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Appeal against the decision of the Executive Council for Genetically Modified Organisms, to authorise various activities of Syngenta Seed Co. (Pty) Ltd regarding maize event Bt11, under the Genetically Modified Organisms Act, 15 of 1997.

Prepared on behalf of:

The Biowatch Trust

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Prepared by:

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1. INTRODUCTION

The Biowatch Trust ("Biowatch") is a national non-governmental organisation that acts in the public interest. It was established in response to, among other things, concerns arising from the widespread commercialisation of genetically modified organisms (GMOs) in South Africa, and the absence of civil society involvement in the determination of policy and law, and in decision-making, regulating their use, control and release.

Biowatch is aggrieved by the actions and decisions of the Executive Council for Genetically Modified Organisms ("the Council") and/or the Registrar: Genetically Modified Organisms ("the Registrar"), relating to an application made to the Directorate: Genetic Resources, Department of Agriculture, by Syngenta Seed Co. (Pty) Ltd ("Syngenta"), for the import of maize event Bt11 ("Bt11 maize") seed and the commercial planting and general release of Bt11 maize.

A party aggrieved by a decision or action taken by the Council or Registrar may, under section 19 of the Genetically Modified Organisms Act, 15 of 1997 ("the GMO Act") read with the Regulations promulgated under the GMO Act ("the Regulations"),¹ in accordance with the procedure prescribed in the GMO Act and the Regulations, appeal against such decision or action to the Minister for Agriculture ("the Minister").

Biowatch hereby appeals to the Minister to set aside the decisions made by the Council and/or the Registrar in June and July 2003 to authorise the import of Bt11 maize seed and the conditional general release and commercial planting of Bt11 maize by Syngenta.

2. THE FACTS

At the beginning of October 2002, Biowatch became aware that Syngenta had made application to the Directorate: Genetic Resources, Department of Agriculture, for the general release (by means of commercial planting) and testing (by means of field trials) of Bt11 maize, when it saw two public notices placed by Syngenta in *The Star* newspaper on 2 and 3 October respectively. Copies of these notices are attached as Annex "SA1."² From the notices, it appears that authorisations for field trials and general release of Bt11 maize were applied for simultaneously.

As it was entitled to under Regulation 6(3)(d) of the Regulations, on 30 October 2002 Biowatch sent the Registrar comments and objections with respect to Syngenta's proposed activities as detailed in the public notices. (A copy of the comment and objection document is attached, marked Annex "SA2".) Biowatch raised a number of concerns regarding the process in terms of which Syngenta's applications for the testing and general release of Bt11 maize were being considered, and some concerns

¹ GN R1420 of 26 November 1999, as amended.

² A second notice was published on 2 December 2002 in order to correct an error in the preceding notices. A copy of this second notice is attached as Annex "SA 1A".

regarding the nature and effects of Bt11 maize. In brief, Biowatch's primary concerns, upon reading the public notices were:

- that the simultaneous application by Syngenta for the authorisation of field trials and general release does not meet best practice procedures for biosafety, undermines the primary purpose of field trials, violates the environmental impact assessment provisions of the National Environmental Management Act, 107 of 1998 ("NEMA") and is at odds with the objectives of the GMO Act;
- that BT toxins may be harmful to the environment, as indicated by studies done abroad;
- that South Africa may be placing reliance on studies used by regulatory agencies in the United States of America which are methodologically flawed and consider the impact of Bt toxins on a different environment to South Africa with its unique biodiversity;
- that the public participation process undertaken by Syngenta and the Department of Agriculture regarding the application by Syngenta for the authorisation of field trials and general release, was flawed, with the effect that a number of constitutional and other rights of Biowatch and the public have been violated. These include:
 - the right of access to information contained in the Constitution of the Republic of South Africa Act, 108 of 1996 ("the Constitution");
 - the provisions of the Promotion of Access to Information Act, 2 of 2000 ("PAIA");
 - the principles contained in section 2 of NEMA; and
 - the provisions regarding public participation contained in the GMO Act.

In its comment and objection document of 30 October 2002, Biowatch reserved its rights to make additional comments and objections once it was in possession of further information regarding Syngenta's applications. It also requested to be notified, in writing, of any decisions of the Council in regard to Syngenta's applications referred to in the public notices.

Biowatch received an undated letter (attached as Annex "SA3") from the Registrar in response to its comment and objection document of 30 October 2002. In it, the Registrar acknowledged receipt of Biowatch's comment and objection document, and stated that the Advisory Committee appointed under the GMO Act was, at that time, reviewing Syngenta's application and would "take [Biowatch's] comments into consideration when compiling their report". The Registrar further stated that Biowatch's concerns would also be reviewed by the Executive Council when it assessed Syngenta's application.

Biowatch received a second letter from the Registrar containing a Department of Agriculture stamp of 15 January 2003, which is attached as Annex "SA4". In it, the Registrar dealt with Biowatch's comment and objection document in more detail, and referred to some (but not all) of the points raised in it. One of the concerns to which the Registrar responded, was the simultaneous authorisation for field trials and general

release of Bt11 maize. In particular, his letter states that “Although both applications have been submitted at the same time, the trials being conducted in the 2003-growing season will be completed before a decision has been taken on the general release application.” This statement does not appear to be supported by the information available on the Department’s website which, in Biowatch’s view, indicates that both authorisations were granted prior to the completion of the relevant growing season. Accordingly, the question of simultaneous authorisations remains a concern to Biowatch.

On 22 August 2003, when it logged onto the Department of Agriculture’s website, Biowatch became aware that four authorisations had apparently been granted to Syngenta by the Directorate: Genetic Resources in June and July 2003, for the import of B11 maize seed, field trials in respect of and conditional release of Bt11 maize. Notwithstanding that Biowatch had raised detailed concerns regarding Syngenta’s applications for authorisations under the GMO Act, had specifically requested that it be notified in writing of the outcome of Syngenta’s applications (in its comment and objection document of 30 October 2002 which is “SA2” hereto), and had been in correspondence with the Registrar over a number of months regarding those concerns, it was not notified, in writing or otherwise, of the granting of the authorisations.

On 9, 16 and 18 September 2003, Biowatch’s legal advisors, Winstanley, Smith and Cullinan Inc. (“WSC Inc.”) sent three separate written requests on behalf of Biowatch to the Registrar, for written notification of the granting of the reported authorisations to Syngenta, to enable Biowatch to exercise its rights of appeal under the GMO Act and the Regulations. The letters containing these requests are attached as Annexes “SA5”, “SA6” and “SA7”. Biowatch received a response from the Registrar by fax on 18 September 2003, which fax also arrived by post on 26 September 2003 (attached as Annex “SA8”). In it, the Registrar informed Biowatch that “The application in question was approved in the Council’s meeting on the 09 June 2003 and the Registrar was authorized to issue a permit.”

In its letter of 18 September 2003 (“SA7” hereto), WSC Inc. also requested from the Registrar, on behalf of Biowatch, under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), reasons for the decision to grant the four authorisations to Syngenta which form the subject of this appeal. In his letter received on 18 September 2003 (“SA8”), the Registrar stated that he had “requested the Executive Council for authorization to provide reasons for their decision”, and that the matter was being given urgent attention, and Biowatch would be notified as soon as the Council had responded. At the date of lodging this appeal, neither WSC Inc. nor Biowatch had received any further correspondence addressing the requests made in terms of PAJA.

In another letter of 18 September 2003, WSC Inc. also requested from the Information Officer of the Department of Agriculture, under Part 2 of PAIA, access to copies of the applications lodged by Syngenta with the Directorate: Genetic Resources, in respect of which Syngenta was granted the authorisations which form the subject of this appeal. On the same date, WSC Inc. received a letter from the Department of Agriculture acknowledging receipt of their letter and requesting payment of a fee which was duly deposited into the stipulated bank account held by the Department. At the date of lodging this appeal, neither WSC Inc. nor Biowatch had received copies of any of the documents requested in terms of PAIA.

In terms of section 19 of the GMO Act, read with Regulation 9 of the Regulations, Biowatch has 30 days from the date upon which it was notified in writing of the decision or action against which it wishes to appeal. The letter from the Registrar, attached as Annex "SA8", constitutes written notification of the decision against which Biowatch is appealing. The reference number of Annex "SA8" is 1/2/3/1 and it contains a Department of Agriculture stamp of 18 September 2003.³ Accordingly, Biowatch has 30 days from 18 September 2003, to lodge its appeal. It is lodging its appeal timeously.

3. WIDE APPEAL UNDER THE GMO ACT

Section 19(1) of the GMO Act entitles any person who feels aggrieved by any decision or action taken by, among others, the Council and the Registrar to appeal against such decision or action to the Minister who is then required to appoint an appeal board for the purpose of that appeal.

Section 19(4) of the GMO Act empowers the appeal board to:

" (a) confirm, set aside or amend the decision or action concerned which is the subject of the appeal;

(b) refer the relevant matter back to the Registrar for reconsideration by the Council; or

(c) make such other order as it may deem fit."

In an administrative appeal, the two principal considerations that must be borne in mind by the appellate body are the need to protect individual rights and interests and the application of public policy.⁴

South African law recognises three different kinds of administrative appeals. These are set out in the matter of *Tikly and Others versus Johannes NO and Others*.⁵ In this matter, the court held that appeal, in the context of administrative appeal, means either an appeal in the wide sense, an appeal in the ordinary strict sense or an administrative review, and that the meaning intended in a particular statute must be determined from the wording of the statute.⁶

The presence of the following factors would indicate an intention to confer a wide appeal:

- 1) the appeal is available against a determination or decision and the word 'against' is specifically used;

³ In terms of Regulation 9(1)(b), Biowatch is required to state the reference number and the date of the document by means of which Biowatch was notified in writing of the decision against which it is appealing.

⁴ *The New Constitutional and Administrative Law*, by Hoexter, C and Lyster, R, Volume 2, 2002, Juta at page 37.

⁵ 1963 (2) SA 588 (T).

⁶ *Tikly and Others versus Johannes NO and Others* 1963 (2) SA 588 (T) at 591B.

- 2) the administrative body making the initial decision (that is subject to appeal) is not required to retain a record of the proceedings in terms of which the decision was made; and
- 3) the parties to the appeal are entitled to appoint legal representatives.⁷

It is clear that the nature of the appeal conferred by section 19 of the GMO Act is a wide appeal. Firstly, section 19(1) provides for an appeal against a decision or action taken by the Council or the Registrar, among others. Secondly, there is no requirement in the Act or the Regulations that a record be retained by either the Council or the Registrar in relation to a decision to authorise the grant of a permit⁸ and thirdly, Regulation 9(5) entitles the appellant to appoint legal representation during any appearance before the appeal board.

A wide appeal requires a complete re-hearing and re-determination on the merits of the decision or action appealed against, with or without the consideration of additional evidence or information.⁹ This means that the appeal board appointed in terms of the GMO Act would not be confined to the information or evidence already considered by the Council and/or the Registrar in relation to the decision to authorise the grant of a permit to Syngenta and would be empowered to review the decision being appealed against in order to determine whether it was procedurally fair.¹⁰

In our view, the provisions of NEMA impose an obligation on the appeal body constituted in terms of the GMO Act to apply the national environmental management principles set out in section 2 of the National Environmental Management Act¹¹ ("NEMA"). These principles are guidelines to which any organ of state must refer when exercising any function under a statute that requires a decision to be taken concerning the protection of the environment.¹² This means that the appeal body must scrutinise the proceedings giving rise to the decision being appealed against, to ensure that they were procedurally fair and reasonable, with particular regard to the importance of public participation and, in the event that they are found not to be, set the decision aside on that basis alone. This follows from the following principles set out in section 2 of NEMA:

"2(4)...(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge."

⁷ *Tikly and Others versus Johannes NO and Others* 1963 (2) SA 588 (T) at 591H-593B.

⁸ Regulation 5(8) only requires that written reasons be furnished to an applicant where the application is refused.

⁹ *Tikly and Others versus Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A.

¹⁰ *The New Constitutional and Administrative Law*, by Hoexter, C and Lyster, R, Volume 2, 2002, Juta at page 40.

¹¹ Act 107 of 1998.

¹² Section 2(1)(c) and (e) of NEMA.

From the preceding discussion, it is apparent that the appeal by Biowatch against the decision of the Council and/or the Registrar requires both a complete re-hearing and re-determination on the merits of the decision, with such additional evidence and information as may be necessary, and a review of the decision on procedural grounds.

4. GROUNDS OF APPEAL

Set out below are the grounds upon which Biowatch challenges the merits of the decision by the Council and/or the Registrar to grant authorisations to Syngenta for the import of Bt11 maize seed and the conditional general release of and field trials in respect of Bt11 maize. As the written reasons for this decision¹³ have not yet been made available, Biowatch reserves the right to amend and/or supplement its grounds of appeal after the receipt thereof.

4.1 Failure to properly consider and/or give effect to the applicable provisions of NEMA

Biowatch contends that the decision by the Council and/or the Registrar fails to properly give effect to the principles contained in section 2 of NEMA which apply to the actions of all organs of state that may significantly affect the environment.¹⁴

These principles include the following:

- development must be socially, environmentally and economically sustainable, and sustainable development requires the consideration of all relevant factors including that a risk-adverse and cautious approach be applied, taking into account the limits of current knowledge of consequences of decisions and actions;¹⁵
- the social, economic and environmental impacts of activities, including disadvantages and developments, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment;¹⁶
- Decisions must take into account the interests, needs and values of all interest and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.¹⁷

As noted in section 3 of this document, these principles apply to the actions of all organs of state, including the Registrar and the Council, and are intended to guide both the taking of decisions by such organs and their interpretation, administration and implementation of the GMO Act and the Regulations.

¹³ WSC Inc. requested these reasons on 18 September 2003. In this regard see Annex " SA7".

¹⁴ NEMA section 2(1).

¹⁵ Section 2(3) and (4)(a)(vii) of NEMA.

¹⁶ Section 2(4)(i) of NEMA.

¹⁷ Section 2(4)(g) of NEMA.

The simultaneous authorisation for the conducting of field trials and the conditional general release of GMOs demonstrates a failure to properly consider and give effect to the principles of NEMA highlighted above, in particular, the principle that a risk-adverse and cautious approach should be applied. Further, the apparent reliance by the Council on research into the effects of Bt11 maize conducted in the United States of America and other foreign jurisdictions,¹⁸ having different biodiversity and, consequently, different environmental issues, demonstrates a failure to adhere adequately to the NEMA principle that environmental impacts be assessed.

The failure of the Registrar and/or the Council to offer any information or facts rebutting the concerns raised by Biowatch regarding the toxicity of Bt11 maize,¹⁹ indicates a failure to recognise the knowledge displayed by Biowatch in their comments and objection document, thus violating the NEMA principle that the decisions of organs of state should take into account all forms of knowledge.

4.2 Failure to properly apply the objectives of the GMO Act

The objectives contained in the preamble to the GMO Act state that the Act is intended to provide for measures to, among other things, ensure that all activities involving the use of GMOs are carried out in a way that limits possible harmful consequences to the environment and, further, to ensure that GMOs do not present a hazard to the environment. For a number of reasons, Biowatch contends that Bt11 maize presents a hazard to the environment. These are set out fully in Annex "SA1" and include possible insect resistance to Bt toxins, the negative effects of Bt toxins on non-insect species and the potential build-up of Bt toxins in soil.

The reference to an "insect resistance management system" in the first notice reproduced in Annex "SA1" suggests that the relevant administrators within the Department were aware of some of the risks posed by Bt toxins but does not address Biowatch's concerns adequately, nor does it deal with the other risks identified by Biowatch.

Accordingly, the decision of the Council and/or the Registrar reflects a failure to apply the objectives of the GMO Act highlighted above properly.

4.3 Too great a reliance placed on information supplied by applicant with vested interest

In the absence of any plausible rebuttal of many of the concerns raised by Biowatch in the various correspondences received from the Registrar, it is Biowatch's contention that too great a reliance was placed on information provided by Syngenta in making the decision to grant the authorisations requested by Syngenta.

This amounts to an over-emphasis on the individual (commercial) interests of Syngenta at the expense of the concerns and interests of the public.

¹⁸ In this regard, see pages 3 and 4 of Annex "SA1".

¹⁹ In this regard, see the section numbered 2 on page 3 of Annex "SA1".

4.4 Decision incorrectly construes the environmental right contained in the Constitution

Section 24 of the Constitution of the Republic of South Africa²⁰ ("the Constitution") entrenches the rights of all South Africans to an environment that is not harmful to health or well-being and imposes an obligation on the state to protect the environment, for the benefit of present and future generations. These rights may only be limited where such limitation is justifiable and reasonable.²¹

In the present context, Biowatch has demonstrated sufficient grounds to suggest that Bt toxins are harmful to the environment. It is clearly not justifiable for the commercial interests of Syngenta to limit the constitutional rights of all the individuals in whose interests Biowatch acts and accordingly, the decision by the Council and/or the Registrar to grant the relevant authorisations to Syngenta, constitutes a failure to take the reasonable measures to protect the environment, required by the Constitution.

5. GROUNDS FOR PROCEDURAL REVIEW

What follows are the grounds identified by Biowatch that support its appeal to the Minister for the setting aside of the decision by the Council and/or the Registrar on procedural grounds. As noted in section 3, the Minister is empowered to review the procedure underlying the decision due to the wide nature of the appeal powers conferred by the GMO Act.

Biowatch reserves the right to amend and/or supplement these grounds at a later stage upon further information being made available to it.

5.1 In the process leading to the granting of the authorisations, and in the granting of the authorisations, mandatory and material procedures or conditions prescribed by empowering provisions were not complied with

5.1.1 NEMA

Section 24 of NEMA requires that, in respect of all activities that require authorisation or permission by law and which may significantly affect the environment, the potential impact on:

- 1) the environment;
- 2) socio-economic conditions; and
- 3) cultural heritage

²⁰ Act 108 of 1996.

²¹ Section 36 of Act 108 of 1996.

be considered, investigated and assessed prior to their implementation and reported to the organ of state charged by law with authorising, permitting or otherwise allowing the implementation of that activity.²²

This would apply to the activities authorised in terms of the decision that Biowatch is appealing against. Firstly, due to the fact that Syngenta requires authorisation under the GMO Act in order to conduct those activities and secondly, due to the fact that Biowatch's concerns demonstrate the significant effect that such activities may have on the environment.

As stated elsewhere in this document, Biowatch has a number of concerns regarding the extent to which the environmental impact of the importation of Bt11 maize seed and field trials for and general release of Bt11 maize was adequately assessed. In addition, Biowatch is concerned that the impact of Bt11 maize on socio-economic conditions and cultural heritage has not been properly assessed and may, in fact, not have been considered, investigated or assessed at all. Accordingly, these important provisions in NEMA have, in all likelihood, not been complied with prior to the making of the decision to grant authorisations to Syngenta under the GMO Act.

As noted elsewhere in this document, NEMA also lays down a number of environmental management principles that apply to the actions of all organs of state that may significantly affect the environment.²³ They constitute guidelines to which organs of state must refer when taking any decision under NEMA or any other statutory provision concerned with the protection of the environment.²⁴ They also guide the interpretation, administration and implementation of all laws concerned with the protection or management of the environment.²⁵ Among the principles are several of relevance to public participation in environmental decision-making. For example, the participation of all interested and affected parties in environmental governance is required to be promoted,²⁶ and decisions must be taken in an open and transparent manner.²⁷

In the process leading to the granting of the authorisations, and the granting itself, it is the contention of Biowatch that the Registrar failed to apply the NEMA environmental management principles of relevance to public participation and the taking of decisions in an open and transparent manner.

The reasons for this contention include the failure of the Council to properly deal with the concerns raised by Biowatch in Annex "SA2" in any of the methods provided by the GMO Act²⁸ and the failure of the Council to give Biowatch any indication of the Council's views or to notify it of the outcome of the Council's deliberations.

²² Section 24(1) of NEMA.

²³ Section 2.

²⁴ Section 2(1)(c).

²⁵ Section 2(1)(e).

²⁶ Section 2(4)(f).

²⁷ Section 2(4)(k).

²⁸ In this regard, section 7(6) of the GMO Act empowers the Council to invite comment from knowledgeable persons and/or to invite additional persons to advise the Council.

In addition, the public participation principles contained in section 2 of NEMA were further undermined by the fact that the public notices contained insufficient information to enable Biowatch to respond fully to the authorisations requested. This is partly the result of Syngenta's failure to comply with the requirements under the GMO Act and the Regulations and is addressed more comprehensively in section 5.1.2. While the Registrar disputes the extent to which the GMO Act and the Regulations stipulate the amount of information required in a public notice,²⁹ he does acknowledge that insufficient information was made available in the notices by the following statement contained in his letter of 13 September 2003: *"To limit the inadequate supply of information in a public notice in future, the Council will deliberate on a method to standardise the information contained in a press release according to the provisions of the GMO Act."*

Inadequate disclosure of information restricts the ability of interested parties to respond to applications for authorisations under the GMO Act and this, in turn, undermines the effectiveness of the public participation process.

The duty imposed by NEMA would require the Council and the Registrar to ensure that Syngenta complied with the public notice requirements as its failure to do so renders the public participation process ineffective.

5.1.2 The GMO Act and the Regulations

Regulation 6(1) of the Regulations requires that applicants for permits for the activities listed in column 1 of Table 1 of the Annexure to the Regulations, are required to notify the public of any proposed release of GMOs before making application for such release. Notification is to be in the form of a standard notice, which is required to contain, among other things, a full description of the GMOs that the applicant for the permit intends to release, and a description of the proposed trial release, including the area and environment in which it is to take place.³⁰

The notices published by Syngenta under Regulation 6 regarding its applications for field trials for, and general release of, Bt11 maize, fail to comply with the provisions of Regulation 6(3).³¹ Among other things, they fail: to identify the gene inserted into the maize varieties in question; to identify or describe the maize varieties in question; to describe the receiving environment of the GMOs; and to specifically describe the area/s of proposed release. By failing to ensure compliance by Syngenta with the public notification procedures contained in the Regulations, the Registrar breached his duty in terms of Regulation 5(7) which is to examine conformity of all applications to the GMO Act and refer those not in compliance back to the relevant applicant for rectification.

Further, section 11 of the GMO Act obliges the Advisory Committee constituted in order to advise, among others, the Council, to liaise with organisations concerned with

²⁹ Annex "SA4" at section 3.2.

³⁰ Regulation 6(3).

³¹ Although Biowatch has not yet received the amended notices, it is not anticipated that the content would be materially different. It would be necessary for the appeal body to consider the second notices and it is hoped that the appeal body would have more success in obtaining copies from the Department of Agriculture or Syngenta.

biosafety.³² The organisations contemplated by the legislature would include Biowatch yet this obligation has not been complied with.

The GMO Act requires a risk-averse approach to activities relating to GMOs. This is evident from the objectives of the Act, stated in the preamble, and including the limitation of possible harmful consequences to the environment and ensuring that genetically modified organisms do not present a hazard to the environment. The emphasis on risk aversion is further demonstrated by the requirement in Regulation 3 of the Regulations that adequate assessments be undertaken before activities involving genetic modification are undertaken. While Biowatch has not had sight of the applications made by Syngenta,³³ the outcome of these applications together with the content of Biowatch's correspondence with the Registrar (all of which is attached), does not advance any basis for disputing the material risks perceived by Biowatch and summarised in Annex "SA2".

5.2 The process leading up to the granting of the authorisations and the process applicable to the granting of the authorisations, was procedurally unfair

The examples given in relation to the other grounds highlighted above all suggest a process that was slanted towards the interests of Syngenta and cannot be said to reflect procedural fairness.

In addition, there appear to be inconsistencies between certain statements in the public notices. The statement is made (in both notices reproduced in Annex "SA1") that Bt11 maize has been extensively tested for negative impact to humans, animals and the environment and that "No such negative impact has been recorded." In the notice relating to the proposed general release, reference is made to the set-up of an "insect resistance management system". The need for such a system is difficult to understand unless there is in fact a negative impact on insects coming into contact with Bt11 maize. These inconsistencies or, at best, ambiguities further confirm the failure to provide sufficient information to allow for a standard of public participation process that is required to ensure procedural fairness.

5.3 Constitutional rights were violated in the process leading up to the granting of the authorisations and the process applicable to the granting of the authorisations

It has already been noted, in section 5.1.1 hereof, that insufficient information was provided to Biowatch in relation to the Syngenta application and, as yet, no information has been supplied to Biowatch pursuant to its requests under PAIA and PAJA.

The failure of the Council and/or the Registrar to ensure a procedurally fair decision-making process, in which the principles of public participation and open, transparent decision-making are upheld, has contributed to the violation of Biowatch's right of access

³² Section 11(1) (c).

³³ A request has been submitted on behalf of Biowatch for copies of the applications by WSC Inc. in terms of the Promotion of Access to Information Act 2 of 2000.³³

to information and its right to administrative action that is lawful, reasonable and procedurally fair. These are fundamental rights conferred upon Biowatch by the Constitution of the Republic of South Africa.³⁴

Further, the non-compliance with the GMO Act and Regulations by Syngenta and the failure of the Council and/or the Registrar to rectify this and adopt a cautious approach to the risks inherent in Bt11 maize is in violation of Biowatch's constitutional right to an environment that is not harmful to health or well-being and its right to have the environment protected, for the benefit of present and future generations,³⁵

In our view, for the reasons suggested in section 4.4, a limitation of these rights is not reasonable and justifiable in the present circumstances.

5.4 Failure to give appropriate weight to Biowatch's comments and objections

From the information available to Biowatch, in particular the content of the public notices contained in Annex "SA1", it appears that the information used to assess the risks inherent in Bt11 maize was taken from international studies. For the reasons set out in Annex "SA2", conclusions drawn from foreign jurisdictions cannot be used as a basis for establishing the risks to South Africa's unique biodiversity. Biowatch is not aware of any appropriate risk assessments conducted in South Africa in relation to Bt11 maize, other than those presented to the Department by Syngenta (and referred to in Annex "SA1"). The merits of placing sole reliance on studies commissioned by the applicant are dubious, at best, given its vested interests. In addition, the public notices refer to international studies as the basis for Syngenta's expectation of its applications being successful which suggests that the assessments provided by Syngenta are based on these international studies. Accordingly, Biowatch contends that the decision by the Registrar and/or the Council fails to recognise the gravity of Biowatch's concerns, in relation to the types of studies relied on in formulating policy for and making decisions on GMO approvals.

In addition, the decision by the Council and/or the Registrar indicates a failure to afford sufficient weight to the other concerns raised by Biowatch and set out in Annex "SA2".

6. SUSPENSION OF AUTHORISATION GRANTED TO SYNGENTA

In our view, procedural fairness requires that the decision to grant a permit under the GMO Act) be suspended during the time within which an appeal may be lodged against the relevant act and, in the event that an appeal is lodged, until the outcome of such appeal.³⁶ Accordingly, Biowatch requests that the Registrar suspend the operation of the authorisations granted to Syngenta in terms of the GMO Act, pending the outcome of Biowatch's appeal. The effect of this would be to render unlawful the exercise by Syngenta of any of the rights conferred upon it by the authorisation prior to the outcome

³⁴ Sections 32 and 33 of Act 108 of 1996.

³⁵ Section 24 of Act 108 of 1996.

³⁶ This request has been made previously by WSC Inc in a letter to the Registrar of 9 September 2003, attached as Annex "SA5".

of Biowatch's appeal. The Directorate: Genetically Modified Organisms would be under a legal duty to enforce the provisions of the GMO Act and take the prescribed action against such unlawfulness.

7. CONCLUSION

Biowatch is hereby exercising its entitlement in terms of section 19 of the GMO Act to appeal against the decision of the Council and/or the Registrar to grant a permit (or permits) to Syngenta authorising the importation of Bt11 maize seed and the general release of, and field trials in relation to, Bt11 maize.

Accordingly, the Minister is obliged to appoint an appeal board in accordance with section 19 for the purposes of a complete re-hearing and re-determination on the merits of the decision, with such additional evidence and information as may be necessary, and a review of the decision on procedural grounds. In this regard, Biowatch has scientific papers and other information in relation to the concerns expressed in this document and would be happy to make those available, at the request of the appeal board and/or the Minister.

Upon receipt of the appeal board's decision, the Minister may take such action as she considers necessary. In doing so, the Minister should be guided by the legal principles applicable to all organs of state, most notably the NEMA environmental management principles, and the provisions of the GMO Act and the Constitution. On the strength of the grounds set out in this appeal, Biowatch asks that the Minister set aside the decision of the Council and/or the Registrar to grant a permit (or permits) to Syngenta authorising the importation of Bt11 maize seed and the general release of and field trials in relation to Bt11 maize.

In the event that the appeal does not adequately address the irregularities of the process underpinning the decision by the Council and/or the Registrar, a judicial review of the decision will be applied for under PAJA.

DATED at CAPE TOWN on this 16th day of OCTOBER 2003.

C.P. CULLINAN & J.A. EASTWOOD