

**EMS  
FOUNDATION**

compassion • synergy • social justice

## **COMMENTS TO THE DRAFT AFRICAN PENGUIN (*SPHENISCUS DEMERSUS*) BIODIVERSITY MANAGEMENT PLAN<sup>1</sup>**



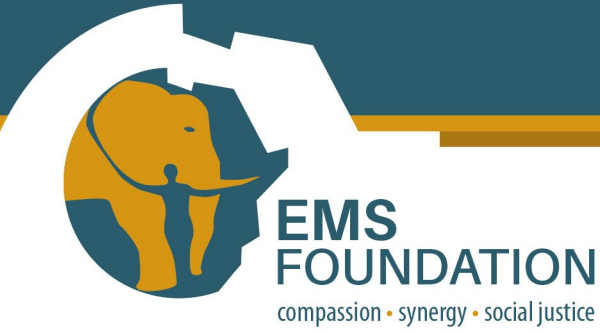
In June 2000 the sinking of the Chinese carrier 'MV Treasure' and the consequent spill between Dassen and Robben Island threatened 40 per cent of the African Penguin population  
*Credit AfriPics*

**21 AUGUST 2022**

---

<sup>1</sup> nemba\_africanpenguin-biodiversitymanagementplan\_g47061gon2032\_0.pdf (dff.gov.za)

[www.emsfoundation.org.za](http://www.emsfoundation.org.za)



# TABLE OF CONTENTS

URGENT ACTION IS REQUIRED TO SAVE THE AFRICAN PENGUIN .....3

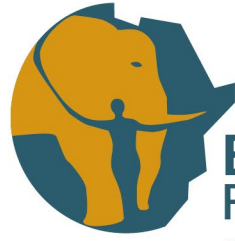
PRIORITISE THE EXPANSION OF MPAS TO FAVOUR THE RECOVERY OF THE AFRICAN PENGUIN .....3

ADDRESS POSSIBLE CONFLICT OF INTEREST ISSUES.....5

ACKNOWLEDGE CLIMATE CHANGE FROM BOTTOM TRAWLING AND THE IMPACTS ON THE AFRICAN PENGUIN .....7

IMPLEMENT THE POLLUTER PAYS: NEMA.....8

RECOMMENDATIONS .....9



**EMS  
FOUNDATION**

compassion • synergy • social justice

*‘Ecological recovery is remarkable  
if natural systems are protected from extraction’<sup>2</sup>*

The EMS Foundation is a registered South African non-profit organisation (NPO and PBO) with a substantial interest in environmental protection. The EMS Foundation has, since its inception, expressed an interest in governance and policies, lobbying to achieve lasting solutions, alleviate and end suffering, raise public awareness, provide dignity, and promote the rights and interests of vulnerable groups, particularly children, the elderly and wild animals.

Contact: [info@emsfoundation.org.za](mailto:info@emsfoundation.org.za)

---

<sup>2</sup> IUCN Ecological Restoration for Protected Areas [PAG-018.pdf \(iucn.org\)](#)

## URGENT ACTION IS REQUIRED TO SAVE THE AFRICAN PENGUIN

The EMS Foundation appreciates the Department of Forestry, Fisheries and Environment (DFFE) work and the opportunity to comment on this draft BMP, which highlights in detail the threats and causes of the decline of the African penguin, a crucial predator and indicator of environmental pollution.<sup>3</sup>

The human-related threats include climate change (extreme weather) overfishing, bunkering, gas explorations, mining and finfish farming. We are pleased to see that this document highlights the fact that the decline of the penguin is linked to the aforementioned legally permitted activities. We urge the South African government to take all the necessary steps to cease the same.

We are concerned that, despite all the available data that has been assimilated by scientific research, no effective immediate action or mitigation processes have been prioritised in this document instead, further research, and investigations have been proposed.

We support further research processes but we believe, based on the enormous body of evidence already available, that further delays in mitigating a solution might be irreversibly detrimental to the species. Scientists focusing their research on this penguin species are confident that there is enough information available to determine the causes of the decline of the population in South Africa.<sup>4</sup>

In addition, the research has indicated that penguins who undergo rehabilitation have a very low reproductive rate so, although we appreciate the care for individual animals that are rescued, rehabilitated and released, increasing rehabilitation capacity will not improve the conservation of the species. Scientists have indicated that this species of penguin could be functionally extinct by 2035.

## PRIORITISE THE EXPANSION OF MPAs TO FAVOUR THE RECOVERY OF THE AFRICAN PENGUIN

The United Nations supports the target of the Convention on Biological Diversity for Marine Protected Areas (MPAs) of 10% by 2020 and 30% by 2030.<sup>5</sup> South Africa should make every effort not to fall behind the developing countries that are achieving a minimum target of 10%.

Although the MPAs were extended in 2019 from 0.43% to 5%,<sup>6</sup> 95% of South African waters remain open to exploitation and harmful activities. The current 5% is designed to protect 87% of the various and diverse marine

<sup>3</sup> Joanna Burger & Michael Gochfeld, *Marine Birds as Sentinels of Environmental Pollution*, 2004, available at the link:

[Marine Birds as Sentinels of Environmental Pollution | SpringerLink](#)

<sup>4</sup> [Creecy's plan to save plummeting African penguin population \(PMP\)](#)

<sup>5</sup> Bethan C. O'Leary, Marit Winther-Janson, John M. Bainbridge, Jemma Aitken, Julie P. Hawkins, Callum M. Roberts. *Effective Coverage Targets for Ocean Protection*, available at the link:

[The Society for Conservation Biology \(wiley.com\)](#)

<sup>6</sup> South Africa announces 20 new marine protected areas - Save Our Seas Foundation

ecosystem types found in the country's waters, however, they too remain vulnerable to commercial activities and exploitation which are allowed in these areas even if they are *controlled*.<sup>7</sup>

Activities allowed in *restricted* areas include the extraction of *marine resources*, with a permit; industrial fishing is also permitted in both *controlled* and *restricted* areas<sup>8</sup> including in critical conservation hotspots. Gas and oil explorations, mining and bunkering processes are permitted in the proximity of critically endangered ecosystems or across crucial migration routes. For example, in Algoa Bay, bunkering has been permissible since 2016 and more recently finfish farming has been allowed.

The *Recommendations of the Scientific Working Group to the Department*<sup>9</sup>, include details for the issuing of the sardine and anchovy fishing *quotas* from 2020 to 2022. Despite the small pelagic sector being severely depleted and the low biomass circumstances reported since 2018, particularly between Saldanha and Cape Agulhas, “*fishing rights*” are allocated each year. Anchovies and sardines are caught *en masse* and often in mixed shoals. Fishing companies receive permits for both sardines and anchovies because they are often in close proximity to each other on capture. (*Total Allowable Catch – TAC*) or in *Bycatch* (TAB).

The fluctuations of the sardine and anchovy populations have resulted in the penguin population decline and this has also been linked to an event in January 2021 when more than 1000 Cape Cormorant pairs abandoned their nests on Robben Island. A frantic and massive human rescue operation of the remaining chicks<sup>10</sup> was well documented. Furthermore, an investigation at the end of 2021 after the mass deaths of juvenile Cape Fur seals indicated a lack of available fish which lead to severe malnutrition and death.

The DFFE Scientific Working Group have, despite the severity of the situation and external evidence accumulated, recommended that fishing quotas for anchovies and sardines be re-issued and increased for the fishing seasons 2019 to 2022.

Over and above the ongoing research, we strongly recommend the following actions:

1. a moratorium on the fishing of so-called ‘*small pelagic*’ species via purse net or bottom trawling
2. no-take zones, including no-take of aquatic life, fossil fuels and minerals (no-take Marine Protected Areas are rare, for obvious reasons the fishing industry is the most powerful opponent of no-take zones).<sup>11</sup>

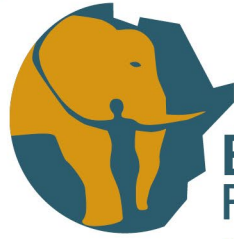
<sup>7</sup> CLASSIFICATION AND ZONING OF MPAs Marine Protected Areas (MPA's) of South Africa: - Jencatco

<sup>8</sup> South Africa's Marine Protected Areas | MPA Forum

<sup>9</sup> Recommendations from the Small Pelagic Scientific Working Group were obtained via a PAIA Application in 2022

<sup>10</sup> [Cape cormorants: Caring for South Africa's chicks abandoned in wild - BBC News](#)

<sup>11</sup> [No-take zone - Overview | NGSociety](#)



## ADDRESS POSSIBLE CONFLICT OF INTEREST ISSUES

Possible examples with regard to fisheries include:

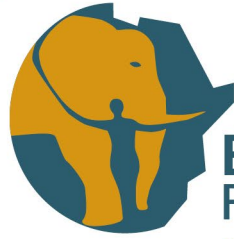
1. Are policies being informed by external scientists who collaborate and are employed by the industry?
2. Self-regulation seems to be widely accepted - are the fisheries monitored by commissions and conventions linked to or even funded by the same fisheries they should be overseeing?
3. Are appointed *fishing operations monitors* at sea paid for by the industry itself?
4. Eco-labels, which could accurately inform the consumer and thus aid the sustainability of a species are purchasable online, through a simple application; there is no compliance process in place.<sup>12</sup>
5. Scientific recommendations for increases despite depletion:

**SUMMARY OF THE SCIENTIFIC RECOMMENDATIONS TO THE DEPARTMENT OF FISHERIES - FOR SMALL PELAGIC 2020 -2022  
(TOTAL ALLOWABLE CATCH -TAC AND BYCATCH -TAB: SMALL PELAGIC FISHERIES)<sup>1</sup>**

**'LOW BIOMASS EXCEPTIONAL CIRCUMSTANCES' FOR SARDINE HAVE BEEN DECLARED IN THE 2018-19-20-21-22 FISHING SEASONS**

PERIOD	DOCUMENT	SUGGESTIONS AND RATIONALE	IT WAS	IT IS
APRIL 2020	AD HOC RECOMMENDATIONS <b>TO INCREASE</b> THE 14 MC+ SARDINE TAB WITH ROUND HERRING AND ANCHOVY (DIRECTED)  <b>Following the Declaration of Exceptional; Circumstances for Sardine in Dec 2018</b> - low biomass of sardine was recorded in surveys and assessments over two years  <b>Concerns about the Sardine population size particularly the Western population</b> (Additional Recommendations April 2020)	Lack of Sc Rec so they gave an initial 1000 t TAB  But industry suggests that avoiding bycatch is impossible and the TAB is already exhausted  The Scientific Working Group (SWG_PEL) remains extremely concerned about the low sardine population, as observed recently. The pelagic industry should minimise sardine by-catch	For the Cape Agulhas 6250 t + 3 000 t TAC 1 000 t TAB  <b>7000 t Sardine</b> smaller than 14 cm TAB with Anchovy fishing	TAB is <b>increased</b> by 1 650 t ( <b>from</b> 1 000 to 2 650 t)
JUNE 2020	RECOMMENDATIONS <b>TO INCREASE</b> THE 14 CM- SARDINE TAB WITH ANCHOVIES (DIRECTED)	The right holders have already exhausted their allocations of juvenile sardines and they ask to use the anchovy TAB	This TAB is approved	TAB for anchovies is <b>increased from 7 000 to 8 000 t</b>
JULY 2020	RECOMMENDATIONS OF THE SMALL PELAGIC SWG <b>TO INCREASE</b> THE SARDINE SMALLER THAN 14 CM TAB WITH ANCHOVIES	The South African Pelagic Fishing Industry Association (SAPFIA) requested an increase - approved  All other TAC-TABs remain unchanged	TAB for Sardine smaller than 14 cm was 8 000 t	TAB for Sardine smaller than 14 cm is <b>increased to 10 000 t</b>

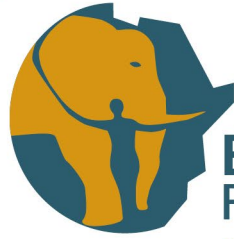
<sup>1</sup> All scientific recommendations obtained via PAIA Application in 2022 – Credit: DFFE



PERIOD	DOCUMENT	RECOMMENDATIONS AND RATIONALE	AS IT WAS	APPROVED
JUNE 2020	RECOMMENDATIONS OF THE SMALL PELAGIC SCIENTIFIC WORKING GROUP FOR ANCHOVY TAC FOR 2020 - <b>INTERIM INCREASE</b>	This survey is currently delayed due to the pandemic – The South African Pelagic Fishing Industry Association (SAPFIA) requested an interim increase	Direct Anchovy TAC was at 200 000 t (As per Rec in March 2020)	It is increased to 250 000 t  All other TAC-TABs from 2020 remain unchanged
JULY 2020	RECOMMENDATIONS OF THE SMALL PELAGIC SCIENTIFIC WORKING GROUP FOR ANCHOVY TAC FOR 2020 ( <b>INCREASED</b> )		Direct Anchovy TAC for 2020 is set at 350 000 t	
AUGUST 2020	RECOMMENDATIONS <b>TO INCREASE</b> THE DIRECTED 14 CM+ SARDINE TAC  FROM THE SMALL PELAGIC SCIENTIFIC WORKING GROUP (SPSWG)	Following a survey  Environmental NGOs observers preferred any increase to be as small as possible to promote recovery of the sardine population so that forage fish can be available for predators including endangered seabirds. The resource is described as seriously depleted.  The proposed increases, proposed by Small Pelagic Industry Associations, provide socio-economic relief. However, the SWG-PEL agreed it <b>COULD NOT</b> support this as allocations must promote resources growth	<b>Cape Agulhas Sardine – From 6 000 to 14 000 t TAC</b>  Sardine From 22 000 t to 32 000 t TAC	<b>SARDINE TAC is increased to 14 000 t</b>

PERIOD	DOCUMENT	RECOMMENDATIONS AND RATIONALE	AS IT WAS	APPROVED								
DECEMBER 2020	INTERIM RECOMMENDATIONS FOR THE SUSTAINABLE MANAGEMENT OF SMALL PELAGIC RESOURCES FOR 2021  <b>RECOMMENDED: ZERO</b>	<b>Given the extremely low biomass estimate of Sardine from the survey for the area to the west of Cape Agulhas, the interim-directed TAC for this area is recommended to be zero</b>  Low availability is indicative of a very low abundance	TAC for Sardine East of Cape Agulhas set at 1 000 t  Anchovy TAC set at 100 000 t									
MARCH 2021	RECOMMENDATIONS OF THE SMALL PELAGIC SWG <b>TO INCREASE</b> THE 14+ CM SARDINE TAB WITH ANCHOVY  <table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th></th> <th>Quantum</th> </tr> </thead> <tbody> <tr> <td>Originally approved &gt;14 cm sardine TAB</td> <td>500 t</td> </tr> <tr> <td>&gt;14 cm sardine TAB landed to date</td> <td>930 t</td> </tr> <tr> <td>&gt;14 cm sardine TAB recommended now</td> <td>1 500 t</td> </tr> </tbody> </table>		Quantum	Originally approved >14 cm sardine TAB	500 t	>14 cm sardine TAB landed to date	930 t	>14 cm sardine TAB recommended now	1 500 t	<b>The SWG recommended a TAB of 500 t to emphasise the need to minimise this by-catch</b>  <b>The industry exhausted the TAB pool on the 18<sup>th</sup> of February</b>	Sardine TAB was set at 500 t	<b>Increase to 1 500 t is Approved</b>
	Quantum											
Originally approved >14 cm sardine TAB	500 t											
>14 cm sardine TAB landed to date	930 t											
>14 cm sardine TAB recommended now	1 500 t											
APRIL 2021	RECOMMENDATIONS <b>TO INCREASE</b> THE SARDINE LARGER THAN 14 CM DIRECTED TAC			<b>Sardine direct TAC is increased to 15100 t</b>								
APRIL 2021	RECOMMENDATIONS <b>TO INCREASE</b> THE SARDINE LARGER THAN <u>14 CM TAB</u>		TAB Sardine was at 2 650 t	<b>TAB Sardine is increased to 5 650 t</b>								





PERIOD	DOCUMENT	RECOMMENDATIONS AND RATIONALE	AS IT WAS	APPROVED
APRIL 2021	RECOMMENDATIONS <b>TO INCREASE</b> THE ANCHOVY TAC		TAC Anchovies was at 252 500 t	TAC Anchovies is <b>increased</b> to 299 700 t
AUGUST 2021	DDG: Fisheries approve <b>AN INCREASE</b> in the current approved anchovy TAC			350 000 t <u>TAC</u> and <b>10 000 t TAB</b> of juvenile sardine bycatch
JANUARY 2022	RECOMMENDATIONS OF THE SPSWG FOR ANCHOVY TAC AND SARDINE TAB FOR 2022  <b>SARDINE <u>TAC</u> - IS RECOMMENDED TO BE ZERO</b>	Recommendations are based on previous years' statistics  <b>The industry has proposed the deployment of shore-based observers and a limited number of at-sea observers given that it is extremely difficult to optimise catches</b>	247 000 initial direct anchovy TAC + <b>10 000 t TAB</b> Sardine bigger 14 cm + 5- 650 t Sardine smaller 14 cm	

## ACKNOWLEDGE CLIMATE CHANGE FROM BOTTOM TRAWLING AND THE IMPACTS ON THE AFRICAN PENGUIN

'Greenwashing', is the marketing practice which presents a product which is harmful to the environment in a way that misleads the consumers to believe it is ecologically beneficial or sustainable,<sup>13</sup> The ARB Advertising Appeals Committee ruled in the *KEMP, OTHERS vs FAIR CAPE DAIRIES (PTY) LTD, 30-04-2020*<sup>14</sup> that you cannot mislead the reasonable consumer to believe that a product is environmentally safe when it is not.

The devastating effects of bottom-trawling on microfauna and flora and ecosystems have been widely documented as being more harmful *than the more visible clearing of forests*<sup>15</sup>. In March 2021 a team of scientists and economists demonstrated that *bottom trawling fishing emissions must be added to national greenhouses gas inventories, as the practice is responsible for 1 billion tonnes of underwater emissions every year*<sup>16</sup>. Trawlers, dragging their nets, not only destroy marine wildlife and entire ecosystems but they release carbon which otherwise, would remain safely stored and trapped at the bottom of the ocean. Bottom-trawling fisheries are

<sup>13</sup> Greenwashing a reality in South Africa (environment.co.za)

<sup>14</sup> ARB Appeals Committee Decision - Kemp, Others v Fair Cape Dairies - 2020-04-30.pdf e

<sup>15</sup> Malakoff D. 1998. Abstract.

<sup>16</sup> TRAWLING EMISSIONS EFS (emancipatoryfutures.co.za)



mostly eco-labelled and certified as sustainable. Bottom trawling, directly and indirectly, impacts the ecosystems the penguins rely on. 'Greenwashing' should be properly addressed.

### IMPLEMENT THE POLLUTER PAYS: NEMA

Section 28 of the National Environmental Management Act requires every person causing significant pollution or degradation of the environment, to take reasonable measures to prevent it from occurring, continuing or recurring. The provision articulates the so-called "polluter pays" principle which has been globally accepted in progressive jurisdictions and codified in the National Environmental Management Principles of NEMA. These principles were enacted to [...] *guide the interpretation, administration and implementation of this Act [...]* and prescribe that:

- (i) there should be life-cycle responsibility for anything which impacts the environment; and that
- (ii) the costs of remedying environmental pollution and of preventing, controlling and minimising environmental damage must be paid by those responsible for harming the environment.

Bunkering should only happen in specific harbours. Fishing quotas should not be influenced by fishing companies. Explorations, drilling and mining should take place only if the resource is far from critically important biodiversity hotspots and migratory corridors. The evident impacts of these activities should become directly accountable as per our legislation.

Penguins stand to be negatively affected by the recently proposed Total Energies Offshore Exploration in Block 5/6/7, South-West Coast, South Africa,<sup>17</sup> irrespective of whether the project area avoids all MPAs. The fact that the project has even a 5,4% overlap with Critical Biodiversity Areas is a cause for concern as the physiological, mental and emotional effects of the drilling have been seen to cause negative impacts varying in severity, the most severe resulting in the death of a variety of marine faunal species.

The noise can cause temporary or permanent hearing loss, abandonment of habitats, disruption of mating and feeding, disorientation and death. Penguins communicate to find food, hunt, reproduce and escape dangers. Underwater prolonged noise has been linked by several marine scientists, who submitted expert affidavits for the High Court Case vs Shell, section 53, to cause massive mortality and destruction in zooplankton, which is the base of all marine food chains. In the judgement these experts are quoted for their reference to the African penguin behaviour:

*[...] distinct avoidance responses such as leaving the area of activity. Ceasing to undertake everyday activities such as feeding in preferred areas, is likely to negatively impact the fitness of an affected*

---

<sup>17</sup> [TotalEnergies - Proposed Offshore Exploration in Block 5/6/7, South-West Coast, South Africa \(slrconsulting.com\)](http://slrconsulting.com)

*animal. The result of a study in South Africa [...] shows clear evidence that the endangered and endemic African penguin avoided preferred feeding sites [...] this is a particular concern for a species that is already stressed by prey depletion and the greater demand for them to forage further afield, and for which the prospect of extinction is significant.*

## RECOMMENDATIONS

We urge the minister and the department to prioritise action. In particular to:

1. Finalize the expansion of mpas and no-take zones around penguin colonies;
2. Address any influence of the fishing industry on decision-making processes;
3. Halt the permitting of harmful activities;
4. Improve accountability and implement the principles of 'polluter pays' in terms of NEMA;
5. Include all necessary provisions and to identify the links to other legislation – including the forthcoming NEMLA – to empower DFFE to halt activities that have already been identified as causing the loss of individual penguins and the ecosystem they rely on in the African Penguin Management Plan;
6. Impose a moratorium on the fishing of so-called '*small pelagic*' species via purse seine net and of bottom-trawling, at least in/near areas where the penguin is present.