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**TO: THE DIRECTOR-GENERAL: DEPARTMENT OF FORESTRY, FISHERIES,  
AND ENVIRONMENT**

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**RE:** NATURAL JUSTICE COMMENTARY ON THE INTENTION TO EXCLUDE THE DEVELOPMENT AND EXPANSION OF SOLAR PHOTOVOLTAIC INSTALLATIONS FROM THE REQUIREMENT TO OBTAIN AN ENVIRONMENTAL AUTHORIZATION BASED ON COMPLIANCE WITH AN ADOPTED ENVIRONMENTAL MANAGEMENT INSTRUMENT GAZETTED NO. 46871 OF 08/SEP/2022 AND THE INTENTION TO ADOPT THE NATIONAL WEB-BASED ENVIRONMENTAL SCREENING TOOL AS AN ENVIRONMENTAL MANAGEMENT INSTRUMENT (SCREENING TOOL).

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## **PART 1: INTRODUCTION**

1. Natural Justice is a non-profit organization, registered in South Africa since 2007. Our mission is to facilitate the full and effective participation of Indigenous peoples and local communities in the development and implementation of laws and policies that relate to the conservation and customary uses of biodiversity and the protection of associated cultural heritage. Natural Justice works at the local, national, regional, and international levels with a wide range of partners. We strive to ensure that community rights and responsibilities are represented and respected on a broader scale and that gains made in international fora are fully upheld at lower levels.
2. Natural Justice extends its gratitude to the Portfolio Committee on Forestry, Fisheries and Environment for the opportunity to comment on this Notice.
3. We acknowledge the necessity of hastening the switch to clean energy, which includes greatly increasing the installation of solar photovoltaic (PV) systems and associated infrastructure for renewable energy in South Africa.
4. Solar power and solar PV are of importance in combatting energy poverty and phasing out fossil fuels. It has a much less harmful impact on people's health and the environment than the generation of energy from coal and gas power plants. Although solar energy projects have fewer negative effects than fossil fuel projects, they still might. This is especially true for medium-or large-scale projects or when there are many projects in a single area.
5. Natural Justice is deeply concerned about the proposed blanket and overbroad exclusion of activities from the environmental impact assessment (EIA) process and the proposed use of the Screening Tool as a virtual substitute for EIA.
6. The notice for the consultation on the intention to adopt the National Web Based Environmental Screening Tool as an Environmental Management Instrument (the Screening Tool) was gazetted on September 6, 2022, in Government Gazette Notice 46867. Natural Justice strongly urges that both proposals be withdrawn.
7. Conducting EIA on the development and expansion of all proposed solar PV installations, with robust consultation with all stakeholders, is fundamental to informed decision making. Greenlighting listed activities in areas that the proposed Environmental Screening Tool deems to be low or medium environmentally sensitive without an EIA puts the environment, communities, and public health at risk.
8. Considering the above, Natural Justice hereby submits to the Department of Forestry, Fisheries and Environment the following comments pertaining to the Government Gazetted (GG no. 46871) *Consultation on the Intention to Exclude the Development and Expansion of Solar Photovoltaic*

***Installations from the Requirement to Obtain an Environmental Authorization Based on Compliance with an Adopted Environmental Management Instrument*** (the Exclusion).

9. This submission is set out in the three following sections:
  - 9.1. Relevant legislation;
  - 9.2. Comments; and
  - 9.3. Conclusion with recommendations.

**PART 2: RELEVANT LEGISLATION AND LEGAL BACKGROUND**

10. The Constitution of South Africa, 1996 (the Constitution) affords all people in South Africa fundamental justiciable rights. In respect of this submission, the following rights must be emphasised:
  - 10.1.1. The preamble of the Constitution states that the aims of the Constitution include to "*lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law; improving the quality of life of all citizens; and freeing the potential of each person.*" Public participation is an expression of the will of the people.
  - 10.1.2. Section 24 of the Constitution in the Bill of Rights guarantees that everyone has a right to an environment that is not harmful to their health or wellbeing; 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; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
  - 10.1.3. The Constitution also affords other rights which relate to public participation. These rights are the right to equality (section 9), the right to dignity (section 10), the right to language and culture (section 30), the right to cultural, religious, and linguistic communities (section 31), the right to access to information (section 32), and the right to just administrative action (section 33).
- 10.2. The National Environmental Management Act 107 of 1998 (NEMA) stems from Section 24 of the Constitution and its function is to legislate the right to a healthy environment for all.
  - 10.2.1. The preamble of NEMA states that:

- 10.2.1.1. Sustainable development requires the integration of social, economic, and environmental factors in the planning, implementation, and evaluation of decisions to ensure that development serves present and future generations.
- 10.2.1.2. It is desirable that the law develops a framework for integrating good environmental management into all development activities and that it should establish procedures and institutions to facilitate and promote public participation in environmental governance.
- 10.2.2. NEMA defines “sustainable development” as the integration of social, economic, and environmental factors into planning, implementation, and decision-making to ensure that development serves present and future generations.
- 10.2.3. NEMA defines “public participation process” as being, in relation to the assessment of the environmental impact of any application for an environmental authorisation, means a process by which potential interested and affected parties are given an opportunity to comment on or raise issues relevant to the application.
- 10.2.4. The principles of NEMA state in section 2(4)(c) that "environmental justice must be pursued so that adverse environmental impacts are not distributed in such a way as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons."
- 10.2.5. Section 24 of NEMA sets out the requirements for environmental authorisations. More specifically, in Section 1A, NEMA requires every applicant to comply with any procedure relating to public consultation and information gathering. However, section 24(2)(e) allows the Minister to exclude specified activities from obtaining an environmental authorisation if a project follows an environmental management instrument adopted in the prescribed manner.
- 10.3. The Environmental Impact Assessment Regulations for NEMA of 2014 (the EIA Regulations) provide the guidelines for EIAs and, more specifically, the standards for public participation in EIAs. More specifically, the purpose of the EIA Regulations, at section 2, includes that an environmental authorisation is done to avoid or mitigate detrimental impacts on the environment and increase positive environmental impacts.
- 10.4. Chapter 6 of the EIA Regulations describes public involvement, which aims to give potential or registered interested or affected parties access to information about the proposed project and a chance to comment on it.

- 10.5. The Promotion of Access to Information Act (2 of 2000) further speaks to the access to information of individuals and communities to protect the right to access information. In terms of a public body, section 11 applies and states that access to the records of a public body must be given if procedure is complied with and there is no ground of refusal. In terms of a private body, section 50 allows for access to records on the basis that the record is required for the exercise or protection of any rights, that procedural requirements have been complied with, and that grounds of refusal do not apply.
- 10.6. The Promotion of Administrative Justice Act 3 of 2000 (PAJA) protects the right to just administrative action through protecting the right to administrative action that is lawful, reasonable, and procedurally fair and the right to written reasons for administrative action, especially that affecting a person.

### **PART 3: COMMENTS**

11. Should the Exclusion become law, it will result in sacrificing administrative justice, principles of participatory democracy, the importance of public participation, communities' rights, public health, and protection of the environment for misguided attempts at expediency. The results will go against the principle of environmental justice as stated in NEMA, with adverse environmental impacts felt by affected communities or individuals who will not be entitled to a voice in these projects.
12. Administrative Justice
- 12.1. The constitutional right to just administrative action in terms of PAJA will be violated should there be no avenue for review of the application of the Screening Tool, nor any opportunity to appeal the Screening Tool results should a critical area be missed because of inadequate mapping or be poorly applied and miss a critical risk or potential impact.
- 12.2. The Exclusion fails to provide adequate time and resources for meaningful consultation on a proposed installation project. It does not give the right to bring objections or have written reasons for approval of a proposed project. The rights of interested and affected parties to just administrative action, as guaranteed in Section 3 of the Constitution and the PAJA, are thus violated. The Exclusion will lead to more projects that have already begun based on the Screening Tool being judicially appealed or reviewed by communities whose participation rights have been infringed and whose local knowledge of the potential environmental and public health impacts of the project has not been heard, much less duly incorporated into appropriate environmental assessment and siting analysis.

- 12.3. The impact of the Exclusion will be felt in medium or large projects that will have investment or finance involved. This will lead to a decrease in these types of projects and adversely affect the energy transition as required.
13. Participatory Democracy
  - 13.1. The principles that inform and govern the consultation process, as outlined in NEMA and the EIA Regulations, should be used to guide public participation. The EIA Regulations prescribe mandatory conditions by which notice must include posting on public media sites; an adequate reasonable time; and prior arrangement.
  - 13.2. Without transparency, there is no way to hold the government accountable for its actions or to assess whether the project is upholding its constitutional and NEMA commitments.
14. Importance of Public Participation and Communities' Rights
  - 14.1. The proposed Screening Tool for the Exclusion was introduced for public comments in the Government Gazette on September 6, 2022. Natural Justice has submitted its comments specific to the Screening Tool on October 7, 2022. This section corresponds with Natural Justice's comments on the Screening Tool and elaborates further.
  - 14.2. From the reading of this Notice and the notice of the Screening Tool, it is clear that public participation is being removed from the proposed projects of solar PV and replaced with a screening tool to speed up the process of solar energy project sitings. Public participation includes access to information in the form of environmental authorisation of the proposed project. The constitutional right of access to information in terms of PAIA will be violated if communities or individuals whose environment, health, or livelihoods may be affected are not given the opportunity to access the project's documents and to provide input to prospective activities.
  - 14.3. Excluding the EIA process, community consultations, and public participation for the development and expansion of solar PV installations risks generating local opposition and social backlash, which could stymie solar projects. Stakeholders and communities are more likely to demonstrate little support and increase resistance to the projects when they are not given the chance to participate through workshops, consultations, and being heard.
  - 14.4. EIA processes have been shown to improve project acceptance and minimise project derailment. Transparent procurement and sitting processes that allow for acceleration of clean energy and electricity planning that prioritises renewable energy should be the priority for the government to meet its goals of renewable energy deployment. Furthermore, it will encourage investment in renewable energy projects. To date, in South Africa, activities that have lacked public participation and/or transparency have slowed

investment and deployment of solar PV. This results in uncertainty in policy and regulation and a high cost of capital. It also often results in projects being stopped by the courts. This can be seen in examples of the Karpowerships agreements and the lack of public participation in the case of Makhanda High Court, where Impact Africa and Shell's exploration rights were found invalid. The Court further found that the decision to grant the exploration right did not use the cautionary approach as mentioned in NEMA. EIA exemptions are likely to increase public discontent where there is a lack of public participation and result in more litigation; a more uncertain and riskier investment environment; and a higher cost of capital for renewable energy projects, which could lead to potential decreases in investment.

## 15. Environmental Impacts

- 15.1. More importantly, communities and the environment may be harmed by projects that have passed the Screening Tool. Local knowledge regarding potential harm and mitigation possibilities will not be addressed or made available to government decision-makers and project proponents without substantive public engagement processes, such as those offered by the EIA.
- 15.2. Though PV solar projects are less harmful to communities and the environment compared to non-renewables, impacts can nonetheless take place, especially in terms of medium or large-scale projects, and especially where multiple projects in an area have cumulative impacts. These impacts include projects that use large portions of cleared lands, maximizing sunlight for panels prior to installation. Furthermore, land clearing and space are required should the PV project connect to distribution or transmission lines.
- 15.3. Large quantities of solar panels can affect the temperatures in a region and have climatic impacts. Reflection from the solar panels can attract water birds who believe them to be lakes. There are toxic materials and elements in most solar panels today, which can contaminate soil and water should they not be properly handled and recycled at the end of their useful lifespan.
- 15.4. While PV solar projects have significantly fewer impacts on surrounding communities than fossil fuel projects, such as coal or gas extraction or generation, they require a lot of land, which will inevitably reduce the availability of land in a district for alternative livelihood activities and impact the environment, especially when these solar projects accumulate within a given region. PV solar generation generally requires 2 to 4 hectares of land per MW of electricity generated (depending on type and efficiency rating). In certain settings, solar facilities can be beneficial for some aquatic ecosystems and some agricultural and

livestock systems. However, they can also displace other productive uses of land and destroy or fragment animal habitats. Additionally, most medium, and large-scale projects will be grid-connected, hence requiring the build out of distribution and possibly transmission grids. Transition and distribution lines can have large footprints. Based on the EA exemption in the proposed exclusion of "linear infrastructure", it seems these lines may also be exempt from any sensitivity analysis under the proposed regulation and would not require an EA.

- 15.5. The EIA process and conclusion are critical to evaluating the cumulative impact of multiple projects in the same area and projects that require land for transmission and distribution line construction. The Screening Tool and the Exclusion will not include a methodology or requirement to consider the cumulative impact. Individually, a project may not have a significant impact, but collectively, it could be devastating.

#### 16. Infringement on Land Rights

- 16.1. Not only can environmental damage occur, but due to the land requirements of solar projects, the land rights of communities can be affected. Land ownership and contested claims over land in South Africa are issues that only a more serious process, such as an EIA process, would uncover, even though provisions are made for landowners to give consent in terms of the forms required to be filled out to use the Screening Tool.
- 16.2. Through colonialization and Apartheid, South Africa has a dark history of land being appropriated from the indigenous and local communities. This proposed Exclusion further illustrates the importance of the EIA process to not only ensure rights to public participation but also the security of tenure and access to traditionally used lands of local communities.
- 16.3. Should land not be dealt with sufficiently and cautiously, the proposed Exclusion will result in conflict and delays in all projects.

#### 17. Issues of Water

- 17.1. While we strongly urge that the exemption proposal and proposed use of the web-based screening tool be withdrawn, if nonetheless, they go forward, we strongly recommend that the Department amend the screening tool to ensure that fundamental deficiencies are addressed, including, *inter alia*:
  - 17.1.1. The Department should also further-define low and medium environmental sensitivity areas. Some areas are in the process of recovering from natural disasters such as floods, fires, and vegetation fragmentation, which may not be recorded on the Screening Tool.



- 17.1.2. South Africa is a water-scarce country, and climate change will likely make areas of it more water-stressed. As such, the Screening Tool should include a special process to evaluate areas subject to periodic drought to take these extreme conditions into account. Where solar installations may interfere with water rights and aquatic biodiversity, the government should create strategies to protect those rights.
- 17.1.3. Medium and large solar PV projects require water to clean the solar panels for optimal usage. That water usage should be regulated under a water use license under NEMA. This type of license will usually be considered in the process of the EIA. There is no clear indication that the Screening Tool will consider these impacts.
18. Registration
- 18.1. The government has provided a 15-day period for registering a proposed facility. It is important to provide firms and people with a reasonable amount of time to gather information, make plans for their registration in advance, and complete the relevant paperwork, including looking for forms, seeking assistance if necessary, and filling them out.
- 18.2. The Notice should advance and apply the principles of the process as highlighted in the EIA Regulations on public participation. The timeframes offered in the Act must be justifiable in their operation and support fair procedures and processes for consultation that we believe are necessary to give effect to lawful, reasonable, and procedurally fair administrative action as provided for in the EIA Regulations on public participation and PAJA. The time frames should be extended to 30 days, which is the period set out in the EIA Regulations.

#### **PART 4: CONCLUSION AND RECOMMENDATIONS**

19. The proposed Exclusion is tantamount to making decisions behind closed doors, with no provision for public notification, access to project documents, or participation. Decision-making without transparency and public engagement risks a major backlash when communities perceive that deals are being made behind closed doors as projects advance without public consultation or environmental and social impact assessment. This backlash could easily undermine the stated purpose of the proposed Exclusion – to accelerate and deregulate the deployment of renewable energy in South Africa

20. Natural Justice strongly suggests withdrawal of the proposed Exclusion. Nonetheless, Natural Justice acknowledges that considering regulatory reform to expedite deployment of solar PV in the future is appropriate. Such legal reform must carefully formulate approaches to expedite permission of solar PV installations on land. It needs to include looking at land that can be used where just transition policy considerations would steer its deployment, like in the case of unrehabilitated mining sites, landfills, land where there is soil destruction, and other similar lands. These designations of land should include local land use planning and approval. They should also ensure constitutionally required and meaningful public consultations.
21. The need to strike a balance between accelerating renewables deployment and allowing for meaningful community engagement in the siting of medium- and large-scale solar projects is driving the development of careful and creative regulatory solutions worldwide. There are many sites where solar energy generation 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.<sup>1</sup> Right-of-ways for railroads and highways are other excellent options for installing extensive solar without competing with other valuable land uses.<sup>2</sup> Many analyses have shown that it is possible to meet much, if not all, renewable energy needs by prioritizing these and other degraded or unused non-urban sites when combined with solar installations in the built environment, including on rooftops of residential, commercial, and industrial buildings.<sup>3</sup> Research has shown that even in prime agricultural regions, there is often plenty of land for renewable energy siting that need not compete with food production.<sup>4</sup>
22. Some initiatives, tools, and regulations have been developed in other jurisdictions to direct development toward these sites. The U.S. EPA, for example, oversees a RE-Powering program<sup>5</sup> that helps accelerate brownfield renewables development, including by providing best practice guidelines, case studies, and mapping tools to identify worthy sites on a national scale and supporting initiatives to do the same at a state or county level.<sup>6</sup> Several U.S. states have passed laws enabling streamlined permitting and environmental review processes that make room for respecting local regulations and ensuring community engagement. For fostering solar production on brownfields, many of these states also offer financial incentives and procurement regulations.<sup>7</sup> Some of these regulations, like those in New York State, have created special offices to oversee renewable energy permitting.<sup>8</sup> None of these regulations use screening tools that are not fit-for-purpose to entirely exempt large projects from environmental authorization, like the proposal at hand.
23. In conclusion, Natural Justice urges the Minister to withdraw the proposed Exclusion due to the significant risk that projects excluded from complying with the EIA process would have significant

negative impacts on the environment, public health, just administration action, the right to access to information, participatory democracy, and public participation.

**Endorsed by the Legal Resources Centre**

