



The Director-General  
Department of Forestry, Fisheries and the Environment  
Att.: Dr Dee Fischer  
Private Bag X447  
Pretoria  
0001  
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6 October 2022

Dear Dr Fischer

**SUBMISSION 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, AND ON THE INTENTION TO ADOPT THE NATIONAL WEB BASED ENVIRONMENTAL SCREENING TOOL AS AN ENVIRONMENTAL MANAGEMENT INSTRUMENT.**

**Introduction**

1. We address you in our own name as the Centre for Environmental Rights,<sup>1</sup> and on behalf of our clients, the groundWork Trust<sup>2</sup> and Earthlife Africa.<sup>3</sup> Together, all three organisations comprise the Life After Coal/Impilo Ngaphandle Kwamalahle campaign.<sup>4</sup>
2. We refer to the government notice published by the Department of Forestry, Fisheries and the Environment (the "**Department**") on 8 September 2022 in Government Gazette No. 46871 (GN 2466) inviting the public to submit written input on the intention to exclude the development and expansion of solar photovoltaic installations from the requirement to obtain an environmental authorisation ("**the proposed exclusion**").<sup>5</sup>
3. Should this proposed exclusion be promulgated, it would apply to, and potentially adversely affect, all future developments and expansions of solar photovoltaic (**PV**) installations and associated activities in different parts of the country. We raise concerns around the adverse impacts of solar PV projects as well as the unreliability of sensitivity ratings as an environmental management instrument *in lieu* of an environmental impact assessment (**EIA**) process. Importantly, we are deeply concerned that the proposed exemption from compliance with the

<sup>1</sup> <https://cer.org.za/>.

<sup>2</sup> <https://groundwork.org.za/>.

<sup>3</sup> <https://earthlife.org.za>.

<sup>4</sup> See <https://lifeaftercoal.org.za/>.

<sup>5</sup> Government Gazette Notice No. 46867, 8 September 2022.

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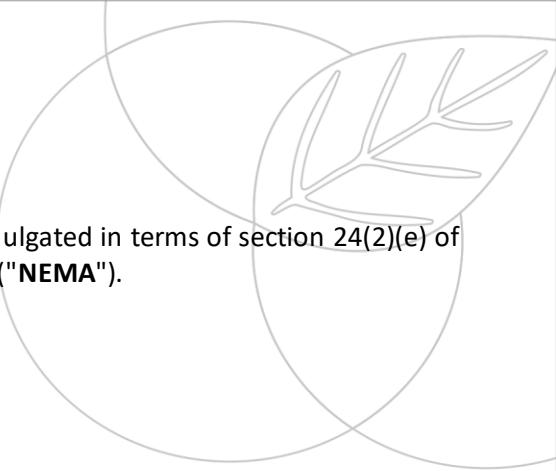
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public participation and transparency requirements of the EIA Regulations will facilitate the violation of constitutional rights that are central to environmental governance. Moreover, it would situate these developments outside the mitigation hierarchy – an untenable departure from our environmental framework – and exclude an assessment of cumulative impacts, which is irresponsible and dangerous.

4. Kindly note that our comments on the proposed exclusion also include commentary on the Notice referring to the Intention to Adopt a National Web-based Environmental Screening Tool as an Environmental Management Instrument (**“the screening tool”**) published on 6 September 2022 in Government Gazette No. 46867 (GN 2464).<sup>6</sup> This is because our comments on the proposed exclusion are inherently linked to our comments on the screening tool – they cannot be read in isolation; one goes along with the other and must thus be read in conjunction. The screening tool as an environmental management instrument which precludes the requirement of an environmental authorisation (EA) and EIA, or at the very least a basic assessment, is wholly unfit for purpose. It has problems related to accuracy, sufficiency of information and level of detail that render it inappropriate for use as an environmental management instrument.
5. We record that we do not support the outright exclusion of any listed activities from the EIA process. Provision still needs to be made for some form of impact assessment – even if a basic assessment - for proposed listed activities to be undertaken, consultation with stakeholders, and decision-making by a competent authority. Enabling listed activities to proceed without any of these checks and balances in place poses high risks to the environment, human health and wellbeing and is prejudicial to potential interested and affected parties as well as other stakeholders. Further, the potential cumulative impacts in the area where these installations will occur will remain unknown until these impacts are visibly affecting local biodiversity and the local population – and thus may be irreparable. Understanding the potential cumulative impacts in advance is important, and the chosen site-specific analysis aimed at replacing the process of obtaining an EA does not provide adequate depth of information.
6. The proposed exclusion is not sufficiently justified. It is not evident how an EIA would be an impediment or constraint to the expansion and installation of solar facilities. A basic assessment under the EIA Regulations with reasonably truncated timeframes may be sufficient if the aim is to expedite the transition to renewable energy. In general we note that any fast tracking of renewable energy (including through the development of renewable energy development zones) must still meet the needs of communities; and include them in decision-making.
7. We, and our clients are not, in principle, opposed to the fast-tracking of solar PV projects under certain circumstances and conditions. Striking a balance between accelerating renewables deployment and ensuring space for meaningful community engagement in the siting of medium- and large-scale solar projects is driving the development of careful and creative regulatory solutions around the world. There are many sites where solar has a minimal impact, or even generates benefits to the landscape, such as on brownfield sites that previously housed industrial activity but are not currently in use, including old mines, coal plant sites, or landfills. Right-of-ways for railroads and highways are other options for installing extensive solar without competing with other valuable land uses. Many analyses have shown that it is possible meet much if not all renewable energy needs by prioritising these and other degraded or unused sites when combined with solar installations in the built environment, including on rooftops of residential, commercial, and industrial buildings. Research has shown that even in prime agricultural regions, there is often plenty of land for renewables siting that need not compete with food production. Such plans, however, must be guided by best practice guidelines, case studies, community consultation and mapping tools to identify worthy sites at a national scale and supporting initiatives to do the same at a state or county level. The use of general screening tools to entirely exempt large projects from environmental authorisation, like the proposed exclusion and adoption of the screening tool, is not an appropriate means to achieve the above objectives.

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<sup>6</sup> Government Gazette Notice No. 2466, 6 September 2022.



8. These submissions warrant due consideration before an exclusion is promulgated in terms of section 24(2)(e) of the National Environmental Management Act, 1998 (Act No. 107 of 1998) ("NEMA").
9. These submissions are set out as follows:
  - 9.1. We set out the relevant legal background;
  - 9.2. We look at the potential impacts of solar PV;
  - 9.3. We make general and specific comments and queries on the proposed exclusion; and
  - 9.4. We make general comments and queries on the use of the proposed screening tool as an environmental management instrument.

### **Legal background**

#### ***The Constitution of the Republic of South Africa***

10. The Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), in its very first section, entrenches South Africa's founding values of human dignity, the achievement of equality and the advancement of human rights and freedoms generally.<sup>7</sup>
11. Further enshrined in the Constitution is section 24 which entails the right to an environment that is not harmful to health or wellbeing. In subsection (b) of section 24 the legislature goes on to mandate that the environment must be protected, for the benefit of present and future generations, through legislative and other measures.<sup>8</sup>
12. In *The Trustees for the Time Being of Groundwork Trust & Vukani Environmental Justice Alliance Movement in Action v The Minister of Environmental Affairs and Others, Case Number 39724/2019* ("the Deadly Air case"), the court held that the section 24 constitutional right is immediately realisable, meaning that action can and must be taken now to advance the right, as opposed to it being progressively realisable over time.<sup>9</sup>
13. Section 7 of the Constitution places an obligation on the State to respect, protect, promote and fulfil the rights in the Bill of Rights.
14. In consideration of the above, all forms of legislation should be created in line with the provisions of the Constitution and not seek to infringe on human rights despite the immediate necessity for renewable energy.

#### ***National Environmental Management Act***

15. NEMA was enacted to give effect to Section 24(b) of the Constitution as well as the principles of sustainable development and environmental justice. Section 2 of NEMA sets out the principles which:

*"(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination; (b) serve as the general framework within which environmental management and implementation plans must be formulated; (c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment;*

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<sup>7</sup> The Constitution of the Republic of South Africa Act 108 of 1996, section 1.

<sup>8</sup> The Constitution of South Africa Act 108 of 1996, section 24.

<sup>9</sup> *The Trustees for the Time Being of Groundwork Trust & Vukani Environmental Justice Alliance Movement in Action v The Minister of Environmental Affairs and Others, Case Number 39724/2019* at paragraph 39.

*(d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations; and (e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.”<sup>10</sup>*

16. NEMA provides certain guiding principles that inform decision-making in the realm of the environment. Of these principles are the requirements that environmental management places people and their needs at the forefront, serving their physical, psychological, developmental, cultural and social interests equitably and that development must adhere to socially, environmentally and economically sustainable methods.
17. The proposed exclusion and the adoption of the screening tool should be informed by such people-centric, sustainable development principles.
18. Now, section 24(2)(a) of NEMA provides for “*activities which may commence without environmental authorisation from the competent authority*”.<sup>11</sup>
19. Section 24(2)(c) of NEMA refers to the identification of geographical areas based on environmental attributes and specified in spatial tools or environmental management instruments in which specified activities may be excluded from the requirement to obtain an environmental authorisation.<sup>12</sup>
20. Section 24(2)(e) further provides that “*The Minister, or an MEC with the concurrence of the Minister, may identify... activities contemplated in paragraphs (a) and (b) that, based on an environmental management instrument adopted in the prescribed manner by the Minister or an MEC, with the concurrence of the Minister, may be excluded from the requirement to obtain an environmental authorisation from the competent authority.*”<sup>13</sup>
21. The proposed exclusion and the screening tool notice purport to fall within the ambit of these NEMA provisions. It must be borne in mind that section 24(2) of NEMA is to be interpreted in a manner that promotes the ethos of the Bill of Rights and the values and principles contained in NEMA.
22. Furthermore, section 23A of NEMA provides specifically for environmental management instruments. Section 23A(2) specifically states that an environmental management instrument must:
  - a. integrate environmental considerations into decision-making;
  - b. provide for the implementation of best environmental practice;
  - c. promote the progressive adoption of environmentally sound technology; or
  - d. promote sustainable consumption and production, including, where appropriate, eco- endorsement or labelling.<sup>14</sup>

#### Impacts of solar PV

23. As much as the development and expansion of solar photovoltaic will promote an expedited transition to renewable energy, excluding these activities from having to obtain an environmental authorisation could also have a number of negative environmental impacts, as set out as follows:
  - 23.1. Firstly, the land that is required for these installations often exceeds 1 hectare in size. Land clearance at a large scale, especially in areas where there are slopes, may result in soil erosion. In areas where there is

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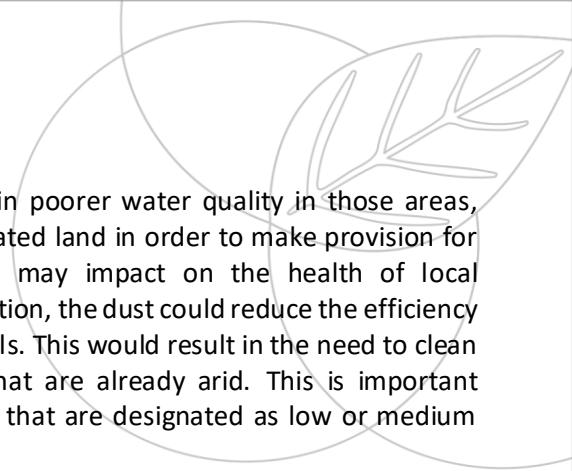
<sup>10</sup> National Environmental Management Act 107 of 1998, section 2.

<sup>11</sup> Act 107 of 1998, section 24 (2)(a).

<sup>12</sup> Act 107 of 1998, section 24 (2)(c).

<sup>13</sup> Act 107 of 1998, section 24 (2)(e).

<sup>14</sup> Act 107 of 1998, section 23A (2)



heavy rain, silt may run off into waterways which may result in poorer water quality in those areas, whereas in arid regions, in a case where there may be de-vegetated land in order to make provision for solar developments, wind-blown de-vegetated soil and dust may impact on the health of local populations. In addition to impacts on the health of a local population, the dust could reduce the efficiency of solar installations if it so happens that dust settles on the panels. This would result in the need to clean those panels with water that is most likely scarce in areas that are already arid. This is important considering that the proposed exemption would apply in areas that are designated as low or medium significance, namely areas that are likely already degraded.

- 23.2. Additionally, since only 20% of the energy absorbed from the sun by solar panels is converted into electricity, the rest of the energy results in added heat to the environment. This is also as a result of the albedo from panels being lower than that of the surrounding environment. A potential consequence of this is a change in microclimatic dynamics similar to the urban heat island effect.<sup>15</sup> The climatic effects of large-scale solar installations in dry areas may range from contributions towards warmer weather.<sup>16</sup>
- 23.3. Furthermore, clearing of large spaces of land may disturb smaller ecosystems in the areas where solar photovoltaic installations will take place and also disturb movement and migratory patterns of terrestrial and arboreal animals. In addition to this, although this is an ongoing area of investigation, the reflectivity of photovoltaic solar panels may have ecological effects, such as the possible attraction of water birds to the panels as birds may believe them to be lakes, which is also known as the 'lake effect'. This effect may be associated with avian mortality.
- 23.4. The potential cumulative impacts in the area where these installations will occur will remain unknown until these impacts are visibly affecting local biodiversity and the local population after the installation of the solar photovoltaic facilities has occurred. Knowing about this in advance would be a better position to be in, and unfortunately the chosen site-specific analysis aimed at replacing the process of obtaining an EA does not provide such depth of information.
- 23.5. As mentioned, oftentimes large areas of land are required for solar installations. Wetlands and pans in these areas are sometimes only discoverable upon impact site assessment with wetland specialists. Wetlands play a vital role in recharging groundwater systems, and also in retaining water in the case of floods, thereby minimising damage to the surrounding areas. Thus, wetlands and pans have significant climate change value from a water availability perspective as well as minimisation of climate change impacts.

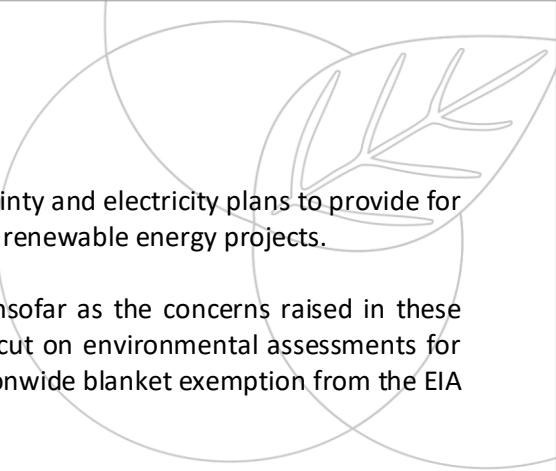
#### **General comments on the proposed exclusion**

24. While we and our clients accept and support the development of renewable energy on land already degraded by mining and industrial activities in keeping with a just transition plan, we submit that doing away with the EIA process is not an appropriate, or safe manner in which to expedite much-needed renewable electricity capacity, particularly with reference to the potential harms listed above. The risks of harm and prejudice to interested and affected parties outweigh any benefits of an expedited process. In any event, we note that, predominantly, the

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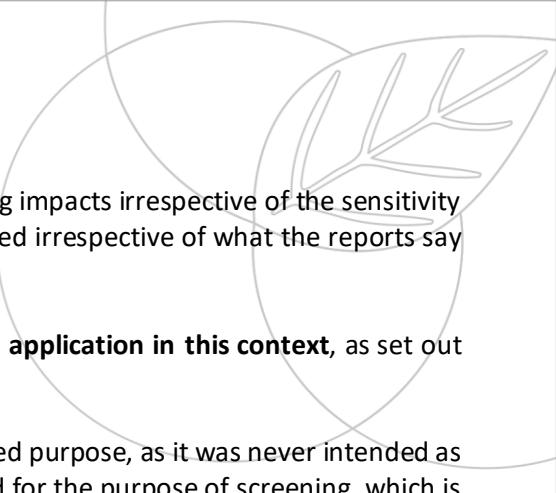
<sup>15</sup> Greg A. Barron-Gafford *et al.*, *The Photovoltaic Heat Island Effect: Larger solar power plants increase local temperatures*, 6, Sci Rep, 35070 (2016), <https://www.nature.com/articles/srep35070>.

<sup>16</sup> Aixue Hu *et al.*, *Impact of solar panels on global climate*, 6, Nature Clim Change, 290–294 (2016), <https://www.nature.com/articles/nclimate2843>; Yan Li *et al.*, *Climate model shows large-scale wind and solar farms in the Sahara increase rain and vegetation*, 361, Science, 1019–1022 (2018), <https://www.science.org/doi/10.1126/science.aar5629>; Zhengyao Lu *et al.*, *Impacts of Large-Scale Sahara Solar Farms on Global Climate and Vegetation Cover*, 48, Geophysical Research Letters, e2020GL090789 (2021), <https://onlinelibrary.wiley.com/doi/abs/10.1029/2020GL090789>.



delays in the deployment of clean energy lie with the need for policy certainty and electricity plans to provide for the needed volumes of clean energy; and expedited procurement of clean renewable energy projects.

25. We therefore recommend that the proposed exclusion be abandoned insofar as the concerns raised in these comments are not addressed, as it is not appropriate for corners to be cut on environmental assessments for projects with potential for negative environmental impacts through a nationwide blanket exemption from the EIA requirements.
26. In the event that the proposed exclusion is to proceed, then we urge the Department to at least consider the concerns listed below and amend the provisions that require amendment and attention as per these recommendations.
27. Overall, some of our main concerns with the proposed exclusion are the following:
  - 27.1. There is **no provision for public participation or even notification or access to registration documents**. This is highly concerning. We foresee a highly prejudicial barrier being created for stakeholders and their ability to know whether an exclusion of an EIA and subsequent environmental authorisation is validly applied, and whether the tool was correctly applied. It will mean that stakeholders are in the dark as to when the installations are taking place and the various details of a proposed project; and importantly whether the project proponent is in fact acting within the confines of the registration. There is potential for communities to be adversely affected and prejudiced here if there is no provision for people to be consulted or notified of the processes and projects, or to have any automatic access to records dealing with proposed and existing PV projects that entail listed activities. During the EIA process, whether it be a basic assessment, or full EIA with scoping, consultation is an essential part of the process. It ensures that the Constitutional right to just administrative action, as contained in section 33 of the Constitution and encapsulated in the Promotion of Administrative Justice Act, Act 3 of 2000 (“PAJA”), is fulfilled and that the voices of all interested and affected persons are heard. Furthermore, public participation and transparent decision-making are important principles contained in NEMA, with the EIA Regulations. Section 2(1)(f) of NEMA provides that the participation of all interested and affected parties must be promoted and such persons must have the chance to develop the understanding, skills and capacity in order to achieve meaningful participation. This is qualified with the proviso that the participation of vulnerable and disadvantaged people must be ensured. Excluding public participation may lead to the loss of critical local knowledge that local communities have regarding the biodiversity, air, water and other environmental aspects of the land that they live on. The inclusion of local communities through a consultative process is also critically important for the preservation of cultural heritage such as graves and sacred sites, much of which is not necessarily documented or readily available to an environmental assessment practitioner other than through consulting with interested and affected parties in local communities. Without consultation, important local knowledge relevant to the proposed development will be excluded. Additionally local acceptance of, and willingness to actively support and participate in, a project will be excluded. This approach flies in the face of a range of NEMA principles and defies the (state-endorsed) conception of the Just Transition.
  - 27.2. The **competent authority appears to have no discretion or decision-making powers** under the proposed exclusion. The competent authority must have power to refuse registration and/or re-registration. There must be express provision for the competent authority to confirm registration and to refuse to register a project if the records are inadequate or show evidence of potential significant impacts, or for any other reason. It is also not clear whether the registration would be an appealable decision under section 43 of NEMA.
  - 27.3. The proposed exclusion makes **no provision for checks and balances or risk management**, for example if: the screening tool is defective; if sensitive areas are poorly mapped; if the verification is flawed; and/or



if the proposed activities pose significant negative and far-reaching impacts irrespective of the sensitivity of the project area. The exclusion cannot allow activities to proceed irrespective of what the reports say and whether requirements have, in fact, been met.

27.4. We have significant **concerns over the screening tool's envisaged application in this context**, as set out below at paragraphs 53 - 71 and as follows:

27.4.1. We submit that the screening tool is not fit for the proposed purpose, as it was never intended as a tool to replace an EIA process. The screening tool is used for the purpose of screening, which is a requirement of the **initial** stages of the EIA process. The use of a screening tool therefore does not, and should not, automatically negate the necessity of an EIA process.

27.4.2. There is inadequate provision for consideration of project-specific impacts. The screening tool looks more at the sensitivity of an area, as opposed to how a proposed project and activities might affect an area (irrespective of area sensitivity).

27.4.3. We also understand that a number of governmental departments may not have the expertise and technology to apply the screening tool.

27.4.4. It is concerning that no provision is made for considering cumulative impacts in circumstances where there may be multiple PV projects proposed for the same area.

28. The above concerns must be addressed in any exclusion notice to be promulgated if the exclusion is to proceed.

#### **Specific comments on the proposed exclusion**

##### ***Comments on clause 3: Exclusion***

29. As stated throughout, we object to the exclusion of activities from the requirement to obtain an environmental authorisation regardless of sensitivity of the area – this fatally disregards potentially far-reaching project-specific impacts; and removes crucial accountability mechanisms under the environmental management regime as envisaged by NEMA.

30. Worryingly absent from the listed themes in this clause are:

30.1. Hydrology - particularly as solar PV development may likely often happen in water scarce areas – and wetlands; and

30.2. Climate impacts – not necessarily greenhouse gas emissions (although lifecycle emissions should be considered), but it is important that consideration be given to how the project and surrounding area might be affected by climate change for the duration of the project.

31. The above themes should, at the very least, be added to 3.1.1 and 3.1.2.

##### ***Comments on clause 4: Activities***

32. We note that, in order for the exclusion to apply, the development or expansion must trigger “Activity 1 or Activity 36 of Listing Notice 1; or Activity 1 of Listing Notice 2”.

33. Activity 1 of Listing Notice 1 refers to “*The development of facilities or infrastructure for the generation of electricity from a renewable resource where- (i) the electricity output is more than 10 megawatts but less than 20 megawatts;*

or (ii) the output is 10 megawatts or less but the total extent of the facility covers an area in excess of 1 hectare; excluding where such development of facilities or infrastructure is for photovoltaic installations and occurs within an urban area.”<sup>17</sup>

34. Activity 36 of Listing Notice 1 provides for “*The expansion of facilities or structures for the generation of electricity from a renewable resource where- (i) the electricity output will be increased by 10 megawatts or more, excluding where such expansion takes place on the original development footprint; or (ii) regardless of the increased output of the facility, the development footprint will be expanded by 1 hectare or more; excluding where such expansion of facilities or structures is for photovoltaic installations and occurs within an urban area.*”<sup>18</sup>
35. Activity 1 of Listing Notice 2 speaks to “*The development of facilities or infrastructure for the generation of electricity from a renewable resource where the electricity output is 20 megawatts or more, excluding where such development of facilities or infrastructure is for photovoltaic installations and occurs within an urban area.*”<sup>19</sup>
36. The listing notice activities provided for above pertain to activities that are considered to be likely to have significant impacts on the environment, hence their placement on a list of activities that requires environmental authorisation. To negate the requirement that an EIA be undertaken creates potential for environmental harm that may have otherwise been avoided through an EIA process.
37. The provision in 4.1 extending the exclusion to: “*any associated activity identified in Listing Notice 1,2 or 3 necessary for the realisation of such facilities*” is hugely problematic and must be deleted. It opens the door too wide for additional activities to proceed without EIA or environmental authorisation and risks abuse and uncertainty in the application of the exclusion. If the associated activity is a listed activity under NEMA, then an EIA is required. If it is to remain then, at the very least, these ‘associated activities’ must be defined and clearly delineated.

#### ***Comments on clause 5: Site Sensitivity Verification***

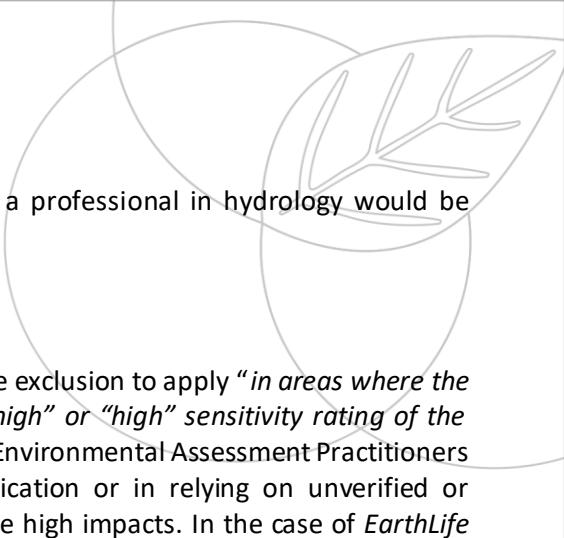
38. We support the provision for site sensitivity verification in this clause.
39. While we note the attention of the notice to the assessment of the sensitivity of the environment, there is no provision for consideration of cumulative impacts at site and the development footprint – for example, in instances where multiple PV and/or other projects are proposed in the same area. We suggest that the notice makes express provision for the consideration of cumulative impacts on the proposed site as part of the verification process.
40. We further note that the site sensitivity verification accommodates verification by professionals in the areas of terrestrial biodiversity inclusive of fauna, avifauna and habitat, aquatic biodiversity, agriculture, cultural heritage, and palaeontology resources. As above in relation to clause 3, the areas of climate change and hydrology are notably absent as no professionals specialising in these areas have been included at 5.2.2. This should be amended.
41. As a point of reminding the Department of the necessity of these two areas, climate change is a phenomenon currently at play, thus all activities affecting the environment should be verified for their impact on climate change – as well as the ways in which climate change will impact the proposed activities. Regardless of the fact that solar PV constitutes clean energy with lower impacts than other energy sources, the failure to include professionals in climate change as verifiers for such a sensitive environmental problem, is a significant oversight. Additionally, due consideration should be given to the fact that some of the installations or expansions may be conducted in areas

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<sup>17</sup> Government Gazette Notice No. 38282, 4 December 2014.

<sup>18</sup> id.

<sup>19</sup> Government Gazette Notice No. 136, 13 February 2009.



prone to droughts or wetland habitats, in which case the expertise of a professional in hydrology would be essential for verification purposes.

#### **Comments on clause 6: Application of the exclusion**

42. We are concerned with, and object to, clause 6.1.2, which provides 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*”. In our experience, Environmental Assessment Practitioners often make conclusions of medium/low impact - often without justification or in relying on unverified or unattainable mitigation measures - even if the specialist studies reference high impacts. In the case of *EarthLife Africa v Minister of Environmental Affairs and Others*, the court recognised that it is not sufficient for developers and consultants to provide generic assumptions of climate change impacts on projects and merely state that they are not very high without sufficient evidence supporting these claims.<sup>20</sup>
43. Similarly, reliance on practitioners appointed by project proponents deciding on the level of sensitivity without sufficient justification cannot suffice. This additionally creates a perverse incentive to degrade sensitive areas so that projects may proceed. It therefore opens the door to abuse by proponents and incentives to degrade highly sensitive areas – if it then means they can proceed without any EIA, public participation or prior approval from a competent authority.
44. This is not a concern that is raised without a reasonable apprehension; it is not uncommon for environmental assessment practitioners (**EAPs**) to be lazy in some instances and unscrupulous in others. EAPs have been found to have misrepresented their qualifications,<sup>21</sup> and ignored the adverse effects that proposed developments may have in the compilation of their impact assessment reports.<sup>22</sup> At least one EAP faces criminal charges for professional misconduct entailing the plagiarism of reports that were location-specific.<sup>23</sup> There is thus the reasonable apprehension that some EAPs may lack the independence, professionalism and honesty required of them to perform their environmental protection functions meaningfully. This is hugely problematic in a process where no provision is made for public scrutiny and consultation or for discretion and decision-making by the competent authority, as in the proposed exclusion. **We thus suggest that clause 6.1.2 be deleted.**
45. We are also concerned about the exception provided for at the end of clause 6.1 for “*linear infrastructure which is necessary and that forms an integral part of such activity, in which case such infrastructure can be in areas of “very high”, “high”, “medium” or “low” environmental sensitivity.*” **We strongly recommend that this be deleted.** Firstly, “linear infrastructure” is not defined – lending to uncertainty as to what this entails and exposing the application of the exclusion to abuse. Secondly, it is unacceptable that activities can take place in areas of high sensitivity simply by virtue of being allegedly integral to excluded activities, and without any prior assessment or approval by a competent authority – this poses room for grave risk to environment, and prejudice to human health and well-being and renders redundant the EIA and environmental management system.

#### **Comments on clause 7: Registration**

46. Our main concerns with this provision are the following:

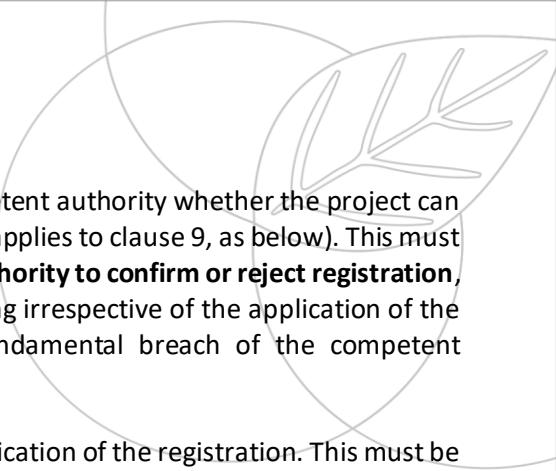
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<sup>20</sup> *EarthLife Africa Johannesburg v Minister of Environmental Affairs and Others*, case number 65662/2017 at paragraph 94

<sup>21</sup> Bloom K, 2021, *Mordor at the gates (Part Two): The men behind the ploy to strip-mine Selati Game Reserve*. Daily Maverick: Our Burning Planet. 16 May 2021 [accessed 4 October 2022].

<sup>22</sup> Bloom K, 2021, *KZN'S marine treasures: Sasol Offshore oil drilling sustains a major legal broadside*. Daily Maverick: Our Burning Planet. 24 June 2021 [accessed 04 October 2022].

<sup>23</sup> Bloom K, 2021, *Thirstlands of EAPASA: The failures of our environmental regulator*. Daily Maverick: Our Burning Planet. 18 July 2021 [accessed 04 October 2022].



- 46.1. the absence of any provision for a decision to be made by a competent authority whether the project can proceed or not based on the verification report and tool (this also applies to clause 9, as below). This must be corrected. **There must always be provision for a competent authority to confirm or reject registration**, to exercise necessary discretion to stop an activity from proceeding irrespective of the application of the tool and independent verification, failing which there is a fundamental breach of the competent authority's custodial duties and obligations; and
- 46.2. the absence of any provision for public participation or public notification of the registration. This must be addressed.

47. We submit that registration or reregistration only 15 days prior to proposed commencement is too short a period to enable any meaningful, and necessary, consideration by a competent authority as well as notification to, and consideration by, the public and relevant stakeholders and interested and affected parties.

48. The absence of any provision for notification and public participation on registration is a fatal flaw.

49. Further, express provision must be made for the registration documents listed in clause 7.2 to be publicly available on the website of the Department, on the project site, on the website of the proponent, and where the proponent does not operate a website, then automatically on request.

#### ***Comment on clause 8: Re-registration***

50. Our concerns and objections in relation to registration (clause 7) and processing of registration (clause 9) apply equally to re-registration and this provision. The recommendations made in respect of clauses 7 and 9 must apply here too. Namely there must be provision for: public participation on re-registration; and for discretion of the competent authority to refuse re-registration where appropriate.

#### ***Comments on clause 9: Processing of Registration***

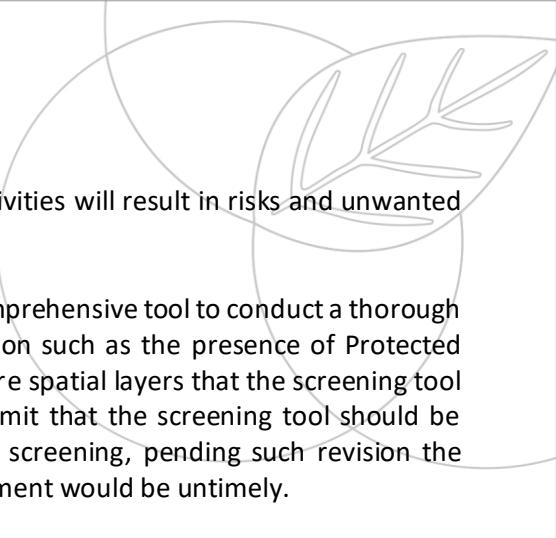
51. We reiterate the same concerns shared in our comment on clause 7.
52. The use of the word 'must' in 9.1 suggests a lack of decision-making power and discretion by the competent authority. This suggests that anyone can effectively proceed irrespective of what the reports and application documents say – rendering redundant the report and verification process. **This is a fatal flaw and shortcoming in the proposed exclusion.**
53. Further, there is no possibility of appeal in terms of section 43 of NEMA if there is no decision by a competent authority and no possibility to stop the activity in instances that would require such an intervention.

#### ***Comments on Appendices***

54. We note that Appendix A – registration form – refers to consideration of the form and application by the competent authority. Notably, however, this is not provided for in the provisions of the proposed exclusion. This should be addressed for consistency and certainty.

#### **General Comments on the screening tool**

55. The screening tool was developed as a means to gauge whether or not a proposed project would need an EIA to be conducted. If an EIA was found to be necessary, the screening tool would then provide for the type of EIA required, especially with regard to the level of detail that is required to be in the EIA.
56. The screening tool, at the inception of a project, will determine the level of sensitivity of a project area based on a multitude of factors, including terrestrial, aquatic, agricultural, cultural heritage and paleontology. This initial screening is not an intensive, on-site study, but rather constitutes a desktop study. Purely relying on the screening



tool to reach conclusions about the potential significance of proposed activities will result in risks and unwanted environmental impacts that could otherwise have been avoided.

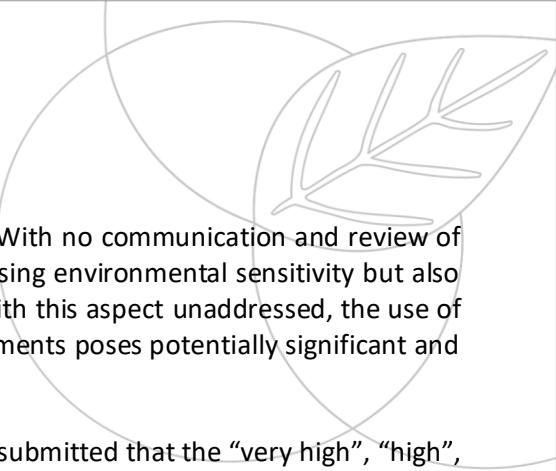
57. Even for the purpose of screening, the screening tool cannot serve as a comprehensive tool to conduct a thorough screening of all environmental features. For example, essential information such as the presence of Protected Areas is often not picked up by the screening tool. Along with this, there are spatial layers that the screening tool uses that should not be in an environmental screening process. We submit that the screening tool should be revised to excise spatial layers that do not add merit to environmental screening, pending such revision the screening tool's implementation as an environmental management instrument would be untimely.
58. The foundation of this decision to adopt the screening tool as an environmental management instrument to exclude activities as per section 24(2)(a) and (b) of NEMA is based on the screening tool's assessment of the potential significance of impacts. While in some instances it can be argued that it may be appropriate to base all reliance on the sensitivity ratings, as provided for by the screening tool, it is inherently risky to anticipate and draw conclusions about the potential significance of proposed projects based solely on the screening tool.
59. The screening tool was merely meant to function as a means to assist in the screening stage of the EIA process with the screening process being intended to determine which aspects of a proposed project merit greater inspection and which aspects can be safely excluded from further inspection. It is not up to standard as a blanket environmental management instrument.

#### ***Insufficient information***

60. The screening tool notice does not provide enough information regarding the way in which it is to be used as an environmental management instrument. For example, it is not clear how the categories of environmental sensitivity (low, medium, high, very high) are to be used to determine exemptions from the NEMA EIA Regulations. Notably, the screening tool merely looks at the sensitivity of a proposed project's site as opposed to the project-specific impacts that a proposed project would have.
61. Furthermore, it is not inherently clear whether the sensitivity ratings, and the thresholds between them, have been subject to peer review. It is our submission that the intended approach for the use of the sensitivity ratings be made explicitly clear as well as the level of academic and professional scrutiny that they have been through.
62. Of concern, too, is the scale of the screening tool. There is a bundling that occurs within the screening tool whereby different features are mapped at different scales into a single spatial layer. This ignores the fact that it may very well be possible that a small project could still fall within a "very high" sensitivity rating should the impacts thereof require mitigation. Also, the screening tool excludes regional features and spatial components of ecological functions. From a biodiversity point of view, it is argued that an understanding of the aforementioned components is vital in ensuring that the risk averse and cautious approach, as espoused in NEMA, is applied.
63. While NEMA encapsulates the principles of avoidance, and, where avoidance is not possible, minimisation, mitigation, management and remediation, the screening tool does not stipulate the type of mitigation that should permeate long-term project planning around crucial areas such as, *inter alia*, ecological compensation and biodiversity offsets. It is essential to ask whether the adoption of the screening tool as an environmental management instrument would serve the purpose of the mitigation hierarchy?

#### ***Reliability of the screening tool***

64. Along with the lack of sufficiency regarding the information provided and the lack of public participation in the screening process, there remains concern about the reliability of the screening tool as an environmental management instrument.



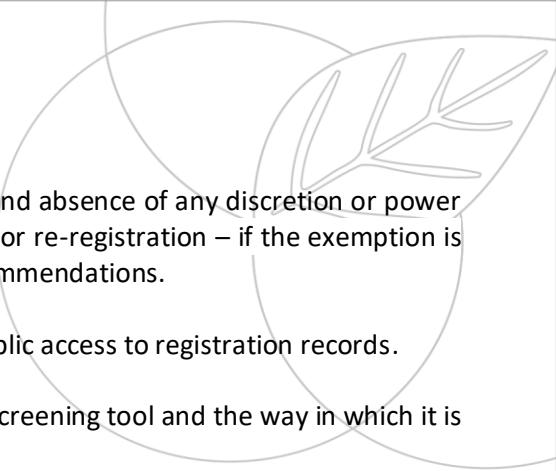
65. The basis for the categorisation of environmental sensitivity is not clear. With no communication and review of the categories, there are questions around not only the basis for categorising environmental sensitivity but also about how the information and knowledge gaps have been dealt with. With this aspect unaddressed, the use of the screening tool alone to exempt certain activities from the EIA requirements poses potentially significant and unacceptable environmental risk.
66. The inaccuracy of the screening tool reflects in the sensitivity ratings. It is submitted that the “very high”, “high”, “medium” or “low” sensitivity ratings are inaccurate. While the “very high” and “high” sensitivity ratings are less likely to be incorrect because these ratings are only allocated in instances where fine scale mapping and accurate data points are available, the “medium” and “low” ratings are allocated in the absence of fine-scale data.
67. It is argued that it is premature to adopt the screening tool as an environmental management instrument at this juncture due to the fact that it is incomplete for some regions and therefore unreliable as a blanket tool.
68. It is erroneously assumed that all biodiversity and environmental features have comparable importance or value and that they can be measured on the same scale. The significance of impacts, however, depends on several factors including the sensitivity of the receiving environment, the values of the environment which would be negatively affected and the nature of the proposed activities. The import of these factors are synergistic and there is not a ‘one-size-fits-all’ metric that can be used to measure them.

#### ***Cumulative and indirect impacts***

69. The screening tool merely provides limited information on the direct impacts of development on a specific geographical area. However, there are indirect impacts, which can occur off site, as well as cumulative impacts which are added to and interact with other impacts in a synergistic manner.
70. These indirect, induced and cumulative impacts often far exceed the direct impacts. The screening tool’s failure to indicate the potential for indirect, induced and cumulative impacts on and within different environmental categories renders it unsuitable for use as a whole-scale environmental management instrument which effectively negates the comprehensive and rigorous requirements contained in the EA process.
71. This is even more crucial in instances where there are multiple solar PV projects proposed for the same area. There is a greater duty to understand the environmental impacts in such instances as a result of the fact that the adverse effects on the environment are compounded.

#### **Conclusion**

72. In summary, we reiterate the following submissions:
  - 72.1. We recommend that the proposed exclusion be abandoned, for undue risks of harm posed to the environment and constitutional rights, or at least substantially amended in accordance with our recommendations above.
  - 72.2. With due support for the necessity to speedily transition to renewable energy, we cannot put this before the health and safety of people and the protection of our environment.
  - 72.3. It is essential to bear in mind that solar photovoltaic installations and expansions can have negative impacts on local populations and biodiversity, and proper environmental authorisation would need to be obtained before commencing developments in order to ensure that these possible impacts are avoided or minimised, managed and rehabilitated.



- 72.4. We are highly concerned about the level of self-regulation, gaps and absence of any discretion or power for the competent authority to confirm or reject registration and/or re-registration – if the exemption is to be implemented, this must be addressed as per the above recommendations.
- 72.5. Provision must be made for public participation and automatic public access to registration records.
- 72.6. We are highly concerned with the lack of details surrounding the screening tool and the way in which it is intended to be used as an environmental assessment tool.

73. We thank you for the opportunity to submit these comments and trust that they will be fully considered, and addressed. Please let us know if you have any questions or would like to discuss this further.

Yours faithfully  
**CENTRE FOR ENVIRONMENTAL RIGHTS**



per:

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