



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

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Our ref: BA/NL
9 March 2022

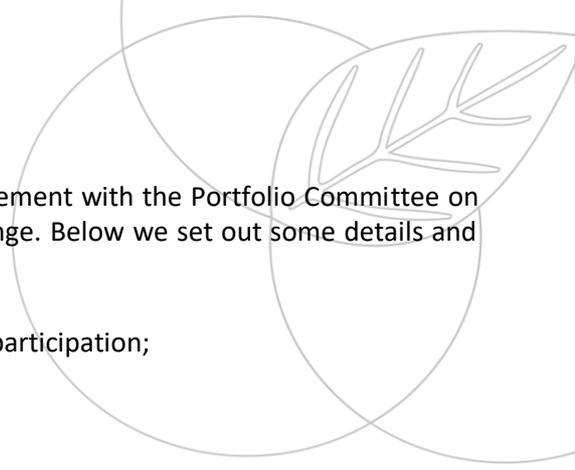
Dear Hon. Muthambi

CLIMATE CHANGE GOVERNANCE AND THE CLIMATE CHANGE BILL

1. We wish to thank you for the opportunity to address the Portfolio Committee on Environment, Forestry and Fisheries (“the committee”) on climate change governance and related matters in December 2021. It was gratifying for us to be able to share our research with the committee, and also to gain insight into the concerns and considerations of the committee members who engaged in the discussions following the presentation. It is a relief to know that the honourable members share many of our concerns about the severity and urgency of the intensifying climate crisis.
2. In order to cover a suitably wide range of the key climate change governance and response aspects in the presentation, we necessarily had to summarise and shorten these (though we of course could have gone into more detail on a number of important issues). We would be more than happy to engage with, or present on, any of these aspects in more depth, as well as facilitate conversations between the committee and some of the experts that we engage with, in regard to climate change, its impacts and the necessary responses.
3. From our side, we wish to maintain the momentum of this important conversation, and build on some of the issues with reference to the most recent developments. We also note that the Climate Change Bill (a crucial piece of draft legislation on the regulation of climate change in South Africa) was tabled in Parliament on 18 February 2022 and that this Portfolio Committee is scheduled to be briefed on the Bill on Friday 11 March 2022. The importance of this legislative tool and the measures that will flow from it will be of vital importance in driving South Africa’s ability to address this “*most pressing issue of our time*”.¹

¹ <https://www.gov.za/speeches/president-cyril-ramaphosa-virtual-leaders-summit-climate-22-apr-2021-0000>

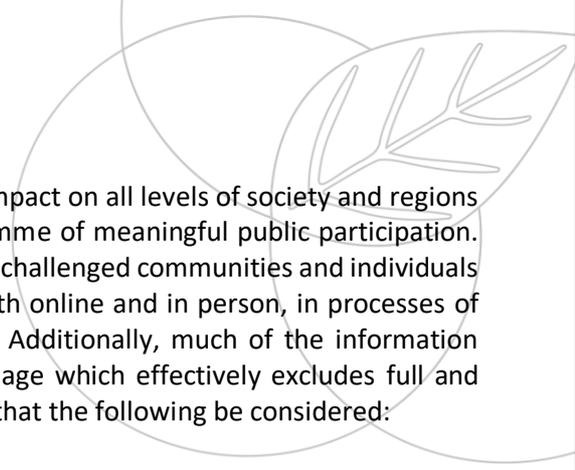
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4. In this regard, we welcome any questions or requests for further engagement with the Portfolio Committee on the matter of South Africa’s Climate Bill and governance of climate change. Below we set out some details and information that may be of assistance to the Committee:
 - 4.1. The Climate Change Bill (“the Bill”) – progress, timelines and public participation;
 - 4.2. Certain key governance principles covered in the Bill; and
 - 4.3. South Africa’s Nationally determined Contribution (NDC), including the ‘fair share’ concept.

THE BILL: TIMING, PROCESS AND PUBLIC PARTICIPATION

5. We are pleased and relieved to see that the Bill was formally tabled in the National Assembly on the 18th of February. It has long been our position that this critical piece of legislation is urgently required in order to empower all of the necessary stakeholders and provide the necessary prescripts to ensure a sound climate change response for South Africa.
6. We have shared our views on why a robust Climate Change Bill is important on a number of occasions, including in correspondence to this committee. We do not wish to repeat these points here, but do want to highlight some of the most recent developments which underscore the importance of sound climate legislation:
 - 6.1. The latest United Nations Intergovernmental Panel on Climate Change (IPCC) report on Adaptation, Vulnerability and Impacts was released last week on 28 February 2022. The report highlights the impacts of, and vulnerabilities to, climate change impacts and reiterates that *“any further delay in concerted anticipatory global action on adaptation and mitigation will miss a brief and rapidly closing window of opportunity to secure a liveable and sustainable future for all.”*²
 - 6.2. The recent \$8.5 billion climate finance deal has revealed a very important trend in the global climate financing realm. The signals sent out by a country in terms of climate targets and policies and measures create a perception that strongly influences whether such country is seen as an attractive investment destination. South Africa is arguably on the right track in this regard having already attracted some funds (though still not enough for an effective climate response), and it will be critically important that the all-important Climate Change Act is prioritised and regarded as being effective so that South Africa continues to attract this type of financial assistance, viewed in some circles as a lifeline. All around the world, nations’ climate legislation and policies are closely scrutinised and rated in terms of effectiveness.
7. We understand that the next phase is that the Bill is referred to the committee for consideration, and that the committee will then publish the Bill for public comment as an initial public engagement action step. We have also learned that the Department of Forestry, Fisheries and the Environment (DFFE) will be briefing the committee on the Bill on Friday 11 March 2022. In this regard, and based on our concerns as listed below, we offer a list of suggested questions for the DFFE which will hopefully bring clarity on various aspects of uncertainty.
8. There is already considerable interest in the Bill and the matters it purports to regulate. It will be invaluable to get an understanding of the committee’s expectations, plans and ambitions around timing of key milestones such as calls for public comment, public hearings, engagement in National Council of Provinces (NCOP) structures and the like. We understand that this can be difficult to determine precisely at this early stage, but any insight into approximate timing would be highly appreciated, given the importance of this process for stakeholders and the public more generally.

² <https://www.ipcc.ch/report/ar6/wg2/>

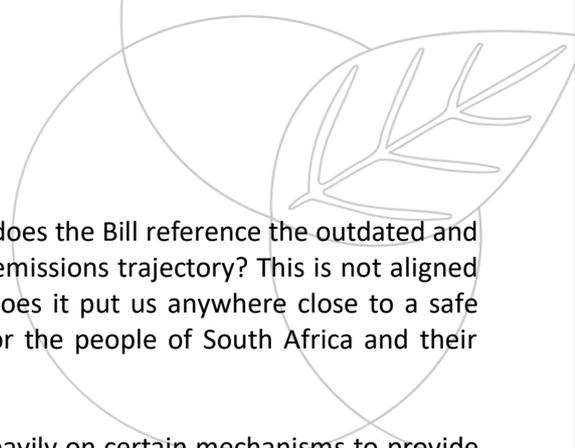
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9. Given the extent and nature of the climate crisis, and the far-reaching impact on all levels of society and regions in South Africa, we strongly encourage a highly comprehensive programme of meaningful public participation. Our experience has shown 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 circumvent this challenge, we recommend that the following be considered:
- 9.1. 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 - for example Emalahleni, Lephalale, Newcastle.
 - 9.2. Translation / interpreting services should be provided.
 - 9.3. Adequate and effective notice of hearings, invitations to comment and other participation processes should be provided.
 - 9.4. 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.
 - 9.5. Given that certain sectors of society – particularly women and youth – are shown to have 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.
10. 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.

KEY GOVERNANCE PROVISIONS IN THE BILL

11. While we will be engaging in depth on the content of the Bill via all available channels, and will be submitting detailed and motivated comments as these are called for, we believe that it would be useful to highlight some of the key concerns around governance mechanisms and their implications in the Bill, namely:
- 11.1. **Emission reduction targets:** Solid and ambitious emission reduction targets are essential to ensure adequate and effective climate change mitigation, one of the key objectives of the Bill. While we note that the Bill provides for the Minister to determine a national greenhouse gas emissions trajectory, we are concerned that the interim trajectory contained in Schedule 3 of the Bill is in fact South Africa’s 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, and they put the world on track for an up to 4°C warming³ increase on average globally (this could translate to 8°C⁴ for South Africa as it warms at twice the global average rate – an untenable situation). At the very least we were expecting South Africa’s NDC update of 2021 to be included here, as this is now SA’s emission target for 2025 and 2030. 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. We will speak further to our current NDC in the section below.

³ <https://climateactiontracker.org/countries/south-africa/targets/>

⁴ <https://iopscience.iop.org/article/10.1088/1748-9326/10/8/085004/pdf>



Suggested questions for the DFFE at the briefing on the Bill: Why does the Bill reference the outdated and highly insufficient 2015 NDC target as an interim greenhouse gas emissions trajectory? This is not aligned with our current commitments under the Paris Agreement, nor does it put us anywhere close to a safe climate response target – a position which is highly dangerous for the people of South Africa and their Constitutional rights.

11.2. **Urgency and timeframes - mitigation:** The Bill necessarily relies heavily on certain mechanisms to provide certainty and enforceability for key mitigation action, most notably the allocation of carbon budgets - these are an assigned amount of greenhouse gas emissions allocated to a person - by the Minister, as well as the determination of sectoral emissions targets – greenhouse gas emission limits to be allocated per sector. Neither of these key mechanisms 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 (a delay we cannot afford).

Suggested question for the DFFE at the briefing on the Bill: In the absence of timeframes for setting carbon budgets and sectoral emissions targets in the Bill, what are the DFFE’s plans for the timeous implementation of these important mitigation mechanisms?

11.3. **Urgency and timeframes – 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. 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. When we consider the nature of potential near-term climate impacts for South Africa – most notably threats to fresh water, food security, fire, infrastructure damage, and all of the related costs⁵ - many of which we have and are already experiencing to some extent, we can see that the need to mainstream climate change adaptation in the relevant organs of state is critically urgent.

Suggested question for the DFFE at the briefing on the Bill: Does the DFFE have any plans to support or initiate accelerated implementation of climate change adaptation measures on timescales more urgent than those provided for in the Bill?

11.4. **Penalties, compliance and enforcement:** We note that currently the only offence that is created in the Bill is the failure to provide a greenhouse gas mitigation plan. The potentially harmful act of exceeding an allocated carbon budget is not made an offence in the Bill, nor is the provision of false or misleading information. The climate crisis is predicated on the human-caused emissions of greenhouse gases, and it is specifically this activity which needs to be strictly and progressively reduced in accordance with a scientifically-informed emissions reduction trajectory. We are aware of the previous version of the Bill referring to an increased carbon tax rate, and that the Minister of Finance in the 2022 Budget Speech also referenced a higher carbon tax rate on emissions exceeding the carbon budget. We would need to see more detail on this mechanism. In any event, we take the view that the range of offences needs to be widened, and that criminal and administrative penalties need to be able to be levied by the regulator in appropriate cases.

Suggested question for the DFFE at the briefing on the Bill: Can the DFFE provide clarity on the carbon tax as a mechanism for enforcing carbon budgets, and how this interfaces with Treasury’s announcements in this regard? Why is the failure to provide a greenhouse gas mitigation plan the only offence in the Bill? What about contraventions of other provisions of the Bill or actions that contravene the objectives of the Bill?

⁵ <https://cer.org.za/wp-content/uploads/2021/09/Nick-King-Report-Final.pdf>

11.5. **Co-operative governance:** The Bill prescribes a possibly unprecedented level of co-operative governance in responding to the climate crisis – this is appropriate given the cross-cutting nature of climate change. National, provincial and local government organs of state all have critically important roles to play, and no less than 17 Ministries are delegated with considerable duties in terms of adaptation and mitigation response. We are of the view that the Bill will need to be carefully scrutinised so that all of these stakeholders are optimally empowered by the legislation to perform these roles. Over and above this, however, it will be important to ensure that financial and technical support is in place to ensure efficiency and functionality, and that the necessary political will is in place to drive this. We trust that the committee will play a pivotal role in helping to create the necessary conditions for effective cooperative governance by virtue of its centrality in South Africa’s climate change response.

11.6. **Transparency and access to information:** In its current iteration, the Bill provides for very limited access to information. Climate change affects every person in society in increasingly profound ways, and information concerning GHG emissions and their management, as well as adaptation measures, must be publicly-accessible. Our research of climate laws applied in other jurisdictions has yielded some very innovative approaches to access to information through legislation, which we would be happy to share with the committee in detail.

Suggested questions for the DFFE at the briefing on the Bill: Why is public availability of climate data not explicitly provided for in the Bill and why is public access not the default position for information regarding GHG emissions, mitigation and adaptation plans? The Minister of Environment’s appeal decision LSA190924 of 5 April 2020 in terms of the Promotion of Access to Information Act 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.”*⁶ She went on to say that she cannot find that redacting data on anticipated projected emissions and emissions reduction is justifiable or in the public interest.

SOUTH AFRICA’S NATIONALLY DETERMINED CONTRIBUTION (NDC)

12. Parties to the Paris Agreement, including South Africa, are obliged to submit successive NDCs every 5 years setting out their commitments to curb greenhouse gas emissions and address climate change.

13. South Africa’s NDC update of 2021, which is expressed as a range rather than one fixed value, is:
398 to 510Mt CO₂-eq for the years 2021-2025
350 to 420Mt CO₂-eq for the years 2026-2030

This is claimed in the NDC document to be a “significant progression” over its 2015 predecessor. It is indeed a notable improvement, and this is welcomed, but there are nonetheless concerns that this NDC is still not adequate to ensure sufficient ambition, safety or compatibility with the Paris Agreement, or, for that matter, South Africa’s Constitution and the entrenched right to an environment not harmful to health and wellbeing.⁷

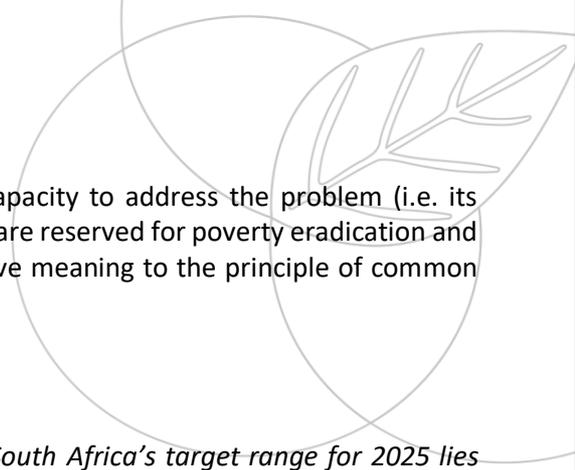
14. According to the renowned independent scientific climate action analyst, Climate Action Tracker (CAT), the 2021 NDC update is rated as *“insufficient”* overall, and is in line with holding global warming to 2°C, and not *“well below 2°C”* as required by the Paris Agreement as a minimum. To reach the Paris Agreement’s strongly urged safe limit of 1.5°C, South Africa’s targets and commitments would need *“substantial improvement”*.⁸

15. One of the key aspects that is causing South Africa’s rating to remain at *“insufficient”* according to CAT relates to the so-called **Fair Share**. The Climate Equity Reference Calculator (CERC) is a globally recognised tool that calculates each country’s fair share based on its share of the global responsibility for causing the climate problem

⁶ See <https://cer.org.za/wp-content/uploads/2019/12/PAIA-Appeal-Decision-Minister-Creecy-GHG-Reports-LSA190924.pdf>.

⁷ Section 24.

⁸ <https://climateactiontracker.org/countries/south-africa/>



(i.e. its historical and ongoing emissions) and its share of the global capacity to address the problem (i.e. its financial capacity, with exemptions for the incomes of the poorest which are reserved for poverty eradication and other sustainable development priorities). In other words, it seeks to give meaning to the principle of common and differentiated responsibilities.

16. South Africa's NDC also relies on the CERC and states that:

“South Africa’s whole updated target range for the upper end of South Africa’s target range for 2025 lies above the CERC 2 degree allocation (adjusted to include land use), and below the CERC 2 degree allocation for 2030 (as contained in Table 2) lie within the 2 °C fair share range based on the post September 2020 version of CAT (UCT 2021a). The lower end of South Africa’s 2030 target range lies within CERC’s 1.5 degree assessment (UCT 2021a)”

17. It is worth noting that, although our NDC is expressed as a range, in our experience, the perception is that it is only the upper end of the range that has legal and formal meaning. If we attain the upper end of the range – emit fewer emissions than that limit - we will have “achieved” our NDC according to the terms of the Paris Agreement, and in the eyes of the world and domestically. Conversely, we will have failed to achieve our NDC if we breach the upper limit.

18. The framework calculates that the fair share range – for South Africa – amounts to between 0.46% and 0.70% of the global effort in 2030. The fair share is calculated for both a 1.5°C pathway and a 2°C pathway. (Note, the 2°C pathway should not be considered consistent with the “well below 2°C” provision of the Paris Agreement.)

19. 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 draft NDC update to its fair share of the global mitigation effort to limit climate change. According to the findings⁹, South Africa’s fair share is:

274 to 352Mt CO₂-eq for a 1,5°C pathway; and

350 to 401Mt CO₂-eq for a 2°C pathway

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 1,5°C pathway. Even the lower range number only just touches the range for a 1,5°C pathway.

20. The COP 26 climate negotiations held in Glasgow in November and December 2021 saw nations being urged to strengthen ambitions and increase mitigation action. They were also requested to consider revising targets prior to COP 27 to be held in Egypt at the end of this year.

21. In light of the above factors, as well as the continually intensifying warnings from the scientific community, we strongly urge that the committee encourages and oversees South Africa improving its targets, and enquire whether this is something already under consideration.

CONCLUSION

22. We are committed to working with all stakeholders to help ensure a robust climate change response that takes the needs of South Africa and her people into account, and most meaningfully gives effect to our constitutional rights while enabling truly sustainable development for current and future generations.

⁹ <https://cer.org.za/wp-content/uploads/2021/05/NDC-vs-fair-share-memo-v04-corrected-version.pdf>

23. We welcome further engagement with the committee, and would appreciate opportunities to present on any of these, or other related, aspects of climate change governance and responses to the climate crisis.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS



per:

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