Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

Honourable Ms Semenya
Chairperson
Portfolio Committee on Agriculture, Forestry and Fisheries
National Assembly
Parliament of the Republic of South Africa
Cape Town

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Attention: Ms Kakaza
Secretary
Portfolio Committee on Agriculture, Forestry and Fisheries
By Email: akakaza@parliament.gov.za

Your ref: Honourable Ms Semenya
Our ref: MF/MT
Date: 25 July 2017

Dear Honourable Ms Semenya

COMMENTS BY THE CENTRE FOR ENVIRONMENTAL RIGHTS ON THE NATIONAL FORESTS AMENDMENT BILL, 2016

1. In this document, the Centre for Environmental Rights makes comments on the National Forests Amendment Bill, 2016 (Bill) introduced to Parliament on 21 July 2016 by the Minister of Agriculture, Forestry and Fisheries.

2. The Centre for Environmental Rights is a non-profit organisation and a firm of environmental rights lawyers that helps communities defend their right to a healthy environment. We do this by advocating and litigating for transparency, accountability and compliance with environmental laws.

3. We welcome the initiative taken by the Minister of Agriculture, Forestry and Fisheries to clarify and improve upon some of the aspects of the National Forests Act, 1998 (Act). However, we have some general concerns about the Act and some specific concerns about the proposed amendments to the Act, which we set out in the paragraphs that follow.

General concerns about the Act

4. The Act was promulgated in 1998, before the commencement of the National Environmental Management Act and the specific environmental management Acts, such as the National Environmental Management: Protected Areas Act, 2003 (NEMPAA) and the National Environmental Management: Biodiversity Act, 2004 (NEMBA). NEMPAA and NEMBA have since created mechanisms that can replace the provisions in the Act dealing with the protection of natural forests and forest ecosystems. The provisions and regulations in NEMBA relating to threatened or protected species[1] and ecosystems that are threatened and in need of protection[2] can be utilised

[1] GN R152 in GG 29657 of 1 June 2007
[2] GN R1002 in GG 34809 of 11 December 2011

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to protect specific tree species and forest ecosystems. NEMPAA can be utilised as a mechanism to include natural forests in South Africa's protected areas network.

5. The benefits of protecting and managing the use of natural forests in terms of NEMBA and NEMPAA are threefold:

    a. It would promote legislative and regulatory coherence. The Act merely contributes to the legislative and regulatory fragmentation that plagues the environment sector in South Africa. Experts[3] in environmental governance have expressed concerns about fragmentation and have argued against the dividing environmental provisions and functions among too wide a range of laws and functionaries respectively.

    b. It would help clarify the distinction between natural forests and industrial plantations. Although the Act makes distinctions between natural forests and plantations, the distinction is not always clear and the definitions are unnecessarily complex. Moreover, natural forests and plantations require very different management measures. Legislative clarity will be promoted if the Act is amended to make provision solely for the management of industrial plantations.

    c. NEMBA and NEMPAA are better equipped to deal with indigenous forest conservation. Both NEMBA and NEMPAA are specific environmental management Acts[4] in terms of the NEMA. NEMA sets out specialised provisions for specific environmental management Acts that do not currently apply to the Act.

6. To the extent that *lacunae* may occur by deleting the provisions in the Act relating to natural forest management, the provisions in the Act that are not provided for in NEMBA and NEMPAA, such as the provisions relating to community forestry, can be transferred to those Acts.

7. We would therefore recommend that a legal audit be conducted to assess to what extent the provisions in the Act dealing with the conservation of natural forests are still necessary.

Clause 1: Proposed amendment to the definitions of "natural forest" and "woodland" in section 1 of the

8. We support the proposal to widen the definition of the terms "natural forest" and "woodland." The wider definition will lead to more indigenous vegetation and ecosystems enjoying the protection under the Act.

Clause 2: Proposed insertion of section 2A in the Act

9. We submit that it is incorrect that national government is the sole public trustee of the nation's forestry resources as asserted in the proposed section 2A. In terms of the Constitution, all three tiers of government are involved in the conservation of natural forests, forest ecosystems and woodlands and are therefore the shared trustees of South Africa's forestry resources:

    a. "Forestry" is defined in section 1 of the Act as "... the management of forests, including the management of land which is not treed but which forms part of a forest management unit." Also in terms of section 1, the term "forest" includes, inter alia, "... a natural forest, woodland and a plantation." "Forestry" must therefore be construed to include the conservation and management of natural forests and woodlands, which is a function that may, in accordance with the Constitution, be performed not only by national government, but also by provincial and local government.

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[3] See for instance A Paterson and L Kotzé Towards a more effective environmental compliance and enforcement regime for South Africa in A Paterson and L Kotzé *Environmental Compliance and Enforcement in South Africa* (2009); L Kotzé Improvind unsustainable environmental governance in South Africa: the case for holdtic governance (2006) *Potchefstroom Electronic Law Journal* (1) 2006

[4] 4 See the definition of "specific environmental management Act" in section 1 of NEMA

b. Part A to Schedule 4 of the Constitution lists "environment" and "nature conservation" as functional areas of concurrent national and provincial legislative competence. Government at national and provincial level share the role of conserving and managing South Africa's natural forests and woodlands. Part B to Schedule 4 of the Constitution provides that "municipal planning" is an exclusive municipal competence. In the matter of Le Sueur and another v eThekwini Municipality and others,[5] the High Court held that environmental management and conservation inherently form part of municipal planning and that municipalities therefore have powers relating to environmental management and the conservation of nature. Municipalities are therefore also a legitimate functionary in the conservation and management of natural forests and woodlands.

c. We furthermore submit that reference in the proposed section 2A to national government flies in the face of the constitutional imperative to promote co-operative governance.[6] In addition, it ignores the measures already taken by other organs of state to protect natural forests. For instance, various forest ecosystems have been listed as critically endangered, endangered, threated or protected in terms of the National List of Ecosystems that Are Threatened and in Need of Protection[7] published under NEMBA; forest vegetation types are often listed as critical biodiversity areas in provincial conservation agencies' biodiversity spatial assessments;[8] and local government often protect natural forests in terms of local planning by-laws and other planning instruments, such as spatial development frameworks, land use / town-planning / zoning schemes and environmental management frameworks.

10. We therefore recommend the following re-formulation of the proposed section 2A of the Act:

*The **[National]** Government of the Republic of South Africa, as the public trustee of the nation's forestry resources **[, acting through the Minster,]** must ensure that these resources, together with the land and related ecosystems which they inhabit, are protected, conserved, developed, regulated, managed, controlled and utilised in a sustainable and equitable manner, for the benefit of all persons and in accordance with the constitutional and developmental mandate of government.*

Clause 3: Proposed amendment to section 7 of the Act

11. We support the proposed insertion of the prohibition on cutting, disturbing, damaging or destroying indigenous forest vegetation other than trees in a natural forest. Such an insertion would promote the ecosystems approach to the conservation of natural forests. The ecosystems approach is an internationally recognised principle of environmental governance and enshrined as a national environmental management principle in the National Environmental Management Act, 1998 (NEMA).[9]

12. We also welcome the proposed insertion of subsection (5), which would authorise the Minister to issue a written notice to any person who has cut, disturbed, damaged or destroyed any indigenous tree in a natural forest. In our experience, the command and control approach to environmental management is the most effective one.

13. We, however, submit that the Minister must also be authorised to issue written notices to persons who have cut, disturbed, damaged or destroyed any indigenous vegetation other than indigenous trees in a natural forest. We therefore recommend the following re-wording of the proposed subsection (5):

"If a person is in breach of subsection 1(a) or (b), the Minister may, by written notice, ..."

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[5] [2013] ZAKZPHC 6 (30 January 2013)
[6] Section 41 of the Constitution
[7] GN 1002 in GG 34809 of 9 December 2011
[8] See for instance the Mpumalanga Tourism and Parks Agency's Biodiversity Sector Plan Handbook (2014)
[9] See section 2(4)(b) of the National Environmental Management Act, 1998

Clause 4: Proposed insertion of subsection (3) in section 8 of the Act

14. We submit that the phrase "that may be determined by the Minister" is too subjective and may therefore be unconstitutional for being at odds with the rule of law. We therefore recommend that the said phrase is deleted from the proposed subsection.

Clause 6: Proposed deletion of subsection (a) in section 15(1) of the Act

15. It is not clear from the Memorandum on the Objects of the National Forests Amendment Bill, 2016 why it is proposed in the Bill that subsection (1)(a), which prohibits the cutting, disturbing, damaging or destroying any protected tree, be deleted. We strongly recommend that the subsection (1)(a) stays intact. The deletion may result in a lacuna.

Clause 8: Proposed insertion of subsection (14) in section 17 of the Act

16. We submit that he phrase "If the Minister is of the opinion" in the proposed subsection (14) is too subjective and may well therefore be unconstitutional for being at odds with the rule of law. We therefore recommend that the proposed subsection (14) is re-worded as follows:

    *If **[the Minister is of the opinion that]** the owner fail**[ed]**s to comply with or is in contravention of the notice issued in terms of subsections (3) and (4), **[he or she]** the Minister may –*

Clause 15: Proposed insertion of section 57A in the Act

17. We support the proposed insertion of an appeal provision in the Act. We however submit that the right to appeal must be afforded not only to "affected" persons, but also "interested persons."

18. Decisions taken in terms of the Act typically impact on "everyone's" environmental rights enshrined in section 24 of the Constitution and are therefore public interest issues that are of importance to the country as a whole.[10] We therefore recommend that the right to appeal any decision taken in terms of the Act, in as far as it impacts on environmental rights, is extended to "everyone." This approach would be in line with the national environmental management principle in section 2(4)(f) of NEMA, which provides that –

    *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.*

19. We therefore recommend the following re-formulation of the proposed section 57A(1):

    *Any **[affected]** person may appeal to the Minister against a decision or action taken by any person acting under a power or duty delegated in terms of the Act.*

20. We furthermore recommend that the Minister be afforded the power to make regulations relating to a set procedure for appeals contemplated in the proposed section 57A of the Act. Appeal regulations will promote regulatory clarity.

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[10] Company Secretary, Arcelor-Mittal and another v Vaal Environmental Justice Alliance and others (69/2014) [2014] ZASCA 184 at para 52

Clause 16: Proposed amendment to section 58 of the Act 5

21. We support the proposal to provide for a more severe sentence for category five offences. More severe sentences for offences in terms of the Act may well result in better compliance with the provisions of the Act. We also recommend that more severe penalties are prescribed for all offences, not only category five offences.

22. Moreover, we recommend that the words "or subsequent" be inserted in subsection (5) between the words "second" and "conviction." The current wording of that subsection implies that the more severe penalties apply only to second convictions and not third or subsequent ones. We submit that all subsequent convictions on offences in terms of the Act should carry heavier sentences than first convictions, not only second convictions.

23. Finally, we submit that all fines should be quantified in the Act. The failure to quantify fines may lead to insignificant maximum fines for offences in terms of the Act. In terms of the Adjustment of Fines Act, 1991 read with the Magistrates' Courts Act, 1932, the maximum fine a district or regional court may impose for offences is R40 000.00 per year of imprisonment. For example, a first category offence carries the penalty of a fine or a maximum of three years' imprisonment. The maximum fine would be R120 000.00. In comparison with maximum fines in other environmental legislation, which general vary between R1 million and R10 million, such a fine is relatively low. As prison sentences for environmental crimes are rare, it is essential that Courts are granted more latitude in handing down fines. We therefore recommend that the Act provides for maximum fines between R1 million and R10 million.

Clauses 18 and 19: Proposed amendments to sections 62 and 63 of the Act

24. We support the more severe penalties proposed for contraventions of sections 7(1), 17(3) and (4) of the Act. We submit that more severe penalties for environmental crimes may well contribute to their deterrent effect.

25. We furthermore welcome the proposed insertion of the words "a natural forest or protected trees" in section 63(5)(a) of the Act. It may well lead to better protection for natural forests and protected tree species outside of protected areas.

26. We thank you for the opportunity to make comments.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

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