COMMENT on DRAFT WESTERN CAPE BIODIVERSITY BILL, 2019

HANDS OFF FERNKLOOF NATURE RESERVE·THURSDAY, 1 AUGUST 2019·20 MINUTES

2019-07-30

Ms Marlene Laros
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Dear Ms Laros

DRAFT WESTERN CAPE BIODIVERSITY BILL, 2019

Whale Coast Conservation (WCC) welcomes the opportunity to comment on the above Draft Bill.
We would value detailed feedback on the comments made and ask that this be done following consideration of our input.
WCC is pleased that the Department of Environmental Affairs and Development Planning (DEA&DP) is reviewing the existing legislation and proposing an integrated Bill to replace dated legislation. We wish to bring to your attention a number of concerns and shortcomings in the proposed Bill, which we request should be given serious consideration by DEA&DP prior to a final version of the Bill being processed further.
Our main concerns divide into those that are of particular concern to WCC in relation to issues with which we have been involved in the Overstrand, and issues of a more general nature (parts of the latter will also naturally have implications for biodiversity in the Overstrand.)
Overstrand concerns

Those concerns that are of particular relevance to the Overstrand include:
• The need to cater for proclaimed nature reserves owned by municipalities and the definition of “private nature reserve”; and
• The need to provide control over so-called wildlife sanctuaries, game farms and similar that involve the exploitation of wild animals for commercial purposes.
General concerns
Concerns that are of a more general nature include:
• Alignment between the Draft Bill and the National Environmental Management: Biodiversity Act (NEM:BA);
• Introduction and application of the “biodiversity economy” and its interpretation vis-a-vis “sustainable”, “environmental sustainability” and “sustainable development”;
• Ambiguities in the application of Chapter Nine of the proposed Bill.

1 Issues of particular relevance to the Overstrand
1.1 Consequences of the definition of “Private Nature Reserve” for municipal-owned proclaimed nature reserves
The Draft Bill defines and regulates “provincial protected areas”, “private nature reserves” and “biodiversity stewardship areas”. The provisions in the Draft Bill for provincial protected areas and biodiversity stewardship areas are satisfactory. However, the inclusion of municipal-owned protected areas / nature reserves within the definition of “private nature reserve” is highly problematic and unacceptable, especially since CapeNature and civil
society are accorded virtually no role in or authority over the management of municipal- owned reserves.
According to the Draft Bill, and in the absence of a definition that caters for municipal-owned proclaimed reserves, such nature reserves fall under the definition of a “private nature reserve" because they are "a nature reserve which is in communal ownership" ("communal ownership" is not defined though, and should be). The Draft Bill says further in the definition of “landowner” that if the reserve land is under the control or management of a municipality, "landowner" means the municipal manager. There is no real power given to CapeNature in relation to the management of private nature reserves with the only "duty" given to CapeNature being in 10(g)(iv) to "establish a system for monitoring and reporting on the management of provincial

protected areas, protected environments, private nature reserves, mountain catchment areas and biodiversity stewardship areas", and in 10(l) to "provide advice to landowners to improve biodiversity or the conservation of the environment on their land or how to manage the interface between humans and indigenous biological resources".

Under Section 11 the only "power" directly relevant to private nature reserves is 11(2) CapeNature may for the purpose of performing its functions and to achieve the objectives

of this Act: (i) inspect and investigate non-compliance and offences in terms of this Act; (n) establish one or more advisory committees to assist it with fulfilling any of its functions in terms of this Act. "Inspect and investigate non-compliance" is very vague in relation to "private nature reserves" so this gives no power to do more than make comments on management and hope that the municipality will listen.

Section 11(3) adds that "If CapeNature is satisfied on reasonable grounds that it is appropriate and necessary for it to take action for the conservation of biodiversity, an official or person designated by CapeNature may enter onto private land— (a) with the consent of the landowner; or (b) in a situation posing imminent risk to human life or biodiversity, without such consent." This amounts to being able to do next to nothing in terms of overseeing how municipalities manage municipal nature reserves and protected areas. In defining a municipal-owned nature reserve as a "private nature reserve" there is no obligation on the municipality, in terms of section 11(3) and (6), to even allow CapeNature onto its nature reserves unless there is "a situation posing imminent risk to human life or biodiversity". This is totally unacceptable.

There is nothing said about who should be the members of any "advisory committee" appointed in terms of 11(2)(n) by CapeNature. Presumably, in the context of the paragraph, an "advisory committee" advises CapeNature how to fulfil its duties. In relation to municipal-owned nature reserves, such an "advisory committee" would not be able to advise the municipal manager as "landowner". There is therefore no requirement in the Draft Bill, for example, for the Overstrand municipality to continue with the Fernkloof Advisory Board, which is a requirement under existing legislation. This reduces the protection afforded by existing legislation.

The Draft Bill accords more protection to "biodiversity stewardship areas" (which are still to be defined and declared), by virtue of them being subject to contractual

agreements between CapeNature and the landowner, than to existing municipal-owned nature reserves, which is absurd.

Part (c) of the definition of a "private nature reserve", when applied to Section 42 of the Draft Bill, implies that a private nature reserve need not be subject to the National Environmental Management: Protected Areas Act (NEM:PAA). The consequences are profound. It means, for example, that the Fernkloof Nature Reserve (FNR) could be managed outside of the protection of the NEM:PAA. Very worrying indeed is that Section 42(6)(b) says that if the landowner of FNR (i.e. the municipal manager, according to the definition) applies to the MEC for the withdrawal of the declaration of FNR as a private nature reserve then the MEC must, without any discretion, approve the application. This is totally unacceptable.

A practical example illustrates the serious consequences of this issue to the protection of biodiversity in the Overstrand. FNR is a municipal-owned nature reserve situated in Hermanus. It was proclaimed under the Nature Conservation Ordinance and therefore is a proclaimed protected area under the National Environmental Management Act (NEMA). It is an acknowledged centre of biodiversity. This tiny reserve has over 1300 plant species alone in the varied habitats of its 18 hectares, some of which are unique to the reserve. Urban expansion has led to the loss of many species in unprotected areas over the years since its proclamation. The Overstrand Municipality has been responsible for two major attacks on the reserve's ecological integrity in the past few years.

The first was a plan for a wholly unnecessary bypass road that would be constructed through the southern part of the reserve; when this was turned down the alignment was curtailed, but still would go through the area of highest biodiversity and vulnerability. Approval has been halted on budgetary grounds but according to the current Mayor, it remains part of the municipality's future plans.

The second was a summary revision of the FNR management plan by the Municipality without reference to the Fernkloof Advisory Board to allow for a range of adventure and eco- tourist facilities. After a public outcry this was revised to reduce the area of the reserve that could be put to development. However, the application of the Municipality's revision of zoning regulations to the reserve still makes those reduced areas vulnerable to inappropriate development. The revised plan is currently in the public participation process, despite the fact that CapeNature is still waiting for

its request for full comments on the public participation for the first revision to be honoured. The municipality also refuses to accept the continuation of a petition against development in the reserve that was started for the first revision, as valid for the second revision. The petition has garnered over 16 000 signatures, divided more or less equally between the two versions.

FNR's exceptional biodiversity is guarded by active environmental and civic groups and concerned citizens in the Overstrand, armed with the protection afforded by the current legislation. Any legislation that will replace this must strengthen rather than weaken the efforts of these groups and individuals.

Recommendations:

On this issue, the WCC recommends that:

1.1.1. the NEM:PAA definition of "nature reserve" should be adopted in the Draft Bill

1.1.2 municipal-owned nature reserves / protected areas should be added as a specific type of nature reserve

1.1.3 the level of protection given to municipal-owned nature reserves / protected areas should be at least that which is accorded to them in existing legislation that will be replaced by the Draft Bill when promulgated.

Municipal-owned nature reserves should be categorised into three areas; those that have significant biodiversity value and must be declared as and managed as "protected areas" in terms of NEM:PAA, areas that must be managed as "biodiversity stewardship areas", and those that can be regarded as "private nature reserves". The categorisation should be decided by CapeNature in consultation with municipalities and must be subject to public participation. Municipal nature reserves that are categorised as biodiversity stewardship areas and private nature reserves can be subject to the provisions currently within the Draft Bill. Those that are categorised as "protected areas" should be subject to a new section within an amended Bill; this should include as a minimum that:

1.1.a The municipality, or an appropriate approved alternative organisation, is the management authority of a municipal-owned protected area nature reserve, authorised by the MEC in terms of an approved protected area management plan that complies with NEM:PAA

1.1.b The management authority must appoint an advisory committee composed of representatives of appropriate civil society organisations and must pay heed to and act

according to its advice; the appointment of the members of the advisory committee must be subject to a public participation process.

1.1.c The management authority must submit the protected area management plan for the nature reserve to the advisory committee for its approval, subject it to a public participation process and submit it to CapeNature for its approval and recommendation to the MEC;

1.1.d In terms of section 26 of NEM:PAA, on application by the advisory committee the MEC supported by CapeNature may designate a municipal nature reserve as a "wilderness area" and impose such restrictions on development within the reserve as he or she may decide.

1.2 Wildlife Sanctuaries, Game Farms and Similar Commercial Activities .

It has come to the attention of WCC that CapeNature currently issues permits to private wildlife sanctuaries, game farms and similar commercial operations. One such proposed operation is situated in the Overstrand. These permits state that CapeNature does not approve of close human–wild animal interaction, but knowing that the applicant intends to allow and even encourage visitors to interact with the animals, are issued nonetheless. The Draft Bill is silent on the norms and standards to which these operations must comply. Nor does it cover the duties and powers of CapeNature to make close human-wild animal interaction illegal, and to refuse and withdraw permits to persons and organisations who do not comply with the norms and standards and terms in the permits issued.

Recommendations:

WCC recommends that the Draft Bill should include a section on wildlife sanctuaries, game farms and similar operations that covers the following:

Norms and standards for these operations must be developed to be applied by CapeNature and must be subjected to a public participation process, before being recommended to the MEC for approval and gazetting.

If the activities of such an operation do not trigger an environmental impact assessment (EIA), applicants for permits to establish or operate such commercial operations must, prior to consideration by Cape Nature, submit management plans that have been drawn up independently to a public participation process in a similar way as is required for an EIA CapeNature may not issue a permit for such an operation unless

it has been subjected to an EIA or to a public participation process as proposed above, and all concerns have been resolved.

2 General concerns

2.1 Alignment between the Draft Bill and the National Environmental Management: Biodiversity Act (NEM:BA)

The Draft Bill introduces concepts not found in NEM:BA and makes no reference to others in NEM:BA that are relevant. If these are not new concepts, they have possibly been renamed, but the links to NEM:BA are not shown. For example, NEM:BA requires the development of a National Biodiversity Framework with norms and standards (see the last paragraph of this point below). However, the Draft Bill never refers to such a national framework, or to national norms and standards, or to any need to consider these in biodiversity management in the Western Cape. The Draft Bill must show its alignment to these overarching policy guidelines.

The Draft Bill refers to and requires the development of a "Biodiversity Spatial Plan", which is not referred to at all in NEM:BA but is required by the Local Government: Municipal Systems Act, the Spatial Planning and Land Use Management Act and the Western Cape Land Use Planning Act. NEM:BA refers in Section 40 to "bioregional plans", which are presumably what the Draft Bill refers to as "Biodiversity Spatial Plans". If this is so, the Draft Bill should define biodiversity spatial plans in terms of the NEM:BA bioregional plans and show how the proposed biodiversity spatial plans are linked to and guided by NEM:BA.Section 40(3) of NEM:BA requires that the MEC must prepare the bioregional plans with the concurrence of the national minister. However, Section 34 of the Draft Bill makes no reference to this requirement or how this will be achieved. See also the last paragraph of point 2.2 below in this regard. In response to Section 38 of NEM:BA the Department of Environmental Affairs (DEA) has drawn up what it calls the National Biodiversity Framework (NBF) - first revision in draft form - and Biodiversity Norms and Standards. The Draft Bill should refer to these and adopt common terminology from them. For example, the NBF introduces what it calls "strategic spatial priorities" such as Critical Biodiversity Areas (CBAs), Ecological Support Areas (ESAs), Strategic Water Source Areas (SWSAs) and Freshwater Ecosystem Priority Areas (FEPAs), amongst others. These are referred to in a National Biodiversity Strategy and Action Plan and in the periodic National Biodiversity Assessments and Provincial Biodiversity Assessments that the NBF

directs must be undertaken. The Draft Bill merely says in Section 35 (b) “Spatially identify one or more categories of biodiversity priority areas ...” This is vague and presumably calls the “strategic spatial priorities” referred to in the NBF by a different name. There should be careful alignment in the Draft Bill with the nationally-developed terminology in order to avoid confusion.

Recommendations:

2.1.1 WCC recommends that the Draft Bill should specify, explain and clarify its alignment with NEM:BA and how provincial level biodiversity assessments and bioregional plans are to be incorporated into the national-level documents. As a minimum the Draft Bill should:

2.1.a Refer to the National Biodiversity Framework (NBF) and Norms and Standards;

2.1.b Use the same terminology as that used in the NBF;

2.1.c Require the drawing up and periodic review of a Western Cape Biodiversity Assessment and a Western Cape Biodiversity Strategic Action Plan;

2.1.d Prescribe that all levels of government in the Western Cape must use the strategic spatial priorities in all spatial and land use planning processes, in environmental impact assessments and in decision-making processes for the issue of permits for wildlife sanctuaries and game farms.

2.2 “Biodiversity economy” and its interpretation vis a vis “sustainable”, “sustainable development” and “environmental sustainability” Section 2(k) of the Draft Bill gives one of 11 objectives of the future Act as being to “enable and develop an equitable and sustainable biodiversity economy in the Province, including the promotion and development of eco-tourism in protected areas under the control of CapeNature”. This stands in stark contrast to the objectives of SANBI, which is established in sections 10 and 11 of NEM:BA, and in which (inter alia) 11(e) says SANBI “must manage, control and maintain all national botanical gardens”. This, together with the operations of dedicated divisions such as the citizen-science centered Custodians of Rare and Endangered Wildflowers (CREW), is a far more appropriate objective and function for a conservation agency than overseeing the development of a biodiversity economy. The purpose of CapeNature needs to be stated clearly in the opening section of Chapter Four of the proposed Bill. Using Section 11 of NEM:BA as a guide, the purpose of CapeNature could be stated as to protect biodiversity; to manage, control

and maintain all provincial nature reserves under its control, and to ensure that all other protected areas within the Western Cape under the control of other organs of state or subject to biodiversity stewardship agreements are similarly managed, controlled and maintained.

It is essential that CapeNature is adequately funded by government to be able to achieve this primary purpose. If it is not, generating income through commercial functions (including those relating to tourism) will become an ever-more important consideration for the organisation and will inevitably lead to compromises regarding the protection of biodiversity. Placing the onus on CapeNature to develop a biodiversity economy in the Province will exacerbate this.

Developing a biodiversity economy should not be a focus of CapeNature; this is specialised task of business development - as is the promotion of local economic development opportunities, which is also stated – again wholly inappropriately - as a duty of CapeNature in Section 10(2)(b). The Province must ensure that sufficient funding is made available to CapeNature through government grants to undertake its primary function of protecting biodiversity. In this regard, although a Provincial grant is listed in Section 29(1)(b), it is omitted from Section 11. The South African Constitution states in Section 24 that "Everyone has the right -

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

It is significant that the priority given in the Constitution is to prevent ecological degradation and promote conservation before promoting development. The spirit of the Constitution is clearly that justifiable economic development will not cause any ecological degradation or undermine conservation. Environmental protection is a basic human right under the Constitution – development is not. Sadly, this focus has all too often been reversed by the very structures appointed to uphold the Constitution.

An example of this reversed focus is what is proposed by the Overstrand municipality in the draft FNR Protected Area Management Plan, which says, "The main focus of

any proposed structural/man-made development on FNR must be to ensure that development is restricted/mitigated". This is not what the Constitution requires. No development should be contemplated in a protected area that would require mitigation of environmental degradation.

With regard to the above, Section 6(f) which supports the idea that ecosystem disturbance and the loss of diversity is acceptable, should be removed. Another example, again from the Overstrand, is the extraction of water from aquifers to feed the needs of a rapidly growing population before clearing rampant alien vegetation infestations in the local watercourses. The long-term impact of this extraction through an increasing number of boreholes on the vegetation of the Kleinrivier mountains is not well understood. However, the beneficial impact of clearing alien vegetation infestations is very well understood, including its vital impact on protecting biodiversity. The latest budget of the Overstrand municipality sets aside a paltry amount of R250 00 for clearing alien vegetation in the entire Overstrand. Section 40(2) of the proposed Act should be helpful in this regard; however, measures for the protection of mountain catchment areas given in Section 41 are vague and need more attention.

CapeNature should be the institutional example of upholding the rights to environmental protection stated in the Constitution. It should also be the guardian of this principle for all protected areas in the Western Cape that are not under CapeNature management and in Western Cape biodiversity stewardship areas. The Draft Bill should reflect this duty and function.

In this regard, the proposed Biodiversity Spatial Plan is also of great importance. Section 35(b) sets a bottom limit of only one biodiversity priority area to be identified in the plan. This is too low for an area of the biodiversity complexity of the Western Cape. Section 35(d) also notes that the plan will provide "spatial planning and land use guidelines". No mechanism is given as to what will happen if these guidelines are ignored by authorities, nor is the relationship specified between the plan and land use planning legislation (see also point 2.1 above in this regard). Section 37(1)(c) notes that the Biodiversity Spatial Plan is a plan contemplated in the Western Cape Land Use Planning Act, but gives no indication of its status vis-à-vis the other provincial plans. Unless careful attention is given to this aspect, the purpose of the plan as given in Section 35(e) of "ensuring that the ecological infrastructure in the Province is

maintained" will be impossible to achieve. See also Section 37(2)(c) and Section 37(3) in this regard.

Recommendations:

The purpose of CapeNature should be clearly stated in the introduction to Chapter Four; this purpose should be focused on the protection of biodiversity and its duties and objectives should not include a sweeping economy-related focus that is not within its specific expertise.

CapeNature must receive adequate funding from government to fulfil its primary purpose of protecting biodiversity.

The proposed Bill must uphold the priority given in the Constitution to the protection of the environment before development, and CapeNature should be an institutional example of doing so.

2.3 Points of clarification

In addition to the above, clarity is needed on points that include:

Section 7(1)(d): Clarity is needed on how the effectiveness of the implementation and enforcement of the proposed Act will be evaluated. No mention is made of the State of Biodiversity Report; if this is to form part of the evaluation it should be stated.

Section 10(1)(a) refers to "protected environments", but these are not defined.

Section 10(1)(d) does not include protected environments in the register to be kept.

Section 10(1)(e) should include a mechanism for incorporating the involvement of concerned citizenry in the declaration of or the withdrawal of the declaration of a protected area.

Section 10(2) and elsewhere refers to "eco-tourism activities and facilities", but these are not defined. Eco-tourism has become a marketing catchphrase that covers a wide range of activities that are not necessarily beneficial to the environment.

These activities, and the facilities that support them, should be defined.

Section 11(2)(h) does not refer to CapeNature's duties towards conserving biodiversity in areas that are not under its control. The Western Cape is a patchwork of various types of land ownership and control. In its totality it houses unique, highly biodiverse and highly threatened habitats, all of which need some level of protection to retain this biodiversity into the future. Serious consideration needs to be given to how CapeNature can influence this in areas that are not under its control.

Section 11(2)(k) and (l) should cover the expansion of facilities in areas that become increasingly popular and where there is pressure to extend facilities and infrastructure.
The Board Charter referred to in Section 12(1)(e) should be developed by the Province with public participation and the Board should act according to it. The Board should not develop its own Charter.
Minutes of meetings referred to in Section 24(2) should be forwarded to Province as soon as they are available and should be made part of public record.
The minimum requirements for an "appropriately qualified" Chief Financial Officer in Section 27(4)(e) should be specified.
The Chief Executive Officer should be responsible for managing the senior members of staff and establishing staff rules and policies, rather than all the staff members as stated in Section 27(4)(g).
Section 37(2) notes that the Biodiversity Spatial Plan must "inform" various aspects. "Inform" is a vague term that gives no indication as to whether any heed should be paid to the information or what process should be followed if a party decides to act in a way contrary to that in which the BSP recommends.
Section 42(12) states that the Provincial Minister "may" prescribed requirements for the management of private nature reserves. This should be more directive, i.e. "must", and it is unclear why CapeNature is not the prescribing authority or at least required to make recommendations to the Minister.
Clarity is needed on how the process referred to in Section 48 i.e. that of identifying an area in need of special protection, is initiated.
Section 57(1) should include the prescription of penalties.
Section 58(a) does not define the difference between an officer and a ranger. The definitions merely loop back to this section. Presumably the difference is that contained in Section 63(4); if so, they need to be differentiated in the definitions.
Section 64((l) should include a provision to seize and remove animals brought on to land under the control of CapeNature that are not under the control of the owner of the animal/s.
2.4 Ambiguity regarding Chapter 9
Chapter Nine of the Draft Bill (dealing with authorisation) needs an introductory section setting out its purpose in the same way as Section 87 of NEM:BA does for its Chapter 7.

Without this it is unclear as to which sections of the Draft Bill Chapter 9 is referring.

Kindly acknowledge receipt of this letter. All rights reserved.
Best regards
Rob Fryer
General Manager

TEMPLATE TO AGREE WITH THIS COMMENT:

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Dear Ms Laros

DRAFT WESTERN CAPE BIODIVERSITY BILL, 2019

I align myself fully with all the points made in WCC's comment, which you will find attached, and wish these to be registered as my individual comments as well.
Please acknowledge receipt of this letter.
Kind regards
NAME