

Comment on Draft National Environmental Management: Integrated Coastal Management Bill, 2011

This submission relates to the National Environmental Management : Integrated Coastal Management Amendment Bill as published in Government Notice 840 of 2011.

Amendment of section 1

"adverse effect"

The simplification of this definition, and incorporation of *cumulative* impacts, are supported, although prior reservations about interpretation of the terms *trivial* and *insignificant* persist.

"coastal waters"

Presumably there is a typographical error in part (b), which should refer to *any estuary* in accordance with the principal Act, rather than *an estuary*.

"estuary"

- (i) Notwithstanding that the Act presently refers to the rise and fall of water level *at spring tides*, the use of the italicized terminology is questioned for the following reasons:
 - It is neither precise nor absolute, pertaining (at least in the writer's understanding) only broadly to the phases in the tidal cycle around new and full moon.

- It is moreover not defined in the Act.
- There is no guarantee that particularly high or low tidal extremes will indeed occur within the spring tide window, given the effect of additional factors such as atmospheric conditions, swell and wave height, coastal trapped waves and other oceanographic phenomena in determining sea level at any point in time.
- By the same token, tidal extremes outside of the spring phase can exceed those at springs.
- These anomalies may be accentuated in estuaries, all the more so if their openings to marine waters are marginal or tenuous.

Hence reference to spring tides may be unintentionally restrictive in implementation of the Act. At the same time, especially in the case of estuaries with marginal or tenuous openings to marine waters, there may be a significant number of instances or periods when tidal fluctuation is not measureable at times within the spring phase.

All told, therefore, it may be pragmatic to refer simply to discernable water level fluctuations resulting from a watercourse being open to marine waters, or suchlike, rather than the rise and fall at spring tide. Either way, what is important is that it be appreciated in finalizing the amendments that the reality of estuary water level fluctuation is not necessarily one which can readily be captured by way of simplistic reference to spring tides.

- (ii) Not entirely unrelated to the above point, and (again) notwithstanding that the Act is currently framed this way, consideration should perhaps be given to substituting the term *open to marine waters* with *in contact with marine waters*.

The basis for this suggestion is that the water level inside an estuary which is in a closed state can rise as a result of overtopping of marine water by wave and/or tidal action, and this can be seen to be analogous to a rise as a result of an influx of marine water through an opening.

In turn note that there is a linkage between this point and comment on “high water mark” below.

“high water mark”

- (i) In the first instance the amended definition appears to be fatally flawed in as much as by replacing the reference to *coastal* waters with one pertaining to *marine* waters, and given the definition of the latter in the Amendment Bill,

the concept of the high water mark no longer applies to estuaries. Clearly this error needs to be rectified.

- (ii) Unfortunately the writer does not have insight to the reason(s) for the introduction of provisions relating to the high water mark being determined by way of notice in the Gazette. Regardless, this development is perplexing and is viewed with skepticism. On the one hand, deeming a line relative to Chart Datum to be the high water mark would obviously be an exercise in fiction. On the other, the logistics associated with physically determining any point or points on the line would be staggering, and surely outweigh any possible challenges entailed in determining the position of the high water mark by way of the usual criteria employed in appraisal of specific sites. Consequently it is urged that these provisions be abandoned.
- (iii) Removal of the reference to floods or storms *that occur no more than once in ten years* is supported. However, the stipulation covering *an ordinary storm occurring in the most stormy period of the year* is not. This is for the simple reason that (given among others the factors which affect sea-level as alluded to in comment on the definition of estuary) extreme inland reaches of the sea may not necessarily be attained in the stormiest period of the year.
- (iv) Caution is also expressed about the exclusion of lines reached during *exceptional or abnormal floods*. Quite aside from any difficulties associated with obtaining consensus on or unequivocal definition of these conditions, it can be argued that in view of current and projected rises in sea level, coastal management needs to be premised on a definition of the high water mark which tends toward a higher rather than lower extreme, so to speak.
- (v) Hence proposed alternative wording could simply be along the lines of *the highest line reached by coastal waters, excluding any lines reached during excessively extreme weather and sea conditions*.
- (vi) Excluding lines reached as a result of estuaries being closed to marine waters is questioned, given that water level can rise from overtopping, and this can be viewed as being akin to ingress of marine water when estuaries are open, as already mentioned. It is acknowledged that water level may also rise in closed estuarine systems as a result of fresh water inflow (in conjunction with overtopping or otherwise). In any event, since water level is determined by more than simply tidal action, as dealt with under the definition of estuary, and following the argument in (iv) above that high water marks should tend to be higher rather than lower, a case can be made for accepting the said lines as *bona fide* high water marks. It is argued that this is in fact desirable given among others the management challenges associated with low-lying infrastructure in the vicinity of temporarily open or closed estuaries.

“marine waters”

- (i) The position of this definition, alphabetically speaking, is incorrect.
- (ii) It is unclear why the introduction of the term to the ICM Act is necessary.
- (iii) The precise meaning of the term *salt water* is unknown. For example, would estuarine water of 4 ppt be regarded as salt water? In this regard it is noted that the definition of *sea* encompasses *all marine waters.....including estuaries*, but the definition of marine waters itself is silent on estuaries, presumably because they fall within the definition of *coastal waters*. Either way the picture which is presented is confusing and unconvincing.

“sea”

- (i) See comment re inconsistencies under the definition of *marine waters*.
- (ii) The term *submerged* implies permanent inundation, which will obviously not be the case in the intertidal zone. This aspect needs to be clarified.

Amendment of section 7

Re sub-subsection 7(2)(b):

The logic underpinning this provision is questioned. As we know, members of the public may and in the past have acquired rights to establish infrastructure such as jetties, slipways and embankments on portions of coastal public property. Much of this infrastructure can to all intents and purposes be regarded as immovable. Assuming that the “feet” of such infrastructure are below the high water mark (as is usually the case), those parts which extend above the high water mark will be excised from coastal public property. This is bizarre and needs to be clarified.

At the same time there is a plethora of structures which have been constructed without the requisite rights having been acquired, as equally there is a plethora of structures which may have been or were established legally but for which records no longer exist or cannot be accessed. Are the supra-tidal elements of such structures likewise to be excised from coastal public property?

Amendment of section 14

- (i) The removal of the temporal stipulations in subsections 4 & 5 is supported.

- (ii) Note the typographical error in the proposed new subsection 7 (*declared* should be *declare*).

Repeal of sections 35-37

- (i) These repeals are supported because of issues around practicality, need and duplicity, given the focus in real terms on Provincial Coastal Committees.
- (ii) That said, there remains a real need for Working Group-type structures to oversee and coordinate the effective implementation of all legislation ordinarily administered by coastal management functionaries (e.g. the NEMA Regulations for Control of Vehicles in the Coastal Zone), and not just the ICM Act itself. This in particular given glaring omissions in implementation capacity in the lower tiers of government.
- (iii) Even more critical is the imperative to create effective oversight and coordination mechanisms to deal with the woeful anomaly whereby (at least biophysically) the state of the coast is presently being shaped, from a legislative perspective, in large measure by the NEMA EIA Regulations, which are not administered at provincial level by coastal management functionaries.
- (iv) This applies to both the provisions in the Regulations which deal directly with coastal matters (activities in the sea or within 100 meters of the high water mark etc), and to those activities which are not specific to the coastal zone, but have a bearing on the state of the coast by virtue of their being carried out there.
- (v) The situation as described gives rise to chronic lapses in coastal governance and severe undermining of the objects of the Act, in the process exposing section 63 of the ICM Act as a wholly inadequate quality control mechanism on its own.
- (vi) There is no reason to believe that the proposed amendments to section 63 will bring about any improvement (on the contrary – see comment under that section), which appears to leave little option but that national government takes charge and imposes itself within an active cooperative governance context to eliminate unacceptable conduct by other organs of state and ensure ongoing sound practice.
- (vii) Conceivably this can take place within a Working Group, the establishment and functioning of which does not need to be provided for in the Act.
- (viii) Processes administered in terms of land use planning legislation are arguably playing an equally significant role in determining the shape of the coast, notwithstanding the various provisions in the Act which purport to bring

these processes into line with good coastal practice. As such this aspect of governance also needs to be dealt with within the mooted cooperative governance framework, although sheer practicality may necessitate that the focus of this is at provincial level, with national government maintaining oversight to ensure ongoing effective action provincially as required.

Amendment of section 63

- (i) It appears that the proposed substitution of subsection 1(f) entails the deletion of subsection 1(g) but there is no indication to this effect. This issue needs to be clarified. If it is indeed the case then the reasoning involved is unclear, other than that it can be speculated that it is because 1(g) states the obvious and is hence unnecessary.
- (ii) That said, the provision relating to cumulative impacts in 1(g) is of fundamental relevance in the coastal zone, and consideration should therefore be afforded to the retention of such a reference in Section 63.
- (iii) If 1(g) is removed then 1(h), (i), (j) & (k) must become will become 1(g), (h), (i) & (j) respectively.
- (iv) The transposition of sub-subsections (2)(a)-(g) in the principal Act into proposed subsection 1, and, in particular, the deletion of the safeguard in subsection 2 against poor decision-making, is opposed. This in its own right as well as especially in view of the reservations about the competence of environmental impact management practitioners in relation to coastal matters, as articulated in comment on the proposed deletion of sections 35-37 (above).

Repeal of section 64

This is wholly supported because the provision was fraught with risk of undermining the objects of the Act.

Amendment of headings to Part 4 & Section 65

There is no principle objection to this but it is cautioned that it may cause confusion in the public sphere, given the use of the term *authorization* in relation to the NEMA EIA Regulations in general, and specifically since the term also applies to coastal zone activities approved in terms of the Regulations.

Amendment of section 66

The writer is supportive of the restructuring of authorization periods, but is aware of instances where the shorter timeframe could legitimately be regarded as problematic. Perhaps some form of activity-based sliding scale could be contemplated to deal with such cases, which may tend to be associated with deep-water projects. But the need for strictly limited period authorizations for small to medium scale projects on the seashore and especially in estuaries is affirmed.

Amendment of section 79

The meaning of the term *passes*, which has been carried over from the principal Act, is unclear.

Amendment of section 90

The amendment is not to the heading as indicated.

Amendment of section 91

The amendment involves a substitution and not an insertion as indicated.

Amendment of Section 95

While the amendment is not opposed it is unclear how the plethora of structures on coastal public property (at least in the Eastern Cape Province) without corresponding Seashore Act documentation is going to be dealt with. This includes instances where real estate (e.g. estuarine property) "associated" with such structures has changed hands without attention being afforded to the legalities of the structures.

Insertion of section 97A

No heading is presented for this section. It is presumed that the present heading of section 97 is not applicable.

Concluding remarks

- (i) It is contended that the following three interrelated issues have a fundamental influence on the value of the ICM Act in ensuring sound coastal management in South Africa:
- the fact that the state of the coast is in large measure presently being determined by the NEMA EIA Regulations, which are generally administered at provincial level by functionaries who are not coastal managers, and by processes in terms of land use planning legislation, which are generally dealt with at local government level;
 - the fact that while one of the purposes of the coastal protection zone is the protection of *the ecological integrity, natural character and the economic, social and aesthetic value of coastal public property*, protecting these attributes in the coastal protection zone itself is not a primary objective of the ICM Act, and
 - the limited landward extent of the coastal protection zone.
- (ii) The first issue has been dealt with in comment on the repeal of sections 35-37 and touched on in comment on the amendment of section 63. The constraints inherent in the prescribed structural arrangements associated with the EIA Regulations are recognized, and mechanisms to enhance counteraction against these have been proposed.
- (iii) As regards the second and third issues, the current wholesale alteration of South African coastal landscapes, the proliferation of ribbon development, and corresponding changes in coastal zone usage are serious threats to the integrity of the coastal zone, and to the rights of everyone to have the coastal environment protected for present and future generations.
- (iv) Expansion of the rationale for the coastal protection zone to include the protection of its own ecological integrity, natural character and economic, social and aesthetic value would constitute a quantum step forward in consolidating the protection of the coastal environment as a whole.
- (v) Such expansion however needs to be complemented by the incorporation into the coastal protection zone of all areas which are vulnerable to the stated threats. It is acknowledged that provision is made in the Act for adjustment of the boundaries of the coastal protection zone, as well as for other mechanisms which could address the land use challenge. Nevertheless the situation is urgent to the extent that novel innovations are required in order for it to be brought under control in the short term.

- (vi) Within the context outlined here, the Amendment Bill disappoints in that it fails to tackle key threats to the integrity of the coast through imaginative reworking of provisions relating to the coastal protection zone.

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