Legal issues arising from application of herbicide to Bushmans Estuary salt marsh, including implications for Draft National Environmental Management: Integrated Coastal Management Amendment Bill, 2011

This communication arises from the recent spraying of herbicide on salt marsh vegetation at the Bushmans estuary. The salt marsh falls within coastal public property.

In this regard:

- Indications are that the application of the herbicide occurred in violation of the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947.

- However it appears that the matter cannot presently be dealt with in terms of the ICM Act. This is because, in brief, neither does the spraying fall within the categories of activities which are restricted within coastal public property, nor can a coastal protection notice be issued *post facto* for an activity which has an adverse effect on the coastal environment. The matter can also not be dealt with in terms of the Sea-Shore Act. These deficiencies, which are detailed below, may also be exposed by other coastal public property activities.

- Activities not currently captured under the ICM Act could be dealt with in terms of section 28 of NEMA if they are held to cause significant pollution or environmental degradation, or to detrimentally affect the environment in a significant manner. It is however argued that it is preferable that such activities be expressly dealt with under the ICM Act in the future, in order *inter alia* to negate the need to negotiate the issue of significance of impacts as required under section 28 of NEMA.

- This can be achieved by way of the provisions which presently cover other activities within coastal public property, assuming that these provisions are amended as proposed in the ICM Amendment Bill.

- It is however crucial to appreciate that complete rectification of the current situation will not automatically accrue from enactment of the Amendment Bill

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in its current form. The issuing of *post-facto* coastal protection notices will be possible, but activities such as the application of herbicide will only be fully embraced by the Act if they are captured in the listing processes provided for in the Bill. Input on the utilization of these listing processes is offered.

- A possible anomaly in the part of the Bill which deals with offences, and which is of relevance in this issue, is also pointed out.

A. Deficiencies in the ICM Act as presently framed

1. Subsection 65 (1) provides that *no person may occupy any part of, or site on, or construct or erect any building, road, barrier or structure on or in, coastal public property except under and in accordance with a coastal lease……* T

2. The spraying of herbicide is clearly not captured in this clause, as conceivably are not various other environmentally impacting activities which people may undertake from time to time.

3. Neither, do I believe, does the transgression in this instance fall within the domain of subsection 65 (2) *(no person may claim an exclusive right to use or exploit any specific coastal resource in any part of, or that is derived from, coastal public property……).*

4. Hence the spraying of herbicide and other activities within coastal public property which cannot be categorized as either occupation, siting, construction or erection are not restricted activities in terms of section 65 of the Act.

5. The die-off of salt marsh vegetation as a result of the spraying of herbicide could reasonably be regarded as an adverse effect as defined in the Act, and as such the spraying of herbicide constitutes an abrogation of the duty of care provisions of section 58.

6. However, the issuing of a coastal protection notice in response to this activity (and other activities which do not fit within the stated categories) is not an option, since subsection 59 (1) is not applicable after the fact, pertaining as it does to the issuing of a notice *if the Minister has reason to believe that a person is carrying out, or intends to carry out, an activity that is having, or is likely to have, an adverse effect……* (underlining mine).

7. In conclusion, the ICM Act appears not to provide any avenues for following up the case in point.

B. Deficiencies in the Sea-Shore Act

1. Apparently this Act is still in effect.

2. Sub-subsection 3 (1) (o) which provides for leases for *the carrying out of any work which in the opinion of the Minister serves a necessary or useful purpose,* could perhaps be viewed as a net to capture activities such as the spraying of herbicide, which activities are not captured in the range covered in 3 (1) (a)-(n).

3. However 3 (1) (o) would only be useful in the event of a lease application being lodged for the spraying of herbicide, in response to which the Minister could apply his/her mind to the matter of whether the spraying would serve a necessary or useful purpose.

4. It is contended that 3 (1) (o) is not useful in a punitive sense, since although sub-subsection 12A (1) (a) provides that it is an offence to use any portion of the sea-shore or sea for any of the purposes specified in subsection 3 (1) without a lease having first been obtained, it cannot be used retrospectively after the spraying of herbicide, because the spraying is not *work which in the opinion of the Minister serves a necessary or useful purpose!*

5. Therefore the Sea-Shore Act appears not to provide for punitive action in this case.

C. ICM Amendment Bill

1. The provision in substituted sub-subsection 65 (1) (a) which enables the Minister to list activities that are prohibited within coastal public property, or require a coastal authorization, is an improvement relative to the principal Act in so far as it creates an avenue for specifying a more expansive range of activities than those contained in the principal Act, which, as already pointed out, are confined to occupation, siting, construction and erection.

2. The principle of prohibiting certain activities outright, as opposed to viewing all activities through the lens of coastal leases, is also supported, on the self-evident basis that there are indeed activities which simply should not ordinarily be considered within coastal public property. The spraying of herbicide is arguably a case in point.

3. However the challenge associated with listing activities is **the unlikelihood that one will be able to pre-empt all environmentally threatening activities which may be contemplated for or perpetrated within coastal public property.**[1]

[1] There is a precedent to this in the Environmental Impact Assessment Regulations. In terms of the original regulations promulgated under the Environment Conservation Act, the listed activity *the construction or*

4. Hence **it is imperative that any listing processes include broadly defined catch-all type provisions,** equivalent to sub-subsection 3 (1) (o) of the Sea-Shore Act (but minus the restriction relating to the Minister's opinion regarding the necessity or usefulness of activities). A possible option could be along the lines of *any work not provided for in all other listed activities.*

5. As an aside, **it is obviously also crucial that prohibited activities and activities requiring coastal authorizations be listed simultaneously with the amendments coming into effect,** in order to avoid a general hiatus resulting from the removal, from subsection 65 (1) of the principal Act, of the provision that *no person may occupy any part of, or site on, or construct or erect any building, road, barrier or structure on or in, coastal public property except under and in accordance with a coastal lease…….* One wants to believe that this is recognized and that the matter is in hand.

6. As far as *post facto* interventions are concerned, it is acknowledged that, in contrast to the principal Act, section 19 of the Bill provides for the issuing of a coastal protection notice *if the Minister or MEC has reason to believe that a person has carried out…..an activity that is having or is likely to have an adverse effect on the coastal environment……* (again, underlining mine).

7. This is an improvement in that obligations in relation to protecting the environment and investigating and evaluating the impact of the activity can be placed on the person responsible for the activity after it has already taken place.

8. However, the issuing of a coastal protection notice does not constitute a punitive mechanism *per se,* which is surely required for dealing with situations such as this one.

9. Accordingly, it is noted that substituted subsection 65 (2) specifies that no person may undertake an activity prohibited in terms of subsection 65 (1), or likewise undertake without a coastal authorization an activity listed as requiring such authorization in terms of 65 (1).

10. This clearly provides the desired *post facto* intervention mechanism.

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upgrading of marinas, harbours and all structures below the high water mark of the sea was an outstanding catch-all provision which negated the possibility of unanticipated yet significantly impacting types of structures slipping through a loophole. At the same time, and at the discretion of the administering authority, environmentally benign structures which fell within the domain of the list could be expediently dealt with by way of the Act's exemption provisions. Regrettably this approach was abandoned with the drive under the NEMA Regulations to single out specific types of structures, thereby introducing the loophole phenomenon. In turn this has subsequently been exacerbated by the specification of size thresholds for structures. It is urged that this approach is not duplicated in the case of listing processes under the ICM Act.

11. It is also noted that in terms of substituted section 79, contravention of 65 (2) will constitute a category two offence.

12. At the same time, the express mention of 65 (2) (b) in 79 (2) (f), in contrast to the omission of 65 (2) (a), is puzzling. By way of 79 (2) (g), 65 (2) (a) is in any event assigned category two status, but by default rather than specification. If this is the intended category, one could reasonably expect it to be explicitly assigned as such, as is the case with 65 (2) (b).

13. Conceivably it was intended to specify 65 (2) (a) as a category one offence, but this has failed to materialize? Regardless, **it is suggested that 65 (2) (a) should indeed be a category one offence,** on the basis that the undertaking of a prohibited activity is more serious than the undertaking of one for which authorization may be granted, but has not been.

14. In summary:

    - The listing process provides an opportunity for reconfiguring the existing range of activities which are restricted within coastal public property, and

    - *post-facto* punitive action and the issuing of coastal protection notices will be possible in the case of listed activities having been undertaken unlawfully, but

    - potential pitfalls in the listing process, as pointed out, must be avoided, and possible anomalies in the offences provision should be addressed.

I trust that this input will add value. Please note that this is not in its own right an effort to slip through late comment on the Amendment Bill. It is an issue which has arisen specifically from the spraying of herbicide at the Bushmans estuary, subsequent to our submitting comment on the Bill.

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