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25 July 2024

Department of Forestry, Fisheries and Environment
C/o biodiversitybill@dffe.gov.za

To Whom It May Concern:

ENVIRONMENTAL LAW ASSOCIATION OF SOUTH AFRICA COMMENTS ON THE BIODIVERSITY BILL

Acting in the public interest, the Environmental Law Association of South Africa (**ELA**), a non-profit organisation, seeks to participate in the development and reform of law that has a bearing on the right to an environment not harmful to health or well-being enshrined in section 24 of the Constitution of the Republic of South Africa, 1996. The right must be given effect through reasonable legislative and other measures aimed at, among other things, conservation and ecologically sustainable use and development of natural resources that promotes justifiable social and economic development.

On 24 May 2024 the Department of Forestry, Fisheries and the Environment (**the Department**) published GN 4887 in GG 50706 a draft National Environmental Management: Biodiversity Bill (**the Biodiversity Bill**) for public comment. The Bill seeks to repeal and replace the current National Environmental Management: Biodiversity Act 10 of 2004 (**NEMBA or the Biodiversity Act**).

The Biodiversity Bill is accompanied by a brief statement of its purpose and aims and limited 'clause by clause explanation'. However, the Department has not provided a comprehensive written explanation or comparison and 'markup' of the Biodiversity Act to indicate how the proposed governance of biodiversity conservation and ecologically sustainable use and development of the country's natural resources is set to change under the proposed Biodiversity Bill.

A comparison or tracked version of NEMBA comparing it to the Biodiversity Bill offering a detailed explanation of how provisions are expected to change under the new law is essential to ensure a fair legislative process in the circumstances, and to enable meaningful public participation.

In addition to this deficiency in the legislative process, the Department has afforded the public only 60 days to comment on the Biodiversity Bill. This period is insufficient given the extensive revisions proposed to the governance of South Africa's biodiversity (a wholesale legislative shift).

We accordingly submit that the process adopted by the Department is deficient when viewed in the context of the substantive public participation required by the principles set out in the National Environmental Management Act, 1998 as well as the



requirements of the existing section 100 of the Biodiversity Act that requires meaningful participation - an issue which the courts have emphasised in several judgments, including those relating to biodiversity and flaws in related law-making processes. We therefore call upon the Department to reconsider the approach adopted, which has no place in our constitutional democracy. We call upon the Department to expand its approach to participation in the formulation of the Bill, including by holding extensive public workshops and publishing for public scrutiny a comprehensive comparison of NEMBA against the Biodiversity Bill to indicate how the proposed governance of biodiversity conservation and ecologically sustainable use and development of the country's natural resources is set to change. We further call upon the Department to afford the public an extended period to comment on the Biodiversity Bill, once the abovementioned comparison has been published.

Information sessions on the Biodiversity Bill were held by the Department on 15 July 2024, 13h00 – 16h00; 18 July 2024, 13h00 – 16h00; and 19 July 2024, 09h00 – 12h00. To ensure meaningful public participation, the advertisement of these information sessions should have been strategically distributed to stakeholders of interest as well as the general public to ensure that everyone impacted by the Biodiversity Bill had sufficient time and ample opportunity to attend a session and make comments before the deadline. This was not done. We ask that our organisation be recognised as such a stakeholder. We also note that three (3) virtual sessions are inadequate to address the implications of the overhaul of a national law that has far-reaching impacts on various sectors and members of the public, in both urban and rural landscapes. The Department should ensure that public participation is facilitated through more virtual engagements as well as in-person public hearings across the country. These sessions need to be timed in a way that allows people at least 30 days before the deadline to apply their minds to the Biodiversity Bill and to prepare comments for submission to the Department.

Absent an inclusive and truly participatory approach, the ELA submits that the legislative process will have failed the public and the environment on which all life on Earth depends, in a manner that constitutes a violation of various rights and values entrenched in the Constitution.

We wish to make limited comments on the Biodiversity Bill at this stage, which we hope to supplement in due course.

First, the Biodiversity Bill fails to adopt a human and environmental rights framing for issues such as sustainable use. The notion of 'sustainable use' ought not to be misaligned with constitutional rights.

Second, as you know, section 100 of NEMBA requires that:

'(1) The Minister must give notice of the proposed exercise of the power referred to in section 99-

(a) in the Gazette; and

(b) in at least one newspaper distributed nationally, or if the exercise of the power may effect only a specific area, in at least one newspaper distributed in that area.



- (2) The notice must-
 - (a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and
 - (b) contain sufficient information to enable members of the public to submit meaningful representations or objections.
- (3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.
- (4) The Minister must give due consideration to all representations or objections received or presented before exercising the power.'

In contrast, section 68 of the Biodiversity Bill merely requires that the Minister 'follow an appropriate procedure', which must include publication of a notice

'(a) in the Gazette inviting members of the public to submit written representations or objections within a minimum period of 30 days from the date of that publication; and (b) in at least one newspaper distributed nationally, or if the exercise of the power affects only a specific area, in at least one newspaper distributed in that area.'

Whilst it is positive that the time to submit comments is now a *minimum* of 30 days, the requirement that the Minister include sufficient information enabling the public to submit meaningful representations has problematically been omitted, and the possibility of oral representations is no longer expressly provided for. The requirement that the Minister give 'due consideration' to objections and representations has further problematically been omitted.

We submit that these problematic omissions from section 68 of the Bill could serve to further marginalise and exclude vulnerable communities from meaningfully participating in decision-making about the environment, and thus perpetuate environmental injustice.

Relatedly, the ELA is concerned about the lack of transparency within which permits relating to biodiversity are intended to be issued under the Biodiversity Bill. Considering that the issuance of permits essentially privatises the State's trusteeship of biodiversity, the ELA submits that, in the same way that water use license applications, as well as prospecting rights, mining permits and mining rights are subject to advertisement and public comment, so too should permits issued in terms of the Biodiversity Bill, in the public interest.

Finally, we wish to alert the Department to concerns regarding indigenous knowledge (IK). There is a diversity of views on governance of biodiversity and IK. On the one hand, there is scope to incorporate community-based natural resource management (CBNRM) and holistically incorporate Indigenous Peoples Knowledge systems into biodiversity governance. The Department could, for instance, refer specifically to historical initiatives / approaches of local communities on conservation such as CBNRM. On the other hand, the view has been expressed that the protection, development, and regulation of IK is governed by other legislation and policy such as the Indigenous Knowledge Act 6 of 2019. This legislation is already complex,



inconsistent, and difficult to enforce, and the Biodiversity Bill could add a further layer of complexity. Further consultation on this issue, particularly with Indigenous Peoples, is crucial.

Overall, we reiterate that a failure to facilitate an adequate public participation process compromises the legitimacy of the legislative process. Although the Biodiversity Bill will be subjected to public scrutiny during ongoing parliamentary processes, we believe that it is not appropriate to table this Bill before Parliament in its current state due to fundamental oversights in its content, most of which have not been touched on in this submission, due to capacity constraints, exacerbated by the process failures raised above. The content of the Biodiversity Bill has far-reaching implications for the country and beyond, as well as potential conflicts with existing legislation. In order to ensure legal certainty, these concerns need to be properly ventilated by interested and affected parties and understood and addressed by the Department prior to the Biodiversity Bill going for further parliamentary processing.

We trust that you will receive our comments in the spirit intended, namely to support the Department in ensuring that any reform of biodiversity law and governance in the country upholds the environmental right and the Constitution more broadly. We request that you keep the ELA abreast of the Department's response to our comments. If there are any uncertainties, or if any additional information is required, please feel free to contact us.

Yours in the pursuit of environmental justice,

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