansion Strategy. This Strategy aims to add 2.7 million hectares (an additional 2.4 per cent) to the terrestrial protected areas network over the next 20 years, as well as 88 sq km to the marine inshore protected areas network, 52,500 sq km to the offshore marine protected areas network and 23,300 sq km to the marine protected areas network surrounding the Prince Edward Islands (which form part of South Africa's sovereign territory).

The Strategy focuses on the acquisition of land parcels of over 5,000 hectares which can contribute to a broad range of objectives including biodiversity conservation, ecological sustainability, climate change resilience, land reform and rural livelihoods, and socio-economic development. Mechanisms for securing additional areas include the setting aside of additional state land, the direct purchase of private land, securing private land through stewardship agreements and upgrading the existing protection status of certain areas. The cost of the planned land purchases is estimated at 23 billion rand, and will be financed through government and donor funding. The uptake of stewardship agreements by private landowners will be encouraged through the introduction of further fiscal incentives (see Box 12).

69 In light of current resource constraints, private and communal landownership realities, the high premium for purchasing such land, and the proliferation of private conservation initiatives,[179] it is imperative that the government creates alternative mechanisms to encourage the incorporation of private and communal land within proclaimed protected areas, and to share management costs with willing conservation organizations, local communities and individuals. Various incentives to encourage these enterprises are discussed in Box 12. These incentives are, however, limited in their ambit and plagued by several anomalies which require urgent resolution.[180] There are numerous additional forms of tax incentives which could be used to facilitate public participation such as donations tax, estate duty and transfer duty deductions and exemptions.[181] Recent environmental and fiscal policy documents have recognized the importance of implementing incentives of this nature and this bodes well for their introduction in the not-too-distant future.[182] In addition, the government would be well advised to consider creating the enabling policy and legislative environment for introducing many other effective tools, the use of which is on the increase internationally, such as environmental funds; debt-for-nature swaps; biodiversity offset schemes; benefit-sharing and revenue-sharing schemes; contracting private investment; investment, credit and enterprise funds; resource extraction fees; bioprospecting charges; and payments for ecosystem services. Several of the these options have been recognized in a new National Protected Areas Expansion Strategy (see Box 14), which is currently being prepared by the DEAT.

3.13 Measures to promote coordination and cooperative governance

70 The Protected Areas Act recognizes that South Africa's protected areas system consists of numerous forms of protected areas which are regulated by a range of laws and authorities.[183] As mentioned above,

179 It is estimated that 13 per cent of South Africa's land surface is now under some form of private conservation management in the form of conservancies, private game reserves or farms, and mixed game/livestock farms (DEAT, 2005a. p. 45).

180 For a full discussion of these anomalies see Paterson, 2005a, pp. 117–122.

181 Income tax deductions could be allowed, for example, in respect of expenditure incurred in implementing a management plan or co-management agreement. Exemptions or reductions in respect of donations tax and estate duty could be granted, for example, in respect of donations or bequests of cash to conservation agencies and management authorities and land for incorporation within a protected area. Exemptions or reductions could similarly be granted, for example, in respect of transfer duty where land is transferred for incorporation within a protected area. See generally Paterson, 2005b, pp. 194–216.

182 These include National Treasury, 2008, p. 71; South African Revenue Service, 2008, pp. 17–18; National Treasury, 2006, pp. 95–100; DEAT, 2005b, pp. 29–32, 40–41, 49, 62 and 64; and DEAT, 1997, pp. 27, 38, 81–83 and 97–98.

183 Protected Areas Act, s 9.

one of the express objectives behind the introduction of the Act was to rationalize the fragmented regime and entrench a more cooperative and integrated approach.[184] The Act has sought to achieve this objective in several ways.

Firstly, the Protected Areas Act repeals various national laws, specifically those governing national parks, special nature reserves, protected natural environments and lake areas.[185] However, the majority of these areas are simply reconstituted under the Act.[186] 71

Secondly, the Act recognizes various forms of protected areas declared under other national laws.[187] The majority of these protected areas are not, however, subject to the Protected Areas Act's declaratory and management regime and, apart from the requirement that they be entered into the Protected Areas Register compiled by the Minister, the Protected Areas Act is generally of no relevance to their regulation.[188] There are, however, certain exceptions to this rule which may cause substantial future confusion, given the ad hoc manner in which they are scattered through the Act.[189] Provincial protected areas[190] are generally subject to the Act's new management regime but not its declaratory regime.[191] Certain types of other statutory and non-statutory protected areas are entirely ignored by the new law.[192] 72

Although it may be argued that the Protected Areas Act does achieve a limited degree of harmonization, it would appear to be far from satisfactory. The Act fails to rationalize the number of types of protected areas. Many protected areas remain subject to separate regulation as they are largely excluded from the ambit of the Act. The partial and overlapping regulation of provincial protected areas will no doubt cause confusion.[193] The failure to expressly incorporate marine protected areas within the ambit of the Protected Areas Act is puzzling,[194] especially in light of the fact that its application extends to 73

184 S 2(a).

185 S 90 read with Schedule 1 repeals: the National Parks Act (which regulated national parks), ss 16–18 of the Environment Conservation Act (which regulated special nature reserves and protected environments), and the Lake Areas Development Act (which regulated lake areas).

186 The Protected Areas Act provides for the declaration of special nature reserves (s 18), national parks (s 20) and protected environments (s 28). The only form of protected area that is not reconstituted under the Protected Areas Act is lake areas previously regulated under the Lake Areas Development Act.

187 These areas are: world heritage sites (s 13); marine protected areas (s 14); special protected forest areas, forest nature reserves and forest wilderness areas (s 15); and mountain catchment areas (s 16).

188 S 10.

189 Marine protected areas and world heritage sites are subject to norms and standards prescribed by the Minister (s 11(1)(a)). The provisions regulating access and use of aircraft apply within world heritage areas (s 46 and s 47); restrictions placed on prospecting and mining activities apply within world heritage sites, marine protected areas, specially protected forest areas, forest nature reserves and forest wilderness areas (s 48(1)(c)); and the provisions regulating commercial and community activities apply within world heritage sites (s 50).

190 These would include provincial nature reserves, local nature reserves, private nature reserves and any other form of protected are declared under provincial legislation.

191 The definitions of 'nature reserve' and 'protected environment' expressly include any area which before or after the commencement of the Protected Areas Act was, or is, declared in terms of provincial legislation for a purpose for which that area could in terms the Protected Areas Act be so declared (s 1). In addition, protected areas declared under provincial legislation must be regulated as if they were nature reserves or protected environments declared under the Protected Areas Act (s 12). It therefore appears that the constitution of these areas will be regulated under provincial legislation and, once constituted, will be subject to the management requirements prescribed under both the Protected Areas Act and provincial legislation.

192 Statutory protected areas include all forms of heritage sites declared under the National Heritage Resources Act, limited development areas previously declared under the Environment Conservation Act (s 23), and protected islands and rocks declared under the Sea Birds and Seals Protection Act. Non-statutory areas include transfrontier conservation areas, biosphere reserves and conservancies.

193 This confusion may be averted to a certain degree by current reform undertaken by the DEAT to align the protected areas provisions in provincial conservation laws with those contained in the Protected Areas Act (DEAT, 2006a).

194 The practical realities of this anomaly have recently been recognized by SANParks, which has identified the alignment of the provisions of the Marine Living Resources Act with those of the Protected Areas Act as a major challenge facing the future regulation of marine protected areas (SANParks, 2006a).

South Africa's exclusive economic zone and continental shelf.[195] The failure to afford various protected areas statutory status, and thereby incorporate them within the formal regulatory web, is also disappointing.

74 It may be argued that given the diversity of resources, areas, threats and stakeholders involved, it is both impossible and undesirable to prescribe a single law to regulate the identification, declaration and management of all forms of protected areas. However, nothing precludes the prescription of differing regulation for different types of protected areas within one coherent law. Surely this approach is far more desirable than retaining differing regulation across a fragmented and inconsistent array of provincial and national laws.

75 Despite the absence of such a coherent and integrated approach, the Protected Areas Act does fortunately attempt to promote cooperative governance in various ways. This is very much in keeping with the broader dictate of cooperative governance enshrined in the Constitution[196] and further enunciated in NEMA.[197] The Protected Areas Act must be applied in accordance with the national environmental management principles prescribed in NEMA and the provisions of the Biodiversity Act.[198] This will hopefully ensure that its implementation will be aligned with the broad principles and planning provisions prescribed in these laws, most importantly the biodiversity planning framework prescribed in the Biodiversity Act. Conflicts arising from the implementation of the Protected Areas Act must be resolved in accordance with the conflict resolution procedures prescribed in NEMA.[199] Provision is made for mandatory intergovernmental consultation prior to declaring protected areas,[200] prescribing norms and standards,[201] and preparing management plans.[202] Management authorities are specifically compelled to manage protected areas in accordance with any applicable national, provincial and local legislation. This is practically reinforced by compelling management authorities to incorporate the provisions of any relevant integrated development plan or biodiversity management plan into the management plans prepared under the Protected Areas Act.[203]

76 In addition to these statutory institutions and mechanisms aimed at facilitating inter-agency coordination, there are various additional non-statutory institutional structures which seek to promote intergovernmental relations generally. The first are the Committees of Ministers and Members of Executive Councils, which consist of the national line function ministers, deputy ministers, relevant provincial members and local government representatives responsible for similar functional areas in their respective jurisdictions.[204] These structures were principally developed in order to promote consistency and coordination between national and provincial policy makers. The second are the Ministerial Technical Committees (MINTECs), which are led by the directors-general of the relevant government departments. The role of the MINTECs is to facilitate coordination between the practical

195 Protected Areas Act, s 4(2).

196 Chapter 3 of the Constitution is dedicated to cooperative governance.

197 NEMA contains an array of mechanisms aimed at facilitating cooperative environmental governance. These include: prescribing national environmental management principles (chapter 1), establishing a Committee for Environmental Coordination (chapter 2), providing for the preparation of environmental management and implementation plans (chapter 3), and procedures for resolving disputes (chapter 4).

198 Protected Areas Act, ss 5(1)(a) and 6.

199 S 5(2).

200 Ss 31, 32 and 34. The Minister and relevant provincial MECs must consult with all relevant national organs of state, and provincial and local authorities prior to declaration.

201 S 11(2). Before issuing these standards, the Minister must consult the relevant provincial MECs and local authorities.

202 S 39(3). When preparing a management plan, the management authority must consult local authorities and other organs of state which have an interest in the area.

203 S 39(4) read with s 41(2)(a).

204 Malan, 2005, p. 233.

implementation and administration of national and provincial policies and laws. Three key working groups of relevance to protected areas have been established under the Environment MINTEC structure, namely: the Biodiversity and Heritage Working Group, the Impact Management Working Group, and the Planning and Coordination Working Group. These intergovernmental structures and working groups play a key role in promoting cooperation between the relevant political and administrative institutions tasked with overseeing and implementing South Africa's protected areas regime. [205] The South African government has also initiated various projects aimed at fostering regional collaboration in Africa such as the recent establishment of Leadership for Conservation in Africa (see Box 15).

Box 15: Leadership for Conservation in Africa

Leadership for Conservation in Africa (LCA) is an African Union project initiated by SANParks with support from Gold Fields Ltd and IUCN. It is a collaboration of heads of conservation in 16 African countries (Burkina Faso, Botswana, Cameroon, Ethiopia, Gambia, Ghana, Malawi, Mozambique, Namibia, Republic of Congo, Senegal, South Africa, Tanzania, Uganda, Zambia, and Zimbabwe), and more than 20 African and international agencies and business leaders (including Gold Fields, ABN Amro, the Buffett Foundation, the De Beers Group, Mittal Steel, the Plattner Foundation, RMC (Russia), Sasol, Virgin International, the United Nations World Tourism Organisation, the Getty Conservation Institute, and a representative of the Ministry of Environment, Germany).

The primary objective of the LCA is to provide a platform for conservation agencies and state departments to exchange and share technical information and experiences in matters of mutual interest. The LCA also aims to harness the collective will and capacity of conservation and private-sector leadership for sustainable conservation-led socio-economic development in Africa, by actively advocating, promoting and initiating the involvement of the business community and selected business leaders (nationally and internationally). The LCA is governed by the LCA Council which comprises representatives from national LCA chapters established in each of the 16 member states.[1]

1 For further information see Leadership for Conservation in Africa, web site.

4 Conclusion

What should be evident from the discussion in this case study is that, following the promulgation of the Protected Areas Act, significant strides have been made to overcome the challenges that hampered South Africa's previous protected areas regime. The nation's protected areas are now placed under the trusteeship of the state. Clear and comprehensive procedures have been prescribed for identifying and declaring areas worthy of conservation. Provision is made for the incorporation, within a hierarchical structure of protected areas, of state, communal and private land. Significant incentives have been introduced to draw the latter two forms of tenure into the protected areas regime, essential in a nation with such a high percentage of private and communal land ownership. Provision is made for a diverse yet stringent array of management options, effectively providing for state, private and communal protected areas. A range of statutory mechanisms has also been introduced to facilitate community-based natural resource management, both within and adjacent to protected areas. 77

Notwithstanding these significant improvements, various key challenges remain and have the potential to undermine the Act's stated objective of entrenching a more efficient and equitable protected areas framework in South Africa. These dilemmas include continued legislative and institutional fragmentation, the imposition of a uniform declaratory and management regime for protected areas of differential status, and the discretionary nature of many of the tools aimed at facilitating community-based natural resource management. These, however, appear to constitute relatively minor legal obstacles when 78

205 For a full discussion of these structures see State of the Environment South Africa web site, 'Governance: Integration and cooperation'.

compared to the political, budgetary and capacity constraints continually, and increasingly, faced by South Africa's national, provincial and local conservation authorities. Absent strong and regular political utterances of the inherent value of conservation and its ability to significantly contribute to socio-economic uplift, absent significant increases in budgetary allocations for conservation, and absent a concerted effort to rationalize the nation's land reform imperatives with those of conservation, the new legal order may evaporate off the increasingly dry, dusty and eroded landscapes on the Southern tip of Africa.

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Web sites

Cape Action for People and the Environment, http://www.capeaction.org.za/.

CapeNature, http://www.capenature.org.za/.

Department of Environmental Affairs and Tourism (DEAT), www.deat.gov.za/ and http://www.environment.gov.za/.

Ezemvelo KZN Wildlife, http://www.kznwildlife.com/.

Gouritz Initiative, http://www.gouritz.com/.

Grasslands Programme, http://www.sanbi.org/index.php?option=com_content&view=article&id=291&Itemid=115.

Greater Cederberg Biodiversity Corridor, www.cederbergcorridor.org.za.

Leadership for Conservation in Africa, http://lcafrica.org/.

People and Parks Conference, http://www.environment.gov.za/HotIssues/2008/people_Parks/programme.html.

Protected Areas Register, http://gis.deat.gov.za/paregister/.

South African Heritage Resources Agency, http://www.sahra.org.za/.

South African National Biodiversity Institute (SANBI), http://www.sanbi.org/.

South African National Parks (SANParks), http://www.sanparks.org/.

State of the Environment South Africa, 'Governance: Integration and cooperation', http://soer.deat.gov.za/frontpage.aspx?m=2.

Stewardship, http://www.stewardship.co.za/.

Subtropical Thicket Ecosystem Project, http://bgis.sanbi.org/STEP/project.asp.

Succulent Karoo Ecosystems Programme, http://www.skep.org/.

Legal instruments

Most legal instruments discussed in this case study are available online. Readers may view the full text on the ECOLEX web site using the hyperlinks below, or at the URL provided.

National laws

Constitution of the Republic of South Africa 108 of 1996
http://www.info.gov.za/documents/constitution/index.htm

Deeds Registries Act 47 of 1937	LEX-FAOC045061
Environment Conservation Act 73 of 1989 (repealed)	LEX-FAOC012908
Expropriation Act 63 of 1975	LEX-FAOC009927
Forests Act 122 of 1984	LEX-FAOC024836
Income Tax Act 58 of 1962	LEX-FAOC093024
Lake Areas Development Act 39 of 1975 (repealed)	LEX-FAOC093777
Local Government: Municipal Property Rates Act 6 of 2004	LEX-FAOC093025
Local Government: Municipal Systems Act 32 of 2000	LEX-FAOC093030
Marine Living Resources Act 18 of 1998	LEX-FAOC015984
Mountain Catchment Areas Act 63 of 1970	LEX-FAOC018621
National Environmental Management Act 107 of 1998	LEX-FAOC018752
National Environmental Management: Biodiversity Act 10 of 2004	LEX-FAOC045083
National Environmental Management: Protected Areas Act 57 of 2003	LEX-FAOC045046
National Environmental Management: Protected Areas Amendment Act 31 of 2004	LEX-FAOC048108
National Forests Act 84 of 1998	LEX-FAOC017629
National Heritage Resources Act 25 of 1999	LEX-FAOC028733
National Parks Act 57 of 1976 (repealed in part; section 2 and Schedule 1 still in force)	LEX-FAOC018625
Promotion of Access to Information Act 2 of 2000	LEX-FAOC093032
Promotion of Administrative Justice Act 3 of 2000	LEX-FAOC093033
Restitution of Land Rights Act 22 of 1994	LEX-FAOC008962
Sea Birds and Seals Protection Act 46 of 1973	LEX-FAOC018610
World Heritage Convention Act 49 of 1999	LEX-FAOC028730

Provincial laws

Kwazulu-Natal Nature Conservation Management Act 9 of 1997	LEX-FAOC093034
Limpopo Environmental Management Act 7 of 2003	LEX-FAOC093035
Mpumalanga Nature Conservation Act 10 of 1998	LEX-FAOC093357
Nature and Environmental Conservation Ordinance 19 of 1974 (Cape)	LEX-FAOC093358
Nature Conservation Ordinance 8 of 1969 (Orange Free State)	LEX-FAOC093038
Nature Conservation Ordinance 12 of 1983 (Transvaal)	LEX-FAOC093041
Provincial Parks Board Act 12 of 2003 (Eastern Cape)	LEX-FAOC093042
Western Cape Nature Conservation Laws Amendment Act 3 of 2000	LEX-FAOC093043

Notices and regulations

Regulations in terms of chapter 5 of the National Environmental Management Act (GNR 385 in GG 28753, 21 April 2006)	LEX-FAOC093044
List of activities and competent authorities identified in terms of sections 24 and 24D of the National Environmental Management Act (GNR 386 in GG 28753, 21 April 2006)	LEX-FAOC073713
List of activities and competent authorities identified in terms of sections 24 and 240 of the National Environmental Management Act (GNR 387 in GG 28753, 21 April 2006)	LEX-FAOC073712
Guidelines Regarding the Determination of Bioregions and the Preparation and Publication of Bioregional Plans (draft) (GN 112 in GG 30262, 5 September 2007) http://www.info.gov.za/view/DownloadFileAction?id=73526	
Link to the Register of Protected Areas in Terms of the National Environmental Management: Protected Areas Act (GN 1051 in GG 30442, 9 November 2007)	LEX-FAOC093363
Marine Living Resources Regulations (GNR 1111 in GG 6284, 2 September 1998)	LEX-FAOC077701
National Biodiversity Framework for South Africa (draft) (GN 801 in GG 30021, 29 June 2007) http://www.info.gov.za/view/DownloadFileAction?id=73219	
National Norms and Standards for the Development of Biodiversity Management Plans for Species (draft) (GN 1108 in GG 30269, 6 September 2007)	LEX-FAOC093050
Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites (GNR 1061 in GG 28181, 28 October 2005)	LEX-FAOC073597
Publication of Lists of Critically Endangered, Endangered, Vulnerable and Protected Species (GNR 151 in GG 29657, 23 February 2007)	LEX-FAOC093045
Threatened or Protected Species Regulations (GNR 152 in GG 29657, 23 February 2007)	LEX-FAOC085760