PSAM
Public Service Accountability Monitor

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ADVANCING YOUR RIGHT TO SOCIAL ACCOUNTABILITY

Select Committee on Land Reform, Environment, Mineral Resources and Energy
National Council of Provinces

Via Committee Secretary: Mr A Bawa

Email: *abawa@parliament.gov.za*

COMMENT ON NATIONAL FORESTS AMENDMENT BILL

1. Background

(a) 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.

(b) Since 2012 PSAM has been involved in numerous iterations associated with the drafting of the Bill, these having entailed both public processes and direct engagement with the (then) Department of Agriculture, Forestry and Fisheries (DAFF).

2. Submission to Parliamentary Portfolio Committee

(a) In October 2017, in accordance with arrangements concluded with the Secretary and Content Advisor of the Parliamentary Committee for Agriculture, Forestry and Fisheries, PSAM provided the Committee with a submission on the version of the Bill which in that period had been availed for public comment. A copy of the submission is included as Annexure 1 hereto.

(b) There is no indication that the Committee had regard for our submission or provided it to DAFF for attention, with an enquiry in this regard to the Committee Secretary on 23 May 2018 having elicited no response.

(c) As pointed out in the submission, the Bill contained various elementary flaws. These have in the interim been addressed, but given the above circumstances it is unknown whether this was as a result of comment by ourselves or other stakeholders, or on DAFF's own initiative.

3. This submission

(a) Given the uncertainty surrounding the fate of our submission to the Portfolio Committee, aspects of it which appear to have had no bearing on the amendment process are included in this submission, and, in one instance, expanded upon.

(b) Serious matters which were raised in the previous submission but subsequently addressed (as alluded to at para. 2 (c) above) are excluded from this submission.

(c) For the record it is noted that two comments provided to the Portfolio Committee were later found to have been premised on misprints in the pocketbook version of the National Forests Act, and these are therefore also omitted from this submission.

(d) Of the matters being carried over into this submission, one, pertaining to the perceived need for amendments arising from a judgment issued by the Supreme Court of Appeal in 2017, is regarded as being of considerable gravity and urgency (this is the aspect of the Portfolio Committee submission which receives expanded coverage here).

(e) At the same time, despite motivations since 2012 for amendments to provide for public participation in the administration of the Act, the Bill is silent in this respect. As such the matter remains vexing, and our previous comment on it is reproduced here.

(f) With the exception of the Bill's provision for the issuing of directives under section 7 of the Act, which is the subject of some concern, the other matters covered in this submission are relatively rudimentary in nature, but are included given the uncertainty over what attention, if any, they received from the Portfolio Committee.

(g) No new matters (i.e. matters not covered in the submission to the Portfolio Committee) are included in this representation.

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

(a) Section 3 (3) (a) of the National Forests Act specifies that *natural forests must not be destroyed save in exceptional circumstances where, in the opinion of the Minister, a proposed new land use is preferable in terms of its economic, social or environmental benefits.*

(b) This provision is a principle which, in terms of section 3 (1) (a) of the Act, must be considered and applied *in the exercise of any power or the performance of any duty in terms of (the) Act.*

(c) In High Court reviews of DAFF decisions to decline licences for the destruction of natural forest for property development schemes at Cintsa and Kenton-On-Sea

respectively in the Eastern Cape,[1] both applicants asserted that the natural forests in which their envisaged schemes would be located would have to be eradicated in their entirety in order for section 3 (3) (a) of the Act to be of relevance to their license applications.

(d) A High Court ruling in favor of DAFF in the Cintsa case was appealed and in handing down judgment on 22 September 2017 (copy included as Annexure 2) the Supreme Court of Appeal effectively dismissed this argument.

(e) Using a hypothetical example to illustrate its stance, the Court indicated that *if one acre of indigenous trees in (a) natural forest will be destroyed to create new land for the construction of a road, this will self-evidently constitute the destruction of natural forest for the purposes of the section. In the latter event, the guiding principle that natural forests must not be destroyed, save in exceptional circumstances, will have to be observed. Consequently, a licence for the prohibited activity may only be granted by the first and second respondents if satisfied that the proposed new use for the land is 'preferable in terms of its economic, social or environmental benefits.*[2]

(f) The Appeal Court's rejection of the applicant's effort to negate the relevance of section 3 (3) (a) to its licence application is wholly embraced by PSAM.

(g) However, in arriving at its position, the Court specified that when considering applications for licences to destroy trees in a natural forest, *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]

(h) PSAM's submission to the Portfolio Committee noted that this requirement was *viewed as being extremely onerous on both the Department and license applicants.*[4]

(i) This is so in a number of respects, including, but not necessarily limited to, the following:

(i) In many South African natural forest types, if not the majority or even all of them, it would not be possible to determine *the number, location, extent and distribution of indigenous trees that will be destroyed* without damage having to be inflicted on the forest in order to enable access for the purpose of carrying out of the necessary assessment – which would clearly constitute a contradiction in terms.

(ii) This reality will be exacerbated if, as provided for in Clause 3 (a) of the Amendment Bill (absolutely correctly, in PSAM's view), the prohibition on the

[1] These are the only High Court reviews of licence refusals to have occurred since the promulgation of the Act in 1998.
[2] 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), pp. 10-11.
[3] *Ibid*, p. 10.
[4] P. 6 of submission.

destruction of trees in natural forests is augmented to additionally encompass the destruction of any other indigenous vegetation in a natural forest. In these circumstances not only trees, but also vegetation forms such as ground cover and creepers, could not, without a licence, be cut, disturbed, damaged or destroyed for the purpose of carrying out the determination as provided for the Appeal Court's judgment.

(iii) These complications aside, it is unclear who would have to carry out the assessments– the National Forests Act does not require licence applicants to appoint independent environmental assessment practitioners as for example the Environmental Impact Assessment Regulations promulgated under the National Environmental Management Act (NEMA) do, while at the same time PSAM would contend, based on its familiarity with DAFF operations and precedents, that the scale and complexity of assessments would as a general rule exceed Departmental capacity.

(iv) The determination of the *extent of the natural forest in question* is also likely to be contentious, more so given the fractured nature of many of South Africa's natural forests (the Kenton-On-Sea example being a particularly pertinent case in point).

(v) By the same token the determination of what would constitute destruction in relation to a given natural forest is also likely to be contentious.

(j) Prior to drawing the Portfolio Committee's attention to the implications of the Appeal Court judgment in our submission of 29 October 2017, PSAM had, on 10 October 2017, indicated to DAFF officials associated with the drafting of the Bill, that *it is our view that in the amendment process account needs to be taken of pronouncements by the Supreme Court of Appeal in the judgment it handed down on 22 September 2017 in the Long Beach Homeowners' Association matter, and we would therefore…….appreciate an indication of DAFF's outlook on this.*

(k) The requested indication was not received, PSAM's impression being that to date the consequences of the judgment have yet to be fully internalized within the Department.

(l) On the other hand the threats posed to natural forest by several current land use schemes have highlighted the fact that, as a matter of legal necessity, the Department must view licence applications lodged in conjunction with the schemes through the lens of the judgment, and, in the process, the challenges inherent in applying the judgment's prescriptions have become evident.

(m) Proposed responses aimed at making the Court's much-required direction practicable are as follows:

(i) adjusting the term *natural forests* in section 3 (3) (a) of the Act to its singular form, viz. *natural forest*. As noted in PSAM's submission to the Portfolio Committee,[5] this minor adjustment will in fact have a substantial effect, in as

[5] P. 6 of submission.

much as it will cause the subject of section 3 (3) (a) to be natural forest as defined in the Act, as opposed to discreet, specific forest units, as fruitlessly argued by the Cintsa and Kenton-On-Sea licence applicants.

With the Act defining natural forest as a group of indigenous trees with particular characteristics,[6] the Appeal Court has effectively decreed that section 3 (3) (a) can pertain to a sub-group contained within a larger group of such trees. This is completely logical, it being a nonsensical notion that a group of trees as a whole needs to be threatened with destruction in order for the principle embodied by section 3 (3) (a) to be applicable to it.

In the circumstances it is submitted that the proposed amendment would not be inconsistent with the essential intent of the current section 3 (3) (a), as correctly interpreted. It would however ensure that the processing of forest destruction licence applications will be spared the burden of the unwieldly and unfeasible methodology prescribed in the Court's judgment.

(ii) In the event that the proposed amendment is adopted, it may be prudent to additionally amend the definition of *natural forest* such that it explicitly also spans sub-groups of larger groups of trees, as alluded to above.

(iii) It can reasonably be anticipated that the meaning of the terms *destroy* and *destruction* in relation to natural forest is likely to remain contentious, even if the amendments proposed here are enacted. For this reason it is urged that the terminology be defined in the Act.

In this respect, it is noted that (formerly) DAFF's *Policy Principles and Guidelines for the Control of Development Affecting Natural Forest* contains a definition of the term *destruction,*[7] but this is obviously not a suitable substitute for a definition within the Act *per se,* and it in any case requires revision in light of the Appeal Court judgment.

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

This matter was originally raised by PSAM in 2012, 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

[6] Amendments to the definition as provided for in the Bill will not alter this.

[7] DAFF Policy Principles and Guidelines for Control of Development Affecting Natural Forests, September 2009, p. 8.

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.

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. 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.*[8]

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[9] conceivably provide pointers to mechanisms for facilitating public participation in the administration of the Act.

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

6. 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 (c) of the Bill (amendment of section 7 of Act 84 of 1998, as amended)

(a) 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.

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

(c) 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.

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

(e) 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.

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

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 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.

N G Scarr
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