

23 July 2021

Attention: The City of Cape Town Metropolitan Municipality:

To: Mr Richard Nel
Manager for the Water Quality Improvement Project
City of Cape Town Metropolitan Municipality
Per: E-mail: Richard.Nell@capetown.gov.za

And to: Mr Michael Webster
Office of the Executive Director:
Water and Waste Services
Per: E-mail: Michael.Webster@capetown.gov.za

And to: Alderman Dan Plato
Executive Mayor
City of Cape Town Metropolitan Municipality
Per: E-mail: dan.plato@capetown.gov.za

CC: Alderman Xanthea Limberg
Mayoral Committee Member: Water and Waste
City of Cape Town Metropolitan Municipality
Per: E-mail: Xanthea.Limberg@capetown.gov.za

CC: Mr Lungelo Mbandazayo
City Manager
City of Cape Town Metropolitan Municipality
Per: E-mail: Lungelo.Mbandazayo@capetown.gov.za

Good day Sir/s,

POLLUTION AND DEGRADATION OF THE DIEP RIVER CATCHMENT AND THE MILNERTON LAGOON

1. The Organisation Undoing Tax Abuse (“OUTA”) is a proudly South African non-profit civil action organisation, comprising of and supported by people who are passionate about improving the prosperity of our nation.
2. In the spirit of transparency and cooperation, we endeavour to write this letter.
3. We herewith specifically refer to The Directive that was issued by the Department of Environmental Affairs and Development Planning (“DEA&DP”), dated 21 September 2020, as modified in certain respects on appeal by the Provincial Minister of Local Government, Environmental Affairs and Development Planning (“the Provincial Minister”) on 22 January 2021 (“the Directive”).
4. Whilst we acknowledge that the City has taken some known steps to comply with its obligations under the Directive, the current situation, six months after the Provincial Minister’s decision on appeal, casts doubt on whether the City has taken all necessary steps to fulfil these obligations, many of which ought to have already been fulfilled, which we deal with in more detail below.
5. The facts pertaining to the pollution and degradation of the Diep River and Milnerton Lagoon over many years were aptly summarised in the Provincial Minister’s decision on appeal, dated 22 January 2021, and in the interest of brevity we will not repeat them.
6. The City is also familiar with the regulatory framework within which its protracted failure to prevent and remedy the ongoing harm to the Diep River and Milnerton Lagoon was raised, which eventually culminated in the issuing of the Directive, as confirmed and modified by the Provincial Minister.

7. Amongst others, the following bears reference:

- 7.1 In terms of section 28(1) of National Environmental Management Act, 1998 (“NEMA”) every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation;
- 7.2 Section 49A(1)(e) of NEMA renders it an offence to unlawfully and intentionally or negligently commit any act or omission which causes significant pollution and/or degradation of the environment or is likely to cause such pollution or degradation;
- 7.3 Section 49A(1)(f) of NEMA renders it an offence to unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to detrimentally affect the environment;
- 7.4 Section 49A(1)(g) of NEMA renders it an offence to fail to comply with a Directive. The City took no steps to review the Provincial Minister’s decision on 22 January 2021 and as such, the Directive stands and is binding on the City;
- 7.5 Furthermore, section 19(1) of the National Water Act, 1998, (“the NWA”) provides that an owner of land, a person in control of land or a person who occupies or uses the land on which any activity or process is or was performed or undertaken, or any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring;

- 7.6 In terms of section 20(3) and (4) of the NWA an emergency incident must as soon as reasonably practicable be reported to the Department of Human Settlements, Water and Sanitation and the responsible person must take all reasonable measures to contain or minimise the effects of such an incident, undertake clean-up procedures and remedy the effects of the incident;
- 7.7 Section 151(1)(i) and (j) of the NWA furthermore renders it an offence for a person to unlawfully and intentionally or negligently commit any act or omission which pollutes or is likely to pollute a water resource, or which detrimentally affects or is likely to affect a water resource.
8. Whilst the object of the Directive was to prevent and remedy the harm to the Diep River and Milnerton lagoon, it does not replace the City's obligations under NEMA. Rather, the Directive is one, albeit important, mechanism towards ensuring that the City meets its constitutional and statutory obligations.
9. These provisions of NEMA and the NWA were designed to give effect to the environmental rights that are enshrined in section 24 of the Constitution. The public, and particularly the affected residents, who are frequently, directly, and adversely impacted by the pollution and degradation of the Diep River and Milnerton Lagoon, have the right to an environment that is not harmful to their health and well-being and to have the environment protected through reasonable legislative and other measures that prevent pollution and ecological degradation, and promote conservation. When this right is violated, it often results in other human rights violations, such as those involving dignity, equality, property, housing, health, and just administrative action.
10. Over a prolonged period, Milnerton residents and visitors have had to contend with an environment that has been, and is still being, significantly compromised by the inadequacy of the wastewater treatment system, starting at the Potsdam Wastewater Treatment Works ("WWTW") and ending with the emission of

untreated or inadequately treated wastewater where the Diep River flows into the Milnerton Lagoon. As such, there has been a relentless affront to several of their fundamental rights.

11. The operation and maintenance of the system is a highly regulated activity and as the Court recently observed in *South African Human Rights Commission v Msunduzi Local Municipality and Others (Kwa-Zulu Natal Division of the High Court, Pietermaritzburg, case number 8407/2020P)*, in a matter where the facts were strikingly similar to the present facts, “it is therefore expected that the municipality will act in an exemplary manner at all times by complying strictly with the relevant legislation and permits which regulate its conduct”.
12. The Court went further and cited the well-known Constitutional Court judgments in *Merafong City Local Municipality v AngloGold Ashanti Limited*, where it was held that a municipality must act as a “good constitutional citizen” and its conduct should be in compliance with the Constitution, and *MEC for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd*, where it was held that there is a higher duty on the state to respect the law and to tread respectfully when dealing with rights. Government is the Constitution’s primary agent. It must do right, and it must do it properly.
13. It is against this backdrop that we turn to the current situation, some six months after the Directive was confirmed, but modified in certain respects, by the Provincial Minister’s decision on appeal, mainly in respect of the timelines that were imposed by DEA&DP for completing the necessary infrastructure upgrades.
14. The City’s latest test results revealed, amongst others, that the Diep River estuary mouth contained 380 000 cfu/100ml *E. coli* per sample tested on 1 July 2021, with 290 000 cfu/100ml at Otto Du Plessis Drive bridge and 210 000 cfu/100ml at the estuary at Woodbridge Island. The results as reflected in the two recent reports are, as far as we know, some of the worst that have been

yielded to date and demonstrate the significant ongoing pollution.

15. The 17 June 2021 test report reflected 350 000cfu/100ml E. coli at Theo Marais downstream of Duikersvlei Stream. Independent testing at Erica Road outlet flowing directly into the Diep River shows E. coli levels between 3.9 million and 71.0 million (March-July 2021) despite being specifically noted in the Directive.
16. Diep River water test results below Potsdam WWTW (880 000 cfu/100ml as of 17 June 2021) consistently show E. coli levels many magnitudes higher than immediately above Potsdam (82 000 cfu/100ml) on the same day. Furthermore, Potsdam WWTW has repeatedly been observed discharging effluent at sites other than where the effluent quality is tested (e.g. pond 5, reed bed, long pond) for which no test results have been provided, most recently on 17 July 2021 from the temporary outlet, as well as pond 5 and reed bed simultaneously. Independent water testing showed E Coli levels of 1 million cfu/100ml in samples taken from the discharge from the reed bed on this date.
17. These test results reveal that there is significant, ongoing non-compliance with the Water Use License in respect of Potsdam WWTW.
18. The interim response plan to deal with the trapping and clean-up of general waste at stormwater outlets flowing into the Diep River and Milnerton Lagoon, has repeatedly failed and despite the submission of complaints in this regard, it is still insufficient.
19. It is not surprising that, notwithstanding the fact that the Directive came into force in January 2021, a foul odour, ranging from pungent to toxic, has intermittently permeated over the residential areas surrounding the lagoon.
20. This situation casts doubt on whether the City has taken the necessary steps to fulfil its obligations under the Directive. We therefore request that the City provide conclusive evidence to demonstrate that it has complied with such obligations as

have fallen due in the past, which we summarise as follows:

20.1 AD ACTION PLAN:

20.1.1 Re-prioritise expedition of investigation of illicit discharge into the stormwater drainage system and surrounding water courses and submit findings and proposed actions to prevent ongoing pollution **within 60 calendar days;**

20.1.2 Submission of completed over-arching document and appendices (pertaining to the re-prioritisation of revised pollution incident protocols and contingency plans for Potsdam WWTW, Koeberg and Sanddrift Pump Stations) **within 30 calendar days;**

20.1.3 Provision of an interim remediation/incident management response plan to deal with instantaneous pollution events/emergency incidents that may occur and result in pollution of the Diep River Catchment and Milnerton lagoon **within 60 calendar days;**

20.1.4 Keeping DEA&DP informed of progress with the implementation of the upgrade of Potsdam WWTW (due for completion by the end of August 2025) in monthly reports, which is an **immediate and ongoing obligation;**

20.1.5 Indicating to DEA&DP the measures to be undertaken to reduce the blockages as a result of foreign objects entering the sewer reticulation network (relating to item 301, i.e., the upgrade of the Montague Gardens Bulk Sewer Gravity Reticulation Network and screening system, which is due for completion by 30 June 2025) **within 60 calendar days;**

20.1.6 Keeping DEA&DP informed of progress with the implementation of the

ORGANISATION UNDOING TAX ABUSE

Reg No: 2012/064213/08 – PBO No: 930042651

Directors: WL Duvenage (CEO), Adv. S Fick

Non-Executive Directors: W Modisapodi(Chair), F Adam, P Majazi, LJJ Pauwen, T Pillay Van Graan, Dr HC Volmink

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upgrade of the Du Noon and Doornbach Sewer Gravity Reticulation Network (which is due for completion by the end of December 2023) in monthly reports, which is an **immediate and ongoing obligation**;

20.1.7 Submitting progress reports to DEA&DP on a monthly basis in connection with the implementation of the upgrade of the Koeberg Road Pump Station (which is due for completion between 1 July 2022 and 1 June 2024), which is an **immediate and ongoing obligation**;

20.1.8 Submitting the sewer station audit report for review and comment **within 60 calendar days**;

20.1.9 Increasing frequency of refuse collection and area cleaning with submission of a plan for approval by DEA&DP to address the littering and solid waste pollution occurring through wind dispersion, illegal dumping and within the stormwater drainage systems within Du Noon, Doornbach and Joe Slovo Park, including clear action deliverables, proposed budgets and adequate timeframes, **within 30 calendar days**.

20.2 AD INTERIM MEASURES AT THE POTSDAM WWTW:

20.2.1 Conducting a thorough clean-up of the sludge within the Diep River at the final effluent discharge point of Potsdam WWTW **within 14 calendar days**, and if complied with, given repeated unacceptably high levels of E. coli, proof of recurring clean-up activities;

20.2.2 Adding additional sampling point at final effluent discharge point (at the point of entry into the Diep River) in order to reflect water quality upon final effluent entering the environment – no date was provided, but it ought to have been added by now, i.e., six months after the date of the Directive;

20.2.3 Effectively seal off all historical outlets and underground pipes leading from Potsdam WWTW (including maturation ponds) into the Diep River, **within 30 calendar days**, and provide proof **within seven calendar days**;

20.2.4 Stand-by generators immediately coming online in the event of a power outage, avoiding 15 to 30-minute delays, and providing proof **within seven calendar days**;

20.3 AD ADDITIONAL MEASURES TO LIMIT DIEP RIVER AND LAGOON POLLUTION:

20.3.1 Submitting monthly progress reports on the implementation of measures at strategic stormwater outlets to trap all the general waste flowing into the river and lagoon (to be implemented by the end of November 2021), which is an **immediate and ongoing obligation**;

20.3.2 Providing an interim response plan to deal with the trapping and clean-up of general waste at stormwater outlets flowing into the Diep River and Milnerton lagoon, **within 60 calendar days**, while the plan is under development. Seeing that the response plan has repeatedly failed, the City should indicate whether the plan has been improved in order to effectively deal with the trapping and clean-up of general waste at these outlets;

20.3.3 Submitting an estuary management plan for the lagoon, which must address improving the estuary water quality, marine and coastal ecosystem functions, and the overall management of the lagoon estuary, for comment and approval **within 60 calendar days**.

20.4 AD ADDITIONAL ACTIONS:

20.4.1 Continuing to submit monthly update reports on the implementation of the Action Plan, which must include the progress of actions on infrastructure upgrades, additional sampling point at Potsdam WWTW and implementation of measures at strategic stormwater outlets to trap all general waste flowing into the river and lagoon, which is an **immediate and ongoing obligation**;

20.4.2 Continuing to conduct meetings or engagements with affected groups to communicate and inform the communities along the Diep River Catchment of the City's short-, medium- and long-term actions contained in the Action Plan, and providing them with copies of the update reports, which is an **immediate and ongoing obligation**.

21 In addition, we require conclusive evidence that the City has submitted to the provincial head of the Department of Human Settlements, Water and Sanitation, from the date of commencement of the Water Use License, the annual internal and external audit reports on compliance with the conditions of the license, as prescribed in the general conditions attached to the license, as well as evidence that all incidents causing pollution to the Diep River and Milnerton Lagoon, since January 2021, were reported to the provincial head within 24 hours.

22 Finally, we require conclusive evidence that accurate and up to date records have been kept of all system malfunctions resulting in treated water containing waste disposal not in accordance with the requirements of the license, as well as action plans submitted to the provincial head within 14 days, or shorter time as specified by the provincial head, from the occurrence or detection of any incident, with a detailed time schedule, of the measures taken to correct the impacts resulting from the incident, prevent the incident from causing any further impacts and prevent a recurrence of similar incidents.

- 23 We trust that the City will not insist on a formal PAIA request, but rather, in the interest of transparency and accountability, provide, within the timeframe mentioned below, the necessary information to enable us to assess the extent to which the City has, or has not, complied with its obligations under the Directive and Water Use License as at the date of this letter.
- 24 The information that we seek, is official information pertaining to the City's compliance with its Water Use License and the Directive, which was compelled by years of neglect in acknowledging and resolving the harm caused to the Diep River and Milnerton lagoon, and we do not believe that any of the grounds on which access to the information may or must be refused, as contemplated in PAIA, would be applicable.
- 25 We will also address correspondence to the relevant regulatory authorities, (i.e. the Department of Human Settlements, Water and Sanitation and DEA&DP) enquiring into the measures that they have implemented in order to monitor compliance by the City with the conditions of the Water Use License and Directive, respectively, and to report to us in this regard.
- 26 We request that the City respond to this letter within 14 days.
- 27 Should no response be forthcoming, or should the response be unsatisfactory, we will have no choice but to consider taking appropriate further action, which may include approaching the court for appropriate relief, referring the matter to the Human Rights Commission or the Public Protector for investigation and/or submitting a formal complaint to SAPS.
- 28 Should you have any queries, kindly contact OUTA's Senior Legal Project Manager, Ms. Andrea Korff, on andrea.korff@outa.co.za.

29 We trust that you find the above in order.

Yours Sincerely,



Stefanie Fick

Executive Director of the Accountability Division

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