

Submission on the Proposed "Flexible EIA" System

To: Department of Forestry, Fisheries and the Environment ("DFFE")
Attention: Ms Sindiswa Dlomo / Ms Lindiwe Khumalo

By email: FlexiEIA@dffe.gov.za

Date: 31 May 2026

RE: SAFCEI's Comments on the Proposed Flexible Environmental Impact Assessment ("Flexible EIA") System

A) Introduction

On behalf of the Social Change Assistance Trust (SCAT), Earthlife Africa, Action Aid South Africa and The Southern African Faith Communities' Environment Institute ("SAFCEI"), we submit the following comments on the proposed Flexible Environmental Impact Assessment ("Flexible EIA") System.

SAFCEI is a Southern African multifaith organisation advocating for sustainable living, climate justice, and environmental accountability. Our mission involves empowering faith leaders and communities through research, advocacy, and mobilisation to address environmental justice and climate change.

We support those affected by environmental harm, and pollution, prioritising transparency, accountability, and meaningful public participation in decision-making.

We view Environmental Impact Assessments ("EIAs") as essential, legally mandated instruments to ensure accountability, environmental integrity, meaningful participation, and transparency in the development of projects. Furthermore, the proposed Flexible EIA risks undermining Constitutional rights and the precautionary principle by introducing broad, unreviewable discretion for competent authorities, limiting public participation, and allowing for "early-existing" mechanisms that could lead to the under-assessment of significant impacts.

SAFCEI therefore has a direct interest in any proposed reform of South Africa's environmental governance framework, particularly reforms affecting EIA processes under the National Environmental Management Act, 1998 ("NEMA").

SAFCEI welcomes the opportunity provided by DFFE to submit comments on the proposed Flexible System.

1. BACKGROUND

These submissions are made in response to the DFFE stakeholder consultation process on the proposed Flexible EIA System presented during the March–April 2026 provincial consultations. The proposed reforms represent a significant restructuring of environmental governance under the NEMA.¹

We acknowledge the Department’s intention to improve administrative efficiency, reduce unnecessary procedural burdens, and develop a more context-responsive environmental assessment system. We further recognise the legitimate concern that the current EIA system can be rigid, overly threshold-driven, and insufficiently adaptive to differing environmental contexts.

However, while administrative flexibility may be a legitimate policy objective, any reform of the EIA framework must remain fully compliant with;

- section 24 of the Constitution of South Africa.²
- the principles of environmental management under section 2 of NEMA;
- procedural fairness requirements under the Promotion of Administrative Justice Act, 2000 (“PAJA”)³; and
- established jurisprudence on public participation, transparency, rationality, and accountability in environmental decision- making.

In our view, several aspects of the proposed Flexible EIA System raise serious public interest and constitutional concerns, particularly regarding:

- the reduction or discretionary limitation of public participation;
- the broad discretionary powers proposed for competent authorities;
- the introduction of “early exit” mechanisms;
- reduced transparency in screening decisions;
- the potential weakening of precautionary environmental governance.

2. CONSTITUTIONAL AND LEGISLATIVE FRAMEWORK

Section 24 of the Constitution guarantees everyone the right:

- 24 (a) to an environment that is not harmful to their health or wellbeing;⁴ and,
- 24 (b) to have the environment protected for present and future generations through reasonable legislative and other measures. ⁵

The NEMA gives effect to these constitutional rights and establishes binding environmental management principles, including sustainable development; public participation; transparency; accountability; environmental justice; and the precautionary principle.

¹ National Environmental Management Act, 1998

² the Constitution of the Republic of South Africa

³ Promotion of Administrative Justice Act, 2000

⁴ Section 24 of the Constitution

⁵ Ibid

Importantly, section 2(4)(f) of NEMA provides that: “The participation of all interested and affected parties in environmental governance must be promoted.”⁶

Similarly, section 2(4)(g) requires that: “Decisions must take into account the interests, needs and values of all interested and affected parties.”⁷

Any regulatory reform that weakens these foundational participatory protections risks constitutional invalidity.

3. PUBLIC INTEREST CONCERNS

3.1 Discretionary Public Participation is Constitutionally Problematic

One of the most concerning amendment proposals is the suggestion that:

“The extent of consultation must be equal to the extent of impact,” and that competent authorities may exercise discretion regarding the level of public participation required.⁸

While differentiated participation processes may appear administratively efficient, the proposal raises significant constitutional concerns.

3.1.1 Public Participation is a Mandatory Constitutional Safeguard

Public participation is not merely a procedural formality; it is a constitutional governance requirement, an accountability mechanism, a means of ensuring informed decision-making, and a safeguard against arbitrary administrative action. Communities are often best placed to identify impacts, risks, and socio-economic realities that may not be captured in desktop screening exercises or technical reports. Reducing participation based on preliminary screening assessments creates a circular problem, where authorities determine the significance of impacts before affected communities have had a meaningful opportunity to identify and raise concerns. These risks exclude the voices of the most affected by environmental harm.⁹

Flexible discretionary systems often disproportionately disadvantage rural communities, low-income communities, communities with limited access to legal representation, and those historically excluded from environmental governance. Where participation becomes flexible or reduced, well-resourced developers can rely on technical and legal expertise to navigate the system, while vulnerable communities lose meaningful procedural protections. This is particularly concerning considering the principle of Free, Prior and Informed Consent (“FPIC”), which is protected under international human rights standards recognising that “all peoples have the right to self-determination” and the right

⁶ Section 2(4)(f) of NEMA

⁷ Section 2(4)(g) of NEMA

⁸ Flexible EIA Provincial Consultations Presentation at slide 34

⁹ Flexible EIA Provincial Consultations Presentation at slide 25

to freely pursue their economic, social, and cultural development.¹⁰ FPIC is supported by key international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)¹¹, the Convention on Biological Diversity, and the International Labour Organization Convention 169¹², all of which recognise the rights of Indigenous Peoples and emphasise the importance of meaningful participation and consent in decisions affecting their lands, resources, cultures, and livelihoods.

Flexible discretionary systems create an imbalance that risks deepening existing environmental injustices and undermining the transformative constitutional objectives of equity, fairness, and inclusive decision-making in environmental governance. Any push for “faster approvals” must not come at the expense of environmental accountability or exclude marginalised communities from the decision-making process. It must not prioritise people over profit and reduce environmental accountability.¹³

The regulations should prescribe non-negotiable baseline requirements for public participation, including mandatory notification procedures, access to requisite information, minimum comment periods, and clear publication obligations. These safeguards are essential to ensure that participation is meaningful, transparent, and accessible. Public participation should therefore never be left entirely to discretion, as doing so risks undermining accountability and excluding affected communities from decision-making processes.

3.1.2 Discretion Without Clear Criteria Creates Risk of Arbitrary Decision-Making

The proposed system repeatedly relies on “competent authority discretion” without sufficiently defined legal standards. This discretion extends to screening outcomes, the assessment route to be followed, the requirement for specialist studies, determinations of whether impacts are considered “significant,” and the extent of public participation required.¹⁴ Without clear and legally enforceable criteria guiding these decisions, the proposal risks inconsistent decision-making, unequal treatment across provinces, procedural unfairness, and irrational administrative action that may be reviewable under PAJA. These concerns are further worsened by the absence of appeal processes against screening decisions.

There is also a real risk that political or business interests could be prioritised over the needs and rights of affected communities, especially where decision-making bodies are already facing concerns about accountability, fairness, or transparency. Giving these authorities even broader powers without proper safeguards may weaken public trust and reduce confidence in the environmental assessment process.

¹⁰ Food and Agriculture Organization of the United Nations (FAO). 2016. Free, Prior and Informed Consent: An Indigenous Peoples’ Right and a Good Practice for Local Communities. Manual for Project Practitioners. Rome: FAO.

¹¹ United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

¹² United Nations. Convention on Biological Diversity. Adopted May 22, 1992.

¹³ Flexible EIA Provincial Consultations Presentation at slide 27

¹⁴ Flexible EIA Provincial Consultations Presentation at slide 26

4. CONCERNS REGARDING “EARLY EXIT” MECHANISMS

The proposed “Statement of No Significant Impact” and “early exit” routes may significantly weaken environmental oversight.¹⁵

4.1 Risk of Under-Assessment

The proposal suggests that projects may proceed based solely on existing information, without specialist studies, and potentially with limited public participation.¹⁶ This is particularly concerning in the South African context, where cumulative impacts are often poorly understood, environmental data may be incomplete, and environmental authorities continue to face significant capacity constraints. Local and indigenous communities also often possess valuable knowledge about the landscape, water bodies, biodiversity, and cultural heritage that technical experts or desktop studies may overlook. As a result, there is a real risk that developments with potentially serious environmental and social impacts could be incorrectly screened out and allowed to proceed without adequate assessment, community input, or scrutiny.

4.2 Inconsistency with the Precautionary Principle

Section 2(4)(a)(vii) of NEMA requires a risk-averse and cautious approach where there is uncertainty regarding environmental impacts.¹⁷

A system designed to minimise assessment obligations before impacts are fully understood may conflict with the precautionary principle.

The precautionary principle requires uncertainty to trigger deeper assessment, not reduced scrutiny.

5. SCREENING DECISIONS MUST BE REVIEWABLE

The proposal indicates that screening decisions may be treated as “in-process decisions” and therefore not subject to appeal, which is deeply problematic. Screening decisions in practice determine the level of environmental scrutiny required, whether specialist studies are conducted, the scope of public participation, and the quality of information available to competent authority. These are therefore substantive decisions with direct legal and environmental consequences. Excluding appeal rights at this stage risks undermining access to justice, reducing accountability, and conflicting with constitutional protections for administrative justice. At a minimum, affected parties should have the right to object to screening outcomes, reasons for screening decisions must be made publicly available, and screening criteria must be clearly prescribed in law and applied consistently.¹⁸

6. NEED FOR LEGALLY BINDING SAFEGUARDS

¹⁵ Flexible EIA Provincial Consultations Presentation at slide 27

¹⁶ Ibid

¹⁷ Section 2(4)(a)(vii) of NEMA

¹⁸ Flexible EIA Provincial Consultations Presentation at slide 20-24

Should DFFE proceed with the Flexible EIA model, the following safeguards are essential:

6.1 Binding Screening Criteria- Safeguards

Screening criteria need to be created as safeguards to be publicly accessible, scientifically informed, legally enforceable, and consistently applied across the country. These requirements are essential to ensure transparency, predictability, and fairness in environmental decision-making, while also preventing arbitrary or inconsistent application by different authorities. The proposed flexible EIA system may also place an unfair burden on communities, who may be expected to track and monitor decisions made by authorities without clear access to information, sufficient notice, or meaningful opportunities to challenge decisions that affect them.

6.2 Written Reasons for Screening Decisions

Competent authorities must be legally required to provide detailed written reasons for all screening decisions, including clear reference to the applicable criteria and a transparent explanation of how potential impacts were evaluated. This is essential to ensure accountability, enable meaningful oversight, and allow affected parties to understand and, where necessary, challenge the basis of decisions taken.

6.3 Independent Oversight and Appeal Mechanisms

All screening decisions must be subject to independent oversight and robust accountability mechanisms, including internal review processes, appeal rights where rights may be adversely affected, opportunities for decisions to be challenged in the interests of accountability, and transparent public scrutiny. These safeguards are necessary to ensure fairness, prevent abuse of discretion, and uphold constitutional principles of administrative justice.

6.4 Enhanced Protection for Sensitive Environments

Developments within protected areas, critical biodiversity areas, watercourses, coastal zones, and climate-vulnerable regions should automatically trigger heightened environmental scrutiny and require mandatory specialist assessments. This ensures that environmentally sensitive and high-risk areas receive appropriate levels of protection and that potential impacts are thoroughly evaluated before any development is approved.

7. CONCLUSION

While administrative reform and improved efficiency are legitimate objectives, environmental governance reform cannot come at the expense of constitutional rights, environmental justice, and democratic participation. The proposed Flexible EIA System risks concentrating excessive discretionary power in competent authorities, reducing transparency, weakening public participation, and undermining precautionary environmental governance. Any revised framework must therefore ensure meaningful and enforceable public

participation, transparent and reviewable screening decisions, consistency in application, procedural fairness, and robust environmental safeguards. The EIA process exists not only to facilitate development, but to protect constitutional environmental rights and ensure accountable, informed, and participatory decision-making in the public interest.

The push for flexible EIAs has the potential to bypass public accountability and approve destructive industrial and energy projects. The decision to approve flexible EIAs will come at the expense of local communities and sensitive ecosystems. It would have the ability to reduce transparency and limit the voices of communities. Constitutional integrity must be always upheld, by ensuring that Section 24 of the Constitution is not compromised by bypassing the right to a healthy environment.

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