



Sustainable Landscape Finance Coalition

Innovation Hub

Finance Solution Incubators: Report

Wilderness Foundation Africa | WWF-SA

Incubator Report BMA Tax Incentive Investigation

Background: Sustainable Landscape Finance Coalition

The Sustainable Landscape Finance Coalition (Coalition) is a driving force for the creation of finance solutions for effective and enduring landscape conservation in South Africa and across Africa. The Coalition has two primary aims. First, to develop and implement new finance solutions to address finance shortages across sustainable landscapes. Second, to advance a cohesive landscape finance sector in South Africa and beyond.

The Coalition's Finance Solution Incubators provide a coordinated approach to specific finance solution investigations in order to ensure strategic implementation. Incubators develop the finance solution concept they are created for, following the Coalition's Finance Solution Approach ©, in order to unlock new and sustainable financial mechanisms for conservation landscapes and to provide a road map to determine viability and ensure effective implementation. Incubators fall under the Coalition's Innovation Hub and aim to remain relatively small and niche to allow for fast and flexible innovation and implementation.

One such Finance Solution Incubator which has been launched, investigated and closed out successfully, is the Biodiversity Management Agreement (BMA) Tax Incentive Incubator.

BMA Tax Incentive Incubator

The BMA Tax Incentive Incubator aimed to unlock the tax incentive dedicated to BMAs thereby providing a new flow of finance for the conservation management of species and habitats. Its key objective was to investigate the potential to unlock the section 37C(1) tax incentive within the Income Tax Act No. 58 of 1962 (ITA) designed for BMAs in section 44 of the National Environmental Management: Biodiversity Act No. 10 of 2004 (NEMBA). Section 37C(1) has been in legislation since 2009 but has never been utilised to date due to the fact that no BMA has been created in South Africa. The incubator investigated this issue and developed building blocks to practically test the incentive. All BMAs should be concluded in terms of Biodiversity Management Plans (BMPs). The Incubator was also closely aligned with the SANBI BMP-Ecosystems Project, the Department of Forestry, Fisheries, and the Environment (DFFE), and the broader context of Biodiversity Stewardship.

BMA Tax Incentive Incubator Members and Focal Areas

Candice Stevens [Wilderness Foundation Africa (WFA)/Coalition]: green finance innovator and tax specialist

Natasha Wilson [South African National Biodiversity Institute (SANBI)]: biodiversity stewardship specialist

Marthán Theart [previously SANBI, now DFFE]: legal specialist

Jeanetta Selier [SANBI]: BMP community of practice and threatened species specialist

Ellané van Wyk [WFA]: tax implementation specialist

Humbu Mafumo [DFFE]: BMP Task Team and threatened species specialist

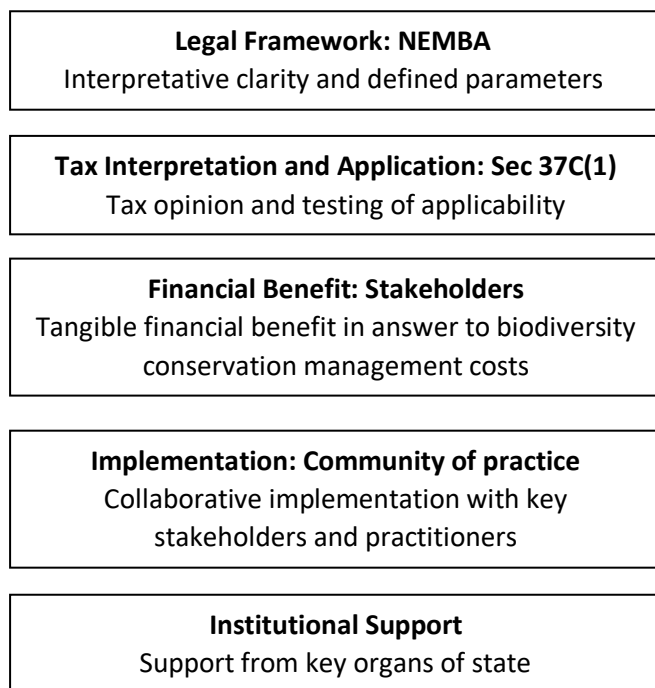
Neo Nkotsoe [DFFE]: Legal and Policy Specialist



Key Learning & Framing Questions

The Incubator investigated framing questions to determine whether the building blocks, needed to get this finance solution implementable, were present. These building blocks are depicted in Figure 1:

Figure 1: Finance Solution Building Blocks (BMA Tax Incentive Incubator)



It was determined that all these building blocks are present, and that the Finance Solution can be advanced into a Pilot Stage. Key findings from the incubator are provided next.

Framing Question 1:

Does each BMA have to be published in a government gazette?

Framing Question 2:

Do BMAs need to be signed by the National Minister and the legal entity (tax presence) individually?
2.1

Incubator Findings on Framing Questions 1 & 2 (Legal Opinion prepared by Neo Nkotsoe & Marthan Theart, DFFE):

Refer to Annexure A to this report.

Framing Question 3:

What does the BMP have to note regarding section 43(2) of NEMBA and identifying the responsible person/s?

Framing Question 4:

If there are no BMPs answering Key question 3, is there a draft BMP that is far enough along to build this investigation into that process?

Incubator Findings on Framing Questions 3 & 4 (Feedback provided by Natasha Wilson, SANBI):

Refer to Annexure B to this report.



Framing Question 5:

Are there major differences between BMPs for Ecosystems (BMP-E) and BMPs for Species (BMP-S) that need to be accounted for or is the primary legislation applicable to both equally?

Incubator Findings on Framing Question 5 (Feedback provided by Ellane van Wyk, WFA):

Refer to Annexure C to this report.

Framing Question 6:

Norms and Standards (N&S): do these have a bearing on the above or can we focus on the primary legislation to simplify things?

Incubator Findings on Framing Question 6 (Feedback provided by Marthan Theart, DFFE):

We can focus on primary legislation as N&S are not legally binding.

Framing Question 7:

Is there a BMP that answers the above questions and offers a cohesive community of practice/stakeholder group that would be willing to sign a BMA/s and allow for testing of the above?

Incubator Findings on Framing Question 7 (Feedback provided by Jeanetta Selier, SANBI & Humbu Mafumo, DFFE):

Yes, there are several, such as Lion, Cycad. Engagement with these communities of practice(s) initiated.

Framing Question 8:

Does the “testing” BMP community of practice undertake management activities on private or communally owned land?

Incubator Findings on Key Question 8 (Feedback provided by Jeanetta Selier & Humbu Mafumo):

Yes.

Additional Considerations (Candice Stevens and Ellané van Wyk, WFA):

- a. Tax Alignment – to be tested in BMA Pilot Project described below.
- b. Determine if there is a cohesive community of practice (COP)/stakeholder group that would be willing to sign BMAs and allow for a feasibility study – to be tested in BMA Pilot Project described below.
- c. Pick a min of two community of practice to begin engaging with – Lion & Rhino selected (please see below).
- d. Discuss and determine potential sources of seed funding for the feasibility study – funding secured (please see details below).



BMA Tax Incentive Pilot Project

WFA has secured funding to pilot the BMA Tax Incentive encased in section 37C(1) of the ITA. The pilot project will aim to implement the BMA Tax Incentive in instances where owners and managers of threatened species are not able to deduct any or some of their conservation and management expenses in respect of the species.

The pilot project will be conducted by:

- Ellane van Wyk (WFA Environmental Tax & Training Services Lead): Project Lead.
- Candice Stevens (WFA Head of Innovative Finance & Policy): Project Oversight.

The aim of the pilot project is to test section 37C(1) of the ITA in a minimum of one tax return of a qualifying taxpayer who manages a threatened species (either rhino or lion, or both if possible). The project will thus focus on the rhino and lion communities of practice. However, the finance solution has building blocks that allow it to be applied and transferred to other communities of practice managing other threatened species with BMPs, such as vulture and cycad. In addition, BMAs have been recognised as a Candidate Other Effective Area-Based Conservation Measure (OECM) through the Recognising OECMs Project conducted in 2019-2020. The project will therefore have benefits for area-based conservation targets in South Africa.

Pilot 1: Rhino

A minimum of three voluntary landowners will be engaged to test application of the BMA tax incentive in relation to their management costs incurred per the provisions of the associated BMP and conclusion of a BMA. The project will seek alignment with the revision of the associated BMPs (White Rhino and Black Rhino) currently being undertaken by Dave Balfour. Guidance from a high level panel on rhino management to the Minister of the Environment will be provided through WFA CEO, Andrew Muir.

Pilot 2: Lion

A minimum of three voluntary landowners will be engaged to test application of the BMA tax incentive in relation to their management costs incurred per the provisions of the associated BMP and conclusion of a BMA. The project will seek alignment with the Lion Management Forum (LiMF) and guidance from Dr. Jeannette Selier, threatened species specialist at SANBI.

BMA Pilot Project Commencement Date & Duration

The commencement date for the BMA Pilot Project is 1 July 2021, and the project is anticipated to end on 30 June 2022.

BMA Tax Pilot Project Advisory Committee

A BMA Tax Pilot Advisory Committee will be established. The advisory committee will meet regularly to discuss progress of the pilot and to receive expert input on the application of the incentive. The members of the Advisory Committee will include the original experts of the incubator and the particular species management specialists responsible for the applicable BMPs.

Advisory Committee Members and Focal Areas

Natasha Wilson [SANBI]: biodiversity stewardship specialist
Marthán Theart [previously SANBI, now DFFE]: legal specialist
Jeanetta Selier [SANBI]: BMP community of practice & threatened species specialist
Humbu Mafumo [DFFE]: BMP Task Team & threatened species specialist
Neo Nkotsoe [DFFE]: Legal & Policy Specialist
Dave Balfour [Consulting Conservation Ecologist]: Species & Protected Area Specialist
Nokutula Mhene [BIOFIN]: Project Implementation Specialist
Daniel Marnewick [IUCN]: Green List, Key Biodiversity Area, OECM & Area-Based Conservation Specialist



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BMA Tax Incentive Estimated Economic Benefit

Working with an independent consultant, Dr Hugo van Zyl of Independent Economic Researchers, the Coalition investigated the potential economic impacts of each of the Finance Solution Incubators and their associated interventions. It is estimated that the BMA Tax Incentive will result in benefits that would increase gradually from approximately R1.4 million per annum in 2022 to R2.7 million per annum in 2030 and R3.7 million per annum in 2040.

Conclusion

It is hoped that, through the successful completion of the BMA Tax Incentive Incubator and the BMA Tax Incentive Pilot Project, additional finance will be introduced into the conservation landscape for the benefit of threatened species and ecosystem conservation.



Annexure A: Legal Opinion addressing Key Question1 1 & 2



Legal opinion to clarify the legal requirements for the drafting of biodiversity management agreements in terms of section 44 of the National Environmental Management: Biodiversity Act 2004, (Act No. 10 of 2004)

TO: Directorate: Biodiversity and Conservation Management

FROM: Chief Directorate: Law Reform and Policy Coordination

DATE: August 2020

PRIORITY: HIGH

1. OPINION REQUESTED

1.1 The Directorate: Law Reform, has been requested to provide a legal opinion pertaining to the following questions in relation to the drafting of biodiversity management agreements in terms of section 44 of the National Environmental Management: Biodiversity Act 2004, (Act No. 10 of 2004):

1.1.2 Do biodiversity management agreements need to be published in the Government Gazette?

- (a) If so does each agreement need to be published individually when dealing with multiple parties relating to the implementation of one biodiversity management plan? and,
- (b) Is the process to gazette long and burdensome?



1.1.3 Do biodiversity management agreements need to be signed by the Minister individually?

- (a) If so will the Minister be willing to sign a batch of individual agreements or will it be a bureaucratic burden?
- (b) Would one contract that references all parties suffice, and if so what is the risk? and,
- (c) Can a standard biodiversity management agreement template be developed that is quick and easy to use and that references the relevant biodiversity management plan so that we do not have to put all the detail in each biodiversity management agreement but leave the biodiversity management plan for the details?

2. THE LAW AND ITS APPLICATION

Do biodiversity management agreements need to be published in the Government *Gazette*?

- (a) If so does each agreement need to be published individually when dealing with multiple parties relating to the implementation of one biodiversity management plan? and,
- (b) Is the process to gazette long and burdensome?

2.1 Section 44 of the National Environmental Management: Biodiversity Act 2004, (Act No. 10 of 2004) states the following:

“44. Biodiversity management agreements.—*The Minister may enter into a biodiversity management agreement with the person, organisation or organ of state identified in terms of section 43 (2), or any other suitable person, organisation or organ of state, regarding the implementation of a biodiversity management plan, or any aspect of it.”*



- 2.2 Section 44 of the National Environmental Management: Biodiversity Act 2004, (Act No. 10 of 2004) (NEMBA), does not require that biodiversity management agreements be published by notice in the Gazette or otherwise.
- 2.3 In instances where an empowering Act authorizes Minister to conduct any act, matter or thing, but does not specify the notification method to the public informing them of the act, we look at section 15 of the Interpretation Act 1957, (Act No. 33 of 1957) (the Interpretation Act). The section states the following:
- “15. Notification in Gazette of official acts under authority of law.—**When any act, matter or thing is by any law directed or authorized to be done by the President or the Premier of a province, or by **any Minister**, or by any public officer, the notification that such act, matter or thing has been done **may**, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.”*
- 2.4 Moreover, section 1 of the Promotion of Administrative Justice Act 2000, Act No. 3 of 2000 (PAJA) states the following:
- “administrative action”** means any decision taken, or any failure to take a decision, by—*
- (a) an organ of state, when—*
 - (i) exercising a power in terms of the Constitution or a provincial constitution; or*
 - (ii) exercising a public power or performing a public function in terms of any legislation; or*
 - (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect,...”*
- 2.5 Section 15 of the Interpretation Act gives Minister a discretion on whether to gazette the biodiversity management agreement or not as NEMBA does not make it a requirement. However, if the agreement falls within the definition of “administrative action” as defined in section 1 of PAJA, that is if it will adversely affect the rights of the public or any other third party, the



discretion falls away and the act has to be published for consultation purposes in the *Gazette* or in any other practical manner as stated in section 4 of PAJA including public hearings, newspapers, etc.

2.6 If the biodiversity management agreement will not adversely affect the rights of the public or any other third party, for example if the agreement is only concerned with private property and is only between Minister and the lawful property owner, then Minister has a discretion to publish the agreement or not. In making this decision, she must consider section 11 of the Protection of Personal Information Act 2013, (Act No. 4 of 2013), which prohibits the dissemination of some personal information without the consent of the affected party and other considerations listed in the Act. Private property owners might prefer to remain anonymous and the location of their properties and the characteristics of their private properties to not be made public.

2.7 If the biodiversity management agreement will adversely affect the rights of the public or any other third party, NEMBA contains consultation provisions in sections 99 and 100 which are relevant. Section 99 must also be followed if the biodiversity management agreement is also going to affect other national departments and/or other provincial departments. The sections state the following:

“99. Consultation.—(1) *Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances.*

(2) *The Minister must, in terms of subsection (1)—*

- (a) *consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;*
- (b) *in accordance with the principles of cooperative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and*
- (c) *allow public participation in the process in accordance with section 100.*

100. Public participation.—(1) *The Minister must give notice of the proposed exercise of the power referred to in section 99—*



- (a) *in the Gazette; and*
 - (b) *in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.*
 - (2) *The notice must—*
 - (a) *invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and*
 - (b) *contain sufficient information to enable members of the public to submit meaningful representations or objections.*
 - (3) *The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.*
 - (4) *The Minister must give due consideration to all representations or objections received or presented before exercising the power.”.*
- 2.8 In order to respond to the questions raised in paragraph 1.1.2, the following: Section 44 of NEMBA does not require that biodiversity management agreements be published by notice in the Gazette. However, section 15 of the Interpretation Act states that when any act, matter or thing is by any law directed or authorized to be done by any Minister, the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.
- 2.9 Therefore there are two types of scenarios that can eventuate requiring Minister to respond accordingly, depending on the circumstances as follows:
- 2.9.1 If the biodiversity management agreement will not adversely affect the rights of the public or any other third party, for example if the agreement is only concerned with private property and is only between Minister and the lawful property owner, then the Minister, in terms of section 15 of the Interpretation Act, has a discretion to publish the agreement or not, just for notification purposes. In making this decision, she

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must consider the consent of the property owner in line with section 11 of the Protection of Personal Information Act 2013.

- 2.9.3 If the biodiversity management agreement amounts to administrative action in terms of PAJA, that is if it will adversely affect the rights of the public or any other third party, for example if the agreement is concerned with public property such as a beach or state property such as a protected area, then the Minister is obliged in terms of section 4 of PAJA to afford interested and affected parties an opportunity to make representations. In this regard, section 4 of PAJA states the following:

“Administrative action affecting public.—(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—

(a) to hold a public inquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure;”

- 2.10 If the biodiversity management agreement amounts to administrative action as stated in 2.9.3, we recommend that Minister follow the NEMBA sections 99 and 100 consultation and public participation procedures as enabled by section 4(1)(d) of PAJA to afford the interested and affected parties an opportunity to make meaningful representations.

- 2.11 The biodiversity management agreements amounting to administrative action can be published in one *Gazette* when dealing with multiple parties. Multiple notices/agreements, can be published under one Government *Gazette* and every notice/agreement, will be allocated its unique notice number so that it is identifiable and can be consulted on individually, by the relevant



interested and affected parties. On whether one agreement can be drafted if multiple parties are involved in the implementation of one biodiversity management plan, we believe this will be influenced by the nature of the agreement, the intended area of implementation, whether or not the contents, purpose and conditions are similar, etc., but, the Directorate: Corporate Legal Support, who are the Directorate in the Department that legally vets agreements, MOUs, etc., will advise accordingly when vetting the agreement.

2.12 If the biodiversity management agreement amounts to administrative action and the NEMBA section 99 and 100 consultation and public participation procedures are followed, it will take 30 days to allow the public and other Departments to make comments on the proposed biodiversity management agreement. If there are no objections that require substantial changes to the proposed agreement from the consultation period then the agreement can be published for implementation. If there are objections that lead to substantial changes to the agreement then a second round of 30 days consultation may have to be undertaken. The timeframe of considering comments must also be taken into account.

2.13 Considering the questions contemplated in paragraph 1.1.3, the following:

In terms of section 44 of NEMBA, the power to enter into biodiversity management agreements resides with the Minister therefore the Minister must sign the agreements individually unless Minister has delegated those powers. NEMBA does not have a general delegation clause however, section 42 of the National Environmental Management Act 1998 (Act No. 107 of 1998) states the following:

“42. Delegation of powers and duties by Minister and Director General.—(1) The Minister may delegate a power or duty vested in him or her in terms of this Act or a specific environmental management Act to—

(a) the Director General;

(b) an MEC, by agreement with the MEC;



- (c) the management authority of a protected area; or
(d) any organ of state, by agreement with that organ of state.”

- 2.14 NEMBA is a specific environmental management Act and the Director-General is also empowered to further sub-delegate the delegated function to any official in the Department. The Directorate: Biodiversity and Conservation Management will have to assess the volume and frequency of the work and decide if they want to request the Minister to delegate her NEMBA section 44 powers to enter into and sign biodiversity management agreements.
- 2.15 A standard biodiversity management agreement template can be developed that references the relevant biodiversity management plan if the contents, purpose and conditions are the same. The relevant biodiversity management plan can be referenced either within the agreement, or can be included as an Annexure. Provision will also have to be made in the agreement on how the agreement will be amended and on how changes to the relevant biodiversity management plans will be addressed in the biodiversity management agreement. This will depend on the specific facts of the case under consideration. The Directorate: Corporate Legal Support will advise further in this regard when vetting the agreement.
- 2.16 On whether or not one contract that references all parties will suffice, and if so what is the risk, kindly refer to paragraph 2.11 above but the Directorate: Corporate Legal Support will have to advise on the form of the actual agreement.
- 2.17 The opinion was provided on and limited to the questions provided in paragraphs 1.1.2 and 1.1.3 above. It is important however to also state that section 44 of NEMBA refers to section 43(2), which states that:
- “Before approving a draft biodiversity management plan, the Minister must identify a suitable person, organisation or organ of state which is willing to be responsible for the implementation of the plan.”*
- 2.18 Section 43(3) of NEMBA then states:



“(3) The Minister must—

- (a) publish by notice in the Gazette a biodiversity management plan approved in terms of subsection (1);
- (b) determine the manner of implementation of the plan; and
- (c) assign responsibility for the implementation of the plan to the person, organisation or organ of state identified in terms of subsection (2).”

- 2.19 The process of approving and *Gazetting* a draft biodiversity management plan in terms of section 43 of NEMBA may very well overlap with the process of entering into a biodiversity management agreement in terms of section 44. The plan and the agreement, where the agreement will amount to administrative action, can be *Gazetted* simultaneously in terms of section 43(3)(c).
- 2.20 A separate consultation process for the biodiversity management agreement can be followed as advised in 2.9, particularly where there is an existing plan but no agreement. Another scenario might include a plan with an identified implementer who is no longer in a position to implement the plan for whatever reason.
- 2.21 In the absence of having specific scenarios to advise on and assuming that there may be a multitude of other different scenarios, it would be better to advise on such scenarios if there is a need to do so and subject to receiving the relevant detailed information. The Directorate: Corporate Legal Support may also need to advise further depending on the details of the scenarios and when vetting any such agreements.

MR NEO NKOTSOE
LEGAL ADMIN OFFICER: LAW REFORM
DATE Sept 2020





Annexure B: Feedback from Natasha Wilson addressing Key Questions 3 & 4

Feedback:

Section 43(2) Before approving a draft biodiversity management plan, the Minister must identify a suitable person, organisation or organ of state which is willing to be responsible for the implementation of the plan.

The attached example of a BMP:S outlines a clear way to identify the role players involved in implementing the BMP:S.

Section 44 Biodiversity Management Agreements

The Minister may enter into a biodiversity management agreement with the person, organisation or organ of state identified in terms of section 43(2), or any other suitable person, organisation or organ of state, regarding the implementation of a biodiversity management plan, or any aspect of it.

There are few restrictions regarding the Minister entering into a BMA. The only restriction for our purposes would be on qualifying for the tax benefit.

It might be useful to initiate a process where we support the development of a BMA and learn from this process and then proceed with a BMA to enable the tax benefit. There will be a lot to learn in the process.

4. If there are no BMPs answering 3, is there a draft BMP that is far enough along to build this investigation into that process? (NW)

As you may know, SANBI has appointed a post doc to develop the first BMP:E. it might be worthwhile trying to enable a BMA through this process to access the tax benefits.

Published BMP-S: nemba10of2004_bmforpelargonium_sidoides



Annexure C: Feedback from Ellane van Wyk on Key Question 5:

Legislation	Aspects	Differences (Y/N)	Comments
Section 43	Submission	N	
	Approval	N	
Section 52 & 56	Importance	Y	Ecosystems: National & Provincial Species: National
	BMP lists	Y	BMP-E lists submitted & reviewed by Minister & MEC BMP-S lists submitted & reviewed by Minister only
Section 44	BMA	N	
Sections 45-49		N	Guided by Norms & Standards
Section 99 & 100	Public & Other participation	N	
Norms & Standards	Initiation/ Development	Y	Provincial conservation authority needs to be involved in development (or at least be consulted) in the case of a BMP-E.
	Approval	Y (slight)	BMP-E: Minister <u>can</u> publish BMA in Gazette. BMP-S: no reference to publication of BMA in Gazette.