29 May 2026

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Dear Sindiswa Dlomo and Lindiwe Khumalo

RE: BIODIVERSITY LAW CENTRE COMMENTS ON THE PROPOSAL FOR A FLEXIBLE EIA SYSTEM

CONTENTS

A. INTRODUCTION

1. The following submissions are made by the Biodiversity Law Centre ("**BLC**") in response to the Department of Forestry, Fisheries and Environment's ("**DFFE**") proposal on the Flexible EIA System (hereafter, the "**proposal**"). They are directed at the proposal slides[1] as presented and do not propose solutions, consistent with this stage of the consultation. We reserve our rights to expand on our submission upon receipt of the complete concept note.

2. This submission is endorsed by Natural Justice, the Centre for Environmental Rights, and the Southern African Foundation for the Conservation of Coastal Birds (SANCCOB). The BLC also endorses the submissions made by Natural Justice and the Centre for Environmental Rights.

3. The BLC is a non-profit organisation and law clinic. Our mandate is to use the law to protect and restore indigenous ecosystems and species in Southern Africa to support ecosystem functioning and sustainable livelihoods. The BLC is particularly concerned with law and policy that give effect to section 24 of the Constitution,[2] and the State's obligations to protect the environment for present and future generations, by preventing pollution and ecological degradation, promoting conservation, and securing ecologically sustainable development. Section 24 imposes both negative and positive obligations on the state. Negatively, the state must refrain from authorising activities harmful to the environment without proper safeguards. Positively, it must affirmatively design regulatory systems that are capable of identifying and preventing environmental harm before it occurs. The proposal must be assessed against both dimensions.

4. As such, these comments will refer to relevant portions of South Africa's legislated environmental framework that gives effect to this constitutional right, namely the National Environmental Management Act ("**NEMA**"),[3] the Environmental Impact Assessment Regulations ("**EIA Regulations**"),[4] and the three listing notices corresponding to the EIA Regulations ("**Listing Notices**").[5] We also refer to the Promotion of Administrative

[1] Found at: https://www.dffe.gov.za/flexible_eia_consultation#submission.
[2] Constitution of the Republic of South Africa, 1996.
[3] Act 107 of 1998.
[4] GNR 982 in *Government Gazette* 38282 of 4 December 2014.
[5] GN 983 in *Government Gazette* 38282 of 4 December 2014, GN 984 in *Government Gazette* 38282 of 4 December 2014, and GN 985 in *Government Gazette* 38282 of 4 December 2014 ("**Listing Notice 1, 2, and 3**", respectively).

Justice Act ("**PAJA**"),[6] which gives effect to everyone's right to lawful, reasonable, and procedurally fair administrative action.[7].

5. Throughout these comments, the proposal is assessed against the framework principles established in section 2 of NEMA ("**NEMA Principles**"). The NEMA Principles most directly relevant the proposal include –

5.1. the duty to avoid, minimise, and remedy the disturbance of ecosystems and loss of biological diversity;[8]

5.2. the precautionary principle, which requires that a risk-averse and cautious approach be applied where there is uncertainty about the consequences of an activity;[9]

5.3. the principle of integrated environmental management, which requires that all the elements of the environment be acknowledged as linked and interrelated;[10] and

5.4. the principle that participation of all interested and affected parties in environmental governance must be promoted – this is a positive duty, not a passive willingness to receive comments.[11]

6. The NEMA Principles are not aspirational and apply throughout South Africa to the actions of all organs of state that may significantly affect the environment, alongside all other appropriate and relevant considerations.[12] They are legally binding obligations that any replacement to the current EIA regime must satisfy. Together, these principles establish both the baseline and the framework for the constitutionally compliant reform of South Africa's EIA process.

7. The BLC supports the DFFE's recognition that South Africa's current EIA system requires reform, particularly in relation to inefficiency, disproportionality, fragmentation, and inadequate strategic integration. We agree that a more context-sensitive, environmentally responsive system could better align environmental governance with section 24 of the Constitution and the principles of NEMA. However, while the proposal identifies many of the correct problems, it does not yet provide a legally or institutionally sound mechanism for solving them. As currently formulated, the proposal depends on preconditions that do not yet exist, confers broad discretion without adequate

[6] Act 3 of 2000.
[7] Constitution section 33. The Constitutional Court has affirmed that all statutes that authorise administrative action must be read together with PAJA, see: *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 101.
[8] NEMA section 2(4)(a)(i).
[9] NEMA section 2(4)(a)(vii).
[10] NEMA section 2(4)(b).
[11] NEMA section 2(4)(f).
[12] NEMA section 2(1)(a).

safeguards, risks weakening public participation and precautionary protections, and may deepen rather than resolve existing systemic failures, including those associated with strategic planning gaps and the One Environmental System ("**OES**"). Reform is necessary, but reform that is not properly sequenced, legally coherent, and practically implementable risks replacing one flawed system with another in a way that risks undermining both the constitutional right to have the environment protected in terms of section 24 and the right to just administrative action under section 33.

8. In summary, the BLC's submission is structured as follows –

8.1. Opportunities identified in the proposal –

8.1.1. Context-sensitive environmental assessment using environmental management frameworks ("**EMFs**"), bioregional plans, and conservation plans as inputs to the screening process is meaningful improvement on threshold-based triggers.

8.1.2. Integration with strategic planning frameworks formalises the link between strategic environmental planning and project-level authorisation. The opportunity to improve proportionality, through a multi-route structure has the potential to better match regulatory intensity to environmental need.

8.2. Concerns with the proposal as currently formulated –

8.2.1. The consultation process of the proposal itself was inadequate for a reform of this significance.

8.2.2. The preconditions of the new system do not exist and are outside the scope of this proposal.

8.2.3. The proposal does not achieve its stated purpose of efficiency, adaptability, meaningful public participation and stakeholder engagement, substantive environmental protection, and regulatory compliance.

8.2.4. The proposal does not engage with the One Environmental System or explain how the new flexible process will interact with mining authorisations.

9. The sections below first acknowledge the proposal's potential reform opportunities, before setting out the structural, legal, and institutional concerns that currently limit its viability

B. OPPORTUNITIES

10. At the outset, the BLC commends the DFFE's effort to reform a system that has not adequately served South Africa's constitutional environmental obligations. The proposal identifies several legitimate shortcomings in the current EIA system, including inefficiency, fragmentation, disproportionality, and inadequate strategic integration. These are real concerns that warrant reform.

11. The BLC therefore acknowledges that the proposal presents meaningful opportunities to strengthen South Africa's environmental governance framework. However, these opportunities are contingent on legal, scientific, and institutional preconditions that are not yet guaranteed. They should accordingly be understood as reform potential, rather than benefits the proposal can presently deliver in its current form.

12. *The opportunity for context-sensitive environmental assessment:*

12.1. The clearest opportunity presented by the proposal lies in its recognition that environmental risk cannot be determined solely by activity type or scale, but must also account for the sensitivity of the receiving environment.

12.2. A system more explicitly informed by strategic instruments such as EMFs, bioregional plans, and conservation plans could better distinguish between developments in already-transformed landscapes and those proposed in ecologically or culturally sensitive environments. This may strengthen precaution, improve ecological responsiveness, and better align environmental assessment with section 24 of the Constitution and NEMA's principles.

12.3. However, this opportunity depends on those strategic instruments being current, standardised, comprehensive, and legally reliable. Without this, the proposal's receiving-environment approach cannot function as intended.

13. *The opportunity for stronger strategic integration:*

13.1. The proposal also presents an opportunity to better integrate project-level environmental authorisation with South Africa's broader integrated environmental management framework.

13.2. By more meaningfully linking EIAs to EMFs, bioregional plans, conservation plans, and other strategic tools, the proposal could improve cumulative impact governance, reduce duplication, and strengthen alignment between environmental planning and project-level decision-making. More broadly, this creates an

opportunity not only to reform EIA procedure, but also to strengthen the wider environmental governance system.

13.3. However, this opportunity can only be realised if those strategic planning systems are themselves strengthened and operationalised before they become central to a new screening architecture.

14. *The opportunity to improve proportionality:*

14.1. The proposal correctly identifies that the current EIA system may not always proportionately align regulatory burden with environmental risk.

14.2. A more differentiated framework may, in principle, better calibrate process intensity to actual environmental significance, reducing unnecessary burdens for genuinely low-risk developments while preserving robust scrutiny for environmentally significant or uncertain activities.

14.3. However, proportionality cannot come at the expense of precaution, public participation, legal certainty, or constitutional compliance. A proportionate system is only a lawful opportunity if built on clearly defined safeguards, thresholds, and procedural protections.

15. *The opportunity for broader systemic reform:*

15.1. Finally, this reform process presents an opportunity to address wider structural weaknesses within South Africa's environmental governance framework, including uneven implementation of strategic planning tools and unresolved governance concerns associated with the OES.

15.2. A reform of this scale should move beyond the redesigning of procedural routes to strengthen how environmental governance functions systemically.

16. In summary, the proposal identifies several reform pathways that could, if properly sequenced and lawfully implemented, improve South Africa's environmental governance framework. However, the success of this opportunity depends on foundational legal, institutional, scientific, and participatory preconditions that must be established before flexibility can operate rationally, consistently constitutionally, and in line with the principles of administrative justice. Each of the opportunities identified above is addressed in the concerns below in terms of the preconditions necessary to realise it.

C. CONCERNS

17. The concerns below are not directed at the proposal's objectives (which represent a legitimate attempt to reform the current EIA system), but rather at the absence of a rational connection between those objectives and the mechanisms proposed to achieve them. Such mechanisms include the public participation process of the proposal itself. These concerns are not abstract and are grounded in South Africa's current administrative and ecological context, and in the specific institutional conditions under which the proposed system will need to operate.

18. A regulatory scheme must demonstrate the rational connection between its objectives and the mechanisms proposed to achieve them. In *Albutt,* the Constitutional Court confirmed the relevant enquiry is whether the means selected are rationally related to the object sought to be achieved,[13] and further clarified in *Democratic Alliance* that "means" encompasses both the substance of the decision and the procedure in terms of which it is taken.[14] The proposal satisfies neither.

The public participation process is legally deficient

19. The proposal represents a fundamental restructuring of the statutory EIA framework through which South Africa's environmental obligations under section 24 of the Constitution are discharged. The consultation process does not satisfy the requirements of section 195(1)(e) of the Constitution, or NEMA's duty to promote participation of all interested and affected parties in environmental governance[15] because –

19.1. The timeframe provided (although extended) was not an adequate timeframe for interested and affected parties to comment on a regime reform that is so legally and technically complex.

19.2. The in-person consultation sessions were inaccessible and poorly communicated, and the link to the online session was not distributed timeously.[16]

19.3. The stakeholder consultations were based on a PowerPoint presentation and not a full concept document. The screening criteria, thresholds, minimum requirements, and assessment route definitions do not yet exist. It is difficult to provide a meaningful comment on instruments that have not been drafted. Subsequent to the stakeholder consultation sessions held in April 2026, the BLC became aware that

[13] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) at paragraph 49.
[14] *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) at paragraph 34.
[15] NEMA section 2(4)(f).
[16] This was noted in the Cape Town consultation session.

the DFFE had made available on the Flexi-EIA website a detailed discussion document entitled Draft Discussion Document on the Implementation of a Flexible EIA Process for South Africa, Version 2 (the "**Concept Note**"), dated August 2025. The Concept Note was not made available to stakeholders prior to or during the consultation process, despite having been finalised some seven months before the consultation sessions were held. The DFFE instead elected to release only the PowerPoint presentation and related workshop materials at the time of consultation. The BLC's comments in this submission have accordingly been prepared on the basis of those materials, and we have not had a reasonable opportunity to review or engage with the Concept Note in the time available to prepare this submission. This is a significant gap in the public participation process. The Concept Note, on a preliminary reading, provides considerably greater detail on the rationale, structure, and intended implementation of the proposed system than the materials made available for consultation, and a number of the concerns raised in this submission may be reinforced, refined, or extended by its contents. The BLC reserves the right to engage further with the Concept Note in any subsequent consultation round and reiterates its recommendation, set out above, that a further round of public participation be conducted on a draft legal instrument. The DFFE's failure to make the Concept Note timeously available is itself a procedural deficiency that is relevant to the constitutional adequacy of the consultation process as a whole.

20. It is recommended that a further, more extensive round of public consultation should be conducted following this consultation period (on a draft legal instrument, rather than a concept) so that stakeholders can engage with the actual mechanisms that will give effect to reform rather than the stated intentions behind it. As it reads currently, this is a consultation process on an intention to make a proposal, rather than a consultation on an actual proposal.

21. The Constitutional Court has repeatedly confirmed that meaningful public participation is a foundational constitutional requirement rather than a procedural formality. In *Doctor's for Life International v Speaker of the National Assembly and Others*,[17] the Court confirmed that participatory governance is central to constitutional democracy and requires a genuine opportunity for affected parties to influence decision-making.

<u>The proposal depends on preconditions that do not yet exist</u>

22. The proposal's central mechanism is a context-sensitive screening process based on the characteristics and sensitivity of the receiving environment. In principle, this presents

[17] 2006 (6) SA 415 (CC)

a meaningful opportunity to improve environmental governance. However, the proposal's functionality depends on institutional and informational preconditions that do not exist yet.

23. The proposal repeatedly relies on strategic planning instruments such as EMFs, bioregional plans, conservation plans, and screening criteria that are either incomplete, inconsistent, non-binding, or still to be developed. The proposal itself acknowledges that much of this work will be undertaken by a separate task team outside the scope of the current reform process. No timeline, minimum coverage standard, or condition precedent to implementation is identified.

24. At present, EMFs and related planning instruments are not applied consistently across South Africa. Coverage is partial, uneven, and in some areas absent entirely. Where such instruments do exist, their quality varies considerably, and their findings do not carry binding legal effect. The proposal, therefore, seeks to redesign the EIA system before reforming the integrated environmental management tools on which the new system depends.

25. The same concern applies to environmental information and scientific data. South Africa possesses substantial biodiversity and environmental data generated by SANBI, universities, research institutions, monitoring programmes, and citizen science initiatives. However, this information is not consolidated into an integrated national system capable of supporting consistent screening decisions. Environmental Assessment Practitioners ("**EAPs**") and competent authorities ("**CAs**") must instead locate and interpret information independently, with varying degrees of access, expertise and thoroughness.

26. The proposal refers to discretion supported by "systems, tools, and science". At present, those systems remain aspirational. If they do not exist before the conferral of screening discretion, the resulting decision-making process will not be adaptive or context-responsive, but arbitrary.

27. This would require, at minimum –

27.1. binding legal status for EMF findings in environmental decision-making;

27.2. mandatory review and update cycles for strategic planning instruments;

27.3. national methodological standards for screening and spatial planning tools; and

27.4. A properly resourced national environmental information system providing ease of access to South Africa's wealth of biodiversity and environmental data.

28. These are not implementation details that can be resolved later. They are preconditions to the lawful operation of the proposed system.

29. The table below summarises the current[18] Integrated Development Plans ("**IDPs**"), Spatial Development Frameworks ("**SDFs**"), and EMFs used across South Africa. It has been divided by province and the number of districts in each province is represented by the number between the brackets. **Please note** the table displays this information at a district level and was sourced from an internet search (and therefore displays what was readily accessible and publicly available).

	WC (6)	NC (5)	EC (8)	KZN (11)	MP (3)	GU (5)	FS (5)	NW (4)	LP (5)
IDP	6/(6)	3/(5)	7/(8)	9/(11)	2/(3)	5/(5)	4/(5)	2/(4)	5/(5)
SDF	6/(6)	0/(5)	3/(8)	2/(11)	0/(3)	2/(5)	1/(5)	0/(4)	1/(5)
EMF	5/(6)	0/(5)	0/(8)	0/(11)	0(3)	0/(5)	0/(5)	0/(4)	0/(5)

National summary of up-to-date framework documents (%) 52 districts	
IDP %	82.69%
SDF %	28.85%
EMF %	9.62%

30. While the majority of districts have an up-to-date IDP, most do not have an SDF or an EMF. It is clear that the Proposal's preconditions do not exist, and the Proposal cannot operate the way it is intended to without these preconditions.

The proposal does not achieve its stated purpose

31. The proposal states the flexible EIA system will improve efficiency, adaptability, stakeholder engagement, and environmental protection while ensuring compliance with regulatory requirements. The intention is further described as allowing for more flexibility, introducing an "early exit" option, and allowing the CA discretion supported by systems, tools, and science.[19]

32. However, and as explained below, there is no rational connection established between the aims and the mechanisms proposed to achieve them.

[18] "**Current**" refers to the framework documents that are published and up-to-date and does not include draft documents.
[19] Proposal slide 3.

Efficiency

33. The proposal claims the new system will improve efficiency. One of the mechanisms proposed to achieve this is the introduction of a screening phase with an "early exit" option, through which low-impact developments can be authorised without a full EIA.

34. However, rather than reducing the process, the proposal effectively adds mandatory procedural steps upstream. The current EIA system moves directly from an activity in the Listing Notices to either a BA or S&EIR (as appropriate), while the proposed system inserts a pre-application form submission and a potential pre-application meeting,[20] which is to be followed by a screening phases requiring a detailed application.[21]

35. Because the proposed system adds additional procedural steps at the front end, any efficiency gain depends entirely on the early exit option eliminating enough applications downstream to offset the upstream burdens. The proposal provides no evidence that this offset will occur, or at what rate. In its current form, the proposal risks increasing the administrative burden of an already resource-constrained CA.

36. This concern is not hypothetical. The consultation process itself reflected the DFFE's existing resource constraints (as discussed above in paragraphs 19 - 21). The same institutional limitations that affected the consultation process are likely to affect implementation of the flexible EIA system.

37. The proposal itself acknowledged that "*more developments will trigger the need to conduct screening*" and that this "*will require increased resources to deal with these applications*".[22] The proposal, therefore, accepts that its primary efficiency mechanism may initially increase administrative burden rather than reduce it. The efficiency objective and the acknowledged resource implications cannot be reconciled without a credible resourcing and transition plan.

38. A concern was raised by an EAP at the Cape Town consultation session, who explained that the proposal also rests on an assumption of good faith self-assessment by applicants. The early exit option and the *Statement of Insignificant Impact* depend on the applicants accurately and honestly characterising the environmental significance of their own development (something which the EAP considered naïve). The EIA system exists to take away this self-assessment, and the proposal does not explain what safeguards will be put in place against bad faith or negligent self-assessment. Verifying

[20] Proposal slide 20.
[21] Proposal slide 21.
[22] Proposal slide 15.

this only adds to the CA's administrative burden further, and may compound inefficiency rather than remedying it.

Adaptability

39. The proposal claims the new system will be more adaptable but does not define what adaptability means within the regulatory context. The proposed flexibility depends primarily on CA discretion at the screening phase, informed by screening criteria that do not yet exist and strategic planning instruments that remain incomplete, inconsistent, and legally non-binding (as discussed above in paragraphs 22 - 30).

40. This is work that needs to happen before the flexible EIA system becomes operational. If not, the discretionary screening system will be an arbitrary practice across most of the country, rendering the process administratively flawed This concern about ungoverned discretion is supported by comparative law. A 2018 UNEP global review of EIA legislation found that activity-based lists "remove the burden of case-by-case analysis on the screening authority and minimize the chance of ambiguity and corruption in decision making." The proposal's replacement of objective triggers with a discretionary screening model does the opposite: it maximises the role of case-by-case judgement and, with it, the scope for inconsistent, influenced, or captured decision-making. This concern is particularly acute in a context of documented institutional capacity constraints and commercial pressure from applicants and their EAPs.

41. The legal character of the screening decision compounds this concern. The CA must exercise discretion to make a decision, based on the screening criteria, about whether a development needs an environmental assessment, and then the level of that assessment.

42. The Supreme Court of Appeal has confirmed decisions constitute administrative action if they have a direct, external legal effects.[23] A screening decision that determines whether a development proceeds to assessment, and what level of assessment is then required, has direct legal consequences for both the applicant and for affected parties.

43. If this is the case, the CA's decision on the outcome of the screening process will constitute administrative action and be subject to the provisions of PAJA, including requirements of procedural fairness, reasons, and access to review. The proposal does not engage with this implication at all.

[23] *Grey's Marine Hour Bay v Minister of Public Works* 2005 (6) SA 313 (SCA).

44. The proposal acknowledges that both the screening criteria and the strategic planning tools necessary to guide the screening decisions remain under development. It is, therefore, irrational to claim that the proposed system is capable of producing context responsive outcomes before the informational and institutional infrastructure necessary to support these outcomes exists.

45. The over-reliance on administrative discretion contradicts the principle of integrated environmental management[24] because a system that produces inconsistent outcomes across different CAs cannot acknowledge all elements of the environment as linked and interrelated in any coherent or systematic way. It is also inconsistent with the precautionary principle[25] as inconsistent discretion will vary with the individual official making the decision rather than actual environmental risk.

Public participation and stakeholder engagement

46. The proposal claims the new system will improve stakeholder engagement. The mechanism proposed is a flexible public participation process in which the "extent of the consultation must be equal to the extent of the impact," with the applicant/EAP proposing the public participation plan and the CA confirming the appropriate level of public participation.[26]

47. This is legally deficient for several reasons and cannot be said to be connected rationally to the aim of improved stakeholder engagement.

48. First, stakeholder engagement is not merely a quality control mechanism, and its intensity is not meant to scale with the assessed impact significance. It is the mechanism through which affected parties assert their rights, how local social and environmental knowledge enters the process, and a way for communities and civil society to hold developers and authorities accountable.

49. These functions do not diminish when assessed impacts are low. In fact, stakeholder engagement may even be more important in such instances, because the low impact assessment may itself be a product of information that only the affected community holds and that the screening process has not yet obtained.

50. Reducing the extent of public participation as a function of assessed insignificance is circular: the CA determines the significance of the impact based on the information

[24] NEMA section 2(4)(b).
[25] NEMA section 2(4)(a)(vii).
[26] Proposal slide 34.

before it during the screening stage, and then uses that determination to justify limiting the participation that might have provided the information to correct it. This is not rational.

51. Further, the proposal gives the applicant/EAP the role of proposing the Public Participation Plan. This is problematic because neither the applicant, nor the EAP to a certain extent,[27] are independent from the development, and both have a direct commercial interest. The applicant has a financial interest in minimising the scope, cost, and duration of the public participation process, and the EAP is appointed and paid by the applicant[28] and therefore has a commercial interest in maintaining that relationship.

52. The current system manages this structural conflict of interests by prescribing mandatory minimum requirements for public participation, as a matter of law, independent of what the applicant or EAP might prefer.[29] The proposal replaces this system with a system where the party most motivated to minimise the process has the mandate to propose it, and the CA (who is already over-capacitated and exercising discretion on criteria that does not exist yet) is asked to correct for that motivation. There is no rational basis for concluding this produces better stakeholder engagement than the current mandatory minimum.

53. This concern is particularly significant in the environmental context, where the Constitutional Court in *Bengwenyama Minerals*[30] emphasised the importance of meaningful consultation with affected parties before decisions affecting rights and resources are made.

54. A related concern is the proposal's assumption that the information available to the CA at the screening stage will be sufficient to make an informed decision. The formal spatial planning instruments mentioned in the proposal (being EMFs, bioregional plans, and conservation plans) are ecologically orientated. They do not map indigenous or cultural landscapes, sacred sites, customary land use areas, or community-defined areas of significance. Many traditions are oral and the community would have to be consulted before they become apparent. The Constitution protects the rights of communities to enjoy their culture and use of their language,[31] and a system that does not consult communities before determining insignificance cannot claim to protect these rights.

[27] EIA Regulations regulation 13(1)(a) requires the EAP to be independent, but their commercial relationship with the applicant muddies this.
[28] EIA Regulations regulation 12(1).
[29] EIA Regulations regulation 41.
[30] *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).
[31] Constitution section 31.

NEMA also provides the duty to avoid the disturbance of sites that constitute South Africa's cultural heritage.[32]

55. NEMA contains the duty to *promote* public participation of all interested and affected parties.[33] A system that makes participation flexible and discretionary cannot be said to be promoting it and the proposal is, therefore, inconsistent with this principle.

56. The proposal is further inconsistent with the principle of integrated environmental management[34] because local and community knowledge is part of the integrated understanding of an environment's condition as required by NEMA. Excluding it impoverishes the information base which an integrated assessment depends on.

Constitutional requirements

57. Section 24 of the Constitution provides that everyone has the right to an environment that is not harmful to their health or wellbeing,[35] and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation,[36] promote conservation,[37] and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.[38] In *Fuel Retailers*,[39] the Constitutional Court confirmed that environmental authorities are required to integrate environmental protection and development considerations in a manner than promotes sustainable development. Meaningful public participation is one of the principal mechanisms through which this constitutional obligation is given practical effect in the EIA context.

58. The environmental right under section 24 is not limited to those in the immediate vicinity of a proposed development. Environmental impacts can be latent, dispersed, cumulative, and temporally removed from the development that causes them. An impact that appears insignificant at project level may contribute to a pattern of cumulative degradation that is only visible at a landscape or catchment scale. This was recognised in *Earthlife Africa,*[40] when the High Court confirmed the importance of considering

[32] NEMA section 2(4)(a)(iii).
[33] NEMA section 2(4)(f).
[34] NEMA section 2(4)(b).
[35] Constitution section 24(a).
[36] Constitution section 24(b)(i).
[37] Constitution section 24(b)(ii).
[38] Constitution section 24(b)(iii).
[39] *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC).
[40] *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* 2017 2 All SA 519 (GP).

broader and cumulative environmental consequences in environmental decision-making.

59. Environmental degradation is, therefore, a matter of public concern, not merely private proximity. People depend on ecological systems for food, water, shelter, cultural practices, and wellbeing. The right to a healthy environment is a constitutional right held by the public at large, and the public accordingly has a legitimate interest in participating in environmental decisions, even where they are not directly adjacent to a proposed development.

60. Section 33 of the Constitution provides for just administrative action. Everyone has the right to administrative action that is lawful, reasonable, and procedurally fair.[41] It is already a well-established principle that environmental authorisations are administrative action within the meaning of PAJA (and it is likely that the described screening decisions will also fall into this meaning). The consequence of this characterisation is significant: if screening decisions are administrative action, they must comply with PAJA's requirements of lawfulness, reasonableness, and procedural fairness *independently* of what follows in the assessment phase.

61. Procedurally fair administrative action includes adequate notice of the nature and purpose of the proposed action and a reasonable opportunity to make representations. A person affected by a development who is not notified because the CA has screened the decision out is denied both. The CA's screening determination does not cure this deficiency, it just relocates it, because the screening determination itself is then vulnerable to challenge on the basis that it was made without the procedural fairness it was supposed to inform. To the extent that the proposal limits the rights in sections 24 and 33 of the Constitution, any such limitation must satisfy the requirements of section 36. It must be reasonable and justifiable in an open and democratic society, regard being had to the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and whether less restrictive means to achieve the same purpose exist. The proposal does not engage with section 36 at all. There is no analysis of less restrictive alternatives — such as improving administrative capacity and processing efficiency within the existing rules-based framework — that might achieve the stated efficiency objectives without curtailing participatory and procedural rights. This omission is itself a reason why the proposal, as currently formulated, cannot be said to be constitutionally sound.

[41] Constitution section 33(1).

NEMA and the EIA Regulations

62. The proposal acknowledges that public participation "will always be a mandatory (fundamental) requirement in terms of section 24 of NEMA". However, it then proceeds to propose that the extent of participation in terms of the new system will be flexible and determined by the CA based on the significance and extent of the impact. There is no section of NEMA that suggests that this is legally acceptable.

63. Regulation 41 of the EIA Regulations establishes a detailed and mandatory public participation procedure. Regulation 40(1) requires all interested and affected parties to be given at least 30 days to comment. The requirements in the EIA Regulations are a matter of law, regardless of the assessed significance of the impact. The proposal does not explain how these requirements will be amended, disapplied, or replaced, which creates legal uncertainty.

64. During the consultation session in Cape Town, it was confirmed that the minimum public participation timeframe for assessments will remain 30 days. This commitment is commendable, but does not address the absence of participation in the screening decision that determines the assessment route, nor does it explain the necessary quality and accessibility of the participation (an applicant could formally comply with the 30-day requirement while designing the process, but it could still be practically inaccessible to affected communities) or confirm it will align with the full suite of public participation requirements in the EIA Regulations. These participatory concerns are closely connected to broader administrative justice obligations.

PAJA requirements

65. Where a screening decision constitutes administrative action (which it arguably does), affected parties have the right to procedurally fair administrative action, including adequate notice, a reasonable opportunity to make representations, and the furnishing of reasons.

66. The proposal states that screening decisions are "in process" decisions that are not subject to appeal.[42] This is legally questionable because, if a screening decision materially determines the level of scrutiny to which a proposed development will be subjected, it is a decision that has direct and significant practical consequences for affected parties.

67. An incorrect decision at the screening stage has the potential to have catastrophic consequences. A development with significant environmental impacts might accidentally

[42] Proposal slide 36.

be classified as Route 1 or Route 2, which would result in those impacts never being identified, assessed, or subject to public scrutiny. Once the authorisation is issued and the development proceeds, the environmental damage may be irreversible.

68. Labelling a decision "in process" does not immunise it from the requirements of PAJA. The in-person consultation session in Cape Town clarified that, while one cannot appeal a screening decision, the result of the screening will be published and can be objected to. However, it is not clear if the reasons behind the decision will be made available (which is a requirement of section 5 of PAJA). This is contrary to procedural fairness.

69. A system that prevents affected parties from meaningfully challenging a screening determination is inconsistent with NEMA's participatory,[43] preventative,[44] and precautionary[45] principles. The precautionary principle itself is inherently forward-looking. It requires the prevention of harm before it occurs. A non-appealable screening determination removes one of the final accessible administrative safeguards available before potentially irreversible environmental harm occurs.

70. The proposal considers the possibility of allowing "submissions of objections to the findings of in process decisions" but does not commit to this or explain how this would operate. Affected parties are entitled to know, with certainty, what recourse they have against a screening decision that determines the level of environmental assessment to be applied to a development that may affect their rights. This ambiguity denies legal certainty to parties whose constitutional and statutory rights depend on knowing what recourse they have available.

The "early exit" option and participation

71. The proposed "early exit" option and the *Statement of Insignificant Impact* appear to contemplate that authorisation for a development can be granted on the basis of a statement prepared by the applicant or the EAP, with minimal or no public participation. This is concerning for several reasons and creates a mechanism by which developments affecting third parties can be authorised without those parties being given a meaningful opportunity to participate.

72. It also places the determination of insignificance in the hands of the party with the greatest financial interest in that determination being made, and it does so based on existing information without specialist studies or community input.

[43] NEMA section 2(4)(f).
[44] NEMA section 2(4)(a) more generally.
[45] NEMA section 2(4)(a)(vii).

73. The precautionary principle[46] requires a risk-averse and cautious approach precisely where information is incomplete. A *Statement of Insignificant Impact* prepared solely based on existing information, without specialist investigation or meaningful community participation, amounts to a determination of insignificance made in the very circumstances where precaution should apply most strongly.

74. While the proposal states the *Statement of Insignificant Impact* "still results in the issuance of environmental authorisations by the competent authority," it is not clear that the public participation requirements that currently apply to such authorisations would be retained. If they are not, the early exit option effectively creates a category of environmental authorisation that bypasses the participatory safeguards that NEMA and the Constitution require. The section 24 right is not deferred or contingent on future regulatory steps. In *Trustees for the Time Being of Groundwork Trust & Another v Minister of Environmental Affairs & Others,*[47] the High Court confirmed that the constitutional right to an environment not harmful to health or wellbeing is immediately realisable, imposing on the state an obligation to maintain a regulatory system capable of identifying and preventing harm before it occurs. An early exit mechanism that forecloses assessment on the basis of an applicant's self-assessment, without independent verification or specialist input, is inconsistent with this obligation. The harm the Constitution requires the state to prevent may be precisely the harm the state has elected not to investigate.

Environmental protection

75. The proposal's core mechanism for protecting the environment is CA discretion at the screening phases, informed by screening criteria still to be developed, strategic planning still to be updated, and a risk matrix that is illustrative only.[48] This is a significant departure from the current system, in which the necessity and type of environmental assessment is prescribed by law.[49]

76. The current system (despite its inefficiencies) provides legal certainty and consistency, which environmental protection depends on. The removal of a known legal minimum to replace it with an undefined future instrument is not rationally connected to improved environmental protection.

[46] NEMA section 2(4)(a)(vii).
[47] [2023] ZAGPPHC 1700.
[48] Proposal slide 28.
[49] EIA Regulations and Listing Notices.

77. Most concerning is the treatment of cumulative impacts. The EIA Regulations require the mandatory assessment of cumulative impacts.[50] The proposal's early exit option and *Statement of Insignificant Impact* (to be prepared by the applicant on the basis of existing information without specialist input)[51] contains no equivalent requirement.

78. Under the proposed system, multiple individually screened-out developments may each proceed without a cumulative assessment. Section 1 of the EIA Regulations defines cumulative impacts as those that "itself may not be significant, but may become significant when added to the existing and reasonably foreseeable impacts eventuating from similar or diverse activities". A system that structurally excludes the assessment of such impacts is not fit for purpose and is also inconsistent with the principle of integrated environmental management and that all elements of the environment are linked and interrelated.[52] Cumulative impacts are the direct result of those linkages.

79. The proposal's screening mechanism also fails to adequately protect ecologically sensitive areas. The receiving-environmental approach depends on spatial planning instruments whose absence, inconsistency, and non-binding status have already been identified above. The proposal's environmental protection mechanism is therefore circular: it depends on preconditions that the proposal itself doesn't secure.

80. Further, a case-by-case discretionary system, involving multiple CAs, in which many applications are screened out without a formal assessment record creates a fragmented system with decisions that are difficult to audit, challenge, and impossible to aggregate into a cumulative picture.

81. The increased screening volume already acknowledged by the proposal[53] will fall on the already under-resourced CA. There is, therefore, a real risk that screening decisions will, in practice, deter to EAP recommendations rather than being subjected to independent scrutiny.

82. In the current system, this limited independence is partially managed by the Listing Notices, which prescribe the assessment route as a matter of law and leave the EAP without the power to negotiate it. In the proposed system, the EAP can recommend the assessment route (the determination most directly affecting the development's cost and timeline) and the CA approves it. The proposal also points towards the possibility of "thematic" triggers for different assessment routes, such as different industries. This

[50] EIA Regulations, Appendix 1 section 3(1)(j)(i) and Appendix 3 section 1(1).
[51] Proposal slide 22.
[52] NEMA section 2(4)(b).
[53] Proposal slide 15.

gives rise to the risk that certain industries as a whole will be subject to lower levels of scrutiny.

83. The OES, discussed in more detail below, provides another complication, as the proposal does not explain how the flexible EIA system will interact with mining authorisation processes. Mining developments (which are among the most environmentally consequential activities regulated under NEMA) may be subject to a screening determination by a CA in the Department of Minera Resources and Energy ("**DMRE**") (which is already facing significant capacity constraints and a documented appeal backlog). Introducing a more complex discretionary screening process would likely worsen outcomes, not improve them.

84. The proposed system cannot be consistent with the precautionary principle.[54] A system that is itself uncertain (where the pathway after triggering is unknown and CA-dependent) exports that uncertainty onto the regulatory process. This is inconsistent with a framework designed to reduce, not reproduce, environmental uncertainty.

85. Further, the "early exit" options risks weaker environmental scrutiny and contradicts the duty to avoid, minimise, and remedy the disturbance of ecosystems and loss of biological diversity.[55] It creates a mechanism through which developments causing such disturbances to be authorised without the disturbance itself being identified or assessed (as the authorisation is based on current, already-known information and there is no public consultation).

Regulatory compliance

86. The proposal states it will ensure compliance with regulatory requirements. This is the aim for which the rational disconnect is most structurally significant because regulatory compliance is not a matter of degree.

87. The proposal does not create a rational link between its proposed mechanisms to compliance and the specific legal requirements that bind it. There are three main tensions that do not adequately address the constitutional and statutory imperatives that underpin environmental decision-making –

87.1. First, NEMA requires the procedure for the investigation, assessment, and communication of the potential impacts of a development include an investigation of the potential environmental consequences and assessment of their

[54] NEMA section 2(4)(a)(vii).
[55] NEMA section 2(4)(a)(i).

significance.[56] The early exit option permits authorisation based on an applicant's self-assessment, without an investigation. This is not a procedure that "investigates" potential consequences. It is a procedure that accepts the assertion that an investigation is not necessary, without independent verification. Relatedly, the process must still satisfy the requirements of section 24(4) of NEMA and the mandatory public participation requirements in chapter 6 of the EIA Regulations regardless of which assessment route is taken. Each assessment route must satisfy these requirements independently and in its own right — it is not sufficient for compliance to be achieved in aggregate across routes. The proposal does not explain how every route, including those with minimal or no public participation, achieves this independently.

87.2. Further, the science underpinning screening and assessment must be external to both the CA and the applicant. It cannot be generated by the applicant, who has a direct financial interest in a determination of insignificance. Nor can it rest entirely on CA judgement, since CAs vary in their scientific training and are subject to capacity constraints. A compliance framework that relies on applicant-generated science to satisfy a statutory investigation requirement is not, in substance, an investigation, and may amount to a ratification of the applicant's preferred outcome.

87.3. Second, administrative action is reviewable if relevant considerations were not taken into account.[57] As already established, a screening decision made without the necessary public participation is vulnerable to this review ground. The proposal cannot claim to ensure regulatory compliance while acknowledging information necessary for compliant decision-making is not considered.

87.4. Third, the proposal's recommendation that a screening decision is to be treated as an "in process decision" not subject to appeal[58] is not consistent with section 33 of the Constitution, PAJA, or access to justice. Procedural labels do not determine whether a decision constitutes administrative action. What matters is whether the decision has a direct, external legal effect, which would arguably be the case when a development is screened out to produce an environmental authorisation with minimal scrutiny and minimal public participation. Excluding such decisions from appeal does not render them immune to judicial review, but does remove the more

[56] NEMA section 24(4)(b).
[57] PAJA section 6(2)(e)(iii).
[58] Proposal slide 36.

accessible administrative remedy that is the first line of recourse for affected communities

Failure to address implementation challenges of the One Environment System

88. The EIA Reform process also provides an opportunity to take a reflective approach to assessing how South Africa's EIA system has functioned in practice and to and to confront the structural weaknesses that have become embedded in the current framework, however it does not meaningfully do so in its current form. A key systemic reform in 2014 took the form of the One Environment System ("**OES**"), which fundamentally shifted the way that environmental assessments are undertaken for mining-related activities, through transferring decisions on environmental authorisations from the environmental department to the minerals department, unless decisions are taken on appeal. The flexible EIA system will need to interact with the OES for all mining-related activities. However, the proposal does not provide a mechanism for that interaction or meaningfully assess how the OES has been implemented to date, and how its shift in mandate have manifested in practice, or what effect that shift has had on environmental scrutiny and authorisation outcomes.

89. The OES is itself a major source of concern. It has been criticised for placing environmental authorisation for mining in the hands of the very department whose core mandate is mineral development, essentially creating a "fox in charge of the hen house" problem. It has also generated legal and policy uncertainty because its implementation has not been clear, stable, or consistently effective, and commentary has questioned whether the architecture is capable of supporting sound environmental decision-making in extractive industries. In practice, this has not produced a cleaner or more coherent system. Instead, it has created a framework in which mining-related environmental decisions may be advanced under a structure that is institutionally misaligned with environmental protection, while delays and bottlenecks in the associated appeal system further weaken oversight.

90. The introduction of a flexible EIA system presents an opportunity to revisit and rationalise the OES alignment, without simply replicating it in its current form in a new framework. The flexible EIA system cannot be designed in a silo from the broader legislative ecosystem into which it must fit. The new system will require amendments to both NEMA and the EIA Regulations, and this legislative reform should also be used to dismantle the OES alignment problems that have accumulated since its introduction, rather than to entrench them.

91. More specifically, the following is necessary –

91.1. The relationship between the flexible EIA process and the mining authorisation process under the OES needs to be defined clearly. If mining activities are to go through the same screening phase as other developments, the CA exercising the discretion must be established. If mining activities are not to be screened in the same way other developments are, this must be explained and set out clearly how the two regimes interact must also be provided.

91.2. The flexible EIA process needs to be formally aligned with the authorisation processes prescribed in the SEMAs,[59] with concurrent timelines, shared public participation processes (where appropriate), and a clear mechanism for resolving conflicts between regulatory outcomes.

91.3. The appeal process for mining-related environmental authorisations needs to be reviewed. The current backlog within the DMRE is evidence that the OES is not functioning adequately.[60] A reformed EIA system should address this so as not to inherit it instead. A reformed EIA system should not absorb those delays and defects without addressing them.

[59] Specifically, the National Water Act 36 of 1998, the National Environmental Management: Waste Act 59 of 2008, and the National Environmental Management: Air Quality Act 39 of 2004.
[60] The appeal backlog was raised at the public consultation in Cape Town.

Summary of concerns

The following table consolidates the concerns set out above for ease of reference:

Concern	Reason
Over-reliance on administrative discretion	• There is a shift from rule-based triggers (Listing Notices and thresholds) to a discretionary process that will determine if an EIA is needed and, if so, the level and type of assessment necessary. • This creates the risk of inconsistent, subjective, or even arbitrary decision-making across different CA.
Reduced legal certainty and predictability	• The current system allows developers and stakeholders to determine whether an activity triggers a BA or a S&EIR upfront. • The flexible system triggers only an initiate screening, and no clear pathways afterwards (this is left to the CAs discretion). • This uncertainty may disadvantage communities and NGOs trying to anticipate potential impacts of a development and creates uneven regulatory application. • This uncertainty may also erode investor confidence.
Spatial planning instruments are not available on a wall-to-wall basis	• The success of the proposal depends on comprehensive EMFs, bioregional plans, and conservations plans that are not available across South Africa. • Where they do exist, they vary significantly in quality. • Without them, CA discretion is exercised in an informational vacuum.
Screening criteria not yet developed	• There is mention of screening criteria, but these have not been defined.

	• The screening criteria are the central mechanism through which the CA's discretion will be exercised and constrained. • Without knowing these criteria, stakeholders cannot evaluate whether the proposed system will provide adequate environmental protection or consistent application. • The entire discretionary architecture of the proposal rests on criteria that do not yet exist. It is, therefore, difficult to provide a meaningful comment.
Thresholds are deferred without resolution	• The proposal states that "the use of thresholds is still to be further determined" and acknowledges that thresholds will "have resource implications". • The proposal acknowledges that the current system's threshold-based triggers are a problem, but risks replicating the existing problem by the thresholds that are still to be determined (ie: stakeholders cannot comment on the appropriateness of the thresholds that are still to be determined). • If thresholds are abandoned, the proposal must explain how the system that replaces them works and how legal certainty is maintained.

Limiting public participation	• Public participation remains a mandatory principle, but its extent is determined on a case-by-case basis by the CA, based on perceived impact.
	• This introduces the risk that –
	  ○ Participation could be narrowed or minimised inappropriately.
	  ○ Affected communities may be excluded early in the process.
	• Decisions about participation are made before the impacts of the development are fully understood.

Screening phase carries assessment-level consequences without assessment-level safeguards	• The screening phase is presented as a routing mechanism with limited consequences. • However, Route 1 produces an EA without further assessment. • In these cases, the screening phase is itself the assessment and should attract the procedural safeguards that an assessment would require.
No appeal for screening decisions	• The proposal indicates that screening decisions are “in-process” and not appealable. Labelling a decision “in-process” does not immunise it from PAJA. • Screening determines whether an EIA happens at all, as well as how rigorous it will be. • Without appeal rights, stakeholders may be left with limited recourse against flawed or unlawful screening outcomes. • A decision that screens out a development into a low-assessment scrutiny route (or screens it out entirely through the early exit option) has direct and potentially irreversible environmental consequences. • Excluding such decisions from appeal is limiting access to justice.

Risk of weaker environmental scrutiny (“early exit”)	• The “early exit” option allows projects to proceed with a *Statement of Insignificant Impact* based on existing information, and then be screened out entirely.
	• This risks –
	  ○ Allowing projects with unidentified or underestimated impacts to avoid full assessment.
	  ○ Reducing the use of specialist studies, even when they may be necessary.
	  ○ Shifting the system towards efficiency at the expense of precaution.

Potential weakening of cumulative impacts	• The EIA Regulations define cumulative impacts and require their assessment as in both a BA and S&EIR, as cumulative impacts are often the most significant environmental consequence of a development. • The proposal does not explain how cumulative impacts will be identified and assessed under the new system, particularly where multiple developments are individually screened out through the early exit option. • The reform is partially motivated by the failure of project-level EIAs to address cumulative impacts in practice. • However, a flexible, case-by-case system may further fragment assessment, particularly if projects are screened out early or assessed with limited information. A system that cannot adequately address cumulative impacts is not fit for purpose.
Capacity and resource constraints	• The new system anticipates more applications entering screening (due to broad triggers), which means there will be increased reliance on the CA. • Given existing capacity challenges, this could overburden official and lead to rushed or poor-quality decisions, undermining the goal of evidence-based, scientific screening. • Further, there is no resourcing plan for CAs. The proposal acknowledges the new system will require increased resources, but does not go further to describe capacity-building.
OES non-alignment	• The proposal does not explain how the flexible EIA system will interact with mining applications under the OES. • DMRE already faces capacity constraints and appeal backlogs.

	• The proposal risks inheriting and deepening the existing OES misalignment rather than resolving it.
Consultation timeline and adequacy	• The timeline at hand has been insufficient for a reform of this legal and technical complexity. While an extension for the comment period was ultimately provided to all provinces, communication regarding this extension was piecemeal and unclear. • In-person sessions were inaccessible and poorly communicated. • The proposal is a PowerPoint presentation, not a full concept document.
No draft legal framework	• Stakeholders are being asked to comment on a concept (ie: this proposal) without being shown the legal instruments that would give effect to it. • This makes meaningful engagement difficult and raises questions about the depth of the analysis that has been brought to the legal and regulatory implications of the proposal.

D. CONCLUSION

92. The proposal identified real and long-documented problems with the current EIA framework and proposes a conceptual direction that has genuine merit in certain respects. The move towards a context-sensitive assessment, the integration of strategic planning instruments, and the introduction of process proportionality are sound objectives worth pursuing.

93. However, the proposal as currently formulated cannot achieve its stated aims. The mechanisms it proposes are not rationally connected to the outcomes it claims. Its reliance on CA discretion is not yet supported by the necessary criteria, capacity, and data that would make that discretion lawful and rational rather than arbitrary. Its treatment of public participation is internally contradictory and inconsistent with NEMA, PAJA, and the Constitution. Its early exit option is inconsistent with the precautionary principle and the mandatory assessment requirements of NEMA. Further, its own consultation process is unsatisfactory.

94. The BLC respectfully requests the DFFE to publish a formal concept note, with defined screening criteria, assessment route thresholds, minimum public participation requirements, and the proposed relationship to the OES, and subject that document to a full public commenting process before any draft regulations are developed.

95. It is respectfully submitted that the DFFE should address the concerns raised in these comments in full before the concept document is converted into draft regulations, and that a further, and more extensive, round of public consultation should be conducted on a draft legal instrument once one is available.

Yours faithfully,

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