



Date: 6 October 2022

TO: **Department of Forestry, Fisheries and the Environment**

**The Director General**

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Total pages: 14

Our ref: BLC/solar PV exclusion

**COMMENTS ON THE INTENTION TO EXCLUDE THE DEVELOPMENT AND EXPANSION OF SOLAR PHOTOVOLTAIC INSTALLATIONS FROM THE REQUIREMENT TO OBTAIN AN ENVIRONMENTAL AUTHORISATION BASED ON COMPLIANCE WITH AN ADOPTED ENVIRONMENTAL MANAGEMENT INSTRUMENT (GN 2466 OF 8 SEPTEMBER 2022)**

**Introduction:**

1. Thank you for the opportunity to comment on the above-mentioned *Notice of intention to exclude the development and expansion of solar photovoltaic installations from the requirement to obtain an environmental authorisation based on compliance with an adopted environmental management instrument* (“the Exclusion Notice”).
2. The Biodiversity Law Centre (“BLC”) is a non-profit organisation and law clinic, registered in 2021. Our vision is flourishing indigenous species and ecosystems that support sustainable livelihoods in Southern Africa. The Centre’s mission is to use the law to protect, restore and preserve indigenous ecosystems and species in Southern Africa.
3. We note at the outset that we have read the comments on the Exclusion Notice prepared by BirdLife South Africa, as well as the recommendations made by BirdLife with regards to proactive interventions for fast-tracking applications that do not amount to a blanket exemption covering potentially sensitive areas and which do not

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jeopardise the integrity of the Screening Tool, the adoption of which has also been published for comment.<sup>1</sup> We fully endorse BirdLife’s comments.

4. Our submission begins with general comments on the proposed exclusion, and the BLC’s position in this regard. This is followed by a list of more detailed comments on the Exclusion Notice.

## General comments

### *In principle support for renewable energy*

5. We must at the outset note that the BLC is entirely supportive of the Just Energy Transition, and the replacement of harmful fossil fuel energy generation, which contributes to greenhouse gas emissions and climate change, with clean renewable energy. We are also very aware of Government’s commitments in terms of the Paris Agreement and its Nationally Determined Contribution, and consequently that divesting from fossil fuels and increasing production of renewable energy is imperative. We are also aware that South Africa is currently facing an energy crisis, and that there is consequently an urgent need to procure as much renewable energy as possible in order to ameliorate this crisis and move towards a low carbon future.
6. We are also aware that President Ramaphosa has, as part of an Emergency Electricity Plan, committed to “tabling special legislation in Parliament on an expedited basis to address the legal and regulatory obstacles to new generation capacity.”<sup>2</sup>
7. There is consequently no doubt that the procurement of additional renewable energy generation capacity is of critical importance.
8. However, the BLC is concerned that the proposed exclusion may expedite the rollout of renewable energy (solar PV) projects to the potential detriment of indigenous species and ecosystems. We say this because renewable energy installations often extend over vast areas that are relatively undisturbed, and the environmental impact assessment (“EIA”) of the areas in question prior to project implementation therefore becomes critical. The potential impacts associated with wind and solar PV expansion have been deemed significant enough for the IUCN to publish guidelines for *Mitigating biodiversity impacts associated with solar and wind energy development*. The following is recorded in the Guideline:

*“Achieving a climate-resilient future, in accordance with the Paris Agreement and the Sustainable Development Goals (SDGs), requires rapid, sustained and far-reaching transformations in energy, land-use, infrastructure and industrial systems. Large-scale expansion of renewable energy can play a critical role in meeting the world’s growing energy demands and in the fight against climate change. However, even ‘clean’ energy*

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<sup>1</sup> GN 2464 in GG 46867 of 6 September 2022.

<sup>2</sup> <https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-energy-crisis-25-jul-2022-0000>.

*sources can have significant unintended impacts on the environment. A truly sustainable green energy transition must therefore be carefully planned and managed so that it does not come at an unacceptable cost to nature.* (our emphasis)

9. Renewable energy development, including solar PV, is going to increase significantly over the next few years as government aims to meet the projected targets set out in the *Integrated Resource Plan, 2019*. In order to ensure that renewable energy is developed in a manner that does not come at an unacceptable cost to nature, it is imperative that development of solar PV is carefully planned and managed, and that the potential impacts of such development are carefully assessed and mitigated (where necessary) through the imposition of project-specific conditions of authorisation. This cannot be achieved with the process envisaged by the Exclusion Notice.
10. We emphasise that the BLC is not against expediting the roll out of renewable solar PV energy in South Africa. We support renewable energy development as critical to achieving a low carbon economy and mitigating the harmful effects of climate change. These comments are rather intended to highlight some of the substantive and procedural difficulties we have identified with the Exclusion Notice, which does not represent best environmental practice.<sup>3</sup> In addition, there are certain aspects of the Exclusion Notice which would not withstand judicial scrutiny, in the event the Department of Forestry, Fisheries and the Environment (“DFFE”) elects to proceed with publication thereof.
11. DFFE must rather look to other means of expediting the development of renewable energy. Suggestions in this regard are made in the conclusion.

*Lack of justification for exclusion of solar PV from the need to obtain environmental authorisation*

12. One of the primary concerns we have with the Exclusion Notice is that the need for the procedure it endorses is not justified. In this regard, we wish to emphasise that DFFE has already adopted reasonable legislative measures to streamline the EIA process in relation to renewable energy developments. In this regard, the DFFE has:
  - 12.1. identified and declared 11 Renewable Energy Development Zones (“REDZ”)<sup>4</sup> in terms of a Strategic Environmental Assessment (“SEA”) which sought to “*identify Renewable Energy Development Zones (REDZs) that are of strategic importance for large scale wind and solar photovoltaic development in terms of Strategic Integrated Project 8, and in which significant negative impacts on the*

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<sup>3</sup> As is required by section 23A(2) of NEMA, the requirements for Environmental Management Instruments.

<sup>4</sup> GN 114 in GG 41445 of 16 February 2018 and GN 144 in GG 44191 of 26 February 2021.

*natural environment are limited and socio-economic benefits to the country are enhanced;*<sup>5</sup>

- 12.2. identified the procedure to be followed when applying for or deciding on an application for environmental authorisation for large scale wind and solar development when occurring within a REDZ;<sup>6</sup> and
- 12.3. identified the procedures to be followed in applying for or deciding on an environmental authorisation application for the development of electricity transmission and distribution infrastructure when occurring in a REDZ.<sup>7</sup>
13. In terms of the abovementioned procedures, only a basic assessment process as opposed to the more lengthy and cumbersome scoping and environmental impact report process needs to be followed by an applicant looking to develop renewable energy in a REDZ. Furthermore, the timeframe for decision making is truncated from 107 days from receipt of the basic assessment report, as stipulated in Regulation 20 of the EIA Regulations, 2014,<sup>8</sup> to only 57 days.
14. There is consequently already a process in place that expedites the development of solar PV energy facilities located in areas which have, through the SEA, been identified as suitable for such development.
15. We are concerned that notwithstanding the SEA and designation of the REDZ and concomitant procedures for applying for environmental authorisation, the Exclusion Notice now seeks to impose a blanket exemption applicable across the entire country, including areas which are not covered by the SEA. We are of the view that this approach is unjustified and undermines DFFE's efforts to develop renewable energy in areas which are best suited for such development, as identified by the SEA.
16. We further contend that environmental regulatory processes are not the reason for a delay in rolling out more renewables. As noted by BirdLife, a study by Meridian Economics (2020)<sup>9</sup> identified key constraints to renewable energy development as including lack of political commitment and policy certainty, regulatory restrictions in the electricity sector, grid capacity and connection issues and local content requirements. Environmental regulations were noted as a potential constraint for wind, but not solar energy. In fact, the report notes that:

*"[M]any project developers reported that projects – particularly solar PV – can be built with all the necessary contractual agreements around land and environmental permits*

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<sup>5</sup> CSIR "Strategic Environmental Assessment for Large Scale Wind and Solar Photovoltaic Energy in South Africa" (2015).

<sup>6</sup> GN 114 in GG 41445 of 16 February 2018 and GN 142 in GG 44191 of 26 February 2021.

<sup>7</sup> GN 145 in GG 44191 of 26 February 2021.

<sup>8</sup> GN R982 in GG 38282 of 4 December 2014, as amended.

<sup>9</sup> Renaud, C, Tyler, E, Roff, A. and Steyn, G, 2020, Accelerating renewable energy industrialisation in South Africa: What's stopping us? [Meridian Economics](#). Cape Town.

*in a relatively short period of time. Hence, environmental regulations were not viewed as highly constraining on project development by all developers.”<sup>10</sup>*

17. It therefore does not appear that the EIA and environmental authorisation process is an impediment to rolling out renewable energy development. In addition, the Scoping and EIR process has been truncated to a basic assessment process when occurring in a REDZ, and decision-making timelines have also been cut by almost half to 57 days. Consequently, the exemption included in the Exclusion Notice appears to be neither necessary nor justified, and rather opens the door to potentially deleterious development without the necessary environmental scrutiny.
18. We also note, as an aside, that the requirement for the competent authority to register a solar PV facility within 10 days of receipt of the registration documents means that registration of a facility in terms of the Exclusion Notice would therefore be only 47 days faster than registration for a solar PV facility to be developed in a REDZ. The slightly longer timeframe does not justify exclusion from the need to obtain an environmental authorisation in circumstances where law already makes provision for truncated timeframes, and the time to be gained by the procedure outlined in the Exclusion Notice is negligible.
19. At an online stakeholder meeting with Dr. Dee Fischer on 4 October 2022, it was repeatedly mentioned that DFFE has processed over 900 renewable energy applications and it seeks to manage the number of appeals it adjudicates. To the extent that DFFE wishes to alleviate its own administrative burden by excluding solar PV from having to obtain an environmental authorisation, this is not a justifiable reason for deviating from impact assessment procedures and regulatory approval processes designed to safeguard the environment.

#### Misuse of the Screening Tool

20. The Screening Tool, as its name suggests, is designed to facilitate or assist with the screening process. Screening determines which aspects of a proposed project need investigation based on identified themes, and what can be excluded from additional scrutiny. The data collected and fed into the GIS layers that comprise the Screening Tool are intended to facilitate this sorting process at the outset of an EIA.
21. We are further advised by BirdLife that the Screening Tool sensitivity ratings of “low”, “medium” and “high” are being misapplied by the Exclusion Notice. In this regard, the sensitivity ratings – which are not defined in the Exclusion Notice – are determined by the scale of mapping and the associated confidence limits in the data, and to ensure alignment with the definitions in the *Terrestrial Animal Species Protocol for the*

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<sup>10</sup> *Ibid* page 20.

*Specialist Assessment and Minimum Report Content Requirements for Environmental Impacts on Terrestrial Animal Species*<sup>11</sup> (“the Animal Species Protocol”).

22. The Animal Species Protocol describes High Sensitivity Areas as:

*“1. Confirmed habitat for SCC.*

*2. SCC, listed on the IUCN Red List of Threatened Species or South Africa’s National Red List website as Critically Endangered, Endangered or Vulnerable, according to the IUCN Red List 3.1. Categories and Criteria and under the national category of Rare. These areas are unsuitable for development due to a very likely impact on SCC.”*

23. The Animal Species Protocol describes Medium Sensitivity areas as:

*“1. Suspected habitat for SCC based either on historical records (prior to 2002) or being a natural area included in a habitat suitability model for this species.*

*2. SCC listed on the IUCN Red List of Threatened Species or South Africa’s National Red List website as Critically Endangered, Endangered or Vulnerable according to the IUCN Red List 3.1. Categories and Criteria and under the national category of Rare.”*

24. The Animal Species Protocol describes Low Sensitivity areas as:

*“1. Areas where no natural habitat remains. 2. Natural areas where there is no suspected occurrence of SCC.”*

25. This Screening Tool consequently indicates the *likelihood* of species of conservation concern and other environmental features being present at a site, assigns a corresponding level of sensitivity to the site, and dictates what specialist studies must take place as part of the environmental authorisation process. Sensitivity is not a measure of potential impacts of development; it only flags potential risks that need assessment. Outputs from the Screening Tool reflect the current state of knowledge, as a basis for further determination. Hence the Screening Tool, when used as part of an EIA authorisation process, has a mandatory site verification procedure, and is supported by species and ecosystem specific Protocols and accompanying Guidelines. The sensitivity rating for Terrestrial Animal Species is based on the type of data, and confidence levels in that data.

26. Based on the above, it must be appreciated that the Screening Tool is an initial step. Its core function is to initiate, or set the course for a host of subsequent steps, prior to decision-making. The use of the Screening Tool to circumvent these subsequent steps is not the intention of the Tool. In this respect, the DFFE website that hosts the Screening Tool indicates that *“(t)he Screening Tool therefore flags the need for an*

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<sup>11</sup> GN 1150 in GG 43855 of 30 October 2020.

*Assessment, but the developer/EAP/CA will decide on the process going forward sourcing relevant data".*

27. The Screening Tool therefore should not be used as a basis for excluding the need to obtain an environmental authorisation, as this is not its intended purpose.

### **Specific comments:**

#### Site sensitivity verification (section 5)

28. The Exclusion Notice refers, in section 5.2, to Site Sensitivity Verification being undertaken "on the site". The wording is ambiguous as to the precise requirements of the verification process. "On the site" can mean physically present on the site, or simply refer to a desktop analysis. This confusion was compounded by comments made by Mr. Rhulani Kubayi at the stakeholder meeting on 4 October 2022 to the effect that Site Sensitivity Verification does not require one to be on the site. There needs to be more explicit wording requiring that the EAP and relevant specialists physically visit the area and inspect the site and its surrounds.
29. We furthermore agree with BirdLife South Africa's recommendation regarding the inclusion of references to the National Protocols and Guidelines regarding standardised requirements for Specialist Studies in EIA.<sup>12</sup> These Protocols should still be applicable to the content of the site sensitivity verification report (referred to in sections 5.3 to 5.7), given that these have been gazetted as the minimum requirements for the specialist assessment and reporting of environmental impacts. These Protocols also provide clarity on what is "low" or "medium" sensitivity. These terms are pivotal to the proposed exclusions, yet they are not defined in the Site Screening Tool or in the Exclusion Notice.

#### Application of the exclusion (section 6)

30. Given what we have said in the preceding sections regarding the Screening Tool's ratings of "high", "medium" and "low" referring to the likelihood of occurrence of species of conservation concern, it must be stressed that that the "High" and "Very High" sensitivity ratings are least likely to be incorrect, given that the allocation of this rating is only admissible in instances where fine scale mapping and accurate data points are available. Consequently, it is more likely that "medium" and "low" ratings (indicative of less reliable or absence of fine-scale data) will be inaccurate.
31. Accordingly, development should be even less permissible in areas of "low" or "medium" sensitivity, as these are the areas for which habitat for species of conservation concern is merely suspected, whereas for "high" sensitivity, habitat for species of conservation concern is confirmed.

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<sup>12</sup>[https://www.dffe.gov.za/sites/default/files/gazetted\\_notices/nema\\_environmentalthemes\\_reportingcriteria\\_g43110\\_gn320.pdf](https://www.dffe.gov.za/sites/default/files/gazetted_notices/nema_environmentalthemes_reportingcriteria_g43110_gn320.pdf)

32. It is nonsensical for the exclusion to apply in areas where the site sensitivity verification for a specific theme identifies that the “very high” or “high” sensitivity rating of the screening tool is in fact “medium” or “low” sensitivity. Again, the use of the sensitivity ratings is being misapplied here.
33. We are also very concerned that development of linear infrastructure that forms an integral part of an excluded activity may take place in areas of “very high”, “high”, “medium” or “low” environmental sensitivity. Linear infrastructure such as roads, substations and powerlines can cause harmful impacts: in remote areas such infrastructure can extend over many kilometres, posing a significant risk to bats and birds, and fragmenting habitats. It is therefore extremely concerning that such infrastructure is receiving a blanket exclusion, as it stands to have a significantly detrimental impact on terrestrial biodiversity. Deciding to exclude, under any and all circumstances, the requirement to obtain an environmental authorisation in the instance of linear infrastructure that forms part of a solar PV facility is contrary to the principles contained in section 2 of the National Environmental Management Act, 1998 (“NEMA”).

*Registration and re-registration (sections 7 and 8): absence of consultation and right to appeal*

34. We note that in terms of sections 7 and 8 of the Exclusion Notice, a project proponent needs simply to register the proposed facility and infrastructure 15 days prior to the expected commencement date of the proposed development or expansion. We are deeply concerned that the registration process makes no provision for public participation and consultation with interested and affected parties.
35. The registration process is consequently not only procedurally unfair, but unlawful insofar as it fails to comply with requirements of integrated environmental management and impact assessment and the section 2 principles contained in NEMA. The Exclusion Notice would not withstand judicial scrutiny on this basis.
36. All South Africans have a right to administrative action that is lawful, reasonable and procedurally fair.<sup>13</sup> Procedurally fair administrative action requires a person whose rights stand to be adversely affected by a decision to be given adequate notice of the nature and purpose of the proposed decision, and an opportunity to make representations in relation thereto.<sup>14</sup>
37. NEMA recognises the importance of this right and contains several procedural safeguards in relation to the right of interested and affected parties to participate in environmental decision-making. In this regard NEMA provides as follows.
  - 37.1. The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to

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<sup>13</sup> Section 33, Constitution.

<sup>14</sup> Section 3, Promotion of Administrative Justice Act, 2000.



develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.<sup>15</sup>

- 37.2. The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.<sup>16</sup>
- 37.3. The general objective of integrated environmental management is to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment.<sup>17</sup>
- 37.4. Procedures for the investigation, assessment and communication of the potential consequences or impacts of activities on the environment must ensure, with respect to every application for an environmental authorisation public information and participation procedures which provide all interested and affected parties, including all organs of state in all spheres of government that may have jurisdiction over any aspect of the activity, with a reasonable opportunity to participate in those information and participation procedures<sup>18</sup>
38. By enabling a proponent to register a solar PV facility without notifying potentially interested and affected parties of the impending registration, and without affording those parties an opportunity to make submissions in respect of the proposed facility, rights to procedurally fair administrative action are undermined. The Exclusion Notice fails to comply with provisions of NEMA which explicitly requires public participation in environmental decision-making.
39. At the stakeholder meeting of 4 October 2022, DFFE commented that there is no need to have a second public participation process as part of the registration process, as public participation is already conducted as part of the application for a change in land use, and there is accordingly no need to duplicate this process. We strongly object to this line of reasoning for the following reasons:
- 39.1. it is inconsistent with South African jurisprudence<sup>19</sup> which recognises the land use planning process (in terms of which land is rezoned for the purposes of solar PV development) is separate and distinct from the environmental regulatory process;
- 39.2. the former falls within the regulatory authority of municipalities, and the latter with provincial or national departments responsible for the environment; the

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<sup>15</sup> Section 2(4)(f).

<sup>16</sup> Section 2(4)(q).

<sup>17</sup> Section 23(2)(d)

<sup>18</sup> Section 24(4)(a)(v).

<sup>19</sup> *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC).

constitutionally mandated functions of the different spheres of government must be respected;

- 39.3. the public participation process as part of the land change application can *never* be a substitute for public participation in terms of NEMA.
40. In addition, no provision is made for interested parties to be notified of a registration decision. It is therefore quite conceivable that the entire registration process takes place without the people who may stand to be most affected thereby having any knowledge of it. In this regard, we note DFFE's concession at the stakeholder meeting that there is no social layer in the Screening Tool for solar PV. There is consequently no means of taking into account the views and concerns of persons who stand to be directly affected by solar PV developments of significant magnitude.
41. Furthermore, in addition to being denied the opportunity to participate in decisions regarding the registration of solar PV facilities, interested and affected parties are also left without the option to appeal against those decisions. If interested and affected parties are not notified of the registration decision, it is unclear how they would know to submit an appeal.
42. Further, no right of appeal is in any event available to affected persons in terms of section 43 of NEMA because the decision to register a solar PV facility in terms of the Exclusion Notice is not a power delegated to the competent authority under NEMA. The only option available to a person whose rights have been affected by a decision to register is to approach the High Court to judicially review such decision. Insofar as the DFFE has published the Exclusion Notice in an effort to alleviate its administrative burden, it is highly likely that it will find itself burdened with defending applications for the judicial review of registration decisions in the absence of a right to appeal being available to affected persons.

*Unenforceable declaration of commitment to implement Environmental Management Programme ("EMPr")*

43. We note that the Exclusion Notice contains, in sections 7 and 8, the requirement for an EMPr (compiled by the environmental assessment practitioner and signed off by specialists) and a signed declaration of commitment by the project proponent that the EMPr will be implemented.
44. We are however very concerned that this declaration constitutes no more than a watered-down gesture to comply with an EMPr, with no provision made for monitoring compliance, and no obligation in law for a project proponent to in fact abide by the declaration.
45. The declaration (Appendix 6) makes provision for the proponent to attest that they are fully aware of their responsibilities in terms of NEMA and failure to comply with 'these requirements' may constitute an offence. It is however unclear from this discretionary

language what 'requirements' are contemplated by the provision and what circumstances would render non-compliance an offence. It certainly can't be argued that failure to comply with the Exclusion Notice is an offence, as no provision is made to this effect. Further, if implementation of the EMPr is not a condition of an environmental authorisation, failure to implement the EMPr is also not an offence in terms of NEMA.

46. In addition to the above, the proponent is expected to testify to having complied with "all obligations as expected...in terms of the EMPr." This is simply not possible or logical, given that at the registration stage construction of the facility would not have commenced and implementation of the EMPr not yet required.
47. There is no legal obligation for a project proponent to comply with the EMPr. The declaration of commitment is unenforceable, and because it is not a condition in an environmental authorisation, falls outside the ambit of the compliance and enforcement provisions of Part 2 of Chapter 7 of NEMA. This is entirely inadequate, considering the potential for abuse of the exclusion by unscrupulous developers.

#### Fettering of the decision-maker's discretion

48. Section 9 of the Exclusion Notice stipulates that within 10 days of receipt of the correctly completed registration form and supporting documentation described in paragraph 7 of the Schedule, the competent authority *must* register the proposed development or expansion.
49. The peremptory nature of this section unduly fetters the discretion of the competent authority. It is left with no choice to refuse a registration or call for additional information. As long as a registration form and completed documentation is filed with the competent authority, the latter compelled to register the proposed facility. The competent authority therefore has no discretion to refuse a registration in circumstances where the information supplied may be complete, but inadequate, or where more detailed information regarding certain aspects of the proposed development may be required.
50. This provision should be contrasted with Regulation 20 of the EIA Regulations, 2014, which provides that the competent authority must within 107 days of receipt of the basic assessment report and accompanying documents (a) grant environmental authorisation in respect of all or part of the activity applied for; or (b) refuse environmental authorisation.
51. This regulatory tick-box approach is inadequate considering the potential impacts on the receiving environment. The competent authority's discretion should not be restricted in this manner, and it must have the option of refusing a registration, or calling for additional information.

*Failure to comply with principles of integrated environmental management*

52. Integrated environmental management requires:<sup>20</sup>
- 52.1. the integration of NEMA section 2 principles of environmental management into all decisions that may affect the environment;
  - 52.2. the identification, prediction and evaluation of actual and potential impacts on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities;
  - 52.3. ensuring that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them; and
  - 52.4. crucially, ensuring adequate and appropriate opportunity for public participation in decisions that may affect the environment.
53. None of the above requirements are met by the Exclusion Notice. Not only are the NEMA principles overlooked, particularly in relation to public participation, but there is inadequate identification, prediction and evaluation of impacts. There is furthermore no opportunity for the assessment of cumulative impacts, which becomes particularly important in circumstances which contemplate the blanket approval (and associated proliferation) of facilities which may have significant, negative cumulative impacts on social and ecological aspects of the environment. We have already emphasised our concern at the lack of opportunity for public participation.
54. We are primarily concerned that there is insufficient justification for the wholesale exclusion from the need to obtain environmental authorisation for solar PV facilities. In this regard, a number of key environmental regulatory safeguards that are usually implemented through an EIA and environmental authorisation will be forfeited. Specifically:
- 54.1. the mitigation hierarchy, which calls for impacts to first be avoided, will not be implemented;
  - 54.2. linked to the absence of implementation of the mitigation hierarchy, valuable opportunities to offset residual environmental impacts through conditions in environmental authorisations will be lost;
  - 54.3. specialised assessments to be conducted by qualified experts, with data collected in accordance with the species protocols and associated guidelines, will not be conducted;

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<sup>20</sup> Section 23, NEMA.

- 54.4. the opportunity to impose conditions (in an environmental authorisation) in relation to the activity, thereby mitigating potential negative impacts associated with a solar PV facility (should the activity be authorised) will be lost;
- 54.5. no provision can be made for the regular auditing of compliance with the EMPr, which is in any event not enforceable;
- 54.6. because no environmental authorisation is issued, the registration of solar PV facilities falls outside of the ambit of the compliance and enforcement provisions contained in Part 2 of Chapter 7 of NEMA; and
- 54.7. there is no procedure or penalty in place for the commencement of construction of a solar PV facility prior to registration (akin to the section 24G process), which means that there is little incentive to register a facility in the first place.

## **Conclusion**

55. In light of the above concerns, the BLC is of the view that the blanket exclusion contemplated in the Exclusion Notice is not justified, and further that significant, negative impacts stand to be sustained in the event that DFFE proceeds with publication of the exclusion.
56. We are also concerned that in the absence of regulatory control measures in place to monitor compliance with EMPr's, the potential loss of sensitive habitat could result with no opportunity to mitigate or offset. Furthermore, the process could easily be abused by unscrupulous EAPs and applicants. This is a likely consequence given that there is no discretion or powers allocated to the competent authority to refuse registration where projects will have negative environmental impacts.
57. In the absence of provisions rendering failure to obtain registration prior to development an offence, there is little incentive for project proponents to even bother with the registration process in the first place.
58. The DFFE has other options available to expedite the roll out of solar PV energy rather than the exclude it from the need to obtain environmental authorisation. Declaration of the REDZ and the procedure to be followed (namely a basic assessment process) if the proposed renewable energy facility falls within one of the REDZ provides an adequate mechanism for expediting renewable energy development in a manner that is sensitive and responsive to environmental, social and economic constraints. In this regard we reiterate BirdLife's comment that the CSIR has already done comprehensive studies that could be used to expand existing REDZ, and for additional areas to be demarcated. The Screening Tool could be used in this process to check the sensitivity levels of these areas.
59. We therefore urge the DFFE to reconsider the approach proposed in the Exclusion Notice (which is in our view unlawful and challengable in certain respects), and rather

look to other means of expediting and expanding the renewable energy offering in South Africa, including expansion of the REDZ. Excellent suggestions in this regard have been made by BirdLife in their comments on the Exclusion Notice, which we endorse.

60. Thank you for consideration of our comments and suggestions.

Yours faithfully,



**BIODIVERSITY LAW CENTRE NPC**

***Per* Kate Handley**