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20 December 2010

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Dear Sir/Madam,

**INTRODUCTION: FOREST WATCH GHANA POSITION ON THE DEVELOPMENT OF A
LEGISLATIVE INSTRUMENT ON THE GRANT OF TIMBER RIGHTS OFF-RESERVE**

Forest Watch Ghana (FWG) is a civil society coalition of over 35 NGOs which was formed in 2004. The coalition is hosted by Civic Response (NGO), a member of FWG. FWG works towards just forest development through campaigns for:

- (a) fair access to forest resources as between different stakeholders and in particular for improved access for forest dependent communities;
- (b) fair distribution of benefits from forest exploitation as between different stakeholders and in particular for forest dependent communities;
- (c) greater democratic stakeholder participation in forest policymaking and management particularly for forest dependent communities;
- (d) greater civil society mobilization around forest and natural resource issues.

On 19th November, 2010, the Ministry of Lands and Natural Resources (MLNR) invited us to participate in a "stakeholder consultative workshop on the development of a Legislative Instrument (LI) on the Grant of timber rights off-reserve" at the Wood Industry Training Centre (WITC) near Ejisu in Kumasi. FWG participated in the said workshop on Monday 6th December, 2010 and raised a number of positions with regards the proposed LI.

Please find attached the position of the coalition on the draft LI.

Sincerely Yours

A handwritten signature in blue ink, appearing to read "Kingsley Bekoe Ansah".

Kingsley Bekoe Ansah
(Coordinator)

Management Committee:

A. Katako, K Opoku, PK Anderson, J.M. Shaibu, R. Antwi-Bediako, O.Y. Owusu-Sekyere, Ben Guri
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Forest Watch Ghana

Position on the

Development of a Legislative Instrument On the Grant of Timber Rights Off-Reserve

Development of a Legislative Instrument on the Grant of Timber Rights Off-Reserve

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Forest Watch Ghana would like to urge a rethink of this proposed LI. We think this is justified on both legal and policy grounds as discussed below.

Legal Grounds

Inconsistency with the 1992 Republican Constitution

We believe that the proposed LI is inconsistent with the Constitution's requirements for the grant of natural resource rights in that it seeks to confer on the Chief Executive of the FC the power to grant timber rights without Parliamentary ratification. Article 268 of the Constitution provides:

(1) Any transaction, contract or undertaking involving the grant of a right or concession by or on behalf of any person including the Government of Ghana, to any other person or body of persons howsoever described, for the exploitation of any mineral, water or other natural resource of Ghana made or entered into after the coming into force of this Constitution shall be subject to ratification by Parliament.

(2) Parliament may, by resolution supported by the votes of not less than two-thirds of all the members of Parliament, exempt from the provisions of clause (1) of this article any particular class of transactions, contracts or undertakings.

Article 269(2) of the Constitution provides:

Notwithstanding article 268 of this Constitution, Parliament may, upon the recommendation of any of the Commissions established by virtue of clause (1) of this article, and upon such conditions as Parliament may prescribe, authorise any other agency of government to approve the grant of rights, concessions or contract in respect of the exploitation of any mineral, water or other natural resource of Ghana.

These constitutional provisions apply to timber rights. Any timber permit issued without parliamentary ratification would be void as would any Act of Parliament of Legislative Instrument that purports to authorise them.

Inconsistency with Timber Resources Management Act 1997 (Act 547)

We believe that the draft LI is inconsistent with the Timber Resources Management Act, 1997 (Act 547) under which the Minister purports to make it. Section 1 of Act 547 provides as follows:

No person shall harvest timber from any land to which section 4 of this Act applies unless he holds timber rights in the form of a timber

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utilization contract entered into under this Act in respect of the area of land concerned.

There are some difficulties about whether under Section 4(2) as amended it is possible for the state to issue a TUC in respect of any land in Ghana other than state owned land without local stakeholder permission. However there is no doubt that Act 547 itself does not create any permit other than a TUC. Our advice is that given the clear language of Act 547, LI 1649 cannot validly create new rights. It can only detail or perhaps amplify the rights provided for in the parent Act.

TUPs and SPs

The FC argues that there is precedent for the proposed off-reserve permit in the "Timber Utilisation Permit" and the "Salvaging Permit". These permits are purportedly created or referenced in L.I. 1649 and have for many years now been issued by the Forestry Commission without parliamentary ratification. Rather than legitimising off-reserve permits we believe that these permits and the LI provisions that purports to establish them are void. We strongly recommend that the Honourable Minister seek advice from AG's department on this issue to prevent further unlawful conduct by the FC.

We are in complete sympathy with the FC regarding the difficulties of working with the ambiguities of existing sector legislation. We cannot however support *ad hoc* fixes that ignore this legislation.

Legal Reform Process

Of course we expect that the Honourable Minister for Lands and Natural Resources will seek advice from the Honourable Attorney General. Our understanding however is that the process for establishing an Off-reserve Timber Permits and correcting current anomalies would require the Honourable Minister for Lands and Natural Resources to:

- a. request Parliament, pursuant to Article 268(2), to pass a resolution exempting Timber Utilisation Permits, Salvaging Permits and the proposed Off-reserve Permits from the ratification requirement of Article 268(1) of the Constitution;
- b. (assuming that Parliament passes the resolution with the requisite two-thirds majority) request Parliament, pursuant to Article 269 (2), to authorise some agency of government to "approve" grants of Timber Utilisation Permits, Salvaging Permits and Off-reserve Timber Rights Permits;
- c. seek an amendment to Section 1 of Act 547 to enable the grant of timber rights other than TUCs including those under discussion here; and
- d. seek an amendment to L.I. 1649 (or perhaps a new LI) to provide for the detailed operation of these permits.

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As discussed in the next section we hope that the Honourable Minister for Lands and Natural Resources will forbear from pursuing the above on policy grounds.

Policy Grounds

Two assumptions underlying the proposal for an Off-reserve felling permit concern us. The first is that Ghana can afford additional felling. The second is that the Forestry Commission is ready for greater autonomy in the management of the permits regime. The two are of course inter-related and in the following paragraphs we address them as such.

Ghana Cannot Afford Additional Logging

Ghana is internationally recognized as country where poor sector governance arrangements driven by distorted relations between the logging industry, politicians and officials have led to the decimation of forest resources, impoverishment of rural communities, corruption and collapse of public revenue. (Indeed the term “timberisation” widely used in the English-speaking forestry world to describe state capture by the logging industry was first coined to describe the phenomenon in Ghana!). Ghana lost over 80% of its forest cover between 1909 and 1990 (and probably really since Independence). Since 1990 all available evidence points to the acceleration of deforestation. Despite the parlous state of our resource base we consistently exceed our annual allowable cut (the volume of timber extraction consistent with the forest’s natural regeneration capacity) by a factor of 300%. Ghana’s forests are absolutely and by any definition in crisis. In this situation our priority should be controlling rather than facilitating additional logging. Any reforms in the permitting regime must aim to reduce the drawdown on our national biodiversity resources to at least sustainable levels and preferably towards enhanced regeneration.

The Forestry Commission is not ready for greater autonomy in managing the permits regime

We are not confident that the Commission is yet ready to manage the permits regime without parliamentary supervision and we have monitored FC governance for almost a decade now. Prima facie, as the manager, regulator and policy coordinator for Ghana’s forestry sector since 1994 the FC must take significant blame for Ghana’s forestry debacle. The onus therefore lies on the FC to demonstrate that it has developed the vision, strategy and systems to justify greater autonomy. We advance two arguments in support of our position.

- a. The proposal for off-reserve permits itself raises questions about the Forestry Commission’s vision for the sector and its own role. The Commission argues that the proposed off-reserve permits are necessary because off-reserve forests are under attack from illegal loggers and that as a result the state is losing revenue. All this is true but it is must however be put in perspective: the state of Ghana’s

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forest reserves, which are managed by the Forestry Commission, is not significantly better than the off-reserve and historical revenue losses from reserve logging have been at least as spectacular as for off-reserve logging. More fundamentally, the real problem we confront is not the loss of revenue but the loss of the biodiversity on which our rural economy, social organisation and culture depend. This should be the obvious priority of a Forestry Commission. If we have reached a point where all the Forestry Commission can aspire to is to “cash-in” on deforestation and forest degradation then fundamental questions need to be asked about the future of the Commission itself.

- b. In recent weeks we have learned of a massive escalation in the administrative allocation of “salvaging permits” by the Forestry Commission. We have seen official records of at least 111 Salvaging Permits issued between 8 January 2010 and 14 November 2010. By contrast, in 2009 the Commission issued a total of 9 Salvaging Permits. It issued none in 2008. Further, these permits were allocated administratively i.e. without the publicity and competitive processes and state revenue generation specifically required by the Timber Resources Management Act and the Timber Resources Management Regulations. The lack of an open competitive process would be worrying enough in itself. In historical context it is truly alarming. Historically, the Forestry Commission has used Salvaging Permits to evade the transparency and competitiveness requirements of Act 547 and channel wealth illegally to preferred timber companies, officials and politicians. By the mid 2000s these practices had bankrupted the Forestry Commission financially and collapsed its authority as an industry regulator. In 2004, Forest Watch Ghana calculated that the State and forest owning communities were losing at least 100 million dollars a year from logging permits malpractices. The Forestry Commission never challenged our analysis. In its defence it argued that it believed it was acting in the best interest of the timber industry. We are not alleging corruption. We argue simply that this systematic abuse of the permits regime demonstrates that the Forestry Commission is not yet ready to operate without parliamentary supervision. We will deal with the larger issues raised by the unlawful use of Salvaging and other Permits in a separate public statement.

Conclusion

For these reasons we hope that the Honourable Minister will not pursue the proposed LI.

Alternatives

There is no need for the defeatism implicit in the proposal for new off-reserve felling permits. It is possible to manage forests reserves and off-reserve forests sustainably if we shift to a more progressive paradigm of forestry. There is ample international and local evidence that communities given opportunity can and do manage resources sustainably because this is in their own interest. It is because the State denies forest-owning communities both a role in management and a fair share of the

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monetary benefits from forest exploitation that many communities are joining this destructive race to the bottom. The solution is thus policy, legislative and institutional reforms that recognise and realise community tenure and management rights; that devolve greater regulatory authority to District Assemblies and that promote greater public investment in local skills and capacity. Based on this paradigm shift it is possible to achieve other objectives like the “low-volume, high-value” wood industry that the Ministry and the Forestry Commission have promised the country since the early 1990s.

Fortunately there are resources available within NREG (and other) frameworks to enable the thoroughgoing overhaul of policy, legislation and institutions required. Indeed we are making slow but steady progress in that direction. If we are to make the progress we need we must realign these processes more logically and inject greater energy in to moving them forward through consultative processes. We in civil society are happy to engage with the Ministry and with other interested stakeholders in this re-invigoration and redirection of the reform policy.

Distribution

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Ministry for Lands and Natural Resources
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Chairman, Board of Commissioners, Forestry Commission
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National Tree Growers Association
Parliamentary Select Committee on Lands and Natural Resources
Ghana Timber Association
Ghana Timber Millers Organisation
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