Can hunting?

An analysis of recent changes in the legal framework governing the management of large predators in South Africa

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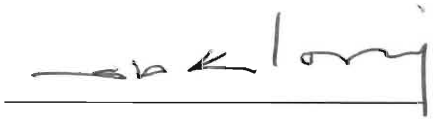
DECLARATION

I hereby certify that the contents of this dissertation are entirely my own work, except where I have indicated to the contrary in the text, and that neither the whole nor any part of this dissertation has previously been submitted towards any degree.



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ABSTRACT

New regulations have been published under the National Environmental Management: Biodiversity Act ('the Biodiversity Act') that regulate activities regarded as 'restricted activities' by that Act involving listed species of flora and fauna. The regulations include several provisions relating specifically to five species of large predator (lions are a notable exception) and to black and white rhinoceros and represent the end of a lengthy law reform process. The regulations came into force on 1 February 2008.

South Africa is a signatory to several international instruments concerned with the protection of biodiversity including the Convention on International Trade in Endangered Species ('CITES'), the United Nations Convention on Biological Diversity and the SADC Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community. The Biodiversity Act is the key national law concerned with management of large predators from a conservation and biodiversity protection point of view. Several Acts administered by the Department of Agriculture, such as the Animals Protection Act and the Performing Animals Protection Act, provide for the welfare of animals in captivity. However, the management of wild predators has up to now been regulated at provincial level by a series of outdated nature conservation ordinances that are inconsistent with one another and with the provisions of CITES.

It is clear from the Game Theft Act, from national policy instruments such as the National Biodiversity Strategy and Action Plan and from the draft Game Farming Policy that hunting and game farming are seen as important contributors to the South African economy with the potential to address rural poverty and create employment. Hunting is itself a multimillion rand industry in South Africa and a substantial part of that industry is trophy hunting. Large predators in South

Africa are most affected by trophy hunting practices, but other animals and other predators are also affected. Large predators are also the subject of both national and international trade. In recent years captive breeding of large predators has increased dramatically in order to supply the trophy hunting industry. During the late 1990s concerns began to be raised in the press regarding so-called 'canned hunting' practices and the law reform process mentioned in the first paragraph was partially a result of this focus on canned hunting.

The new regulations provide, among other things, for greater control of the wildlife industry and for the setting of hunting off-take limits, but they have several weaknesses. On the most basic level, the regulations contain drafting errors, are overly complex and may conflict with existing provincial legislation. They are likely to impose a greater administrative burden on provincial authorities already struggling to implement the existing provincial legislation. It is submitted that the provisions relating to animal welfare (for example, those dealing with prohibited methods of hunting) should have been enacted elsewhere. The provisions relating to self-regulation of the hunting industry and black economic empowerment are ineffectual as currently drafted.

Most importantly, the new regulations do not represent a significant departure from the utilitarian approach to wild animals that has characterised South African law since its earliest days. In this sense, the regulations conform to the current policy of 'making conservation pay'.

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1. INTRODUCTION

Glavovic writes that '[i]deally, law should be defined with reference to its purpose and have a sound philosophical base...However, philosophers do not agree on the proper basis of the relationship between men and animals.'[1]

The Panel of Experts on Hunting appointed by the Minister of Environmental Affairs and Tourism ('the Minister (DEAT)') in April 2005 concluded in its final report to the Minister that the wildlife industry was operating in a 'vacuum of coherent policy' and that the continuation of the *status quo* would be detrimental to South Africa's biodiversity and wildlife conservation efforts.[2] The Report does not define the term 'wildlife industry' expressly, but it is clear that the term is used to mean hunting, game farming and the trade in wildlife.

The Panel was appointed as part of a law reform process which was at least partly precipitated by the *Cook Report*, a documentary film about so-called 'canned' lion hunting practices which was screened on South African television in 1997.[3] The reform process involved the publication in June 2003 of draft 'National principles, norms and standards for the sustainable use of large predators in South Africa'[4] ('the 2003 draft norms and standards') followed by draft norms and standards and regulations concerned

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[1] PD Glavovic 'An Introduction to Wildlife Law' (1988) SALJ 519, 525.
[2] *Report to the Minister of Environmental Affairs and Tourism by the Panel of Experts on Professional and Recreational Hunting in South Africa,* Final Edited Version, November 2005 1.
[3] The *Cook Report* is a British documentary, first screened in Britain on 6 May 1997 and subsequently broadcast on 18 May 1997 in South Africa as part of the television programme, *Carte Blanche.* (http://www.carteblanche.co.za/story/cbl_story_monumental_canned.asp, accessed on 13 May 2007).
[4] GN 874 in *Government Gazette* No. 25090 of 13 June 2003.

with the management of large predators in January 2005[5] ('the 2005 drafts') and revised draft regulations and norms and standards in May 2006 ('the 2006 drafts').[6] In February 2007, revised draft legislation was published, which was scheduled to come into effect on 1 June 2007,[7] but the commencement date was subsequently postponed to 1 February 2008.[8] The revised draft regulations were amended in December 2007,[9] and again in January 2008.[10] The law reform process is discussed in more detail in the sixth section of this dissertation.

The revised draft legislation, as amended ('the *final regulations*'), consists of a notice declaring certain species flora and fauna to be 'threatened or protected' species (referred to in this dissertation as 'TOP' species),[11] and regulations[12] made under the National Environmental Management: Biodiversity Act ('the Biodiversity Act')[13] for the management of those species.

The *final regulations* are the latest in a series of draft regulations and norms and standards which initially focussed on large predators only; but which have now evolved into regulations under section 97 of the Biodiversity Act – regulating restricted activities involving specimens of listed TOP species. Despite the wider scope of the *final*

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[5] GN 72 in *Government Gazette* No. 27214 of 28 January 2005.
[6] GN 597and 598 in *Government Gazette* No. 28803 of 5 May 2006.
[7] GN R150 in *Government Gazette* No. 29657 of 23 February 2007.
[8] This was announced by the Minister in a press release on 4 May 2007 ('Threatened or Protected Species Legislation to come into force on 1 February 2008', www.environment.gov.za , accessed on 25 May 2006) but an amendment to the *final regulations* has not yet been gazetted.
[9] GNR 1187 and GNR 1188 in *Government Gazette* No. 30568 of 14 December 2007.
[10] GNR 68 and GNR 69 in *Government Gazette* No. 30703 of 28 January 2008.
[11] National Environmental Management: Biodiversity Act (10/2004): Lists of critically endangered, endangered, vulnerable and protected species, GN R151 in *Government Gazette* No. 29657 of 23 February 2006.
[12] National Environmental Management: Biodiversity Act (10/2004): Threatened Or Protected Species Regulations, GN R152 in *Government Gazette* No. 29657 of 23 February 2006.
[13] Act 10 of 2004.

regulations, they have retained a number of special provisions which relate to certain species of large predators only. The species are *Acinonyx jubatus* (cheetah); *Crocuta crocuta* (spotted hyena); *Hyaena brunnea* (brown hyena); *Lycaon pictus* (wild dog) and *Panthera pardus* (leopard).[14]

Lion (*Panthera leo)* were originally included in the definition of "listed large predator" but were excluded by the December 2007 amendments to the regulations.[15] Lion remain a listed TOP species however. The *final regulations* also include special provisions that apply to black rhinoceros (*Diceros bicornis*) and white rhinoceros (*Ceratotherium simum*).

The new regulations introduce the concept of ethical hunting which, although touched upon in provincial conservation legislation, has not been comprehensively legislated for until now. The concept has two main aspects: the principle of the fair chase and humane hunting practices. Thus the regulations deal both with the conservation of species and the protection of animal welfare.

This dissertation will briefly discuss the philosophical and historical context to the development of wildlife law in general before considering hunting law in particular and some salient features of the hunting industry in South Africa. It will then review the current framework of international agreements and national and provincial law and policy

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[14] See Appendix 2 of the 2003 draft regulations, part 1 of the 2005 regulations, regulation 1 of the 2006 regulations and regulation 1 of the *final regulations*. The exclusion of lion will be discussed in more detail, later in this dissertation.
[15] Paragraph 2(g) of the Schedule to GNR 1188 of 14 December 2007.

and provide a brief summary of the legal reform process before considering critically how the *final regulations* will fit into the existing legal framework and the changes they will make to that framework. In doing so, this dissertation will look at changing attitudes to the natural world in general and to wild animals in particular and developments in international law and jurisprudence and will consider whether the *final regulations* fulfil their stated purpose and reflect current attitudes to the relationship between 'men and animals'.

2. HISTORICAL AND PHILOSOPHICAL BACKGROUND TO WILDLIFE LAW

As Glavovic has pointed out, '[t]he attitudes of the people sought to be bound by any law will to a large extent determine the effectiveness and measure of acceptance of that law. An appreciation of evolving human attitudes towards wildlife and society's perceptions of its value is therefore essential to a proper understanding of wildlife law and the extent to which it is reflective of those changing attitudes and perceptions.'[16]

2.1 What is the value of wildlife?

Many writers have considered the value of wildlife.[17] It is possible to distinguish between anthropocentric and biocentric perspectives to the value of wildlife. Anthropocentrism sees the natural world and wild animals from a human-oriented

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[16] PD Glavovic *Wilderness and the Law* (1995) 39.
[17] See for example Glavovic (note 17 above) 41-59 and J Glazewski *Environmental Law in South Africa* 2 ed (2005) 7.

perspective and the nature, order and integrity of the natural world is of secondary importance to human use. The justification for preserving wildlife is therefore on the basis of its utilitarian value and benefits to humans.[18] Glazewski regards anthropocentrism as holding that our moral duties regarding the natural world are determined by the duties we owe one another as humans.[19] The philosopher John Gray and the founder of the Gaia Hypothesis, James Lovelock, identify the Christian and humanist traditions as the main source of a 'blindness' to anything beyond the needs of humans.[20] Glavovic argues that the Old Testament passage that prescribes that humans should rule over the earth and subdue it[21] is capable of a utilitarian interpretation but the better interpretation involves a moral duty to act as a shepherd, custodian or trustee of the earth.[22]

The concept of 'stewardship' holds that we have an obligation to preserve wilderness (of which biodiversity is a part) for future generations. This idea has gained currency recently in the context of growing public awareness of the potential dangers of climate change and recognises that, unless we preserve the natural world, humankind as a whole will not survive. 'The notion of stewardship is therefore a survival concept as well as a moral or philosophical commitment to the interests of generations not yet born.'[23]

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[18] Glavovic (note 17 above) 43.
[19] *Ibid*, 7.
[20] J Gray *Straw Dogs* (2002) 3-4 and J Lovelock *The Revenge of Gaia* (2007) 8-9.
[21] Genesis I: 26-29.
[22] Glavovic (note 17 above) 43-44.
[23] *Ibid*, 46.

The biocentric approach holds that all living things have intrinsic value by virtue of their being members of the earth's 'community of life'.[24] The concept of intrinsic value is not a simple one and the phrase is used in several different senses. In its strongest sense, intrinsic value means that living things have value that exists independently of human valuations of it. O'Neill argues that this does not necessarily preclude us from having an ethical duty to the natural world.[25] In his view, without returning to a narrow anthropocentric or utilitarian view of the biotic community, 'care for the natural world is constitutive of a flourishing human life.'[26]

An early (and perhaps the most well-known) thinker from a biocentric perspective was Aldo Leopold who famously declared that 'a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community. It is wrong when it tends otherwise.'[27] Deep ecologists[28] such as Arne Naess also approach the natural world from an biocentric perspective and hold that, among other things, the well-being and flourishing of human and non-human life on Earth have value in themselves and that these values are independent of the usefulness of the non-human world for human purposes and that 'richness and diversity of life forms contribute to the realisation of these values and are also values in themselves'. Humans have no right to reduce this richness and diversity 'except to satisfy vital needs'.[29]

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[24] Glazewski (note 17 above) 7.
[25] J. O'Neill 'The Varieties of Intrinsic Worth' in A Light and H Rolston (eds) *Environmental Ethics* 10.
[26] *Ibid,* 139.
[27] A Leopold *A Sand County Almanac - And Sketches Here and There,* 224.
[28] The term 'deep ecology' was coined by Arne Naess in the early seventies. It describes an ecological philosophy that recognises the inherent value of both human and non-human life and advocates the use of this view in shaping environmental policies.
[29] A Naess and G Sessions *Deep Ecology Platform* http://www.deepecology.org/platform.htm accessed on 17 February 2008.

Chardonnet *et al* point out that it is possible to classify the value of biological resources in several different ways. They distinguish between direct values, such as consumptive use value and productive use value, and indirect values like option value (the value of maintaining options available for the future) and existence value – the value of ethical feelings about the existence of wildlife.[30]

The value of wildlife can be considered as being negative or positive. Depredation to people, livestock and agriculture by wildlife can be considered negative values.[31] However, there may be different views of the value of the same wildlife. For example, a biocentrist might not see negative value in the fact that a leopard eats a farmer's goat; it is, after all, in the nature of predators to eat prey species. However, the farmer would probably disagree.

Chardonnet *et al* also distinguish between the 'pragmatic' and 'virtual' value of wildlife. Pragmatic value includes the economic importance (both in terms of consumptive use of wildlife and non-consumptive use such as eco-tourism and wildlife photography), nutritional value, ecological role (which recognises the role played by species within ecosystems in contributing to the functioning of the ecosystem) and socio-cultural significance of wildlife.[32]

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[30] PH Chardonnet, B des Clers, J Fischer, R Gerhold, F Jori and F Lamarque 'The Value of Wildlife' *Rev. Sci. Tech. Off Int Epiz.* 2002 21(1) 15.
[31] *Ibid* 16.
[32] *Ibid.*

The virtual value of wildlife is based on feelings about the existence of wildlife. In the view of Chardonnet *et al*, pragmatic values 'are often dominant for high-level decision-makers as well as for grass-root level individuals who live in close proximity to wildlife' but conclude that '... the greatest value of biodiversity may lie in future opportunities brought to mankind to adapt itself to local and global changes.'[33]

2.2 The development of wildlife law

Looking at the development of wildlife law from a global perspective, de Klemm and Shine are of the view that, while many traditional societies considered that the natural resources they exploited were their collective property and developed their own rules for excluding outsiders and sharing resources among their members, 'many if not most legal systems have their roots in Roman law, the *res nullius* concept has gained almost universal recognition.'[34] This is true of South Africa where – at common law – wild animals enjoying a state of freedom are regarded by the law as, first of all, *res* (things) and, moreover, in their natural state, *res nullius* (things owned by no-one)[35] but also *res intra commercium* (things capable of being owned).

However, as wild flora and fauna are increasingly being recognised as a valuable part of the national heritage, some states that previously regarded wild animals as *res nullius* have replaced the concept with that of state ownership of wild animals. For example,

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[33] *Ibid.*
[34] C de Klemm & C Shine *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* IUCN Environmental Policy and Law Paper No. 29 (1993) 59.
[35] CG van der Merwe and M Blackbeard 'Animals' in *LAWSA* vol 1, 2 ed. (2003) para 461.

section 83 of the Queensland Nature Conservation Act, 1992[36] provides that the ownership of all protected animals vests in the state but that protected animals can be alienated by means of a permit, licence or regulation. It is 'doubtful' in the view of de Klemm and Shine whether State ownership provides better protection for wild animals since government property is 'all too likely to be perceived as the property of anyone and everyone, making the net result the same as if the wildlife had no owner at all.'[37] However, there is precedent in South African law for natural resources or elements of the biotic community to be regarded as public property and incapable of private ownership. Section 3 of the National Water Act,[38] provides that the national government is the public trustee of the nation's water resources and abolishes the private ownership of water. This is consistent with the principle in NEMA that 'the environment is held in public trust for the people.'[39] Similarly, one of the objectives of the National Environmental Management: Integrated Coastal Management Bill, 2007[40] is 'to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations.'[41] Similarly, section 3 of the Biodiversity Act is entitled 'State's trusteeship of biological diversity', and provides that the State must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources and must implement the Act to achieve progressive realisation of the environmental rights contained in section 24 of the Constitution.[42]

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[36] http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/N/NatureConA92.pdf accessed on 17 February 2008.
[37] De Klemm & Shine (note 34 above) 60.
[38] Act 36 of 1998.
[39] Section 2(4)(o).
[40] GNR 954 in *Government Gazette* No. 30141 of 6 August 2007.
[41] Section 2(c).
[42] Constitution of the Republic of South Africa, 1996.

However, the Biodiversity Act does not alter the common law position regarding the ownership of wild animals.

According to de Klemm and Shine, notwithstanding the legal ownership of animals, '[i]n most cases, regulatory powers regarding wild animals were initially used (and to a considerable extent are still used) to preserve valuable economic or recreational resources against uncontrolled exploitation. The legitimacy of species preservation was therefore seen only as incidental to the preservation of legitimate human pursuits. This is the basis on which hunting and fishing legislation was developed over the years throughout the world.'[43] It therefore seems clear that, in formal legal systems at least, the earliest laws regarding wild animals reflect a firmly utilitarian view of animals.

It is submitted that this is true of South Africa also. Glazewski (quoting Fuggle and Rabie) notes that the origins of nature conservation legislation in South Africa can be traced to the arrival of colonial settlers at the Cape in the seventeenth century.[44] According to Fuggle and Rabie '[n]o less than eight *placaaten* addressed the steadily growing problem of diminishing wildlife as a consequence of illegal and excessive hunting during the first 40 years of white settlement at the Cape. During the same time a beginning was made with the attempted extermination of problem animals, particularly lions and leopards...'[45]

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[43] De Klemm & Shine (note 34 above) 61.
[44] Glazewski (note 17 above) 365.
[45] MA Rabie & RF Fuggle 'The rise of environmental concern' in RF Fuggle and MA Rabie *Environmental Management in South Africa* (1992)) 13.

For much of the 18th century, there was very little manifestation of environmental awareness or concern save for 'growing official distress over illegal hunting' which resulted in further *placaaten*. During the period 1800 to 1910, there was a substantial growth in legislation aimed at wildlife conservation as the newly established provincial legislatures of Natal, Transvaal, the Orange Free State and the Cape passed game laws at regular intervals.[46]

The first game reserve in South Africa was established in 1894 in Pongola, followed swiftly by four in KwaZulu-Natal and the Sabie Game Reserve in 1898. Several national parks were proclaimed in the 1930s after the National Parks Act was promulgated in 1926.[47] Fuggle and Rabie regard this as the beginning of South Africa's recognition of nature conservation as a public responsibility.[48] However, Van Sittert identifies other trends in laws relating to wild animals over this period. Looking particularly at the Cape, he characterises the development of wildlife law during the period 1850 to 1950 as the 'commodification' of wild animals. 'Over the *longue durée* the unmistakable trajectory of wild animals defined as 'game' was from *res nullius* to private rather than to public property.'[49] 'Thus, game law reform, far from marking the terminus of utilitarianism and the transfer of select wild animals into the custodianship of the state and beyond reach of the market, formed an aspect of its continued privatization and commercialization, everywhere encouraged by progressive farmers and the state and enabled by enclosure.'[50] 'Many of those wild animals neither domesticated nor privatized as game were

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[46] *Ibid*, 14
[47] Act 56 of 1926.
[48] Fuggle and Rabie (note 45 above) 12.
[49] 290.
[50] 284.

commodified instead as 'vermin', acquiring a market value through the state bounty placed on their heads.'[51]

After Union in 1910, nature conservation became a matter of provincial legislative competence, as it remains today, although the provinces now exercise their legislative powers concerning nature conservation concurrently with national government.[52] Most of the provinces consolidated their nature conservation laws into nature conservation ordinances during the 1960s and, after 1970, which Fuggle and Rabie refer to as a 'watershed year' in the rise of environmental concern, new nature conservation ordinances were passed by the provinces, which remain in force today in large parts of the country.[53] In addition to these, since the change in government in 1994, the main framework laws governing biodiversity such as the National Environmental Management Act ('NEMA'),[54] the Biodiversity Act and the National Environmental Management: Protected Areas Act[55] were put into place.

In Glazewski's view it is evident that, historically, the concept of nature conservation was narrowly construed to embrace the setting aside of protected areas, and the conservation of indigenous wild animals, plants and freshwater fish. Today the emphasis is coming to

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[51] 290.
[52] By virtue of section 22 and 125 read with Schedule 4 of the Constitution.
[53] For example, the Natal Nature Conservation Ordinance, 15 of 1974, still in force in KwaZulu-Natal; the Nature Conservation Ordinance 19 of 1974, in force in the Western Cape, Eastern Cape, North West Province and Northern Cape and the Nature Conservation Ordinance 12 of 1983, still in force in Gauteng and Mpumalanga.
[54] Act 107 of 1998.
[55] Act 57 of 2003.

be on the wider notions of the conservation of biodiversity and the sustainable use of species and ecosystems.[56]

Glazewski also refers to the 'modern-day emphasis on making conservation pay, a reaction to the decreasing capacity of government coffers to subsidise the costs of managing protected areas. Legal and managerial mechanisms are being developed to preserve our wildlife heritage, while ensuring that it simultaneously generates income, either directly through harvesting or indirectly through tourism, particularly in the context of the needs to redress the imbalances of South Africa's past...'[57] This attitude to wildlife is enshrined in the constitutional right to have the environment protected 'through legislative measures that, among other things, promote conservation and the ecologically sustainable use of natural resources, while promoting justifiable economic and social development'[58] and in the principle, set out in NEMA, environmental management 'must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'.[59]

Similarly, McCauley has recently suggested that 'perhaps the most important trend in conservation science at the moment is "ecosystem services", typically seen as economic benefits provided by natural ecosystems.'[60] He points out some of the dangers of convincing legislators and decision-makers that nature ought to be conserved because it is profitable and argues that 'we must strongly assert the primacy of ethics and aesthetics in

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[56] Glazewski (note 17 above) 365.
[57] *Ibid*, 365-366.
[58] Section 24 of the Constitution.
[59] Section 2(2).
[60] DJ McCauley 'Selling out on nature' *Nature* vol 443/7 September 2006 27.

conservation. We must act quickly to redirect much of the effort now being devoted to the commodification of nature back towards instilling a love for nature in more people.' He cites several ways in which the usefulness of 'ecosystem services' is limited, including the fact that, as discussed earlier in this section, ecosystems can have negative as well as positive value to humans. Put another way, ecosystems can provide disservices as well as services: wild animals, and large predators in particular, kill people and harm property, including domestic animals. Furthermore, it is unwise to think about the value of wildlife principally in terms of economics when market forces are by their nature uncertain, while it is generally accepted that nature must be conserved in perpetuity. Finally, it should also be recognised that 'making money and protecting nature are all too often mutually exclusive goals. Win-win solutions cannot always be found.'[61] He argues that nature conservation must be framed as a moral issue and argued as such to policy-makers, who are 'just as accustomed to making decisions based on morality as on finances.'

2.3 The biocentric approach and rights for non-humans

Another modern trend in nature conservation that Glazewski has identified is increasing pressure for the ethical treatment of animals 'raising interesting constitutional questions pertaining to animal rights'.[62]

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[61] *Ibid* 28.
[62] Glazewski (note 17 above) 366.

In Glavovic's view, if we adopt a biocentric approach then the questions to be asked when formulating laws are the following:

- Can non-human entities have inherent worth or intrinsic value deserving of legal recognition and protection?
- Do they have ethical or moral rights which should be legally recognised and protected?
- Can and should they be given legal rights?[63]

A great deal has been written about the possibility of extending rights to non-humans since Christopher Stone's seminal 1972 article, *Should Trees Have Standing – Towards Legal Rights for Natural Objects?,*[64] far more than can be comprehensively discussed in this dissertation. The article was written in an attempt to influence the United States Supreme Court, which was about to review the case of *Sierra Club v Morton,*[65] and it was indeed referred to with approval in the dissenting judgement of Justice Douglas in that case. When Stone wrote the article he pointed out that while the concept of extending rights to non-humans seemed 'unthinkable', extending human rights to corporations, children, slaves and women was once just as 'unthinkable'. In this regard, Cullinan argues that, to indigenous cultures, the idea that someone might invent a fictitious legal person such as a corporation and give it rights that are protected by law and enormous powers may seem 'far more perverse'.[66]

However, in the last few years, issues pertaining to the protection of the natural world have become much more prominent in the public consciousness because of growing awareness of the threat to human survival posed by climate change. In 2006, a local

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[63] Glavovic (note 17 above) 47.
[64] CD Stone *Should Trees Have Standing? and other essays on law, morals and the environment* (1996) *1.*
[65] Justice Douglas, dissenting 405 U.S. 727 at 741-42.
[66] C Cullinan *Wild law* (2002) 124.

authority in the United States passed an ordinance that recognised that ecosystems possess enforceable rights against corporations.[67] The Community Environmental Legal Defence Fund, a non-governmental organisation that helped draft the ordinance, stated in a press release recently that

> '[t]he Tamaqua Borough Council has taken an extraordinary – but logical – step. Since this nation's founding – and for thousands of years before – 'law' in the western world has treated rivers, mountains, forests, and other natural systems as 'property' with no rights that governments or corporations must respect. This has resulted in the destruction of ecosystems and natural communities, backed by law, public policy, and the power of government. The people of Tamaqua have changed how the law regards Nature, and have acted in the grand tradition of the Abolitionists, who launched a people's movement in the 1830's to end the legal but immoral treatment of slaves as property and to establish forever their rights as people entitled to fundamental and inalienable human rights.'[68]

Extending legal rights to non-humans is controversial; what should the nature of these rights be? Cullinan argues that the 'first step is for our human jurisprudence to recognise that the dominant cultures of our times have no right to prevent the other components of the Earth Community from fulfilling their evolutionary role.'[69] Cullinan's approach is to see the universe as a 'communion of subjects' rather a collection of objects. In his view, 'in defining the rest of the Earth Community as objects, the dominant legal philosophies not only legitimize and facilitate our exploitative relations with the Earth Community;

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[67] A 2006 Ordinance passed by East Brunswick Township, Schuylkill County, Pennsylvania Ordinance provides that '[n]atural communities and ecosystems possess inalienable and fundamental rights to exist and flourish within the Township of East Brunswick. It shall be unlawful for any corporation or its directors, officers, owners, or managers to interfere with the existence and flourishing of natural communities or ecosystems, or to cause damage to those natural communities and ecosystems. The Township of East Brunswick, along with any resident of the Township, shall have standing to seek declaratory, injunctive, and compensatory relief for damages caused to natural communities and ecosystems within the Township, regardless of the relation of those natural communities and ecosystems to Township residents or the Township itself. Township residents, natural communities, and ecosystems shall be considered to be "persons" for purposes of the enforcement of the civil rights of those residents, natural communities, and ecosystems.'

[68] The Community Environmental Legal Defence Fund: Press release 20 September 2006, http://www.celdf.org/PressReleases/TamaquaLawRecognizesRightsofNature/tabid/367/Default.aspx accessed on 20 January 2008.

[69] Cullinan (see note 66 above) 116.

they also prevent the emergence of two-way relationships between subjects that both have legally recognised "rights"'.[70]

In the most far-reaching legislative development yet, voters in Ecuador approved a new Constitution on 28 September 2008 that contains a chapter entitled 'Rights for Nature'. Article 1 provides that 'Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public bodies.'[71] It will be interesting to see how effect is given to this article.

But, as Singer points out, it is also important, 'in the context of environmental issues, to note that living things may be regarded either collectively or as individuals.'[72] The question arises as to whether it is possible to have an environmental ethic that is based on the preserving the integrity and stability of the biotic community and at the same time to place value on the existence of individuals within the biotic community or within the smaller communities that constitute it. In the natural world, species (including humans) survive by killing other species. In Singer's view, where our actions are likely to make animals suffer, that suffering must count in our deliberations and actions affecting the environment and it should count equally with a like amount of human suffering, insofar

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[70] *Ibid,* 123.
[71] The Community Environmental Legal Defence Fund: Press Release 'Ecuador Approves New Constitution: Voters Approve Rights of Nature' 28 September 2008 (www.celd.org, accessed on 5 October 2008).
[72] P Singer 'Not for Humans Only: The Place of Nonhumans in Environmental Issues' in A Light and H Rolston III *Environmental Ethics* (2003) 55.

as rough comparisons can be made.[73] The principle of equal consideration of interests gives rise to what Singer calls 'an odd kind of right – it is really a necessary foundation for having rights rather than a right in itself. But some other rights could be derived from it: the right not to have pain gratuitously inflicted would be one such right.'[74]

Katz's approach to this problem is to develop a first and second principle. The primary principle must be moral regard for the ecosystem or natural community since this is the only way of protecting inanimate or non-sentient members of those communities. The second principle holds that in cases where health and welfare of natural community is not at issue then human action concerning the environment should be judged by its relationship to natural individuals and species. 'This supplementary or secondary moral consideration of individuals will yield a much richer environmental ethic than a mere consideration of ecosystem good...'[75]

2.4 The ethics of hunting

The main reasons for hunting today are sport, subsistence, commercial exploitation or 'therapeutic' reasons. The latter involves the killing of animals for reasons relating to management of ecosystems or human/animal conflict, often described as 'culling'. Since, generally speaking, large predators are not killed for food, most of the hunting of large predators in South Africa is for trophies or to manage actual or potential human/animal

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[73] *Ibid* 59.
[74] *Ibid* 58.
[75] E Katz 'Is There a Place for Animals in the Moral Consideration of Nature?' in A Light and H Rolston III *Environmental Ethics* (2003)85, 90-91.

conflict. The debate about animal rights is pertinent to hunting since one of the main objections to hunting is on the grounds of the welfare of the individual animal being hunted. Animal rights activists also question the right of hunters to kill unnecessarily, or for sport. Because it serves no subsistence purpose and is, essentially, a sport involving the killing of animals, trophy hunting is perhaps the most controversial of hunting practices, generally criticised by those who believe in the right of animals to life and those for whom trophy hunting can be regarded as the 'wasteful, disrespectful, and harmful act of a person who regards wild animals as a commodity.'[76] Paul Theroux has called trophy hunting 'the unspeakable, in pursuit of the stuffable'.[77]

The *final regulations* contain provisions relating to the use of different kinds of weapons, traps and poison that are specifically concerned with prevention or minimising of suffering by the animal being hunted. Clearly the hunting of animals by humans causes pain to animals, but it may be argued that hunting need not necessarily increase the suffering of individual large predators, who may die a more merciful – albeit less natural – death at the hands of a skilful hunter than would be the case if they were killed by another predator, or starved or died of a disease.

If we approach the hunting of large predators from the perspective of Leopold's ethic, it is hard to see how the hunting of large predators tends to preserve the beauty, integrity or

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[76] Cullinan (note 66 above) 120. According the principles of 'wild law' or 'earth jurisprudence', an alternative approach to governance developed by Cullinan and set out in *Wild Law*, the rights and wrongs of, for example, hunting a lion, should be determined with reference to the 'Great Jurisprudence' which can be described as the 'laws' or principles that govern how the universe functions (chapter 7).

[77] P Theroux *Dark Star Safari* (2003) 434. Theroux is paraphrasing Oscar Wilde on fox-hunting: 'the unspeakable, in full pursuit of the uneatable'.

stability of the biotic community. There is very little evidence that the killing of large predators is necessary for the health of ecosystems since large predators do not tend to be overabundant.

However, large predators are responsible for some human/animal conflict. This may have a purely economic effect, such as when farmers in the Baviaanskloof lose sheep to leopards,[78] but may also result in human injury and death. Since most of the conflict takes place in rural or remote areas, the main victims of the conflict are likely to be the rural poor.

It could be argued that breeding large predators solely for the purposes of hunting them later for trophies may have little or no effect on the health and welfare of natural systems and that it therefore cannot be regarded as unethical. This view is consistent with the narrow kind of environmental ethic that disregards the animal rights view entirely.

3. THE WILDLIFE INDUSTRY

The wildlife industry today, as indicated in the first section of this dissertation, can be regarded as having three major components: private game farming, hunting and the trade in wildlife. The components are interlinked, as the trade in wildlife supplies game farms and most hunting takes place on private game farms.

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[78] See, for example, G Rogers 'Baviaanskloof Leopard Research Project Launched' in *The Herald Online* *http://www.theherald.co.za/herald/news/n15_06022008.htm*, accessed on 17 February 2008 and C Dolley 'Neels gets collared in leopard "breakthrough"' *Cape Times* 12 December 2006, 9.

Historically, the main direct threats to large terrestrial mammals have been human hunting pressure and incompatibility with agricultural practices.[79] Consequently, as stated in the previous section, some of the earliest environmental laws in South Africa concerned hunting and the control of problem animals in general, and large predators in particular. Indirect threats, such as habitat loss or degradation, have increased in importance along with the human population increase and industrialisation.

Hunting and 'problem animals' or 'damage causing animals' are still an important aspect of the management of large predators, as will become apparent in section 7 of this dissertation which discusses the *final regulations*. However, an increase in the number of captive breeding operations involving large predators in recent decades has made further controls necessary. Controlling the movement of large predators in and out of the country and within the country has also become important.[80]

Game farming is more economically important in some areas of the country than in others. The National Biodiversity Strategy and Action Plan ('NBSAP'),[81] finalised in 2005, regards wildlife ranching (game farming) as 'an important economic activity in the savanna biome, particularly in Limpopo (where more than half of all game farms are located) and the Northern Cape' but notes that game farming is also growing rapidly in

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[79] J du P Bothma & PD Glavovic 'Wild Animals' in RF Fuggle & MA Rabie *Environmental Management in South Africa,* 256.

[80] 'South Africa Moves to Restrict Canned Hunting' Planet Ark online news service, 15 December 2006 http://www.planetark.com/avantgo/dailynewsstory.cfm?newsid=39492 accessed on 2 September 2007.

[81] National Biodiversity Strategy and Action Plan 2005. See www.environment.gov.za. The plan is discussed in more detail in the next subsection.

the Eastern Cape.[82] The NBSAP country study also noted that there are an estimated 9 000 privately owned game ranches in South Africa, covering an area of more than 17 million hectares. The sale of game has shown substantial growth in the last decade from 8 292 animals sold in 1991 (worth R9 million) to 20 022 animals sold in 2002 (worth R105 million) at 52 auctions held throughout South Africa.[83] The North West province has the largest number of predator breeding operations in the country – variously reported as either 45 or 49 according to official figures, but possibly as many as 80.[84]

An investigative journalist, Ian Michler, commissioned by the International Fund for Animal Welfare (IFAW)[85] during 2005 to investigate captive breeding of large predators, was of the view that breeding of large predators for export is an increasingly large industry.[86] A British-based NGO, the Born Free Foundation, estimated in December 2006 that there were more than 3000 lions in South African captive breeding operations, compared to 300 in 1997.[87] Michler also found that the provinces in which hunting and captive breeding of predators were the most prevalent, were also those in which the conservation authorities were least able or willing to implement laws regulating the practice.[88]

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[82] NBSAP, 19.
[83] NBSP, 20.
[84] 'Escalated measures to control [*sic*]', Department of Agriculture, Conservation and Environment, North West Provincial Government: Press release 19 June 2007.
[85] www.ifaw.org.za accessed on 30 March 2008.
[86] S Kvalsvig & T Winstanley 'Review of the legal framework governing captive breeding and hunting of large predators in South Africa', Report prepared for the International Fund for Animal Welfare, Cape Town, November 2005 (http://www.ifaw.org/ifaw/dimages/custom/2_Publications/BTBW/ZA/CaptiveBreedingLargePredators.pdf accessed on 13 May 2007) 4.
[87] *Op cit* note 90 above.
[88] Kvalsvig & Winstanley (note 86 above) 27.

According to the NBSAP, hunting is much more profitable than the sale of wild game. Professional hunting is estimated to support 70 000 jobs and to generate R1 billion a year from trophy hunting fees, taxidermy, accommodation and venison.'[89] A report prepared for the Panel of Experts on Hunting during 2005 estimated that between 5000 and 6000 foreign hunters visited the country during the 2003/2004 hunting season and that these hunters shot 53 453 animals with a combined value of USD40.7 million. According to the report, there are also approximately 200 000 hunters resident in South Africa.[90]

4. HUNTING

As has been mentioned in the previous section, there are various reasons for hunting.[91] In South Africa, hunting in general falls into three main categories: trophy hunting, subsistence hunting (mainly with dogs) and meat or biltong hunting.[92] As mentioned above, the hunting of large predators falls mainly into the first category, although products of large predators are used in traditional medicine[93] and predators are hunted to prevent or manage human-animal conflicts. Therefore, hunting as it relates to large predators in South Africa is mostly sport hunting; but it is commercial in the sense that an industry has grown up around the provision of hunting services.

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[89] NBSAP, 20.
[90] C Patterson & P Khosa 'Background Research Paper: A status quo study on the profession and recreational hunting industry in South Africa', paper prepared for the Panel of Experts on Hunting October 2005 3.
[91] Chardonnet (note 30 above) 24.
[92] Patterson & Khosa (note 90 above) 1.
[93] X Zulu'Muti-seller arrests a "victory for wildlife"' *The Mercury* 18 May 2007, 6.

A fairly recent hunting practice which has given rise to specific animal welfare or cruelty concerns and which may affect large predators is 'green hunting'. This involves tranquillising instead of shooting an animal so that a photograph can be taken of the hunter with the animal. The animal in question may or may not need to be darted for veterinary purposes or for translocation. Animal welfare groups point to the health risks for the animal of being tranquillised and also the difficulty in regulating how many times a particular animal had been darted: 'What the tourists don't know was that the animal might have been darted several times in the space of a few weeks, leading to liver, kidney and brain damage. The fifth or sixth time a lion was darted... it was so ill that it was ready to be hunted and shot.'[94]

Chardonnet *et al* are of the view that 'the biological impact of sport hunting is small due to the limited number of hunters and also because the animals hunted are only mature males. The hunters most often look for trophy animals, which are usually old males.'[95] This is true of large predators to an extent, but the emphasis on trophy hunting has created a demand, not only for certain kinds of trophies (male lions with long black manes are preferred to other kinds of lions) but for unusual trophies. This has led some breeders to breed intensively certain unusual (but naturally occurring) colour morphs, such as white lions, black leopards and 'king' cheetah, especially for the trophy industry.[96] Furthermore, the movement of captive bred animals from intensive to extensive systems can have an effect on the genetic integrity of existing populations. On

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[94] C Hooper-Box 'Green Groups Seek Ban on Canned Hunting' *Sunday Independent*, 23 January 2005, 1.
[95] Chardonnet (note 30 above) 25.
[96] Kvalsvig & Winstanley (note 86 above) 27.

the other hand, captive breeding of large predators has been defended on the basis that it takes hunting pressure off wild populations and therefore has an *ex situ* conservation purpose.[97]

Apart from the fact that it earns foreign exchange, sport hunting is also defended because it creates employment in remote rural areas and makes use of land that is not suitable for agriculture or sufficiently picturesque for eco-tourism.[98] It therefore has the potential to address poverty in rural areas. The report of the Panel of Experts on Hunting found, however, that there is a 'lack of widespread involvement of traditional communities in the hunting industry.'[99] While there were 'many opportunities for the transformation of the hunting industry',[100] current benefits to communities from hunting are 'minor and indirect such as meat from trophy hunts and employment as hospitality staff, hunting guides, skinners and menial labour.'[101]

4.1 'Canned' hunting

It is clear that the large predator and rhino species, to which the special provisions in the *final regulations* apply, have been singled out because they are sought-after animals in the trophy hunting industry. The fact that foreigners are paying high prices for the chance to hunt a trophy animal (including the costs of the hunting safari) tends to put pressure on

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[97] News24 report 'Conservation or Canning?' 5 December 2008 http://www.wag.co.za/Canned%20lion/Conservation%20or%20canning.htm, accessed on 30 March 2008.
[98] AM Rosser, N Tareen and N Leader Williams 'The Precautionary Principle, Uncertainty and Trophy Hunting: A Review of the Torghar Population of Central Asian Markhor *Capra falconeri*' in R Cooney and B Dickson (eds) *Biodiversity & the Precautionary Principle* (2005).
[99] Report of the Panel of Experts on Hunting (note 3 above) 56.
[100] *Ibid,* iv.
[101] Report of the Panel of Experts on Hunting (note 3 above) 56.

the providers of hunts (game farm owners, hunting professionals and hunting outfitters) to ensure that an animal is actually killed during the hunt. Also, the time periods for hunts are decreasing.[102] In the past hunts were normally carried out over 3 months. Now they are generally 7, 14 or 21 days. (The average for the 2003/2004 period was 11 days.)[103] This increases pressure on the operators to ensure that an animal is shot before the hunt ends.[104] The result is that operators began to employ certain practices which make it easier for the hunting client to obtain the trophy. These practices included hunting animals that had been bred or kept in captivity at some stage during their lifetimes so that they had to a greater or lesser extent lost their natural fear of humans. Animals were also being shot in enclosures that limit their ability to escape the hunter's weapons and animals may also be either drugged before the hunt or lured by artificial means toward the hunter.

The approach taken by the previous drafts of the norms and standards and regulations to deal with this problem was to look both at factors which are external to the animal and internal (or behavioural) factors to determine whether an animal should be hunted. The external factors were the fact that it is free-ranging and occurs in its natural habitat; that it lives on wild prey populations and its diet is not supplemented by human means; and, finally, that its social requirements are met at all times. If any of these factors was missing, the animal was regarded as captive. The internal factor used in the 2003 draft

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[102] Patterson & Khosa (note 90 above) 9.
[103] *Ibid*, 35.
[104] *Ibid*, 9.

legislation[105] was the extent to which the animal is 'human imprinted'. It is submitted that this approach is broadly correct but that the term 'human imprinted' is not a useful one. A possible alternative approach would be to define the internal factors with reference not to imprinting but to a wild animal's innate fear of humans. If one is to declare that hunting an animal that is not wild is unethical, then whether the animal is wild or not should be determined with respect to whether the animal fears humans.

When the first draft hunting legislation was published in 2003, 'canned hunting' was defined to mean 'any form of hunting where a large predator is tranquillised, artificially lured by sound, scent, visual stimuli, feeding, bait other animals of its own species, or another species, or any other method, or captive large predators are hunted'. The April 2005 draft of the norms and standards,[106] retained this definition but a definition of canned hunting was absent from the 2006 draft. The *final regulations* have also shied away from a definition of canned hunting. Instead, they contain provisions which are specifically aimed at preventing the practices described in the 2003/2005 definition of canned hunting. These are discussed in more detail below, but include defining a 'put and take' animal (which is a captive-bred large predator or elephant or rhinoceros that has been in an extensive wildlife system for less than 24 months)[107] and prohibiting the hunting of large predators that are 'put and take' animals[108] or the hunting of large predators against a fence or in a small enclosure or hunting a predator which has been

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[105] GN 874 in *Government Gazette* No. 25090 of 13 June 2003.
[106] GN 72 in *Government Gazette* No. 27214 of 28 January 2005.
[107] Regulation 1 of the *final regulations.*
[108] Regulation 24(1)(a) of the *final regulations.*

tranquillised or from a vehicle or with lights or using lures.[109] Therefore the *final regulations* have moved away from a complete ban on captive bred animals and no longer regard as canned hunting the hunting of animals that have been in an extensive system for 24 months.

Therefore, at present 'canned hunting' has no legislative definition. Moreover, there is a lack of agreement about whether it is ethical to hunt an animal that has been captive bred at all; or, if it is, how long the animal should have been in an extensive system before it can be ethically hunted. The vice-president of the South African Hunters' and Game Conservation Association[110] has said in the media that he does not see a problem with the hunting of bred predators that were released and 'wilded for a few months' in a large area of 1000ha or more. 'In terms of real canned hunting where guys shoot a large predator that's been released in a small enclosure from the back of a vehicle...that's bad...we don't call it hunting, we call it shooting. I think no hunter would support that.'[111]

It would seem that the main objections to canned hunting methods are based, firstly, on welfare or cruelty grounds concerned with additional stress caused to the animal; and, secondly, because it violates a code amongst hunters that can be described as the 'fair chase' principle. A new definition of 'fair chase principle' has been inserted by the January 2008 amendments to the regulations: 'fair chase principle' means a set of hunting conditions in which the individual decision-maker judges the taking of prey as acceptably

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[109] Regulation 26 of the *final regulations.*
[110] See www.sahunt.co.za.
[111] 'Mixed reaction to delay of canned hunting regulations' *Mail & Guardian online* 7 May 2007, http://www.mg.co.za/articlepage.aspx?area=/breaking_news/breaking_news__national/&articleid=306916# accessed on 2 February 2008.

uncertain and difficult for the hunter'. The regulations require hunting organisations to define criteria for hunting listed TOPs species according to the fair chase principle.[112]

It is submitted that the fair chase principle is a completely anthropocentric one which can have no meaning for the animal being hunted and is further evidence of the fact that trophy hunting is principally a sport. Furthermore, the word 'acceptably' is likely to cause difficulty in the interpretation of the definition since, as argued above, there is no consensus on what is acceptable when it comes to hunting of large predators. However, it is submitted that the definition assumes that the animal in question is sufficiently wild that it is prompted to try and escape the hunt; since it is unlikely that anyone would agree that hunting conditions in which the animal being hunted did not attempt to escape would constitute hunting conditions that were acceptably difficult. This is an important factor for opponents of the hunting of captive bred animals: an animal that has been bred in captivity is more likely to lack the fear of humans that prompts it to escape the hunt.

Although hunting may have played a role in preserving animals at a time when, as Glavovic puts it, 'very few others cared'; his view is that this cannot justify the continuation of hunting (at least sport hunting) 'in the light of a new scientific and social concern.'[113] As is discussed in the next section of this dissertation, the imposing of a moratorium on the hunting of large predators was at one time considered by DEAT, as well as a ban on the hunting of captive-bred animals, but a complete ban on trophy hunting does not ever seem to have been seriously considered.

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[112] Regulation 52.
[113] Glavovic (note 17 above) 50.

5. CURRENT LEGAL FRAMEWORK

5.1 The common law

As discussed briefly in the first section of this dissertation, under the common law of South Africa, wild animals are regarded as objects, rather than the subjects of rights. As Botha and Glavovic point out, this means that there are no private law remedies available to protect wild animals from being disturbed, captured, injured or killed unless they are already the property of another person.[114]

Ownership of a wild animal can be acquired by means of *occupatio,* which requires the intention to own the animal and actual physical control of it. The animal in question must be ownerless. The effect of this is that when a wild animal is no longer under the control of its owner, for example when it breaks out of a game farm or reserve, it reverts to being *res nullius*. Furthermore, the common law rules provide that a person can acquire ownership of an animal (for example, by hunting it and controlling the carcass) even where physical control of the animal is taken on someone else's land. The former owner of an animal would have no recourse under the common law against someone who hunted or captured an animal on his or her land or who hunted or captured the animal after it had escaped from his or her control.

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[114] Bothma and Glavovic (note 79 above) 259.

In Roman-Dutch law, a hunter who killed or captured an animal contrary to game laws or other statutory provisions did not acquire ownership of the animal; but a South African court has held that this is not necessarily so and depends on the laws and provisions concerned.[115] Since South Africa has not adopted the Roman-Dutch principle that animals killed or captured unlawfully must be forfeited to the state, it is now generally accepted that this principle does not form part of South African law.[116]

5.2 International and regional wildlife law

5.2.1 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

CITES is an international agreement that was adopted in 1973 and came into force in 1975. South Africa acceded to the Convention in the same year and today is one of 173 parties to the Convention.[117] The Convention works by classifying species according to their conservation status. It assists member countries to regulate the international trade in certain fauna and flora (including live specimens and dead and products of protected species) by a system of import and export permits and certificates to be issued by a designated 'management authority' in that country. In South Africa, the national Department of Environmental Affairs and Tourism ('DEAT') is the management

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[115] *S v Frost; S v Noah 1974 (3) SA 466,* 472.
[116] Van der Merwe & Blackbeard (note 35 above) para 461..
[117] http://www.cites.org/eng/disc/parties/index.shtml accessed on 2 September 2007.

authority[118] along with the provincial conservation authorities, the latter being responsible for issuing of the permits.

The species which the Convention regulates are listed in Appendices I to III to the Convention. The permitting requirements differ for species on the different Appendices and are set out in Articles III to V. Appendix I species are those that are threatened with extinction. Trade in these species must be 'subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.'[119] Appendix II contain species which 'although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival.'[120] Appendix III species are chosen by parties to the Convention as being species which a party 'identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the co-operation of other parties in the control of trade.'[121]

Species are placed on Appendices I and II by agreement of the parties to the Convention following a vote of the Conference of the Parties.[122] A party can place species on Appendix III simply by notifying the Secretariat of the Convention.[123]

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[118] DEAT press release '14th Conference of Parties to CITES' www.environment.gov.za , accessed on 11 June 2006.
[119] Article II(1).
[120] Article II(2).
[121] Article II(3).
[122] Article XV.
[123] Article XVI.

The Convention also requires that each party establish one or more Scientific Authority.[124] The main function of the Scientific Authority is to advise on the granting of import and export permits of species on the Appendices and the introduction of such species from the sea and, more specifically, to confirm that the granting of particular permits will not be detrimental to the survival of the species concerned.[125] The Scientific Authority must also monitor the number of export permits granted for species on Appendix II and the actual number of exports and advise on measures to limit the number of permits if a species may otherwise become at risk of requiring listing on Appendix I.[126]

Although no specific provision is made for it in the Convention, one of the tools which parties to the Convention use to regulate trade in endangered species is the establishment of export quotas for certain species. The quotas can be established by a party to the Convention or by a resolution of the Conference of Parties.[127] There is only one export quota established for a large predator from South Africa; it is for leopard. The quota was set by the Conference of Parties and limits the export of leopard trophies or skins from South Africa to 150 per annum for 2008.[128] The quota was doubled from 75 in 2004 at South Africa's suggestion; but uncertainty about the sustainability of this level of off-take

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[124] Article IX(1)(b).
[125] Articles III(2)(a), III(3)(a), III(5)(a), IV(2)(a), and IV(6)(a).
[126] Article IV (3).
[127] According to Sands, a resolution of an international organisation (including a conference of the parties to an international agreement) made in terms of a treaty which does not establish clearly the legal consequences of such a resolution is not binding *per se*, although it may contribute to the development of customary international law or may provide an authoritative interpretation of the international agreement under which it was adopted (P. Sands *Principles of International Environmental Law* 2 ed ((2003) 141).
[128] See http://www.cites.org/common/quotas/2008/ExportQuotas2008.pdf accessed on 24 March 2008.

caused DEAT to suspend the operation of the increased quota.[129] The existing quota of 75 is divided amongst the provinces proportionately to the demand for leopard hunting.[130]

Most of the large predators contemplated by the *final regulations* appear on the various CITES appendices and the establishment of export quotas for the export of skins and trophies is potentially an effective tool for controlling hunting of these predators by foreign hunters. This in turn should have an effect on the numbers of captive bred animals. This of course presupposes that legislation implementing the system is put in place and effectively enforced and that there is adequate (and accurate) information about predator populations. However, in their 'background report' to the Panel of Experts on Hunting regarding the hunting industry in South Africa, Patterson and Khosa make the point that 19 of the top 20 hunted species in South Africa are not listed on the CITES appendices.[131] The exception is the caracal (*felis caracal*), which is listed on Appendix II.[132] It is interesting to note that caracals are regarded as problem animals by several provincial nature conservation ordinances in South Africa. This means that they may be hunted with dogs, trapped and poisoned.[133] In KwaZulu-Natal a reward of R40 is offered for their destruction![134]

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[129] Patterson & Khosa (note 90 above) 17.
[130] For example, in 2004 Limpopo province was allocated 35 leopard for hunting out of the total of 75. M Wray 'Limpopo leaves leopard hunters in the dark' Kruger Park Times, http://www.travel.za.net/Glossary-travel/krugerpark-times-2-2-leopard-hunters-19034.html accessed on 19 June 2007.
[131] Patterson & Khosa (note 90 above) 46.
http://www.environment.gov.za/HotIssues/2005/29062005/07October/PoE_research_report_Status_quo_of_hunting_industry_2st_draft.doc accessed on 19 June 2007.
[132] See http://www.cites.org/eng/resources/species.html accessed on 19 June 2007.
[133] See, for example, the KwaZulu-Natal Problem Animals Control Ordinance 14 of 1978. Section 1 of the Ordinance defines 'hunt' to include the use of dogs, poison and traps. Section 3 provides for the declaration of animals as problem animals and for the determination of rewards for their destruction, and section 6 for the establishment of hunt clubs for the destruction of problem animals.
[134] PNN 466 of 27 October 1988.

One of the stated objectives of the Biodiversity Act is "to give effect to ratified international agreements relating to biodiversity which are binding on the Republic."[135] The extent to which the Biodiversity Act has succeeded in giving effect to CITES is not clear. The Act does not mention CITES at all, yet Section 60 of the Biodiversity Act requires the Minister (DEAT) to establish a scientific authority 'for the purpose of assisting in regulating and restricting the trade in specimens of listed threatened or protected species.' Section 62 requires the authority to publish "any annual non-detriment findings on trade in specimens of listed threatened or protected species in accordance with an international agreement regulating international trade in specimens of listed threatened or protected species which is binding on the Republic." Both of these functions seem to allude to functions which a national Scientific Authority is required to undertake in terms of CITES.

The *final regulations* establish a Scientific Authority 'in terms of section 60 of the Biodiversity Act'[136] but, again, no specific reference is made to CITES and the powers and functions of the Scientific Authority are not set out. This is possibly because a separate Act is planned to deal with the requirements of CITES.[137] The 'personal effects' permits provided for in the *final regulations*[138] reflect language used in Article VII(3) of the Convention which provides that the permitting requirements set out in Articles III, IV and V do not apply to specimens which are household or personal effects (neither term is defined) except in certain circumstances. The circumstances include a situation where a

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[135] Section 2(b) of the Biodiversity Act. The Act is discussed in detail in the next subsection.
[136] Chapter 7. The Scientific Authority is defined in regulation 1 as 'the Scientific Authority referred to in section 60 of the Biodiversity Act.'
[137] Pers. comm. with Markus Burgener, programme officer for TRAFFIC 14 April 2008.
[138] See the regulations generally, but in particular, regulations 1, 5(6), 13(3), 18(1), 19(1)(k), 27(4) and Appendix 1.

hunter has taken an Appendix II animal into a country which is not his or her residence and which requires an export permit and is importing it into his or her country of residence. Captive bred specimens of species on Appendix I are deemed to be Appendix II species for the purposes of the permitting requirements.

Finally, the list of TOP species which has been published with the *final regulations* does not explicitly include all species on CITES appendices as did the 2006 draft. If the intention is that the *final regulations* will provide for the system of permits prescribed in CITES then, since the CITES Appendices are amended from time to time, it would appear that the list of TOP species will have to be amended to take account of this.

It is unfortunate that the Biodiversity Act and the *final regulations* make provision for the establishment of a Scientific Authority and make several references to the provisions of CITES without explicitly enacting the provisions of CITES into national law.[139] To this extent the Biodiversity Act has not achieved one of its stated objectives. However, CITES provisions may in future be the subject of a separate Act.

5.2.2 United Nations Convention on Biological Diversity

This international agreement was adopted in 1992 in Rio de Janeiro and came into force in 1993. It has as its goal the conservation of biodiversity; the sustainable use of

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[139] According to Ingrid Coetzee, former Chief Director: Regulatory Services of the North West Province Department of Agriculture, Conservation and Environment, the Scientific Authority established in section 60 of the Biodiversity Act was always intended to be the CITES Scientific Authority and the lack of specific reference to powers and duties under CITES is an oversight. (Personal communication with the author on 15 September 2007).

biological resources; and the fair and equitable sharing of benefits arising from the use of genetic resources.[140] As a signatory to the Convention,[141] South Africa is obliged to develop national strategies, plans or programmes or adapt existing ones to implement the provisions of the Convention and to integrate the conservation and sustainable use of biodiversity into sectoral and cross-sectoral plans, programmes and policies.[142] In fulfilment of its obligation to develop national strategies, the Government has published the NBSAP. As is the case with CITES, there is no mention of the provisions of the Convention in the Biodiversity Act, despite the fact that one of the objectives of that Act is to give effect to international agreements relating to biodiversity.

The Convention is too broad to deal with large predators specifically but clearly the concept of sustainable use of biological diversity has relevance to hunting and captive breeding. One of the arguments for captive breeding is that it protects wild populations from being decimated by hunting.

Also notable is the fact that the Convention recognises that *ex situ* conservation[143] of species has a role to play, although *in situ* conservation is the fundamental requirement of conservation of biological diversity.[144] The question of whether captive breeding of large predators fulfils any *ex situ* conservation function is an important one in considering whether the practice should be outlawed.

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[140] Article 1. See www.biodiv.org, accessed on 6 April 2008.
[141] South Africa signed the Convention in 1993 and ratified it in 1995.
[142] Article 6 of the Convention.
[143] That is, the conservation of species outside of their natural habitat.
[144] Preamble to the Convention. *Ex situ* conservation is also the subject of Article 9.

The Preamble to the Convention also recognises the fact that there is a 'general lack of information and knowledge' about biological diversity and that the development of identification and monitoring systems is key.[145] The lack of monitoring systems at a national or regional level is a weakness of the current legal framework governing the management of large predators. It also contains a formulation of the precautionary principle in that it provides that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat." The precautionary principle can be stated in a number of ways but, in essence, it provides that 'complete certainty regarding an environmental harm should not be a pre-requisite for taking action to avert it.'[146] The principle has been incorporated into South African law in NEMA, although the principle is differently formulated in NEMA. This is discussed further in section 5.3.2 below.

5.2.3 SADC Protocol on Wildlife Conservation and Law Enforcement in the Southern African Development Community

The Protocol was signed by the 14 members of SADC on 18 April 1999 and came into force on 30 November 2003.[147] Its broad objectives are to establish common approaches to the conservation and sustainable use of wildlife resources in the member states and to assist with effective enforcement of laws relating to these resources. In doing so, the

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[145] See also Article 7.
[146] R Cooney 'From Promise to Practicalities: the Precautionary Principle in Biodiversity Conservation and Sustainable Use' in Cooney and Dickerson (note 98 above) 55.
[147] http://www.sadc.int/english/fanr/wildlife/index.php accessed on 20 May 2007. South Africa ratified the Protocol on 31 October 2003 (www.dfa.gov.za/foreign/index.html, accesses on 5 October 2008).

Protocol aims to promote sustainable use of wildlife, and the conservation of shared wildlife resources through transfrontier protected areas, to facilitate the exchange of information regarding wildlife and to harmonise laws governing wildlife use and conservation. The Protocol also aims to build national and regional capacity for wildlife management and enforcement of wildlife laws and to promote community-based natural resources management programmes.[148]

The Protocol establishes various wildlife committees consisting of Ministers and senior officials responsible for food, agriculture and natural resources from the various member states[149] and prescribes the measures, including legislative measures, which member states must take to implement the Protocol within its jurisdiction. There is provision for sanctions to be imposed against member states that persistently fail to fulfil obligations under the Protocol or implement policies which undermine the objectives of the Protocol.

It is clear from the Preamble to the Protocol that it places much emphasis on the economic value of wildlife resources and the use of those resources. For example, the Preamble asserts that 'the conservation and sustainable use of wildlife in the SADC Region contribute to sustainable economic development and the conservation of biological diversity', that 'the conservation and sustainable use of wildlife in the SADC Region depend on the proper management and utilisation of wildlife' and that 'the regional management of wildlife and wildlife products will promote awareness of the socio-economic value of wildlife and enable equitable distribution of the benefits derived

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[148] Article 4.
[149] Article 5.

from the sustainable use of wildlife'. Although recent legislative and policy developments in South Africa do not conflict with the aims of the Protocol, it does not seem to have had much impact on policy development to date.[150]

5.3 National wildlife law

5.3.1 Constitution of the Republic of South Africa, 1996 ('the Constitution')

The Constitution establishes the founding principles of the environmental law framework in South Africa by creating the right to an environment that is not harmful to health or well-being; and the right to have the environment protected through legislative measures that, among other things, promote conservation and the ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.[151] 'Environment' is defined in NEMA to include micro-organisms, plant and animal life and the interrelationships between them and the land, water and atmosphere of the earth.'[152]

Section 44, read with Schedule 4, of the Constitution provides that national and provincial government have concurrent legislative competency with regard to the environment and nature conservation (except national parks and national botanical gardens, for which only national government has legislative competency). In South

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[150] M Burgener, A Greyling & A Rumsey, 'Background Research Paper: A status quo report on the policy, legislative and regulatory environment applicable to commercial and recreational hunting in South Africa', paper prepared for the Panel of Experts on Hunting, October 2005, 11. Accessed at: http://www.environment.gov.za/HotIssues/2005/29062005/25102005/PoE%20research%20report%20legislation%20and%20policy%20Final.doc on 2 September 2007.

[151] Section 24 of the Constitution.

[152] Section 1.

Africa, most regulation of large predators has, up to now, been carried out by the provincial sphere of government through the provincial nature conservation ordinances discussed in the next subsection. This has meant that different laws apply to the same species in different provinces which, it will be argued, is not always justified. In addition, capacity to implement and enforce wildlife laws varies from province to province and there is evidence that the provinces in which most hunting and captive breeding occurs are the least effective in enforcing the laws.[153] The *final regulations* are made by the national sphere of Government and provide for an additional layer of regulation of large predators to the provincial laws.

The Constitution also sets out[154] the procedure to be followed in deciding which legislation is to prevail where there is a conflict between national and provincial legislation. National legislation will prevail where it deals with a matter that cannot be regulated effectively by provincial legislation;[155] where it deals with a matter that, to be dealt with effectively, requires uniformity across the nation and the national legislation establishes norms and standards, frameworks or national policies[156] and where it is necessary to protect the environment. [157]

The *final regulations* are inconsistent with provincial legislation in a number of ways, including the conservation status accorded to listed species. Kidd points out that elephant and white rhinoceros are regarded as 'protected' in the *final regulations* (the lowest of the

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[153] Kvalsvig & Winstanley (note 86 above) 27.
[154] In section 146.
[155] Section 146(2)(a).
[156] Section 146(2)(b).
[157] Section 146(2)(c)(vi).

four categories), while the Natal Nature Conservation Ordinance,[158] still in force in KwaZulu-Natal, designates these species as 'specially protected'.[159] In the Western Cape, wild animals are classified as either endangered or protected.[160] Cheetah is regarded as endangered in the Western Cape[161] but only 'vulnerable' in the *final regulations.* In the Western Cape a permit may be obtained to hunt a rhinoceros with a bow and arrow, while the *final regulations* do not allow permits to be issued for the hunting of rhinoceros with a bow and arrow.[162] It is submitted that, in the case of provisions enacted in order to promote animal welfare, such as prescribing the kinds of weapons with which they may be hunted, it is illogical for these to vary from province to province since the potential for suffering of a rhinoceros hunted with a bow and arrow in Limpopo province will not be different to that of a rhinoceros similarly hunted in KwaZulu-Natal. Taking this argument further, it is similarly illogical for each province to decide which animals may be hunted thus, as is provided for in the *final* regulations. Clearly provisions dealing with animal welfare require uniformity across the nation and where provincial legislation is inconsistent with national legislation, it is submitted that national legislation should prevail.

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[158] Ordinance 15 of 1974.
[159] M Kidd *Environmental Law Sibergramme,* (28 April 2007) 7.
[160] Section 1 of Ordinance 15 of 1974.
[161] Schedule 1 of Ordinance 15 of 1974.
[162] Regulation 26(8).

5.3.2 National Environmental Management Act

NEMA came into force in January 1999 as the new framework environmental Act.[163] As mentioned previously in this dissertation, the Act sets out principles for decision making and procedures for co-operative governance as well as providing for the establishment of environmental institutions such as the Committee for Environmental Co-ordination and the National Environmental Advisory Forum.

As framework legislation, the Act contains no specific provisions about the captive breeding or hunting of large predators. However, Chapter 1 sets out the principles which must govern the actions of organs of state when making decisions that may significantly affect the environment[164] and several are relevant to wildlife conservation, for example, the principle that sustainable development requires that:

- the disturbance of ecosystems and loss of biological diversity are avoided, or if unavoidable are minimised and remedied;[165]
- the use of renewable resources and their ecosystems does not exceed the level beyond which their integrity is jeopardised;[166] and
- a risk-averse and cautious approach is applied to ensure that negative impacts on the environment and on environmental rights be anticipated and prevented or minimised.[167]

Thus, a form of the precautionary principle has been incorporated into South African law but it is submitted that the wording in NEMA creates a different duty to that envisaged by the preamble to the Convention on Biological Diversity (discussed in section 5.2.2

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[163] It has to a large extent superseded the previous framework environmental law, the Environment Conservation Act, 73 of 1989, parts of which remain, however, still in force.
[164] Note that the use of the word 'may' gives the section much wider applicability than if decision-makers were only required to apply the principles to decisions that will affect the environment. This is in accordance with the precautionary principle that is a principle of customary international law and is the basis for section 2(4)(a)(vii) of NEMA.
[165] Section 4(a)(i).
[166] Section 4(a)(ii).
[167] Section 4(a)(vii).

above). The Convention imposes a positive duty to act where there is a threat to biodiversity notwithstanding the lack of scientific certainty whereas NEMA arguably imposes a duty not to act without anticipating and preventing or minimising negative impacts on the environment. In the sense that it does not impose a positive duty, the NEMA formulation is perhaps the weaker.

The NEMA principles must be applied by decision-makers in respect of hunting or captive breeding permit applications under existing provincial ordinances as well as the *final regulations.* For example, the release of a captive-bred trophy animal into an extensive wildlife system for the ultimate purpose of hunting it may result in hybridisation, or may have an adverse effect on prey populations. Adopting a risk-averse and cautious approach to regulating hunting and captive breeding of large predators may for example require that risk assessments are carried out before permits are granted for the translocation or hunting of large predators if not enough is known about the possible effects on the ecosystem concerned. The

Other principles of NEMA are also relevant to the management of large predators:

- equitable access to environmental resources, benefits and services especially by categories of persons disadvantaged by unfair discrimination;[168]
- decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge;[169]
- there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment;[170] and
- global and international responsibilities relating to the environment must be discharged.[171]

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[168] Section 4(d).
[169] Section 4(g).
[170] Section 4(l).
[171] Section 4(n).

5.3.3 National Environmental Management Amendment Act

The Amendment Act[172] came into force on 1 May 2005 and amended NEMA so as to provide for the appointment of Environmental Management Inspectors (EMIs) either by the Minister or by an MEC, for purposes of investigation, monitoring and enforcement of the provisions of NEMA and other specified environmental management Acts. The specified Acts include the Biodiversity Act and any regulations made under it.[173] Therefore EMIs may be mandated to enforce the *final regulations*. It is accepted that one of the most important ways in which the current regulatory framework is failing to protect large predators is that the provinces have different capacities to implement and enforce the laws. The designation of EMIs[174] who are mandated to enforce the Biodiversity Act and the *final regulations* may address this.

5.3.4 National Environmental Management: Biodiversity Act

The general purpose of the Biodiversity Act is to regulate the management and conservation of biodiversity. In particular this means the protection of species and ecosystems, sustainable use of indigenous natural resources, sharing of benefits from bioprospecting of indigenous natural resource and the establishment of the South African National Institute for Biodiversity.[175]

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[172] Act 46 of 2003.
[173] See section 1 of NEMA for the definition of 'specific environmental management Acts'.
[174] Colloquially known as the 'green scorpions'.
[175] Long title to the Act.

The Act requires that the principles set out in NEMA must be applied in the implementation of the Act.[176] Since the principles would apply by virtue of section 2 of NEMA in any event, this is trite.

Section 9 of the Act empowers the Minister to publish norms and standards after consultation with Cabinet, provincial government and the public. Norms and standards may apply nationwide or to a specific area or may be issued for a specific category of biodiversity only. Draft hunting norms and standards (discussed at pages 78ff below) have been published in terms of this section.

The Act also provides for the creation of the South African National Biodiversity Institute ('SANBI')[177] in Chapter 2. Important functions of SANBI for the purposes of this dissertation are:

- monitoring and reporting to the Minister on the status of biodiversity generally and on the conservation status of threatened or protected species listed in terms of Section 56 of the Act (these are discussed in more detail at pages 87 to 88 below);
- acting as a research, advisory and consultative body;
- gathering and disseminating information about biodiversity and maintaining databases in this regard; and
- co-ordinating programmes to involve civil society in the conservation and sustainable use of indigenous biological resources.[178]

Chapter 3 of the Act creates tools for biodiversity planning and monitoring. These include a national biodiversity framework, the identification of bioregions and the drafting of bioregional plans, biodiversity management plans and biodiversity

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[176] Section 7. The principles are set out in section 2 of NEMA.
[177] See www.sanbi.org.za .
[178] Section 11(1).

management agreements. A biodiversity management plan ('BMP') may deal either with an ecosystem or an indigenous species that is listed in terms of section 56 or which 'warrants special conservation attention'. A BMP in respect of a species must be aimed at the long-term survival of the species and be consistent with applicable legislation and policy any relevant planning instruments.[179] It is submitted that BMP plans might be an alternative means of managing large predators to the current system of regulations or norms and standards. This is discussed under section 7.8 below.

Before approving such a plan, the Minister (DEAT) must approve a suitable person, organisation or organ of state that is willing to be responsible for the implementation of the plan[180] and follow a prescribed consultation process.[181] The Minister may also enter into biodiversity management agreements regarding the implementation of a biodiversity management plans[182] The Act is silent on the enforcement of such agreements.

Chapter 4 of the Act deals with threatened or protected species and ecosystems and allows the Minister to publish lists of TOP species[183] which must be reviewed at least every five years[184] and lists of prohibited activities in connection with those species.[185] The categories of TOP species are defined as follows:

- critically endangered species, being any indigenous species facing an extremely high risk of extinction in the wild in the immediate future;
- endangered species, being any indigenous species facing a high risk of extinction in the wild in the near future, although they are not a critically endangered species;

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[179] Section 45.
[180] Section 43(2).
[181] Section 47.
[182] Section 44.
[183] Section 56(1).
[184] Section 56(2).
[185] Section 57.

- vulnerable species, being any indigenous species facing an extremely high risk of extinction in the wild in the medium-term future, although they are not a critically endangered species or an endangered species; and
- protected species, being any species which are of such high conservation value or national importance that they require national protection, although they are not listed in terms of paragraph (a), (b) or (c).

A permit is required for carrying out of restricted activities involving listed species.[186]

The restricted activities relating to TOP species include:

- hunting, catching, capturing or killing any living specimen of a listed TOP species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;
- exporting from the Republic, including re-exporting from the Republic, any specimen of a listed TOP species;
- having in possession or exercising physical control over any specimen of a listed TOP species;
- growing, breeding or in any other way propagating any specimen of a listed TOP species;
- conveying, moving or otherwise translocating any specimen of a listed TOP species;
- selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed TOP species; or
- any other prescribed activity which involves a specimen of a listed TOP species.

The Minister may by notice in the *Gazette* prohibit an activity which is of a nature that may negatively impact on the survival of a listed TOP species or declare that a permit is necessary for such activity.[187]

The Act also sets out certain duties of the Minister with respect to trade in TOP species[188] including monitoring compliance with the permitting system for restricted activities and with the relevant international agreements[189] and prescribing a system for the registration of institutions, ranching operations, captive breeding operations and other facilities.[190]

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[186] Section 57(1).
[187] Section 57(2).
[188] See section 59 generally.
[189] Section 59(a).
[190] Section 59(f).

The Minister is empowered by section 97 to make regulations regarding restricted activities.[191] The *final regulations* are made under section 97(1)(b) – the carrying out of a restricted activity involving a listed TOP species. The *final regulations* will be discussed in more detail in section 7 of this dissertation. Failure to comply with such regulations may be made an offence.[192]

It is an offence to carry out a restricted activity involving a TOP species without a permit, to fail to comply with the conditions of a permit, or to allow another person to do so. It is also an offence to fail to comply with a notice prohibiting an activity.[193] A person convicted of an offence under this section is liable to a fine or imprisonment for up to five years or both. The maximum fine is R20 000 or (if the specimen in terms of which the offence was committed is a TOP species) the greater of R20 000 or three times the commercial value of the specimen in respect of which the offence was committed.[194] 'Commercial value' is not defined; this may lead to problems of interpretation but this provision is a useful one in the context of large predators as the commercial value of the animals is generally high. For fines to act as a deterrent they should have the potential to exceed substantially the pecuniary benefit to the person committing the offence.

The Biodiversity Act is therefore the key national law concerned with management of large predators from a conservation and biodiversity protection point of view. All of the

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[191] Section 97(1)(iii).
[192] Section 98(2).
[193] Section 101.
[194] The figure of R20 000 is calculated using the formulas in section 98 (2) of the Biodiversity Act and in section 92(1) of the Magistrates Court Act 32 of 1944 and may therefore change from time to time.

large predators and some smaller predators can potentially be regulated by inclusion into the lists of threatened or protected species. The importing, keeping and breeding of alien large predators is made subject to a permit being required. The Act does not, however, directly regulate hunting of alien species. The Act perpetuates the current system of regulating activities through the mechanism of permits to be issued either by the Minister or a provincial body. This is potentially an effective mechanism but, as suggested above, depends on provinces having sufficient information on species at their disposal and the capacity to consider applications, impose appropriate conditions and enforce them.

5.3.5 National Environmental Management: Protected Areas Act

The National Environmental Management: Protected Areas Act ('the Protected Areas Act)[195] came into force on 1 November 2005 and is to be read with the Biodiversity Act in its application to protected areas.[196] The Act provides for new categories of protected areas:[197]

- national parks;
- special nature reserves (which will include areas which were special nature reserves in terms of the Environment Conservation Act);[198]
- nature reserves (this will include wilderness areas and existing provincial nature reserves);
- protected environments;
- world heritage sites in terms of the World Heritage Convention Act;[199]
- specially protected forest areas forest nature reserves and forest wilderness areas declared in terms of the National Forests Act;[200] and
- mountain catchment areas declared in terms of the Mountain Catchment Areas Act.[201]

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[195] Act 57 of 2003.
[196] Section 6.
[197] Section 9.
[198] Act 73 of 1989.
[199] Act 49 of 1999.
[200] Act 84 of 1998.
[201] Act 63 of 1970.

The Minister (DEAT) may publish norms and standards for the management of special nature reserves, national parks, nature reserves (including wilderness areas), protected environments, world heritage sites and marine protected areas.[202] The objectives of protected areas are defined[203] and these include 'to provide for the sustainable use of natural and biological resources[204] but also 'generally, to contribute to human, social, cultural, spiritual and economic development'.[205]

Management of protected areas will be assigned to appropriate bodies who must administer the area in terms of a management plan and in accordance with the regulatory framework and the purpose for which it was proclaimed.[206]

The Act provides that regulation or restriction of activities in protected areas will be by means of:

- regulations made by the Minister under section 86;[207]
- regulations made a provincial MEC under section 87 in the case of provincial and local protected areas;
- by-laws made by the relevant municipality, in the case of local protected areas; and internal rules made by the managing authority of the area under section 52.[208]

The management authority of a national park, nature reserve or world heritage site may carry out commercial activities in the park or activities aimed at raising revenue or to allow a local community to use the resources of the park in a sustainable manner 'despite

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[202] Section 11.
[203] In section 17.
[204] Section 17(h).
[205] Section 17(k).
[206] Section 40(1).
[207] Regulations under this section have been published (GN1060 and GN1061 in *Government Gazette* No. 28181 of 28 October 2005). These are discussed in the section following.
[208] Section 49.

any regulation or by-law referred to in section 49, but subject to the management plan of the park, reserve or site' provided these do not negatively affect the survival of any species or disrupt the integrity of the ecological systems in the park or reserve.[209] This provision could potentially be used to permit commercial hunting but only if the management plan did not prohibit it. If the hunting involved a listed TOP species then a separate permit would be necessary in terms of regulations made under section 86, and which are discussed in subsection immediately following.

Section 6 of the Protected Areas Act provides that the Act must, in relation to any protected area, be read, interpreted and applied in conjunction with the Biodiversity Act.

5.3.6 Regulations for the proper administration of special nature reserves, national parks and world heritage sites[210]

As mentioned in the preceding section, regulations have been issued[211] which control restricted activities in special nature reserves, national parks and world heritage sites. In terms of these regulations, a wide spectrum of activities (including hunting, capturing, moving or trading in) involving listed threatened or protected species are defined as 'restricted activities'.[212] Engaging in restricted activities without the prior written consent of the management authority of the protected area concerned is prohibited. [213]

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[209] Section 50.
[210] GN1060 and GN1061 in *Government Gazette* No. 28181 of 28 October 2005.
[211] In terms of section 86 of the Protected Areas Act (GN1060 and 1061 in *Government Gazette* No. 28181 of 28 October 2005).
[212] Regulation 45.
[213] Which includes any species listed in terms of section 55 of the Biodiversity Act.

Providing the management plan allows it, the management authority may grant a permit allowing sustainable use of biological resources.[214]

There is therefore the potential for hunting to be permitted in national parks and special nature reserves either in terms of the regulations (by obtaining a permit from the management authority) or in terms of the Act itself,[215] provided that, in each case, the management plan allows it.

At the time of writing no regulations regarding restricted activities in provincial protected areas had yet been gazetted.

5.3.7 Game Theft Act

The Game Theft Act[216] was passed to protect the game farming and eco-tourism industries by altering the common law rules set out above relating to the acquisition and loss of ownership of certain wild animals. This is clear from the fact that the Act defined 'game' narrowly to mean 'animals which are kept or held for commercial or hunting purposes.' The definition of 'game' also includes the meat, skin, carcass or any portion of the carcass of that game.[217] The Game Theft Act therefore does not apply to animals which are not hunted for sport or for food, or to animals which might be so hunted, but

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[214] Regulation 5.
[215] Section 50.
[216] Act 105 of 1991.
[217] Section 1.

are not kept for commercial or hunting purposes. Neither of these terms is defined in the Act.

Section 2(1)(a) of the Act provides that, notwithstanding the common law, a person who keeps game on land that is sufficiently enclosed or in a pen or kraal or in or on a vehicle will not lose ownership of that game if it escapes from such enclosed land or from such pen, kraal or vehicle.[218] Land is regarded as sufficiently enclosed for the purposes of the Act where the landowner has obtained a certificate to this effect from the relevant provincial authority. The certificate remains valid for three years.[219]

Furthermore, in terms of section 2 (1)(b), game hunted or captured on the land of another person either unlawfully or without the consent of the owner of the land, does not become the property of the hunter or person catching or hunting it but ownership vests in the owner of that land. The effect of the section is that ownership for the purposes of the Act vests in the person from whose land the animal has escaped or on whose land the animal is captured or hunted. Taking or killing that animal would therefore constitute theft.

Section 2(1)(b) does not require that the land on which the animal is hunted or captured should be sufficiently enclosed as is the case for section 2(1)(a); it merely provides that ownership of game hunted 'on the land of another person without the consent of the owner or lawful occupier' vests in the owner of the land. Section 2(2), which amplifies the requirements for 'sufficient enclosure' specifically refers to section 2(1)(a) and not

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[218] Section 2(1)(a).
[219] Section 2(2)(a).

section 2(1)(b). According to Freedman, it is arguable that sections 2(1)(a) and 2(1)(b) both create new methods of acquiring ownership of wild animals (that can be defined as 'game'). Freedman's view is ultimately that this is not the case, but rather that section 2 provides for a fictitious form of ownership which operates only within the context of the criminal law.[220]

Section 3 makes it an offence to enter another person's land with intent to steal game or to disperse game from that land; or, without entering another person's land, intentionally dispersing or luring away game from that land. Upon a conviction for stealing game or malicious injury to property, where the property concerned is game, the court may award compensation to the owner of the game.[221]

Given the restricted definition of 'game', some writers have queried whether the Game Theft Act will apply to animals which escape from national or provincial reserves in respect of which hunting is prohibited.[222] While it is arguable that some reserves are operated at least partly as commercial operations, the provincial authorities are not required to have a certificate of enclosure and therefore do not fulfil this requirement of the Act. The effect is that animals escaping from these protected areas revert to the status of *res nullius* and can lawfully be hunted, captured or killed by anyone who obtains the

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[220] W Freedman 'Rules of the "Game": a comment on section 2 of the Game Theft Act' (2000) SAJELP Vol 7 no. 1 140, 142.

[221] Section 7.

[222] This point was also briefly touched on, but unfortunately not decided, by Fabricius, J in *Vorster v Department of Economic Development, Environmental Affairs and Tourism* 2006 (5) SA 291 (T) 301. In considering whether the applicants, whose farm bordered a protected area, should be permitted to hunt elephant that had broken the fence and ventured onto applicants property, the Judge held that it was clear from the Limpopo Environmental Management Act (7 of 2003) that officials in the Department were not the owners of the elephants but "merely custodians of the elephants for the benefit of the public and for the protection of the environment and the animals themselves."

necessary permit. Since protected areas are established to protect biodiversity from indiscriminate destruction, this is a further indication that the Game Theft Act was enacted (and in fact serves) mainly to protect commercial interests rather than those of biodiversity conservation.[223]

Therefore, although the Game Theft Act alters the common law principle that wild animals are *res nullius*, it does so only in very limited circumstances. Its primary purpose is to prevent game farmers from losing ownership of escaped animals, rather than to control the hunting of wild animals. Animals that are not 'hunted or kept for commercial purposes' are not afforded protection under the Act.

5.3.8 Animals Protection Act [224]

The Act applies to any animal, including wild animals, in captivity or under the control of any person. Neither 'wild' nor 'wild animal' is defined but large predators are clearly within the ordinary meaning of 'wild animal'. The Act therefore potentially applies to any activity involving a large predator provided the large predator is in captivity or under the control of the person concerned. The sole aim of the Act is the promotion of animal welfare.

The Act makes it an offence, among other things, to:

- ill-treat, neglect, infuriate, torture or maim or cruelly beat, kick, goad or terrify any animal; or

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[223] Freedman (note 220 above) 141-142. See also Burgener *et al* (note 150 above) 23.
[224] Act 71 of 1962.

- confine, chain, tether or secure any animal unnecessarily or in such a way as to cause that animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather; or
- unnecessarily starve or under-feed or deny water or food to any animal; or
- lay any poison or infectious agents 'except for the destruction of vermin or marauding domestic animals' without taking reasonable precautions to prevent injury or disease being caused to animals; or
- use on or attaches to any animal any equipment, appliance or vehicle which causes or will cause injury or disease to such animal; or
- liberate any animal in such manner or place as to expose it to immediate attack or danger of attack by other animals or by wild animals ('save for the purpose of training hounds maintained by a duly established and registered vermin club');
- lay any trap or other device for capturing or destroying any wild animal the destruction of which is necessary for the protection of property or for the prevention of the spread of disease; or
- having laid any such trap or other device to inspect and clear it at least once each day; or
- convey, carry, confine, secure, restrain or tether any animal in such a way as to it unnecessary suffering or in conditions affording inadequate shelter, light or ventilation or in which such animal is excessively exposed to heat, cold, weather, sun, rain, dust, exhaust gases or noxious fumes or without making adequate provision for suitable food, potable water and rest for such animal where necessary; or
- without reasonable cause to administer to any animal any poisonous or injurious drug or substance; or
- by wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the commission or omission of any act, to cause any unnecessary suffering to any animal; or
- kill any animal in contravention of a prohibition in terms of a notice published in the *Gazette* under subsection (3). The subsection allows the Minister to prohibit by notice in the *Gazette* the killing of an animal specified in the notice with the intention of using the skin or meat or any other part of such animal for commercial purposes.[225]

There is a presumption that the owner of any animal is deemed to have permitted or procured the commission or omission of any act in relation to that animal if, by the exercise of reasonable care and supervision in respect of that animal, he could have prevented the commission or omission of the act.[226]

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[225] Section 2.
[226] Section 2(2).

The Act is administered nationally by the Department of Agriculture. Officials of any branch of the Society for the Prevention of Cruelty to Animals are empowered to enforce the provisions of the Act.[227]

5.3.9 Performing Animals Protection Act[228]

This Act is to be read with the Animals Protection Act and 'animal' in this Act has the same meaning as in the Animals Protection Act.[229] The Act prohibits the exhibition of an animal unless a licence for that animal has been obtained.[230] A licence is obtainable from a magistrate and is valid for one calendar year. A further certificate must be obtained in respect of the proposed exhibition.

This aim of the Act is purely to promote animal welfare by controlling the exhibition of animals and the treatment of exhibited animals. The Act is concerned with the promotion of animal welfare and does not confer any rights on animals. Regulations under the Act make it an offence to exhibit an animal which is injured or suffering from a disease. They also provide that an applicant for a licence must state whether he or she has been previously charged or convicted of cruelty to animals. In addition, the regulations require an applicant to specify the number and species of animal to be exhibited and the cost of

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[227] Section 8. The Societies for the Prevention of Cruelty to Animals Act (Act 69 of 1993) provides for the establishment of a National Council of Societies for the Prevention of Cruelty to Animals (section 2) and for the registration of regional societies (section 8).
[228] Act 24 of 1935.
[229] Section 11.
[230] Section 1.

accommodating and feeding such animals. Proof that the applicant has sufficient income to meet the stated costs must be furnished. A licence under this Act costs only R50.[231]

5.4 National wildlife policy

5.4.1 National Biodiversity Strategy and Action Plan

The National Biodiversity Strategy and Action Plan (NBSAP) was prepared by DEAT during the period 2003 to 2005, partly in fulfillment of South Africa's obligations under the Convention on Biological Diversity.[232] Article 6 of the Convention requires parties to develop national strategies, plans or programmes and to integrate conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

The overarching goal of the NBSAP is to 'conserve and manage terrestrial and aquatic biodiversity to ensure sustainable and equitable benefits to the people of South Africa, now and in the future'[233] and it sets out strategic objectives, outcomes and activities for achieving the goal. The strategic objectives are that:

1. an enabling policy and legislative framework integrates biodiversity management objectives into the economy;
2. enhanced institutional effectiveness and efficiency ensures good governance in the biodiversity sector;
3. integrated terrestrial and aquatic management across the country minimises the impacts of threatening processes on biodiversity, enhances ecosystem services and improves social and economic security;

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[231] GN R1672 in *Government Gazette* No. 15102 of 1 September 1993.
[232] Page 7.
[233] See page 27.

4. human development and well-being is enhanced through sustainable use of biological resources and equitable sharing of the benefits ; and that
5. a network of conservation areas conserves a representative sample of biodiversity and maintains key ecological processes across the landscape and seascape.

NBSAP is too broad to have specific reference to large predators but several outcomes and activities associated with Strategic Objective 4 are of relevance to hunting. According to the strategy, this strategic objective 'relates primarily to the benefits that people get from direct use of biological resources, whether at a household level (for subsistence or trade) or by sectors which are dependent on the renewal of these resources, and which will suffer economic losses if the resources are not well managed or are lost. This includes sectors such as eco-tourism, fishing, hunting and ranching (wildlife and domestic livestock).'[234]

Moreover, the activities which are advocated in connection to the strategic objective include that the sustainable use of game animals and birds 'should be promoted as an alternative conservation compatible land use that provides economic benefits' and that 'the potential for appropriate sustainable resource use in protected areas should be assessed and included in park management plans'.[235] The NBSAP notes that:

> The wildlife industry in South Africa, including eco-tourism and hunting, already contributes significantly to economic growth, job creation and expansion of land under biodiversity management. More could be done to grow the sector and enhance its sustainability, for example, by expanding the scope of use of biological resources, broadening the resource base and developing, among others, management guidelines, norms and standards. This could apply to both communal and privately owned land. Partnerships could be developed between government, communities and the business sector as part of poverty alleviation and job creation strategies.[236]

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[234] See page 62.
[235] See page 65.
[236] *Ibid.*

The long term (15 year) targets for Strategic Outcome 4 include that:

- economies based on use of species and genetic resources are optimised and sustainably managed and contribute significantly to livelihoods and equity;
- no species status declines;
- natural products sector contribution to GDP grows by 50 per cent compared to 2005 baseline; and that
- poverty is alleviated through more equitable and effective resource use.[237]

It is therefore clear that there is at least equal weight given to conservation aims and economic development aims in the strategy.

An activity that is advocated in relation to Strategic Outcome 5 is that management plans for critically endangered species need to be prioritised.[238] In terms of section 43(1) of the Biodiversity Act, any person, organisation or organ of state may submit to the Minister (DEAT) for approval a draft management plan for an indigenous species which is either a listed species or which warrants 'special conservation attention...'

5.4.2 Draft Policy on Game Farming

The national Department of Agriculture ('DoA') has published a document entitled 'Publication of Policy on Game Farming for Public Comments'. It is clear that the Department wishes to increase the contribution of game farming to the economy but is of the view that the potential entrants to the market are 'often hampered by a legion of confusing and potentially conflicting legislation and a lack of logistical support...'[239] Game farming is subject both to agricultural and food safety laws like the Animal

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[237] See page 75.
[238] Page 73. No large predators are listed as critically endangered in the *final regulations*.
[239] Paragraph 1.1 of the Policy.

Diseases Act,[240] the Meat Safety Act[241] and the Conservation of Agricultural Resources Act ("CARA")[242] as well as the animal welfare laws and the suite of environmental acts discussed above. An additional complication is the provincial conservation ordinances which are discussed in the subsection following.

Game farming is defined in the policy as any farming activity involving wild animals. 'Wild animal' is not defined, but 'animal' means any wild animal used in a production system that involves human intervention, approved for farming or ranching purposes by the South African Wildlife Ranchers Association[243] and includes the operation of extensive (ranching) systems and systems where animals are fed. These roughly coincide with distinction in the *final regulations* between 'extensive wildlife systems' and 'controlled environments'. Although this is not explicitly stated, it seems that the policy is mainly concerned with wild herbivores 'for the production of venison and for the hunting and eco-tourism industry.'[244]

The broad objective of the policy is to 'cover all the current anomalies and shortfalls hampering the development of a viable game farming sector through a multi-disciplinary framework that can be endorsed by cabinet and all affected national departments for implementation at all levels of governance.'[245]

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[240] Act 35 of 1984.
[241] Act 40 of 2000.
[242] Act 43 of 1983.
[243] Paragraph 2.1.
[244] Paragraph 1.1.
[245] Paragraph 4.

The policy proposes that norms and standards should be developed for 'sustainable game farming as an agricultural activity' and that a national game farm and animal database should be established which would include standard procedures for compliance with NEMA and CARA regulations. The policy should be amended to include measures for compliance with the Biodiversity Act and regulations since they may be applicable if the game farming activity includes species listed under the Biodiversity Act. The policy also recommends the development of guidelines for sustainable ranching to be developed by DEAT and DOA to assist game farmers with compliance with legislation governing the sustainable use of resources.

It is interesting that the policy seeks to promote the intensive and extensive farming of wild animals for the hunting industry (among other purposes) even while the *final regulations* are attempting to prevent captive bred large predators from supplying the hunting industry. This raises the question: why *not* farm large predators for the hunting industry? Put another way: why is there not general concern about 'canned antelope hunting'? Clearly, the ecological impact of hunting large predators is not the same as for hunting of prey species such as antelope, since prey species are much more numerous. However, it is submitted that opponents of canned hunting express their opposition to the practice on the basis of morality as well as citing ecological reasons.[246]

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[246] Minister van Schalkwyk has been quoted in the press as saying 'To see people who are half-drunk on the back of a [truck] hunting lions which are in fact tame animals is quite abhorrent', C Nullis 'South Africa finalizes hunting laws' *The Boston Globe* online 20 February 2007 (http://www.boston.com/news/science/articles/2007/02/20/south_africa_finalizes_lion_hunting_laws/, accessed on 6 April 2008.)

5.5 Provincial nature conservation ordinances

As mentioned previously in this dissertation, historically, both the hunting of and the keeping in captivity of large predators has been regulated mainly at provincial level by a system of permits and licences issued by provincial conservation authorities under the relevant nature conservation ordinance. A detailed discussion of the individual ordinances is beyond the scope of this dissertation, but an overview of the regulatory regime is provided in the paragraphs following.

With the exception of one, the original four main ordinances ('the nature conservation ordinances') enacted by the pre-1994 provinces are all still in force albeit modified by later legislation and adapted for use in the current nine provinces. The exception is the Free State Nature Conservation Ordinance.[247] In addition, Mpumalanga has enacted the Nature Conservation Act.[248] The four ordinances are:

5.5.1 Natal Nature Conservation Ordinance[249]

This ordinance applies in KwaZulu-Natal but has been partially repealed and supplemented by the KwaZulu-Natal Nature Conservation Management Act.[250] Two subsequent amending Acts were published in 1999 but have not come into force and it is not certain when they will do so.[251] The intention of the amending Acts was to repeal the

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[247] Ordinance 8 of 1969.
[248] Act 10 of 1998.
[249] Ordinance 15 of 1974.
[250] Act 9 of 1997.
[251] The KwaZulu-Natal Nature Conservation Management Amendment Acts, 5 of 1999 and 7 of 1999.

old Nature Conservation Ordinance entirely as well as the KwaZulu Nature Conservation Act.[252]

5.5.2 Cape Nature Conservation Ordinance[253]

This ordinance applies in the Western Cape, Eastern Cape Northern Cape and North West provinces. It is in the process of being revised but the new legislation is not yet in place.

5.5.3 Transvaal Nature Conservation Ordinance[254]

This applies in Gauteng province but has been entirely repealed in Mpumalanga province by the Mpumalanga Nature Conservation Act.[255] The latter Act also repealed all of the relevant Bophuthatswana, Lebowa and KaNgwane legislation in Mpumalanga and the North West Province.

Prior to 1994, separate nature conservation legislation was in force in the apartheid-era 'homelands'. The fact that the provincial ordinances have not been extensively reviewed since 1994 means that in some provinces more than one provincial ordinance applies or that former homeland legislation applies alongside one or more provincial ordinances. Conflicts between applicable legislation have contributed to the problem of poor enforcement of legislation.

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[252] Act 29 of 1992.
[253] Ordinance 19 of 1974.
[254] 12 of 1983.
[255] 10 of 1998.

The pre-1994 nature conservation ordinances all take a species-based approach to conservation, dividing fauna and flora into different categories according to their conservation status. As discussed briefly above, these categories differ across the provinces. For example, the Natal Nature Conservation Ordinance defines open game, ordinary game, protected game, specially protected game and endangered mammals.[256] The Cape Nature Conservation Ordinance, on the other hand refers to wild animals, protected wild animals and endangered wild animals.[257]

All of the nature conservation ordinances regulate hunting, capturing, transporting and selling of large predators and other wild animals through a complex system of permits and licences. Generally, there are different provisions relating to hunting on private and state land. Hunting in provincial nature reserves is either by permit or in terms of specific regulations. Exemptions from the permitting requirements will often apply to land-owners who have a certificate of adequate enclosure from the provincial authorities when hunting on their own land, and to their relatives and full-time staff.[258]

The ordinances all require a permit for specific methods of hunting. These usually include snares, traps, baiting, hunting at night or from a vehicle or with dogs. Some ordinances prohibit bow hunting. Some specify a minimum calibre for hunting

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[256] Section 1.
[257] Section 1.
[258] See for example section 47 of Ordinance 12 of 1983.

generally[259] or the calibre of weapon which may be used to hunt a particular species, while others provide that this can be the subject of regulations.

The Nature Conservation Ordinance[260] currently in force in Gauteng and the Mpumalanga Act contains provisions clearly meant to combat canned hunting, in terms of which one may not, without a permit, hunt any protected wild animal (which includes lion, leopard, cheetah, wild dog and brown hyena in Gauteng and lion, leopard, cheetah and spotted hyena in Mpumalanga) by drugging the animal, or using bait or lures or where the animal is confined to an area of less than 400ha (1000ha in Mpumalanga) from which it cannot easily escape. The owner of land or his relative or an occupier may however bait any of these animals where it is found near a carcass which it has 'apparently' killed.[261] Similarly such an owner or other person may hunt these animals without a permit if it is about to cause damage or is causing damage to stock.[262] This must however be reported to the conservation authorities or police within 24 hours.[263]

Most of the ordinances provide for some kind of record keeping by hunters for example, by returns which must be sent to provincial authorities after the hunt has taken place.

All of the ordinances provide for hunting seasons to be declared by proclamation. The proclamations are issued annually and prescribe the different species which may be hunted and in which areas, the daily bag limit for each species and the extent to which

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[259] Section 12 of Ordinance 12 of 1983 (Gauteng).
[260] 12 of 1983.
[261] Ordinance 12 of 1983 section 23(1).
[262] *Ibid* section 18(1)(b).
[263] *Ibid* section 18(2).

otherwise prohibited hunting methods can be used to hunt the species. For example the Western Cape Hunting Proclamation for 2005[264] allows black-backed jackal and caracals to be hunted all year round in unlimited numbers by virtually any method. This reflects the fact that these two species are designated 'problem animals' in the Western Cape.

All of the provinces have legislation that deals with, firstly, species which are regarded as pests or 'problem animals' and, secondly, individual 'damage causing'[265] animals. In the context of large predators, the latter are often escapees from private or state protected areas. The terms are used somewhat interchangeably. The Gauteng and Cape Nature Conservation Ordinances provide for species to be declared 'problem animals'. This is problematic as it has led to the 'systematic and organised' killing of certain species that have been perceived as causing damage, without them actually having caused damage.[266] Problem animals are also the subject of separate ordinances in some provinces.[267] These ordinances designate certain species as problem animals or allow the Minister so to designate them by proclamation. The Cape and Gauteng Nature Conservation Ordinances each contain a separate provision which allows the provincial conservation authorities to issue a permit to hunt an animal or species threatening human life or crops or other property.[268]

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[264] Proclamation 16 in Provincial Gazette 6195 of 17 December 2004.
[265] It would be more grammatically correct to call these animals 'damage-causing animals' but they are referred to as 'damage causing animals' by the *final regulations.*
[266] *Research into Possible Conflict Between Draft Regulations of the Department of Environmental Affairs and Tourism and the Provincial Governments*, April 2008, Endangered Wildlife Trust, Law and Policy Working Group.
[267] Problem Animals Control Ordinance Ordinance (KwaZulu-Natal) 14 of 1978; Problem Animal Control Ordinance 26 of 1957 (applies in the Eastern and Western Cape and the North West province).
[268] Section 18 of Cape Ordinance 19 of 1974 and section 30 of Gauteng Ordinance 12 of 1983.

Some provinces allow the creation of hunt clubs on which a duty to control problem animals is imposed. To facilitate the discharge of this duty, hunt clubs are empowered to enter private land without the owner's permission.

Most importantly, the provisions prohibiting certain methods of hunting are generally suspended in relation to damage causing or problem animals. In Mpumalanga problem animals (such as black-backed jackal or caracals) may be poisoned.[269] In Gauteng animals which are found near a carcass may be killed by the owner of the land in question without a permit or using bait or a trap.[270]

Keeping wild animals in captivity, selling, exporting, importing or moving are also regulated by means of permits. Again, exemptions may apply to land owners who keep in captivity animals captured on their own land.

Failure to obtain a permit either for hunting, keeping in captivity, importing or exporting wild animals is usually made an offence. In Gauteng conviction for such an offence involving lion, leopard, cheetah, wild dog, or brown hyena usually carries a fine of R1500 (for a first offence, rising to R2000 for subsequent offences) or imprisonment for 18 months (increased to 2 years for later offences).[271] However, where the offence involves elephant or rhinoceros, the penalty may include a fine of up to R100 000 or 10

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[269] Section 49 of the Mpumalanga Nature Conservation Act.
[270] Ordinance 12 of 1983 (Gauteng), section 27(1).
[271] Ordinance 12 of 1983. See ss16-25.

years imprisonment or both plus an additional fine of up to three times the commercial value of the animal.

The provincial conservation ordinances are largely outdated[272] and have been enacted and amended on an *ad hoc* basis. In some provinces conflicting pieces of apartheid-era legislation are in force. It is assumed that these ordinances and regulations will be revised after regulations under the Biodiversity Act that are currently being drafted are finalised;[273] but at present the *final regulations* simply add complexity for those who implement the law and those who must comply with it.

Some provinces have instituted a voluntary moratorium on the issuing of permits for captive breeding of large predators, pending the coming into effect of the *final regulations*. DEAT asked the provinces to impose the moratorium in 1997 in the wake of the *Cook Report*. In response to a question in Parliament on 3 September 2004, the Minister indicated that five provinces (Free State, KwaZulu-Natal, Mpumalanga, Northern Cape and Western Cape) had imposed the moratorium since 1997 and that a sixth, Limpopo was undergoing public consultation on the issue. A media report in the *Mail and Guardian* on 24 November 2004[274] suggested that there was some doubt as to how strictly provinces were adhering to the moratorium. Captive breeding permits are not

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[272] The section describing persons eligible for membership of a hunt club in the Problem Animal Control Ordinance 26 of 1957 (which is still in force in the Eastern and Western Cape and the Northwest province) begins 'Every person who is not a Black…'!(Section 5(1)).

[273] Such as the *final regulations*, regulations relating to alien and invasive species and regulations relating to bioprospecting (GN329 in *Government Gazette* No. 29711 of 16 March 2007.)

[274] F McLeod 'Big Cat Permit Dodge Feared', *Mail & Guardian* online, http://www.mg.co.za/articlePage.aspx?articleid=198857&area=/insight/insight__national/, accessed on 20 May 2007.

necessarily issued for a limited time. It is therefore possible that breeding facilities were (and are) continuing to operate under permits issued before the moratorium.

5.6 Provincial policies

The provincial policies are intended to provide guidance on the implementation of provincial legislation but they suffer from the same disadvantages as provincial nature conservation legislation: they are outdated have been developed in an *ad hoc* manner which simply adds complexity.

For example, in some provinces[275] there are policies relating specifically to large predators but again, not all policies define the same group of large predators. A large number of more general policies also impacts on the hunting and captive-breeding of large predators.

Some policies attempt to address welfare issues but in an inconsistent way. In Mpumalanga, the policy on problem animals requires that where it is not appropriate for a hunter (either foreign or local) to destroy a problem animal, a conservation official should do so. While the conservation official is required to 'dispatch such animals as speedily and as humanely as possible', there is no requirement for a hunter to do the same.[276]

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[275] Such as KwaZulu-Natal.
[276] Mpumalanga Parks Board 'Policy on the Control of Dangerous Game in the Mpumalanga Province' 2.

Most provinces have policies which relate to ethical hunting but, again, the criteria for an ethical hunt vary from province to province.

5.7 Local authority legislation

There is very little local authority legislation dealing with the hunting of large predators in South Africa. However, in 2006, the City of Johannesburg Metropolitan Municipality published by-laws for the protection of wild animals and birds.[277] The by-law defines a wild animal simply as any animal other than a domestic or domesticated animal, rat or mouse. 'Hunt' means hunt for, shoot, kill, snare, capture, pursue or search for or lie in wait with intent to kill, shoot, capture or disturb, destroy, wound or maim any wild animal or bird.'[278] The by-law makes it an offence to hunt any wild animal without permission.[279]

6. LAW REFORM PROCESS

In January 2005 the Minister (DEAT) published Draft Norms and Standards Relating to the Management of Large Predators under section 9(1) of the Biodiversity Act and draft regulations in terms of section 97(1)(b)(iii) of the Biodiversity Act relating to the keeping and hunting of wild dog, hyena, leopard, lion and cheetah.[280] The public response to the draft legislation convinced the Minister that further investigation into the hunting

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[277] PN 1335 in *Provincial Gazette Extraordinary* 135 of 10 April 2006.
[278] Regulation 1.
[279] Regulation 2(a) read with regulation 4(a).
[280] GN 72 in *Government Gazette* No. 27214 of 28 January 2005.

industry was necessary. He therefore established the Panel of Experts on Hunting referred to in the introduction to this dissertation, in April 2005.[281] In May he indicated that he was considering a partial or full moratorium on hunting of large predators and that a complete ban on the captive breeding of large predators was 'not excluded from the range of possible policy options'[282] but, in the event, neither of these approaches has been adopted.

The Panel presented its final report to the Minister on 25 October 2005.[283] The report recommended that '[i]n general, the practice of hunting captive bred animals should be disallowed' and suggested that that the release of animals from captive breeding operations into wild populations had serious biodiversity impacts and carried the risk of disease transmission, genetic mixing and release of inferior specimens.[284] The report recommended a complete ban on the import of exotic species for hunting and recommended that indigenous species should not be translocated outside their natural ranges.[285] It suggested that uniform national guidelines are necessary for bow hunting and green hunting and that canned hunting and hunting with dogs should be banned.[286] The Panel felt strongly that 'damage causing animals' should not be hunted via hunting concessions as this leads to 'damage causing animals' being declared artificially. The

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[281] Speech During National Council Of Provinces Policy Debate On Budget Vote 27: Environmental Affairs & Tourism, by Marthinus Van Schalkwyk, Minister Of Environmental Affairs & Tourism, 14 April 2005. See www.environment.gov.za.
[282] 'Minister Broadens Terms of Reference of Expert Panel', DEAT press release dated 31 May 2005 (http://www.environment.gov.za/NewsMedia/MedStat/2005May31_1/31052005_2.htm, accessed on 13 May 2007).
[283] 'Final Draft Report to the Minister of Environmental Affairs and Tourism by the Panel of Experts on Professional and Recreational Hunting in South Africa', 25 October 2005.
[284] Page ii.
[285] Page ii.
[286] Page iii.

Panel recommended that a set of national norms and standards for hunting should be adopted.[287]

Following the Panel's report, a second set of draft threatened or protected species regulations and draft national norms and standards for the regulation of the hunting industry ('the draft national norms and standards for hunting') was published May 2006. Press reports at the time indicated that a further draft of the regulations was to be published in 2007 following further consultation on the question of 'nuisance animals'.[288]

The *final regulations* were published in February 2007 with a commencement date of 1 June 2007, but this was postponed to February 2008, ostensibly to allow stakeholders to prepare for the implementation of the regulations.[289] Amendments to the regulations were made in December 2007 and January 2008. Missing from the *final regulations* are specific provisions relating to the implementation of CITES, which formed Chapter 4 of the 2006 regulations. As indicated above, it is presumed that this will be dealt with by other legislation. No final version of the Norms and Standards for Hunting was published with the regulations. It appears from statements made to the press by the Minister (DEAT) that revised norms and standards will be published at a later date and that these would 'form a framework for provincial legislation and further streamline permitting.'[290]

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[287] Page iv.
[288] C Benjamin 'Environment legislation will soon be ready for comment', *Business Day*, 13 December 2006 (http://www.businessday.co.za/articles/article.aspx?ID=BD4A340792 accessed on 2 September 2007).
[289] See note 8 above.
[290] R Davies 'Minister Cans Captive Lion Hunting', *Cape Times,* 21 February 2007, 5. See also paragraph 8 of the draft National Biodiversity Framework, which was published for comment on 29 June 2007 (GN801 in *Government Gazette* No. 30027).

In a speech made recently to the Professional Hunters Association of South Africa, the Minister made it clear that the *final regulations* are intended to address the canned hunting issue as well as illegal hunting and unethical methods and devices and provide formal recognition by his department to hunting organisations. Speaking about the game farming and hunting industries collectively, he said that he was 'very optimistic about the future of this industry and the great potential to further nurture its economic and conservation worth.' He made it clear that his department prefers industry-led transformation but would regulate as a last resort if the industry did not 'demonstrate the will for real and lasting change'.[291]

7. THE FINAL REGULATIONS

The *final regulations* are made under section 97 of the Biodiversity Act. Section 97(1)(b)(ii) allows the Minister (DEAT) to make regulations regarding 'the facilitation of the implementation and enforcement of section 57(1) or any notice published in terms of section 57(2)'. Section 97(1)(b)(iii) allows the making of regulations relating to 'the carrying out of a restricted activity involving a specimen of a listed threatened and protected species'. Since section 57(1) prohibits the carrying out of restricted activities involving listed TOP species, it appears that 97(1)(b)(ii) and (iii) regulate the same thing. It is not apparent from the *final regulations* which of the subsections they are made under.

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[291] Transcript of speech made at the Annual General Meeting of the Professional Hunters Association of South Africa (http://www.info.gov.za/speeches/2007/07112112151004.htm).

The stated aim of the regulations is, among other things, to further regulate the permit system provided for the in the Biodiversity Act insofar as it applies to TOP species and to provide for the registration of various facilities that deal with listed TOP species. The regulations also aim to deal regulate specific restricted activities involving specific TOP species, particularly hunting and to provide for the protection of wild populations of TOP species.[292]

Broadly speaking, the *final regulations* allow for the declaration of certain species (both flora and fauna) as 'listed threatened or protected species' ('listed TOP species')[293] and, in Chapter 2, create a permit system for activities involving those species, including hunting. Certain restricted activities involving specific listed TOP species are prohibited. Chapters 3 and 4 of the regulations provide for the registration of wildlife traders[294] and various kinds of facilities that involve wildlife, while Chapter 5 deals with the regulation of hunting organisations. Chapter 6 provides for various appeals from decisions of issuing authorities in terms of the regulations and Chapter 7 further regulates the Scientific Authority which must be established in terms of section 60 of the Biodiversity Act. Chapter 8, among other things, sets out transitional arrangements for existing wildlife facilities and traders, makes provision for the setting of annual hunting off-take limits and prescribes offences and penalties.

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[292] Regulation 2.
[293] Regulation 1.
[294] The definition of 'wildlife trader' includes commercial game capturers.

The listed TOP species are divided into categories as contemplated in section 56(1) of the Biodiversity Act, namely, critically endangered, endangered, vulnerable and protected species.[295] This is different from the 2006 draft list which divided the listed species into two schedules. Schedule A contained a list of threatened species and these were further divided into critically endangered, endangered and vulnerable species. Schedule B simply listed protected species in Part I while Part II consisted of any species listed on a CITES Appendix. It is not clear why the listed species are no longer aligned with CITES listings, but it is submitted that an opportunity to make the legal framework regulating species in need of protection more integrated has been missed.

Listed large predators for the purposes of the regulations are, as mentioned earlier: leopard, cheetah, wild dog and hyenas (brown and spotted).[296] Wild dog are regarded as 'critically endangered', while leopard and cheetah are 'vulnerable' and both species of hyena are 'protected'.

It is interesting that lion have been excluded from the definition of 'large predator' in the latest amendments to the regulations. According to a press release by DEAT, lions have temporarily been removed pending the outcome of an action instituted by the South African Predator Breeders Association against DEAT.[297] Although lion are no longer listed large predators, they remain a listed TOP species, and are classed as 'vulnerable'.

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[295] GNR 151 in *Government Gazette* No. 29657 of 23 February 2007.
[296] Regulation 1.
[297] http://www.deat.gov.za/NewsMedia/MedStat/2007Dec14/14122007.html, accessed on 24 March 2008.

7.1 Definitions and concepts

Key features of the regulations include the defining of different kinds of facilities and people that deal with listed TOP species, and providing for compulsory registration of those facilities and people; specific regulation of hunting (which is a restricted activity in terms of section 1 of the Biodiversity Act) and creating a distinction between culling and hunting. The regulations also contain provisions clearly aimed at the control of canned hunting (which take the form of provisions concerned with distinguishing 'wild' animals from those it is considered undesirable to hunt for ethical reasons), and provisions concerned with ethical hunting.

7.1.1 Wildlife facilities

The regulations seek to control various kinds of operations and people involved with wildlife. These include: game farms, captive breeding operations, commercial exhibition facilities, scientific institutions,[298] sanctuaries and rehabilitation facilities (collectively referred to in this dissertation as 'wildlife facilities') and wildlife traders.

A 'captive breeding operation' is defined in regulation 1 as a facility where specimens of listed threatened or protected species are bred in a controlled environment for conservation or 'commercial purposes'. The latter is defined to mean that the 'primary purpose of the restricted activity is to obtain economic benefit, including profit in cash or

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[298] The definition includes organs of state involved in research.

in kind, and is directed towards trade, exchange or another form of economic use or benefit'.

Four further types of operations which could involve large predators as listed TOP species are defined. They are: commercial exhibition facilities, rehabilitation facilities, sanctuaries and scientific institutions. Like captive breeding operations, they are required to be registered.

Provision is made in the regulations for a 'game farm hunting permit'[299] but nowhere in the regulations is a game farm defined. It does not appear as if game farm registration is compulsory; only that a game farm owner may not apply for a game farm hunting permit or standing permit if his or her game farm is not registered.[300]

A registered wildlife trader is a person who may sell (including bartering and exchange), display, offer or advertise a listed TOP species or who may possess such a species for those purposes. The definition specifically includes taxidermists.[301]

7.1.2 Activities involving listed TOP species

In the regulations 'culling' is given a specific definition when it relates to listed TOP species. Culling is defined differently according to whether the operation takes place in a

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[299] See regulations 1 and 5(2)(j) in particular.
[300] Regulation 28(1).
[301] Regulation 1.

protected area or relates to an animal on a game farm. In the first case, the object of the killing must be management of the animal in accordance with the management plan for the protected area and, in the second case, the killing must conducted by the owner or person designated by the owner, and in order to manage the species concerned on that game farm.[302]

'Hunt' in relation to a specimen of a listed TOP animal species has a fairly extensive definition but the intention to kill the animal concerned is a requirement for the activity to be regarded as a hunt. This effectively excludes 'green hunting' from the definition. However, 'darting' is listed in regulation 26 as a prohibited method of hunting except for certain purposes which are discussed on page 105 below. The definition specifically excludes culling of a listed TOP species in a protected area or on a registered game farm or the culling of a listed TOP species that has escaped from a protected area and become a damage causing animal.

Presumably, the distinction between hunting and culling has been made more clear in the *final regulations* in order to prevent animals originating from protected areas being hunted on a commercial basis under the guise of culling or controlling 'damage causing animals'. This is discussed further below.

A 'damage causing animal' is one that, when interacting with human activities, causes losses to livestock or other wild specimens (which includes both plants and animals),

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[302] Regulation 1.

excessive damage to cultivated trees or crops, natural flora or other property, presents a threat to human life or is present in such numbers that agricultural grazing is 'materially depleted'. There must be 'substantial proof' that the animal has caused such loss or damage or presents such a threat to human life or is present in sufficient numbers that it materially depletes agricultural grazing.[303]

The definition has been revised since the 2006 draft regulations in two material respects. Whereas before, a damage causing animal could be any animal, now the definition is restricted to listed TOP species. Secondly, instead of a damage causing animal being one that damages crops, stock or 'property', it is now also an animal that causes damage to 'other wild specimens' or natural flora, within the scope of an interaction with human activities. It is an improvement on the 2006 definition which omitted the word excessive and thus had no materiality requirement with respect to damage to trees, crops and property. However, the phrase 'interaction with human activities' is vague and it is not clear what is meant by 'causing damage to other wild specimens', particularly since it is the nature of predators to cause damage to other wild specimens.

A hunting client is defined to mean a person not resident in South Africa and who pays or rewards a professional hunter either directly or through a hunting outfitter in connection with the hunting of a listed TOP species. A professional hunter for the purposes of the regulations is one who is licensed in terms of provincial legislation. It is not clear why the definition of hunting client is limited to non-residents of South Africa. However, the

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[303] Regulation 1.

word is similarly defined in the Limpopo Environmental Conservation Act,[304] and the Gauteng Nature Conservation Ordinance.[305]

Importantly, the regulations provide for the setting of 'hunting off-take limits' in relation to listed TOP animal species. Off-take limits are set for individual listed TOP species and prescribe a limit on the hunting of that species. The limits are determined by SANBI every year and limits must be set for the country as a whole and per province.[306] Off-take limits do not apply to listed TOP species which are culled in protected areas in accordance with the management plans of those areas.[307] It is not clear why those animals have been excluded or what provision there is for reporting on animals culled in protected areas. It is submitted that the setting of off-take limits is an important new provision in that it effectively fetters the discretion of provincial authorities to grant excessive numbers of permits for hunting and provides for a more coordinated approach to the conservation of large predators than has previously been the case. However, SANBI is only required to set off-take limits for listed TOP species. Therefore, the effectiveness of the system as a tool for biodiversity conservation depends on whether species that are actually at risk are included on the list of TOP species. This in turn depends upon the quality of information provided to the Minister (DEAT) when making or updating the list.

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[304] Act 7 of 2003: "any person who is not normally resident in the Republic, who pays or rewards any other person for or in connection with the hunting of a wild or alien animal" (section 1).
[305] 12 of 1983: "any person not normally resident in the Republic and who pays or rewards any other person for or in connection with the hunting of a wild animal or an exotic animal" (section 1).
[306] Regulation 72.
[307] Regulation 72(2).

The 2006 draft norms and standards required SANBI to keep a National Hunting Register as part of its statutory database. The information which SANBI was required to record was:

- the number of animals of each species for which national and provincial hunting permits are issued annually for each province, national protected area or provincial protected area;
- the number of animals of each species culled in each protected area annually;
- the number of animals hunted for trophy purposes, recreational and biltong purposes or subsistence purposes;
- statistics on different methods of hunting; and
- any other statistics which SANBI may require.[308]

The 2006 drafts also required issuing authorities to keep registers of all applications received by the authority and all permits granted and to report to SANBI regarding these and, specifically, regarding hunting permits issued and animals actually hunted.[309] As indicated in the previous section, revised norms and standards have not been published. It is to be hoped that, if and when they are, these clauses are incorporated, since this information would provide an indication of which species are being hunted, including non-listed TOP species, and could inform the setting of off-take limits and the listing of species in terms of section 56.

7.1.3 Kinds of permits for restricted activities

'Permit' is defined in the *final regulations* to include any permit issued by an issuing authority in respect of any restricted activity involving a listed TOP species.[310]

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[308] Clause 19.
[309] Regulation 34.
[310] Regulation 1.

The regulations make provision for specific kinds of permits. A standing permit is available for people or authorities who may need to carry out a number of restricted activities in the course of operating a wildlife facility or carrying out their duties. Its ambit is quite strictly defined. For example, a standing permit may only be obtained by a provincial or national department in respect of land under its jurisdiction; the management authority of a protected area in respect of activities in that area which are necessary for the management of listed TOP species in accordance with the management plan; veterinarians; a person operating a registered captive breeding facility, sanctuary rehabilitation facility or scientific institution.

As its name implies, a possession permit may be issued solely for the keeping or conveying of a specimen of a listed threatened or protected species "for personal use" without performing any other restricted activity in relating to the specimen. A game farm hunting permit can only be issued to the owner of a registered game farm and may authorise only the buying and hunting of a listed TOP species and the transport and possession of the dead specimen after the hunt. A personal effects permit can only be issued to a registered wildlife trader and authorises a person to buy live or dead specimens of listed TOP species including products from the wildlife trader for non-commercial purposes and keep in his or her possession for a specific period or export it from the Republic.

7.1.4 Control of canned hunting

The regulations distinguish between 'extensive wildlife systems' and 'controlled environments'. Extensive systems are defined in regulation 1 as systems which are 'large enough and suitable for the management of self-sustaining wildlife populations in a natural environment with minimal human intervention in the form of the provision of water or food (except during droughts), control of parasites or the provision of health care' On the other hand, a 'controlled environment' is an enclosure designed to hold specimens of a listed TOP species in a way that prevents them from escaping and facilitates human intervention in the form of provision of food or water, artificial housing or health care and also facilitates the intensive breeding of that species.'

'Wild specimen' means a specimen that is 'living and growing in natural conditions with or without human intervention while a 'wild population' is a group or collection of wild specimens. A 'captive bred animal' is defined as a listed TOP species that was bred in a controlled environment. A 'put and take animal' is defined to mean a live specimen of a captive bred listed large predator species or white or black rhinoceros that is released in an extensive wildlife system for the purpose of hunting the animal within twenty four months. Since lions are no longer regarded as listed large predators, a 'put and take' animal no longer includes lions.

These definitions are a key part of the attempt to control canned hunting, effectively by distinguishing between animals that are wild and those that are, in some respects, tame. It is submitted that, while the species on the TOPs list may represent some animals at risk

from canned hunting practices, the limitation of these provisions to listed species is somewhat arbitrary. Even more arbitrary is the limited definition of put and take animals, particularly now that lion have been excluded, albeit temporarily. It is unclear why it should be unethical to hunt a 'put and take' listed large predator but not any other animal.

7.2 The permit system

The issuing authority for permits is either the Minister (DEAT) or a provincial MEC. The Minister (DEAT) is responsible for permits involving *inter alia* marine species, activities in a protected area or area managed by or under the control of an organ of state,[311] the control of 'damage causing animals' originating from protected areas by a provincial department and activities carried out by a national department on land under its jurisdiction. The MEC may permit all others in that province, except for activities carried out by a provincial conservation department on land under its own jurisdiction or for the control of 'damage causing animals' by a provincial department under regulation 14.[312] Hence, the regulations provide for oversight by the national Minister of actions involving listed TOP species by provincial departments. The MEC must enter into an agreement with SANParks in relation to the control of 'damage causing animals' originating from national parks.[313]

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[311] This is in line with the Constitution, which provides that matters pertaining to national parks and marine protected areas fall within the exclusive competence of national government. (See section 104 read with Schedule 4).
[312] Regulation 3.
[313] Regulation 3(4).

A key feature of the *final regulations* is that a permit issued in terms of provincial legislation for a restricted activity involving a listed TOP species, is regarded as a permit under the Biodiversity Act and the *final regulations*, provided the person who issued the permit was an issuing authority under the regulations. This is a useful saving provision in that it would add considerably to the burden of provincial conservation authorities if they were required to issue two permits (one in terms of provincial legislation and one in terms of the *final regulations*) for the same activity. An exemption issued under provincial legislation is not, however, regarded as a permit or exemption in terms of the regulations. Exemptions issued under provincial legislation will continue to be valid for a period of six months after the *final regulations* come into effect, whereafter the holder must stop the activity or apply for a permit under the regulations.[314] As mentioned in the previous section, many of the provincial ordinances exempt the holder of a certificate of adequate enclosure from obtaining permits that would otherwise be necessary.[315] The effect of the final regulations, therefore, is to increase the regulation of landowners on private land with respect to listed TOP species and this is to be welcomed. Although registered game farm owners can obtain a single standing permit in respect of a number of activities to be carried out on the land, it is submitted that this is a better approach than the exemption approach, in that the issuing authority will have been required to apply his or her mind to each application for a standing permit and the activities it will authorise.

An applicant for a permit for a restricted activity involving a listed protected species on private land owned by someone other than the applicant must obtain the written consent

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[314] Regulation 4.
[315] See, for example, regulation 36 in the Western Cape Nature Conservation Ordinance (19 of 1974).

of the owner of the land. If the activity involves a threatened species then the written consent must also be submitted to the issuing authority. The written consent of the owner is not required for the control of a damage causing animal by a provincial department.[316]

Importantly, the regulations provide guidance for issuing authorities by listing factors which must be taken into account when issuing a permit. These include the following, set out in regulation 10:

- applicable legal requirements;
- whether the species has been listed[317] as an endangered, critically endangered, vulnerable or protected species;[318]
- the IUCN Red Data List status of the species;
- whether the application involves a species which will be taken or removed from a wild population;
- whether the activity is prohibited in terms of the regulations;[319]
- whether the authority has cancelled another permit held by the applicant because false or misleading information was supplied in relation to that permit, or because there was non-compliance with permit conditions or applicable laws;[320]and
- all other relevant factors.

Other factors which may be relevant include:

- information submitted by the applicant;
- any additional information which the issuing authority has requested;[321]
- whether the activity for which the permit is sought is likely to have a negative impact on the survival of the species concerned;
- any biodiversity management plan for the species concerned;[322]
- any recommendations by the Scientific Authority;[323]
- any risk assessment or expert evidence requested by the issuing authority;

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[316] Regulation 7.
[317] In terms of section 56 of the Biodiversity Act.
[318] The regulations only apply to listed species, so what must be taken into account is not whether the species is listed at all, but the level of protection which ought to be afforded to it.
[319] Regulations 23, 24 and 25 set out various activities which are prohibited or in respect of which a permit application must be refused. These include activities involving large predators, rhinoceros or cycads or involving translocation of listed species. These provisions are discussed in more detail later in this section.
[320] The issuing authority is empowered to cancel permits in these circumstances under section 93 of the Biodiversity Act.
[321] Section 88(2) of the Biodiversity Act allows a permit issuing authority to request further information from an applicant before making a decision.
[322] See section 43 of the Biodiversity Act.
[323] The Scientific Authority is empowered by section 61(1)(c) of the Biodiversity Act to make such recommendations.

- any relevant information on SANBI's database;[324]
- any objections; and
- where the activity will take place (registered captive breeding operation, game farm, commercial exhibition facility, scientific institution, sanctuary, rehabilitation facility); and whether a registered wildlife trader will undertake the activity).[325]

Some kinds of applications require the issuing authority to consider additional factors to those listed above. Where the application involves a wild population of a critically endangered species, (wild dog, for example), the issuing authority must require a risk assessment in accordance with regulation 15[326] and must consider whether the activity is in line with the biodiversity management plan, if any, for the species ('the regulation 11 factors').

An issuing authority for a hunting permit must consider the regulation 11 factors and also take into account whether the activity involves prohibited activities listed in regulation 24; prohibited methods of hunting listed in regulation 26; whether the hunt will take place on a registered game farm; whether it involves 'damage causing animals' in terms of regulation 14; in the case of a hunting client, whether he or she is accompanied by a professional hunter, in the case of a disabled person, whether the National Council for Persons with Disabilities in South Africa is of the view that the person is disabled, whether the hunter is a member of a recognised hunting organisation and any relevant hunting off-take limits determined by the Minister in terms of the regulations.[327]

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[324] In terms of section 11(1)(j) of the Biodiversity Act, SANBI must collect, generate, process, coordinate and disseminate information about biodiversity and must establish and maintain databases in this regard.
[325] Regulation 10.
[326] Risk assessments are discussed in more detail later in this section.
[327] Regulation 12.

7.2.1 'Damage causing animals'

Regulation 14 contains provisions relating to 'damage causing animals'. The provisions of the regulations, it must be emphasised, only apply to listed TOP species and the definition of 'damage causing animal' is limited to an individual of a listed TOP species which meets the other criteria set out in regulation 1.

In terms of regulation 14, the provincial conservation departments must determine 'whether an individual of a listed TOP species can be deemed to be a damage causing animal.'[328]

Where the animal has escaped from a protected area, the provincial conservation department concerned must consider three control options: capture and relocation of the animal itself or by the management authority of the protected area concerned; hunting the animal (subject to a permit being obtained for the purpose[329] and according to specified methods by the provincial department or management authority); or capture, re-location, hunting or culling by a person designated by it in writing.[330] The person may not be a hunting client; the intention is, presumably that the control of a 'damage causing animal' that is a listed TOP species may not be a commercial hunt. This provision has probably been included in response to reports that animals were being lured out of protected areas

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[328] Regulation 14(1).
[329] In terms of regulation 5(2)(a), which allows a provincial authority to obtain a standing permit which includes permission to control damage causing animal or regulation 5(2)(c) which allows the management authority to obtain a standing permit to carry out all restricted activities necessary to manage the protected area.
[330] Regulation 14.

by commercial hunting operators who would then hunt them for profit as 'damage causing animals'.[331]

Where an animal has escaped from an area that is not a protected area, it will be dealt with in the same way as for an animal from a protected area, save that there will be no management authority involved.[332]

A permit issued for the hunting of a 'damage causing animal' must specify the methods with which the animal can be hunted. These can include poison (which must be a registered poison)[333] bait and traps, excluding gin traps (but only where the animal is in the immediate vicinity of a carcass of domestic stock or wildlife which it has killed or is about to cause damage to wildlife or domestic stock), dogs (for flushing the animal or tracking a wounded animal), darting (for subsequent relocation) or a firearm which is suitable for hunting. Such a person may in any event lure a damage causing animal using sounds and smell and use a motorised vehicle and lights during the hunt.

When the *final regulations* were first published, the definition of 'culling' included an operation to kill such a damage causing animal 'as a last resort'. This provision was repealed by the January 2008 amendments to the regulations. In effect, there is no longer the requirement that the killing of a 'damage causing animal' must be considered as a

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[331] Patterson & Khosa (note 90 above) 46.
[332] Regulation 14(7).
[333] This is presumably a reference to section 3 of the Fertilizers Farm Feeds Agricultural Remedies and Stock Remedies Act (36 of 1947) which requires agricultural remedies to be registered with the Department of Agriculture. An agricultural remedy is defined in section 1 of that Act to include any chemical substance or biological remedy, or any mixture or combination of any substance or remedy intended or offered to be used for the destruction or control of any vertebrate.

'last resort'. It is submitted that this allows for the killing of a 'damage causing animal', even where other methods exist for its control which may equally protect the people or property threatened by the animal. It would not place the needs of people or property behind those of large predators if the provincial department had to consider first whether the threat by the animal could be as safely and quickly removed by capture and relocation. From an animal welfare perspective, this is particularly unfortunate given that the methods that are specified for the hunting of 'damage causing animals' are those that are normally prohibited such as poison and traps.

A 'damage causing animal' can be killed by a landowner 'in self-defence where human life is threatened' provided that the incident is reported within 24 hours to the relevant issuing authority who can either condone the killing or institute criminal proceedings.[334] It is not clear why only a landowner can kill an animal in self-defence, rather than any person. It is possible that the regulations intended that a landowner can kill animals on his her land only but this is not the effect of the regulations, an oversight that ought to be addressed.

7.2.2 Risk assessments

In terms of section 89 of the Biodiversity Act, an issuing authority has a wide discretion to request a risk assessment as part of a permit application and must do so where the application involves a wild population of a critically endangered species. Regulation 15

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[334] Regulation 14(3).

of the *final regulations* sets out the information which the risk assessment must contain, as determined by the issuing authority concerned.

Broadly speaking this includes information about the species to be hunted, information about the restricted activity concerned, any applicable regulations, policies, norms and standards or international agreements. Also included are the identification, and evaluation, of the potential risks associated with the restricted activity as well as options for minimising and managing the risk. The issuing authority may determine that any other information is necessary. The risk assessment must be carried out by an environmental practitioner[335] who must be independent and have the necessary expertise. An applicant for a permit must take reasonable steps to verify whether the practitioner concerned meets those requirements and has a duty to provide the practitioner with all relevant information at his disposal, whether or not it is favourable to the application.[336]

Risk assessment in the ecological context may be said to be a tool for evaluating 'the likelihood that adverse ecological effects may occur or are occurring as a result of one or more stressors'.[337] One of the strengths of risk assessment in the context of biodiversity assessment is that it is 'unique in providing scientific evaluation of ecological risk that explicitly addresses uncertainty'.[338] It is therefore better able than impact assessment, for example, to deal with the complexities and unknowns inherent in the functioning of

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[335] Regulation 15(2).
[336] Regulation 16.
[337] Department of Environmental Affairs and Tourism 'Integrated Environmental Information Series: Ecological Risk Assessment' 2002, 5.
[338] PBL Tamuno, G. Howard, and MD Smith 'Ecological Risk Assessment (ERA): How Appropriate for Developing Countries? *Environmental Informatics Archives* Volume 1 (2003) 204.

ecosystems. It is also suited to situations where the risk 'problem' is fairly narrowly defined in policy and scientific terms.[339] However, ecological risk assessment is only useful where there is consensus about whether an ecological effect is adverse.[340] Regulation 15(d) provides some guidance in that respect in that it lists degradation and fragmentation of a species' habitat, creation of a significant change in an ecosystem, over-exploitation of a species and hybridisation of a species as adverse impacts that should be considered, among others. It is therefore submitted that risk assessments are a potentially effective tool for assisting decision-makers under the *final regulations*. However, since risk assessment is a complex process and it is likely that some provincial departments lack the capacity properly to evaluate risk assessments provided by applicants, DEAT should provide guidance on the preparation of risk assessments and on how risk assessments should be used by decision-makers.

7.2.3 Administration of permits

The issuing authority must make a decision within 20 days of an application for a permit being made[341] or, where it requests additional information (which it must do within 14 days of receipt of the application), within 20 days of receiving the information.[342] The decision must then be notified to the applicant within five working days. An

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[339] RT Lackey 'Challenges to using ecological risk assessment to implement ecosystem management' *Water Resources Update* 103 1996 46.
[340] *Ibid.*
[341] Regulation 8.
[342] Regulation 9.

unsuccessful applicant must be given reasons and advised of his or her right to appeal the decision under the regulations, if an appeal lies.[343]

The regulations prescribe the contents of permits in some detail. The information which a permit must contain includes details of any conditions imposed by the issuing authority, the identity of the permit holder, the period of validity of the permits, particulars of the specimen of a listed species and the restricted activity in respect of which the permit is issued. The particulars of the specimen may include the sex and markings 'if applicable'. If norms and standards apply to the restricted activity then the permit must be issued subject to the condition that the permit holder must comply with those norms and standards.[344] The permit must specify the location where the restricted activity may take place.

If the permit is a hunting permit, it must specify the methods by which the animal may be hunted.[345] If the permit is for hunting on a game farm or is a personal effects permit then the registration number or standing permit number of the game farm or wildlife trader concerned must be reflected.[346] Such a permit must also stipulate that the holder must apply for either a possession permit (if they don't intend to carry out any other restricted activity with the specimen) or another permit before the expiry of the hunting or personal

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[343] Regulation 17. The right of appeal is granted under sections 94 to 96 of the Biodiversity Act read with Chapter 6 of the *final regulations*, but regulation 54(2) provides that there is no appeal from a decision of the Minister acting personally in his or her capacity as an issuing authority.

[344] Draft norms and standards have recently been issued relating to the management of elephants. (GN224 in *Government Gazette* No. 29674 of 2 March 2007. Since elephant are a listed TOP species, the culling of an elephant would be a restricted activity requiring a permit in terms of the *final regulations*. Such a permit would be required to have as a permit condition compliance with the elephant norms and standards, once finalised.

[345] Regulation 19(3).

[346] Regulation 19(1)(k).

effects permit. Since a game farm hunting permit is issued to the owner of the game farm and allows him or her to authorise another person to hunt on the farm and also to transport and possess the dead specimen after the hunt,[347] it is not clear why a further possession permit is necessary and will create an unnecessary administrative burden on resource – poor administrative agencies, that is (mostly) provincial nature conservation authorities.

A permit in respect of a live specimen is only valid within the area of jurisdiction of the issuing authority or the specific locality where the restricted activity will take place.[348] If the issuing authority is the MEC, then clearly the permit is only valid within that province, but in certain cases, the Minister (DEAT) is the issuing authority.

Most permits may be issued for a maximum period of twelve months. The exceptions are standing permits and possession permits. The former can be issued for 48 months to a provincial or national department or in respect of a protected area or for 36 months to a wildlife facility like a game farm, captive breeding operation or rehabilitation facility. Possession permits can be issued for up to 54 months.[349] A permit may be renewed, provided the application for renewal was made before the expiry of the current permit.[350]

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[347] See the definition of 'game farm hunting permit' in regulation 1.
[348] Except for possession and personal effects permits.
[349] Regulation 22.
[350] Regulation 38(1).

7.2.4 Permit applications which must be refused and prohibited activities

Applications for permits to transfer a listed TOP animal species to an extensive wildlife system which is outside its natural distribution range and is a protected area or where there is a risk of hybridisation with other species or transmission of disease, must be refused.[351] This recognition that animals should not be moved outside of their natural distribution ranges will hopefully ensure greater protection of genetic diversity.

In regulation 24(1), certain activities involving the defined species of large predator or white or black rhinoceros are prohibited. These include the hunting of a 'put and take' animal, hunting in a controlled environment, hunting an animal which is under the influence of a tranquilliser, using a gin trap and selling, supplying or exporting a live specimen unless the person doing so provides an affidavit indicating the purpose for which it is to be sold, supplied or exported and that the ultimate purpose is not hunting activities which are prohibited in terms of this regulation. Similarly, the buyer of such an animal which has been bred in captivity must certify that the species is not purchased or acquired for hunting activities which are prohibited in terms of the regulations

These animals may also not be hunted unless the owner of the land on which the animal is to be hunted provides an affidavit or other written proof indicating how long the animal has been on the land (if not born there) and that the animal is not a put and take animal.

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[351] Regulation 23. Hybridisation is defined in the regulations as cross breeding of individuals from different species or subspecies (regulation 1).

The following is prohibited in respect of listed large predators: hunting a predator in an area adjacent to a holding facility for large predators and breeding in captivity unless the breeder provides a written undertaking to the effect that the no predator of that species will be bred, sold, supplied or exported for hunting activities that are prohibited in terms of this regulation.

However, regulation 24(2) exempts from the provisions of regulation 24(1) activities involving a listed large predator or rhinoceros which has been bred or kept in captivity but which has been 'rehabilitated in an extensive wildlife system' and has been fending for itself in such an area for at least twenty four months.' It is submitted that insufficient thought has been given to the drafting of this regulation. For example, the term 'rehabilitated' is not defined. In addition, because subregulation 1 does not apply in its entirety to a large predator that has been rehabilitated, this arguably means that such an animal can be hunted in the ways set out in 24(1) (b) to (e), that is, in a controlled environment or adjacent to a holding facility or using narcotics or a gin traps. It is unlikely that this is the drafter's intention.

This section is also based on the notion that after a certain period (24 months in the *final regulations* and the previous draft,[352] as opposed to 6 months in the 2005 draft[353]) an

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[352] Regulation 29 in GN 597 in *Government Gazette* No. 28803 of 5 May 2006.
[353] See paragraph 3 of the draft National Norms and Standards for the sustainable use of large predators issued in terms of section 9(1) of National Environmental Management: Biodiversity Act (Act 10 of 2004 published in the schedule to GN 72 in *Government Gazette* No. 27214 of 28 January 2005.

animal can be regarded as wild, and the hunting of it as no longer unethical. This idea has been criticised by animal rights groups.[354]

The regulations also prohibit certain methods of hunting listed threatened or protected species. The prohibited methods include:

- poison;
- traps (with some exceptions including trapping for scientific, veterinary or management purposes);
- snares;
- dogs (except for tracking a wounded animal and pointing, flushing or retrieving);
- darting (unless by a veterinarian or a person authorised by a veterinarian in writing and holding a permit for veterinary, scientific or management purposes);
- with automatic weapons;
- with a weapon discharging a rim firing cartridge of .22 of an inch or smaller calibre;
- shotguns (except for bird hunting);
- airguns;
- bait (except for leopard and hyena where dead bait may be used, fish and terrestrial vertebrates and invertebrates collected for scientific purposes);
- sounds, smell or 'any other induced luring method';
- using lights and vehicles (except for a veterinarian or person authorised by a veterinarian in writing for disease control, scientific veterinary treatment or translocating, tracking an animal over long ranges, culling or allowing a physically disabled or elderly person to hunt) (an elderly person is defined as one over 65 years);
- hunting an animal which is under the influence of a narcotic or tranquilliser;
- trapping an animal against a fence or in a small enclosure where the animal does not have a 'fair chance of evading the hunter'; and
- an issuing authority may not issue a permit for hunting a rhino, crocodile, elephant or listed large predator with a bow and arrow.

In the 2006 draft regulations, only a veterinarian could dart an animal. As mentioned earlier in this dissertation, there have been concerns about the animal welfare implications of 'green hunting' and the prohibition on darting except for veterinary, scientific and management purposes is clearly intended to address this. It is unfortunate

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[354] See, for example, 'South Africa Curbs Canned Lion Hunting', Environment News Service, 21 February 2007, (http://www.ens-newswire.com/ens/feb2007/2007-02-20-02.asp, accessed on 3 June 2007); the NSPCA National Policy on Large Predators at 5 www.nspca.co.za (accessed on 31 October 2005); and the Wildlife Action Group: Comments regarding draft norms, standards and regulations relating to the management and sustainable use of large predators at 9 www.wag.co.za (accessed on 31 October 2005).

that a person authorised by a veterinarian may now dart an animal. Although the darting must still be done for a *bona fide* purpose, in theory a person interested in green hunting could be authorised by a veterinarian. Requiring a veterinarian to carry out the darting would also ensure some level of competence in the person doing the darting. An hippopotamus that had escaped from a protected area was recently darted by employees of a private game farm. The hippopotamus died, and there were allegations that the wrong drug had been used for the darting.[355] It is submitted that allowing persons other than veterinarians to dart animals may not be consistent with the protection of animal welfare.

Leopards and hyenas may be hunted using lights, presumably because they are mainly nocturnal.

Whereas, in the 2006 drafts, bow hunting was not prohibited if permitted by provincial legislation, now the *final regulations* prohibit bow hunting of certain large listed TOP species.[356] Apart from the large species listed in the *final regulations*, provinces still have the discretion to decide which species can be hunted with a bow and arrow. The major consideration in deciding whether to prohibit bow hunting should be whether it is humane to hunt the particular species with that kind of weapon. It is submitted that bow hunting should be banned at a national level, or, if stakeholders consider that inappropriate, then the species which may be hunted with a bow and arrow should be

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[355] M Gosling 'Rondevlei hippo dies after being darted in bid to capture it', *Cape Times,* 30 March 2007, 1.
[356] Regulation 26(8). The species are listed large predator species, crocodile, rhinoceros and elephant.

specified in the draft TOP regulations or hunting norms and standards (i.e. at national level).

The 2006 draft regulations also prohibited hunting with spears or using any other method 'which would result in injuring or killing an animal in a way that is not humane.'[357] This provision has not been included in the *final regulations*. It is submitted that this would be a useful catch-all provision, although the definition of humane might cause some practical difficulties. The ordinary meaning of "humane" is "inflicting the minimum amount of pain".[358] Since pain is experienced subjectively by an animal, it may be difficult for a competent authority to determine whether a particular method of killing an animal would inflict the least possible amount of pain.

7.2.5 Control of wildlife facilities

All wildlife facilities and wildlife traders are required to be registered with the issuing authority.[359] The information to be submitted with each kind of application is specified in annexes to the regulations. If the granting of the approval will affect the rights of a specific person, the applicant must give notice to that person, who may lodge objections in writing within 15 days of being notified.[360] The manner in which notice must be given is not specified and the time-frame for lodging objections seems inadequate.

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[357] Regulation 21(1)(a)(x) in GN 596 in *Government Gazette* No. 287803 of 5 May 2006.
[358] *Concise Oxford Dictionary* 11 ed (2004) 693.
[359] Regulation 27.
[360] Regulation 31.

In considering a registration application, the issuing authority must take into account the conservation status of the species to which the application relates (critically endangered, endangered, vulnerable or protected), the purpose of the facility, all other relevant information and relevant legal requirements and (except in the case of scientific institutions) whether the facility is prepared to microchip each specimen of a listed TOP species it deals with. In an application for a game farm permit, the issuing authority must consider whether the farm is fenced in accordance with the specifications provided for in provincial legislation.[361]

The issuing authority must instruct an official to inspect the premises in terms of regulation 32. The regulation states that the issuing authority must make recommendations about whether the permit should be granted, and on what conditions. Since the issuing authority is the decision-maker, it does not make sense for it to make the recommendations. The intention must have been that the official, rather then the issuing authority, must make the recommendations.

As is the case for permits for restricted activities, there is provision for compulsory conditions of registration. For example, if any norms and standards are relevant, the registration must be issued subject to the condition that the registration holder is bound by the norms and standards and must act in accordance with them.[362] If the registration is sought for a captive breeding operation, rehabilitation facility or commercial exhibition

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[361] Some provincial conservation ordinances allow a person who keeps specified species of animal on a game farm to apply for a certificate to the effect that the land is adequately enclosed as contemplated by section 2(2) of the Game Theft Act. See for example, section 25 of the Western Cape Nature Conservation Ordinance 19 of 1974.
[362] Regulation 34 (2).

facility then the registration must be subject to a condition that the registration holder must prevent hybridisation and/or inbreeding, keep a studbook 'where appropriate' and provide information to the issuing authority once a year about breeding issues.[363] The registration certificate for a sanctuary must stipulate that no breeding is allowed at the sanctuary.[364]

The regulations make provision for a grace period of one year after the regulations come into effect within which existing wildlife facilities and traders may continue to operate but must, at least three months before the end of the grace period, submit a biodiversity management plan to the Minister in terms of section 43 of the Biodiversity Act.[365] This provision, inserted by the January 2008 amendments to the regulations, replaces the earlier provision for a grace period of 3 months that was criticised, particularly by lion breeders, who have speculated that existing facilities that fail to obtain registration under the regulations will have to euthanase their lions.[366] However, it is submitted that the delay in implementing the regulations together with the further period of 9 months to comply afforded by the regulations has given breeders a reasonable opportunity to plan for such an eventuality.

In general, the provisions for registration of wildlife facilities should enable closer regulation of the large predator breeding and hunting industries, which is much-needed. The problem of lack of capacity of the provincial conservation authorities to implement

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[363] Regulation 35.
[364] Regulation 37.
[365] Regulation 71.
[366] *Environment News Service* (www.ens-newswire.com/ens/feb2007/2007-02-20.asp) accessed on 21 February 2007.

and enforce legislation remains but, presumably, the enforcement problem could be alleviated by mandating EMIs to enforce the *final regulations*.

7.2.6 Renewal, amendment, cancellation and transfer of permits and registration certificates

Permits and registration certificates can be renewed but the issuing authority may only consider an application for renewal if all conditions were complied with, there is no indication that the wildlife facility in question is managed in a manner which is detrimental to the species kept there, the conservation of the species has been maintained or improved or the legislation that affects the continuation of the permit or registration has not changed. If the legislation or the conservation status has changed then the issuing authority may request a risk assessment to be submitted.[367]

Both permits and registration certificates may be amended on application by the holder or, in limited circumstances, at the instance of the issuing authority, for example, where it is necessary for the more effective protection of the listed TOP species to which it relates, for more effective enforcement of the Biodiversity Act or the regulations or to give effect to any relevant norms and standard.[368] In deciding whether to grant an amendment, the issuing authority must consider whether the environment or the rights or interests of other parties are likely to be adversely affected.[369]

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[367] Regulation 46. The wording of the subregulation is unclear. It refers also to a permit holder but does not make it clear what the permit holder must do or not do in order to qualify for a permit renewal.
[368] Regulation 43.
[369] Regulation 42.

The circumstances in which a permit can be cancelled are set out in section 93 of the Biodiversity Act. They include where the permit was issued as a result of misleading or false information supplied by the applicant or where there has been non-compliance with permit conditions or with any relevant laws.[370]

A permit or registration certificate relating to a wildlife facility or trader may be cancelled if the holder has breached a permit condition, if the facility or trader is operating in a way which is 'detrimental' to the specimens kept there or not in accordance with information supplied to the issuing authority or where there is a change in the conservation status of the relevant species that affects the continuation of the permit. The holder is entitled to make representations regarding the proposed cancellation of his or her permit or registration and is entitled to appeal the decision.

No permit or registration certificate may be transferred. If ownership of a facility changes, then an application must be made for an amendment of the permit or registration certificate, which amendment must not be 'unreasonably withheld' by the permit authority.[371]

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[370] This includes foreign laws applicable to the restricted activity.
[371] Regulation 49.

7.3 Hunting organisations

Chapter 5 of the regulations provides that hunting organisations, including those in existence when the regulations come into effect, must apply in writing to be 'recognised' by the DG of DEAT.[372] 'Hunting organisation' is defined somewhat clumsily in the regulations to mean 'any organisation that represents hunters and has an accepted constitution and code of conduct that provides for disciplinary actions, should a member not adhere to the code of conduct of the organisation to which he or she is a member.'[373] The application must be approved if the organisation has adopted a 'code of ethical conduct and good practices' and has a clear policy on broad-based black economic empowerment to include persons from disadvantaged communities as members. The code of ethical conduct must further be ascribed to by the organisation's members and must be acceptable to the DG and the organisation must give a written undertaking that it will enforce the code and report criminal conduct involving listed TOP species or a breach of a hunting permit issued in terms of the regulations to the DG, the provincial department or the South African Police Service.[374] A failure to honour the undertaking may result in the withdrawal of the organisation's recognition. The organisation must be given an opportunity to make representations about any proposed withdrawal, but it appears that no appeal lies from the decision of the DG to withdraw recognition.[375]

Further requirements for the code of good practice are set out in regulation 52. These are that it requires its members to act in strict compliance with the law and with any relevant

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[372] Regulation 51() and (2).
[373] Paragraph 2(e) of the Schedule to GNR 1188 of 14 December 2007.
[374] Regulation 51(3).
[375] Regulation 53.

permit conditions, that it defines criteria for hunting specimens of listed TOP species according to the fair chase principle and requires its members to act in strict compliance with the criteria and that it provides for disciplinary measures, including suspension or expulsion from the organisation, against members who breach the code. The 'fair chase' principle is not referred to in the *final regulations* other than in respect of codes of good practice. It seems appropriate that hunting organisations determine what is regarded as a 'fair chase' since, as argued earlier in this dissertation, the concept is more closely related to the sporting aspects of trophy hunting than to the welfare of animals or the protection of biodiversity. However, it is submitted that animal welfare groups should be allowed to have input into codes of good practice since the criteria for hunting may impact on the welfare of the animal being hunted.

7.4 The Scientific Authority

The Scientific Authority is established in the *final regulations* 'in terms of section 60 of the Biodiversity Act.' Its purpose is therefore 'to assist in regulating and restricting the trade in specimens of a listed TOP species.' CITES is not mentioned in section 60 or the regulations, and the regulations do not set out the powers and functions of the Authority. It therefore seems clear that, although the Scientific Authority could be the body referred to in Article IX of CITES, this is not necessarily the case.

7.5 Appeals

The right of appeal against any decision of an issuing authority is granted in terms of part 2 of Chapter 7 of the Biodiversity and further regulated by Chapter 6 of the regulations. Regulation 54(2) provides that no appeal lies against the decision of the Minister in his or her capacity as an issuing authority.

An appellant must lodge the appeal with the director-general within 30 days of the date on which he or she became aware of the decision or could reasonably be expected to have become aware[376] and the director-general must acknowledge receipt within 14 days.[377] The Minister may appoint an appeals panel or decide the appeal himself.[378] If a panel is appointed, it must decide the appeal within 30 days[379] but there is no time limit if the decision-maker is the Minister. It is not clear why the Minister should not be subject to time limits in the same way as the appeal panel; this is inconsistent. Since the failure to make a decision on appeal is a ground for judicial review in terms of the Promotion of Administrative Justice Act[380] ('PAJA'), an appellant under the *final regulations* would have remedy against a failure by the Minister to decide the appeal. However, the appellant would be required to show that the delay was 'unreasonable'.[381] The courts have held that what constitutes an unreasonable delay depends on the circumstances of each case and may depend on a number of factors such as the amount of information

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[376] Section 94 of the Biodiversity Act and regulation 55.
[377] Regulation 56.
[378] Regulation 55(3).
[379] Regulation 57(4).
[380] Act 2 of 2000. See section 6(2)(g).
[381] Section 6(3).

submitted to the decision-maker, the number of similar applications and others.[382] Therefore, an appellant that wishes to take the Minister on review is faced with considerable uncertainty about what constitutes an unreasonable delay.

7.6 Offences

Offences under the regulations include undertaking a restricted activity involving a listed TOP species without a permit or forging a permit or registration certificate. The owners of wildlife facilities excluding game farms commit an offence if they do not comply with conditions of registration or fraudulently alter the certificate. A game farm owner commits an offence if he or she fails to comply with the conditions of the registration certificate, standing permit or game farm hunting permit or fraudulently alters a game farm hunting permit or if prohibited activities take place on the game farm. A person operating as a wildlife trader is guilty of an offence if he or she fraudulently alters a personal effects permit or contravenes the conditions of a registration certificate, standing permit or personal effects permit.[383]

A person convicted of an offence under the regulations is liable to a fine of R100 000 or three times the commercial value of the specimen in respect of which the offence was committed, whichever is greater or to imprisonment for up to five years, or both. It is interesting that section 101 of the Biodiversity Act prescribes a maximum fine of R20

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[382] See *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) and *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) 485.
[383] Regulation 73.

000 for contravening a provision of section 57(1), rather than the R100 000 maximum referred to the regulations. However, as mentioned above, the regulations are not explicitly stated to be made under section 57. It is submitted that tying the amount of the fine to the value of the specimen in respect of which the offence was committed is an appropriate approach to take in the context of large predators where the commercial value of, for example, a trophy lion, can be much more than R100 000. However, section 29(4) of the Environment Conservation Act[384] provides for the imposition of a fine of R100 000 and a further fine of up to three times the commercial value of the thing in respect of which the offence was committed.

7.7 Public reaction to the final *regulations*

According to Bothma and Glavovic, '[f]or any legal dispensation to be effective and enduring, it should be socially and economically relevant.'[385] When the law reform process described above was in its early stages and public indignation over canned hunting practices was high, the Minister indicated that a complete ban on captive breeding of large predators was being considered, as was a moratorium on hunting.

In the event, neither of these policy options has been implemented by the *final regulations*. In this respect they are in line with current policy on wildlife including the NBSAP with its emphasis on expanding the wildlife industry, and the Policy on Game Farming which is intended to promote the farming of wild animals. In allowing captive

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[384] Act 73 of 1989.
[385] Bothma & Glavovic (note 79 above) 258.

breeding operations to breed large predators for 'commercial' purposes rather than for scientific or *ex situ* conservation purposes only, the *final regulations* are permitting the farming of large predators and facilitating the lucrative industry that is trophy hunting.

Public reaction to the *final regulations* has been mixed. Objections from the owners of predator breeding operations have mainly been focussed on the provisions relating to how long a captive bred predator must have been living in an extensive system before it can be hunted (at one stage 6 months but 24 months in the *final regulations*). Their objections are firstly that the provision is irrational and secondly that 'no-one could afford to keep lions for that long without generating income.'[386] The cost of keeping large predators is clearly considerable, for example, in prey species consumed. Animal welfare organisations like SanWild[387] and IFAW have also criticised this provision, but mainly on the basis that either 24 months is too short or that captive bred animals should never be hunted. Other concerns have been about the capacity of the provinces to administer the new system.[388]

A further criticism of the regulations has been that the size of the extensive wildlife system in which the animal must be kept has not been specified.[389] However, it is submitted that this is not necessary, since the size of the system should be determined by

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[386] J Yeld 'We are not Savages, Lion Breeders Testify' *Cape Argus* 29 June 2007.
[387] See www.Sanwild.org.za, accessed on 30 March 2008.
[388] G Rogers 'New permits threat to hunting industry' *The Herald Online* 11 December 2007; 'South Africa Moves to Restrict Canned Hunting' *Planet Ark World Environment News,* 15 December 2006., http://www.planetark.com/dailynewsstory.cfm/newsid/39492/story.htm, accessed on 30 March 2008.
[389] C Mercer 'The New Canned Hunting Regulations in South Africa' 2 http://www.cannedlion.co.za/newregulations.pdf accessed on 14 September 2007.

the minimum size in which wild populations can be regarded as self-sustaining with minimal intervention and this can probably be objectively assessed.

7.8 Critique of the final regulations

As discussed in the second section of this dissertation,[390] some of the first environmental laws in South Africa regulated hunting of large predators and identified certain animals (including large predator species) as 'problem animals'. Today, the regulation of hunting and the control of 'problem' animals (or 'damage causing animals') still form the backbone of provincial nature conservation legislation. The *final regulations* therefore do not represent a radical departure from this basic format of listing species at risk from hunting or that present a threat to human life and property and then controlling their management. However, the *final regulations* are innovative in that they contain the most comprehensive provisions yet for the promotion of 'ethical' hunting and they introduce stringent new controls over wildlife facilities and traders.

The *final regulations* provide a measure of uniformity, in that the management of certain (listed) large predators has been standardised across the provinces which seems more consistent. They also provide for oversight by the national Minister, of actions by the provincial departments, for example, when dealing with 'damage causing animals' of a listed TOP species.

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[390] See pages 10-11.

However, the regulations are extremely complex and do not replace the provincial permitting systems. Provincial government departments and agencies concerned with biodiversity conservation are, in some cases, struggling even to implement the system of provincial permits. The practical effect of the *final regulations* is that provincial bodies have an additional, complex system of permitting to implement and maintain. It is also clear that provincial laws will have to be revised to eliminate conflicts with the *final regulations* to deal with, for example, differences in the way that the conservation status of species is designated, in regulating restricted activities (including exemptions for landowners under provincial legislation) and in the designation of 'damage causing animals' or 'problem animals'. Until this can be achieved, the provinces will have to deal with the fact that there are inconsistencies between the provincial ordinances and the *final regulations,* and this is likely to cause further confusion.[391] A useful provision in the regulations is that which allows the issuing authority to issue an integrated permit.

The *final regulations* are also to be commended in that they provide issuing authorities with more decisional referents in granting or refusing hunting and other permits. They do so by listing the factors which must be taken into account in considering a permit application, by prescribing compulsory conditions, by making provision for risk assessments where the authority deems this necessary and by defining the circumstances in which permits must be refused. In general, the discretion of permitting authorities is considerably guided and fettered by the *final regulations.* Providing decisional referents

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[391] Section 146 of the Constitution prescribes rules for dealing with conflicts between national and provincial legislation falling within functional areas of concurrent legislative competence, which includes the environment. National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation *inter alia* if it is necessary for the protection of the environment (section 146(2)(c)(vi)).

for decision-makers is, according to Hoexter, "a desirable practice, and indeed the Constitutional Court has indicated[392] that it can be entirely unacceptable for a legislature to confer wide discretionary power *without* giving some sort of guidelines."[393]

The provision for the setting of off-take limits effectively allows for closer control of hunting of listed TOP species but this provision should be expanded to make the submitting of data about permits and actual animals hunted to SANBI by the issuing authorities compulsory, as was the case in the 2006 drafts. This would give SANBI a sounder basis for setting off-take limits.

A major difficulty with the *final regulations* is that they apply the principles of ethical hunting in manner that is arbitrary: the provisions relating to prohibited methods of hunting and canned hunting apply only to listed species. Even then, they do not apply to listed species that are 'damage causing animals'. Comment in the press has suggested that, because dogs may not be used for hunting 'damage causing animals', farmers are more likely to turn to the use of traps or poison, which are permitted (except for gin traps). Poison is regarded as less effective than the use of dogs since its effect is non-selective and it can affect birds of prey, meerkats and jackals as well as the targeted damage causing animal.[394]

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[392] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 CC 967.
[393] C Hoexter & R Lyster *The New Constitutional and Administrative Law* Vol 2 (2002) 163.
[394] M Gosling 'Farmers need options: ban on traps, hunting dogs "could lead to use of poison"', *Cape Times,* 30 June 2006, 5.

Furthermore, while banning of hunting of 'put and take' animals is to be welcomed, the limiting of the definition of 'put and take' to certain large predators and rhinoceros' means that this provision is also arbitrary from an animal welfare or 'ethical' point of view. This is especially so since lion are currently excluded from the definition of a 'put and take' animal.

In addition, the regulations require a hunting organisation to have a code of good practice, but his only applies to the hunting of listed species. If one considers that most of the objections to canned hunting practices were on the basis of the perceived cruelty to the animal being hunted, then it is highly cynical to ban those practices only in respect of certain animals. Since the Animals Protection Act applies only to animals in captivity or in the control of a person, it has no application to the process of hunting itself since an animal being hunted is, almost by definition, not in the control of the hunter until he or she has either disabled or killed it. Either the scope of that Act should be expanded or, if norms and standards for hunting are published, they should not be restricted to the hunting of listed species. Because of their limited application, the *final regulations* are not the correct place for provisions relating to the welfare of large predators or any other animal for that matter.

Perhaps the most controversial provisions of the *final regulations* are those relating to ethical hunting. One of the difficulties in responding legislatively to the canned hunting issue is how to define an animal that is sufficiently wild that the hunting of it is can be regarded as complying with the fair chase principle. The *final regulations* deal with this

problem by avoiding any attempt to define a wild animal with respect to internal or behavioural factors. Instead, it allows the hunting of predators that have been 'rehabilitated in an extensive wildlife system' and has been fending for itself for at least two years. However, it is submitted that this provision is arbitrary, and has been rightly criticised by the public; certainly DEAT has not published any scientific study to indicate the basis for this approach. However, it is conceded that it may be administratively impossible to require an issuing authority to ascertain whether the individual animal to be hunted is fearful of humans or not and therefore the approach taken by the *final regulations* represents a practical compromise. A complete ban on hunting of captive bred animals would have been a more consistent approach but this is likely to have a major effect on the hunting industry, which has been identified in policy documents like the NBSAP as an important component of the wildlife industry.[395]

It is further submitted that, for the same reasons, the *final regulations* should have made provision for a national code of good practice for hunting to be developed by stakeholders, rather than allowing hunting organisations to apply different codes, albeit codes approved by the Minister (DEAT). This provision is problematic in any event since the failure by a hunting organisation to enforce its code results in the hunting organisation losing its 'recognised' status. However, there seem to be no particular consequences attached to being recognised or not recognised. It may be that this will be further regulated by Norms and Standards to be published at a later date but this provision is, as matters stand, toothless. Furthermore, self-regulation is only an effective

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[395] NBSAP, 20.

means of governance where the authorities have the capacity (both in terms of skills and sufficient staff numbers) to monitor the industry effectively. It is submitted that this is not the case in South Africa. Indeed, as argued in the fifth section of this dissertation, the provinces in which the most hunting takes place are also the provinces where enforcement of laws is most compromised.

Tighter control of captive breeding operations is desirable but it is arguable whether the attempt to break the link between captive breeding of large predators and canned hunting is successful, given the difficulties with the 24 month rehabilitation period discussed above and because the regulations permit captive breeding of large predators for commercial purposes.

NEMA requires that 'a risk-averse and cautious approach' be applied to actions of all organs of state when making decisions that may affect the environment, which takes into account the limits of current knowledge about the consequences of decisions and actions.'[396] It would be more in keeping with this principle if the regulations had adopted a 'reverse listing' or 'negative listing' approach to listing species under section 56. In this context, this would require making the *final regulations* applicable to all species save those specifically excluded from the list. Whether this approach is practicable, however, is debatable, since it would clearly place a further administrative burden on conservation authorities.

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[396] Section 2(1) read with 2(4)(a)(vii).

Similarly, it is problematic to make special provisions apply only to certain species of large predator and to rhinoceros. Whilst, clearly, these species have been identified as being at risk from canned hunting practices, as indicated earlier, other species are also hunted for trophies, including smaller predators.

Section 43 of the Biodiversity Act provides for the making of BMPs for listed TOP species or those that warrant special attention. To the extent that it is necessary to have special provisions relating to a particular species, it is submitted that this could be achieved via a BMP. This would have the advantage that the population of that species would be considered as a whole and a strategy developed for its long term survival.

8. CONCLUSIONS AND RECOMMENDATIONS

As has been argued above, on the most basic level, the *final regulations* contain some serious drafting errors and inconsistencies and are overly complex. However, the regulations can be said to have substantially achieved their aim of providing for, among other things, greater regulation of certain activities relating to listed TOP species, particularly hunting, and of wildlife facilities involving those species. Aspects of this greater regulation that should be welcomed include the setting of off-take limits and provision for monitoring by SANBI; as well as provision of much more guidance to issuing authorities on the exercise of their discretion in issuing permits and registration certificates.

However, greater regulation means that, in the short term at least, the *final regulations* are likely to increase rather than mitigate the problem of the complexity of the current legal framework governing large predators and in doing so, will impose a greater burden on provincial authorities many of whom are already struggling to implement the existing provincial legislation. This is particularly so given that the *final regulations* conflict with some provisions of provincial ordinances.

The *final regulations* are mainly concerned with the protection of certain species outside of formally protected areas. In this sense, they do not represent a significant departure from the current regime of provincial conservation ordinances. They also do not deal in a comprehensive way with animal/human conflict which is a key issue relating to the management of large predators.

Those who defend trophy hunting point to its potential for job-creation and poverty relief in rural areas. If it is to play a significant role in the upliftment of rural communities, it is necessary to transform the industry from the 'old boys club of white men' as it has been described,[397] and to ensure that the substantial profits from trophy hunting stay with the communities. The *final regulations* do not go very far at all towards transforming the hunting industry in that respect. The implementation of black economic empowerment policies is left up to hunting organisations and is not, in any event, mandatory. It is to be hoped that this will be further addressed by the publication of norms and standards for

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[397] *Statement on Hunting submitted to the Panel of Experts by Community organisations with an interest in conservation and hunting 11 August 2005* Submission to the Panel of Experts on Hunting http://www.environment.gov.za/HotIssues/2005/29062005/Community_statement_on_Hunting.doc accessed on 2 September 2007.

hunting. In general, the provisions relating to self-regulation of the industry seem incomplete.

Similarly, it is doubtful whether the regulations have succeeded in their aim of 'addressing the canned hunting issue', probably because there is no consensus on what actually constitutes canned hunting; in particular, whether captive bred animals can ever be ethically hunted. It is submitted that, in allowing large predators to be bred for commercial reasons and in allowing captive bred animals to be hunted after 24 months in an extensive system, the regulations have failed to break the link between the captive breeding industry and canned hunting practices. Since it seems clear that most canned hunting in South Africa involves lions, the last-minute exclusion of lion from the definition of listed large predator and hence from provisions intended to control canned hunting seems a clear indication that the these provisions have been enacted primarily to protect the credibility of the trophy hunting industry in South Africa.

Bothma and Glavovic are of the view that wildlife law should have as its main purpose the protection of wildlife and its habitat, thereby contributing to the maintenance of genetic diversity and healthy ecological systems.'[398] The *final regulations* are made under the Biodiversity Act which has as its primary objects both the management and conservation of biological diversity and the use of indigenous resources in a sustainable manner. In this context, considerations of animal welfare and of the 'fair chase' seem incongruous and, it is submitted, have no place in legislation designed to protect

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[398] Bothma & Glavovic (note 79 above) 257.

biodiversity and ensure its sustainable use. The reason for this is that the *final regulations* use a system of classifying animals according to their conservation status and then regulating how they may be utilised. The *final regulations* therefore only apply to certain species. It is inconsistent for considerations of animal welfare and ethical hunting to apply only to specific species; and for these considerations not to apply in the case of 'damage causing animals'. The inclusion of animal welfare and ethical hunting provisions in the *final regulations* will lead to those provisions being applied in an arbitrary and unfair manner. A comment made recently by the Deputy-Director of DEAT responsible for biodiversity, Fundisile Mketeni, illustrates this difficulty. Mketeni told *The Star* newspaper that while the government considered the practice of canned hunting to be 'unethical and unwanted', it had no legal basis to ban it. 'If you ban a practice, you must have legal grounds to do so. At the end of the day, we must defend our decisions in court,' he said.[399]

It is therefore submitted that, instead of attempting to silence critics of canned hunting practices, the regulations ought to have focussed on the effect of, firstly, captive breeding of large predators, and secondly, hunting of large predators (particularly captive bred predators), on the survival of those species, the protection of their habitats and the maintenance of genetic diversity and healthy ecological systems. To the extent that animal welfare concerns are relevant to the management of large predators, the Animals Protection Act and its related legislation could provide a more suitable place for provisions relating to animal welfare.

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[399] S Adams 'Rules raise concerns for lions' welfare' *The Star*, 13 December 2006, 2. These comments were made in the context of the 2006 regulations but it is submitted that they apply equally to the *final regulations*.

In Glazewski's view, an anthropocentric approach is implicit in our current legal system, and particularly in NEMA, which holds that environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural and social interests equitably.[400] It is submitted that this is true also of the *final regulations*; they do not venture away from the utilitarian approach to wild animals of the current legal framework, except in slightly strengthening the law relating to cruelty to wild animals. In failing to ban captive breeding of large predators for the purposes of trophy hunting, the regulations perpetuate the commodification of these animals, since there does not seem to be sound evidence that trophy hunting has any conservation value. In this respect, the *final regulations* are consistent with the key policy documents and laws concerning wild animals: the NBSAP and the draft Policy on Game Farming make it clear that the wildlife industry is regarded as a valuable contributor to the economy, while the SADC Protocol emphasises the socio-economic value of wildlife. Ultimately, the approach of the *final regulations* in declining to outlaw trophy hunting of large predators altogether is consistent with the current climate of 'making conservation pay'.

Finally, the regulations do not modify the common law as it relates to the status of wild animals in any material respect. This is a pity, since it could be argued that the common law no longer reflects the changing local and international view of wildlife as part of the public heritage, rather than private property. However, such a fundamental change to the

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[400] Section 2(2).

law relating to biodiversity conservation would most likely require an amendment of the Biodiversity Act itself, or even the Constitution, rather than the regulations.

While it is clear from the developments in Ecuador and the United States discussed in section 2.3 of this dissertation, that significant new steps are being taken elsewhere towards a more biocentric approach by the law, and towards the possibility that in future the rights of large predators may have to be weighed against those of hunters or captive breeders, the final *regulations* have not ventured further into this territory than the existing body of South African law relating to large predators.

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