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Erosion of Public Participation Rights: Reflection by a Retired Environmental Lawyer and Member of Parliament

By
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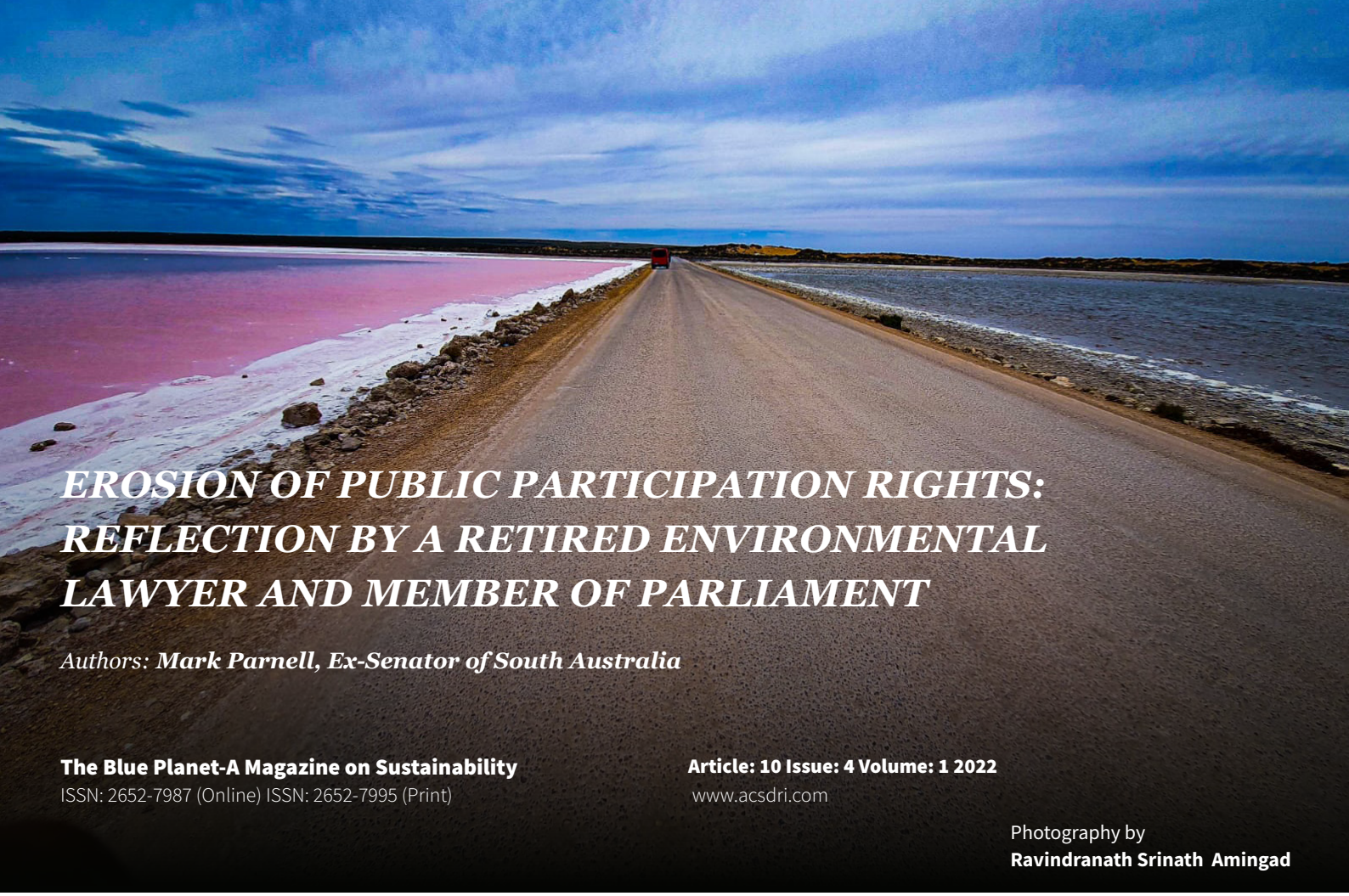

EROSION OF PUBLIC PARTICIPATION RIGHTS: REFLECTION BY A RETIRED ENVIRONMENTAL LAWYER AND MEMBER OF PARLIAMENT

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Introduction

Over the last several decades, one of environmental law's most consistent and depressing themes has been the erosion of public participation rights. This includes 'soft' rights, such as the right to make a submission or have your say, and 'hard' rights, such as the right to appeal against the merits of government decisions. Also being eroded are fundamental rights of judicial review, such as the ability of environmental advocates and groups to insist that proper processes be followed and the environment be protected appropriately. Less obvious erosions are at the parliamentary level, where the ongoing tension between the Executive and the Legislature sees the former prevailing over the latter more often than not.

This article uses some South Australian examples from recent decades to show how this erosion is achieved and why environment professionals should be concerned about its implications.

It is All About Power

When it comes to the environment, governments have long realized that they either lack science or are doing the bidding of their corporate donors. The proposed Nuclear Waste Dump in South Australia is a recent example. Under this plan, the National Radioactive Waste

Management Facility will be designed to permanently dispose of low-level nuclear waste (for example, medical waste) and potentially store intermediate-level waste (for example, nuclear reactor waste from Lucas Heights in New South Wales) temporarily until a more permanent solution can be found.

This project has pitted federal, state, and territory governments against each other for decades. SA went so far as to pass special state legislation back in 2000 to make it clear that nuclear waste dumps were illegal within the state. Nevertheless, the Federal Government has overrode state laws through its legislation.

Remarkably, the debate in the Senate over the enabling Commonwealth legislation was not so much about whether the dump was actually needed as about how to ensure that the Minister for Resources' decisions could not be challenged in court, particularly by First Nations representatives or conservation groups. The original Bill identified Kimba in SA as the site of the facility. As a decision of Parliament, that would have been very difficult, if not impossible, to challenge.

Following amendments, the Bill now provides a short list of locations, with the Minister for Resources making the final decision. While Kimba will again certainly be chosen, that will then be an administrative decision subject to review pursuant to the Administrative Decisions (Judicial Review) Act 1979 (Cth).

Ultimately, amendments to the Bill were passed to enable judicial (but not merits) review. This 'concession' was hard-fought and ultimately overshadowed the more important threshold question about whether moving dangerous intermediate-level nuclear waste from one 'temporary' storage site (Lucas Heights, NSW) to another (Kimba, SA) was a good idea.

For decades, conservationists have fought to have safeguards and checks and balances included in decision-making processes, with some success. Now many of these protections are being dismantled. Governments are characterizing important accountability measures as unnecessary. We are told that these measures impede progress, do not improve decisions, and cause significant harm to the economy.

The language might change over time, but phrases like 'business certainty' and 'efficient decision-making' are usually euphemisms for 'let us make sure those pesky environmentalists and their even peskier lawyers cannot interfere with the right of the Government to make whatever decision it likes, regardless of the impact on the environment or what the public might think.

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As environmental advocates with national conservation groups and lawyers with the Environmental Defenders Office (EDO) in SA, we saw many cases where relevant information and important stakeholder views were deliberately withheld from the decision-making process. Even when conservation groups did manage to get a foot in the door, we saw successful environmental challenges quickly overturned by executive action and the door firmly shut to challenge further.

Fortunately, the legal profession rallied behind the EDOs, and the funding was maintained, but with conditions, including a 'no litigation' restriction. At the time, we were the only part of the legal aid family of services not able to use legal aid funding in the courts on behalf of our clients.

The View from inside the Parliament

My subsequent 15 years as a legislator in the State Parliament were equally frustrating. I opposed the inadequacies at every opportunity, but regardless of who was in power, their philosophy was the same: make it as hard as possible (and preferably impossible) to challenge Government decisions on environmental grounds. That philosophy now permeates the statute books. In the state of SA, whether explicitly or by omission, many of our Acts, regulations, and other statutory policy instruments deny citizens a voice and any meaningful engagement in many decisions that affect them personally and the environment more generally.

Below is a description of some of the deliberate tactics used to prevent or undermine more genuine public participation in environmental decision-making.

Banning legal challenges

In a famous 1999 case, the Conservation Council of SA successfully overturned the approval for 42 tuna feedlots in the sea near Port Lincoln on the grounds that the development was not 'ecologically sustainable'. The decision of the Environment Resources and Development Court in what was then the state's longest-ever environmental trial stood for about a week before the Government passed new regulations (now superseded) declaring that henceforth, such developments would be beyond legal challenge. The developers relodged their defeated applications, which were then duly approved with no ability for objection. The relevant Planning Scheme was also eventually changed to remove the term 'ecologically sustainable', once it became apparent that these words had some meaning.

That experience convinced me that over-reliance on the courts has severe limitations. If I wanted to help defend the environment, I needed to be closer to where the laws were being made.

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(Incidentally, given the 'litigation restriction' imposed on EDOs by the Howard Government, the EDO had to do its fundraising to defend the action opposing the development application).

Going through the motions of public participation

Given that Australia is one of the most urbanised countries in the world, it is not surprising that urban developments, particularly urban sprawl, feature prominently in the rollcall of environmental disputes. One development, in SA, involved rezoning farmland for housing on the urban fringe of Mount Barker. This rezoning process did involve public consultation, including lengthy public hearings which ran for over five nights, for 15 hours in total. Every one of the hundreds of representations was opposed to the plans for urban sprawl, yet the Government's hand-picked 'Advisory Committee that heard all the objections waved it through with minimal changes and the Minister then gazetted 1,300 ha of farmland for urban use.

In a subsequent Ombudsman's inquiry, it was found that the Government's planning consultant was also working for the private property developers who had bought up the farmland in anticipation of rezoning, but the horse had bolted by then. No amount of hand-wringing could wind back the clock or return the farmland.

One recent dispute was over rezoning an old industrial site in Adelaide's inner suburbs. There was agreement that this underused site could be redeveloped, but disagreements persisted over building height and density. When one of the Government's committee members was absent from a meeting, the non-government MPs were able to use their numbers to support disallowance—for the first time since the Development Act 1993 (SA) (Development Act) came into force 25 years earlier.

This allowed the developer and residents to negotiate a mutually acceptable outcome for future development. The zoning rules were adjusted and the disallowance motion was quietly dropped, with no fanfare or publicity. The question remains, though, why it should take the absence of an MP from a committee meeting to deliver proper public participation and an outcome that suits all parties.

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Welcome to the silo

One of the frustrations of tackling massive global problems such as climate change is the difficulty with convincing government planning bodies that they have a role to play. Most jurisdictions now have statutory planning policies dealing with climate change that tend to focus on 'adaptation' rather than 'mitigation'. This tends to take the form of not allowing building too close to the coast in case sea levels rise and buildings are flooded but seems not to consider as relevant the issue of whether the planned development would help to drive climate change in the first place.

For example, in SA, the State Planning Commission is responsible for assessing significant new developments, including new fossil fuel power stations. Following good planning practice, the officers involved have taken great care to explore visual amenity, traffic implications and noise levels; however, they have not paid attention to the fact that burning fossil fuels to generate electricity is bad for the climate.[1] Indeed this is something that we need to stop doing as a matter of urgency? I ensured in my last few years in Parliament that I always attended planning hearings for new gas power stations and always raised climate change impacts as my main submission. My objections, though heard politely, had no effect.

Planning authorities might be hamstrung by 'existing use rights' in relation to existing fossil fuel power generation facilities, but when it comes to brand new facilities my experience is that the proponent has not been asked to estimate the emissions. When challenged, the best planning authorities can offer is acknowledgement that climate change was raised in submissions, without taking responsibility for addressing the issue in a planning context. Accordingly, I have raised this concern many times in Parliament, in the media and in other contexts: 'What planet do these people live on?'.

Limiting Public Participation to Policy, not Assessment Decisions

Most people don't get particularly excited by the prospect of making submissions on government policies. However, when the bulldozers turn up to start clearing the bushland or laying concrete slabs it is easy to fill the local hall with protesters. It is cold comfort to be told, 'It's too late now – you should have submitted five years ago when we consulted over the rezoning'.

An important part of this strategy for the Government is regulating that consultation can be on 'planning policy' only, with no opportunity for public comment when actual development applications are eventually lodged. It's the 'wedding clause': speak now, or forever hold your peace! For example, a government might consult on, and eventually adopt, a general policy that allows it to identify suitable areas for nature-based tourist accommodation. Then, environmentalists are told they can't be heard when it decides to support a development of exclusive private cabins and lodges in unspoilt wilderness in the middle of a national

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park. The hand-picked Government assessing body can simply shrug its collective shoulders, since it is legally prohibited from considering submissions or hearing public concerns.[1] It will only hear from the proponent developer and a few government agencies. It approves most applications that come before it.[1] Furthermore, often even the development plans are not available for public view.

That is precisely what happened with the iconic Flinders Chase National Park on Kangaroo Island.[1] Despite courageous judicial review proceedings instituted by local conservationists against the development,[1] the project was all set to proceed until the devasting bushfires of 2019–2020 decimated the National Park. The fires were a tragedy for Kangaroo Island, but the SA Government's denial of the basic rights of public participation was a serious hit to democracy as well.

Resilient Communities Don't Give up

However, despite this depressing backdrop of the denial of public rights, I am continuously heartened by and amazed at the resilience of communities. They know they are up against it, but they fight on. Sometimes the fight is conducted in the courts, but when those avenues dry up direct action is put back on the table. Iconic environmental battles such as the fight to save the Franklin River in the 1980s used every tool in the shed – legal action, direct action, community education and political pressure.

Movements like Extinction Rebellion are born out of regulatory and institutional failure. These groups include lawyers who realise that putting all your trust in these legal and political institutions will not deliver the needed change. If our political and legal processes were up to properly protecting the environment, dealing with the climate crisis and reversing our appalling loss of biodiversity, then no one would need to lie on the road to block traffic or 'superglue' themselves to anything.

After a lifetime of working for the environment in the law and in politics, my message to campaigners is pretty simple. Don't give up entirely on legal and political institutions; be clear-eyed about the system's limitations. As a politician my advice to constituents, and as a lawyer my advice to clients, was: 'Don't put all your eggs in one basket, and always have another plan ready as well, because more often than not the institutions will let you down.'

About the author:

Mark Parnell has worked for the environment for the last 31 years. This includes 15 years as a Greens Member of the Parliament of SA, 10 years as a solicitor in environmental law with the Environmental Defenders Office (EDO) and 6 years with state and national conservation groups. He is now working with community groups and campaigners to help demystify the workings of Parliament.

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- For example, the inclusion of 'civil enforcement' rights in planning, pollution and some natural resource legislation in SA. See Development Act, s86; Environment Protection Act 1993 (SA), s104; and Natural Resources Management Act 2004 (SA), s201.
First Dog on the Moon, 'Green tape! It's destroying our booming economy just to protect those fur-covered things' (cartoon), The Guardian, 29 June 2020 <https://www.theguardian.com/commentisfree/2020/jun/29/green-tape-its-destroying-our-booming-economyjust-to-protect-those-fur-covered-things>.

- For example, the Development Act, s38(17), provides that representations on development applications from anyone other than immediate neighbours '[are] not required to be taken into account' and 'will not have any effect'.

- For example, in 2000, following the Conservation Council of SA's win in the case referred to at notes 11 and 12 – the 'Tuna feedlot' case (see <https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/1409/attachments/original/1429164947/impact_57.pdf?1429164947>) – the Government passed new regulations to prevent future legal challenge. The defeated development applications were relodged and approved with no opportunity for third party appeal.

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The 'Tuna feedlot' case, ibid, was determined on planning principles contained in the relevant 'Development Plan'. The principles of development control under the old Land Not Within a Council Area (Coastal Waters) Development Plan under the Development Act have been amended many times; however, the specific requirement that all development in coastal waters must be 'ecologically sustainable' has never again been included.

Members of the Development Policy Advisory Committee (DPAC) under the former Development Act were appointed by the Minister for Planning. The author was briefly a member of this Committee during the early 2000s.

The DPAC advice to the Minister was initially kept secret, but was eventually published and can be found in the archives. See <https://www.dpac.sa.gov.au/__data/assets/pdf_file/0013/113332/Mount_Barker_Urban_Growth_DPA_Report_to_the_Minister.pdf> p 8, for reference to the fact that every submission over five hearings was opposed to the rezoning.

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Planning, Development and Infrastructure Act 2016 (SA), ss46 and 74.

Parliamentary Committees Act 1991 (SA), s8.

- There was some discussion in the Committee about whether there was one other casefrom the early 1990s, but, while it may have reached the Legislative Council Notice Paper, there is no record of its being debated. Regardless, the process is very rare given the hundreds of rezonings that the Parliament has considered over the years.The motion disallowing the rezoning was 'discharged' from the Notice Paper of the Legislative Council on 4 December

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2019 following agreement between the property owner, local residents, the government and the local Member. So it was never debated on the floor of Parliament, but was unanimously 'discharged' with only the author offering an explanation of it. See <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-28804>.

- Advice from the SA State Commission Assessment Panel (SCAP) is not generally published, but redacted copies can be obtained under the Freedom of Information Act. For example, the advice from SCAP to The Hon John Rau MP, Minister for Planning, on 15 February 2018 in relation to a proposed Alinta Energy gas/diesel power station at Reeves Plains (SA) acknowledged that climate change was raised as an issue by representors, but stated that 'consideration was not able to be given to the wider strategic implications of the proposal as raised in public representations.' In other words, it was not the job of this body to assess the proposal against climate change policy. This is my experience, having studied many development applications for fossil fuel power stations. In SA, even where public submissions are allowed, copies of development applications are routinely pulled from the Government website after the hearing. Rather than maintaining an 'archive' of old applications, the State Planning Commission required Freedom of Information applications before releasing documents that were briefly freely available. At time of writing, the practice of removing documents still persists. See under 'Previous Meetings' at <https://www.saplanningcommission.sa.gov.au/scap/about_scap/commission_meetings>.

M Parnell, 'Revised Phase Three (Urban Areas) Planning and Development' (Submission, 18 December 2020) <https://plan.sa.gov.au/__data/assets/pdf_file/0008/762677/Parnell,_Mark.pdf.

- At the hearing the Presiding Member of the State Commission Assessment Panel acknowledged the strong public interest in the development, and the frustration of opponents at not being able to make representations. This resulted in the proponent accusing the Presiding Member of not being impartial. See <https://www.adelaidenow.com.au/business/sa-business-journal/the-company-which-wants-to-build-sleeping-pods-on-kangaroo-island-says-the-lengthy-approvals-process-has-been-sidetracked/news-story/3dd08a8e38fb7104145d685bc722234d>.

Under the Planning, Development and Infrastructure Act 2016 (SA), the Governor on the recommendation of the Planning Minister appoints members to the State Planning Commission and Assessment Panel.

Under the Planning, Development and Infrastructure Act 2016 (SA) and its predecessor, the Development Act, the right to make a representation either in writing or in person is limited

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to certain categories of development, mainly those that are well outside the contemplation of the relevant planning scheme or zone. In relation to private tourism developments inside Flinders Chase National Park, the Chair of the SCAP said it was 'unfortunate' that the public was excluded from the process: <https://www.adelaidenow.com.au/business/sa-business-journal/controversial-kangaroo-island-accommodation-plan-wins-development-approval/news-story/2fa70e8ec34a652866908938d61cfc0f>

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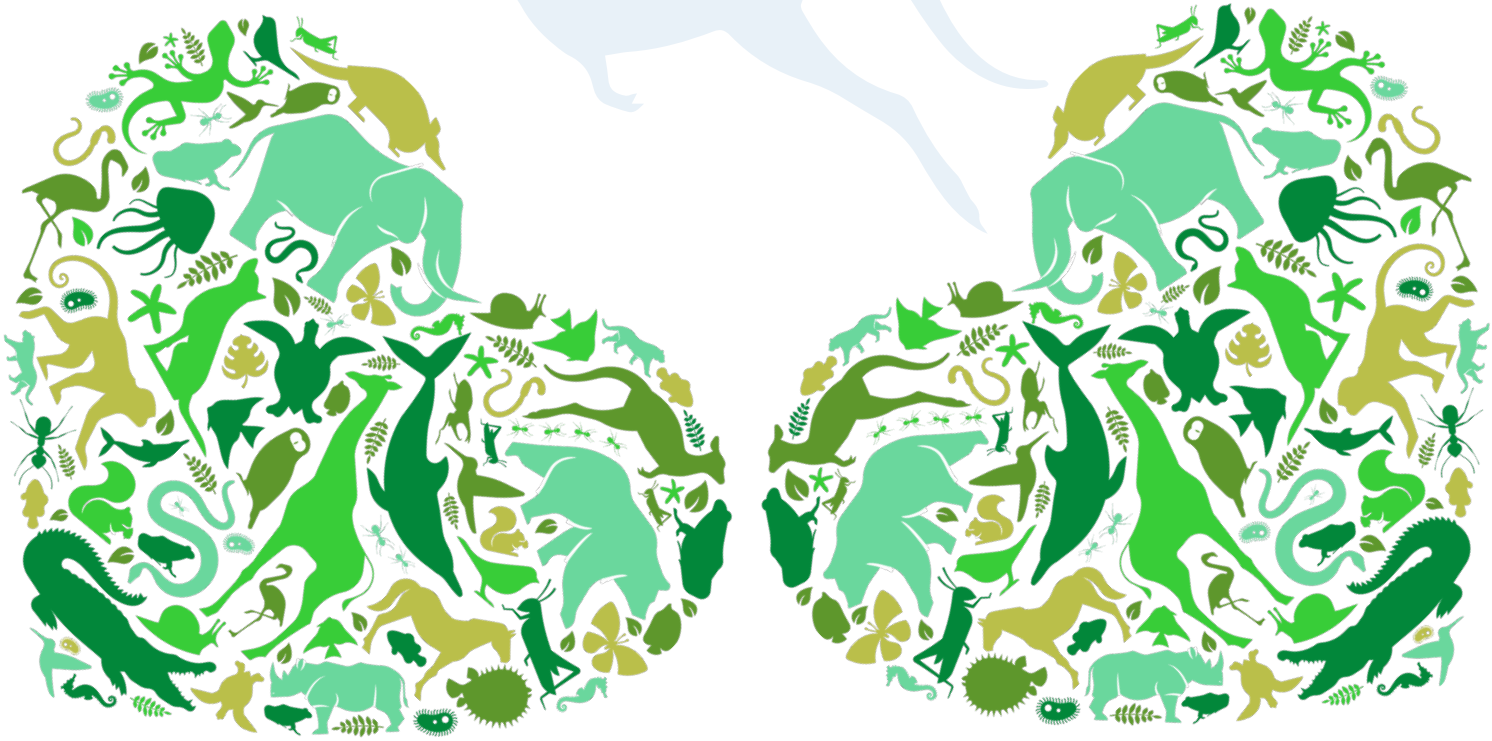

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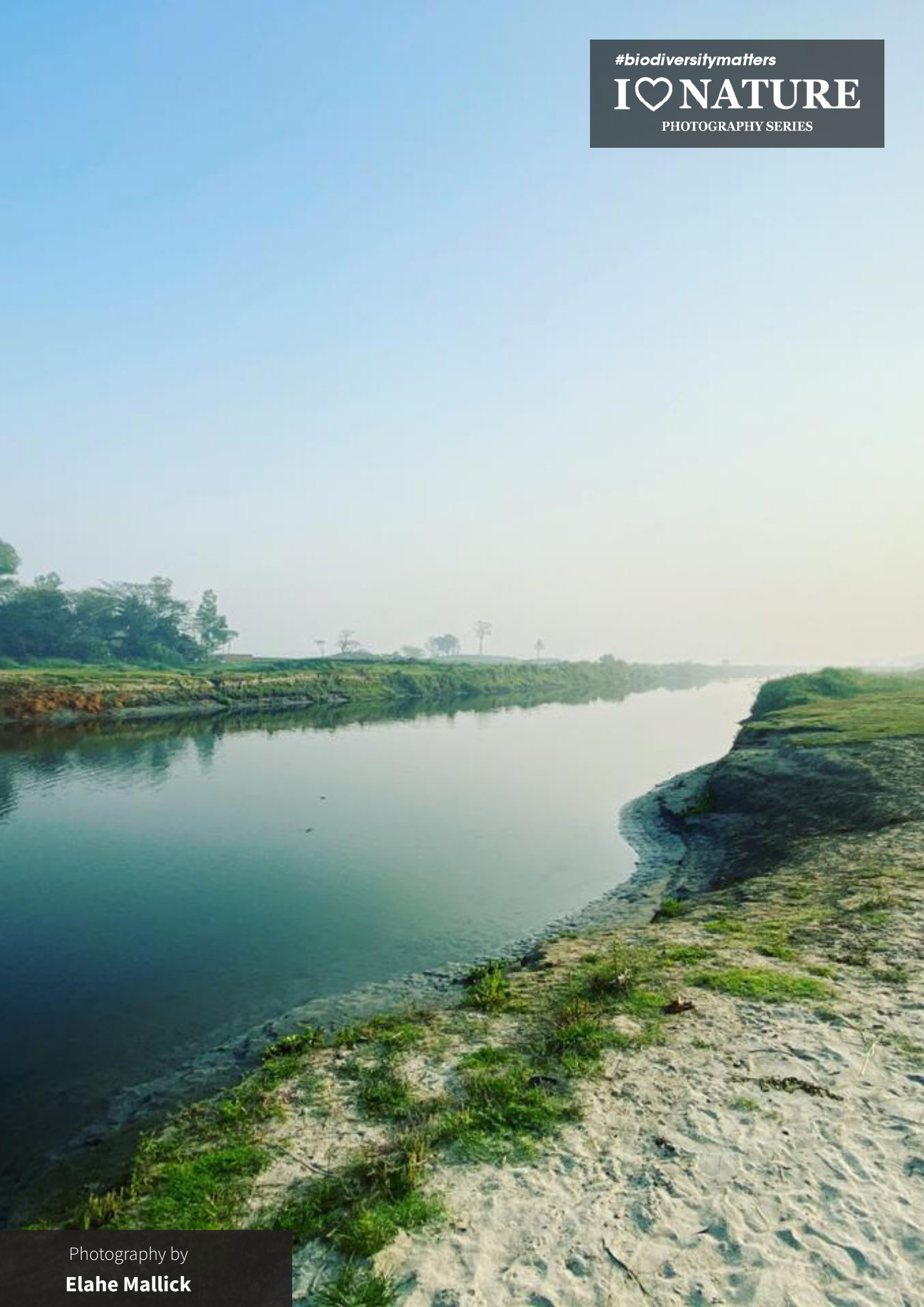

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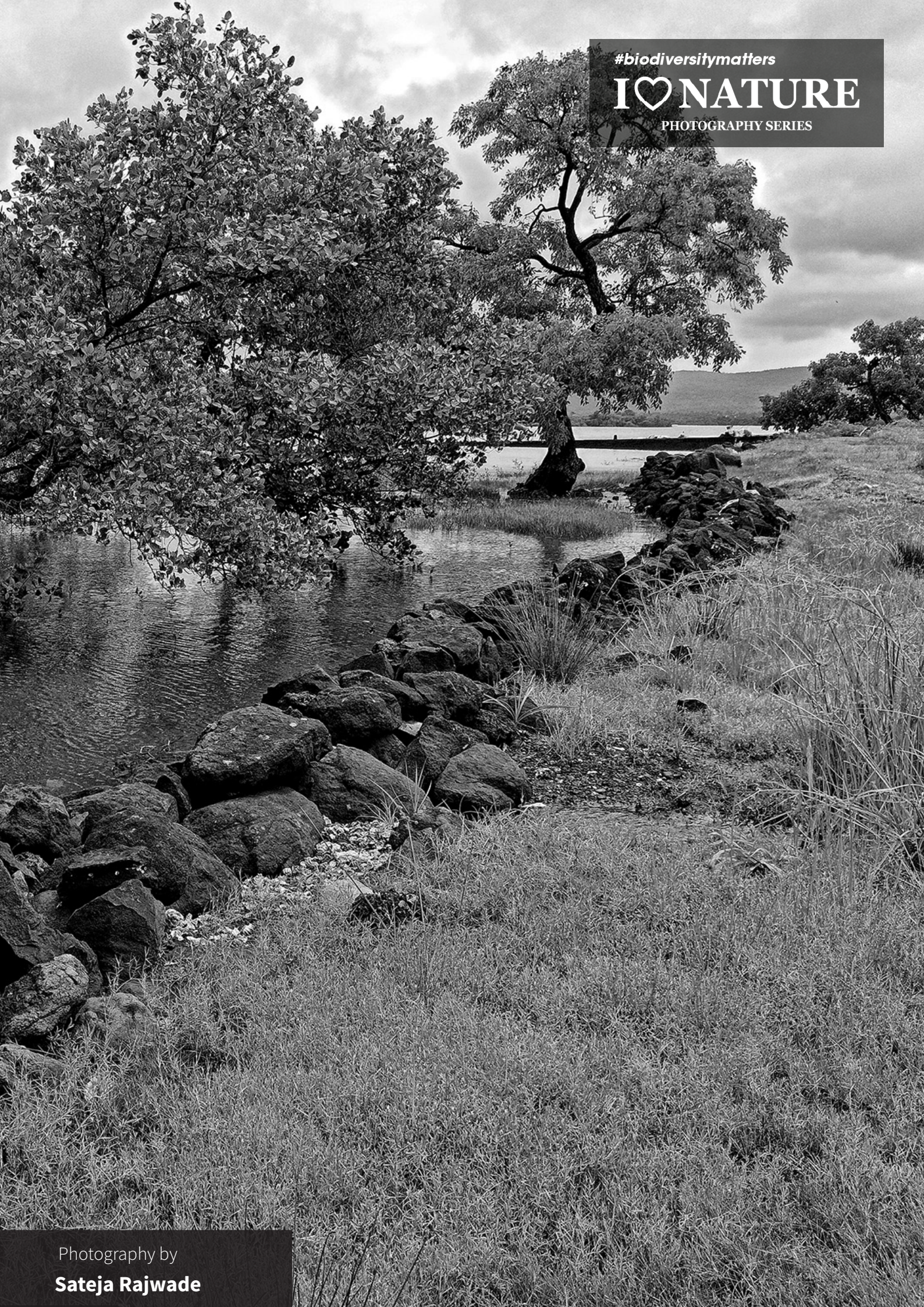

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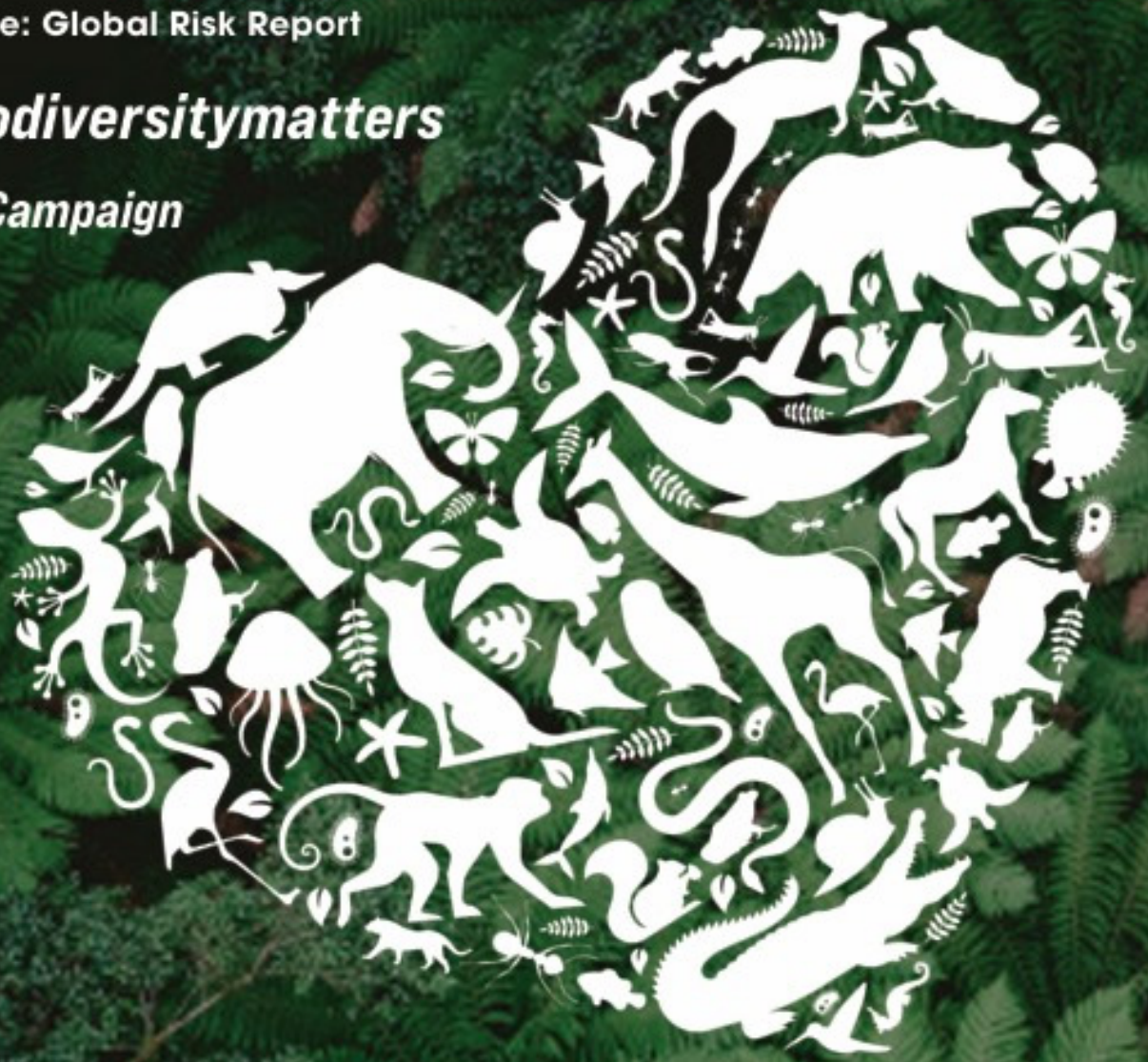

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