PSAM
Public Service Accountability Monitor

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ADVANCING YOUR RIGHT TO SOCIAL ACCOUNTABILITY

Parliamentary Portfolio Committee for Agriculture, Forestry and Fisheries

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COMMENT ON NATIONAL FORESTS AMENDMENT BILL

1. Background

The Public Service Accountability Monitor (PSAM) interacts extensively with the administration of the National Forests Act, with particular emphasis on the protection of natural forest.

2. Comment on existing provisions of the Bill

Re Clause 2 of the Bill (insertion of section 2A in Act 84 of 1998)

(a) It is suggested that the insert (and its heading) should refer to *forest resources* and not *forestry resources.* The latter term is not defined in the Act, but *forestry* is defined as *the management of forests, including the management of land which is not treed but which forms part of a forest management unit.* This definition accords with definitions yielded by a random internet search, the common denominator being that the definitions are couched within a management paradigm. On the other hand, the insert is in the first instance about trusteeship, the object of which, we aver, is forest resources, with their management being subsidiary to the trusteeship, as is in fact duly provided for within the insert. Within this context, and given the definition of *forestry* in the Act, the insert's embracement of management amounts to it providing for management of management, which clearly does not make sense.

(b) That said, it is not, in our view, a given that the acts of protection, conservation, development, regulation, management, control and utilization of forest resources, as provided for in the insert, will necessarily be equally applicable to all forest resources, and hence it is proposed that the reference to these acts be qualified by the inclusion of terminology along the lines of "as the case may be" or "where applicable" or suchlike.

Re Clause 3 of the Bill (amendment of section 7 of Act 84 of 1998, as amended)

A. Inclusion of prohibition relating to forest vegetation other than trees

(a) The insertion of section 1*(aA)* is fully supported, but the inclusion of the word *forest* within the term *indigenous forest vegetation* is perplexing. If its inclusion is with a view to confining the prohibition to vegetation forms such as the creepers which may form a substantial and integral component of natural forests, while at the same time excluding forms which do not co-occur with trees in the same manner, such as ground cover, it can be argued that it fails to achieve this, since recourse to the definition of *forest* in the Act, read together with the definition of *forest produce,* points to the terms *indigenous vegetation* and *indigenous forest vegetation* having the same meaning when used within the context of natural forests. Hence if the intention is indeed to exclude certain forms of indigenous vegetation from the prohibition, it is suggested that the means of doing so will have to be revisited.[1]

If however this is not the intention, then the inclusion of the word *forest* in the latter term is not only unnecessary and serves no useful purpose, but is moreover misleading, since *indigenous forest vegetation* invokes primarily the notion of indigenous forest rather than of indigenous vegetation *per se,* thereby detracting from the essence of the prohibition. It additionally gives rise to confusion in as much as the Act as a whole refers to natural forest rather than indigenous forest – indeed the insertion itself refers to natural forest, in which respect the reference to *indigenous forest vegetation in a natural forest* epitomizes the anomalous and confusing nature of the section's terminology. All told, therefore, if the intention is not to exclude certain forms of vegetation from the prohibition, then the word *forest* should be excluded from the term *indigenous forest vegetation.*

(b) Separately, the heading of section 7 needs to be amended to reflect that henceforth the section will no longer pertain only to trees in natural forests, but also cover other forms of vegetation in such forests. The logical amendment would be for the heading to read *Prohibition on destruction of natural forest,* although this would result in the replication of virtually identical terminology in the description of Part 1 of Chapter 3 of the Act, which immediately supersedes section 7. This may not be appropriate or desirable, but is obviously the lawmaker's preserve.

The reference to indigenous trees in the same description will also have to be expanded to include "other indigenous vegetation", or suchlike.

B. Absence of offence provisions pertaining to indigenous vegetation other than trees in natural forests

With the Bill laudably expanding the scope of section 7 of the Act to include indigenous vegetation other than trees, the scope of section 62 needs to be

[1] This should certainly not be taken to infer that the prohibition itself should be dispensed with, however.

expanded correspondingly. Further comment is provided on this below in relation to section 18 of the Bill.

C. Substitution of subsection 1*(b).*

(a) In line with our comment above, the reference to *indigenous forest vegetation* should be changed to *indigenous vegetation.*

(b) The reference to *paragraph (b)* at the end of the substituted subsection is incorrect, the correct reference being to *paragraph (aA).*

(c) Crucially, and rendering it meaningless, the following content (as currently included in the Act), or an equivalent, has been omitted from the end of the substituted paragraph:

……except in terms of-
(i) a licence issued under subsection (4) or section 23; or
(ii) an exemption from the provisions of this subsection published by the Minister in the Gazette on the advice of the Council.

Clearly this needs to be rectified.

D. Substitution of subsection 7(4)

(a) The reference to *subsection 1(a), (b) or (c)* is incorrect, the correct reference being to subsection *1(a), (aA) or (b).*

E. Addition of subsection 7(5)

(a) This subsection is unconvincing. PSAM provided extensive comment on it to the Department of Agriculture, Forestry and Fisheries (DAFF) in July 2015, but it was not taken into account. Key issues are captured here briefly, but it may be prudent for this input to be supplemented.

(b) In the first place it is unclear why the subsection is only applicable to section 7(1)*(a)* of the Act, and submitted that it should be equally applicable to section 7(1)*(aA),* if not also to 7(1)*(b).*

(c) Section 7(5)*(a)*(ii) provides for a written notice to specify steps to be taken to prevent a breach when the breach has already occurred.

(d) Section 7(5)*(b)*(i) appears to be repetitious of section 7(5)*(a)*(ii).

(e) It is unclear why section 7(5)*(b)*(i) refers only to *damage* when this is but one of a suite of terms referred to in section 7(1)*(a)*, upon which subsection 7(5) is premised.

(f) Section 7(5)*(b)* refers to *penalties in terms of section 63(2),* but section 63 deals with offences, not penalties.

(g) Penalties are in any case the preserve of the criminal justice system, not the Minister, as implied by Section 7(5)*(b).*

(h) A written notice in terms of this subsection should expressly indicate that applicable penalty provisions are not excluded by virtue of the notice being issued.

(i) The subsection should be reviewed in conjunction with regard being had for enforcement provisions provided for in the National Environmental Management Act.

Re Clause 6 of the Bill (amendment of section 15 of Act 84 of 1998, as amended)

Deletion from subsection (1) of paragraph *(a)*

Alarmingly, the deletion from subsection (1) of paragraph (a) has the effect of eliminating from the Act the prohibition against cutting, disturbing, damaging or destroying protected trees. It has to be believed that this constitutes a drafting error, is not an intentional amendment, and will be duly corrected.

Re Clause 7 of the Bill (amendment of section 16 of Act 84 of 1998)

The words *the Minister may request the registrar of deeds for the area to make an appropriate note* (as currently included in the Act), or an equivalent, have been omitted from the end of the substituted paragraph, thereby rendering subsections 1 and 2, and part of subsection 3 meaningless. Again It has to be believed that this constitutes a drafting error, is not an intentional amendment, and will be duly corrected.

Re Clause 8 of the Bill (amendment of section 17 of Act 84 of 1998, as amended)

A. Addition of subsection 17(13)

(a) Since subsection 17(2) empowers the Minister to declare a controlled forest area it is unclear why this is also provided for subsection 13.

(b) Over and above this the portion of the added subsection between the latter's first and second commas appears tedious.

(c) It is therefore suggested that the subsection 7(13) commences with the words *Notwithstanding the provisions of subsection 3, in an urgent situation the Minister may proceed……*, or suchlike.

B. Addition of subsection 17(14)

It is suggested that the word *has* be inserted between the words *owner* and *failed* on the first line of the subsection.

Re Clause 17 of the Bill (substitution of section 61 of Act 84 of 1998)

Sections 7(5), 14(6) and 17(3) reside under Chapter 3 of the Act, which provides for *special measures to protect forests and trees,* and it would therefore appear that the amendments effected by this clause should not be to section 61, which provides for *offences relating to sustainable forest management*, but rather to section 62, which provides for *offences relating to forests and trees.*

Re Clause 18 of the Bill (amendment of section 62 of Act 84 of 1998, as amended)

As pointed out in comment above on section 3 of the Bill, section 62 of the Act needs to be amended to take account of the prohibition of activities in relation to natural forest vegetation other than trees, as inserted into section 7 of the Act. In the circumstances it is proposed that the subsection to substitute the current subsection 62 (1), includes the words *or other (forest?)*[2] *vegetation* between the words *trees* and *in.*

It is felt that the extent to which such vegetation may be integral to natural forests justifies contravention of the prohibition being classified as a first category offence.

Re Clause 19 of the Bill (amendment of section 63 of Act 84 of 1998, as amended)

The need for the specification of offence pertaining to the contravention of *a condition in a license, exemption or any other authorization……..in respect of a natural forest or protected trees* is wholly supported, but by virtue of its heading, section 63 covers offences in relation to *use of forests,* the latter as presumably provided for in Chapter 4 of the Act. By the same token, section 62 covers offences in relation to *protection of forests and trees,* as provided for in Chapter 3 of the Act. Hence it would appear that section 62, and not section 63, needs to be amended to cover the contravention of a condition in a license or exemption issued in terms of section 7 or 15 of the Act.

3. Comment on elementary flaws in the Bill

Some of the comments we have provided above reflect elementary errors incurred during the drafting of the Bill. This is of concern, more so given that these errors are of a multiple nature. Our review has not been with a view to uncovering any and all such errors, but has nevertheless revealed those which we have recorded. It is conceivable that there are more, and it is therefore urged that the Bill be comprehensively interrogated to ascertain if this is the case.

[2] See reservations about the inclusion of this word in comment on Clause 3 of the Bill.

4. Proposed amendment to section 3(3)*(a)* of the Act in view of Supreme Court of Appeal judgment of 22 September 2017

In two recent High Court reviews (the only two to have occurred since the promulgation of the Act) of decisions by the Department of Agriculture, Forestry & Fisheries (DAFF) to decline licenses for the destruction of natural forest, both applicants asserted that natural forests in their entirety need to be eradicated in order for section 3(3)*(a)* of the Act to be of relevance to their license applications. However, on 22 September 2017 the Supreme Court of Appeal effectively dismissed this argument when it provided direction to the interpretation of the section.

Notwithstanding this, it is submitted that consideration should be afforded to adjusting the term *natural forests* in the section to its singular form, viz. *natural forest,* with a view to further simplifying the section's interpretation. This minor adjustment will in fact have a substantial effect, in as much as it will cause the subject of the section to be a vegetation type (natural forest) rather than discreet, specific forest units (as was accentuated by the above applicants in an effort to negate the relevance of the section to their license applications). With natural forest being defined in the Act, the assessment of whether or not license applications will entail the destruction of natural forest as provided for in the section will be a relatively straight forward matter, unlike at present, with the Appeal Court having specified that for each application, *the number, location, extent and distribution of the indigenous trees that will be destroyed, will have to be determined,* along with *regard being had to the nature and extent of the natural forest in question.*[3] While this direction was much needed and is welcome, it is viewed as being extremely onerous on both the Department and license applicants, and since a more expedient, but no less (if not significantly more) effective option is potentially available, it is imperative that it be considered while the amendment window is open.

5. Proposed amendment to provide for public participation in the administration of the Act.

This matter was originally raised by PSAM in a 2012 iteration of the current amendment process, when it included the following comment in a written submission on the version of the amendments which was being proposed at the time:

> *Public participation in decision-making processes*
>
> *It is submitted that the NFA is anomalous in that it does not provide for public involvement in administrative processes such as decision-making in respect of S 7 & 15 license applications. Hence stakeholders are entirely dependent on either goodwill on the part of DAFF, or formal access to information procedures, for recourse to information relating to these processes. This situation is in conflict with various provisions in NEMA, including specific principles in S 2 which relate to this aspect of environmental governance.*

[3] Supreme Court of Appeal of South Africa judgment in the matter between Long Beach Homeowners Association and DAFF/Minister of AFF (case No. 865/2016), p. 10.

It is not being argued that these processes should necessarily be subject to public participation exercises of the same type and scale as those associated with the NEMA EIA Regulations. Nevertheless it is submitted that a mechanism which would actually entitle stakeholders to interaction, as opposed to the present situation where interaction is effectively at the discretion of officials, is a reasonable stakeholder expectation.

Should DAFF concur that this expectation is a reasonable one, it is proposed that the precise form of the said interaction mechanism be determined through workshopping and/or other appropriate forms of engagement.

Subsequently, the 2013 draft Bill (section 74P) made provision for public participation and coordination, but the amendments to section 74 were later scrapped. In any case, the provision had not dovetailed directly with the concerns PSAM had tabled in 2012, given that it only covered public participation in relation to the formulation of policy, drafting of legislation, determination of priorities and establishment of structures, whatever precisely the latter two meant. PSAM's concerns are focussed in particular, but not exclusively, on interaction with DAFF at an operational level, with emphasis on license decision-making processes, as alluded to above, and law enforcement.

In amplification of our 2012 input, Section 2 of the National Environmental Management Act (NEMA) sets out principles which *(inter alia) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment.*[4]

NEMA principles which underpin our call for structured DAFF interaction with stakeholders include the following:

section 2(4)*(f)*: *The participation of all interested and affected parties in environmental governance must be promoted……;*

section 2(4)*(g)*: *Decisions must take into account the interests, needs and values of all interested and affected parties……, and*

section 2(4)*(k)*: *Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.*

The national, provincial and local coastal committees provided for in the Integrated Coastal Management Act[5] conceivably provide pointers to mechanisms for facilitating public participation in the administration of the Act.

N G Scarr
29 October 2017

[4] National Environmental Management Act, 1998 (Act 107 of 1998), section 2(1)*(c)*.
[5] National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008), Chapter 5.