



Centre for Environmental Rights

Advancing Environmental Rights in South Africa

The Executive Officer
Conservation of Agricultural Resources
Department of Agriculture, Forestry and Fisheries

By email: MpumeN@daff.gov.za

Your ref: Draft CARA Bill
Our ref: CER/MF
Date: 18 July 2013

Dear Sir or Madam

COMMENTS ON THE DRAFT CONSERVATION OF AGRICULTURAL RESOURCES BILL

1. In this document, the Centre for Environmental Rights (“CER” or “the Centre”) submits comments in response to the Minister’s invitation to comment on the Draft Conservation of Agricultural Resources Bill, as published in General Notice 673 in the Government Gazette of 2 July 2013 (“the draft Amendment Bill”).
2. The Centre for Environmental Rights NPC is a non-profit organisation and law clinic based in Cape Town. The Centre was established in October 2009 by eight civil society organisations (CSOs) in South Africa’s environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. The Centre’s vision is a South Africa where every person’s Constitutional right to an environment that is not harmful to health or well-being, and to have the environment protected for future generations, is fully realised. Our mission is to advance the realisation of environmental rights as guaranteed in the South African Constitution by providing support and legal representation to civil society organisations and communities who wish to protect their environmental rights, and by engaging in legal research, advocacy and litigation to achieve strategic change.
3. The CER makes these comments based on our experience in advising and working with both non-government organisations and authorities on the interpretation, application and enforcement of the Conservation of Agricultural Resources Act, Act 43 of 1983 (CARA), as well as the National Environmental Management Act, 1998 (NEMA) and the National Water Act, 1998 (NWA), for the protection and management of virgin soil on agricultural land.
4. Some of the comments below deal specifically with permitting under and enforcement of CARA. Since these issues were not the focus of the draft Amendment Bill as it stands, these comments speak more to the opportunity of an amendment to CARA to deal with certain urgent issues holding back the effective implementation and enforcement of CARA. We urge the Department to use the opportunity to address these relatively straightforward issues urgently.

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Alignment of authorisations

5. We are of the view that the authorisation of activities listed under CARA, activities listed under NEMA, and water use activities listed under the NWA, are particularly suitable for a more integrated, streamlined system of authorisation.
6. You will be aware that s.24L of NEMA already provides for the “alignment of environmental authorisations”:

24L Alignment of environmental authorisations

(1) If the carrying out of a listed activity or specified activity contemplated in section 24 is also regulated in terms of another law or a specific environmental management Act, the authority empowered under that other law or specific environmental management Act to authorise that activity and the competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of that activity may exercise their respective powers jointly by issuing-

- (a) separate authorisations; or*
- (b) an integrated environmental authorisation.*

(2) An integrated environmental authorisation contemplated in subsection (1) (b) may be issued only if-

- (a) the relevant provisions of this Act and the other law or specific environmental management Act have been complied with; and*
- (b) the environmental authorisation specifies the-*
 - (i) provisions in terms of which it has been issued; and*
 - (ii) relevant authority or authorities that have issued it.*

(3) A competent authority empowered under Chapter 5 to issue an environmental authorisation in respect of a listed activity or specified activity may regard such authorisation as a sufficient basis for the granting or refusing of an authorisation, a permit or a licence under a specific environmental management Act if that specific environmental management Act is also administered by that competent authority.

(4) A competent authority empowered under Chapter 5 to issue an environmental authorisation may regard an authorisation in terms of any other legislation that meets all the requirements stipulated in section 24 (4) (a) and, where applicable, section 24 (4) (b) to be an environmental authorisation in terms of that Chapter.

7. We see no obvious reason in CARA or the draft Amendment Bill why this provision cannot be used in relation to authorisations issued under CARA. However, it may be useful to incorporate an express reference to s.24L of NEMA in **s.6** of CARA (control measures). For example, in **s.6(3)**:

(3) A control measure may -

- (a) contain a prohibition or an obligation with regard to any matter referred to in subsection (2);*
- (b) provide that the executive officer may exempt a person from such prohibition or obligation by means of a written consent;*
- (c) prescribe the procedure with regard to the lodging of an application for such written consent, which procedure may take into account the alignment of environmental authorisations as described in section 24L of the National Environmental Management Act, 1998.*

8. This proposed amendment would then give the Minister the express option of designing a procedure for integrated permitting with NEMA and the NWA in the Conservation of Agricultural Resources Regulations (GN R1048 in GG 9238 of 25 May 1984) (the CARA Regulations).

Definitions

9. With no disrespect to the Executive Officer to whom these comments are addressed, the definition of “virgin soil” in s.1 must be amended to remove the phrase “in the opinion of the executive officer”. This subjective factor undermines the requirements of criminal law for certainty regarding prohibited conduct, and detrimentally impacts on enforcement of CARA. Please note that this is feedback we have received from a prosecutor working on prosecutions under CARA.
10. The definition of “water course” in s.1 should be harmonised with the definition in the NWA:

Definition in CARA s.1	Definition in the NWA s.1
“water course” means “a natural flow path in which run-off water is concentrated and along which it is carried away”	“watercourse” means - (a) a river or spring; (b) a natural channel in which water flows regularly or intermittently; (c) a wetland, lake or dam into which, or from which, water flows; and (d) any collection of water which the Minister may, by notice in the <i>Gazette</i> , declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks”

11. Note that the NWA definition of watercourse has already been adopted in the Listing Notices to the 2010 EIA Regulations issued under NEMA (GNR.544 and 546 of 18 June 2010, Government Gazette No. 33306).
12. While we support the insertion of a new section expressly recognising that the national government holds the nation’s agricultural resources in public trust (the proposed s.1A), we submit that:
- 12.1. reference be made to an ecosystem-based approach to conservation of agricultural resources that is also “climate smart”, in other words takes into account the risks and opportunities of a changing climate;¹
- 12.2. the concept of “environmental values” in the proposed s.1A(2)(c) of CARA be clarified.
13. We would therefore like to suggest an amendment to the proposed s.1A(2) to the following effect:

“(2) *Without limiting subsection (1), the Minister is ultimately responsible to ensure that agricultural land and all other agricultural resources are equitably accessed and used beneficially in the public interest, while –*

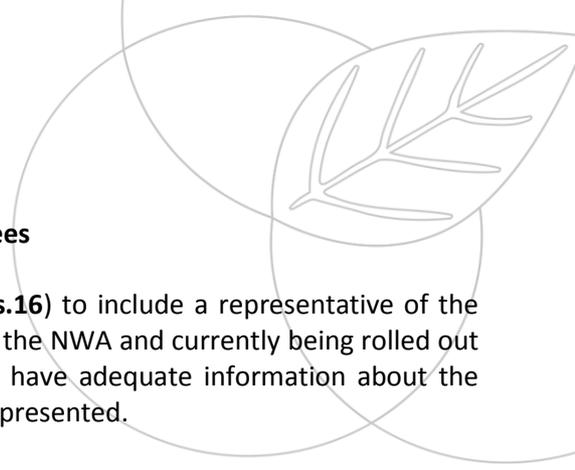
(a) *ensuring long term food security;*

(b) *adapting and building resilience to climate change, and reducing greenhouse gas emissions;*

(c) *promoting economic and social development; and*

(d) *promoting environmental values that enhance the ability of natural agricultural resources to deliver ecosystem goods and services.*”

¹ The Food and Agriculture Organization of the United Nations (FAO)’s Climatesmart Agriculture Sourcebook describes climate smart agriculture as integrating the three dimensions of sustainable development (economic, social and environmental) by jointly addressing food security and climate challenges. “It is composed of three main pillars: sustainably increasing agricultural productivity and incomes; adapting and building resilience to climate change; and reducing and/or removing greenhouse gases emissions, where possible.” Available at <http://www.fao.org/climatechange/climatesmart/en/>



Composition of provincial, metropolitan and district conservation committees

14. We believe that it is vital for the provincial conservation committees (**s.16**) to include a representative of the relevant catchment management agency established under Chapter 7 of the NWA and currently being rolled out by the Department of Water Affairs, to ensure that these committees have adequate information about the protection of water resources and that water concerns are adequately represented.
15. Similarly, metropolitan and district conservation committees (**s.15**) must include a member from affected water user associations (Chapter 8 of the NWA) or from an affected catchment management forum.

Powers of officials and penalties

16. The wide powers of investigation found in **s.18** should be retained. This provides that an inspection can be done to determine compliance, even where there is a suspicion of non-compliance.
17. The penalties in **s.23** and **s.29(3)** should be increased drastically. In this regard, we need to draw your attention thereto that the current National Environmental Laws Amendment Bill [B13-2012] (NEMLAB2) currently in the National Council of Provinces provide for the following three categories of penalties:
 - 17.1. a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment (proposed s.49B(1) of NEMLAB2);
 - 17.2. a fine not exceeding R5 million or to imprisonment for a period not exceeding 5 years, and in the case of a second or subsequent conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, and in both instances to both such fine and such imprisonment (proposed s.49B(2) of NEMLAB2); and
 - 17.3. a fine or to imprisonment for a period not exceeding one year, or to both a fine and such imprisonment (proposed s.49B(3) of NEMLAB2).

There is no reason why the penalties for violation of CARA or regulations under CARA should be orders of magnitude lower than those in NEMA.

18. The provision in **s.23(2)** on extended penalty jurisdiction should be retained.
19. The principles in **s.25** should be retained. However the section should be reworded so as not to create a reverse onus which may be subject to constitutional challenge – see, for example, **s.25(2)**.

Control measures and the CARA Regulations

20. Although these are not under discussion at the moment, we also need to draw your attention to an urgent gap in the CARA Regulations.
21. **S.6(1)** of CARA provides that in order to achieve the objects of CARA, the Minister may prescribe control measures which shall be complied with by land users to whom they apply. **S.6(5)** of CARA provides that any land user who refuses or fails to comply with any control measure which is binding on him, shall be guilty of an offence. The Deputy Minister of Agriculture, acting on behalf of the Minister of Agriculture, made the CARA Regulations in terms of **s.29**, which empowers the Minister to do so. These regulations make no mention of **s.6**, nor explicitly state that the regulations contain control measures. The only mention of control measures is in the title of Part I, and the “intended to be” control measures on alien and invasive species fall under Part II. The 1984 regulations itself does not create any offences or penalties. This is a major loophole in the regulatory regime and requires urgent amendment – to the regulations.

22. Please let us know if the Department requires any further input on any of these issues, which we are happy to provide. Please also keep us informed on the progress of the Amendment Bill.

Yours faithfully

CENTRE FOR ENVIRONMENTAL RIGHTS

per: 

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