



Summary of comments submitted by the Biodiversity Law Centre on the DFFE's flexible EIA proposal

Concern	Reason
Over-reliance on administrative discretion	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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	<ul style="list-style-type: none"> • 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.



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Screening criteria not yet developed	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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.



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Limiting public participation	<ul style="list-style-type: none">• 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 –<ul style="list-style-type: none">○ 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	<ul style="list-style-type: none">• 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.



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No appeal for screening decisions	<ul style="list-style-type: none"> • 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”)	<ul style="list-style-type: none"> • The “early exit” option allows projects to proceed with a <i>Statement of Insignificant Impact</i> based on existing information, and then be screened out entirely. • This risks – <ul style="list-style-type: none"> ○ 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.



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Potential weakening of cumulative impacts	<ul style="list-style-type: none">• 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.



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Capacity and resource constraints	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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.



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Consultation timeline and adequacy	<ul style="list-style-type: none">• 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	<ul style="list-style-type: none">• 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.