

NOTICE 1046 OF 2012**DEPARTMENT OF ENVIRONMENTAL AFFAIRS****EXPLANATION SUMMARY OF THE NATIONAL ENVIRONMENTAL MANAGEMENT:
INTEGRATED COASTAL MANAGEMENT AMENDMENT BILL, 2013**

The Minister of Water and Environmental Affairs intends introducing the National Environmental Management: Integrated Coastal Management Bill, 2013 in Parliament in 2013. An explanatory summary of the Bill is hereby published in accordance with Rule 241 (1) (c) of the Rules of the National Assembly.

Copies of the draft Bill can be obtained from Mr. Heinrich Muller, Department of Environmental Affairs, East Pier Building 1, East Pier Road, V&A Waterfront, Cape Town, hmuller@environment.gov.za. The draft Bill is also available on the Department of Environmental Affairs' website, www.environment.gov.za.

BOMO EDITH EDNA MOLEWA**MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS**

MEMORANDUM ON THE OBJECTS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT AMENDMENT BILL, 2013

1. BACKGROUND

- 1.1. The National Environmental Management: Integrated Coastal Management Amendment Bill, 2012 ("the Amendment Bill"), seeks to amend the National Environmental: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008), ("the Act"). The Act is a specific environmental management Act within the framework of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA). The Act was promulgated in 2008 and came into operation on 1 December 2009. Most of the amendments were identified through implementation of the Act and some originated through consultations with Organs of State such as Transnet on the impact of the Act on their operations as discussed below.

The Act created the notion of 'coastal public property', which gives special status to South Africa's territorial waters up to the high-water mark (beaches, the sea and the sea-bed) including admiralty reserves. In other words, everything that occurs below (seaward of) the high-water mark is part of coastal public property. Ownership of these natural assets is vested in the citizens and held in trust by the State. Due to its dynamic nature, it is critical to manage coastal public property to ensure long-term sustainability and the protection of people and their properties against the natural elements. As part of the management regime, coastal public property cannot be sold or leased for longer than 20 years and all leases must be concluded with the Minister of Environmental Affairs. It is essential to prohibit sale of these natural assets. However, the current lease provisions are very restrictive and prohibit any activity on coastal public property without a lease from the Minister. The section dealing with leases and ownership of coastal public property have not been put into effect because the Act did not clearly deal with the impact of coastal public property on other Organs of State that own assets and operate in that space. The Amendment Bill seeks to correct this.

- 1.2. Definitions and terminology needed to be revised and clarified. In addition, several gaps and textual errors presented themselves during the implementation of the Act. During the printing process, several textual errors occurred in the Act.

2. OBJECTS OF BILL

2.1. The purpose of the Bill is to:-

- ensure that coastal public property does not impact on the ownership of assets and operations of other Organs of State;
- expand the provisions on reclamation;
- simplify the administration of coastal access fee approvals;
- extend the powers of MECs to issue coastal protection notices and coastal access notices;
- simplify and amend powers relating to coastal leases;
- abolish the National Coastal Committee;
- expand the powers of delegation by MEC's;
- expand categories of activities requiring dumping permits;
- provide for exemptions;
- revise offences and increase penalties; and
- make corrections.

2.2. CLAUSE BY CLAUSE EXPLANATION

2.2.1. Ad clause 1 (Amendment of definitions)

Certain definitions are amended to clarify their meanings and usage. These include technical improvements to definitions such as “estuary”, “high water-mark”, and “land unit”. It is proposed that the scope of “coastal waters” be expanded by including the Exclusive Economic Zone and the continental shelf. New definitions are proposed for insertion as a consequence of proposed amendments to the Act, e.g. the definitions for “reclamation” and “harbour”.

2.2.2. Ad clause 2 (Insertion of coastal protection zone in the objects clause)

It emerged from the public comments that the coastal protection zone was erroneously omitted from the objects of the Bill.

2.2.3. Ad clause 3 (Insertion of the purpose of the coastal public property)

Public comments revealed that whilst the purpose of the coastal protection zone is fully covered in section 17, there is no similar clause in respect of coastal public property. A new section is therefore proposed.

2.2.4. Ad clause 4 (Amendment of section 7 - coastal public property)

- (a) The Act created the notion of 'coastal public property' (CPP), which comprises the territorial waters of South Africa up to the high-water mark and includes admiralty reserves. In other words, the beaches, sea and sea-bed which occur below the high-water mark form part of coastal public property. Section 11 of the Act (which is not yet in operation) vests ownership of these natural assets in the citizens to be held in trust by the State. Section 65 (also not yet in operation) prohibits occupation of CPP without a lease from the DEA Minister. Coastal Public Property cannot be sold or leased for longer than 20 years. The Act did not clearly specify whether the infrastructure below the high water-mark also formed part of coastal public property and as a result, Organs of State such as Transnet felt uncertain about the status of their assets within ports. Transnet, for example, leases out spaces on jetties which extend into the sea in order to fund port operations. Their leases are often longer than 20 years in order to secure funding. They are concerned that the Act may be interpreted as divesting Transnet of its ownership and right to lease these jetties. In addition, they are concerned that the 20-year limitation on leases in section 65 limits their ability to secure finances through long-term leases. Clause 4 seeks to clarify that coastal public property **does not** include assets or infrastructure above or below the high water-mark. Hence the Act

would not negatively impact on their leases as they would not be subject to the ownership and lease restrictions in sections 11 and 65.

- (b) The section has also been re-arranged so that it clearly states what does and does not form part of coastal public property.

2.2.5. Ad clause 5 (Insertion of new clause – reclamation)

Section 27(6) of the Act briefly addresses reclamation. The section was inserted late during the parliamentary process to address ad hoc concerns that arose when the Act was being considered by the Portfolio Committee. It was inappropriately placed and the current provision in section 27(6) is inadequate. The Bill proposes an insertion of a new comprehensive clause in a more appropriate place in the Act. In addition, a definition for 'reclamation' was inserted under clause 1.

2.2.6. Ad clause 6 (Amendment to clause 8 Consequential amendment)

This proposed amendment is a consequential amendment to the insertion of section 6A – purpose of coastal public property.

2.2.7. Ad clause 7 (Amendment of section 11 – ownership of coastal public property)

Section 65(2) (coastal leases and concessions) currently provides that a right to exploit a natural resource from coastal public property may only be exercised in terms of national legislation. The section is more appropriately placed under the section dealing with ownership of coastal public property (section 11), as it qualifies/limits such ownership. In addition, during the public comment phase it became evident that there is some confusion about the status of rights to use and exploit natural resources that occur on or in coastal public property. This amendment seeks to clarify the legal position.

2.2.8. Ad clause 8 (Amendment of section 13 – Access fees to coastal public property)

Section 13 of the Act currently obliges a person to obtain the approval of the Minister before charging access fees to coastal public property. The current provisions result in multiple individual applications being made to the Minister for permission to charge any access fees to coastal public property. Fee payers would include municipalities, boat-clubs, events organisers, etc. This would result in hundreds of applications which need to be responded to and delays in processing such applications may negatively impact on municipal revenue. To streamline the process and standardise access fees, it is proposed that the Minister publish a maximum fee and anyone who wishes to charge a higher fee would only then have to apply to the Minister, justifying the need. In addition, it is made clear that access fees are not to be confused with the costs of tickets for commercial activities that take place on or in coastal public property, e.g. a trip to seal island or a beach volley ball event.

2.2.9. Ad clause 9 (Amendment of section 14 – high-water mark)

After the stakeholder engagement on the high water mark, it became apparent, particularly from the Surveyor-General that the substitution of the high water-mark for a straight line boundary was no longer necessary as those properties that were bounded by the high-water mark would gain or lose land depending on the natural movement of the high-water mark. Allowing a property owner to determine a fixed line could potentially create unfair land grabs of coastal public property which would impact on the public's access to the beach. The relevant sections have therefore been deleted and the remaining sections clarify the consequences of the high-water mark moving inland or seaward.

2.2.10. Ad clause 10 (Amendment of section 15 – erosion and accretion)

This proposed amendment to section 15 of the Act is intended to align it with National Environmental Management Act (NEMA).

2.2.11. Ad clause 11 (Amendment of section 16 – composition of the coastal protection zone)

The proposed amendments to section 16 of the Act address textual corrections and a technical change to increase the surface area of flood prone areas as a consequence of climate change. Public comments pointed out that relevant parts of rivers were not part of the coastal protection zone and this is corrected through the proposed amendment to 16(1)(f). The proposed amendment to s16(1)(i) is intended to refer to flooding only from the sea and not from storms upstream from rivers. It is therefore limited to areas adjacent to the other categories of the coastal protection zone. If not, it could potentially cover areas of land that are nowhere near the sea. In addition, the 1:100 year flood line is more appropriate in light of climate change.

2.2.12. Ad clause 13 (Amendment of section 17 - terminology)

The proposed amendment seeks to clarify terminology. The term “coastal waters” is more accurate in the context.

2.2.13. Ad clauses 14 and 15 (Amendment of sections 18 and 19 – designation of coastal access strips)

Currently, there is no power to intervene if a municipality fails to designate coastal access land which is an essential function in complying with the objectives of the Act. Given our strategic focus on access, it is important to empower the MEC and failing the MEC, the Minister to act if a municipality fails to.

2.2.14. Ad clause 15 – 17 (Amendment of section 25 – Coastal set-back lines)

There was confusion between EIA development set-back lines (in terms of the NEMA Environmental Impact Assessment (EIA) regulations) and coastal setback

lines under this Act. It is therefore proposed that 'coastal setback-lines' be changed to 'coastal management lines'. The proposed amendments to these sections are consequential to that change. In addition, a few problems were raised during the public consultations. The Act, in section 26, provides that coastal boundaries may be determined or adjusted by notice in the Gazette. However, section 25 of the Act provides that the MEC must in regulations establish or change coastal (set-back) management lines. Provinces point out that they are currently experiencing difficulties and have to amend some of their set-back lines. It is in fact easier to withdraw or amend notices as opposed to amending regulations, it is therefore proposed that the MEC be given the power to publish a notice in the Gazette to establish or change coastal set – back lines, similar to the powers in section 26 (adjustment of boundaries). The MEC may then still by way of regulations prohibit or restrict the building of structures seaward of that coastal set-back line.

2.2.15. Ad clause 18 (Amendment of section 27 – determining and adjusting the boundary of coastal public property)

During the Parliamentary process when enacting the Act, an attempt was made to address the issue of Transnet with coastal public property (see par. 2.2.4 above) by inserting a power to exclude areas from Coastal Public Property with the ratification of Parliament. Such an 'exclusion' was effected prior to the commencement of the Act, whereby portions of ports under the control of Transnet were excluded from coastal public property, which resulted in unintended and undesirable consequences for both Transnet and DEA. Transnet found itself in a worse position after the exclusion, as the ports which were previously coastal public property now became State owned land, placing them in an equally precarious situation regarding their ownership status. From the environmental perspective, an unintended consequence of exclusion of an area of sea and sea-bed from CPP meant that the excluded portion of the sea and sea-bed could be privately owned, thereby subverting the principle established in the ICM Act – that the sea and sea-bed cannot be privately owned. It is therefore necessary to delete the provision empowering the Minister to exclude CPP.

Reclamation – The reclamation provision in section 27 was inserted late during the parliamentary process to address ad hoc concerns that arose when the Act was being considered by the Portfolio Committee. It was inappropriately placed and the current provision in section 27(6) is inadequate. A new clause has been drafted and more appropriate placed through an insertion of section 7A.

2.2.16. Ad clauses 19 and 42 (Amendment of sections 31 and 42)

The proposed amendments are consequential to the amendment to the definition of local municipality.

2.2.17. Ad clauses 20, 21, 22 and 39 (Amendment of sections 35 – 37 and section 39 – National Coastal Committee)

Section 35 of the Act provides for the establishment of a national intergovernmental body to give strategic direction on implementation of coastal management issues under the Act. To avoid duplication and streamline government processes, the Bill proposes that the existing intergovernmental forums in terms of the Intergovernmental Framework Relations Act, 2005 (Act No. 13 of 2005), (MINMEC and MINTECH), assume the role of the National Coastal Committee. This proposal is also in line with the Intergovernmental Framework Relations Act.

2.2.18. Ad clauses 23, 26 and 27 (Amendment of sections 38, 51 and 56 – corrections and improvements to text)

The Bill proposes to correct a cross-reference in section 38 of the Act, align the wording of section 51 with NEMA, and make a textual improvement to section 56 of the Act.

2.2.19. Ad clause 28 (Amendment of section 59 – extending powers of MECs)

The Act erroneously failed to give an MEC the power to issue coastal protection notices and coastal access notices. Clause 18 of the Bill proposes to correct that omission and to cover a loophole in the criteria for issuing such notices. In addition, the wording in section 59(3) appears to be in conflict with the powers of the MEC as it relates to delegations in terms of s91. It is therefore proposed that section 59(3) be deleted.

2.2.20. Ad clause 29 (Amendment of section 60 – correction)

Section 60(3) of the Act erroneously gives the Minister the power to delegate a power to the MEC, while subsection (1) already assigns the original power to the MEC. The Amendment proposes to correct this. There is also a significant typographical error which will simultaneously be addressed.

2.2.21. Ad clause 30 (Amendment of section 62 – EIA report)

Section 62(2) of the Act requires an Organ of State to first consider an environmental impact assessment report before authorising land to be used for activities within the coastal protection zone which may have an adverse effect on the coastal environment. Since the NEMA Environmental Impact Assessment (EIA) Regulations already cover activities which may have an adverse effect on the coastal environment, this section is unnecessary. In addition, it is unclear what is meant by an “environmental impact assessment report” and it is assumed to be a reference to the report under the EIA Regulations, although it is not clearly stated so. An EIA report is only one component of an environmental impact assessment process so this terminology is inaccurate. It is therefore proposed to delete subsection (2).

2.2.22. Ad clause 31 (Amendment of section 63 – criteria for considering EIAs for coastal activities)

The criteria in section 63 of the Act have given rise to interpretational difficulties for competent authorities. The factors listed for which authorisation must be refused are so broad, that it could potentially prevent competent authorities from granting authorisations. The amendment proposes to address this problem by incorporating the exclusionary criteria as part of the general criteria to be taken into account by competent authorities when considering EIA applications.

2.2.23. Ad clause 32 (Amendment of section 64 – Minister's override)

The Bill proposes the deletion of section 64 of the Act. This section currently gives the Minister an override power over a competent authority to issue an environmental authorisation in certain circumstances, which creates a parallel process to the appeal process in NEMA and causes confusion.

2.2.24. Ad clauses 33 - 37 (Amendment of sections 65 and 66 – coastal leases and concessions)

The original need for coastal leases was to generate funds and to control activities within coastal public property. Section 66 of the Act, which provides for leases of coastal public property is administratively cumbersome, over-regulatory and has a potential unintended impact on other Organs of State that operate within coastal public property. In addition, it is not practical to subject *every activity* on coastal public property to a lease as it not all activities have impact and it would therefore serve no real environmental value. As a result, it was not put into operation. The Bill is proposing to replace the leases with coastal use permits whereby the Minister is authorised to list activities which require authorisations, thereby removing the blanket restriction on activities that do not require regulation. It is intended to create a mechanism to only regulate certain activities which impact on coastal public property but which are not appropriately dealt with under other environmental legislation such as the NEMA Environmental Impact Assessment Regulations. In

addition, the time limitation of 20 years has caused concern among industries that require security of tenure for financial investments – e.g. aquaculture/ sea-ranching within coastal public property. It therefore proposed that the time period be removed and made discretionary, to allow for different scenarios.

2.2.25. Ad clauses 38, 42 and 46 (Amendment of sections 68, 74, and 83)

These proposed amendments are consequential to the change in terminology from 'authorisation' to 'coastal authorisation' – see definitions. The term authorisation was causing confusion with EIA authorisations and was therefore proposed for amendment.

2.2.26. Ad clauses 39 (Amendment of section 69 – consequential amendment)

The proposed amendment is a consequential amendment to the amendment to the definition of authorisation and the repeal of the National Coastal Committee (sections 35-37).

2.2.27. Ad clause 40 (Amendment to section 70)

The proposed amendment is a consequential to the amendment of the definition of 'coastal waters'. 'Coastal waters' currently covers the Republic's territorial waters (12nm) but excludes the exclusive economic zone – 200 nm (EEZ). It would mean therefore that cabling and pipelines etc. that require coastal authorisations would require no authorisation if they extend beyond the 12 nm. It was therefore considered necessary to extend it to the EEZ as well.

2.2.28. Ad clause 41 (Amendment of section 71 – dumping permits)

There are a limited number of activities for which the Minister may issue dumping permits under section 71. There may be circumstances where additional categories are required as changes occur in the international regime which governs dumping, namely the London Dumping Protocol 1996, to which South Africa is a signatory. The amendment proposes to give the Minister the power to prescribe in regulations, additional waste and other material that may be permitted without the need to continuously amend the Act as and when new categories occur. The amendment also proposed to clarify the time period for validity of permit which is ambiguous.

2.2.29. Ad clauses 42- 45 (Amendment of section 79 – 81 offences and penalties)

There have been complaints that the sentencing is inadequate and that there are gaps in the sentencing provisions. Section 79 – 81 Offences and Penalties have been tightened up. There are now only two categories of offences instead of 3 and the sentences for category two offences have been increased. In addition, the proposed amendment to section 81 deals with extra-territorial jurisdiction of South African citizens and improves the text regarding the jurisdiction of courts in respect of offences in terms of the Act.

2.2.30. Ad clause 47 (Amendment of section 84 – terminology)

The proposed amendment is consequential to the amendment of the definition of “coastal set-back lines”.

2.2.31. Ad clause 48 (Amendment to section 85 – penalties for regulations)

There was initially no maximum limit set for offences in regulations this has now been inserted to provide certainty as to the upper limit of the Minister’s powers.

2.2.32. Ad clause 49 (Amendment of section 89 – delegations by the Minister)

Currently, the Minister is required to publish in the Gazette any delegation of power to a functionary outside the Department. This is an administrative procedure which is not strictly necessary and may hinder efficient service delivery. It is recommended for deletion.

2.2.33. Ad clauses 50 (Amendment of section 90 – correction)

The proposed amendment is consequential to the amendment the definition of 'coastal set-back lines'. It also proposes a correction to subsection (1)(d) of the section which does not make sense.

2.2.34. Ad clauses 51 (Amendment of section 91 – delegations by MECs)

The Act erroneously does not allow an MEC to delegate to an official within his/her department. This amendment proposes to correct this.

2.2.35. Ad clauses 36 (Amendment of section 92 – urgent action by Minister)

Following requests during the public comment period, it was considered appropriate to give this power to the MEC to allow for improved efficiency in urgent situations, hence the proposed amendment to subsection (1).

This proposed amendment to subsection (3) is consequential to the proposed amendment to section 59.

2.2.36. Ad clause 54 (Amendment to section 93 – reporting)

With the proposed repeal of the National Coastal Committee, there is no requirement to report to the National Coastal Committee on the status of pipelines. It is recommended that the reporting requirement in section 69(11) be inserted in this section as part of the state of the coast report.

2.2.37. Ad clauses 55 (Proposed insertion of new clause)

There is a probability that many Organs of State may require exemptions from certain provisions. Unforeseen situations need to be accommodated without the need for an unnecessary statutory amendment. It is therefore proposed that an exemption provision be inserted so as not to hinder service delivery. The provision is similar to that it in the Marine Living Resources Act, 1998 (Act No. 18 of 1998), which has been approved by the courts.

2.2.38. Ad clause 56 (Amendment to section 95 - transitional provisions relating to leases)

Since it is proposed that the concept of leasing in section 65 be replaced with coastal use permits for activities which are yet to be listed, there is no need to keep existing leases alive. The reason being that some activities which are currently governed by leases may not require a permit. An example of this is the use of slipways, for which there is no real need for a permit as they would already have undergone environmental scrutiny through the Environmental Impact Assessment process. The only value therefore in asking for ALL existing leases, would be to assist the Department in determining which activities currently under lease (in terms of the Sea Shore Act), would need to be listed as requiring a coastal use permit under the new section 65. It is therefore proposed that copies of all existing leases be submitted to the Minister within 24 months.

2.2.39. Ad clause 57 (Amendment to section 96 - transitional provisions)

The proposed amendments are consequential to the amendment to section 65 – i.e. the new regime of coastal use permits which replace leases.

2.2.40. Ad clauses 58 (correction by deleting section 97)

A transitional provision based on earlier versions of the Act, which were subsequently changed, was erroneously retained and is creating confusion.

Section 97 currently saves activities which were previously listed in a schedule. It was subsequently decided to integrate these activities with the NEMA EIA provisions and this section no longer serves a purpose.

2.2.41. Ad clauses 59 (Proposed insertion of new clause)

Parliament excluded certain portions of the Transnet ports from coastal public property prior to the Act commencing. The exclusion had unintended and undesirable consequences for both Transnet and DEA. Transnet found itself in a worse position after the exclusion, as the ports which were previously coastal public property now became State owned land, placing them in an equally precarious situation regarding their ownership status. From the environmental perspective, an unintended consequence of exclusion of an area of sea and sea-bed from CPP meant that the excluded portion of the sea and sea-bed could be privately owned, thereby subverting the principle established in the ICM Act – that the sea and sea-bed cannot be privately owned and is held in trust by the State. It is necessary to nullify that exclusion in the legislation, as section 7 dealing with coastal public property, now clearly excludes port structures/assets and there is no longer a need for exclusions from coastal public property. It is important to retain the principle that the sea and sea-bed is not capable of private ownership and is held in trust by the State. Allowing for exclusion subverts this principle.

2.2.42. Ad clause 60 (Amendment of section 101 – long title and commencement)

This clause proposes a typographical amendment to the long title of the Act.

3. DEPARTMENTS/BODIES/PERSONS CONSULTED

- Department of Public Enterprises
- TRANSNET

4. IMPLICATIONS FOR VULNERABLE GROUPS

None

5. FINANCIAL IMPLICATIONS FOR STATE

None

6. PARLIAMENTARY PROCEDURE

6.1 The State Law Advisers and the Department of Environmental Affairs are of the opinion that the proposed Bill falls within the ambit of section 76(3) of the Constitution as it deals with a functional area listed in Schedule 4. As such, the Bill must be dealt with in accordance with the procedure established in terms of section 76(1) or (2) of the Constitution.

6.2 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003),

since it does not contain provisions pertaining to customary law or customs of traditional communities.