



# Centre for Environmental Rights

## Advancing Environmental Rights in South Africa

**The Honourable Ms AF Muthambi,**  
MP Chairperson of the Portfolio Committee on Environment, Forestry and Fisheries

For the attention of:

**Ms Tyhileka Madubela**  
Secretary: Portfolio Committee – Environment, Forestry and Fisheries  
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Copied to:

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Our ref: BA/NL  
27 May 2022

Dear Honourable Muthambi

### **LIFE AFTER COAL CAMPAIGN COMMENTS ON THE CLIMATE CHANGE BILL, 2022**

#### **Introduction**

1. We address you on behalf of [groundWork](http://www.groundwork.org.za/)<sup>1</sup> and [Earthlife Africa](http://earthlife.org.za/),<sup>2</sup> and represent the [Life After Coal/Impilo Ngaphandle Kwamalahle Campaign](https://lifeaftercoal.org.za/) (“the Campaign”),<sup>3</sup> a joint campaign by Earthlife Africa, groundWork, and the [Centre for Environmental Rights](https://cer.org.za/)<sup>4</sup> in making these comments. The Campaign aims to discourage the development of new coal coal-fired power stations and mines; reduce emissions from existing coal infrastructure and encourage a coal phase-out; and enable a just transition to sustainable energy systems for the people.
2. We refer to the Climate Change Bill, 2022 (“the Bill”, also referred to, interchangeably, as “the Act”, when making reference to the Climate Change Act to be promulgated in future) tabled in Parliament on 18 February 2022 (B9-

<sup>1</sup> See <http://www.groundwork.org.za/>.

<sup>2</sup> See <http://earthlife.org.za/>.

<sup>3</sup> See <https://lifeaftercoal.org.za/>.

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

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2022), with the stipulated comment deadline being 27 May 2022, for comments to be submitted to the Portfolio Committee on Environment, Forestry and Fisheries.

3. We support and commend the Minister of Forestry, Fisheries and the Environment (“the Minister”) and the Department of Forestry, Fisheries and the Environment (“the Department”) on the tabling of the Bill. Nevertheless, we are highly concerned that the Bill, in its current form, does not go far enough to address the severity, urgency and cross-cutting imperatives of the climate crisis and a sound response thereto, as laid out in this submission. Furthermore, we are concerned by the unduly long timeframes for the Bill’s progression up to this point – with the Bill being published for comment by the Minister and her Department in 2018, and little movement on the Bill since then, despite the fast evolving science and clear evidence of a developing climate emergency in need of urgent response.
4. We therefore request and recommend that the Bill be substantially amended in line with the comments and suggestions herein, and that these amendments take place as soon as possible, with the promulgation of a Climate Act to be prioritised. It is imperative that effective climate change legislation be enacted without delay. Additionally, we and our clients request an opportunity to deliver an oral presentation to Portfolio Committee to allow for clarification and direct engagement on various key issues.
5. While we understand that climate response is framed as an environmental issue, it must be appreciated that it is also an environmental justice issue, an economic issue and a social justice issue, therefore a human rights issue, and requires an all-of-government and an all-of-society response for the reasons set out below.
6. This Bill is necessary, not only to give domestic effect to the 2015 Paris Agreement on Climate Change (“the Paris Agreement”), which South Africa ratified in November 2016, but also to give effect to, and to uphold and protect, the rights enshrined in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (“the Constitution”), recognising that it is the Constitutional mandate of government to address South Africa’s own vulnerability to the impacts of climate change and its contributions to, and exacerbation of, those impacts.
7. South Africa’s own National Climate Change Response White Paper (“the White Paper”), and now also the Bill, acknowledge that South Africa is vulnerable to the impacts of climate change. The country’s first Nationally Determined Contribution (“2015 NDC”) states that a 2°C global temperature increase translates to a 4°C increase for South Africa. The 2021 NDC update<sup>5</sup> reaffirms that South Africa “*is warming at more than twice the global rate of temperature increase.*”<sup>6</sup> The 2015 NDC further confirms that “near zero emissions are required in the second half of the century to avoid even greater impacts that are beyond adaptation capability”<sup>7</sup>.
8. At present, South Africa is not on track to meeting the Paris Agreement target of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels, and to pursue efforts to limit the temperature increase to 1.5 °C.<sup>8</sup> The United Nations Intergovernmental Panel on Climate Change (IPCC) Special Report on Global Warming of 1.5°C of 2019<sup>9</sup> (“IPCC SR1.5”) identified that keeping warming to 1.5°C above pre-industrial

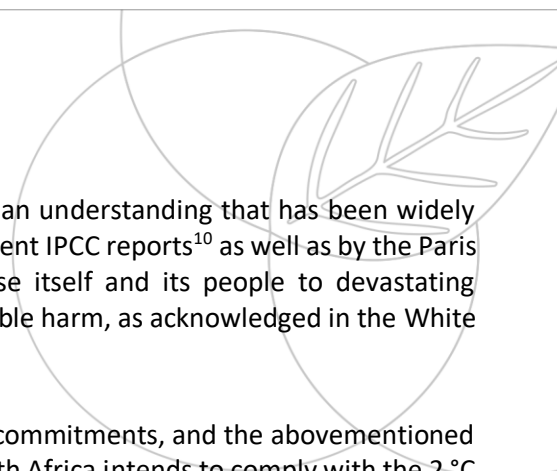
<sup>5</sup> <https://www.dffe.gov.za/sites/default/files/docs/southafricasINDCupdated2021sept.pdf>

<sup>6</sup> See Pg 6 of 2021 NDC update

<sup>7</sup> See <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/South%20Africa%20First/South%20Africa.pdf> at Pg 1

<sup>8</sup> Article 2(1)(a) of the Paris Agreement.

<sup>9</sup> See <https://www.ipcc.ch/sr15/chapter/spm/>



levels will ensure considerably less risk than exceeding this benchmark, an understanding that has been widely endorsed and confirmed by the scientific community at large, by subsequent IPCC reports<sup>10</sup> as well as by the Paris Agreement itself. This means that South Africa is continuing to expose itself and its people to devastating temperature increases and other climate impacts that will cause irreversible harm, as acknowledged in the White Paper and both the 2015 NDC and 2021 NDC update.

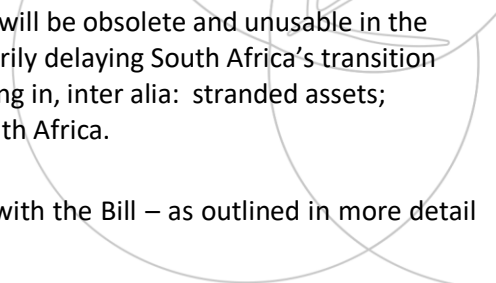
9. It is important to note that, in terms of South Africa's revised 2021 NDC commitments, and the abovementioned 2°C target, there is very limited carbon space for further emissions, if South Africa intends to comply with the 2 °C target,<sup>11</sup> much less the 1.5°C. It is simply not an option for South Africa to use all of its fossil fuel reserves or to continue to burn fossil fuels for electricity, nor is it economically desirable, given the increased risks of such projects becoming stranded assets in light of the availability of cleaner and less harmful alternatives. There is a growing global shift towards leaving coal, oil and gas resources undeveloped and in the ground.<sup>12</sup>
10. There is also a limited window within which necessary GHG emission reductions need to take place to avoid irreversible climate change with impacts which may well be beyond human adaptation capabilities. GHG emissions must be reduced by 43% within the next seven-and-a-half years. South Africa has a long way to go to ensure that we can sufficiently reduce GHG emissions and avoid more of the most devastating impacts of climate change on the country and its people, and also to ensure compliance with the Paris Agreement targets. If we do not take steps now to avoid these impacts (such as water scarcity, increased extreme weather events, and temperature increases) they will be severe for all of us, particularly the poor and marginalised communities of South Africa, as well as women and children. This will exacerbate the already-prevalent environmental, gender and social injustice in South Africa. It is indeed these already marginalised communities being most affected by the two recent flood events in KwaZulu-Natal. Further, it is the state, not the GHG emitters, tasked with responding to these disasters.
11. Government needs to prioritise the most efficient, cost-effective, and feasible means to ensure rapid and significant emission reductions, and at the same time promote labour-intensive and localised opportunities to ensure a just transition to a low-carbon and climate resilient economy and society. We submit that measures for increased energy efficiency and energy demand management would be a low-hanging fruit in this regard. Such a forward-looking climate resilient approach to a just transition from fossil fuels would have additional co-benefits of alleviating energy poverty, reducing household air pollution, job creation, and stimulating the small business sector.

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<sup>10</sup> The IPCC Sixth Assessment report).

<sup>11</sup> The ERC Report, at p 16 & 17 states that “*South Africa can meet the upper range of the PPD to 2050 if it implements a least-cost energy system to 2050; that is, one that excludes new coal-fired power plants, achieves high levels of energy efficiency and continues to invest in renewables. However only achieving the upper PPD range would not be an adequate contribution to limiting warming to below 2°C (PRIMAP, 2018).*” Available at <https://cer.org.za/wp-content/uploads/2018/05/ERC-Coal-IPP-Study-Report-Finalv2-290518.pdf>.

<sup>12</sup> See, for example, the following reports: “*Boom and Bust 2018: Tracking the Global Coal Plant Pipeline*” at [https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/boomandbust\\_2018\\_coalreport.pdf](https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/boomandbust_2018_coalreport.pdf) and “*No country for coal gen – Below 2°C and regulatory risk for US coal power owners*” at <https://www.carbontracker.org/reports/no-country-for-coal-gen-below-2c-and-regulatory-risk-for-us-coal-power-owners/>.

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12. Conversely, locking South Africa into GHG-emitting infrastructure, which will be obsolete and unusable in the future (due to high costs and international obligations) and/or unnecessarily delaying South Africa's transition from fossil fuels, will have severe negative economic implications, resulting in, inter alia: stranded assets; expensive electricity; and water and food insecurity for the people of South Africa.
  13. With the above context in mind, our primary and overarching concerns with the Bill – as outlined in more detail below – are that:
    - 13.1. The Bill does not adequately centre the Constitution and the Bill of Rights;
    - 13.2. The Bill exhibits a lack of urgency, with inadequate or absent timeframes;
    - 13.3. The Bill does not contain effective, suitably ambitious and clear emission reduction targets;
    - 13.4. Transparency, disclosure and access to information are not adequately provided for;
    - 13.5. There is woefully insufficient provision for adequate emission reductions including penalties, offences, enforcement and compliance;
    - 13.6. The Bill must be strengthened in terms of capacitating and empowering organs of state to implement adequate and effective climate response measures;
    - 13.7. The Bill is deficient in mainstreaming and prioritising climate response and sound climate governance across government; and
    - 13.8. The Bill does not adequately address the responsibility of organs of state to consider climate response in decision-making.
  14. We submit below our detailed comments on the Bill, in the following format:
    - 14.1. Current science, risk identification and geo-political context of the climate crisis and climate response;
    - 14.2. Stakeholder engagement and public hearings in respect of the legislative process of the Bill;
    - 14.3. General and overarching comments and concerns in relation to the Bill as currently drafted;
    - 14.4. General comments on climate governance innovations and best practice mechanisms not included in the Bill as currently drafted;
    - 14.5. Recommended additions, deletions and alterations to the Bill in its current form; and
    - 14.6. Concluding remarks.

## Current science, risk identification and geo-political context of the climate crisis and climate response

15. While the general principles underpinning the climate crisis are generally broadly understood, and it is beyond the scope of this submission to restate them, we wish to place on record some of the more recent key information that underpins certain comments, concerns and contentions raised herein.
16. Scientific studies, such as the April 2022 report from Earth Systems Science Data<sup>13</sup> show that global emissions continue to rise to new levels, having dipped by up to 5% during the peak of the Covid-19 pandemic. 2022 is looking likely to have the highest GHG emissions yet, mainly due to increased use of coal-fired power and an insufficiently rapid switch to renewable energy according to the International Energy Agency.<sup>14</sup>
17. The United Nations Intergovernmental Panel on Climate Change (IPCC) has, in the second half of 2021 and in 2022, published the bulk of the reports comprising its Sixth Assessment Report (“IPCC AR6”) on climate change. Given the scope and methodology of the Assessment Report process, we view this as a pre-eminent source of science, meeting the Bill’s principle of basing climate change responses on *“the best available science, evidence and information.”*<sup>15</sup> This is not to the exclusion of other credible sources of information, certain of which we also reference from time to time.
18. The IPCC AR6 Working Group 1<sup>16</sup> report (“IPCC AR6 WG1”) – The Physical Science Basis, released in August 2021 – includes the following key findings:
- 18.1. Global surface temperature will continue to increase until at least the mid-century under all emissions scenarios considered. Global warming of 1.5°C and 2°C will be exceeded during the 21st century **unless deep reductions in CO2 and other greenhouse gas emissions occur in the coming decades.**
- 18.2. Globally, approximately 2390 gigatonnes of CO2 equivalent (“GtCO2e”) of GHGs have been emitted since the mass-scale burning of fossil fuels began in around 1850. In order for an 83% likelihood of avoiding breaching the 1.5°C limit, only a further 300 GtCO2e can be emitted, giving a clear indication we are near the end of the era of being able to emit GHGs with little or no consideration for the consequences.
- 18.3. South Africa is experiencing a decrease in average rainfall, but an increase in flooding due to changing rainfall patterns (more intense and over a shorter time period). There is an increase in heatwaves, droughts, aridity and soil dryness.<sup>17</sup> These events are made more frequent and intense as a result of human-induced climate change.<sup>18</sup> Wind speeds, extreme weather and fire risk are increasing. All of these phenomena are already happening, and will increase in intensity and impact.

<sup>13</sup> <https://essd.copernicus.org/articles/14/1917/2022/essd-14-1917-2022.pdf>

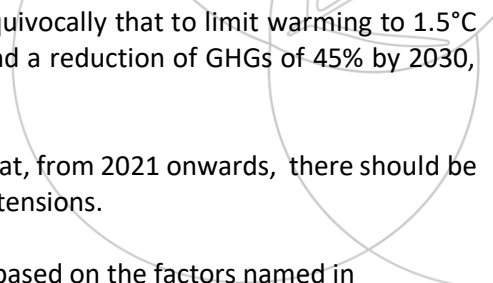
<sup>14</sup> <https://energypost.eu/record-global-power-sector-emissions-by-2022-because-renewables-arent-growing-fast-enough/>

<sup>15</sup> Sections 3(h), 15(2)(d), 17(2)(a), 18(3)(c), 19(1)(c)(iii), 21(4)(b)(iii), 22(5)(b), 22(7)(c), 23(5)(c) and 24(2)(b).

<sup>16</sup> See <https://www.ipcc.ch/report/ar6/wg1/>.

<sup>17</sup> [https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC\\_AR6\\_WGI\\_Regional\\_Fact\\_Sheet\\_Africa.pdf](https://www.ipcc.ch/report/ar6/wg1/downloads/factsheets/IPCC_AR6_WGI_Regional_Fact_Sheet_Africa.pdf)

<sup>18</sup> For example, the intensity of the April 2022 heavy rainfall and flooding in KZN can be attributed to climate change - <https://www.worldweatherattribution.org/wp-content/uploads/WWA-KZN-floods-scientific-report.pdf>.

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19. The IPCC SR1.5 Special Report on Global Warming of 1.5°C<sup>19</sup> states unequivocally that to limit warming to 1.5°C over pre-industrial levels, requires net zero<sup>20</sup> GHG emissions by 2050, and a reduction of GHGs of 45% by 2030, over 2010 levels.
  20. The International Energy Agency in its Net Zero by 2050 report<sup>21</sup> states that, from 2021 onwards, there should be no new oil and gas field development, and no new coal mines or mine extensions.
  21. According to a September 2021 report<sup>22</sup> by Professor Nicholas King, and based on the factors named in paragraph 18.3 above, South Africa will experience intensifying pressure on freshwater and food security, giving rise to conflict, force climate migration, social instability and adverse health impacts. Infrastructure will become increasingly damaged impacting the economy. The report highlights how climate change disproportionately impacts the youth.
  22. According to a 2020 study from the Wits Global Change Institute,<sup>23</sup> the top climate risks faced by South Africa are food insecurity and the viability of the agricultural sector; water insecurity; energy system risks; adverse impacts on health and wellbeing; and loss of biodiversity and ecosystem services.
  23. In terms of the **economic risks** posed by climate change, goods and services created using fossil fuel energy have a high carbon footprint due to the direct and indirect GHG emissions caused by their production. This means exposure to increased taxes and other costs.<sup>24</sup>
  24. If laws are applied more vigorously, and as policies, targets and financial pressures become ever more restrictive, we foresee the very real risk that fossil fuel infrastructure and developments will become inviable and illegal to operate long before the end of their economic lifespans, resulting in stranded assets and very likely placing burdens on the public purse in terms of decommissioning and management costs.<sup>25</sup>
  25. There is a range of climate and transition financing mechanisms becoming available from the Global North for countries embracing accelerated decarbonisation policies and measures.<sup>26</sup> South Africa is viewed as an attractive

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<sup>19</sup> <https://www.ipcc.ch/sr15/>

<sup>20</sup> The IPCC defines net zero is as the “condition in which anthropogenic carbon dioxide (CO<sub>2</sub>) emissions are balanced by anthropogenic CO<sub>2</sub> removals over a specified period.

<sup>21</sup> <https://www.iea.org/reports/net-zero-by-2050>

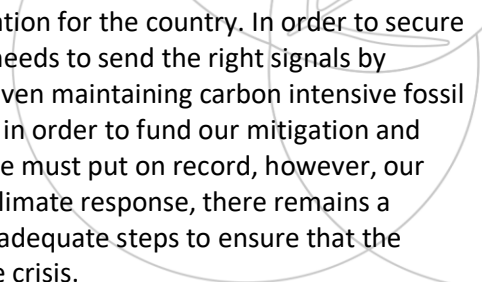
<sup>22</sup> Titled “Climate Change Implications for SA’s Youth”, the report examines the specific risks and exposure pathways for certain parts of South Africa on future trajectories aligned with 1.5°C, 2°C and higher of warming. The report demonstrates, inter alia, that exceeding a 1.5 degree pathway spells dire consequences for South Africa. <https://cer.org.za/wp-content/uploads/2021/09/Nick-King-Report-Final.pdf>

<sup>23</sup> [https://www.scribd.com/document/479771696/The-Climata-Risks-We-Face#download&from\\_embed](https://www.scribd.com/document/479771696/The-Climata-Risks-We-Face#download&from_embed)

<sup>24</sup> The European Union introduced the Carbon Border Adjustment Mechanism (CBAM) which will levy a fee on all imports based on their carbon footprint. An extensive fossil fuel powered electricity system will ensure that our exporters are heavily penalised and their competitiveness is at risk.

<sup>25</sup> <https://oilprice.com/Energy/Crude-Oil/A-Third-Of-Fossil-Fuel-Assets-May-Soon-Be-Stranded>

<sup>26</sup> South Africa has been offered a first-of-its-kind climate finance deal in the amount of R130 billion. While the details of this deal are still to be worked out and then fully evaluated, this is in all likelihood a promising first step in what will hopefully be an ongoing series of financial support mechanisms from the developed world. This financing is different from the \$100 billion



destination for such financing given the relatively low cost of decarbonisation for the country. In order to secure the financial support, which South Africa very much needs, government needs to send the right signals by embracing strong emission reduction measures and avoid expanding or even maintaining carbon intensive fossil fuel use such as coal and gas. This financing is known to be much needed in order to fund our mitigation and adaptation measures, and assist with a implementing a Just Transition.<sup>27</sup> We must put on record, however, our view that, whether or not South Africa accesses financial support for its climate response, there remains a positive obligation and Constitutional imperative on government to take adequate steps to ensure that the people of South Africa are not exposed to the worst effects of the climate crisis.

26. Continued use and development of fossil fuel infrastructure, energy generation and services brings with it **reputational risk** whereby South Africa is seen as a reckless and unnecessarily intensive carbon emitter, compromising our investment opportunities and depriving the economy of growth opportunities.
27. As more stakeholders align with the imperatives of halting global warming, **litigation risk** increases.<sup>28</sup>
28. At the COP 26 climate summit held in the UK, the Glasgow Pact, which was agreed to by a number of state parties including South Africa, clearly lays out pathways for accelerated climate change mitigation and accountability measures. While the Paris Agreement calls for signatory nations to submit emissions reduction targets, or Nationally Determined Contributions (NDCs) every 5 years, and we have just submitted an updated NDC for COP26, the Glasgow negotiations saw nations being requested to submit stricter targets by the end of this year (2022) already. What also emerged is that the \$100bn per year that developed nations had pledged to pay to support developing nations with climate aid has not been forthcoming, and may not be seen for at least another 2 years. We fully support the concept of climate justice, which includes an obligation on wealthy countries who have historically emitted high levels of GHGs providing financial aid to support developing nations in their climate efforts. This is sometimes called a climate debt. Given the signals from high-emitting countries at, and since, COP 26, we have to accept that the scale and timeframe for such aid are uncertain, and cannot afford to postpone addressing the climate crisis until such aid is available.

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referred to earlier. Such financing deals come with conditions related to accelerated decarbonisation, however, and we will have to continue demonstrating increasing commitment and actions to decarbonise. One of the reasons South Africa was considered eligible for such a deal is that the costs of decarbonising our economy are relatively low compared with other countries. But competition is fierce with countries like Mexico, Indonesia and Vietnam also vying for these opportunities. If we do not continue to exhibit strong commitment to climate mitigation action, we will lose our attractiveness as a destination for such financing. The Bill is going to be perhaps the most key indicator of our commitment in this regard.

<sup>27</sup> <https://www.climatechangenews.com/2021/08/20/us-guidance-development-banks-puts-gas-infrastructure-finance-question/>

<sup>28</sup> More than one thousand climate litigation cases have been launched around the world between 2015 and 2020. Our courts have already recognised that new coal fired power developments are contrary to climate change imperatives, and the climate science relating to gas will inevitably result in similar and increasing challenges to new gas developments.

## **The legislative process for the Bill: stakeholder engagement and public participation**

29. Given the extent and nature of the climate crisis, and the far-reaching impact on all levels of society and regions in South Africa, we strongly encourage a highly comprehensive programme of meaningful public participation on the Bill. Our experience has shown that geographically remote and economically challenged communities and individuals are often effectively excluded from meaningful public participation, both online and in-person, in processes of this nature. This is often due to prohibitive data and transport costs. Additionally, much of the information presented, and issues to be considered are couched in technical language which effectively excludes full and meaningful participation. To address this, we recommend that the following be considered:
- 29.1. In-person hearings in all regions and large metros. Particular focus should be given to key areas strongly affected by climate change response and just transition considerations - including at least the Mpumalanga Highveld (towns like Emalahleni, Middelburg, Hendrina, Secunda, Carolina and Ermelo), the Vaal Triangle (Vanderbijlpark and Sasolburg), Durban and Newcastle in KwaZulu-Natal, the Limpopo Waterberg, including towns like Lephalale and Burgersfort, the Northern Cape (Kuruman), Gqeberha in the Eastern Cape and Cape Town in the Western Cape.
  - 29.2. Knowledgeable interpreters need to be available so that participants can express themselves in a language of their choice.
  - 29.3. Adequate and effective notice of hearings, invitations to comment and other participation processes should be provided, along with the relevant resources and documents such as the Bill and explanatory memoranda. Notice periods should be no less than 2 (two) weeks.
  - 29.4. Advertisements for hearings should be widespread, including the use of local notice-boards, community radio stations and in all local languages.
  - 29.5. Parliamentary resources should be deployed to educate people and communities on the key substantive and procedural aspects of the Bill and its passage through the legislature. These should be made available well in advance of any hearings or comment processes to support meaningful consideration and informed comments.
  - 29.6. Given that certain sectors of society – particularly women and youth – are shown to carry a disproportionate burden of the climate crisis impacts, we recommend that additional measures be taken to ensure adequate consultation with, and adequate proportionate representation of youth and women throughout this process.
  - 29.7. Facilitators should be chosen who are able to provide answers to questions during the hearings as far as possible. Technical information must be made sufficiently understandable, and clear and accurate explanations should be given.
  - 29.8. Hearings must be public and broadcast on the Parliamentary online platforms.



29.9. Hearings must be conducted in a spirit of ensuring that views and voices are listened to.

30. We are aware that Parliament’s Public Education Office has the mandate and resources to undertake public education on prospective legislation, such as the Bill, and facilitates various aspects of public participation. We strongly urge the committee to avail itself of this service to further strengthen democratic engagement in the legislative process.
31. We submit that, in the interests of procedural fairness and the obligations of the state to adequately consult with stakeholders, in accordance with section 33 of the Constitution, the above recommendations should be followed.

### **General comments on the Bill as currently drafted**

32. This section contains high-level descriptions and motivations of our fundamental concerns with key mechanisms in the Bill. More detailed engagement, along with proposed additions and revisions to the text of the Bill, can be found below from paragraph 100 onwards.

### **Appropriately centering the Constitution and the Bill of Rights**

33. Notwithstanding the importance of international climate commitments and the imperatives of sound environmental management described in this submission, climate change and South Africa’s response thereto must be seen as a Constitutional issue and a human rights issue. A number of rights enshrined in our Bill of Rights stand to be severely compromised if there is an absent, inadequate or inappropriate response to climate change, both in terms of adaptation and mitigation. The rights in particular, to life,<sup>29</sup> dignity,<sup>30</sup> access to food and water,<sup>31</sup> and to an environment not harmful to health or well-being,<sup>32</sup> being in the forefront. Because climate change is known to more intensely impact on poor people, and women<sup>33</sup> and children, the rights to equality<sup>34</sup> and the rights of children<sup>35 36</sup> are also compromised.<sup>37</sup>
34. Pertaining to the section 24 right to an environment that is not harmful to health or wellbeing, a Pretoria High Court judgement was handed down in March 2022 in the case of *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others (39724 of 2019) [2022] ZAGPPHC 2 (18 March*

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<sup>29</sup> S11, the Constitution.

<sup>30</sup> S10, the Constitution.

<sup>31</sup> S27, the Constitution.

<sup>32</sup> S24, the Constitution.

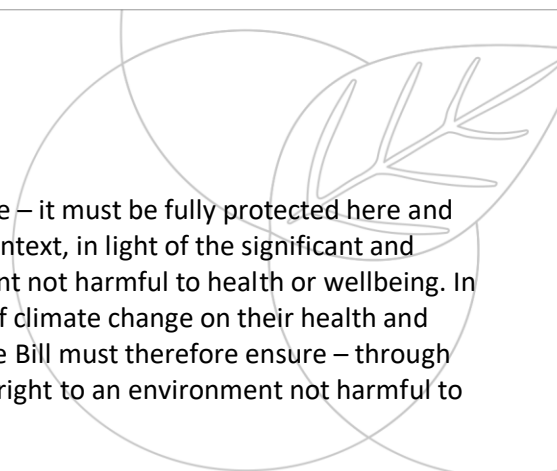
<sup>33</sup> [https://www.un.org/womenwatch/feature/climate\\_change/downloads/Women\\_and\\_Climate\\_Change\\_Factsheet.pdf](https://www.un.org/womenwatch/feature/climate_change/downloads/Women_and_Climate_Change_Factsheet.pdf)

<sup>34</sup> S9, the Constitution.

<sup>35</sup> S28, the Constitution.

<sup>36</sup> <https://www.unicef.org/stories/impacts-climate-change-put-almost-every-child-risk>

<sup>37</sup> A more detailed motivation relating to such compromises of rights can be found starting at p115 of the Founding affidavit in the so-call “CancelCoal” high court constitutional challenge of the state’s procurement of new coal-fired power - <https://cer.org.za/wp-content/uploads/2021/11/2.-Founding-Affidavit-and-Annexures.pdf>.



2022).<sup>38</sup> The court confirmed that the s24(a) right is immediately realisable – it must be fully protected here and now. This judgment has far-reaching implications in the climate change context, in light of the significant and irreversible threat that climate change poses to the right to an environment not harmful to health or wellbeing. In many ways, the people of South Africa are already suffering the impacts of climate change on their health and wellbeing, and therefore are unable to enjoy their section 24(a) rights. The Bill must therefore ensure – through its mechanisms and measures – the immediate and full realisation of the right to an environment not harmful to health and wellbeing, in addition to other Constitutional rights.

35. Section 7 of the Constitution provides that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”. This Bill is a foundational mechanism for how the state will do this in respect of climate change. The Bill, and how it is implemented, must ensure an adequate climate response to avoid unjustifiably limiting these rights and risking more destruction and suffering.

#### **Urgency, and inadequate or absent timeframes**

36. With regard to mitigation, the Bill relies on certain mechanisms to provide certainty and enforceability for key mitigation action, most notably the allocation of carbon budgets by the Minister,<sup>39</sup> as well as the determination of sectoral emissions targets.<sup>40</sup> Both of these mechanisms in turn rely on the listing of GHGs<sup>41</sup> and activities<sup>42</sup> that cause or exacerbate climate change. Fundamental to these mechanisms as a benchmark against which to measure emissions reduction, is the determination by the Minister of a GHG emissions trajectory.<sup>43</sup> **None of these key actions have any timeframes or deadlines attached to them**, creating the real and perceived risk that the Climate Change Act may be toothless and inadequate to drive mitigation action and any meaningful GHG emission reduction for a number of years to come, until such time as regulations are promulgated - a delay we cannot afford. Clear timeframes for these necessary measures to be implemented must be provided for in the Bill. It is also incumbent – in keeping with the objects of an effective climate response – that the necessary regulations be promulgated alongside the Act.

37. With regard to adaptation, the Bill prescribes various steps to be taken by national, provincial and local government to assess climate change needs and then produce response plans.<sup>44</sup> In the case of provincial and local government, the obligation to produce a climate change response implementation plan only becomes mandatory a full five years after the Climate Change Act comes into operation.<sup>45</sup> When we consider the nature of potential near-term climate impacts for South Africa, many of which are already being experienced, we can see that the need to urgently implement climate change adaptation measures by the relevant organs of state is critically urgent. We therefore urge the Portfolio Committee to recommend shorter and more reasonable timeframes for a number of these mechanisms – not longer than one year post promulgation. In many instances

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<sup>38</sup>Para 163 of the judgement in the matter) - <https://lawlibrary.org.za/index.php/za/judgment/high-court-south-africa-north-gauteng-pretoria/2022/2>.

<sup>39</sup> S24 of the Bill.

<sup>40</sup> S22 of the Bill.

<sup>41</sup> S23(1) of the Bill.

<sup>42</sup> S23(2) of the Bill.

<sup>43</sup> S21 of the Bill.

<sup>44</sup> Chapters 3 and 4 of the Bill.

<sup>45</sup> S15 of the Bill.

– the adaptation objectives and response plans provided for in chapter 4 for example, should be required within at most 6 months from promulgation.

### Effective, suitably ambitious and clear emission reduction targets

38. The urgent need to curb emissions, along with a clear target and strict emissions trajectory, are not adequately set out in the Bill. The new legislation cannot be effective unless there is absolute certainty on what the goal is. **The Bill must make explicit reference to the Paris Agreement goal of holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.**<sup>46</sup>
39. We submit that the Paris Agreement goals – holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels - as underscored by the IPCC SR1.5 and IPCC AR6 WG3 reports of 2019 and 2022 respectively, must be expressly stated as being an overarching and binding target. Setting the national target in the Act itself, and requiring a trajectory that is aligned with the “well below 2 °C” Paris Agreement target, would be aligned with many climate change laws around the world:
- 39.1. Mexico’s General Climate Change Law of 2016 sets a preliminary GHG emissions reduction target for 2020 and 2050, which the law requires to be reviewed when the government publishes the National Climate Change Strategy.<sup>47</sup>
- 39.2. Finland’s Climate Change Act of 2015 sets as a binding target “*that the total anthropogenic emissions of greenhouse gases into the atmosphere is reduced in Finland by at least 80 per cent by 2050 compared to 1990 levels.*”<sup>48</sup>
- 39.3. Scotland’s Climate Change Act of 2009 incorporates interim targets, so the country can assess its progress and adapt appropriately to meet its long-term targets. The Act sets a target for the reduction of GHG emissions for the year 2050, an interim target for the year 2020, and provides for annual targets.<sup>49</sup> Although we do not regard these as sufficiently ambitious, by way of example: for 2050, Scotland seeks to ensure emissions accounts are at least 80% lower than the baseline, which it has set as 1990 for carbon dioxide, methane and nitrous oxide, and 1995 for hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride.<sup>50</sup> Scotland also sets an interim target of a 42% reduction from the baseline for 2020, which the relevant Scottish Ministers related to climate change had to reassess as soon as possible after the Act came into effect.<sup>51</sup> Section 3 of the Act also requires the

<sup>46</sup> Article 2(1)(a), Paris Agreement.

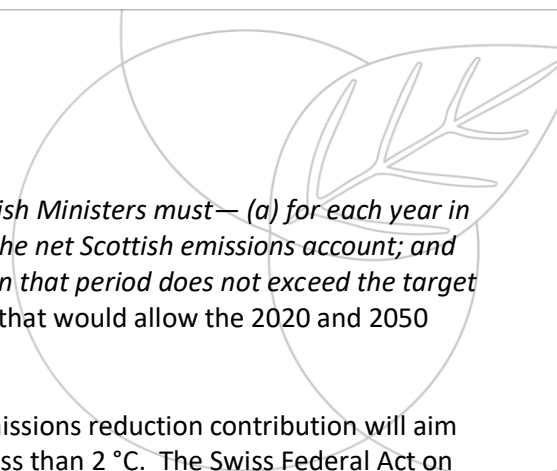
<sup>47</sup> Mexico General Climate Change Law of 2016: <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/03/levclimatico.pdf>.

<sup>48</sup> Finland Climate Change Act of 2015, section 6(3), unofficial English translation at: <https://www.finlex.fi/en/laki/kaannokset/2015/en20150609.pdf>.

<sup>49</sup> Scotland Climate Change Act 2009, part 1. [http://www.legislation.gov.uk/asp/2009/12/pdfs/asp\\_20090012\\_en.pdf](http://www.legislation.gov.uk/asp/2009/12/pdfs/asp_20090012_en.pdf)

<sup>50</sup> *Ibid*, sections 1 and 11.

<sup>51</sup> *Ibid*, section 2.



Scottish Ministers to set annual reduction targets: “(1) The Scottish Ministers must— (a) for each year in the period 2010-2050, set a target for the maximum amount of the net Scottish emissions account; and (b) ensure that the net Scottish emissions account for each year in that period does not exceed the target set for that year.” The annual targets must be set at an amount that would allow the 2020 and 2050 targets to be met.

- 39.4. Switzerland, in addition to setting a target, also notes that its emissions reduction contribution will aim to be consistent with limiting the global rise in temperature to less than 2 °C. The Swiss Federal Act on the Reduction of CO<sub>2</sub> Emissions (“CO<sub>2</sub> Act”) of 2013 aims to reduce GHG emissions with the “aim of contributing to limiting the global rise in temperature to less than 2 degrees Celsius.”<sup>52</sup> It requires: “Domestic greenhouse gas emissions must be reduced overall by 20 per cent as compared with 1990 levels, by 2020. The Federal Council may set sector-specific interim targets.”<sup>53</sup> The CO<sub>2</sub> Act also allows the Federal Council to increase the reduction target to 40 % in order to comply with international agreements.
40. Furthermore, the Bill provides for the Minister to set the national GHG emissions trajectory and to determine a GHG emission threshold at an undisclosed time. We are concerned that the interim trajectory contained in Schedule 3 of the Bill is in fact South Africa’s now obsolete 2015 Nationally Determined Contribution (NDC) emission trajectory. Also known as the “peak, plateau and decline” NDC, these emissions targets were deemed ‘highly insufficient’ according to independent research authority, Climate Action Tracker. This trajectory figure puts the world on track for an up to 4°C temperature<sup>54</sup> increase (this could translate to 8°C<sup>55</sup> for South Africa as it warms at twice the global average rate – an untenable situation). Arguably, the trajectory as it currently stands in the Bill and Schedule 3 is not aligned with the Constitution and poses unacceptable risks to the rights enshrined in the Bill of Rights. Even more so, as government has committed to a more ambitious pathway in its 2021 updated NDC, demonstrating that a safer and more ambitious emissions trajectory is certainly feasible.
41. Basing our trajectory on the 2015 NDC is not only unsafe in terms of climate mitigation action, but immediately places the Bill out of alignment with our international obligations as signatories of the Paris Agreement. To avoid confusion – the NDC and national emissions trajectory should be aligned. At the very least – the trajectory should **not** be more lenient than the updated NDC. **At the very least**, South Africa’s emissions target in the NDC update of 2021 must be reflected in Schedule 3, as this is SA’s official emission target for 2025 and 2030.
42. Notwithstanding what we state above, we place on record that even the 2021 NDC update is insufficient to meet the necessary criteria of ensuring a safe limit to global warming; a safe climate path for South Africa and an adequate contribution in terms of South Africa’s international obligations. An independent climate science initiative – the Climate Equity Reference Project - was appointed by Earthjustice and the CER to compare the 2030 mitigation targets in South Africa’s 2021 NDC update to its fair share of the global mitigation effort to limit climate change. According to the findings,<sup>56</sup> South Africa’s fair share is:

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<sup>52</sup> Swiss (CO<sub>2</sub> Act), article 1.

<sup>53</sup> *Ibid*, article 3.

<sup>54</sup> <https://climateactiontracker.org/countries/south-africa/targets/>

<sup>55</sup> <https://iopscience.iop.org/article/10.1088/1748-9326/10/8/085004/pdf>

<sup>56</sup> <https://cer.org.za/wp-content/uploads/2021/05/NDC-vs-fair-share-memo-v04-corrected-version.pdf>

274 to 352Mt CO<sub>2</sub>-eq for a 1.5°C pathway; and

350 to 401Mt CO<sub>2</sub>-eq for a 2°C pathway (but not 'well below' as formulated in the Paris Agreement).

We can therefore see that the upper limit of our NDC does not satisfy the fair share for even a 2°C pathway, let alone a "well below" 2°C or a 1.5°C pathway. Even the lower range number only just touches the range for a 1.5°C pathway.

43. The Bill should explicitly and immediately set out a strict trajectory that reflects, **at minimum** (meaning in the worst case), the lowest range of the 2021 NDC update (although we dispute that even the low end of the range is consistent with the 1.5°C Paris Agreement target), with an **express and urgent requirement for further downward ratcheting of the trajectory** ambition.<sup>57</sup>
44. The Bill must stipulate long term, and interim, targets for emissions reduction. Based on the IPCC SR1.5 report referenced in paragraph 19 above, we know that we, along with most other nations, need to reduce GHG emissions to "net zero by 2050", and by 45% (over 1990 levels) by 2030 to avoid runaway global warming.
45. A number of countries (as well as companies, cities and other entities) have established "Net Zero by 2050" targets. The IPCC defines net zero as the "*condition in which anthropogenic carbon dioxide (CO<sub>2</sub>) emissions are balanced by anthropogenic CO<sub>2</sub> removals over a specified period.*"<sup>58</sup> The concern that we have with using net zero as a target is that it relies on future uncertain technology<sup>59</sup> or inappropriate or inadequate nature-based solutions<sup>60</sup> to remove as much CO<sub>2</sub> as is being emitted, and thereby granting emitters and regulators a false licence to delay real and meaningful emissions cuts on the basis of solutions that may never materialise. Neither technology nor nature-based solutions are even remotely likely to come anywhere near being able to counter GHG emissions if left unabated, or at least not substantially reduced. On this basis we contend that the Bill must contain a long-term target of "actual zero," or at a minimum "near zero" (allowing for a small amount of hard-to-abate emissions that may be able to be removed by technology in future) in terms of total emissions, and zero emissions from fossil fuel combustion by 2040.
46. Given that we need to see urgent emission reduction in the near-to mid-term (45% reduction by 2030), it is submitted that the Bill should contain, or at least cater for, interim emissions reduction targets. This will assist in

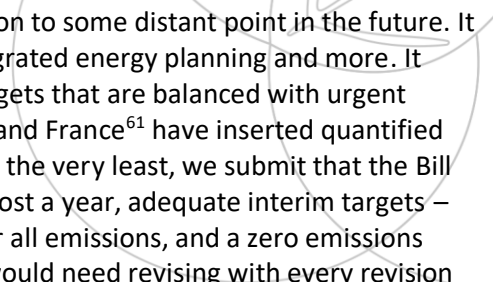
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<sup>57</sup> Ratcheting is a mechanism that ensures that successive targets are stricter (lower) than the targets currently in force, reflecting the principle in the Paris Agreement (Art 4(3)) that "*each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition...*"

<sup>58</sup> In other words, humanity needs to cause as much CO<sub>2</sub> to be taken out of the atmosphere as it is emitting into the atmosphere. Humans can continue to emit greenhouse gases, as long as those emissions are being removed by natural or technological solutions. This is different from zero emissions ('Real Zero') which describes a situation where there are no more human caused CO<sub>2</sub> emissions. A Net Zero benchmark allows for human caused emissions to still exist, but implies that there is an equivalent removal to offset these emissions.

<sup>59</sup> <https://mahb.stanford.edu/blog/climate-scientists-concept-of-net-zero-is-a-dangerous-trap/>

<sup>60</sup> The carbon cycle has two parts: one fast cycle whereby carbon circulates between the atmosphere, land and seas, and one slow cycle whereby carbon circulates between the atmosphere and the rocks which make up Earth's interior. Fossil fuels (coal, oil and gas) come from rocks (part of the slow cycle). Carbon emissions from fossil fuel burning are today 80 times larger than the natural flow of carbon from Earth's interior (via volcanoes). Since the return of carbon to Earth's interior takes millions of years, about half of the emitted carbon remains in the atmosphere for a long time and contributes to global warming. Using the fast carbon cycle to remove slow carbon cycle emissions is misleading and not practicable.



ensuring immediate action and not dangerously deferring mitigation action to some distant point in the future. It is acknowledged that this is a complex task and relates to issues like integrated energy planning and more. It may require further scientific modelling to ensure practicable interim targets that are balanced with urgent reduction imperatives. Countries like Denmark, Germany, Spain, Finland and France<sup>61</sup> have inserted quantified interim emissions reduction targets in their climate change legislation. At the very least, we submit that the Bill should prescribe that the Minister establishes, within six months, or at most a year, adequate interim targets – at the least for 2030 and 2035 - towards the goal of near zero by 2050 for all emissions, and a zero emissions target for emissions from fossil fuel combustion by 2040. These targets would need revising with every revision of the NDC.

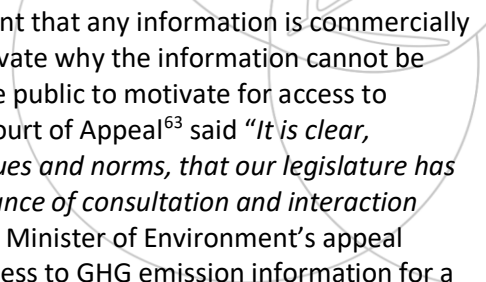
### **Transparency, disclosure and access to information**

47. When it comes to climate change, the most serious global challenge of our time, complete transparency and automatic disclosure of information must be the default position, and any deviation from this position should be justified publicly by those wishing to do so.
48. In its current iteration, the Bill provides for inappropriately limited access to information. Because the climate crisis impacts on every person, community, business and social activity, people need information in order to understand how the country's climate response is progressing, and how the different role-players are responding in terms of exercising their mandates and responsibilities. Transparency is also a critical measure for holding GHG emitters accountable, particularly given our limited compliance monitoring capabilities, and enables action by civil society to enforce environmental laws, as envisaged by the preamble to NEMA.
49. The Bill provides that any information that is provided to the Minister or the Department must be made available to the public subject to the Promotion of Access to Information Act (PAIA) and the Protection of Personal Information Act (POPIA).<sup>62</sup> This provision in the Bill is weak and unacceptable, in that both PAIA and POPIA provide grounds on which the providing of information can be refused, for example on commercial grounds. Furthermore they prohibit the automatic and real-time access to crucial information in the public interest – which the Bill should provide for. It is imperative that the Bill provide for automatic disclosure of information that is critical to climate mitigation, and to enable people to prepare for, and adapt to, climate impacts.
50. The processes required by PAIA and POPIA are time-consuming and can be costly and overly burdensome, with very long lead times before information is accessed (in our experience with PAIA, this is generally longer than 30 days). This is not conducive to easily and quickly obtaining real-time information on issues of South Africa's climate response and progress in relation to GHG emission reductions – information which should be readily accessible by default. The wording of the applicable clause in the Bill, also suggests that information generated by the Minister or Department, which could include important information relating to response plans and activities, including monitoring and evaluation, does not need to be made publicly available. The Bill provides for the generation of a number of crucial reports and climate data, which are of public interest and relevance. The Bill should make express provision for data and reports generated under provisions of the Bill to be gazetted,

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<sup>61</sup> <https://www.ecologic.eu/17233>

<sup>62</sup> S31 of the Bill.



and also made available online and automatically on request. To the extent that any information is commercially confidential – the onus should be on government or a third party to motivate why the information cannot be disclosed. It should not be the responsibility or burden of members of the public to motivate for access to climate-related information, which affects us all. In 2014, the Supreme Court of Appeal<sup>63</sup> said *“It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognised, in the field of environmental protection, inter alia the importance of consultation and interaction with the public. After all, environmental degradation affects us all.”*<sup>64</sup> The Minister of Environment’s appeal decision LSA190924 of 5 April 2020 in terms of PAIA, which related to access to GHG emission information for a number of emitting facilities in South Africa, confirmed that *“the overall purpose of the administration of justice, requires the disclosure of the anticipated projected emissions and the data relating to anticipated and actual emission reduction.”*<sup>65</sup>

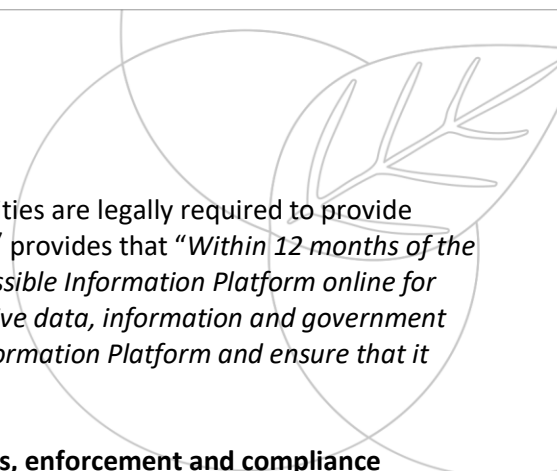
51. Our experience has shown that, given limited compliance monitoring capacity within government, civil society and non-governmental stakeholders are often compelled to monitor, raise awareness of and prosecute social and environmental harms such as pollution. GHG emissions and the impacts thereof are among the most dangerous threats we have faced, and yet information relating to carbon budgets, exemptions thereto, GHG mitigation plans and annual progress reports are not automatically required to be published or disclosed in the Bill. This is a harmful oversight and must be amended in the Bill.
52. Climate risk assessments and adaptation plans and strategies can profoundly affect the people, communities and businesses that they are intended to protect. Sound adaption will in cases mean changes to infrastructure, human settlements, provision of essential services, spatial development, transport and the commercial and social landscape. It is therefore essential that the latest and evolving assessments and plans are easily publicly available so that people, communities and businesses can make appropriate choices and plans in response to intended and actual adaptation actions taken by state actors. Additionally, the very individuals and groupings who are ostensibly being protected often have important experience and knowledge about adaptation needs, and need to have access to this information in order to meaningfully contribute to assessment and risk management activities.
53. Certainly any harms in providing for automatic disclosure and access of key climate mitigation and adaptation data are far outweighed by the harms to stakeholders and members of the public in not having automatic access to such information. We submit that the Bill, as it currently stands in relation to access to information, threatens the section 32 Constitutional right of access to information and must be amended to provide for automatic public access to information and records provided for in the Bill.
54. We recommend that the Bill provide for a publicly accessible web-based information portal that provides regularly updated and well-structured data and information on all key aspects of climate response, including but not limited to the items referred to above. In Guatemala, much of the country’s climate change information can

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<sup>63</sup> Company Secretary of Arcelormittal South Africa v Vaal Environmental Justice Alliance(69/2014) [2014] ZASCA 184 (26 November 2014).

<sup>64</sup> P 29 [71].

<sup>65</sup> See <https://cer.org.za/wp-content/uploads/2019/12/PAIA-Appeal-Decision-Minister-Creecy-GHG-Reports-LSA190924.pdf>.



be found online, on a government website,<sup>66</sup> as all public and private entities are legally required to provide information directly related to climate change. Fiji's Climate Change Act<sup>67</sup> provides that *“Within 12 months of the commencement of this section, the Director must develop a publicly accessible Information Platform online for the purpose of increasing the availability and accessibility of comprehensive data, information and government policies related to climate change. (2) The Director must maintain the Information Platform and ensure that it contains all data and policies relevant to this purpose”*.<sup>68</sup>

### **Provision for adequate emission reductions including penalties, offences, enforcement and compliance**

55. One of the most urgent and fundamental imperatives of the Bill is to ensure adequate GHG emission reductions within the necessary timeframes, to reduce danger to life, wellbeing, property and the economy. This can only happen if emitters (mostly companies) are required to reduce emissions. If there are inadequate consequences for failing to do so, in other words, if the Bill does not provide for cancellation of carbon budgets,<sup>69</sup> or the making of criminal offences and levying of administrative penalties, we are not going to see the necessary change happening quickly enough.
56. The only criminal offence in the current Bill is the failure to prepare and submit a GHG mitigation plan to the Minister<sup>70</sup> subject to penalties imposed in terms of s49B(2) of the National Environmental Management Act, 1998 (NEMA). The Bill does not contain any penalties for failing to implement such plan, nor for failing to report, monitor or effect remedial action if the plan is not being adhered to, or for exceeding a carbon budget. The lack of consequence for these failures effectively renders the Bill toothless to ensure compliance with mitigation plans and carbon budgets. These failures need to be criminal offences and must be made subject to administrative penalties.
57. Of utmost concern to us is that there is no penalty (criminal or administrative) for exceeding a carbon budget.<sup>71</sup> The carbon budget is possibly the clearest and strongest mechanism in the Bill for ensuring emission reductions by individual emitters. The 2018 version of the Bill made the exceedance of a carbon budget a criminal offence. This was omitted in the 2021 version of the Bill approved by Cabinet, and that version provided that exceedance of a carbon budget would cause the emitter to become liable to a higher carbon tax rate. This too has been omitted in the current Bill.
58. The Minister of Finance in the 2022 Budget Speech referenced a higher carbon tax rate on emissions exceeding the carbon budget, but this provision is not contained in the current version of the Bill. Minister Creecy has also

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<sup>66</sup> See <http://sgccc.org.gt/informacion-general/>.

<sup>67</sup> <https://fijiclimatechangeportal.gov.fj/legislation/climate-change-act-2021-an-act-to-establish-a-comprehensive-response-to-climate-change-to-provide-for-the-regulation-and-governance-of-the-national-response-to-climate-change-to-introduce-a-system/>

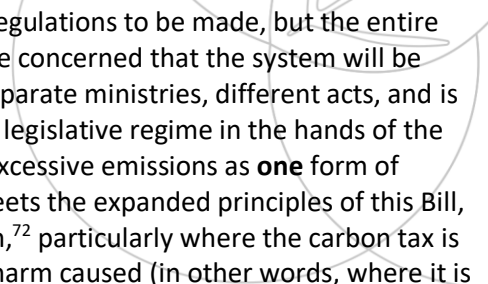
<sup>68</sup> including— (a) the National Development Plan, NCCP, LEDS, NAP, Fijian Planned Relocation Guidelines and National Ocean Policy; (b) any report relating to the review of the NCCP, NAP and National Ocean Policy; (c) any report, statement or communication made in accordance with Part 3, including Fiji's NDC, national inventory reports and adaptation communications; (f) each carbon budget;...(h) a link to the website containing the Adaptation Registry”.

<sup>69</sup> S24(7) of the Bill.

<sup>70</sup> S32 of the Bill.

<sup>71</sup> S24 of the Bill.





verbally indicated that this mechanism would be coming into being via regulations to be made, but the entire proposed system has not been made available for public scrutiny. We are concerned that the system will be fragmented, ineffective and inefficient in that it straddles at least two separate ministries, different acts, and is reliant on regulations still to be made, leaving too much of an important legislative regime in the hands of the Minister. We are in principle supportive of a higher carbon tax rate for excessive emissions as **one** form of incentive to adhere to carbon budgets, provided that the mechanism meets the expanded principles of this Bill, but this measure is highly inadequate as the sole compliance mechanism,<sup>72</sup> particularly where the carbon tax is not high enough to disincentivise violations and/or compensate for the harm caused (in other words, where it is cheaper for companies to pay the higher tax than it is to reduce its GHG emissions). In this regard we need to point out that the social cost of carbon (used as a calculator to measure the cost of climate change on the economy) has been found to be as high as \$3000 per tonne.<sup>73</sup> In any event, we contend that the higher carbon tax mechanism must be expressly provided for in the Bill.

59. Provision also needs to be made for a broader range of penalties including revoking of the licence to operate – where emitters exceed carbon budgets and or fail to adhere to mitigation plans – and personal liability for directors of emitting companies.<sup>74</sup>
60. We are concerned at the possibility for carbon offsetting to be used as a mechanism to escape liability for an emitter’s exceedance of its carbon budget. Carbon offsetting is a practice of investing in or undertaking activities which theoretically reduce the amount of carbon in the atmosphere – for example planting trees – to counter GHG emissions. The concept is fraught with difficulties and controversies<sup>75</sup> and there is considerable doubt as to its effectiveness in contributing to overall mitigation. It is beyond the scope of this submission to expand on the problems, but at the very least the Bill must ensure that emitters are prohibited from using carbon offsetting to be measured against any exceedance of the carbon budget allocated to them.
61. We recognise that the Bill provides that the Minister must make regulations in relation to the determination, review, revision, compliance with, and enforcement of, an allocated carbon budget, amendment and cancellation of a carbon budget allocation, the content, implementation and operation of a GHG mitigation plan, and all matters related thereto. Such regulations **may** provide that any person who contravenes them commits an offence and will be liable, upon conviction, to the penalties contemplated in section 49B(2) of the NEMA. However there are no timeframes set for the making of such regulations, again betraying the urgency of the necessary climate response and placing the Bill’s mechanisms at risk of being ineffective for a long time after promulgation. Additionally the use of the word “may” in this instance is unacceptable in that it potentially creates a discretion which will further exacerbate the ineffectiveness of the Bill.

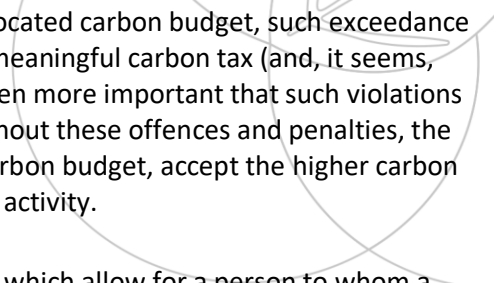
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<sup>72</sup> We note that first phase of the carbon tax being extended by three years for the period 1 January 2023 to 31 December 2025. This also has implications for the carbon budgets to be issued in terms of the Bill – although the Department has given contradictory information on this, it appears that the mandatory carbon budgets will now also be postponed till 2026. In other words, there will be more than three-and-a-half more years of emissions that will attract barely any tax. This despite the demands of climate science for global emissions to be halved in the next seven-and-a-half years.

<sup>73</sup> <https://www.ucl.ac.uk/news/2021/sep/economic-cost-climate-change-could-be-six-times-higher-previously-thought>

<sup>74</sup> Note that personal liability for directors under NEMA’s section 34(7) is only triggered by criminal offences under this act – without a criminal offence, the provisions under this section – are not applicable.)

<sup>75</sup> <https://www.climatecouncil.org.au/resources/carbon-offsetting-worthwhile/>

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62. Given the serious and fundamentally harmful nature of exceeding an allocated carbon budget, such exceedance must be made an offence and/or subject to administrative penalties. A meaningful carbon tax (and, it seems, mandatory carbon budgets) have been deferred until 2026, making it even more important that such violations be severely penalised to ensure prompt emissions reduction action. Without these offences and penalties, the Bill will enable a situation where emitters may choose to exceed their carbon budget, accept the higher carbon tax rate, and be subject to no further action which prohibits the harmful activity.
63. This issue is exacerbated by the provisions of Section 24(7)(b) of the Bill, which allow for a person to whom a carbon budget has been allocated to apply for a revision or cancellation of such carbon budget. This provision must be removed as it makes the entire carbon budget system susceptible to weakening and ineffectiveness. It is also hugely problematic that there is no public participation prescribed for any of the provisions of section 24 (carbon budgets), in particular the revision or cancellation process, if this remains in the Bill.
64. Other offences that must also be included in the Bill include: **providing false and/or misleading information under the Bill** – this is critical to support the overall need for transparency and disclosure; **failure to comply with a sectoral emissions target** (section 22); and **failure to comply with plans to phase out or phase down synthetic GHGs**. These contraventions should also be listed as offences and subject to administrative penalties.
65. Without criminal offences in the Bill, none of the provisions in NEMA’s section 34 (awards of damages; liability of directors, managers, agents and employees; recovery of costs of investigation and prosecution; or the key investigation and enforcement provisions in NEMA’s section 34A to H (award of part of fine recovered to informant; cancellation of permits; forfeiture of items; security for release of vehicles, vessels or aircraft; etc) are triggered. **There is no basis for GHG emitters who violate this Bill to be treated differently from companies and individuals who violate other specific environmental management Acts – if anything, given what is at stake, the consequences should be more severe.**
66. The need for administrative penalties is predicated on the fact that securing criminal sanctions is a complicated, time and resource-consuming process. Government’s substantial resource constraints – both human and financial – have also seriously hindered criminal compliance and enforcement endeavours. Many officials lack the required capacity, skills and designation for effective compliance and enforcement. If an offence is detected and a decision made to prosecute, the prosecutor must prove the violator’s guilt beyond reasonable doubt in criminal court. Administrative penalties avoid many of the main constraints of criminal enforcement – including: the burden of proof, and the time and complexity inherent in securing a criminal conviction and an over-burdened criminal justice system. They are, therefore, a crucial deterrent mechanism.
67. To serve as a sufficient deterrent, penalties should be meaningful and reflect the harm or potential harm of the offending conduct. Typically, administrative penalties are calculated as a meaningful percentage of the activity’s commercial value, such as a percentage of annual turnover or exports, and take into account expenditure saved by not complying with the statutory limit.
68. In addition to administrative penalties and the creation of criminal offences, we urge that a mechanism is included in the Bill that will ensure that persons to whom a carbon budget is allocated are unable to operate in the instance that they exceed such carbon budget or particular GHG emissions thresholds. In this regard,

reference can be had to the National Water Act 36 of 1998, which provides for the suspension of the entitlement to draw water if licencing conditions are not being adhered to.<sup>76</sup>

### **Capacitating and empowering organs of state to implement adequate climate response measures**

69. The Bill places a large burden on municipalities, provinces, sector departments, and the Minister, without making adequate provision for capacity-building and funding. Financial support, technology development, skills transfer, and capacity-building are key aspects of the Paris Agreement, yet these issues – which are crucial for the effective functioning of climate change mitigation and adaptation measures - are entirely absent from the Bill.
70. It is unclear how many municipalities, provinces, and sector departments, which are already struggling to fulfil obligations in relation to air quality, water, and waste management - for example - will have the necessary capacity and resources to carry out the obligations that will be imposed by the Act. The implementation of the planning and reporting obligations under the Bill will require considerable funds and skilled capacity – which many spheres of government do not have. The Bill must make provision for the coordination and provision of funds and support.
71. We have reason to believe that the Minister and Department are also facing capacity and budget constraints, and this Bill places extensive obligations on the Minister, such as the approvals of GHG mitigation plans and deciding of all appeals of decisions taken under the Bill by delegated authorities. Furthermore, unless there is proper oversight, monitoring and funding for this we are concerned that many of these functions, duties and obligations will go unfulfilled, or simply be heavily delayed.
72. We support the provision for climate needs and response assessments by all municipalities and provinces. However we emphasise the need for urgent provision to be made in the Bill for the capacitation, funding, support, and oversight of municipalities and provinces so that they can comply with these obligations.
73. The Bill should at least lay the foundation for the processes and mechanisms that would allow municipalities and provinces to access and manage funding and finances for their obligations under the Act. It should be aligned with the requirements of the Paris Agreement and legislation such as the Public Finance Management Act, 1999, Municipal Finance Management Act, 2003, and the Division of Revenue Act, 2017. Further, the Bill could provide that existing fiscal transfer mechanisms should, at a minimum, consider potential climate impacts of municipal infrastructure plans.
74. The Bill should specifically require integration of municipal climate change response implementation plans in Spatial Development Frameworks (SDFs).
75. Express provision should be made for the reporting, monitoring, and verification of the steps taken and information provided in the implementation plans and reports.

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<sup>76</sup> At section 54

## Mainstreaming and prioritising climate response and sound climate governance across government

76. The Bill does not adequately provide for a strong, suitably prioritised and well-coordinated climate response across government as a whole. The IPCC WG3 report identifies that *“ministries of environment are often appointed as de facto agents of coordination, but have been hampered by their limited regulative authority and ability to engage in intra-governmental bargaining with ministries with larger budgets and political heft.”*<sup>77</sup> Climate change response cannot be relegated to being an issue that needs to compete with all others, leaving the Minister and the Department to struggle for co-operation and compliance with the provisions of the Bill.
77. We recommend that the Bill include the following prescriptions in order to facilitate the necessary mainstreaming and prioritisation of climate response across government:
- 77.1. Establishing an executive, non-political, inter-departmental body to oversee cross-sectoral implementation of applicable sections of the Bill. Please see paragraph 78 below for more details;
  - 77.2. Compelling the Minister to report to parliament bi-annually on progress made with implementing all key provisions in the Bill;
  - 77.3. Directing the Finance Minister and National Treasury to create a dedicated climate change component in, or supplement to, the national budget for climate change response related expenditure, including the implementation of the Act, as well as known costs of climate change impacts;
  - 77.4. Stipulating and strengthening the powers of the Minister to issue guidelines, receive reports and review and evaluate measures established in terms of the Bill;
  - 77.5. Creating focal points within the Schedule 1<sup>78</sup> and Schedule 2<sup>79</sup> ministries, departments and state owned entities, for example the appointment of a person within such entities responsible for implementing, reporting on and liaising about responsibilities created by the Bill;
  - 77.6. We are also concerned that incorporating the climate change forums within the Premiers’ intergovernmental forum,<sup>80</sup> district intergovernmental forum,<sup>81</sup> respectively may not ensure that the stipulated climate change response actions are sufficiently prioritised. Either the climate change forum meetings need to be held separately, or performance measures must be put in place to ensure that climate change matters are sufficiently focussed on.
  - 77.7. Establishing an expedited procedure to allow for the review of any policy, measure, programme or decision that is instituted by any organ of state that is impacted by, or contributes to, climate change, and is inconsistent with the objectives of the Bill;

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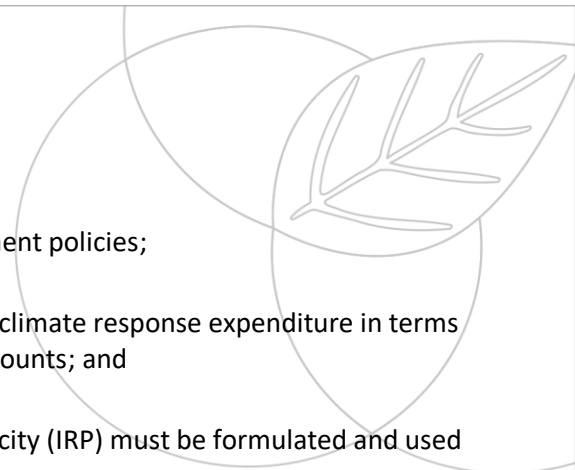
<sup>77</sup> P 2818 IPCC WG3 Full Report.

<sup>78</sup> Ministries who have functions relevant to Sectoral emissions Targets in the Bill.

<sup>79</sup> National Departments and SOEs with sector adaptation responsibilities.

<sup>80</sup> S8 of the Bill.

<sup>81</sup> S9 of the Bill.



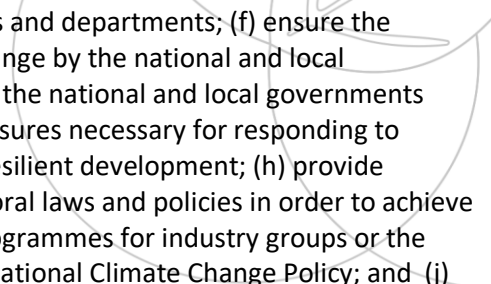
- 77.8. Mainstreaming climate change considerations in state procurement policies;
- 77.9. Prescribing that province and municipalities isolate and identify climate response expenditure in terms of the Bill in budgets, funding requests, reports and financial accounts; and
- 77.10. Key instruments such as the Integrated Resource Plan for electricity (IRP) must be formulated and used to support the necessary emissions reduction pathways.
78. We recommend the establishment of an Inter-departmental Committee on Climate Change to allow for coordination, monitoring and evaluation of measures, mechanisms and programmes created by the Bill, which require co-ordination across ministries and sectors. This committee must comprise:
- 78.1. The Minister, and the Minister of Performance, Monitoring and Evaluation, who shall act as co-chairs; and
- 78.2. The Directors-General of the departments listed in Schedules 1 and 2, as well as of the provinces.
79. We provide the following examples of global best practice to illustrate the type of institutional arrangements that could be employed to ensure sound climate change governance arrangements:
- 79.1. Guatemala's Framework Law on Climate Change (*Ley Marco Para Regular La Reducción De La Vulnerabilidad, La Adaptación Obligatoria Ante Los Efectos Del Cambio Climático Y La Mitigación De Gases De Efecto Invernadero*) created the National Council on Climate Change (NCCC), which must include representatives of government ministries from national and sub-national levels, representatives of several civil society organisations and sectors, representatives of indigenous peoples' organisations, trade associations, and academic institutions.<sup>82</sup> The Law tasks the NCCC with regulating and monitoring the implementation of actions arising out of the law, including the design and implementation of climate change policies, strategies, plans, programmes, and mitigation and adaptation measures.<sup>83</sup>
- 79.2. Fiji's Climate Change Act<sup>84</sup> provides for the National Climate Change Coordination Committee to: (a) respond to requests for support from its members in relation to responding to climate change and the implementation of this Act within their respective portfolios; (b) promote the creation, implementation and monitoring of cross-cutting policies that support the implementation of this Act; (c) ensure the alignment of ministerial and departmental activities with policies and frameworks to support the implementation of this Act; (d) ensure the creation, implementation, monitoring and evaluation of relevant sector plans, with reference to performance indicators, and report back to the Minister; (e) assist with resolving strategic level issues and risks related to climate change and the implementation of

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<sup>82</sup> Guatemala Framework Law on Climate Change, Article 8, Decreto 7-2013.

<sup>83</sup> *Ibid.*

<sup>84</sup> <https://fijiclimatechangeportal.gov.fj/legislation/climate-change-act-2021-an-act-to-establish-a-comprehensive-response-to-climate-change-to-provide-for-the-regulation-and-governance-of-the-national-response-to-climate-change-to-introduce-a-system/>



this Act by providing advice and guidance to ministers, ministries and departments; (f) ensure the mainstreaming of the consideration of and action on climate change by the national and local governments including the provincial administrations; (g) advise the national and local governments including the provincial administrations on policy and other measures necessary for responding to climate change and promoting net zero emissions and climate resilient development; (h) provide guidance on the review, amendment and harmonisation of sectoral laws and policies in order to achieve the objectives of this Act; (i) consider and endorse education programmes for industry groups or the general public related to the implementation of this Act or the National Climate Change Policy; and (j) provide advice, analysis, information or other assistance at the request of the Minister in connection with the progress made towards meeting the objectives set under this Act or any other matter relating to climate change. It is comprised of permanent secretaries (equivalent of South Africa's Directors General) and a number of other appointed members.

- 79.3. Mexico's Climate Change Law establishes the Inter-Secretarial Commission of Climate Change as a permanent body to be chaired by the President, who may delegate this function to the Minister of the Interior or Minister Environment and Natural Resources.<sup>85</sup> The body must include the heads of several national agencies, and must convene a broad range of stakeholders to carry out its functions, including other governmental agencies, local government, and representatives from the "*public, social and private sectors.*"<sup>86</sup> The Law grants the Commission several powers, including to promote and coordinate climate change actions; approve the National Strategy on Climate Change; and formulate national policies for mitigation and adaptation.<sup>87</sup> The Law also requires the Commission to have work groups dealing with adaptation policies, mitigation, reducing emissions from deforestation, and on international negotiations on climate change, among others.<sup>88</sup>

### **Responsibility of organs of state to consider climate response in decision-making**

80. The Bill fails to stipulate clear guiding principles for decision-making under the Bill, and does not directly provide for assessments of climate change impacts across **all** decision-making within and by organs of state. The principles laid out in section 3 of the Bill should be made binding on all organs of state and must apply to all decision-making on matters with climate impacts. While environmental impact assessments for certain listed activities under NEMA are now clearly required to take climate change impact assessments into account,<sup>89</sup> and it is hoped that the Department will urgently finalise, publish and implement the draft national guideline for climate impact assessments published in 2021,<sup>90</sup> this guideline is currently envisaged to be of limited application,<sup>91</sup> and is only a guideline. The consideration of climate impacts needs to be applicable in all state

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<sup>85</sup> Mexico General Law of Climate Change, article 45.

<sup>86</sup> *Ibid*, article 46.

<sup>87</sup> *Ibid*, article 47.

<sup>88</sup> *Ibid*, article 49.

<sup>89</sup> *Earthlife Africa Johannesburg v the Minister of Environmental Affairs and Others* - Case no 65662/16, [2017] 2 All SA 519, (8 March 2017).

<sup>90</sup> <https://cer.org.za/wp-content/uploads/2021/06/NEMA-Consultation-on-intention-to-publish-the-National-Guideline-for-consideration-of-climate-change-implications-in-applications-for-enviro-authorisations-AELs-and-waste-managemen.pdf>

<sup>91</sup> The guidelines is applicable only to the consideration of applications for environmental authorisations, water use licences and atmospheric emission licences.

decision-making about any matter that is impacted by climate change or potentially contributes to climate change.

81. This Bill provides an excellent opportunity for the development of clear and unique principles to guide all decision-making and ensure that adequate and meaningful consideration is given to the need to urgently reduce GHG emissions and address climate change impacts. Guiding principles would strengthen the hand of government decision-makers and also enable decisions that do not meet the principles to be challenged. The Bill should at least make express provision for consideration of: (1) a particular decision's impact on climate change from a GHG emissions perspective; (2) the way in which the decision might exacerbate the impacts of climate change by increasing vulnerability or impacts on climate resilience; and (3) the way in which the decision itself might be impacted by climate change.

**Empowering communities and individuals to respond to the impacts of climate change and to hold those responsible (government and emission-intensive industry) accountable.**

82. According to the socio-economic impact assessment for the Bill,<sup>92</sup> prepared by the Department of Planning, Monitoring and Evaluation ("the SEIA"), *"the Bill seeks to introduce measures which will empower citizens to respond to the potential impacts of climate change and related extreme events. Further, citizens will be prepared to plan for potential extreme events associated with climate change."*<sup>93</sup> Yet it is not clear, from the current provisions of the Bill, how this is the case, particularly as the Bill mainly provides for the establishment of more government structures with little provision for adequate transparency, monitoring, and accountability.
83. The public participation process in the Bill only applies in a range of instances, but not in certain key instances such as the making of peremptory regulations<sup>94</sup> or any of the provisions relating to carbon budgets.<sup>95</sup> The public participation process also needs to make more provision for education, awareness-raising, and empowerment of communities.
84. We recommend that, in addition to what is proposed by s29, the Bill also require consideration of gender and cultural diversity in its public participation processes, and that the Bill put in place mechanisms to create public awareness about climate change. We provide the following examples:

84.1. Peru's Framework Act on Climate Change, for example, provides for the following "principle of participation": *"Every person has the right and duty to participate responsibly in the processes of decision making in the integrated management of climate change that each level of government adopts. For this purpose, the State guarantees timely and effective participation, considering intercultural and gender-based approaches."*<sup>96</sup> Peru's Act also requires that competent authorities that administer financial resources for the mitigation and adaptation of climate change *"establish mechanisms for the exchange of*

<sup>92</sup> [https://static.pmg.org.za/1/seia\\_climatebill.pdf](https://static.pmg.org.za/1/seia_climatebill.pdf)

<sup>93</sup> See P5, 2017 SEIA for the Climate Change Bill.

<sup>94</sup> S27(2) of the Bill.

<sup>95</sup> S24 of the Bill.

<sup>96</sup> Peru, Framework Act on Climate Change, section 2.6, <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2018/04/1638161-1.pdf>.

*information, consultation and dialogue, in order to ensure effective participation of stakeholders at all stages of public policy and investment projects associated with climate change.”<sup>97</sup>*

84.2. Article 23 of Guatemala’s Climate Change Act also deals with education, dissemination, and public awareness related to climate change. It states: *“All public institutions will promote and facilitate, at the national, regional and local levels, strategic dissemination actions, public awareness, sensitization, and education regarding the impacts of climate change, which will lead to the conscious and proactive participation of the population in their different roles, before the imminent danger of their physical integrity, production capacity, health, heritage and development.”*

85. Unless the Bill can at least address the above concerns, as well as the recommendations listed below, and unless it can be implemented with the rigour and urgency that climate change demands, it runs the risk of being not only ineffective and obsolete, but also unconstitutional.

#### **General comments on climate governance innovations and best practice mechanisms not included in the Bill as currently drafted**

86. This section contains descriptions and motivations for climate response mechanisms which are, in our view, consistent with, and essential to, the objects of the Bill

#### **Highlighting the combustion of fossil fuels as the pre-eminent cause of climate change**

87. According to the 2017 National GHG Inventory Report<sup>98</sup> for South Africa (published in August 2021), the energy sector accounted for 410MtCO<sub>2</sub>e<sup>99</sup> out of a total of 516MtCO<sub>2</sub>e in 2017. Of the 410MtCO<sub>2</sub>e, 380 MtCO<sub>2</sub>e were attributable to the combustion of fossil fuels,<sup>100</sup> and a further 30 MtCO<sub>2</sub>e were as a result of fugitive emissions,<sup>101</sup> a phenomenon almost entirely attributable to fossil fuel production. In this regard we must also highlight the importance of reducing methane emissions (which form the bulk of the fugitive emissions referred to above). According to the United Nations Environment Programme (UNEP), in its May 2021 Global Methane Assessment Report, *“In the absence of additional policies and measures, methane emissions are projected to continue rising through at least 2040. Current concentrations are well above levels in the 2° C scenarios used in the IPCC AR5. The Paris Agreement’s 1.5° C target cannot be achieved at a reasonable cost **without reducing methane emissions by 40–45 per cent by 2030.**”<sup>102</sup>*

88. Fossil fuels, the source of over 80% of South Africa’s GHGs, are not mentioned once in the Bill, and yet addressing this source of emissions would resolve the major portion of the emissions reduction challenge, particularly as affordable and feasible low-carbon alternatives are available in, for example, the electricity sector

<sup>97</sup> *Ibid*, section 21.

<sup>98</sup> <https://www.dffe.gov.za/sites/default/files/docs/nir-2017-report.pdf>

<sup>99</sup> Emissions including FOLU (Forestry and Land Use)

<sup>100</sup> See Pg 125 of the GHG Inventory Report

<sup>101</sup> Fugitive emissions refer to the intentional and unintentional release of GHGs that occur during the extraction, processing, and delivery of fossil fuels to the point of final use. Methane is the main gas produced during this process

<sup>102</sup> Page 8. UNEP Global Methane Assessment report: Summary for Decision-Makers

<https://www.unep.org/resources/report/global-methane-assessment-benefits-and-costs-mitigating-methane-emissions>



– making it the cheapest and easiest sector in which to secure large-scale GHG emission reductions and bring South Africa into compliance with legal and international obligations.

### **Education and climate change awareness**

89. Because climate change response requires an all-of-society approach to managing emissions and adaptation needs, it is important that people understand climate change, its drivers and causes, as well as climate adaptation needs and measures. As such the Bill must provide for the inclusion of climate change education at all levels of the national education curricula.
90. It is particularly important that both decision-makers within state structures, and legislators (lawmakers) at national, provincial and local government understand climate change in order to exercise their functions and duties having appropriate regard to the threat of climate change. The Bill must specifically provide for this adequate orientation to the needs and dynamics of both mitigation and adaptation responses.
91. The Philippines Climate Change Act of 2009 has a section requiring the Department of Education to integrate climate change in its educational curriculum. Section 15 states *“Role of Government Agencies. – To ensure the effective implementation of the framework strategy and program on climate change, concerned agencies shall perform the following functions: (a) The Department of Education shall integrate climate change into the primary and secondary education curricula and/or subjects, such as, but not limited to, science, biology, sibika,<sup>103</sup> history, including textbooks, primers and other educational materials, basic climate change principles and concepts;...”*<sup>104</sup>

### **Strengthening climate change related responsibilities in the private sector**

92. Much of the power to practically implement climate response actions, both in terms of mitigation and adaptation, resides within companies, financial institutions and similar entities. While it is all important that these entities produce, implement, report on and update GHG mitigation plans,<sup>105</sup> this alone is not adequate to ensure sufficiently and effective climate response.
93. The Companies Act 71 of 2008 stipulates that directors must act in the best interests of the company,<sup>106</sup> and with the appropriate degree of care, skill and diligence.<sup>107</sup> The Bill should specifically name climate change as a factor which is required for the satisfaction of these requirements. Guidance here can be found in the recommendations from the Financial Stability Board’s Task Force on Climate Related Financial Disclosures (TCFD).<sup>108</sup> This is a global, widely accepted and recognised system for managing climate risk and covers governance, strategy, risk management, and metrics and targets.

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<sup>103</sup> The study of the rights and duties of citizens and of how government works.

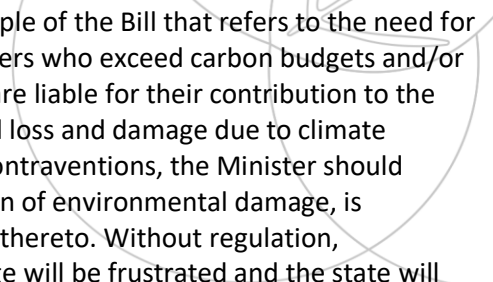
<sup>104</sup> Available at <http://www.ifrc.org/docs/IDRL/RA209729.pdf>.

<sup>105</sup> S24 of the Bill.

<sup>106</sup> S76(3)(b).

<sup>107</sup> S76(3)(c).

<sup>108</sup> <https://www.fsb-tcf.org/recommendations/>



94. In alignment with the “polluter pays” principle in NEMA,<sup>109</sup> and the principle of the Bill that refers to the need for preventative measures to mitigate the causes of climate change,<sup>110</sup> emitters who exceed carbon budgets and/or contribute to climate change or provide false or misleading information are liable for their contribution to the damage and should compensate government or those who have suffered loss and damage due to climate impacts. We submit that given the scale of the damage caused by such contraventions, the Minister should prescribe that Section 24P of NEMA on Financial Provision for remediation of environmental damage, is applicable to GHG emitters, and should publish regulations to give effect thereto. Without regulation, implementation of the polluter pays principle in relation to climate change will be frustrated and the state will bear the burden.

### **Establishing an independent scientific advisory panel**

95. We recommend the establishment of an independent body/panel of scientists and experts to make recommendations to government on decisions to be taken under this Act, to provide support to local and provincial authorities, and, in particular, to continuously consider and review South Africa’s vulnerability, adaptation, and mitigation potential and best practice based on the best available science and technologies.
96. The Panel must produce assessments of the best available scientific information, ideally tracking, responding to and highlighting domestic applicability of the regularly released IPCC reports. These should then be submitted to the Minister to inform measures and updates to mechanisms provided for in the Bill.
97. It is submitted that such a panel would be different in function and scope to the Presidential Climate Commission (“the Commission”) provided for in the Bill, in that the panel’s output and recommendations would be purely based on science, and free of the political and consensus-based output inherent in the recommendations emanating from the Commission.
98. Examples of similar such bodies in other jurisdictions include the following:
- 98.1. Finland’s climate change legislation requires that the government appoint a scientific and independent expert body to support the planning of climate change policy and the related decision-making.<sup>111</sup> The body’s task is to collect and itemise research data on the mitigation of climate change and adaptation for the planning and monitoring of climate change policy. The expert body can also carry out other tasks concerning the generation of basic information on climate change.
  - 98.2. Australia has a climate change authority, which “*provides independent, expert advice on climate change policy*”, in particular it “*plays an important role in the governance of Australia’s mitigation policies, undertaking reviews and making recommendations on: the Carbon Farming Initiative, and the National Greenhouse and Energy Reporting System. Reviews are undertaken on other matters as requested by the Minister responsible for climate change or the Australian Parliament. The Authority conducts and commissions its own independent research and analysis.*”

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<sup>109</sup> Section 2(4)(p), NEMA.

<sup>110</sup> Section 3(i) of the Bill.

<sup>111</sup> Finland Climate Change Act, section 16.

### **Proposed Amendments to Wording of the Bill**

99. Where changes to the Bill's text are recommended, the suggested deletions are within **[square brackets in bold]** and suggested additions are **underlined and in bold**.
100. Our suggested wording will not in all cases fully remedy the broader objections and concerns that we raise in these comments.
101. The absence of comment on a particular provision(s) of the Bill, in no way constitutes acceptance of the legality or acceptability of such provision(s).

### **Preamble**

102. In relation to the Bill's Preamble, we recommend that:
- 102.1. The references to Constitutional provisions in the Preamble be broadened so as to refer to additional relevant Constitutional rights - given the broad nature of climate change; at the very least, the right to life, dignity, equality (given the disproportionate impacts of climate change on certain sectors of society as well as women and youth), access to food and water should be explicitly included;
  - 102.2. The Preamble should acknowledge – as the White Paper does<sup>112</sup> - that a substantial majority of South Africa's GHG emissions are caused by the energy sector and reliance on fossil fuels in energy use;
  - 102.3. The vulnerability to climate change impacts be unqualified and not only linked with impacts that require urgent adaptation responses, as the Preamble currently states. We do not yet know what all the climate impacts will be, and it is unlikely that all climate change impacts can be resolved through adaptation responses – thus mitigation of the impacts is crucial; and
  - 102.4. Emphasis be placed on the need for climate justice, in that the impacts of climate change disproportionately affect the poor; women and children.
103. The wording around vulnerability to the impacts of climate change should be aligned with the White Paper, which states that *“South Africa is extremely vulnerable and exposed to the impacts of climate change due to our socio-economic and environmental context. Climate variability, including the increased frequency and intensity of extreme weather events, will disproportionately affect the poor. South Africa is already a water-stressed country and we face future drying trends and weather variability with cycles of droughts and sudden excessive rains. We have to urgently strengthen the resilience of our society and economy to such climate change impacts and to develop and implement policies, measures, mechanisms and infrastructure that protect the most vulnerable.”*<sup>113</sup>

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<sup>112</sup> P26, the White Paper.

<sup>113</sup> P8, White Paper.

104. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of the Preamble as follows:

#### PREAMBLE

**WHEREAS** everyone has the Constitutional right to life, dignity, equality, access to food and water, and an environment that is not harmful to their health and well-being, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development;

**AND WHEREAS** anthropogenic climate change represents an urgent threat to human societies and the planet and requires an effective, progressive, urgent, just and incremental response;

**AND WHEREAS** the Republic—

- (a) has a role to play in the global effort to reduce the greenhouse gas emissions [**identified by the international community**] confirmed by science as the primary drivers of anthropogenic climate change, and for which the implementation of appropriate mitigation responses is urgently required;
- (b) is especially vulnerable to [**those**] the impacts of climate change [**which require urgent and appropriate adaptation responses**]; and
- (c) has made international commitments and obligations, including to communicate and implement an effective nationally determined climate change response, encompassing mitigation and adaptation actions, that represents the Republic's fair contribution to the global climate change response;

**AND WHEREAS** implementing an effective climate change response is a national sustainable development priority as set out in the National Climate Change Response White Paper, while the Republic's Nationally Determined Contribution under the Paris Agreement, as may be varied from time to time, anticipates—

- (a) the realisation of significant socio-economic and environmental benefits in a manner that is driven and customised in the light of national circumstances, developmental, transformational, equitable, just, empowering and participatory, dynamic and evidence-based, based on the best available science, balanced, cost-effective, integrated and aligned; and
- (b) ...

**AND WHEREAS** responding to climate change raises unique challenges to effective governance as its impact transcends and challenges traditionally sectoral governance approaches, which require a nationally driven, just and ambitious, coordinated and cooperative legal and administrative response that acknowledges the significant role of the provincial and municipal spheres and the public, taking into account the Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005)

**AND WHEREAS** climate change policy needs to be implemented in the context of the Constitution of the Republic of South Africa, this Act and best available science on climate change [sustainable development objectives and the achievement of national development goals], it is desirable to develop a legal and institutional framework for the implementation of the Republic's national climate change response, in order to address these matters,

## Chapter 1: Interpretation, Objectives and Application

## Definitions (section 1)

105. We object to the following definitions and recommend their amendment:

- 105.1. “adaptation” – we suggest that this be aligned with the Intergovernmental Panel on Climate Change (IPCC) definition;<sup>114</sup>
- 105.2. “ecosystem” – we recommend that this be aligned with the existing definition of “ecosystem” in the National Environmental Management: Biodiversity Act, 2004 (NEMBA), which states, “ecosystem” means a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit”;
- 105.3. “just transition” – we recommend that the definition be expanded to include health and wellbeing, in order that the just transition is not interpreted too narrowly and only focussed on economic aspects;
- 105.4. “mitigation” – this definition is too narrow and should be broadened to include prevention or avoidance of emissions (not only positive interventions to reduce emissions), as well as anticipation of the risks or harm. In other words, mitigation should also entail instances of following the so-called “no go” option and not doing anything – for example: decisions not to build new power stations or mines; or measures to improve energy efficiency and energy demand management – measures that will avoid emissions. Such measures and decisions should also be defined as mitigation and aligned with the need to mitigate climate change impacts;
- 105.5. “Nationally Determined Contribution” - we recommend that this definition should specify that the NDC refers to the current and latest NDC as submitted to the Secretariat of the United Nations Framework Convention on Climate Change under the Paris Agreement, and not necessarily the NDC in force at the time of promulgation of the Act – recognising that South Africa’s NDC commitments will be updated at least every five years, as required by the Paris Agreement; and
- 105.6. “vulnerability” – we suggest that this be aligned with the IPCC definition.<sup>115</sup> This should include reference to exposure to climate risk and impacts.

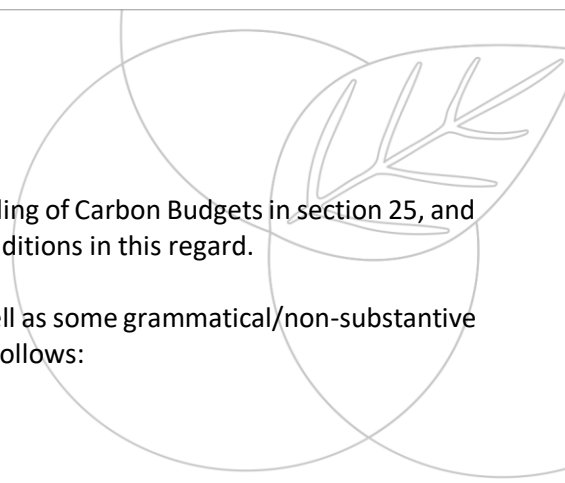
106. We recommend that definitions for the following terms, which appear in the Bill, but which are not defined, be added:

- 106.1. “carbon”, referenced throughout the Bill - we note that “carbon”, “low carbon” and “carbon budgets” may be used to refer to carbon dioxide (“CO<sub>2</sub>”) or, more broadly, to all GHGs (not only CO<sub>2</sub>). We suggest that a definition be included to make clear that references to “carbon”, in this context do not **only** refer to CO<sub>2</sub>, but also other GHGs as CO<sub>2</sub> equivalents; and

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<sup>114</sup>IPCC, Sixth Assessment Report.

<sup>115</sup>IPCC, Sixth Assessment Report.



106.2. “exceeding” – we suggest introducing reference to the exceeding of Carbon Budgets in section 25, and this definition, as added below, will support our suggested additions in this regard.

107. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of the section as follows:

**Definitions**

1. In this Act, unless the context indicates otherwise—

“adaptation” [means any adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects which moderates harm or exploits beneficial opportunities]; In human systems, the process of adjustment to actual or expected climate and its effects, in order to moderate harm or exploit beneficial opportunities. In natural systems, the process of adjustment to actual climate and its effects; human intervention may facilitate adjustment to expected climate and its effects.

...

“carbon budget” means an assigned ... allocated to a person in terms of section [25] 24 ...”

“exceeding” means that a person has emitted more than the assigned amount of greenhouse gas emissions in their allocated carbon budget over a defined time period;

...

“just transition” means a shift towards a low-carbon, climate-resilient economy 35 and society and ecologically sustainable economies and societies which contribute toward the health, wellbeing, creation of decent work for all, social inclusion and the eradication of poverty;

...

“mitigation” means a human intervention to reduce, prevent or avoid the sources or enhance the carbon sinks of greenhouse gases;

...

“Nationally Determined Contribution” means the latest Nationally Determined Contribution, as amended from time to time, prepared in terms of Article 4(2) of the Paris Agreement and submitted by the Republic to the Secretariat of the United

Nations Framework Convention on Climate Change in terms of Article 4(12) of the Paris Agreement;

...

“resilience” means the ability of a social, economic or ecological system to absorb stresses imposed on it by climate change, while retaining the same basic structure and ways of functioning; the capacity for self-organization; and the capacity to adapt to and be better prepared for future climate change impacts

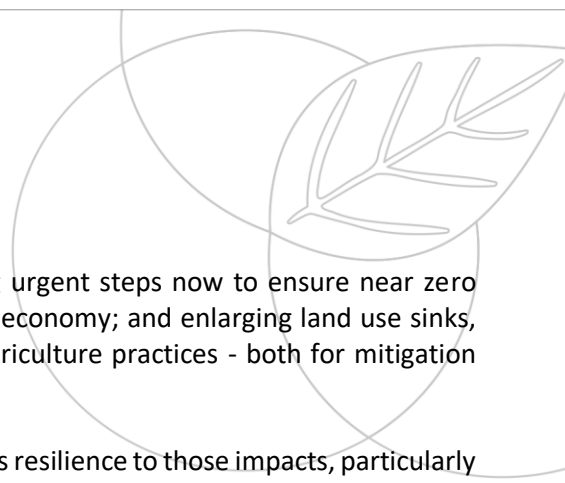
...

“vulnerability” [means the degree to which a system is susceptible to, or unable to cope with, adverse effects of climate change, including climate variability and extremes.] The propensity or predisposition to be adversely affected. Vulnerability encompasses a variety of concepts and elements including sensitivity or susceptibility to harm and lack of capacity to cope and adapt, as well as exposure to applicable risks”

Objects of the Act (section 2)

108. The objects of the Bill could be much more ambitious, acknowledging specifically the **urgent** need to:

108.1. hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change – this would be aligned



with the object of the Paris Agreement;<sup>116</sup>

- 108.2. significantly reduce South Africa’s GHG emissions by: taking urgent steps now to ensure near zero emissions before 2050 and a just transition to a low-carbon economy; and enlarging land use sinks, particularly through agro-ecology and other conservation agriculture practices - both for mitigation and adaptation;
  - 108.3. adapt to the impacts of climate change and build South Africa’s resilience to those impacts, particularly the resilience of vulnerable people and communities; and
  - 108.4. to protect and preserve the climate and environment and reduce climate impacts for present and future generations, recognising that the impacts of climate change pose a significant threat to the realisation of the rights in the Bill of Rights.
109. We object to subsection 2(c); in particular the reference to “*make a fair contribution to the global effort to stabilise greenhouse gas concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system*”; because, *inter alia*:
- 109.1. it is not clear what constitutes a “fair contribution”. The main and primary objective should **always** be to uphold the rights in the Constitution and to protect the people of South Africa and the environment from the threats of climate change, even if this requires a higher ambition than what might be regarded as “fair” in the global context; and
  - 109.2. in any event, our current commitments have been criticised as being insufficient in the global context. How will it be determined whether our contribution is fair and for whom?
110. Some of our proposed changes, in line with the above comments, are reflected on the wording of this section as follows:

### Objects of Act

2. The objects of this Act are to—

55

- (a) provide for [**a] urgent, ambitious and equitable** coordinated and integrated response by the economy and society to climate change and its impacts in accordance with the principles of cooperative governance; **and by all persons** provide for the effective management of [**inevitable] unavoidable** climate change impacts by enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change, **particularly for those communities and persons that are most vulnerable to the impacts of climate change** with a view to building social, economic and environmental resilience and an adequate national adaptation response in the context of the global climate change response;
- (b) provide for the effective management of inevitable climate change impacts by enhancing adaptive capacity, strengthening resilience and reducing **risks** to climate change, with a view to building social, economic and environmental resilience and an adequate national adaptation response in the context of the global climate change response;
- (c) make a [**fair contribution to the global] every effort** to stabilise greenhouse gas concentrations in

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<sup>116</sup> Article 2(1)(a), Paris Agreement.

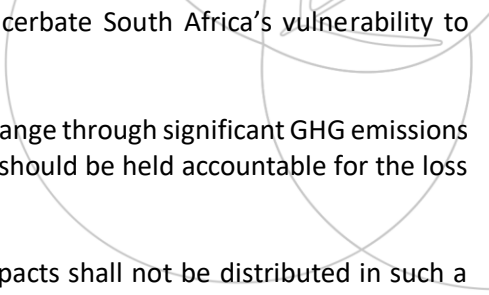
the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system **recognising that the impacts of climate change pose a significant threat to the realisation of the rights in the Bill of Rights;**

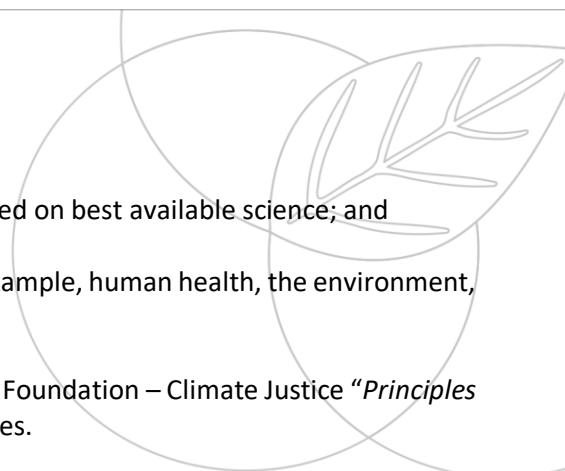
- (d) to ensure a just transition towards a low carbon economy and society considering national circumstances;
- (e) give effect to the Republic's international commitments and obligations in relation to climate change; and
- (f) protect and preserve the planet for the benefit of present and future generations of humankind, **and**
- (g) **significantly reduce greenhouse gas emissions within the Republic, in order to reach near zero emissions before the second half of the century and hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognising that this would significantly reduce the risks and impacts of climate change and seek to protect and promote the rights in the Bill of Rights of the Constitution of the Republic of South Africa.**

### Principles (section 3)

111. We are of the view that this section provides a valuable opportunity to develop a set of unique principles – focused specifically on climate change – which should guide the implementation of this Act, the framework, and any regulations to be promulgated, in addition to the National Environmental Management principles in s2 of NEMA. These principles should be binding on organs of state in decision-making with climate change implications.
112. We recommend that the following principles apply **in addition to** the existing s3 principles in the Bill, as amended below, to guide the interpretation and application of the Act:
- 112.1. the risks associated with the impacts of climate change; including impacts on the environment, human health, society, the economy, and displacement related to the adverse impacts of climate change must be fully assessed, averted, minimised, and addressed;
- 112.2. the combustion of fossil fuels must be urgently phased out, with the aim of reaching near zero emissions before 2050;
- 112.3. South Africa's mitigation efforts must, at least, be aligned with the objects and requirements of international climate change commitments; including the obligation to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 °C;
- 112.4. South Africa's natural and biological resources, including ecosystems, habitats, landscapes, and seascapes; particularly those which are increasingly vulnerable to the impacts of climate change and those which function as carbon sinks and which are essential to our resilience to climate impacts and survival, must be protected, preserved, restored, and rehabilitated, and their preservation, protection, and restoration incentivised and prioritised;
- 112.5. all decision-making by all organs of state must take into consideration short and long-term climate



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- change impacts; including the potential for decisions to exacerbate South Africa's vulnerability to climate change;
- 112.6. those who knowingly and deliberately contribute to climate change through significant GHG emissions are obliged to cease and urgently reduce their emissions and should be held accountable for the loss and damages caused by those emissions;
  - 112.7. climate justice must be pursued, so that adverse climate impacts shall not be distributed in such a manner as to unfairly discriminate against any person; particularly vulnerable and disadvantaged persons;
  - 112.8. all decisions in relation to, and which have impacts for, climate change must be participatory, and transparent, and decision-makers must be accountable;
  - 112.9. limited "emission space" must be carefully allocated, with minimal (with the objective of zero) allocations to sectors where technologically feasible and affordable mitigation and emission-reducing alternatives are available - historical polluters should not be permitted to continue with business-as-usual;
  - 112.10. many decisions and steps taken today will have far-reaching and long-term climate impacts, with irreversible impacts for today's youth and future generations. Lock-in to harmful and/or risky infrastructure or commitments should be avoided at all costs;
  - 112.11. the enduring benefits of ambitious and early action, including major reductions in the cost of future mitigation and adaptation efforts must be recognised;
  - 112.12. the vital link between oceans and climate change is recognised, including the role of marine and coastal ecosystems in carbon sequestration, heat storage, temperature regulation, and improving resilience to climate impacts; and the concomitant vulnerability of marine and coastal ecosystems to climate change;
  - 112.13. the inextricable link between mitigation and adaptation, and the need to integrate responses is recognised;
  - 112.14. in considering the impacts of climate change, consideration must be given to: direct and indirect GHG emissions resulting from the decision; the impacts of the decision on climate change resilience, whether it would exacerbate SA's exposure to climate impacts; and the ways in which the decision itself might be impacted by climate change;
  - 112.15. when considering and implementing climate change adaptation measures, care should be taken to avoid maladaptation - actions that may lead to increased risk of adverse climate-related outcomes, including via increased GHG emissions, increased vulnerability to climate change, or diminished welfare, now or in the future;



112.16. climate science is accepted and decisions must always be based on best available science; and

112.17. the co-benefits of urgently reducing GHG emissions for, for example, human health, the environment, society, and the economy are recognised.

113. We recommend that consideration also be given to the Mary Robinson Foundation – Climate Justice “Principles of Climate Justice”<sup>117</sup> when amending and reconsidering the s3 principles.

114. In addition to the above suggested principles to be added to s3, we recommend the following changes to the existing provisions of s3:

**Principles**

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3. The interpretation and application of this Act must be guided by **the following principles, which are binding on all organs of state in decision-making with climate change implications** —

- (a) the national environmental management principles set out in section 2 of the National Environmental Management Act where applicable in this Act; **and the Bill of Rights of the Constitution**
- (b) the principle that the climate system should be protected for the benefit of present and future generations of humankind **and the environment**; 20
- (c) the principle that acknowledges international equity [**and each country’s common but differentiated responsibilities and respective capabilities, in light of different national circumstances**];
- (d) a contribution to a just transition towards low-carbon, climate-resilient and ecologically sustainable economies and societies which contribute to the 25  
creation of decent work for all, social inclusion and the eradication of poverty;
- (e) the need for integrated management, **that is cross sectoral, transboundary and long term** in the context of climate change, which requires climate change considerations to be integrated into the making of decisions which may have a significant effect on the Republic’s ability to mitigate or which exacerbate its vulnerability **and exposure** to climate change; 30
- (f) the need for decision-making to consider the special needs and circumstance of localities and people that are particularly vulnerable to the adverse effects of climate change, including vulnerable workers and groups such as women, especially poor and rural women, children, especially infants and child-headed families, the aged, the poor, the sick and the physically challenged, **as well as future generations**; 35
- (g) the need for a risk-averse and cautious approach to be adopted, which takes into account the limits of current knowledge about [**causes and**] effects of climate change and the consequences of decisions and actions in relation thereto;
- (h) the need for climate change mitigation and adaptation responses to be 40  
informed by evolving climate change scientific knowledge and decisions which should be based on the best available science, evidence and information;
- (i) an effective climate change response which requires preventative measures to mitigate the causes of climate change and to strengthen resilience through the 45  
adoption of adaptation measures;
- (j) the costs of responding to the adverse impacts of climate change [**and of mitigation**] which must be paid for by those responsible for causing the adverse impact;
- (k) an integrated climate change response which requires the enhancement of 50  
public awareness of climate change causes and impacts and the promotion of participation and action at all levels; and

<sup>117</sup> <https://www.mrfcj.org/principles-of-climate-justice/>.

- (l) a recognition that a robust and sustainable economy and a healthy society depends on the services that well-functioning ecosystems provide, and that enhancing the sustainability of the economic, social and ecological services is an integral component of an effective and efficient climate change response.
- (m) **the risks associated with the impacts of climate change; including impacts on the environment, human health, society, the economy, and displacement related to the adverse impacts of climate change must be fully assessed, averted, minimised, and addressed;**
- (n) **the combustion of fossil fuels must be urgently phased out, with the aim of reaching near zero emissions before 2050;**
- (o) **South Africa's mitigation efforts must, at least, be aligned with the objects and requirements of international climate change commitments; including the obligation to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 °C;**
- (p) **South Africa's natural and biological resources, including ecosystems, habitats, landscapes, and seascapes; particularly those which are increasingly vulnerable to the impacts of climate change and those which function as carbon sinks and which are essential to our resilience to climate impacts and survival, must be protected, preserved, restored, and rehabilitated, and their preservation, protection, and restoration incentivised and prioritised;**
- (q) **all decision-making by all organs of state must take into consideration short and long-term climate change impacts; including the potential for decisions to exacerbate South Africa's vulnerability to climate change;**
- (r) **those who knowingly and deliberately contribute to climate change through significant GHG emissions are obliged to cease and urgently reduce their emissions and should be held accountable for the loss and damages caused by those emissions;**
- (s) **climate justice must be pursued, so that adverse climate impacts shall not be distributed in such a manner as to unfairly discriminate against any person; particularly vulnerable and disadvantaged persons;**
- (t) **all decisions in relation to, and which have impacts for, climate change must be participatory, and transparent, and decision-makers must be accountable;**
- (u) **limited "emission space" must be carefully allocated, with minimal (with the objective of zero) allocations to sectors where technologically feasible and affordable mitigation and emission-reducing alternatives are available - historical polluters should not be permitted to continue with business-as-usual;**
- (v) **many decisions and steps taken today will have far-reaching and long-term climate impacts, with irreversible impacts for today's youth and future generations. Lock-in to harmful and/or risky infrastructure or commitments should be avoided at all costs;**
- (w) **the enduring benefits of ambitious and early action, including major reductions in the cost of future mitigation and adaptation efforts must be recognised;**
- (x) **the vital link between oceans and climate change is recognised, including the role of marine and coastal ecosystems in carbon sequestration, heat storage, temperature regulation, and improving resilience to climate impacts; and the concomitant vulnerability of marine and coastal ecosystems to climate change;**
- (y) **the inextricable link between mitigation and adaptation, and the need to integrate responses is recognised;**
- (z) **in considering the impacts of climate change, consideration must be given to: direct and indirect GHG emissions resulting from the decision; the impacts of the decision on climate change resilience, whether it would exacerbate SA's exposure to climate impacts; and the ways in which the decision itself might be impacted by climate change;**
- (aa) **when considering and implementing climate change adaptation measure, care should be taken to avoid maladaptation - actions that may lead to increased risk of adverse climate-related outcomes, including via increased GHG emissions, increased vulnerability to climate change, or diminished welfare, now or in the future;**
- (bb) **climate science is accepted and decisions must always be based on best available science; and**
- (cc) **the co-benefits of urgently reducing GHG emissions for, for example, human health, the environment, society, and the economy are recognised.**

## Conflict with other legislation (section 5)

115. We support the provision for this Act to prevail in the event of a conflict with other legislation. We, however, recommend that the caveat of “*specifically relating to climate change*” be removed or at least that “*specifically*” be deleted from this provision, as this would unduly narrow the interpretation and application of this provision. S5 should also address instances of conflict between the Act and other legislation, not necessarily specifically relating to climate change, but which may have impacts for climate change mitigation and/or adaptation more broadly, and which would conflict with the objects and principles of this Act.
116. We are also concerned that because the principles and provisions of the Bill are currently so vague and broad, it is not entirely clear which circumstances would constitute a conflict – in other words, there is a risk that contradictory laws would not be read so as to prevail over the Act, even if their impact would be to have significant climate change impacts. For this reason, it is important that firmer obligations and principles be incorporated into the Bill.

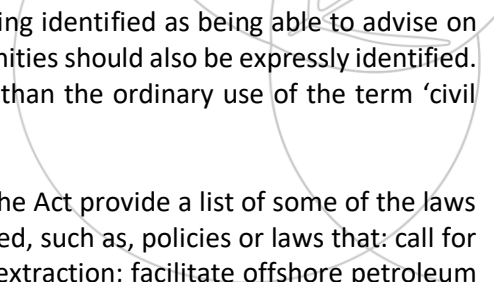
### **Conflict with other legislation**

4. In the event of any conflict between a provision of this Act and other legislation 15  
[**specifically relating to climate change**], this Act prevails.

## **Chapter 2: Policy Alignment and Institutional Arrangements**

### Alignment of policies (section 7)

117. As indicated above, the proper and meaningful alignment of laws and policies is a great concern. This is particularly so as there are currently many decisions being taken which are already locking the country in to many years of high GHG emissions and climate change impacts, which would contradict the objects of this Bill. As further set out above, **drastic law and policy changes are required** in order to properly and holistically address climate change.
118. We make the following recommendations in relation to this section:
- 118.1. The title of this section is “alignment of policies”; yet the content of the section only places an obligation to coordinate and harmonise “*policies, plans, programmes and decisions ...*”. The provision should be amended to expressly provide for alignment. It should also include “laws” in the list.
- 118.2. The Bill should set out specific principles so as to provide clarity on what constitutes alignment with the Bill. The principles recommended for section 3 of the Bill would serve as a good basis for this.
- 118.3. Section 7(1) prescribes that those organs of state that “*exercise a power or perform a function that is affected by climate change must review, revise, amend, coordinate and harmonise their policies measure, programmes and decisions...*” but it is equally if not more important that any such organs of state that exercise such powers or perform such function that **have an effect, impact or contribute to climate change** are also subject to the named responsibilities.

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- 118.4. In addition to organised labour, civil society and business being identified as being able to advise on climate change response, research organisations and communities should also be expressly identified. Community groupings are often more organic and informal than the ordinary use of the term ‘civil society’ suggests.
- 118.5. For clarity and certainty, we recommend that a schedule to the Act provide a list of some of the laws and policies that **conflict** with the Act and need to be amended, such as, policies or laws that: call for new coal-fired power generation, coal mines, or oil and gas extraction; facilitate offshore petroleum (oil and gas) extraction; otherwise support the fossil-fuel industry; or allow for wasteful, water-intensive industries, logging and deforestation, or afforestation with industrial timber plantations, for example.<sup>118</sup> This will remove any uncertainty and also expedite the necessary amendment processes.

#### **Alignment of laws and policies**

5. (1) Every organ of state that exercises a power or performs a function that is 20 affected by climate change, **or that has an effect on, or contributes to climate change**, or is entrusted with powers and duties aimed at the achievement, promotion and protection of a sustainable environment, must review and if necessary revise, amend, coordinate and harmonise their **laws**, policies and measures, programmes and decisions in order to—

(a) ensure that the risks of climate change impacts and associated vulnerabilities 25 are taken into consideration; and

(b) give effect to the principles and objects set out in this Act.

(2) In order to give effect to the principles and objects set out in this Act, organised labour, civil society, **research organisations, communities** and business may advise on the Republic’s climate change response, the mitigation of climate change impacts and adaptation to the effects of climate change 30 towards the attainment of the just transition to a climate resilient and low carbon economy and society.

#### **Provincial and Municipal Forums on Climate Change (sections 8 and 9)**

119. We are concerned that the provincial forums will not have the institutional capacity and expertise needed for the implementation of this climate legislation, and section 30 of the Intergovernmental Relations Framework Act does not make the appointment of experts mandatory. We recommend that the Bill is strengthened in this regard.
120. Some of our proposed changes, are reflected on the wording of the section as follows (although these amendments alone would not address the broader concerns listed above):

#### **Provincial Forums on Climate Change**

8.(1) Every Premier’s intergovernmental forum, established in terms of section 16 of the Intergovernmental Relations Framework Act, also serves as a Provincial Forum on 35 Climate Change.

(2) Sections 17 and 19 of the Intergovernmental Relations Framework Act apply to a Provincial Forum on

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<sup>118</sup> We provide the following examples of legislation that would need significant reworking and alignment with this Act: The Spatial Planning and Land Use Management Act, 2013; the National Energy Act, 2008; the National Electricity Regulation Act, 2006; the Conservation of Agricultural Resources Act, 1983; the National Water Act, 1998; the National Forests Act, 1998; and the Framework Planning Bill; CARA; NWA; National Forest Act; and the Integrated Planning Framework Bill.

Climate Change.

(3) A Provincial Forum on Climate Change must—

- (a) coordinate climate change response actions in the relevant province in accordance with this Act; and
- (b) provide a report to the President's Coordinating Council in terms of section 20(a) of the Intergovernmental Relations Framework Act, which report must include climate change considerations.

(4) A Provincial Forum on Climate Change [**may**] **must** establish an intergovernmental technical support structure in terms of section 30 of the Intergovernmental Relations Framework Act if there is a need for formal technical support to the Provincial Forum on Climate Change, **and must ensure that sufficient and relevant expertise is available to inform the response action referred to in section 8(3)(a).**

### **Municipal Forums on Climate Change**

9.(1) Every district intergovernmental forum, established in terms of section 24 of the Intergovernmental Relations Framework Act, also serves as a Municipal Forum on Climate Change.

(2) Sections 25 and 27 of the Intergovernmental Relations Framework Act apply to a Municipal Forum on Climate Change.

(3) A Municipal Forum on Climate Change must—

- (a) coordinate climate change response actions for those activities within its operational control of the relevant municipality in accordance with this Act; and
- (b) provide a report on such actions to the relevant Provincial Forum on Climate Change.

(4) A Municipal Forum on Climate Change [**may**] **must** establish an intergovernmental technical support structure in terms of section 30 of the Intergovernmental Relations Framework Act if there is a need for formal technical support to the Municipal Forum on Climate Change. **and must ensure that sufficient and relevant expertise is available to inform the response action referred to in section 8(3)(a).**

### **Presidential Climate Commission (section 10)**

121. Given the importance of the role played by the Commission, we submit that its appointment by the President must be mandatory and not discretionary.

122. We submit that all of the functions in section 11 should be made subject to reporting to the President on request.

123. We submit that section 12(2)(b) be expanded to provide for youth representation.

### **Presidential Climate Commission**

10. (1) The President [**may**] **must** establish a Presidential Climate Commission and appoint not more than 30 members comprising representatives of government, organised labour, civil society and business to advise on the Republic's climate change response, the mitigation of climate change impacts and adaptation to the effects of climate change towards the attainment of the just transition to a low-carbon and climate-resilient economy and society.

(2) The members of the Presidential Climate Commission may be appointed for a period determined by the President.

(3) The Presidential Climate Commission is chaired by the President.

(4) The Department is responsible for providing administrative and secretariat support services to the Commission.

(5) The Presidential Climate Commission may determine its own procedures to be followed at its meetings.

### Functions of Presidential Climate Commission

11. The functions of the Presidential Climate Commission are to—
- a. advise on the Republic's climate change response to ensure realisation of the vision for effective climate change response and the long-term just transition to a low-carbon and climate-resilient-economy and society; 35
  - b. advise government on the mitigation of climate change impacts, including through the reduction of emissions of greenhouse gases, and adapting to the effects of climate change; and 40
  - c. provide monitoring and evaluation of progress towards government's emissions reduction and adaptation goals.

### Process of appointment

12. (1) The President will appoint representatives from civil society, business, government and organised labour to serve on the Presidential Climate Commission for a period determined by the President.
- (2) The composition of the Presidential Climate Commission must— 45
- (a) broadly reflect the demographics and gender composition of the Republic, **adequately ensure youth representation;** and
  - (b) be appropriately qualified and have expertise in the socio-economic, environmental and broader sustainability field.

### Reporting to government

13. The President may require the Presidential Climate Commission to provide a report on any advice it provided to government in terms of section 11[(b)].

### Administrative and secretariat support

14. The administrative and secretariat support contemplated in section 10(4) will consist of—
- a. the management of the administrative affairs of the Presidential Climate Commission and assist in performing the duties assigned to the Presidential Climate Commission; and
  - b. the preparation of meetings and the running of the day-to-day operations, communications and research of the Presidential Climate Commission.

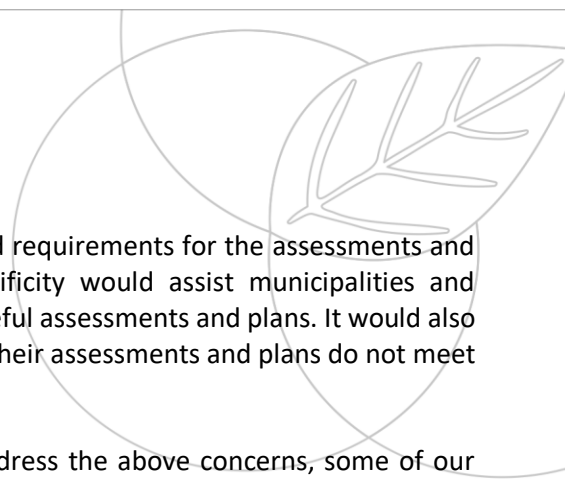
## Chapter 3: Climate Change Response: Provinces and Municipalities

### Climate change response (section 15)

124. In relation to the wording of Section 15, some of our concerns are the following:

- 124.1. Due to the technical nature of the climate response activities, and the reality that many local government organs of state are under-capacitated as it is, we submit that needs and response assessments and response implementation plans must be submitted to the Minister, who must evaluate them for effectiveness and any need for support.
- 124.2. The Bill does not make provision for the climate change needs and response assessments or the response implementation plans to be made to be made publicly available; this must be addressed.





- 124.3. Many of the subsections purporting to set out the detail and requirements for the assessments and implementation plans are vague and unclear. More specificity would assist municipalities and provinces to comply with their obligations and to conduct useful assessments and plans. It would also assist in holding municipalities and provinces accountable if their assessments and plans do not meet the requirements.
- 124.4. While we suggest that the entire section be revisited to address the above concerns, some of our proposed changes, in line with the above comments, are reflected in the wording of the section as follows (although these amendments alone would not address the broader concerns listed above):

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**Climate change response**

- 15. (1) An MEC and a mayor of a metropolitan or district municipality, as the case may be, must—
  - a. within one year of the publication of the National Adaptation Strategy and Plan contemplated in section 18, undertake **and publish** a climate change needs and response assessment for the province, metropolitan or district municipality, as the case may be;
  - b. for the purposes of paragraph (c), assess the extent to which its constitution- ally mandated functions are affected by climate change and formulate steps to address these effects in the performance of its functions; 20
  - c. review and, to the extent necessary, amend **and publish** the climate change needs and response assessment at least once every **[five] two** years;
  - d. within two years of undertaking the climate change needs and response assessment contemplated in paragraph (a), develop **[and]** implement **and publish** a climate change response implementation plan as a component of, and in conjunction with, provincial, metropolitan or district municipal planning instruments, policies and programmes; and
  - e. review and, to the extent necessary, amend the climate change response implementation plan at least once every **[five] two** years.
  - f. Both the needs and response assessment, and the response implementation plans must be submitted to the Minister, who must evaluate them for effectiveness and for any need for further support required by the province or municipality.
- (2) The climate change needs and response assessment, contemplated in subsection 30
  - (1)(a), must—
    - (a) identify climate change response considerations and options;
    - (b) analyse the nature and characteristics of the province or metropolitan or district municipality, as the case may be, and the particular and unique climate change needs and risks that arise as a result of such nature and characteristics; 35
    - (c) identify and spatially map, within the sphere of operations of the province, district or metropolitan municipality, as the case may be, risks, vulnerabilities, areas, ecosystems and communities that will arise, or that are vulnerable to the impacts of climate change;
    - (d) be based on the best available science, evidence and information; and 40
    - (e) identify and determine measures and mechanisms to manage and implement the required climate change response.
    - (f) **be publicly available**
  - (3) A climate change response implementation plan, contemplated in subsection (1)(d), must—
    - (a) be informed by the climate change needs and response assessment contemplated in subsection (1)(a);
    - (b) include measures or programmes relating to both adaptation and mitigation in line with the



- constitutional mandate of the province, or the metropolitan or district municipality; and
- (c) comply with any requirements as may be prescribed by the Minister inclusive of the relevant technical guidelines.

**(d) be publicly available**

(4) A provincial climate change response implementation plan, contemplated in subsection (1)(d), must form a component of the province's environmental implementation plan developed in terms of section 11(1) of the National Environmental Management Act. A metropolitan or district municipal climate change response implementation plan, contemplated in subsection (1)(d), must form a component of the relevant municipality's integrated development plan adopted in terms of section 25 of the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

## Chapter 4: National Adaptation to Impacts of Climate Change

### Adaptation objectives (section 16)

125. Due to the urgency of the climate crisis and its impacts outlined in this submission, the timeframes in section 16 are too long, and we recommend that the one year period be reduced to six months, taking into account that this work, according to the Minister<sup>119</sup> and the Department, is already at an advanced stage and can continue while the Bill goes through the legislative process.
126. It is not clear what is meant by “periodically reviewed” – timeframes for the review of the objects should be specified; particularly if these are made mandatory as recommended.

#### **Adaptation objectives**

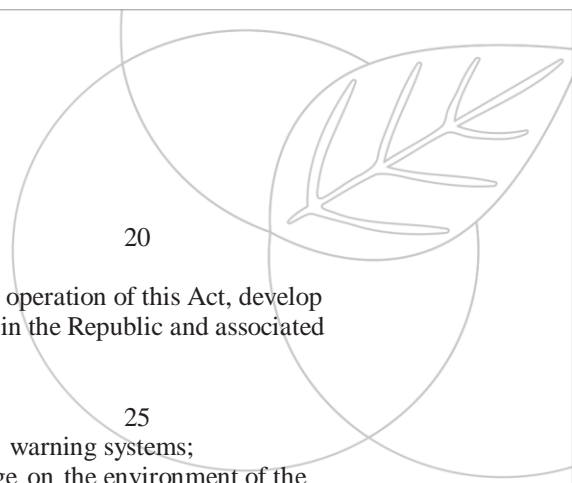
- 16 (1) The Minister must, within **[one year] six months** of the coming into operation of this Act, determine by notice in the *Gazette*—
- (a) national adaptation objectives which will guide the Republic's adaptation to climate change impacts, the development of resilience and sustainable development;
- (b) indicators for measuring progress towards achieving the national adaptation objectives; and
- (c) a date by which the national adaptation objectives should be incorporated into all relevant national planning instruments, policies and programmes which address, or are affected by, the actual and potential impacts of climate change.
- (2) The Minister **[may] must, [periodically],** review and, **as necessary** amend the national adaptation objectives contemplated in subsection (1)(a) **at least once every two years**

### Adaptation scenarios (section 17)

127. Due to the urgency of the climate crisis and its impacts outlined in this submission, the timeframes in section 17 are too long, and we recommend that the one year period be reduced to six months, taking into account that this work, according to the Minister and the Department, is already at an advanced stage and can continue while the Bill goes through the legislative process.
128. It is not clear what is meant by “periodically reviewed” – timeframes for the review of the objects should be specified; particularly if these are made mandatory as recommended.

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<sup>119</sup> <https://pmg.org.za/committee-meeting/34548/>



### Adaptation scenarios

17(1) The Minister must, within [**one year**] **six months** of the coming into operation of this Act, develop adaptation scenarios which anticipate the likely impacts of climate change in the Republic and associated vulnerabilities over the short, medium and longer term.

(2) The adaptation scenarios must—

- (a) be based on best available science, evidence and information;
- (b) include a systematic observation of the climate system and early warning systems;
- (c) include a consideration of the potential impacts of climate change on the environment of the Republic and associated vulnerabilities; and
- (d) contain available adaptation response options to reduce identified vulnerabilities by building adaptive capacity and resilience, in the context of actual or anticipated social, economic and environmental costs.
- (e) The scenarios may designation by the Minister of a moratorium on development of particular geographic areas or locations, and of particular resources, if these are deemed to be important for climate change adaptation and resilience. In the event that such designations are made, they must be included in the national adaptation strategy and plan.

(3) The Minister [**may**] **must**, [**periodically**], review and, **as necessary** amend the national adaptation scenarios contemplated in subsection (1)(a) **at least once every two years**

### National Adaptation Strategy and Plan (section 18)

- 129. Due to the urgency of the climate crisis and its impacts as outlined in this submission, the timeframes in section 18 are too long, and we recommend that the two year period be reduced to one year. As stated above, according to the Minister and the Department, this work is already at an advanced stage and can continue while the Bill goes through the legislative process.
- 130. The National Adaptation Strategy and Plan are envisaged to direct and influence the provincial, district and municipal needs as well as response assessments and response implementation plans as the case may be. The provinces and municipalities should also be consulted by the Minister when the National Adaptation Strategy and Plan is developed. Again, according the Minister and the Department, this work is already being undertaken.
- 131. The review of the Strategy on a 5 yearly basis only is inadequate. Given the variable nature of climate impacts and the importance of proper and up-to-date plans to address these impacts, provision must be made for the review to take place on a more frequent basis. We submit that this should take place, at least, every 2 years. Review must be made mandatory.
- 132. Section 18(4)(e) speaks to the need to include civil society, the private sector and local communities in the management of adaptation measure, but it is too weak and discretionary as currently worded. Adaptation measures will impact on and influence the social and economic landscape profoundly. Such measures require and all-of-society approach in their implementation. We propose wording to strengthen this below.
- 133. We submit that the regular review of the National Adaptation Strategy and Plan must be made subject to public participation.
- 134. The following are suggested edits to the wording of the provision:

## National Adaptation Strategy and Plan

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18. (1) Climate change adaptation within the Republic must be managed in a coherent and coordinated manner and in accordance with a National Adaptation Strategy and Plan.
- (2) The Minister must, in consultation with the Ministers responsible for the functions listed in Schedule 2, **as well as the provinces and municipalities** develop and publish a National Adaptation Strategy and Plan by 40 notice in the *Gazette* within **[two years] one year** of the coming into operation of this Act.
- (3) The Minister **[may] must** review and amend the National Adaptation Strategy and Plan at a **[five] two-** yearly interval to take into account—
- (a) monitoring and evaluation results;
  - (b) technological advances; 45
  - (c) the best available science, evidence or information; or
  - (d) the Republic's international commitments and obligations.
- (4) The purpose of the National Adaptation Strategy and Plan is to—
- (a) achieve a reduction in the vulnerability of society, the economy and the environment to the effects of climate change, strengthen the resilience of the socio-economic and environmental system and enhance the adaptive capacity of society, the environment and economy to the impacts of climate change; 50
  - (b) reduce the risk and vulnerabilities to current and future climate scenarios;
  - (c) achieve the national adaptation objectives contemplated in section 16;
  - (d) provide a strategic and policy directive for adaptation to the impacts of climate change; and
  - (e) provide an integrated and coordinated approach to the management of adaptation measures in response to the impacts of climate change by organs of state in all spheres of government, and **[where relevant it should] must** also include non-governmental organisations, the private sector and local communities.
- (5) The National Adaptation Strategy and Plan must include—
- (a) the national adaptation objectives contemplated in section 16;
  - (b) a consideration of the Republic's climate change scenarios as informed by the adaptation scenarios contemplated in section 17; 10
  - (c) an assessment of the Republic's vulnerability to climate change and related risks at sectoral, cross-sectoral and geographic levels, including a consideration of relevant disaster risk assessments in terms of the Disaster Management Act; **and an assessment of the ways in which the vulnerability and risks could be exacerbated by existing and planned infrastructure, industrial and/or other developments in the Republic.**
  - (d) available adaptation response options to reduce identified vulnerabilities by 15 building adaptive capacity and resilience, in the context of actual or anticipated social, economic and environmental costs – **including declaring particular areas and/or resources to be excluded from any proposed development**; and
  - (e) a plan that details the implementation of adaptation responses informed by the objectives and indicators contemplated in section 16.

## Sector Adaptation Strategy and Plan (section 19)

135. Our comments on the National Adaptation Strategy and Plan above pertaining to timeframes are applicable to the Sector Adaptation Strategy and Plan and recommended wording, as appropriate, is reflected below.
136. With regard to the mapping of risks and vulnerabilities and the measure and mechanisms to be undertaken by the Minister of each sector department for which the department is responsible, it is not clear:
- 136.1. whether this mapping must be repeated and reviewed to address changing circumstances or whether

a one once-off mapping exercise within 2 years of the Act's promulgation is all that is required - we submit that it should be the former;

136.2. whether the mapping under section 19(a)(i) is to be publicly available – we submit that it must be; and

136.3. in relation to the progress reports, whether these reports will be publicly available. We submit that they must be.

### Sector Adaptation Strategy and Plan

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**19** (1) A Minister responsible for functions listed in Schedule 2 must—

(a) within [**one year**] **six months** of the publication of the National Adaptation Strategy and Plan, and in alignment with such National Adaptation Strategy and Plan, conduct an assessment of the functions under the Minister's operational control which— 25

(i) identifies and spatially maps **current and anticipated future** risks and vulnerabilities, areas, ecosystems and communities that will arise and that are vulnerable to the impacts of climate change; and

(ii) determines measures and mechanisms to manage and implement the required adaptation response; 30

(b) within [**two years**] **one year** of the publication of the National Adaptation Strategy and Plan, develop and implement a Sector Adaptation Strategy and Plan which must be informed by the assessment undertaken in terms of paragraph (a)(i) and serve to implement the measures and mechanisms determined in terms of paragraph (a)(ii); and 35

(c) every [**five**] **two** years, review a Sector Adaptation Strategy and Plan and, if required, amend the Sector Adaptation Strategy and Plan to take into account—

(iii) monitoring and evaluation results;

(iv) technological advances; 40

(v) the best available science, evidence or information; and

(vi) the Republic's international commitments and obligations.

(2) A Minister responsible for functions listed in Schedule 2, within five years of the publication of a Sector Adaptation Strategy and Plan, and at [**five**] **two**-yearly intervals thereafter, submit **and publish in the Gazette** reports to the Minister and the Presidency on the progress made in relation to the implementation of the relevant Sector Adaptation Strategy and Plan.

### Adaptation Information and Synthesis Adaptation Report (section 20)

137. The wording does not expressly stipulate that this report is published for public access. We submit that it must be.

### Adaptation Information and Synthesis Adaptation Report

**16.** (1) The Minister may by notice in the *Gazette*, or in writing, require any person to provide, within a reasonable time or on a regular basis, data, information, documents, samples or materials to the Minister that are reasonably required for the purposes of the [**National Climate Change Response White Paper**] **implementation of the Act.**

(2) A notice under subsection (1) must indicate the manner and time-frames in which the information must be furnished and, if required, how the information must be verified.

(3) The Minister must collate, compile and synthesise information relevant to the 55 achievement of the national adaptation objectives and the objectives of this Act and thereafter publish a Synthesis Adaptation Report for consideration by Cabinet and to be used in the Republic's national and international reporting processes. **Such report must be published in the Gazette and be made**

automatically available on request.

## Chapter 5: GHG Emissions and Removals

### National GHG emissions trajectory (section 21)

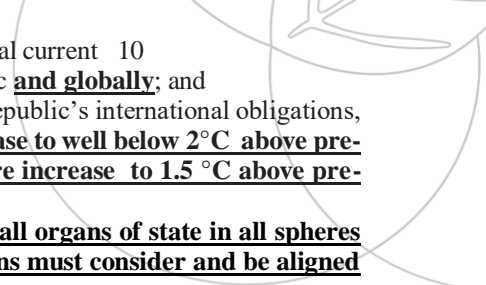
138. In relation to the content of section 21, and in addition to the recommendations made above, we recommend that:
- 138.1. the trajectory be called the “greenhouse gas emission **reduction trajectory**”, given that the overall and long-term aim of the trajectory must be to **reduce** South Africa’s emissions – and not provide any scope for an increase in GHG emissions;
  - 138.2. a time period be set within which the national GHG trajectory should be determined and when it must be reviewed – we recommend 6 months from coming into operation for setting the trajectory and review at least every 2 years;
  - 138.3. the provision for the review of the trajectory must be aligned with the provisions of the Paris Agreement, which require that South Africa communicate and maintain successive NDCs and that these successive commitments must be a progression **beyond** South Africa’s then current commitment and must reflect its **highest possible ambition**.<sup>120</sup> In other words, the trajectory **must be regularly reviewed and updated** and a review of the trajectory in terms of section 11(3) can only result in the trajectory becoming stricter or (at the very least) remaining the same – it cannot result in regression or in the trajectory becoming more lenient;
  - 138.4. the trajectory should not only be informed by the total current and projected volumes of GHGs emitted in the Republic (s11(1)(b)), but also, it should be informed by current and projected **global** emissions, given the transboundary nature of climate change and South Africa’s extreme vulnerability to its impacts; and
  - 138.5. all decisions taken by all organs of state and persons, to the extent applicable, must consider, and be aligned with, the trajectory.
139. Some of our proposed changes, in line with the above comments (noting that these amendments alone would not address the broader concerns listed above), are reflected on the wording of this section as follows:

#### **National greenhouse gas emissions reduction trajectory**

1. (1) The Minister must, in consultation with Cabinet, by notice in the *Gazette* determine a national greenhouse gas emissions **reduction** trajectory for the Republic. 5
- (2) The national greenhouse gas emissions **reduction** trajectory must—
  - (a) specify a national greenhouse gas emissions reduction [**objective**] **target** represented by a quantitative description of the total amount of greenhouse gas emissions projected to be emitted during a specified

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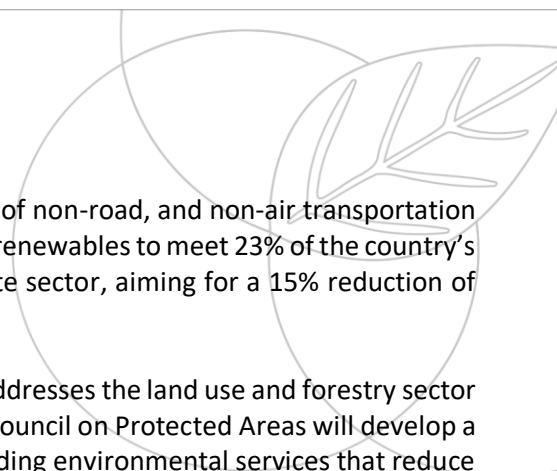
<sup>120</sup> Article 4(2) and (3), Paris Agreement.

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- period in the Republic;
- (b) be informed by relevant and up to date information regarding the total current 10 and projected amounts of greenhouse gas emissions in the Republic **and globally**; and
  - (c) be consistent with the principles and objectives of this Act and the Republic’s international obligations, **in particular the commitment to limit global temperature increase to well below 2°C above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels**
- (3) **The national greenhouse gas emissions reduction trajectory binds all organs of state in all spheres of government, and all persons to the extent applicable. All decisions must consider and be aligned with the national greenhouse gas emissions reduction trajectory.**
- (4) Until such time as the Minister publishes the national greenhouse gas emissions trajectory in terms of subsection (1), the trajectory in Schedule 3 serves as the national 15 greenhouse gas emissions trajectory for the Republic.
- (5) The Minister, in consultation with Cabinet—
- (a) must review the national greenhouse gas emissions trajectory every five years from the coming into operation of this Act; **and any changes to the trajectory must be a progression beyond the current trajectory and must reflect South Africa’s highest possible ambition** and
  - (b) may periodically review the national greenhouse gas emissions trajectory 20 when national circumstances require such a review, including when such requirement is demonstrated by—
    - (i) monitoring and evaluation results;
    - (ii) technological advances;
    - (iii) the best available science, evidence or information; 25
    - (iv) the Republic’s international commitments and obligations; or
    - (v) constraints and opportunities to implementation of policies and measures.

#### Sectoral emission targets (SETs) (section 22)

140. In relation to the SETs, we submit that sector departments will require significant support in the form of additional resources (both financial and human resources), expertise, and capacity to properly and effectively carry out the function of implementing their SETs; developing the necessary policies and measures; and reporting on compliance with the SETs. This must be addressed.
141. We also recommend that the Bill integrate more detailed climate change-related goals and actions for various sectors (not only targets relating to GHG emission reductions). For example, other countries go much further by integrating entire sections on education, waste, energy, transportation, or other issues, per sector, into their climate change legislation requirements.
- 141.1. France’s First Grenelle Act is a law that details the climate-related policy commitments that the French National Assembly made in October, 2007. In this Act, France sets various sectoral targets, principally for the construction and transportation sectors. For example, the building sector must meet an energy consumption target of 50 kilowatt hours per square meter per year and a 38% energy consumption reduction by 2020, assisted by the state’s renovation of 4000,000 housing units each year from 2013.<sup>121</sup> Buildings owned by the state have higher energy efficiency goals of 40% energy consumption reduction and 50% reduction of GHG emissions from those buildings. France also sets a target for its transportation sector to reduce GHGs by 20% by 2020 to bring them back to the level they reached in

<sup>121</sup> France, First Grenelle Act Article 5.



1990.<sup>122</sup> To meet this goal, France aims to increase the share of non-road, and non-air transportation of freight from 14% to 25% by 2020.<sup>123</sup> Energy targets aim for renewables to meet 23% of the country's needs by 2020.<sup>124</sup> Lastly, France sets out targets for the waste sector, aiming for a 15% reduction of waste going into incineration or storage by 2012.<sup>125</sup>

- 141.2. Guatemala's Framework Law on climate change specifically addresses the land use and forestry sector in a separate section, and states that the country's National Council on Protected Areas will develop a plan for sustainable development of forestry resources, including environmental services that reduce GHGs.<sup>126</sup> The Framework Law also has a small section on transportation that requires various governmental ministers to come up with a plan within 24 months that will reduce the GHG emissions of the public and private transportation sector.<sup>127</sup>
- 141.3. South Korea's Framework Act is similar to South Africa, in that it requires the government to develop sectoral targets in a subsequent process. However, the Act also requires the government to establish a basic plan for the energy sector every 5 years and specifically addresses the transportation and traffic sector.<sup>128</sup> The goal of the 5 year energy plan is to better understand domestic and overseas demand and supply of energy, how to secure a stable supply of energy, and how to better use environmentally-friendly energy sources.<sup>129</sup> With respect to the transportation sector, the Act requires that: *"Any person who intends to manufacture means of transportation, such as automobiles, shall prepare a scheme for reducing greenhouse gases emitted from such transportation means and shall actively endeavor to conform with the international competition system for reducing greenhouse gases."* However, the Act does not define the international competition system for reducing GHGs. The Act also requires that: *"The Government shall establish standards for the efficiency of average energy consumption of automobiles and standards for allowable emission of greenhouse gases from automobiles respectively to promote energy saving by improving average energy consumption efficiency of automobiles and to maintain a pleasant and appropriate atmospheric environment by reducing greenhouse gases in exhaust gases from automobiles, but shall allow auto makers (including importers) to choose one of such standards to avoid double regulation and shall ensure that measuring methods do not overlap"*.<sup>130</sup> The Act, however, does not provide further details.
- 141.4. The Swiss CO<sub>2</sub> Act specifies "technical" measures to reduce CO<sub>2</sub> emissions from buildings and passenger vehicles.<sup>131</sup> The Act also creates a CO<sub>2</sub> levy on the production, extraction and import of

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<sup>122</sup> *Ibid.* at Article 10.

<sup>123</sup> *Ibid.* at Article 11 § I.

<sup>124</sup> *Ibid.* at Article 19 § II.

<sup>125</sup> *Ibid.* at Article 46.

<sup>126</sup> Guatemala Framework Law, Article 20.

<sup>127</sup> *Ibid.*, article 21.

<sup>128</sup> South Korea, Framework Act on Low Carbon, Green Growth Article 41.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.* at Article 47.

<sup>131</sup> Swiss CO<sub>2</sub> Act, articles 9-11, unofficial English translation at: <https://www.admin.ch/opc/en/classified-compilation/20091310/201801010000/641.71.pdf>.



thermal fuels.<sup>132</sup> The levy is used to, among other things, finance measures to reduce CO<sub>2</sub> emissions from buildings, including through the promotion of renewable energy sources;<sup>133</sup> guarantee loans to companies for developing and marketing equipment and processes to reduce GHG emissions; facilitate the use of renewable energies;<sup>134</sup> encourage the economical use of natural resources; and redistribute to funds to the public.<sup>135</sup>

142. The provision for the review of the SETs (s22(7)) must expressly state that the SETs cannot be made weaker – only stricter. In other words, it must provide for a ratchet mechanism in line with the Paris Agreement and as recommended for the trajectory.
143. The cumulative amount of GHG emissions which the SETs represent **must necessarily be less than** the maximum allowable emissions in terms of the national GHG emissions trajectory. There will be some sectors or sub-sectors to which SETs are not applicable, but which may still emit small amounts of GHGs, and ensuring that the SETs are cumulatively less than the maximum emission trajectory allowance will create a small allowable carbon space for these emissions.
144. There are no timeframes for the determination by the Minister of the SETs. This is unacceptable given that the SETs are a key mechanism to ensure mitigation in various sectors and in applicable decision-making across organs of state. Additionally, we recommend that the timeframe for listing GHG emitting sectors and sub-sectors by the Minister be reduced to reflect the urgency of mitigation measures.
145. The section must be strengthened in terms of making key information publicly available.
146. Some of our proposed changes, in line with the above comments (noting that these amendments alone would not address the broader concerns listed above), are reflected on the wording of this section as follows:

#### **Sectoral emissions targets**

22 (1) The Minister must, within **[one year] six months** of the coming into operation of this Act, by notice in the *Gazette*, list the greenhouse gas emitting sectors and sub-sectors that are subject to sectoral emissions targets. 30

(2) The Minister may vary the list of sectors and sub-sectors that are subject to sectoral emissions targets.

(3) The Minister must, in consultation with the Ministers responsible for each sector and sub-sector listed in terms of subsections (1) and (2), **within one year of the coming into operation of this Act** determine by notice in the *Gazette* the prescribed framework and the sectoral emissions targets for sectors and sub-sectors.

(4) Sectoral emissions targets must—

- (a) be implemented by the Ministers responsible for the administration of sectors or sub-sectors listed in terms of subsections (1) and (2) through the relevant **laws**, planning instruments, policies and programmes;
- (b) be aligned with the national greenhouse gas emissions trajectory, **and the Paris Agreement**

<sup>132</sup> *Ibid*, article 29.

<sup>133</sup> *Ibid*, article 34.

<sup>134</sup> *Ibid*, article 35.

<sup>135</sup> *Ibid*, article 36.



**commitment to limit global temperature increase to well below 2 °C above pre-industrial levels, while pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels** noting that the cumulative amount of greenhouse gas emissions which the sectoral emissions targets represent **[are not equivalent thereto] must be less than the maximum allowable emissions in terms of the trajectory;** and 45

(c) include quantitative and qualitative greenhouse gas emission reduction goals for the first five years, the subsequent five to 10 years and for a 10- to 15-year period thereafter. 50

(5) When determining the sectoral emissions targets, the Minister must take all relevant considerations into account, including, amongst others—

- (a) the socio-economic impacts of introducing the sectoral emissions targets; and
- (b) the best available science, evidence and information.

(6) The Minister responsible for each sector or sub-sector for which sectoral emissions targets have been determined, in accordance with subsection (3), must adopt policies and measures towards the achievement of the sectoral emissions targets. 55

(7) The Minister must, in consultation with the Ministers responsible for each sector and sub-sector listed in terms of subsections (1) and (2), must, every five years, review the sectoral emissions targets and, when the outcome of the review or national

circumstances require it, revise and amend the sectoral emissions targets, including when the need for such revision and amendment is demonstrated by—

- (a) monitoring and evaluation results;
- (b) technological advances;
- (c) the best available science, evidence or information; 5
- (d) the Republic's international commitments and obligations;
- (e) the strategic importance of the sector or sub-sector as a catalyst for growth and job creation in the economy; or
- (f) the agreed approach to the just transition.

(8) An amended sectoral emissions target must contain quantitative and qualitative 10 mitigation targets for the first five years, for the subsequent five to 10 years and for a 10- to 15-year period thereafter. **Any amendment to the SETs must be a progression beyond the current SET and must reflect the sector's highest possible ambition**

(9) The Minister responsible for each sector and sub-sector for which sectoral emissions targets have been determined, within one year of the publication of the sectoral emissions targets, must— 15

- (a) develop or amend the relevant sectoral and sub-sectoral laws, policies and measures for which that Minister is responsible in terms of the achievement of the sectoral emissions targets;
- (b) publish such amendment in the *Gazette*;
- (c) implement the policies and measures within the relevant sectors and 20 sub-sectors; and
- (d) monitor the effectiveness of implementing such policies and measures in achieving the relevant sectoral emissions target.

(10) The Minister responsible for each sector and sub-sector for which sectoral emissions targets have been revised and amended in terms of subsection (7) must— 25

- (a) within six months of the publication of the revised and amended sectoral emissions targets and to the extent required by such revision and amendment, revise and amend the policies and measures provided for in subsection (9);
- (b) publish such revisions and amendments by notice in the *Gazette*; and
- (c) ensure that the duly revised and amended policies and measures are 30 implemented and monitored for effectiveness.

(11) The Minister responsible for each sector and sub-sector for which sectoral emissions targets have been determined in terms of subsection (3), or for which revised and amended sectoral emissions targets have been determined in terms of subsection (7),

must annually report to The Presidency on progress towards the achievement of the 35 relevant sectoral emissions targets. **Such report must be publicly available.**

(12) The Minister must collate, compile and synthesise the reports provided in terms of subsection (11) and submit progress reports on the implementation of the sectoral emissions targets to Cabinet on an annual basis.  
**Such synthesised report must be publicly available.**

**Listed greenhouse gases and activities (section 23)**

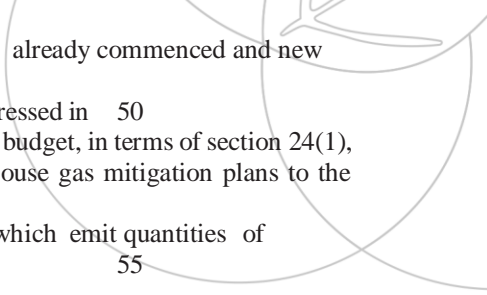
147. The listing of GHGs and activities forms an important foundational base for the carbon budget mechanism, and there is no timeframe attached, again betraying the urgency of climate mitigation measures. It is our understanding from the Minister and the Department that this work has been ongoing as a component of the voluntary carbon budgeting activities that have been taking place, and it should therefore not be overly onerous to prescribe a relatively short timeframe for this activity to be completed.
148. The decision on whether or not to list GHGs and activities cannot be determined according to what the Minister reasonably believes, but must be informed by the best available science.
149. The threshold should be stated in the Bill – this also provides the legal certainty needed for emitters to plan and start putting the necessary measures in place as soon as possible to ensure that they comply with the Act. The SEIA states that the Bill will benefit business and industry by providing “*certainty to business on South Africa’s commitment and means of transitioning to a lower carbon and climate resilient economy and society*” and “[c]ertainty around the extent to which emitters will be required to contribute to the national effort to reduce GHGs. This enables business to plan and budget their investments in lower carbon and resource efficient technologies, well in advance, with an opportunity for the creation of new lower carbon industries and related employment opportunities.”<sup>136</sup> A failure to set the trajectory and the threshold in the Act, will have quite the opposite effect and simply give rise to uncertainty.
150. We submit that the review of lists be made mandatory and not discretionary, given the evolving nature of scientific understanding and mitigation needs.
151. The removal of GHGs and activities from the list should only be permitted on the basis of the best available science supporting that such removal will in no way compromise the mitigation of climate change.
152. Some of our proposed changes, in line with the above comments (noting that these amendments alone would not address the broader concerns listed above), are reflected on the wording of this section as follows:

**Listed greenhouse gases and activities**

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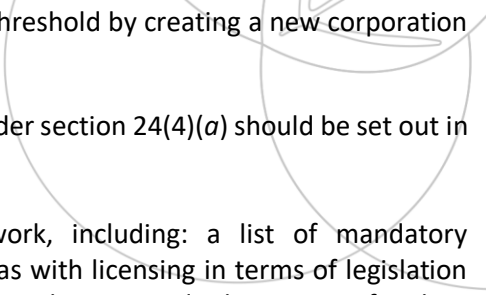
17. (1) The Minister must, by notice in the *Gazette*, **within one year of the Act coming into operation** publish a list of greenhouse gases which, **according to the best available science [the Minister reasonably believes]** cause or are likely to cause or exacerbate climate change.
- (2) The Minister must, by notice in the *Gazette*, **within one year of the Act coming into operation** publish a list of activities which emit one or more of the greenhouse gases listed in terms of subsection (1) and which, **according to the best available science [the Minister reasonably believes]** cause or are likely to cause or exacerbate climate change.

<sup>136</sup> P6, SEIA for the Climate Change Bill.

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- (3) A notice published in terms of subsection (2)—
- (a) must apply to greenhouse gas emitting activities which have already commenced and new greenhouse gas emitting activities;
  - (b) must determine quantitative greenhouse gas emission thresholds expressed in carbon dioxide equivalent to identify persons to be assigned a carbon budget, in terms of section 24(1), and who are required, in terms of section 24(4), to submit greenhouse gas mitigation plans to the Minister;
  - (c) must specify that the notice does not apply to listed activities which emit quantities of greenhouse gases below the quantitative greenhouse gas emission thresholds determined in terms of paragraph (b);
  - (d) may contain transitional provisions and other special arrangements in respect of the activities contemplated in paragraph (a); and
  - (e) must determine the date on which the notice takes effect.
- (4) The thresholds contemplated in subsection (3)(b)—
- (a) must be expressed in carbon dioxide equivalents for carbon budgets and greenhouse gas mitigation plans and shall be applicable at company level based on operational control;
  - (b) must be based on the **[availability of feasible mitigation technology] alignment with the Paris Agreement goals and emission trajectory, taking into account available mitigation technology and methodologies based on the best available science**; and
  - (c) must take into account any opportunities and constraints to implementation of policies and measures.
- (5) The Minister **[may] must** review the lists published in terms of subsections (1) and (2) in line with the requirements of national and international mitigation goals for the purposes of determining whether such lists require revision and amendment, including when the need for such review is demonstrated by—
- (a) monitoring and evaluation results;
  - (b) technological advances;
  - (c) the best available science, evidence or information;
  - (d) the Republic’s international commitments and obligations; or
  - (e) opportunities and constraints to implementation of policies and measures.
- (6) In the event that a review undertaken in terms of subsection (5) indicates the need for revision and amendment of one or both of the lists, the Minister may, by notice in the *Gazette*, revise and amend the relevant list, by—
- (a) adding or removing greenhouse gases from the greenhouse gases list **only on the basis that this is advised by the best available science**;
  - (b) adding or removing activities from the activities list; **only on the basis that this is advised by the best available science** or
  - (c) making other changes to the particulars on the list, such as the applicability of greenhouse gases to certain activities **only on the basis that this is advised by the best available science**.

### Carbon budgets (section 24)

153. The implementation of the carbon budgets is dependent on numerous steps that will still need to be taken by the Minister following the promulgation of this legislation. This makes the carbon budgeting system vulnerable to delays and abuse, which is highly problematic, given the need for urgent climate action.
154. There are numerous uncertainties around, for example: to whom the budgets will apply and how they will apply; and whether budgets can be transferred (the Bill should expressly state that they cannot be transferred).

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155. The Bill must ensure that a person cannot simply avoid exceeding the threshold by creating a new corporation and selling some of its emitting facilities to the new corporation.<sup>137</sup>
156. The requirements, process and procedures for GHG mitigation plans under section 24(4)(a) should be set out in the Bill in full.
157. The Bill should provide a legally-binding decision-making framework, including: a list of mandatory considerations to be taken into account by the Minister (for example as with licensing in terms of legislation such as the NWA and AQA);<sup>138</sup> and acceptable methodologies and approaches, to guide the setting of carbon budgets, and the approval of mitigation plans by the Minister. These considerations should explicitly prohibit “grandfathering” (allowing established GHG emitters to carry on with business-as-usual) as a method for carbon budget allocations.<sup>139</sup>
158. The Bill should expressly state that the Minister must ensure that the sum of all allocated carbon budgets shall be lower than the national GHG emissions reduction trajectory, and that the sum of carbon budgets allocated in a sector shall be lower than the SET for that sector and period. Consideration must also be given by the Minister, when allocating carbon budgets, to emissions from emitting entities that fall **below** the threshold. These entities will cumulatively still take up significant emissions space, and so the carbon budgets need to be sufficiently conservative in order to account for this and not result in an exceedance of the emissions trajectory.
159. There is no express provision for carbon budgets, mitigation plans, and annual reports on carbon budget compliance to be publicly available. This must be remedied, as these records are crucial for ascertaining progress on GHG emission mitigation and for holding emitters accountable.
160. Section 24(7)(b) provides for a person to whom a carbon budget is allocated to apply for a revision or cancellation of the budget. We strongly urge for this provision to be removed from the Bill as it creates opportunities for abuse and the evasion of emission reduction obligations, and high risk of rendering redundant the emission reduction system provided for in the Bill.
161. Some of our proposed changes, in line with the above comments, as well as some grammatical/non-substantive proposed amendments are reflected on the wording of this section as follows:

### **Carbon budgets**

- 24 (1)The Minister must, within six months of the coming into operation of the Act**
- a. (a) allocate a carbon budget to any person that conducts an activity listed in terms of section 23(2).
  - b. No person may conduct any activity listed in terms of section 23(2) unless a carbon budget has been allocated to them.
- (2) When allocating carbon budgets, the Minister must take all relevant considerations into account, including, amongst others—
- (a) the socio-economic impacts of imposing the carbon budget;

<sup>137</sup> Amendments to the Companies Act, 2008 should be considered to address this.

<sup>138</sup> See s27 of the NWA; and s39 of AQA.

<sup>139</sup> The Department’s proposed design to ‘operationalise the post-2020 mitigation system’, currently under-development, outlines detailed methodologies and approaches to determine thresholds and carbon budget allocations of emitting entities.



- (b) the best available science, evidence and information; 30
- (c) the best practicable environmental options available and alternatives that could be taken to mitigate the emission of greenhouse gases;
- (d) national strategic priorities;
- (e) the alignment of the carbon budgets with the national greenhouse gas emissions trajectory, noting that the cumulative amount of greenhouse gas emissions which the carbon budgets represent are not equivalent thereto **must be less than the maximum allowable emissions in terms of the emissions trajectory**; and 35
- (f) progress on the implementation of the greenhouse gas mitigation plans.
- (g) **the public interest in achieving emissions reduction in order to avoid the worst impacts of climate change and ensure the protection and realisation of rights under the Constitution.**
- (3) A carbon budget—
- (a) must have a duration of at least three successive five-year periods; and
- (b) must specify the maximum amount of greenhouse gas emissions that may be emitted during the first five-year periods. 40
- (4) (a) A person to whom a carbon budget has been allocated in terms of sub-section (1) must prepare and submit to the Minister, for approval, a greenhouse gas mitigation plan.
- (b) A greenhouse gas mitigation plan must— 45
- (i) describe the mitigation measures that the person, to whom a carbon budget is allocated, proposes to implement in order to remain within the person's allocated carbon budget; and
- (ii) comply with the content requirements of such plans as may be prescribed by the Minister in terms of section 27, including requirements pertaining to processes, procedures and reporting. 50
- (5) At the time when the carbon budget is assigned for the first mandatory carbon budget cycle, all approved pollution prevention plans as contemplated in section 29 of the National Environmental Management: Air Quality Act, 2004 (Act No. 39 of 2004), and the National Pollution Prevention Plans Regulations, 2017, published under Government Notice No. 712 of 21 July 2017, must be deemed to be greenhouse gas mitigation plans. 55
- (6) A person to whom a carbon budget has been allocated must—
- (a) implement the approved greenhouse gas mitigation plan **which must be publicly available**;
- (b) monitor annual implementation of the greenhouse gas mitigation plan in accordance with the prescribed methodology; 60
- (c) evaluate progress on the allocated carbon budget;
- (d) annually report on the progress against the allocated carbon budget to the Minister in the manner prescribed; and
- (e) in the event that such reporting indicates that the person has failed, is failing or will fail to comply with the allocated carbon budget, provide a description, 5 of measures **which must be publicly available** the person will implement in order to remain within the allocated carbon budget, **which will not absolve the person of any liabilities in law**
- (7) (a) The Minister must review a carbon budget allocated to a person in terms of subsection (1) at the end of the five-year carbon budget commitment period, or upon request by a person subject to a carbon budget. 10
- (b) **[A person to whom a carbon budget has been allocated may apply for a revision or cancellation of the budget under prescribed circumstances.]**
- (c) The factors listed in subsection (2) must be taken into consideration when a carbon budget is reviewed.
- (8) The Minister must, within a reasonable time of the review provided for in subsection (7), revise a carbon budget, **and such revision must always result in a lower carbon budget**— 15
- (a) to ensure that it always has a duration of at least three successive five-year periods; and
- (b) if the National Greenhouse Gas Inventory demonstrates an increase in national greenhouse gas emissions above the national and international climate change mitigation commitments and obligations. 20
- (9) An allocated carbon budget may be amended if the activity for which the carbon budget has been issued is transferred or acquired in part or fully and the affected person must request a reallocation of a carbon budget from the Minister in the prescribed manner.

- (10) **The Minister must ensure that the sum of all allocated carbon budgets shall be lower than the national greenhouse gas emissions reduction trajectory, also taking into account emissions from emitters that fall below the threshold, and that the sum of carbon budgets allocated in a sector shall be lower than the sectoral emission target for that sector and period.**

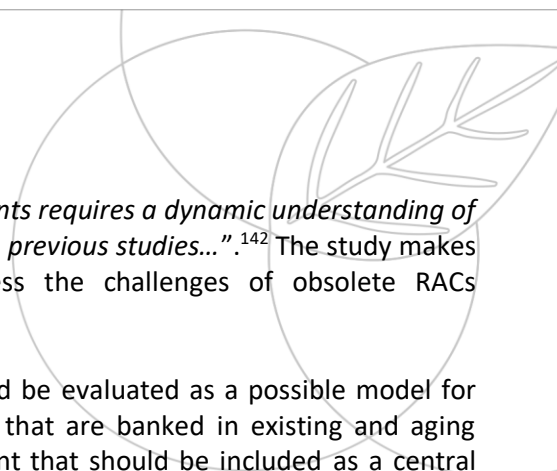
Phase down and phase out of synthetic GHG emissions and declaration (section 25)

162. While we certainly support the phasing down and out of synthetic GHGs, it is not clear how this provision is intended to align with the Regulations Regarding the Phasing Out and Management of Ozone Depleting Substances, 2014.<sup>140</sup> No mention is made of these regulations in the transitional provisions in the Bill (s21).
163. South Africa is also party to the Montreal Protocol on Substances that Deplete the Ozone Layer (“Montreal Protocol”) and more importantly, the Kigali Amendment to the Montreal Protocol.<sup>141</sup> The plan to phase down/phase out the use of synthetic GHGs envisioned by section 14(1)(a) should not be inconsistent with, or less stringent than South Africa’s existing national and international commitments, which must be a minimum consideration for the development of the section 14(1) plan.
164. We make the following comments and recommendations on the content of section 14:
- 164.1. A timeframe must be stipulated within which the plan to phase down or phase out the use of synthetic GHGs must be developed. We recommend 1 year from the promulgation of this Act.
- 164.2. The plan to phase down or phase out the use of synthetic GHGs, and any updates thereto, must be made publicly available and published in the Gazette.
- 164.3. Section 25 must expressly require the proper disposal of synthetic GHGs that are “banked” (stored) in existing and aging refrigerators, air conditioners, and other equipment.
- 164.3.1. In South Africa as in elsewhere in the world, substantial quantities of synthetic GHGs with significant potential to adversely impact the environment are banked in refrigerators, air conditioners, and other equipment nearing end-of-life (EoL) and that can be released to the atmosphere upon improper disposal.
- 164.3.2. Researchers in China, the USA, and Australia published a study about synthetic GHGs banked in refrigerators, air conditioners, and other equipment nearing EoL stating the following: *“[t]he global community has responded to the dual threats of ozone depletion and climate change from refrigerant emissions (e.g., chlorofluorocarbons, CFCs, and hydrofluorocarbons, HFCs) in refrigerators and air conditioners (RACs) by agreeing to phase out the production of the most damaging chemicals and replacing them with substitutes. Since these refrigerants are “banked” in products during their service life, they will continue to impact our environment for decades to come if they are released due to mismanagement at the end of*

<sup>140</sup> Available here <https://cer.org.za/wp-content/uploads/2010/03/Ozone-depleting-substances.pdf>.

<sup>141</sup> <https://www.unenvironment.org/news-and-stories/news/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate>.





life. Addressing such long-term impacts of refrigerants requires a dynamic understanding of the RACs' life cycle, which was largely overlooked in previous studies...".<sup>142</sup> The study makes numerous policy recommendations<sup>143</sup> to address the challenges of obsolete RACs management and associated impacts.<sup>144</sup>

- 164.3.3. The regulatory scheme in place in the USA<sup>145</sup> could be evaluated as a possible model for regulating the proper disposal of synthetic GHGs that are banked in existing and aging refrigerators, air conditioners, and other equipment that should be included as a central component of s14 of the Bill. The US Environmental Protection Agency (EPA) regulations specify, *inter alia*: a prohibition on intentionally venting ozone depleting substances (ODS) refrigerants and ODS substitutes into the atmosphere while disposing of refrigeration/AC equipment; certification requirements for refrigerant recovery equipment, as well as refrigerant evacuation requirements, to maximise recovery of ODS during the disposal of refrigeration/AC equipment; certification requirements for technicians disposing of refrigeration/AC equipment, excluding small appliances;<sup>146</sup> safe disposal requirements for small appliances to ensure removal of refrigerants from goods that enter the waste stream with the refrigerant charge intact; and record-keeping requirements for persons disposing of refrigeration/AC equipment to certify to EPA that they have acquired refrigerant recovery equipment and are complying with the rules.<sup>147</sup>
- 164.4. The section 14(1) plan must provide for the consideration of the combined direct and indirect climate impacts of synthetic GHGs used as refrigerants. According to the United Nations Industrial Development Organisation: *"In Africa and beyond, the successful implementation of the Kigali Amendment (KA) requires addressing two types of emissions that result from refrigeration and air conditioning (RAC) equipment: Direct emissions, from refrigerant gases, foams or solvents, contribute to climate change when fluids with Global Warming Potential (GWP) are released into the atmosphere. The higher the GWP (reference value is CO<sub>2</sub> = 1), the stronger the negative climate impact. Indirect emissions are produced when RAC equipment consumes energy, resulting in the emission of GHGs from power plants. As energy production is the primary factor in the emission of GHG in the atmosphere, energy use is a key consideration. In fact, direct emissions only make up 10 to 40 per cent of total*

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<sup>142</sup> Duan, H., Miller, T. R., Liu, G., Zeng, X., Yu, K., Huang, Q., ... & Li, J. (2018). "A Chilling Prospect: Climate change effects of mismanaged refrigerants in China. Environmental science & technology".

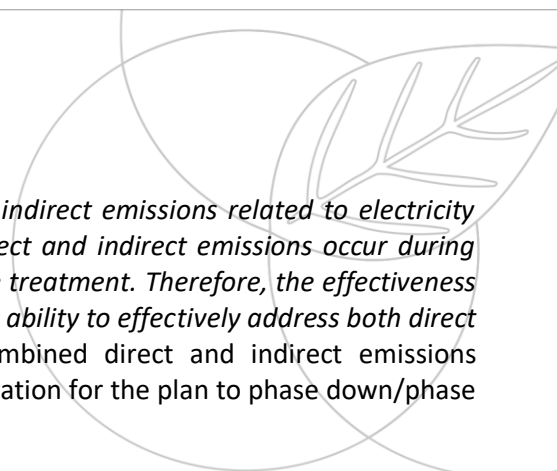
<sup>143</sup> Some of the policy recommendations include: prioritising air conditioners (ACs) over refrigerators (as results show that the GWP impacts are almost entirely derived from scrap ACs; promoting sound formal recycling of EoL RACs in collaboration with the informal sector; classifying refrigerants as hazardous waste; and enhancing the destruction rate of refrigerants.

<sup>144</sup> Duan, H., Miller, T. R., Liu, G., Zeng, X., Yu, K., Huang, Q., ... & Li, J. (2018). "A Chilling Prospect: Climate change effects of mismanaged refrigerants in China. Environmental science & technology".

<sup>145</sup> Under Section 608 of the Clean Air Act (CAA), the US EPA has established regulations (40 CFR Part 82, Subparts A and F) that are relevant to the disposal of refrigeration/AC equipment.

<sup>146</sup> see Box 4 on page 3.

<sup>147</sup> Unites States Environmental Protection Agency (February 2011) "How to Properly Dispose of Refrigeration and Air-Conditioning Equipment" [https://www.epa.gov/sites/production/files/documents/ConstrAndDemo\\_EquipDisposal.pdf](https://www.epa.gov/sites/production/files/documents/ConstrAndDemo_EquipDisposal.pdf) See also: Environmental Investigation Agency (2009) "Recovery and Destruction of ODS Banks to Protect Greenhouse Gas Reductions under the Kyoto Protocol." [https://content.eia-global.org/posts/documents/000/000/432/original/Recovery\\_and\\_Destruction\\_of\\_ODS\\_Banks\\_V2.pdf](https://content.eia-global.org/posts/documents/000/000/432/original/Recovery_and_Destruction_of_ODS_Banks_V2.pdf)



climate impact, while the remaining 60 to 90 per cent are indirect emissions related to electricity consumption. Over the lifetime of RAC equipment, both direct and indirect emissions occur during stages of production, operation, maintenance and end-of-life treatment. Therefore, the effectiveness of the KA in driving down GHG emissions hinges on a nation's ability to effectively address both direct and indirect emissions in national strategies."<sup>148</sup> The combined direct and indirect emissions associated with synthetic GHGs must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

164.5. A plan to phase down/phase out the use of synthetic GHGs cannot be a one-size fits-all approach because there are distinct classes of synthetic GHG uses in South Africa and different solutions to minimising the climate impacts of synthetic GHG uses for these different classes. These classes would be the use of synthetic GHGs in, for example: domestic refrigeration; commercial refrigeration; transport refrigeration; industrial refrigeration; room air conditioning; and heat pumps. The best solutions to minimise the climate impacts of synthetic GHG uses will depend on factors such as: public safety, technological complexity, and economies of scale that are unique to each class of use. Therefore, identification of the predominant classes of synthetic GHG uses in South Africa, and separate inventories for each class of synthetic GHGs, must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

164.6. Consideration must also be given to the role of minimum energy performance standards. Synthetic GHGs are used in a variety of appliances of varying energy efficiencies. Since *indirect* GHG emissions depend on the energy efficiency of appliances, the climate impact of synthetic GHG uses will depend substantially on energy efficiency performance standards that South Africa enacts for such appliances. Energy efficiency is a key component of the Kigali Amendment.<sup>149</sup> South Africa has adopted some minimum energy performance standards that can be the basis for advances in minimising the climate impacts of the use of synthetic GHGs.<sup>150</sup> Improving minimum energy performance standards must be a minimum consideration for the plan to phase down/phase out the use of synthetic GHGs.

165. Some of our proposed changes, are reflected on the wording of section 25 as follows, and must be read with the proposed amendments listed above:

#### **Phase-down and phase-out of synthetic greenhouse gas emissions and declaration**

18. (1) The Minister, in consultation with the Ministers responsible for the greenhouse gas emitting sectors and sub-sectors contemplated in section 22, must **within one year of the coming into operation of the Act**, by notice in the *Gazette*—
- (a). declare certain greenhouse gases to be synthetic greenhouse gases;
  - (b) specify, in respect of each of the gases listed in the declaration contemplated in paragraph (a), whether such gases are required to be phased out or phased down;

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<sup>148</sup> UNIDO (2017) "Africa and the Kigali Amendment" <http://ccacoalition.org/en/resources/africa-and-kigali-amendment> at page 8.

<sup>149</sup> *Ibid.*

<sup>150</sup> For example, "Compulsory Specification for Energy Efficiency and Labelling of Electrical and Electronic Apparatus" GN 944 in Government Gazette 38232 (28 November 2014).



prescribe thresholds for the use of synthetic greenhouse gases in terms of section 23(3)(b); and 35  
(c) contain timeframes for the phase-down or phase-out of synthetic greenhouse gases.  
(2) The Minister, in consultation with the Ministers responsible for the greenhouse gas emitting sectors and sub-sectors contemplated in section 22, and any affected party,

in the prescribed manner, must—

- (a) develop a plan to phase down or phase out synthetic greenhouse gases declared in terms of subsection (1); and
  - (b) review and update the plan provided for in paragraph (a) every five years.
- (3) A plan developed in accordance with subsection (2)(a) must—

- (a) address how importers and exporters of synthetic greenhouse gases must 45  
account for their emissions of synthetic greenhouse gases;
  - (b) contain measures that facilitate the phase-down or phase-out of synthetic greenhouse gases; and
  - (c) be consistent with the Republic's international obligations.
- (4) The Minister may allocate a carbon budget to persons undertaking activities that 50

give rise to emissions of the synthetic greenhouse gases declared pursuant to subsection (1), in which event the Minister must follow the process for the allocation of carbon budgets provided for in section 24.

#### National Greenhouse Gas Inventory (section 26)

166. The Bill should make provision that all data in the inventory is publicly accessible and that there is an obligation to ensure that the records and information are sufficiently detailed and structured to facilitate the monitoring of GHG emission trajectories at both the sectoral and individual facility level, and properly reported.
167. We recommend that the Bill make express provision for a GHG inventory: that goes beyond South Africa's international reporting obligations under the Paris Agreement; that is structured to facilitate the monitoring of sectoral and facility-level emissions; and that requires much more regular and comprehensive reporting, including on meeting the country's GHG trajectory. Section 20 of the Philippines' Climate Change Act, for example, requires annual reporting to the President and both Houses of Parliament "*giving detailed account of the status of implementation of [the] Act.*"<sup>151</sup> We have raised numerous concerns with the Department in relation to the current GHG Reporting Regulations and inventory system,<sup>152</sup> and we repeat our call for this system and process to be reviewed and amended, in particular to provide for **detailed facility-level reporting, transparent auditing and verification of data, and public access to GHG emission data**. The failure to do so affects the integrity of the entire data and reporting system.

#### **National Greenhouse Gas Inventory**

26. (1) The Minister must establish an institutional arrangement to facilitate a national system of data collection for the creation of a National Greenhouse Gas Inventory and the annual compilation of the National Greenhouse Gas Inventory Report.
- (2) The National Greenhouse Gas Inventory Report contemplated in subsection (1) 5 must—

<sup>151</sup> Philippines Climate Change Act, section 20.

<sup>152</sup> See or letter of 19 January 2018, at <https://cer.org.za/wp-content/uploads/2018/01/CER-letter-re-GHG-Regulations-19-January-2018.pdf>.

- (a) set out and analyse emissions trends, including detailed reports on changes in the greenhouse gas emissions intensity in the economy; and
- (b) compare actual greenhouse gas emissions against the national greenhouse gas emissions trajectory and national and international climate change mitigation 10 commitments and obligations.
- (c) **provide for detailed facility-level reporting, transparent auditing and verification of data**
- (d) **be publicly accessible**

(3) The Minister may by notice in the *Gazette* or in writing identify a list of activities and thresholds for which measurements or estimations of greenhouse gas emissions and carbon sinks from stationary, mobile, fugitive, process, agriculture, land use and waste sources must be carried out.

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(4) The thresholds stipulated in subsection (3) must be expressed as a function of activity for greenhouse gas emissions reporting and may be different for different activities, taking into account the significance of the contribution of these activities to total national greenhouse gas emissions as well as its completeness.

(5) A notice under subsection (3) must indicate the manner in which the information 20 must be furnished and, if required, how the information must be verified.

## Chapter 6: General Matters and Transitional Arrangements

### Regulations (section 27)

168. While we, in principle, have no objection to the Minister's powers to make regulations under the Act, we are concerned with the extent of issues and level of detail that has been left for regulation under section 27. This is highly problematic as it is likely to result in, *inter alia*: delays in the implementation of the Bill; legislative uncertainty; and inadequate commitment to applying and implementing the legislation, owing to the delayed and missing detail and the fact that regulations can be subject to more frequent change.
169. In relation to regulations that must be made by the Minister regarding compliance with and enforcement of carbon budgets (section 27(2)(a)(i)), we recommend that reference be had to our suggested change to the offence and penalties clause below.
170. We submit that, in relation to the matters prescribed in section 27(1)(c) the Minister must be compelled to make the necessary regulations. All of the matters prescribed in this sub-section are critically important for effective climate change adaptation, and are necessarily technical. The departments, provinces and municipalities referred to are almost certainly going to be requiring guidance and rules in order to navigate the evolving and complex climate adaptation landscape and an absence of rules is likely to lead to incoherence and under-performance.
171. We submit that the section 27(2) regulations that the Minister is compelled to make should be subject to public participation. It makes no sense to us that the discretionary regulations are subject to public participation, and the mandatory ones are not. The issue for which mandatory regulations are prescribed are a matter of public interest in the context of climate change and an adequate climate response.
172. Some of our proposed changes, in line with the above comments, as well as some non-substantive proposed amendments are reflected on the wording of this section as follows:

### **Regulations**

- 27(1) The Minister may make regulations—
- a. in relation to any matter necessary to give effect to the Republic’s international climate change commitments and obligations;
  - b. in relation to the management of climate change response including incentives and disincentives to encourage a change in behaviour towards the generation of greenhouse gases amongst all sectors of society;
  - c. **[that will promote effective monitoring, evaluation and the assessment of national progress in relation to climate change mitigation and adaptation matters, including—**
    - i. **in relation to the progress made by national departments, provinces and municipalities with the development and implementation of Sector 35 Adaptation Strategy and Plans, climate change needs and response assessments and climate change response implementation plans;**
    - ii. **in relation to the performance of the departments responsible for the functions contemplated in Schedule 2, as well as provinces and municipalities, in respect of the national adaptation objectives; and**
    - iii. **in relation to the consequences for the failure of the departments responsible for functions listed in Schedule 2 as well as provinces and municipalities, to report in the prescribed manner;]**
  - d. that will promote the effective monitoring, evaluation and assessment of national progress in relation to climate change matters and climate change data and information, including information necessary to determine climate change vulnerability and to foster resilience; and
  - e. in relation to the administration and operation of any committee established in terms of this Act, to ensure the achievement of its purpose, functions and responsibilities.
- (2) The Minister must make regulations—
- (a) in relation to the management of climate change response, including—
    - (i) the determination, review, revision, compliance with and enforcement of an allocated carbon budget, amendment and cancellation of a carbon budget allocation, the content, implementation and operation of a greenhouse gas mitigation plan, and all matters related thereto; and
    - (ii) the phasing down or phasing out of synthetic greenhouse gases, including the development of timeframes, inventories and mechanisms for reporting;
  - (b) that will promote the effective monitoring, evaluation and assessment of national progress in relation to climate change matters and climate change data and information, including information relating to direct and indirect greenhouse gas emissions, for the purposes of planning, analysis and monitoring and the compilation of the National Greenhouse Gas Inventory, and that will inform how the Republic may comply with any international obligations;
    - f. **that will promote effective monitoring, evaluation and the assessment of national progress in relation to climate change mitigation and adaptation matters, including—**
      - i. **in relation to the progress made by national departments, provinces and municipalities with the development and implementation of Sector 35 Adaptation Strategy and Plans, climate change needs and response assessments and climate change response implementation plans;**
      - ii. **in relation to the performance of the departments responsible for the functions contemplated in Schedule 2, as well as provinces and municipalities, in respect of the national adaptation objectives; and****in relation to the consequences for the failure of the departments responsible for functions listed in Schedule 2 as well as provinces and municipalities, to report in the prescribed manner;** and
  - (c) in relation to any other matter which the Minister must prescribe in terms of this Act.
- (3) A regulation made in terms of this Act may provide that any person who contravenes or fails to comply with a provision

thereof commits an offence and will be liable, upon conviction, to the penalties contemplated in section 49B(2) of the National Environmental Management Act.

### Public participation (section 29)

173. We submit that the effectiveness of notices provided must be enhanced.
174. A 30 day comment period may, in some circumstances, be an insufficient time period to consider and comment on technical, lengthy, or complex matters. We recommend that this provision be amended to allow for some discretion in respect of the timeframe by stating that at least 45 days should be provided.
175. We submit that section 18(3) – review of the National Adaptation Strategy and Plan – be included as a process subject to public participation.

#### **Public participation**

- 29.(1) Before exercising a power in terms of section 15(1), 16(1), 16(2), 17(1), 17(2), 18(2), **18(3)**19(1)(b), 19(1)(c), 20(1), 20(3), 21(1), 21(4), 22(1), 22(2), 22(3), 22(7), 22(9), 22(10), 23(1), 23(2), 23(5), 23(6), 25, or 27, the Minister, MEC or mayor must give notice of the proposed exercise of the relevant power—
- (a) in the *Gazette*; and
  - (b) in at least **[one] two** newspapers distributed nationally or, if the exercise of the power will affect only a specific area, in at least one newspaper distributed in that area.
  - (c) **in local languages as well as in English**
  - (d) **on local radio stations**
- (2) The notice must—
- (a) invite members of the public to submit to the Minister, MEC or mayor, as the case may be, within 30 days, **or within 45 days if the complexity of the issue is such that it warrants additional time**, 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 55 meaningful representations or objections, **including plain language explanation of technical information**
- (3) The Minister, MEC or mayor **[may in appropriate circumstances] must** allow any interested person or community to present oral representations or objections to the Minister, MEC or mayor, or to a person designated by the Minister or MEC or mayor. The Minister, MEC or mayor must give due consideration to all representations and objections received or presented before exercising the power concerned.

### Delegation (section 30)

176. We have no objection to provision being made for delegation of powers under the Bill. We do recommend, however, that:
- 176.1. provision be made for all delegations to be published and easily publicly accessible, for purposes of certainty, and to relieve the administrative burden of having to provide proof of delegation through formal information requests; and
  - 176.2. the powers of setting the emissions trajectory, of determining the SETs and of determining the GHG emission threshold (in the event that our recommendations that these be set in the Act itself, are

not followed), cannot be delegated.

176.3. Some of our proposed changes, in line with the above comments, as well as some non-substantive proposed amendments are reflected on the wording of this section as follows:

30. (1) The Minister may delegate a power or duty vested in him or her, excluding the power to make regulations in terms of section 27, in accordance with section 42 of the National Environmental Management Act.
- (2) An MEC may delegate a power or duty vested in or delegated to him or her in terms of this Act in accordance with section 42A of the National Environmental Management Act.
- (3) **Sub-sections (1) and (2) shall not apply to powers exercised in terms of sections 21 and 22.**
- (4) **Any delegations made in terms of sub-sections (1) and (2) must be published and made easily publicly accessible.**

#### Access to Information (section 31)

177. With due regard to our comments in paragraphs 47 to 54, we submit that the following amendments be incorporated into the Bill:

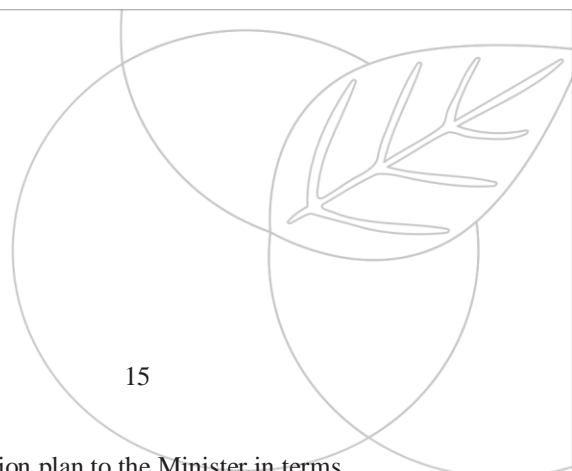
##### **Access to information**

1. Information provided to the Minister or the Department, **as well as all information generated by the Minister of the Department**, in terms of this Act must be [made available by the Minister subject to the provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).] **publicly accessible at all reasonable times, including but not limited to:**
  - (a) **allocated carbon budgets, and any exemptions thereto;**
  - (b) **greenhouse gas mitigation plans, and remedial plans where greenhouse gas mitigation plans are not being achieved; along with reporting against such plans;**
  - (c) **municipal and provincial needs and response assessments and climate change response plans; along with any reporting against such assessments and plans;**
  - (d) **all of the information relating to and contained in the National Greenhouse Gas Inventory;**
  - (e) **all reports provided for in this Act;**
2. **The Minister must, within one year of the coming into operation of the Act, cause the creation of an online climate change information platform which contains all pertinent information generated in terms of this Act, as well as general climate change related information which is of educational and awareness raising value for the public, and such platform must be publicly accessible.**

#### Offences and penalties (section 32)

178. With due regard to our comments at paragraphs 55 to 68 above, we submit the following amendments and additions as reflected below.

179. With regard to the clause on penalties and fines, we submit that the penalties as provided for in NEMA may be too low in many cases, due to most large emitters being large corporations with high revenues and turnover. We recommend that this aspect be workshopped, and that the social cost of carbon (referred to in paragraph 58 above) be used as a reference when devising the values for appropriate penalties.



### Offences and penalties

1. (1) A person commits an offence if:
  - (a) that person fails to prepare and submit a greenhouse gas mitigation plan to the Minister in terms of section 24(4);
  - (b) **that person fails to adhere to, achieve, monitor or report against a greenhouse gas mitigation plan approved in terms of section 24(2);**
  - (c) **that person exceeds their allocated carbon budget as contemplated in section 24(6)(e);**
  - (d) **that person fails to provide information required to be provided in terms of this Act, or provides false or misleading information in connection with any obligation created by the Act.**
- (2) A person convicted of an offence in terms of subsection (1) is liable to the penalties contemplated in section 49B(2) of the National Environmental Management Act, **and to a prescribed administrative penalty.**
2. **Notwithstanding subsection (2) above, where the carbon budget as allocated to a person for any period under review is exceeded, that person will be subject to the highest rate of carbon tax under the Carbon Tax Act, 2019.**

### Conclusion

180. We request and strongly recommend that the Bill be amended in line with the above comments and suggested changes.
181. We trust that the Portfolio Committee will give due consideration to our comments and take the necessary steps to ensure that an appropriately-amended Bill (in line with these comments) is finalised and promulgated as soon as possible, given the urgency of the matter.
182. We would welcome an opportunity to present these submissions to the Portfolio Committee in due course. Please do not hesitate to contact us should you have any questions or require additional information.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**

per:

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