



Submission on the proposed

Flexible Environmental Impact Assessment System

By: The African Synthesis Centre for Environment, Development and Climate Change (ASCEND) synthesis project team on a Climate Justice Centred-Approach to Environmental Impact Assessment in Rural Southern Africa of the ('EIA4ClimateJustice Team' or 'synthesis team')

To: Department of Forestry, Fisheries and the Environment

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About ASCEND and the synthesis team

The [African Synthesis Centre for Environment, Development and Climate Change \(ASCEND\)](#) is the first climate change synthesis centre for Africa, hosted at the University of Cape Town, South Africa. A key aim of ASCEND is to facilitate collaborative research that integrates climate science, legal research, and community perspectives. Our EIA4ClimateJustice Team [is developing a climate justice centred-approach to environmental impact assessments \(EIA\)](#), concerning the experiences of communities in rural Southern Africa, with lessons from the legal systems of South Africa, Zimbabwe, and Lesotho.

## **1 Introduction**

This submission provides input on the proposed introduction of the Flexible Environmental Impact Assessment System in South Africa ('Flexible EIA System') from a climate justice perspective. We understand that greater flexibility is intended to confer greater discretion on those involved in authorising developments in South Africa.

This submission discusses the potential pitfalls of greater regulatory discretion, the need to ensure inclusive and meaningful participation of vulnerable communities (particularly rural communities), and the best available science principle and integration of indigenous knowledge in decision-making about climate change risks and hazards.

Our submission is made in good faith and is intended to be constructive on the way forward for the Flexible EIA System, given that the proposal is at the early stages of development. We acknowledge that a flexible approach to EIA is increasingly becoming best practice internationally. It is further well-noted in popular media, scholarship, and even jurisprudence, that South African EIA laws and practice require greater harmonisation to enhance both certainty and efficiency. Before turning to our submissions, we outline the legal basis of EIA in South Africa, which must remain at the core of any attempt to introduce a flexible approach.

EIA has its basis in the environmental right contained in section 24 of the Constitution of the Republic of South Africa, 1996, which requires that legislation must secure *ecologically* sustainable development and promote *justifiable* social and economic development. Legislation must do so to prevent violations of every person's right to have the environment protected for the benefit of present and future generations. This constitutional provision entails the need to balance social, economic, and environmental concerns in a manner that prioritises *ecological* sustainability and promotes only *justifiable* social and economic development. It must be construed with reference to the Constitution's overarching social justice imperative, recognising that there can be no social justice without climate justice. In turn, climate justice demands: (i) that everyone should enjoy a stable climate system; (ii) that the causes and impacts of climate change should not be disproportionately borne by those living in conditions of poverty; (iii) inclusive and equitable decision-making processes about the climate

system; and the recognition of everyone's inherent moral worth in decision-making about the climate system, particularly those who are most vulnerable to the causes and impacts of climate change.

The environmental right must be interpreted and applied such that it reinforces the fulfilment of other human rights entrenched in the Constitution, including the rights to life, dignity, culture, and access to housing, water, and food, and the rights of the child.<sup>1</sup> Moreover, the environmental right is supported by the rights to access to information and rights to administrative justice entrenched in the Constitution.<sup>2</sup> We submit that EIA, despite its limitations, has the potential to advance the necessary balancing act. Further, 'balancing' in the EIA context also means operating between the poles of over-regulation and hasty, exclusionary decision making that undermines social and climate justice. We approach our submission from these points of departure.

To advance climate justice and human rights, flexible approaches to EIAs must balance the need for expedited EIAs. Specifically in circumstances where developments are perceived to be 'low risk' with integrating contextual information and perspectives of particularly vulnerable people and communities (especially rural, customary and indigenous communities). Such an approach must ensure that the level of risk is determined in an inclusive manner through meaningful participation.

Importantly, a 'flexible' and 'expedited' approach should not permit developers to circumvent constitutional and human rights obligations, particularly in ways that overlook considerations pertinent to those disproportionately impacted by climate change and other causes and impacts of the triple planetary crisis. In other words, the term 'flexible' must be understood in a substantive sense with reference to climate justice. Such an understanding aligns with the overarching social justice imperative, and the human rights entrenched in the Constitution. Moreover, this understanding of flexibility is further supported by the justice-oriented principles contained South Africa's framework environmental legislation, the National Environmental Management Act 107 of 1998 ('NEMA'), among other legal principles and obligations.

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<sup>1</sup> Ss 11, 10, 30, 31, 26, 27, 28 of the Constitution.

<sup>2</sup> Ss 32 and 33 of the Constitution.

## **2 Substantive comments**

Our key concerns relate to the following aspects of the Flexible EIA System:

- The 'listed activities approach' to EIA provides legal and practical certainty to all role-players, including developers, government, and communities, whereas a flexible approach could perpetuate existing power imbalances and injustices, including those arising from unequal access to technology, legal education and resources;
- Greater discretion and flexible participation options ought not to undermine or permit the circumvention of legal obligations and principles relating to justice and inclusion contained in the Constitution, NEMA, the EIA regulations,<sup>3</sup> or jurisprudence, including due diligence obligations detailed in the International Court of Justice ('ICJ') Advisory Opinion on climate change;<sup>4</sup>
- Uncertainty or vagueness about when participation is mandated or discretionary could undermine the rule of law - a foundational value of the Constitution (particularly with regard to pre-application meetings and how public participation plans form part thereof);
- The Flexible EIA system must substantively integrate the best available science principle, indigenous knowledge and cultural practices and beliefs in determining what constitutes 'impacts', 'risk' and 'harm', particularly concerning climate change.

### **2 1 Shifting from listing approach to a flexible approach**

The current approach to EIAs requires either a basic assessment or full impact assessment and scoping report before 'listed activities' (defined in NEMA and contained in listing notices) may be conducted ('listing approach'). The listing approach has both advantages and disadvantages. As an advantage, the listing notices are clear on the details of developments which trigger either a basic assessment or full scoping process (for example, the name of a development, the type, size, and capacity of a development). These processes, in turn, trigger public

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<sup>3</sup> Environmental Impact Assessment Regulations, 2014, GN 517 in GG 44701 (11 June 2021).

<sup>4</sup> International Court of Justice *Obligations of States in Respect of Climate Change*, Advisory Opinion, 2025 I.C.J. Reports General List No.187 (23 July 2025).

participation required by section 33 of the Constitution read with section 4 of the Promotion of Administrative Justice Act 2 of 2000 ('PAJA').

Despite its focus on detail and criteria, the listing approach remains ambiguous in some respects (particularly in peripheral or borderline cases). Nevertheless, the EIA listing notices have developed extensively since their inception in the Environmental Conservation Act 73 of 1989 and continued use under NEMA, and the listing notices are regularly revised to reflect changing realities. As of 2026, the listing notices have evolved to cover a wide spectrum of developments.

In sum, the EIA listing notices make it clear to developers when they are bound to follow either a basic assessment or a full scoping process. They appropriately constrain government discretion by requiring public participation and consideration of relevant factors throughout the EIA process. It is also clear to communities when their participatory rights are triggered. The distinction in the processes is of specific relevance to climate change, which is required to be substantively considered in full scoping processes. Further, a full scoping process entails greater opportunities for public participation.

Regarding disadvantages, the listing approach can result in unnecessary costs and inefficiency in situations when people are engaging in what they consider to be everyday practices of low environmental risk, but which are nonetheless listed in the listing notices. However, requiring assessment even in these situations is aligned with key environmental principles, including the polluter pays principle, precautionary principle and the principle of prevention.

In contrast to the listing approach, the approach contemplated by the Flexible EIA System envisages that whether and to what extent EIA is required will be determined with reference to the perceived risk posed by a development. Risk will be determined through pre-application consultation and screening, based on 'screening criteria'. Additionally, departing from a listing approach, development types – rather than specific activities – will be screened. Development types could include 'human settlements', 'tourism development', 'industrial developments', 'mining operations' and 'bulk infrastructure'. The sensitivity of the receiving environment is envisaged as a key factor in determining the anticipated risks of impacts occurring. Lastly, 'environmental

aspects' such as whether activities result in generation of waste (such as effluent waste), emissions, or require the use of natural resources could trigger screening.

To ensure climate justice, climate change mitigation and adaptation risks and hazards must, of necessity, be among the 'environmental aspects' that require assessment in any EIA system adopted. A failure to assess climate change mitigation and adaptation risks and hazards would result in a breach of South Africa's international climate change and human rights obligations as articulated by the ICJ. Additionally, such assessments must be done to ensure compliance with the Climate Change Act 22 of 2024, as well as judicial pronouncements in emerging domestic climate change jurisprudence, and guidelines.<sup>5</sup>

Following screening, the Flexible EIA System contemplates an 'early exit option' at the discretion of government. This option would enable a developer to forego certain elements of the established EIA process where relevant (or an EIA in its entirety). We would caution that the early exit option should not serve to eliminate many of the established practices, rules, and jurisprudence on what is included in EIAs on the listing notices. Clarity is needed on the screening criteria and how they are to be codified, and what guidelines are envisaged for government officials exercising their discretion on early exit options, basic assessments, or full scoping assessments.

While a flexible approach could be advantageous to smaller developments, presently burdened by the need for EIA, there is a severe risk of human rights violations and climate injustice if the listing approach is abandoned in favour of conferring a wide discretion on environmental authorities and government. In turn, this could result in developments commencing in a manner inconsistent with the polluter pays principle, precautionary principle and principle of prevention, among others. This is particularly true in circumstances where a new, flexible approach fails to incorporate clear and substantive screening criteria, or does not include opportunities for meaningful public participation when screening occurs.

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<sup>5</sup> The new set of National Guideline for the Consideration of Climate Change Implications in Applications for Environmental Authorisations, Atmospheric Emission Licences and Waste Management Licences was of course published in November and December 2025 for public comment.

Abandoning the listing approach could also result in many established practices, guidelines and jurisprudence on what should be assessed, and how to ensure inclusion and participation, being ignored. To ensure climate justice and protect human rights, whatever criteria are used in the screening must be transparent, accessible, and substantively reflected in decision-making arising from relevant reports and environmental management programmes ('EMPr').

Further, a flexible system presupposes capacitated, well-trained and informed environmental assessment practitioners ('EAPs') and government officials. In practice, EAPs and government officials frequently experience capacity constraints and lack extensive knowledge of South Africa's environmental law and governance landscape. There is no clarity on the nature and type of qualifications, if any, EAPs and government officials must secure to be suitably qualified to carry out an EIA, which is an issue that could further be exacerbated in the Flexible EIA System. This is particularly problematic, given that the Flexible EIA System intends to confer greater discretion on government officials. Whatever the content of the Flexible EIA System, the need for training and education of EAPs and government officials represents a structural challenge that could inhibit the effective functioning of such a system. This challenge must be addressed to ensure climate justice and the protection of human rights.

The Flexible EIA System should not serve to undermine established EIA criteria and environmental principles; it should rather confirm and develop them where appropriate. This could be more expressly recognised in the information provided by the Department of Forestry, Fisheries and Environment. Once developed, all information and criteria should also be codified in accessible and transparent sources for both developers and affected communities, and be made available in as many official languages as is practicable. It would also be useful to develop technical standards as in the listing notices, but for the Flexible EIA System also to be made available in simple terms in these languages, so as not to perpetuate existing inequalities and injustice arising from the use of technical and inaccessible language. Additionally, unequal access to technology should be factored into how decision-making procedures are to unfold, so as not to exacerbate climate injustice. Lastly, training and involvement of civil society organisations and communities on the shift in

approach would be essential to ensure climate justice and the protection of human rights.

## **2 2 Flexible public participation, discretionary pre-application meetings, and public participation plans**

Meaningful public participation in environmental decision making is required by the rule of law, as well as the right to just administrative action entrenched in section 33 of the Constitution (given effect by PAJA), read with the environmental right, the principles in section 2 of NEMA, the legal requirements set out in section 24 of NEMA, the EIA Regulations, and relevant jurisprudence, among other laws and policies. Meaningful participation enhances people's dignity, and it promotes a bottom-up approach to environmental governance which enhances public confidence and the legitimacy of decisions.

Importantly, participation is only meaningful where it is fundamentally regarded as a process itself. Too often, participation is regarded as a formalistic requirement or a 'tick box exercise', which fails to give effect to the legal obligations entrenched in the Constitution and laws giving effect to it. Moreover, meaningful participation is required, which entails the capacity to influence substantive aspects of a decision to develop, and whether the development is appropriate in the first place (such as assessing cultural or indigenous ties to the environment that are intangible). Accordingly, participation cannot be isolated to parts of the EIA process where a decision to develop has already been taken (and only content, such as mitigation measures, can be influenced).<sup>6</sup> Further, participation must be ensured at the outset in circumstances where communities' free, prior, informed consent to develop is required.<sup>7</sup> A failure to ensure meaningful participation when decisions are made during the EIA process, including at the pre-screening stage, would violate section 33 of the Constitution and be inconsistent with section 4 of PAJA.

A flexible approach to participation should be contextual and serve community interests. It cannot have the sole consequence that the EIA process is expediated.

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<sup>6</sup> Refer for example to the exclusion of communities found to be unlawful in *South Durban Community Environmental Alliance and Another v The Minister of Forestry, Fisheries and the Environment and Others* (479/2023) (2025) ZASCA 134 (17 September 2025).

<sup>7</sup> Refer for example to *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP).

This would privilege developer and other hegemonic interests and could have the consequence that baseline requirements in the Constitution, NEMA, the EIA regulations, and jurisprudence are circumvented in the interests of speedy development.

It is not clear whether communities will, for instance, be entitled to participate at pre-application meetings or what the extent of their participation might be. Pre-application meetings must not merely serve the interests and perspectives of developers. Communities are disproportionately affected by the adverse impacts of decisions to allow development. The public at large further has an interest in these decisions. Involving all interested and affected parties at the pre-application meeting is therefore critical to recognise their interests, to identify substantive issues, and to ensure their meaningful participation and consent (where applicable). A failure to do so would be in violation of section 33 of the Constitution and section 4 of PAJA.

The high level of discretion proposed to be afforded to government officials<sup>8</sup> to conduct pre-application meetings could be problematic. Subjecting all developments to the same a wide discretion will create legal uncertainty and could serve to perpetuate the dominant interests of developers and government at the cost of community interests. The introduction of a wide discretion to conduct a pre-application meeting (or even an EIA in its entirety) could also create an additional administrative and legal hurdle for communities, beyond the decision to authorise a development. A decision not to conduct a pre-approval meeting must be subject to the same levels of (legal) review as other administrative decisions in the process. Communities will need to mobilise additional (legal and financial) resources to challenge such a decision, placing additional burdens on them.

Importantly, meaningful participation should not function on a sliding scale where it is restricted to developments that pose greater risk and are likely to have significant (potential) impacts. In other words, the Flexible EIA System must ensure meaningful participation regardless of the type, scale, or size of development to give effect to the

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<sup>8</sup> Relevant government officials are those with the statutory authority to grant environmental authorisation for a development. This includes national departments, provincial departments and in certain cases local authorities.

Constitution, PAJA, the NEMA principles, the EIA regulations, and relevant jurisprudence.

We note that submission of a public participation plan by developers is envisaged in the Flexible EIA System. Community participation on the public participation plan must be ensured to promote a contextual approach to decision making. Communities could then communicate their specific needs about participation that the developer should integrate into the process and that could constitute reasonable accommodation. For example, communities could give input on how consultation occurs (e.g. community meetings in their village or in a suitable alternative location), what languages they understand, etc.

Ultimately, the discretion to conduct pre-application meetings and to ensure public participation should be guided by strict criteria that ensure that climate justice and human rights obligations are advanced.

### **2 3 Best available science for ‘impacts’ and ‘risks’ in respect of climate change and balancing indigenous knowledge**

In developing criteria for what constitutes ‘impacts’ and ‘risks’ in respect of climate change under the Flexible EIA System, the best available science principle, as contained in article 4 of the Paris Agreement<sup>9</sup> and developed by the ICJ in its Advisory Opinion on climate change, must be considered.<sup>10</sup> The ICJ noted the difficulty in predicting specificity with regards to certain aspects of climate change in EIAs, such as cumulative impacts and long-term effects.<sup>11</sup> This does not mean that individual projects and developments are exempt from contemplating climate change impacts and risks. Rather, the implication is that national regulation must oblige developers to consider these impacts with reference to the best available science available at the time of application for the EIA process, as part of their due diligence obligations.

What constitutes ‘impact’ and ‘risk’ will necessarily be evolving concepts, and EIA screening criteria therefore cannot be static. Government officials must include a wide

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<sup>9</sup> COP 21 Report, United Nations Framework Convention on Climate Change (2015), Adoption of the Paris Agreement.

<sup>10</sup> International Court of Justice *Advisory Opinion on the Obligations of States in respect of Climate Change* of 23 July 2025.

<sup>11</sup> Para 298.

range of stakeholders when developing the standards for the screening criteria. They should draw on the ICJ's jurisprudence to ensure compliance with international climate change and human rights obligations, and consistent integration of South Africa's international legal commitments (such as to the Convention on Biodiversity, Convention on Law of the Seas, and the newly developed Biodiversity Beyond National Jurisdiction Treaty). Moreover, developers, EAPs and the specialists in EIA processes must be held accountable with reference to this principle when they assess climate impacts and risks of development.

Importantly, the assessment of climate change impacts and risk cannot be exclusively tied to the scale and size of the development. The pre-application and screening criteria on climate change must be based on the best available science to develop substantive criteria of climate impact and risk assessment. These standards of assessment should also be consistent with the Climate Change Act, relevant guidelines and emerging climate change jurisprudence domestically,<sup>12</sup> and beyond.<sup>13</sup>

Importantly, the integration of science and the best available science principle should not marginalise indigenous knowledge. Such epistemic marginalisation fundamentally impairs the recognition and procedural aspects of climate justice. The experiences and perspectives of indigenous communities provide invaluable context to climate change governance (such as the lived realities of climate risks and harms, and culturally sensitive and nature-based mitigation and adaptation measures).<sup>14</sup> Section 30 and 31 of the Constitution require consideration of these experiences and perspectives by virtue of their recognition of cultural rights, beliefs and practices. Moreover, indigenous knowledge often complements scientific knowledge and enhances climate change standards relating to impacts and risk.<sup>15</sup> The inherent flexibility of the Flexible EIA

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<sup>12</sup> See for example: *Earthlife Africa Johannesburg v Minister of Environmental Affairs* (2017) 2 All SA 519 (GP) para 88; *Philippi Horticultural Area Food & Farming Campaign v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* 2020 (3) SA 486 (WCC) paras 100-102, 142; *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) paras 33, 107, 120-125; *Thungela Operations (Pty) Ltd v. Chief Director, Water Use License Management: Department Of Water And Sanitation* (WT04/22/GP) (2023) ZAWT 1; *African Climate Alliance v Minister of Mineral Resources and Energy* ("African Climate Alliance ZAGPPHC 1271 (4 December 2024) paras 22-27.

<sup>13</sup> *Verening Mileudefensie v Royal Dutch Shell* (2021) HA ZA 19-379; *Dejustica and Acción Jurídica* Decision C-298/24 (Columbian Constitutional Court) (11 July 2024); *Amu Power Company Ltd v Save Lamu et al* (2025) KEELC 7285 (KLR) (16 October 2025).

<sup>14</sup> IPCC *Sixth Assessment Report* 1943-1945, 2342-2344.

<sup>15</sup> As above.

System should be operationalised to incorporate indigenous knowledge – and must not exclude it.

### **3 Conclusion**

In an era of climate crisis, the Flexible EIA system cannot afford to ignore the need to advance climate justice which is inextricably linked to the fulfilment of human rights and the pursuit of social justice. Accordingly, to ensure equity and fairness, the content and criteria for triggering pre-application meetings must be clarified, and the standards of participation (to give effect to the Constitution, PAJA, NEMA, the EIA Regulations and jurisprudence) must also be developed. It is critical to acknowledge that flexibility and discretion create uncertainty and could be used to subvert substantive and procedural justice required by the Constitution, PAJA, and the current EIA regime, including the EIA regulations, Draft National Guidelines for the Consideration of Climate Change Implications in Applications for Environmental Authorisations, Atmospheric Emission Licences and Waste Management Licences, and jurisprudence. Moreover, training of government officials, EAPs and specialists will have to be strengthened for the system to function effectively in a manner that does not compromise human rights or social and climate justice. Finally, climate change occupies a unique position in the EIA milieu. To advance the best available science principle and the recognition of indigenous knowledge, the assessment and screening of climate change will require substantial technical and participatory work that enhances and legitimises the position of marginalised and vulnerable communities.

Thank you for the opportunity to make comments on the Flexible EIA System. We hope that these comments will be helpful as the Flexible EIA System is conceptualised and developed moving forward.

Yours in the pursuit of climate justice,

**EIA4ClimateJustice Team**