

COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) ON
THE DRAFT NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL
MANAGEMENT AMENDMENT BILL, 2011

The Law Society of South Africa (LSSA) has considered the Draft National Environmental Management: Integrated Coastal Management Amendment Bill, published in Government Gazette 34781 on 25 November 2011 for public comment. We wish to comment as follows:

1. Comment on the format of the proposed Bill

There appears to be some inconsistency in the numbering format of the Bill in relation to the numbering format of the Act, which needs to be addressed.

2. Comments on the proposed Preamble of the Bill

2.1 The Preamble states that the aim of the Bill is "to amend the National Environmental: Integrated Coastal Management Act so as to ..." This should be corrected to read "to amend the National Environmental Management: Integrated Coastal Management Act so as to"

2.2 The Preamble states that the aim of the Bill is "to amend the National Environmental: Integrated Coastal Management Act so as to (...) simplify and amend powers related to coastal leases". This should be clarified as the Bill actually changes the terminology from "coastal leases and concessions" to "**coastal authorisations**".

2.3 The Preamble states that the aim of the Bill is "to amend the National Environmental: Integrated Coastal Management Act so as to (...) amend the composition of the **National Coastal Committee**". This should be clarified and amended, as the Bill actually proposes to repeal all sections (including section 35 relating to the establishment of the National Coastal Committee) and references related to the National Coastal Committee.

3. Comments on the proposed amendment of section 1(b) – Substitution of the definition of "authorisation"

3.1 As a result of the proposed amendment of section 1(b), the following three legal definitions/terms will co-exist: "authorisation", "coastal authorisation" and "environmental authorisation". It is submitted that the proposed amendment has the potential to create confusion and challenges at the implementation level. For example, some authorisations in the coastal zone in terms of the National Environmental Management: Integrated Coastal Management Act (NEM:ICMA) will be defined as "authorisations" but will not be "coastal authorisations" or "environmental authorisations". It is our opinion that the drafters of the Bill might want to reassess the terminology used in this context and perhaps opt for different terminology to clarify the situation and avoid legal complexity at a practical level.

3.2 It is also submitted that further confusion at a practical level could be created when referring to a "general authorisation", which could refer to a general authorisation in terms section 69 of NEM:ICMA and/or to a general authorisation in terms of the National Water Act 36 of 1998.

4. Comment on the proposed amendment of section 1(g) – Substitution of the definition of "estuary"

It is essential that the definition of "estuary" in the NEM:ICMA be the same as the one provided by the National Water Act, which is not the case with the proposed amendment. The proposed definition of "estuary" could remain if the definition provided by the NWA is amended accordingly to ensure alignment between the two Acts.

5. Comment on the proposed amendment of section 1(i) – Substitution of the definition of "high water mark"

It is submitted that the definition of "high water mark" should make reference to section 14 of the Act (as proposed to be amended by the Bill). The definition of "high water mark" and section 14 are complimentary and should not be read independently, as this could create interpretation issues.

6. Comments on the proposed amendment of section 1(j) – Insertion of the definition of "marine waters" and section 1(m) insertion of the definition of "sea"

6.1 It is submitted that the co-existence of the following definitions and legal concepts, "coastal waters", "marine waters" and the "sea", creates legal complexity which could impede the effective and efficient implementation of the Act.

6.2 Moreover, the Bill defines "marine waters" as meaning "the body of salt water forming part of the ocean". However, no definition is provided for "ocean".

6.3 It is therefore recommended that the drafters of the Bill reconsider the abovementioned definitions to ensure their rationalisation so as to facilitate the practical implementation of the Act.

7. Comments on the proposed amendment of section 1(o) – Insertion of the definition of "water course"

7.1 We note that the definition provided for "water course" is aligned with the one provided by the National Water Act.

7.2 It must be noted that, in terms of the proposed definition of "Minister" by the Bill, it only refers to the Minister of Environmental Affairs, not the Minister of Water Affairs.

Currently this is not an issue, as there is a single Minister for Environmental and Water Affairs. However, if this situation changes, it may have implications for the implementation of the Act in relation to the inter-connectivity of certain issues pertaining to inland and marine waters.

8. Comments on the proposed amendment of section 7

- 8.1 It is submitted that the proposed subsections 7(1)(b)(iii)(aa) and 7(1)(b)(iii)(bb) should become subsections 7(1)(c) and 7(1)(d) respectively, as the "seashore of reclaimed land" and "immovable property located below the high water mark" cannot be *per se* assimilated as being part of "land submerged by coastal water".
- 8.2 It is also submitted that the reference to "immovable property located below the high water mark" could be interpreted as including fixed offshore facilities located below the high water mark. We are not sure that it was the intention of the drafters of the Bill to include such offshore facilities in the coastal public property. This specific reference might require further legal analysis to avoid any unwanted legal consequences of the proposed amendment for facilities such as a Petro SA offshore facility.
- 8.3 Regarding the proposed subsection 7(1)(g), we also would like to raise the attention of the drafters of the Bill to the fact that "any natural resources on or in any coastal public property" could be interpreted as including migratory birds. This might require further legal analysis to avoid any unwanted legal consequences for the proposed amendment.

9. Comment on the proposed insertion of a new section 7A "Reclamation of land from coastal waters"

It is submitted that it may be in the interests of clarity and certainty to provide further details on the procedure to be followed regarding the approvals required for the reclamation of land. This could be provided for as follows: *"the procedures to be followed to apply for and for the*

approval of the reclamation of land will be prescribed by the Minister in regulations to be published in the National Gazette".

10. Comment on the proposed amendment of section 11

It is submitted that the proposed subsection 11(b) should provide a cross-reference to section 13, by amending the end of the subsection as follows: "(...) unless that person is authorised to do so by national legislation, in terms of section 13 of this Act".

11. Comment on the proposed amendment of section 15

It is submitted that the provisions of the proposed sub-section 15(2) may be too limited. They only refer to the NEM:ICMA and specific environmental management acts. Acts such as the Disaster Management Act 57 of 2002 might also need to be referred to.

12. Comment on the proposed amendment of section 16

It is submitted that subsection 16(c) might need to be modified to take out the term "river" which is not defined in the NEM:ICMA or the National Water Act and which might create uncertainty.

13. Comment on the proposed amendment of section 18

In terms of the proposed subsection 18(b), the drafters of the Bill should consider the possibility of the Province designating coastal access land if a municipality within its jurisdiction fails to do so.

14. Comment on the proposed amendment of sections 59 and 60

It is not very clear why the power of delegation has been deleted from these clauses. It is submitted that such delegations will be essential in the future to facilitate effective implementation of the Act. It is further submitted that the power to issue coastal protection, repair and removal notices should not be a national power only.

15. Comment on the proposed amendment of section 62

It is not very clear why subsection 62(2) is proposed to be deleted from the Act. This proposed deletion is not regarded, *a priori*, as an improvement of the Act. The use of the coastal protection zone needs to be controlled in an informed way. It is acknowledged that the use of an environmental impact assessment report might not be the most appropriate method, but this could be amended to make reference to an "environmental assessment report".