Other Effective Area-Based Conservation Measures, Biodiversity Stewardship and Statutory Intervention – A South African Perspective

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Abstract

Area-based approaches are a central component of global efforts to conserve biodiversity. While the focus of many countries has been mainly on protected areas, other effective area-based conservation measures (OECMS) have been accorded global recognition in the past decade as a vital complementary approach to protected areas. This recognition has been reemphasised in the *Kunming-Montreal Global Biodiversity Framework* adopted by parties to the *Convention on Biological Diversity* in December 2022, with its Target 3 ratchetting up area-based coverage targets to 30 per cent by 2030. A growing focus and reliance on OECMs to contribute towards achieving this target is anticipated. The international community has in the past few years introduced some guidance to identify, secure, manage, monitor and verify the anticipated long-term biodiversity conservation outcomes of OECMs. Some commentators have argued for domestic legal intervention to complement this general international guidance. The South African Government has recognised the potential contribution of OECMs towards the achievement of domestic and global area-based biodiversity targets in its *National Protected Areas Expansion Strategy* (2018) but has alluded to the need for legal intervention to ensure that they achieve positive and sustained long-term outcomes for the *in situ* conservation of biodiversity. Some domestic commentators have highlighted the strong link between biodiversity stewardship (particularly conservation areas) and OECMs, advocating that these conservation areas should form the priority focus of domestic efforts to identify OECMs. This article scopes this potential link and specifically considers whether the current domestic legal and policy framework applicable to these conservation areas is sufficiently robust to ensure that only appropriate areas are identified as OECMs and that once recognised, they are governed and effectively managed in the long term. It highlights several frailties of the existing framework and drawing from anticipated legal reform in the Western Cape relating to biodiversity stewardship, it proposes a possible model for future national legislation regulating OECMs.

Keywords

Biodiversity; conservation; area-based approaches; other effective area-based conservation measures; law.

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1 Introduction

Area-based approaches have for several decades been viewed as an integral component of global and domestic efforts to curb the rapid demise of the earth's biodiversity. At the global scale, building upon the obligations contained in the *Convention on Biological Diversity* (CBD),[1] several Programmes of Work, Strategic Plans and Targets have been adopted to inform and promote area-based approaches to conservation. These include the *Strategic Plan for Biodiversity 2011-2020* and the *Aichi Biodiversity Targets* adopted by parties to the CBD in 2010.[2] The latter included Aichi Target 11, that introduced a distinction between two types of area-based approaches, namely protected areas and other effective area-based conservation measures (OECMs). The former type was well known to the international and domestic community, having formed the focus of numerous global guidelines and having been embedded in many countries' legal and policy frameworks. The latter type was a new phenomenon and it was only as recently as 2018 that parties to the CBD adopted *Scientific and Technical Advice on OECMs*[3] and the following formal definition of an OECM:[4]

> A geographically defined area other than a protected area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the *in situ* conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio–economic, and other locally relevant values.

The above advice has more recently been complemented by guidelines on *Recognising and Reporting Other Effective Area-based Conservation Measures*[5] (*OECM Guidelines*) produced by the International Union for the Conservation of Nature's (IUCN) World Commission on Protected Areas (WCPA) in 2019.

Several commentators have emphasised the vital complementary role OECMs play to protected areas.[6] Greater emphasis will probably be

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1 *Convention on Biological Diversity* (1992) (the CBD).

2 *CBD, Strategic Plan for Biodiversity 2011-2020* UN Doc UNEP/CBD/COP/DEC/X/2 (2010).

3 *CBD, Protected Areas and OECMs* UN Doc UNEP/CBD/COP/DEC/XIV/8 (2018) para 3 read with Annex III (the *CBD, Scientific and Technical Advice on OECMs*).

4 *CBD, Protected Areas and OECMs* UN Doc UNEP/CBD/COP/DEC/XIV/8 (2018) para 2.

5 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs*.

placed on this role in the future, given that OECMs remain a central component of the *Kunming-Montreal Global Biodiversity Framework*[7] agreed to at the CBD COP 15 held in December 2022. Kunming-Montreal Target 3, embedded in this Framework and the effective replacement to Aichi Target 11, retains the spotlight on both protected areas and OECMs, but significantly increases the ambition calling upon parties to:

> Ensure and enable that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples and local communities, including over their traditional territories.

According to the *World Database on Protected Areas* (WDPA),[8] approximately 15.8 per cent and 1.2 per cent of the world's terrestrial environment is currently situated in protected areas and OECMs respectively. Numerically these percentages comprise of 267 072 protected areas and only 632 OECMs.[9] The small current contribution of OECMs to global coverage targets to date can no doubt largely be attributed to the fact that guidance on what they are and on how to identify, recognise and report on them emerged only in the last few years. With this guidance now in hand and global coverage targets significantly expanded, it seems logical to assume that domestic law and policymakers may turn heavily to OECMs in the future with a view to contributing to Kunming-Montreal Target 3.

South Africa's *National Protected Areas Expansion Strategy* (2018)[10] (NPAES) sets out the country's latest ambition relating to area-based coverage targets. It sets a twenty-year coverage target of 15.7 per cent for estuaries, rivers and wetlands.[11] In the context of other terrestrial ecosystems, the twenty-year coverage targets range from 12.6 to 28.3 per cent.[12] These long-term domestic targets are clearly below those outlined

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6 Gurney *et al* 2021 *Nature* 646; MacKinnon *et al* 2021 *PARKS* 7-12; Donald *et al* 2019 *Conservation Letters* 1-8; Dudley *et al* 2018 *Global Ecology and Conservation* 1-8.

7 *CBD, Kunming-Montreal Global Biodiversity Framework* UN Doc UNEP/CBD/COP/DEC/15/4 (2022).

8 UNEP-WCMC and IUCN 2023 https://www.protectedplanet.net/en.

9 UNEP-WCMC and IUCN 2023 https://www.protectedplanet.net/en.

10 Department of Environmental Affairs (DEA) *National Protected Areas Expansion Strategy (NPAES).*

11 DEA *NPAES* 18.

12 DEA *NPAES* 18.

initially in Aichi Target 11 and subsequently in Kunming-Montreal Target 3. The latter is not surprising, given that the publication of the NPAES preceded the very recent adoption of the Kunming-Montreal Target 3. With currently only approximately 9.3 per cent of South Africa's terrestrial environment internationally recognised as being secured in protected areas,[13] the country needs to make significant strides to increase coverage. Do OECMs perhaps hold one key to unlocking increased coverage in South Africa?

It has been estimated that 48.5 per cent of sites falling within South Africa's key biodiversity areas but outside of protected areas could be regarded as OECMs.[14] Although South Africa currently does not accord formal statutory recognition to OECMs, various domestic policy documents do either expressly or tangentially refer to them. The *National Biodiversity Strategy and Action Plan (2015-2025)*[15] (NBSAP) contains several references to the contribution of "conservation areas" to the country's conservation estate.[16] These are defined as "areas that are not formally protected by the Protected Areas Act but are nevertheless managed at least partly for biodiversity conservation".[17] The potential overlap between these "conservation areas" and OECMs is apparent.

It is these conserved areas that have formed the focus of some recent studies scoping what types of areas could feasibly constitute OECMS in the South African context.[18] These studies have drawn strong linkages between OECMs and biodiversity stewardship, indicating that initial efforts to assess OECMs locally "must be aligned with biodiversity stewardship" to promote collaboration and ensure that limited resources are not diverted away from overlapping area-based approaches.[19] This alignment makes sense, as biodiversity stewardship is similarly an area-based approach that seeks to target and secure land in priority biodiversity areas through the conclusion of agreements between landowners and conservation authorities to achieve an array of objectives largely overlapping those

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13 UNEP-WCMC and IUCN 2023 https://www.protectedplanet.net/en.

14 Donald *et al* 2019 *Conservation Letters* 5.

15 DEA *South Africa's National Biodiversity Strategy and Action Plan (NBSAP) (2015-2025)*.

16 DEA *South Africa's NBSAP (2015-2025)* 12, 18, 19-20.

17 DEA *South Africa's NBSAP (2015-2025)* 19.

18 Marnewick *et al Assessing the Extent of OECMs*; Marnewick *et al* 2021 *PARKS* 57-70. See further the current WWF Nedbank Green Fund Trust Project "Western Cape Other Effective Area-Based Conservation Measures – Recognising, Assessing and Reporting OECMS in the Western Cape" currently being undertaken by Birdlife South Africa in collaboration with Cape Nature and Conservation Outcomes (Birdlife South Africa date unknown https://www.birdlife.org.za/what-we-do/landscape-conservation/protecting-ecosystems/oecms/

19 Marnewick *et al Assessing the Extent of OECMs* 11.

detailed in the OECM definition.[20] The strong correlation between biodiversity stewardship, conservation areas and expanding the country's coverage and network of area-based approaches to conservation is acknowledged in the *National Biodiversity Framework (2019-2024)*.[21]

With its origins dating back to 2002,[22] and currently underpinned nationally by the *Biodiversity Stewardship Guideline*[23] introduced in 2018, biodiversity stewardship has contributed significantly to increasing the percentage of non-state-owned land incorporated in protected areas over the past decade.[24] Does it hold similar potential to increase the percentage of non-state-owned land recognised as constituting OECMs over the next decade? Comprising of three broad stewardship categories spanning formal protected areas (Category 1) to informal partnership areas (Category 3), it is the second category (conservation areas) that has been earmarked by prior studies as holding the greatest potential overlap with OECMs.[25]

This potential is acknowledged in the NPAES, which calls on the Government to evaluate and possibly include them in the assessment of the country's achievement against area-based targets.[26] Prior to doing so, the NPAES indicates that "robust criteria" need to be established to ensure that only "intact, well managed areas with long-term security of biodiversity are included".[27] Furthermore, where "legally binding measures that require effective management" are absent, OECMs may not provide sufficient protection to warrant inclusion in coverage targets.[28] However, the NPAES indicates that once OECMs have been "effectively secured (through legal measures) and are effectively managed, verified and monitored", they may well warrant consideration in determining the country's coverage targets.[29]

Clearly, domestic law and policymakers have earmarked law as playing a central role in identifying, securing, managing, monitoring and verifying the anticipated long-term biodiversity conservation outcomes of OECMs. The sentiments reflected in the NPAES call for a "robust legal framework"

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20 SANBI *Biodiversity Stewardship Guideline* 16.

21 GN 2386 in GG 46738 of 19 Aug 2022 (*National Biodiversity Framework 2019-2024*) 52.

22 Barendse *et al* 2016 *South African Journal of Science* 5.

23 SANBI *Biodiversity Stewardship Guideline*.

24 Between 2008 and 2016, 68% of the expansion of the country's protected areas can be attributed to biodiversity stewardship initiatives (SANBI *Biodiversity Stewardship Guideline* 17).

25 Wright *Review of the Alternative Area-Based Conservation Mechanisms* 2; Marnewick *et al Assessing the Extent of OECMs* 11; Marnewick *et al* 2021 *PARKS* 60, 67.

26 DEA *NPAES* 60.

27 DEA *NPAES* 60.

28 DEA *NPAES* 4.

29 DEA *NPAES* 4.

regulating the above issues in order for OECMs to be counted towards the country's area-based conservation targets. This aligns with calls by some commentators to accord greater consideration to the influence of law on OECMs as a result of the perceived sketchy recognition of this discipline to date in the *Scientific and Technical Advice on OECMs* and *OECM Guidelines*.[30] It also holds the potential to prevent criticism by other commentators against domestic law and policymakers for offering OECMs weak legal protection over the past decade.[31]

This enterprise forms the focus of this article. It seeks to critically explore whether South Africa's current legal framework of relevance to OECMs is sufficiently robust to identify, secure, manage, monitor and verify the anticipated long-term biodiversity conservation outcomes of OECMs. It begins with a brief overview of recent international guidance regarding the form and nature of OECMS and argues for a more robust legal framework governing them. It then critically reflects on the elements of the current domestic legal framework of relevance to OECMs, specifically focussing on those governing the different forms of agreements underpinning conservation areas (Category 2 stewardship options). These options have been earmarked in prior studies as those with significant potential to constitute OECMs.

While acknowledging the efforts of various provincial departments and conservation agencies to promote provincial stewardship initiatives and programmes,[32] the focus of this article is on the national sphere, given that the national government is responsible for reporting on OECMs under the CBD. National intervention may also be required when it comes to introducing relevant policies and laws governing OECMs to ensure consistency across all provinces. The focus here is also on the national laws and policies linked to identifying, securing, managing, monitoring and verifying the anticipated long-term biodiversity conservation outcomes of conservation areas, and not on the national policies and laws providing potential fiscal incentives to support these areas.[33] Finally, the scope of the article is limited to the terrestrial context.

The article concludes by proposing the introduction of national statutory reform aimed at entrenching a more robust legal framework specifically promoting certainty, clarity and consistency in the identification, recognition, management, monitoring and verification of the anticipated long-term biodiversity conservation outcomes of conservation areas

30 Paterson 2022 *Law Environment and Development* 1-20.

31 Maxwell *et al* 2020 *Nature* 225.

32 See for example: CapeNature 2023 https://www.capenature.co.za/stewardship and Ezemvelo KZN Wildlife date unknown http://www.kznwildlife.com/stewardship.html.

33 For a comprehensive overview of these fiscal incentives fiscal benefits, see: SANBI *Biodiversity Stewardship Guideline* 70-77.

(Category 2 stewardship options). It does so to help ensure that where these conservation areas are recognised by the Government as OECMs in the future, they warrant inclusion in the determination of domestic and international coverage targets, and do not become a convenient domestic strategy to simply and perhaps illegitimately bolster domestic coverage targets to accrue international repute.

2 Understanding OECMs and the influence of law

As highlighted above, two key international documents currently aid domestic policymakers to identify, secure, manage, monitor and verify the anticipated long-term biodiversity conservation outcomes of OECMs, namely the *Scientific and Technical Advice on OECMs* and the *OECM Guidelines.* Lawmakers may then create domestic law or amend existing law to regulate OECMs.

The *Scientific and Technical Advice on OECMs* outlines guiding principles and common characteristics of OECMs[34] and criteria for identifying them.[35] These criteria are as follows: the area is not currently recognised as a protected area; the area is governed and managed; the area achieves sustained long-term effective outcomes for the *in situ* conservation of biodiversity; and associated ecosystem functions and services and cultural, spiritual, socio-economic and other locally relevant values are supported, respected and upheld. Each of these criteria is further clarified through additional sub-criteria and a range of indicators, which largely elaborate on the OECMs definitional elements.[36] The *Scientific and Technical Advice on OECMs* also outlines further considerations relating to management approaches and their role in achieving global area-based targets,[37] recognising and promoting diverse management approaches that either intentionally promote the *in situ* conservation of biodiversity as a primary management objective, or facilitate it as an ancillary or secondary management objective. Monitoring and reporting requirements are identified as key components of any management approach.[38]

The *OECM Guidelines* complement the above in three main respects. Firstly, they elaborate on what is meant by each of the elements reflected in the OECM definition.[39] Secondly, they contain a screening tool to assist decision-makers to determine whether a particular area-based

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34 These guiding principles and common characteristics of OECMs are set out in Part A of the *CBD, Scientific and Technical Advice on OECMs* 10-11.

35 These criteria for identification of OECMs are set out in Part B of the *CBD, Scientific and Technical Advice on OECMs* 12-13.

36 *CBD, Scientific and Technical Advice on OECMs* 12-13.

37 *CBD, Scientific and Technical Advice on OECMs* 13-14.

38 *CBD, Scientific and Technical Advice on OECMs* 14.

39 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 3-7.

conservation initiative meets the OECM definitional criteria.[40] If these are met and the consent of the legitimate governance authority for the area has been obtained, the *OECM Guidelines* advocate that the "candidate" OECM should be subject to a detailed empirical review.[41] The IUCN WCPA has developed very recently a *Site-Level Tool for Identifying OECMs*[42] to guide this review. The *OECM Guidelines* provide that areas that pass this detailed empirical review are suitable for reporting in the World Database on OECMs (WD-OECM).[43] Thirdly, the *OECM Guidelines* emphasise the importance of monitoring the effectiveness of OECMs to ensure the achievement of long-term conservation outcomes,[44] and provide some guidance on reporting and verification requirements for warranting the recording of these areas in the WD-OECM.[45] The above guidance fills a significant void that existed for almost a decade following the initial reference to OECMs in Aichi Target 11 in 2010.

One discipline which arguably has a potential influence on identifying, securing, managing, monitoring and verifying the anticipated long-term biodiversity conservation outcomes of OECMs is law. This influence, together with a critique of its lack of recognition to date in the *Scientific and Technical Advice on OECMs* and *OECM Guidelines,* has been scoped elsewhere.[46] The main purpose here is not to repeat this analysis, but merely to re-emphasise some key integral links to contextualise the subsequent domestic analysis.

Law can aid in defining, delineating the boundaries of and differentiating the types of area-based approaches, such as what constitutes protected areas as opposed to OECMs. Law can inform, through the prescription of criteria or planning frameworks, the identification of areas for the potential recognition as OECMs. Law can provide important mechanisms and processes for recognising and securing the land falling within the OECM. Law can inform, enable and control the governance and management arrangements within the OECM. Law can regulate the monitoring and reporting arrangements and requirements to ensure that the identified long-term outcomes of OECMs are realised.

Law clearly has a potential influence on OECMs, something identified by South Africa's authorities in the NPAES. It can have both positive and negative impacts. It can bring clarity, certainty and consistency, and

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40 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 8-12.
41 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 9.
42 IUCN-WCPA *Site-Level Tool for Identifying OECMs*.
43 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 9.
44 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 13.
45 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 13 read with Appendix 3.
46 Paterson 2022 *Law Environment and Development* 1-20.

thereby feasibly promote and ensure the reliability and success of a targeted outcome. In contrast, if perceived by the regulated community as being overly rigid, restrictive and cumbersome, it can undermine public support for and the success of the targeted outcome. The targeted outcome in focus here is OECMs and their capacity to assist the South African Government to significantly expand the coverage of area-based approaches to conservation in the light of the country's current global commitments under the CBD.

The following part of this paper explores the extent to which South African law helps to expand OECMs as an area-based approach.

3 Relevant domestic law and policy framework relevant to potential OECMs

South Africa currently does not accord specific statutory recognition to OECMs. Some national legislation is directly relevant to OECMs, however, most notably the *National Environmental Management: Biodiversity Act*[47] (NEMBA). OECMs are also accorded express recognition in the NPAES and tangential recognition in the *National Biodiversity Framework (2019-2024)* and *Biodiversity Stewardship Guideline* (2018), with the second stewardship category (conservation areas) having been earmarked by prior studies as holding significant potential overlap with OECMs. There have been calls for further clarity from South Africa's legislative and policy framework regarding these conservation areas,[48] with the agreements underpinning these areas seemingly comprising of two types: agreements currently governed by statute (biodiversity management agreements); and those that are not (biodiversity agreements, conservation servitudes, agreements linked to business/industry and biodiversity initiatives and conservation agreements). The general nature of these two different types of agreements and the current legal and policy framework relevant to them are analysed below with a view to determining whether they provide a sufficiently robust legal framework as called for by the NPAES for the conservation areas subject to these agreements to be recognised as OECMs.

3.1 Statutory agreements

The only form of agreement in Category 2 underpinned by legislation is a biodiversity management agreement (BMA). These agreements are connected to the implementation of biodiversity management plans (BMPs). NEMBA enables the national Minister of Forestry, Fisheries and the Environment (MinFFE) to enter into a BMA with any suitable person,

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47 *National Environmental Management: Biodiversity Act* 10 of 2004 (NEMBA).

48 Marnewick *et al Assessing the Extent of OECMs* 16.

organisation or organ of state to implement a BMP or any component of it.[49] Interestingly, the *Biodiversity Stewardship Guideline* indicates that this authority extends to relevant provincial members of the executive council (MECs), but it is unclear from where this authority is derived, calling into question the validity of any BMAs of this nature signed by MECs to date or in the future.[50]

NEMBA contains a comprehensive set of provisions relating to BMPs. These plans, to which the BMA applies, can relate to ecosystems and indigenous species that have been listed as threatened or in need of protection, and those that have not but still warrant special conservation attention.[51] The authority to list ecosystems falls to both the MinFFE and provincial MECs,[52] while that to list species falls only to the former.[53] Numerous species[54] and ecosystems[55] have been so listed, opening up the potential for BMPs to be adopted and for associated BMAs to be concluded with respective landowners. Nothing precludes the MinFFE from concluding a BMA relating to non-listed species and ecosystems for which a BMP has been introduced.

NEMBA details mandatory content for any such BMP, which includes that it be aimed at ensuring the "long-term survival" in nature of the species or ecosystem to which it relates, and that it identifies the person, organisation or organ of state responsible for monitoring and reporting on progress relating to its implementation.[56] The Act does not prescribe the mandatory minimum or maximum duration of a BMP, but it does indicate that the plan must be reviewed at least every five years to ensure that it is achieving its objectives.[57] Provision is made in NEMBA for both intergovernmental and public consultation prior to the adoption and approval of any BMP.[58]

The provisions in the Act relating to these BMPs are complemented by the *Norms and Standards for Biodiversity Management Plans for Species*[59] and the *Norms and Standards for Biodiversity Management Plans for Ecosystems*.[60] These generally detail the scope, purpose and process to develop and implement the plan. The *Norms and Standards for Biodiversity Management Plans for Species* provide no specific clarity on

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49 Section 44 of NEMBA.
50 SANBI *Biodiversity Stewardship Guideline* 19.
51 Section 43 of NEMBA.
52 Section 52 of NEMBA.
53 Section 56 of NEMBA.
54 GN R151 in GG 29657 of 23 February 2007 (as amended).
55 GN 2747 in GG 47526 of 18 November 2022.
56 Section 45 of NEMBA.
57 Section 46 of NEMBA.
58 Section 47, read with ss 99 and 100, of NEMBA.
59 GN 214 in GG 31968 of 2 March 2009.
60 GN 83 in GG 37302 of 7 February 2014.

the duration of the plan but do define "long-term survival" as spanning a human generation of approximately 30 years.[61] The *Norms and Standards for Biodiversity Management Plans for Ecosystems* indicate that any such plan must be developed for a minimum duration of 5 years.[62]

The Minister has to date approved BMPs for the following species: Albany cycad;[63] black rhinoceros;[64] *Pelargonium Sidoides*;[65] bearded vulture;[66] sharks;[67] white rhinoceros;[68] African lion;[69] eleven critically endangered and four endangered cycad species;[70] the Pickersgill's reed frog;[71] Cape Mountain zebra;[72] bontebok;[73] and Aloe Ferox and Honeybush Species.[74] Only one draft BMP has been adopted for an ecosystem, namely the Hartbeesspruit Ecosystem.[75]

While NEMBA and the associated *Norms and Standards for Biodiversity Management Plans* generally provide clear guidance on the nature, scope and procedure for adopting and implementing BMPs, the same cannot be said for the associated BMAs. This Act only enables the MinFFE to conclude such agreements and specifies that they must relate to a BMP or a component of it. It provides no detail on the expected nature, scope, duration and content to be dealt with in the BMA, the process to be followed in adopting it, and any monitoring and reporting requirements relating to it.

The *Biodiversity Stewardship Guideline* fills the void to some extent, detailing some general biodiversity stewardship principles; broad objectives; models, roles and responsibilities relating to institutional arrangements; the identification of biodiversity stewardship priority areas linked to national and provincial planning instruments; implementation mechanisms; and support mechanisms. While helpful, much of the content regarding the crucial implementation mechanisms is heavily weighted to protected areas (Category 1) as opposed to conservation areas (Category 2). In so far as they provide some guidance relating to conservation areas,

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61 GN 214 in GG 31968 of 2 March 2009, 5.
62 GN 83 in GG 37302 of 7 February 2014, 23.
63 GN 416 in GG 34388 of 24 June 2011.
64 GN 49 in GG 36096 of 25 January 2013.
65 GN 433 in GG 36411 of 26 April 2013.
66 GN 350 in GG 37620 of 8 May 2014.
67 GN 258 in GG 38607 of 25 March 2015.
68 GN 1191 in GG 39469 of 2 December 2015.
69 GN 1190 in GG 39468 of 2 December 2015.
70 GN 315 in GG. 40815 of 28 April 2017.
71 GN 423 in GG 40883 of 2 June 2017.
72 GN 214 in GG 41498 of 16 March 2018.
73 GN 1567 in GG 42887 of 6 December 2019.
74 GN 2192 in GG 46597 of 24 June 2022.
75 GN 427 in GG 39922 of 15 April 2016.

they remain guidelines and accordingly fall to the discretion of those involved whether or not to follow them.

Furthermore, they are also not necessarily clear in all respects. Take for instance the duration of BMAs. The *Biodiversity Stewardship Guideline* indicates that these agreements should have a minimum duration of five years. This duration is presumably distilled from the fact that NEMBA prescribes that any associated BMP must be reviewed every five years, but this relates to the review period for the plan and not the duration of the initial plan itself. The five-year duration is also possibly distilled from the *Norms and Standards for Biodiversity Management Plans for Ecosystems* that indicate that duration of such a plan must be a minimum of five years. No similar minimum duration is specified in the *Norms and Standards for Biodiversity Management Plans for Species*. Aligning the duration of the BMAs to the duration of the associated BMP makes sense, but nowhere is this prescribed. Furthermore, one could question whether five years is appropriate, given that NEMBA prescribes that the related BMP must ensure the "long-term survival" in nature of the species or ecosystem to which it relates. This has in turn been defined in the context of species as spanning a human generation of approximately 30 years. Finally, with neither the Act nor the associated *Norms and Standards for Biodiversity Management Plans for Species* prescribing the duration of such a plan, questions could be raised about the *Biodiversity Stewardship Guideline* indicating five years as the minimum duration for BMAs for species.

Broader questions could be raised about whether the proposed five-year minimum duration for BMA would preclude areas subject to these agreements being regarded as OECMs. The internationally adopted definition of an OECM indicates that these areas should be governed and managed in ways that achieve "sustained long-term" outcomes for the *in situ* conservation of biodiversity. While the *OECM Guidelines* provide some details on what constitutes "sustained" and "long term", they indicate only that short-term or temporary management strategies would not be long-term and that management strategies should be "ongoing".[76] They do indicate that short-term regulatory instruments "renewed continuously" may satisfy the long-term definitional component.[77] In contrast, the *IUCN's Protected Areas Management Category Guidelines* equate long-term with "in perpetuity".[78] Given that both protected areas and OECMs constitute area-based measures counting towards the same target, surely similar interpretations should be accorded to the notion of "sustained long-term" in the context of OECMs. If this argument is accepted, then questions could

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76 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 6.
77 IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 6.
78 Dudley *Guidelines for Applying Protected Area Management Categories* 9.

be asked regarding the feasibility of areas subject to a BMA with a minimum duration of five years and no certainty of sustained cyclical renewals over the long term being considered as OECMs.

Notwithstanding being the only option under Category 2 underpinned by statute, the associated legal framework relating to BMA is accordingly disconcertingly vague, but for indicating who can enter into such agreements and that they must relate to implementing BMPs for species or ecosystems. The accompanying policy framework relating to these conservation areas is also rather vague. Some may well argue that this ensures the necessary flexibility and enables the authorities and landowners to tailor the terms of any BMA to suit their specific situations. The corollary to this may be that it fails to provide a robust legal framework entrenching certainty, clarity and consistency when it comes to the Government's formally identifying, securing, managing, monitoring and verifying the anticipated positive and sustained long-term biodiversity conservation outcomes of areas subject to BMAs as OECMs. Is the time not ripe to provide additional statutory clarity on these issues, thereby potentially overcoming the hurdle anticipated in the NPAES regarding the recognition of areas subject to BMAs as OECMs in the future?

According to the *Biodiversity Stewardship Guideline,* as at 2018 no BMAs had been concluded.[79] Two reasons were posited for this: firstly; the conclusion of such agreements is not mandatory; and secondly, the agreements would be relevant only if there were significant implementation challenges with the associated BMP.[80] Are these agreements not by their very nature voluntary, however, and aimed at facilitating the implementation of BMPs, not only at addressing challenges in their implementation? Could the absence of statutory clarity on the nature, scope, duration and content to be dealt with in a BMA, the process to be followed in adopting it and the monitoring and reporting requirements be contributing to their lack of use? If so, and as proposed above, could statutory reform provide essential certainty, clarity and consistency on these issues thereby facilitating their roll-out. Furthermore, with OECMs constituting an area-based approach, is the time not ripe to promote the roll-out of BMPs for ecosystems, as the current absence of plans spanning these ecosystems seemingly undermines the adoption of associated BMAs relating to them, and the potential recognition of the areas subject to these agreements as OECMs?

3.2 Non-statutory agreements

79 SANBI *Biodiversity Stewardship Guideline* 43.
80 SANBI *Biodiversity Stewardship Guideline* 43.

Four additional forms of agreement are recognised in the *Biodiversity Stewardship Guideline* relating to conservation areas (Category 2). These are biodiversity agreements, conservation servitudes, agreements relating to business/industry and biodiversity initiatives, and conservation agreements. None of these are underpinned by a specific statutory framework and they are generally governed by the law of contract and/or the law of property. With no overarching statutory regime, the anticipated nature, scope, duration and content to be dealt with in any such agreement, the process to follow in concluding them and any associated monitoring and reporting requirements can again only be distilled from available provincial and national guidelines, and in the latter context, most recently the *Biodiversity Stewardship Guideline*.

3.2.1 Biodiversity agreements

Biodiversity agreements are concluded between landowners and conservation authorities (mainly provincial conservation authorities) and on occasion non-government organisations (NGOs). The *Biodiversity Stewardship Guideline* indicates that the typical duration of these agreements ranges from five to fifteen years[81] and anticipates the adoption of a management plan for the area subject to the agreement.[82] Furthermore, it highlights that key components of the agreement should include: the management objectives for the area; the rights and obligations of the landowner (which relate mainly to complying with the management plan and any restrictions this may place on the use or development of the area); and the rights and obligations of the conservation authority (which include providing assistance to the landowner to manage the site in accordance with the management plan, and the monitoring and reviewing of the management plan).[83] Some components of these agreements are apparently on occasion registered against the title deeds of the property concerned, thereby extending the legal impact of these components beyond the duration of the biodiversity agreement.[84] On these occasions there is some overlap between these agreements and the conservation servitudes canvassed below.

As in the case of BMAs, the specific guidance on biodiversity agreements contained in the *Biodiversity Stewardship Guideline* is rather vague. In addition, many of the issues raised above regarding the value of these *Guidelines* in providing clarity, certainty and consistency in the implementation of BMAs and the potential recognition of areas subject to them as OECMs[85] are equally relevant in the context of biodiversity

81 SANBI *Biodiversity Stewardship Guideline* 19.
82 SANBI *Biodiversity Stewardship Guideline* 43.
83 SANBI *Biodiversity Stewardship Guideline* 43.
84 Wright *Review of the Alternative Area-Based Conservation Mechanisms* 19.

agreements. These issues include their discretionary nature and their rather skewed focus on protected areas as opposed to conservation areas. Similarly, many of the concerns raised above regarding the anticipated duration of BMAs are equally applicable to biodiversity agreements. Do biodiversity agreements with a duration of five to fifteen years without provision for compulsory renewal over the long term ensure that areas subject to them are managed and governed in a manner that achieves "sustained long-term" outcomes for the *in situ* conservation of biodiversity? Overall, questions could similarly be raised about whether the current national policy framework, in the form of the *Biodiversity Stewardship Guideline*, informing the roll-out of biodiversity agreements is sufficiently "robust" to satisfy the concerns outlined in the NPAES relating to their potential recognition as OECMs. If not, would the introduction of a more robust overarching statutory framework governing biodiversity agreements bring certainty, clarity and consistency when it comes to the Government formally identifying, recognising, managing, monitoring and reporting on areas subject to biodiversity agreements as OECMs?

3.2.2 Conservation servitudes

Conservation servitudes (also called conservation easements and covenants in other jurisdictions) are founded in South African common law. They are underpinned by an agreement concluded between a landowner and a third party, often an NGO or conservation authority.[86] The agreement requires the landowner to set aside the property or a portion of it in favour of the third party for specified conservation purposes. The terms of the agreement are incorporated in a deed of servitude that is then registered against the title deed of the property, thereby ensuring that these terms are binding on both the current and the future owners of the land. This registration process is governed by legislation, namely the *Deeds Registries Act*[87] (DRA). Other legislation may potentially be relevant in the context of conservation servitudes where, for example, they span "agricultural land" or involve the imposition of restrictions on property rights. This legislation includes the *Subdivision of Agricultural Land Act*[88]

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85 See part 3.1 above.

86 SANBI *Biodiversity Stewardship Guideline* 19-20. See generally on the law applicable to servitudes: Van Der Walt *Law of Servitudes*. For a comprehensive overview of conservation servitudes in South Africa, see: Theart and Meiring 2020 *SAJELP*.

87 *Deeds Registries Act* 47 of 1937 (DRA).

88 *Subdivision of Agricultural Land Act* 70 of 1970 (SALA). SALA governs the subdivision of agricultural land, which is broadly defined in s 1 to effectively include all land falling outside of South Africa's old municipal areas prior to these being amended to span the whole of South Africa through the *Local Government Municipal Demarcation Act* 27 of 1998. The Act prohibits the grant of a right over agricultural land for a period of more than ten years (s 3(e)(ii)) and the imposition of

(SALA) and land-use planning legislation.[89] So while not expressly provided for by legislation, there are some laws generally applicable to the roll-out of conservation servitudes in South Africa.

The *Biodiversity Stewardship Guideline* specifically notes the legal complexity of conservation servitudes and highlights some substantive and procedural issues parties should take into account when considering a conservation servitude.[90] These issues include: assessing the suitability of the site; delineating the boundaries of the area subject to the servitude; the process to secure the delineated area through a conservation servitude; the duration of the agreement underpinning the servitude (ideally being in perpetuity but with a minimum duration of five years); the preparation and approval of an environmental management plan for the area; annual monitoring of the area against the plan; and the review of the plan at least every five years.[91] As in the context of the BMAs and biodiversity agreements discussed above, the guidance on these issues is rather vague and discretionary. This leaves much of the complexity unresolved, thereby again potentially reducing the future appetite of the Government to recognise areas subject to conservation servitudes as OECMs, if the sentiments reflected in the NPAES are anything to go by. While entrenching a great degree of flexibility, questions may again arise whether or not the introduction of some overarching statutory framework governing conservation servitudes would bring the much-needed certainty, clarity and consistency when it comes to the Government formally identifying, recognising, managing, monitoring and reporting on areas subject to conservation servitudes as OECMs. Such an approach would not be unique as some countries have introduced statutory frameworks to govern conservation servitudes with a view to overcoming some of the common law constraints associated with their use.[92] South Africa is yet to

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a servitude over agricultural land (s 6A) without the prior consent of the Minister of Agriculture, Rural Development and Land Reform.

89 This would arise where there is a potential conflict between the applicable zoning for the property and the terms of the conservation servitude; or the need for municipal approval to impose, remove or alter the title deed conditions linked to the conservation servitude. Application legislation would include the *Spatial Planning and Land Use Management Act* 16 of 2013, relevant provincial planning legislation and relevant municipal planning by-laws. See further Theart and Meiring 2020 *SAJELP* 116-117.

90 SANBI *Biodiversity Stewardship Guideline* 19-20.

91 SANBI *Biodiversity Stewardship Guideline* 19-20.

92 See generally: Rodgers and Grinlinton 2020 *MLR* 373-405. Extensive use has, for example, been made of conservation easements in the United States of America, with associated federal and state legislation governing them. For a general overview of this legislation, see: Jay 2012 *Harv Envtl L Rev* 5-34, 43-61. One of the most recent statutory reforms is the United Kingdom's *Environment Act* 2021, with chapter 7 providing for a comprehensive legal framework governing conservation covenants.

do so in the conservation context, but there is precedent from the freshwater context and the integrated coastal management context of legislation providing for servitudes.[93]

The value of introducing some statutory framework is perhaps bolstered by recent moves to formalise the link between conservation servitudes and environmental authorisations regulated by the *National Environmental Management Act*[94] (NEMA), with the link being biodiversity offsets.[95] Commentators have previously been cautious about this link, advocating national regulations, guidelines or a policy position on biodiversity offsets to ensure consistency in their implementation, the adequacy of monitoring and enforcement arrangements, and that biodiversity offsets do not result in perverse outcomes when it comes to securing priority biodiversity areas.[96]

The draft *National Biodiversity Offset Guideline*[97] (*Draft NBO Guideline*) published for comment by the Department of Forestry, Fisheries and the Environment in March 2022, partially heeds the above call. It makes specific reference to conservation servitudes as a possible mitigation option in the context of environmental authorisations granted under NEMA. It is anticipated that, once finalised, the *Draft NBO Guideline* will be introduced under section 24J of NEMA as a complement to the Act's Environmental Impact Assesment (EIA) Regulations.[98] The *Draft NBO Guideline* outlines that the purpose of a biodiversity offset is to assist the country in meeting its international biodiversity targets, including area-based targets.[99] Two main mechanisms to secure biodiversity offsets are identified, namely: declaring the land subject to the biodiversity offset as a protected area; or registering a conservation servitude over the land in perpetuity.[100] Spanning both mechanisms, the *Draft NBO Guideline* sets out a range of principles for biodiversity offsetting; an exceptionally detailed process for identifying the need for, form of and site for a biodiversity offset; securing the biodiversity offset site; preparing a

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93 See further: Van Der Walt *Law of Servitudes* 514-523.

94 *National Environmental Management Act* 107 of 1998.

95 A "biodiversity offset" is defined as "the measurable outcome of compliance with a formal requirements contained in an environmental authorisation to implement an intervention that has the purpose of counterbalancing the residual negative impacts of an activity, or activities, on biodiversity, through increased protection and appropriate management, after every effort has been made to avoid and minimise impacts and rehabilitate affected areas" (*Draft National Biodiversity Offset Guideline*, GN 1924 in GG 46088 of 25 March 2022, 21).

96 Theart and Meiring 2020 *SAJELP* 131; Brownlie *et al* 2017 *Impact Assessment and Project Appraisal* 248-256.

97 GN 1924 in GG 46088 of 25 March 2022.

98 GN 982-985 in GG 38282 of 4 December 2014 (as amended).

99 *Draft National Biodiversity Offset Guideline* 13.

100 *Draft National Biodiversity Offset Guideline* 23, 43-44.

biodiversity offset management plan; incorporating relevant biodiversity offset conditions in the associated environmental authorisation; concluding a biodiversity offset implementation agreement; and setting up a biodiversity offset register to accurately record them.

With conservation servitudes acknowledged in the *Biodiversity Stewardship Guideline* as one mechanism to constitute a conservation area, and conservation areas being identified in local contemporary studies as potential OECMs, the key link between biodiversity offsets and OECMs is apparent.

In contrast with the *Biodiversity Stewardship Guideline*, the *Draft NBO Guideline* is exceptionally detailed when it comes to conservation servitudes as a key mechanism to secure biodiversity offsets, reading more like regulations than guidelines. With a view to filling the current domestic statutory void relating to conservation servitudes generally; bringing certainty, consistency and coherence to their implementation; and giving the valuable detail contained in the *Draft NBO Guideline* legally binding weight, questions may be asked regarding whether the adoption of some statutory regime governing conservation servitudes is desirable. This statutory regime could draw heavily from the detailed *Draft NBO Guideline*, and formally recognise biodiversity offsets linked to conservation servitudes as one form of OECM. It could also potentially streamline the application of the above-mentioned laws of general relevance to conservation servitudes, such as the DRA, NEMA and its EIA Regulations, SALA and national, provincial and municipal planning legislation.

Notwithstanding the detailed advice reflected in the *Draft NBO Guideline*, this link may to some extent be undermined by issues relating to the proposed duration and long-term effectiveness of a biodiversity offset and the associated conservation servitude. One of the proposed foundational principles for biodiversity offsetting is that it must result in the long-term security and management of priority biodiversity, with any offset intervention (such as a conservation servitude) enduring for a minimum of 99 years.[101] While recognising the desired long-term nature of the mechanism, the *Draft NBO Guideline* also indicates that the holder of the environmental authorisation to which the biodiversity offset relates is responsible for implementing and financing it effectively only for a minimum period of 30 years.[102] The choice of this minimum duration is founded upon the apparently wide acceptance that "30 years is the minimum period within which meaningful biodiversity outcomes could be achieved"; and that it constitutes the "length of a human generation".[103]

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101 *Draft National Biodiversity Offset Guideline* 18.

102 *Draft National Biodiversity Offsets Guideline* 63, 67, 68.

Upon termination of this period, the *Draft NBO Guideline* anticipates that the management of the biodiversity offset will be handed to another consenting suitable person, organisation or organ of state.[104] Whether there will be another consenting entity to finance and implement the biodiversity offset after the termination of the 30-year period is uncertain. Many of the biodiversity offset arrangements may accordingly have a secured duration of 30 years. Whether areas subject to 30-year biodiversity offset arrangements would satisfy the OECM definitional element of "sustainable long-term" is debatable.[105] In addition, whilst the conservation servitude registered against the title deed of the property may outlive the 30-year duration of the obligations imposed on the holder of the environmental authorisation, scholars in other contexts with far longer track-records of using conservation servitudes have historically questioned their theoretical "perpetual nature" and called for statutory intervention to improve their long-term security.[106]

3.2.3 Agreements relating to business/industry and biodiversity initiatives

Often driven by a conservation NGO, these initiatives focus on both an industry and a landowner scale.[107] They generally take the form of a conservation NGO, working together with a particular agriculture sector/industry, introducing a sector or industry-wide initiative to promote, for example, conservation and biodiversity-friendly farming practices by those involved in a particular agricultural sector or industry. Participation in the initiative by relevant landowners engaged in the relevant agricultural sector/industry is entirely voluntary and underpinned by an agreement concluded between the landowner and the relevant conservation NGO. In return, the landowners can receive certification that they are members of the initiative and accrue additional forms of support from the NGO to develop environmental management plans, set conservation targets and prioritise certain conservation action. The *Biodiversity Stewardship Guideline* does not outline an anticipated duration for these agreements and does not suggest that their terms be secured against the land in question, thereby feasibly ensuring their long-term duration. Little further specific guidance is provided by the *Biodiversity Stewardship Guideline* on the form, nature, and process to adopt as well as how to implement and monitor these agreements.

As in the case of all the other forms of biodiversity stewardship agreements discussed above, the guidance on these specific agreements

103 *Draft National Biodiversity Offsets Guideline* 63.
104 *Draft National Biodiversity Offsets Guideline* 76.
105 What does or should constitute "sustained long-term" in the context of OECMs is canvassed in part 3.1 above and is not accordingly repeated here.
106 See generally: Jay 2012 *Harv Envtl L Rev*; Brewer 2011 *LCP.*
107 SANBI *Biodiversity Stewardship Guideline* 20.

provided in the *Biodiversity Stewardship Guideline* is rather vague. This again raises questions regarding the value of the *Guideline* in providing the necessary clarity, certainty and consistency in the implementation of these agreements and the potential recognition of areas subject to these agreements as OECMs. Questions could be raised again regarding whether the current national policy framework (the *Biodiversity Stewardship Guideline*) informing the roll-out of these agreements is sufficiently "robust" to satisfy the concerns outlined in the NPAES relating to the potential recognition of the area subject to them as OECMs. As in the context of several of the agreements discussed above, would the introduction of a more robust overarching statutory framework governing these agreements bring certainty, clarity and consistency when it comes to identifying, recognising, managing, monitoring and reporting on areas subject to these agreements as OECMs?

3.2.4 Conservation agreements

Conservation agreements constitute the least formal biodiversity stewardship option in Category 2.[108] They comprise of an agreement concluded between landowners or those who use resources in a particular area, and funding institutions. These funding institutions can include government agencies, NGOs and the corporate sector. Through the conclusion of an agreement, the landowners or users receive socio-economic benefits from the funding institutions in return for undertaking conservation measures or sustainable land use practices in the area subject to the agreement.[109] The range and extent of these benefits can vary extensively and are proportional to the extent of measures and practices undertaken by landowners or users in the area. The nature of these measures, practices and benefits is set out in the conservation agreement, with the anticipated duration of the agreement generally being three years, with the possibility of renewal. The *Biodiversity Stewardship Guideline* does anticipate rigorous monitoring requirements embedded in the agreements to verify the measurements and realisation of the anticipated measures, practices and benefits, but no guidance is provided on the form, nature, extent and regularity of these requirements. No provision is made for securing the terms of the agreement against the land in question, thereby feasibly ensuring their long-term duration. Accordingly, the same criticisms and questions raised in the context of the agreements relating to business/industry and biodiversity initiatives discussed above apply in the context of conservation agreements.

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108 SANBI *Biodiversity Stewardship Guideline* 20.

109 SANBI *Biodiversity Stewardship Guideline* 20.

4 Towards some form of national statutory framework for OECMs

The preceding analysis in part 3 has sought to argue that notwithstanding the valuable guidance provided by the *Biodiversity Stewardship Guideline* and the existence of various laws and additional draft guidelines of relevance to facilitating the roll-out of conservation areas in South Africa, it is debatable whether cumulatively this constitutes a sufficiently robust legal framework as advocated in the NPAES, for these areas to be regarded as OECMs. As highlighted in part 2 above, legislation may promote certainty, clarity and consistency in the identification, recognition, management, monitoring and verification of the anticipated positive and sustained long-term biodiversity conservation outcomes of OECMs. It can thereby ensure that they are worthy of recognition towards global and domestic area-based conservation targets and can promote support for them.

The introduction of statutory provisions in South Africa regulating conservation areas might bring additional certainty, clarity and consistency, satisfy calls in the NPAES for a more robust legal framework, and thereby promote their recognition as OECMs. The question which remains is what form the statutory intervention should take? This in turn raises questions relating to which sphere of government should introduce the statutory reform, what configuration it should take and what issues it should regulate, being constantly mindful of the desire to build in the necessary flexibility and mitigate the pitfalls associated with introducing too rigid and restrictive a scheme.

With the negotiation, signing and reporting on commitments made by South Africa under international instruments (such as the CBD) falling to the national executive,[110] any statutory intervention may most appropriately be introduced through the national sphere. This would ensure uniformity in the regulation of conservation areas across the country, which is seemingly vital in so far as these areas are to be recognised and counted towards domestic and global area-based targets.

If the national sphere is chosen for the statutory intervention, would it be better to enact new stand-alone legislation or simply to embed the relevant statutory reform in existing legislation? Introducing new stand-alone legislation may result in unnecessary legislative fragmentation, and scoping potential and appropriate existing national legislation in which to integrate provisions dealing with conservation areas may preclude this. With OECMs to which conservation areas relate crucially recognised as distinct from protected areas, perhaps the *National Environmental*

[110] Section 231(1) of the *Constitution of the Republic of South Africa*, 1996.

Management: Protected Areas Act (NEMPAA) is not the best home for such reform. This hesitancy could be overcome if the name of NEMPAA were to be amended to refer to both protected areas and conserved areas, and the Act's content were to be substantially reorganised to clearly reflect legal differentiation in the regulation of these different area-based approaches. Another and perhaps more viable option would be to amend NEMBA to refer to conservation areas. With NEMBA generally providing for the long-term management and conservation of South Africa's biodiversity and already regulating BMAs, perhaps it is the best home for including provisions regulating all forms of conservation areas and their recognition as OECMs. This argument is potentially bolstered by the fact that NEMBA already regulates botanical gardens, which while not falling in biodiversity stewardship, have been recognised by some domestic commentators as meeting all the OECM definitional requirements.[111]

If NEMBA were to be selected as the "legislative home" for conservation areas and their recognition as OECMs, the next potential question would be what form should the statutory intervention take? Should it take the form of a new Chapter and set of detailed provisions being included in NEMBA governing conservation areas and their recognition as OECMs, or simply the inclusion of additional powers accorded to the MinFFE to introduce regulations governing these issues? Regulations theoretically constitute a more expedient and flexible approach, adoptable and adaptable at the instance of the MinFFE as opposed to proceeding through a comprehensive parliamentary process on each occasion. However, this flexibility could undermine the long-term security of the relevant statutory intervention and the actions taken in terms of it. Perhaps a blended approach is required to benefit from both approaches. If so, what issues should be addressed through such statutory intervention and what form should each take.

The NPAES highlights the issues relating to OECMs in general requiring a robust legal framework, which are as follows: identification; recognition; management; monitoring; and verification of the anticipated long-term biodiversity conservation outcomes of conservation areas. Additional valuable guidance can be drawn from recent provincial legislation in the form of the *Western Cape Biodiversity Act*[112] (WCBA), which contains the first attempt to legislate biodiversity stewardship in South Africa. This Act enables the MEC to enter into biodiversity stewardship agreements with landowners, thereby creating a biodiversity stewardship area in respect of the area subject to the agreement.[113] It also enables the MEC to prescribe

111 Marnewick *et al Assessing the Extent of OECMs* 46.
112 *Western Cape Biodiversity Act* 6 of 2021 (WCBA).
113 Section 42(2) of WCBA.

by way of regulation: different categories of biodiversity stewardship areas; criteria and conditions underpinning each category; the process to register, amend the boundaries of and withdraw the registration of biodiversity stewardship areas; the rights, duties and powers of landowners who enter into biodiversity stewardship agreements; the criteria and objectives for management plans for biodiversity stewardship areas; and matters relating to the proper management of these areas.[114] Cape Nature, the provincial conservation agency, is responsible for the monitoring and oversight of the biodiversity stewardship agreements and associated biodiversity stewardship areas and an annual report to the MEC is required.[115] Landowners may even be held accountable if they breach a biodiversity stewardship agreement, through the imposition of administrative penalties.[116] Acknowledging that additional rights and accordingly remedies may accrue to the parties concerned through the law of contract and property law, this Act indicates that these administrative penalties do not affect any person's common law rights and remedies.[117]

The precise contours of the above provincial statutory framework regulating biodiversity stewardship embedded in the WCBA are yet to be determined since these regulations are yet to be prescribed. The entry into force of the provisions in the WCBA relating to biodiversity stewardship has accordingly been delayed pending the promulgation of these regulations.[118] When drafting these regulations, the Western Cape Government will hopefully draw heavily on the recent broad guidance provided in the *Biodiversity Stewardship Guideline* relating to conservation areas (Category 2), thereby promoting policy coherence, and giving statutory weight to their content. It will also hopefully ensure that these biodiversity stewardship areas meet the definition and guidance provided in the context of OECMS, thereby enabling them to be recognised as such. Crucial in this regard, and as highlighted on several prior occasions in this article, is the anticipated duration of these biodiversity stewardship agreements, with their needing to ensure that the biodiversity stewardship areas are "governed and managed in ways that achieve positive and sustained long-term outcomes for the *in situ* conservation of biodiversity".

The anticipated provincial statutory framework for biodiversity stewardship areas in the Western Cape provides a possible model for the type of robust legal framework anticipated by the *NPEAS*. As such, it feasibly

114 Section 42(1) of WCBA.
115 Section 42(3) of WCBA.
116 Section 42(4) of WCBA.
117 Section 42(5) of WCBA.
118 Certain components of the WCBA commence on 15 November 2022 (Proc18 in PG 8682 of 11 November 2022), but these expressly exclude chapter 6 (part 3) dealing with biodiversity stewardship.

provides valuable guidance to the national authorities regarding the potential development of future national legislation governing conservation areas. Could similar provisions be included through future reforms to NEMBA? If so, and as proposed above, would it not then be prudent to preclude promulgating discrepant similar provisions in provincial conservation legislation to minimise duplication and promote clarity, consistency and certainty? If so, perhaps the Western Cape should hold back on developing a specific provincial regime.

While providing a possible model for key issues to include in a national statutory framework for conservation areas, these constitute only one broad grouping of areas in South Africa that could feasibly be recognised as OECMs. Other areas recently identified by scholars[119] after a broad initial screening as meeting all or most of the characteristics of an OECM include: indigenous and natural forests;[120] national botanical gardens;[121] national and provincial heritage areas;[122] and biosphere reserve buffer zones.[123] These are regulated under an array of provincial and national legislation. Again, with a view to promoting certainty, clarity and consistency, is the time not ripe to introduce some overarching statutory provision formally defining an OECM in the South African context? A provision of this nature could include a list of areas regulated under other laws (such as those mentioned above), where these laws are recognised as constituting a sufficiently robust legal framework to ensure that these areas are "governed and managed in ways that achieve positive and sustained long-term outcomes for the *in situ* conservation of biodiversity"? Where this is the case, some process embedded in domestic legislation to formally register them as OECMs with a view to subsequently reporting on them internationally may facilitate recognition and promote coherence. For the reasons argued above, perhaps the best place for the inclusion of provisions of this nature is again in NEMBA.

5 Conclusion

The recent adoption of the *Kunming-Montreal Global Biodiversity Framework* and its Target 3 will put pressure on the South African Government to significantly ratchet up its efforts to expand the country's conservation estate. Several recent domestic policies have recognised OECMs as a potential mechanism to do so and have alluded to the need for more robust legal intervention to identify, secure, manage, monitor and

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119 Marnewick *et al Assessing the Extent of OECMs* 46-47.

120 These are regulated under the *National Forests Act* 84 of 1998.

121 These are regulated under NEMBA.

122 These are regulated under the *National Heritage Resources Act* 25 of 1999.

123 These are regulated by some provincial laws, namely the *KwaZulu Natal Nature Conservation Act* 29 of 1992 and the *Western Cape Biosphere Reserve Act* 6 of 2011, with the latter anticipated to be repealed by the WCBA s 87.

verify the anticipated long-term biodiversity conservation outcomes of OECMs. Against this backdrop, this article has sought to critically review the existing legal framework applicable to conservation areas falling under the broad rubric of biodiversity stewardship, as recent domestic studies have drawn very strong linkages between these areas and OECMs. This critical review has highlighted several frailties of the existing legal framework relating to conservation areas. Drawing inspiration from the anticipated legal reform in the Western Cape relating to biodiversity stewardship, it has proposed a broad model for future national legal reform regulating OECMs introduced under NEMBA.

The fundamental premise underpinning the argument for additional statutory intervention is to promote clarity, certainty and consistency, and in turn ensure the reliability and success of the anticipated biodiversity outcomes associated with OECMs. Statutory intervention of this nature may be regarded by some as unduly rigid, restrictive and cumbersome, thereby potentially discouraging landowners from supporting OECM initiatives. A possible response to this may be that having fewer recognised OECMs properly regulated to achieve verifiable positive and sustained long-term biodiversity conservation outcomes is better than having many in number that fail to achieve similar outcomes in the absence of proper legal intervention. The former could build the domestic and global credibility of OECMs as an area-based measure, while the latter could undermine such credibility.

In this regard, it is noteworthy that a perusal of the WDPA indicates that currently seven per cent of South Africa's terrestrial environment (some 85 000 km^2) is apparently already incorporated in OECMs, with these areas largely matching the buffer and transitional zones of the country's ten biosphere reserves.[124] Questions may be raised regarding the credibility of recognising and reporting on these areas as OECMs. Have these areas been properly assessed as constituting OECMS? It seems unlikely, given the extent of these areas and the fact that the IUCN-WCPA *Site-Level Tool for Identifying OECMs* was adopted only in May 2022. Have these areas been secured, as the mere designation of these areas as falling in a biosphere reserve's buffer or transitional zone itself offers very little long-term protection? While the answers to these questions remain unclear, they appear to bolster the argument for statutory intervention of the nature proposed in this article. Statutory intervention may partly help in ensuring that OECMs do not become a convenient way for countries to bolster their coverage targets in the short term without introducing appropriate legal mechanisms and processes to ensure that they are secured, governed

124 UNEP-WCMC and IUCN 2023 https://www.protectedplanet.net/en.

and managed to achieve the very outcomes underpinning their recognition.

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List of Abbreviations

BMA	Biodiversity Management Agreement
BMP	Biodiversity Management Plan
CBD	Convention on Biological Diversity
COP	Conference of the Parties
DEA	Department of Environmental Affairs
DRA	Deeds Registries Act 47 of 1937
EIA	Environmental Impact Assessment
Harv Envtl L Rev	Harvard Environmental Law Review
IUCN	International Union for the Conservation of Nature
LCP	Law and Contemporary Problems
MEC	Member of the Executive Council
MinFFE	Minister of Forestry, Fisheries and the Environment
MLR	Modern Law Review
NBO	National Biodiversity Offset
NBSAP	National Biodiversity Strategy and Action Plan
NEMA	National Environmental Management Act
NEMBA	National Environmental Management: Biodiversity Act
NEMPAA	National Environmental Management: Protected Areas Act
NGO	non-government organisations
NPAES	National Protected Areas Expansion Strategy
OECM	Other Effective Area-Based Conservation Measures
SAJELP	South African Journal of Environmental Law and Policy
SALA	Subdivision of Agricultural Land Act 70 of 1970
SANBI	South African National Biodiversity Institute
UNEP-WCMC	UN Environment Programme World Conservation Monitoring Centre
WCBA	Western Cape Biodiversity Act
WCPA	World Commission on Protected Areas
WD-OECM	World Database on OECMs
WDPA	World Database on Protected Areas
WWF	World Wide Fund for Nature