

24 August 2020

Attention: The Western Cape Government
Directorate: Environmental Law Enforcement

To: Mr Grant Deyers
Environmental Management Inspector
Directorate: Environmental Law Enforcement

Per: E-mail: Grant.Dyers@westerncape.gov.za

And to: Mr Achmad Bassier
Director: Environmental Law Enforcement
Directorate: Environmental Law Enforcement
Per: E-mail: Achmad.bassier@westerncape.gov.za

CC: Mr Piet van Zyl
Head of Department: DEA-&DP
Directorate: Environmental Law Enforcement
Per: E-mail: Pieter.vanZyl@westerncape.gov.za

CC: Dale Wakefield
Region Manager: Sub directorate: Environmental Law Enforcement
Directorate: Environmental Law Enforcement
Per: E-mail: dale.wakefield@westerncape.gov.za

CC: Mr Saleigh Jacobs
National Department of Environmental Affairs
Per: E-mail: sjacobs@environment.gov.za

Dear Sirs,

**RE: MILNERTON / DIEP RIVER WATER CONTAMINATION
OUR REF: L9/BD/04
YOUR REF: UNKNOWN**

1. With reference to the above.

2. 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.
3. OUTA envisions a prosperous country with an organised, engaged and empowered civil society that ensures responsible use of tax revenues at all levels of Government.
4. OUTA is further geared towards the harmonious cooperation with government on various levels and seeks to assist government wherever necessary in carrying out its mandate in the interests of the citizens of South Africa.
5. OUTA was approached by various sources concerned about the ongoing sewage pollution problem at the Milnerton lagoon which forms part of the Diep River Estuary and the City of Cape Town-run Table Bay Nature Reserve.
6. Having exhausted all normal channels (lodging numerous complaints at the City of Cape Town’s Department of Waste and Sanitation) and despairing of any real change, residents’ associations reached out to OUTA and appealed for help in finding a solution to the pollution problem.
7. Since the beginning of 2020, OUTA has been actively taking water samples at strategic sampling points along the Diepriver Estuary to determine the source of the pollution. According to our findings, it has become increasingly clear that the main culprit is the Potsdam Wastewater Treatment Works (herein after referred to as Potsdam WWTW), administrated by the City of Cape Town Metropolitan Municipality (herein after referred to as The City).
8. What is even more concerning is that our results, for the past couple of months, show how the E.Coli levels at our sampling points have drastically become worse, despite the city reporting that the water quality is improving.

9. The results clearly indicate that the City far exceeds the limits imposed by its water use licence agreement and general legislative requirements, related to the sufficient treatment and discharging of wastewater, which is classified as a hazardous waste.
10. The Constitution provides that everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.
11. According to the Constitution (Schedule 4), national and provincial spheres of government have concurrent legislative competence over the functional area of “environment”. The National Environmental Management Act (NEMA) and the associated SEMAs (Specific Environmental Management Acts, for example, the National Water Act, 1998, the National Environmental Management (NEM): Integrated Coastal Management Act, NEM: Waste Act, NEM: Air Quality Act, etc.) define the respective powers of these two spheres of government in respect of governance and compliance.
12. Accordingly, the Water Act stipulates that the disposal of hazardous waste, whether intentionally or in a grossly negligent manner, into a watercourse is a statutory crime and thus the failure to prevent the further discharge of the hazardous waste, will result in a criminal offence.
13. Furthermore, Section 28(1) of NEMA clearly states that 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 of the environment.

14. NEMA's Section 28(2) also states that without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which—
 - (a) any activity or process is or was performed or undertaken; or
 - (b) any other situation exists,which causes, has caused or is likely to cause significant pollution or degradation of the environment.
15. In line with the aforementioned legislative background, the Directorate: Environmental Law Enforcement (herein after referred to as the Department) issued a Pre-Directive (dated 26 March 2020) to the City for the ongoing pollution being caused to the Diep River and Milnerton Lagoon as a result of partially/ untreated sewage emanating from the Potsdam WWTW and other stormwater canals flowing into the Diep River Catchment.
16. The Department's investigation into this matter found that the Diepriver continues to hold significantly polluted water. It found that the water within the Diepriver is filled with stagnating raw sewage along various sections of the river and that these particular sections have extremely high E.Coli and Faecal Coliforms count. The investigation also found that raw sewage continues to flow within the canal adjacent to the Theo Marais Sports Complex.
17. The Pre-Directive issued by the Department directed the city to (a) commence with a thorough clean-up operation of the waste/pollutants from the stormwater canals, adjacent to the Theo Marais Sports Complex and the Potsdam WWTW towards the mouth of the Milnerton Lagoon area, (b) Amend and submit to the

Department the city's action plan for approval, (c) Erect adequate signage along the Diep River Catchment, (d) to submit update reports on the implementation of the city's action plan to the Department and (e) to conduct meetings or engagements with affected groups to communicate and inform the communities of the city's actions, in accordance with their action plan.

18. While we appreciate the Departments efforts in addressing the situation and issuing the City of Cape Town with a Pre-Directive, OUTA's frustration and that of the residents in the area affected by the ongoing extremely poor and dangerous water quality situation, are as follows: -

(a) OUTA and the residents are extremely frustrated that this problem has been in existence for a number of years and the City has been aware thereof yet little meaningful action has been taken, until recently.

(b) To our knowledge, no one within the City has been taken to task or held accountable for what is nothing short of a criminal offence. The criminal conduct aspect of the situation does not appear to be recognised and was not at all considered in the past.

19. What is more concerning to OUTA is that although alleged plans are in place to upgrade the Potsdam WWTW, the interim plan to deal with polluted water currently flowing into the Diep River is ineffective.

20. While we understand that short term solutions such as to breach the mouth when the lagoon becomes eutrophic, does head some positive results, as a long-term plan it amounts to using the river as an informal sewer and might even be seen as contravening the Coastal Management Act.

21. It is our view that The Cape Town Metropolitan Municipality has a duty towards its communities to resolve this situation as a matter of urgency. Failure to act

in resolving the pollution of the Diep River and Milnerton Lagoon, will amount to a dereliction of duty on behalf of the City.

22. It is common cause that the “pollution caused” are due to various different factors. However, the city has a responsibility to practice due diligence in the management of the city’s resources and to hold those entrusted with this responsibility, accountable if they do not execute their respective duties.
23. The fact of the matter remains that the pollution caused is due to various circumstances and one could argue that the officials that are and were mandated to deal with the crisis have failed, especially in the light of the fact that the crisis did not happen overnight but has persisted for almost 8 years.
24. We do not believe that the City is truly serious about holding those accountable and surely some officials are entrusted with the responsibility to ensure that due diligence is followed and if not, should be held accountable. If the City is not willing to deal with this issue, then it stands to reason that the oversight authority should do so alternatively.
25. As of today, in August 2020, the pollution continues unabated and the City of Cape Town’s Potsdam WWTW is non-compliant. This is a fact supported by OUTA’s ongoing testing (see our latest sampling report, attached hereto and dated 22 July 2020).
26. We are of the opinion that the City’s current interventions are only addressing failing systems and infrastructure that should in any event be working effectively. We would like to see what action the City will be taking to actively remedy the state of the lagoon, which at this stage is still filled with stagnant, polluted effluent and should be a functioning estuary supporting marine and estuarine life.

27. We therefore propose that the Department direct the city to expand their efforts in providing the following additional interventions:

- (a) An approved estuarine management plan which addresses the marine life and ecosystem function of the Milnerton Lagoon;
- (b) A plan to actively improve the water condition/ quality within the Milnerton Lagoon and not just sealing off overflowing pipes;
- (c) Estuary rehabilitation plans and as far as humanly possible restoring the lagoon, back to the condition that it should be, which would support marine life and allow the public to enjoy the lagoon waters.

28. Accordingly, Section 28(4) of NEMA states that the Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests. direct any person who fails to take the measures required under subsection (1) to-

- (a) investigate. evaluate and assess the impact of specific activities and report thereon:
- (b) commence taking specific reasonable measures before a given date;
- (c) diligently continue with those measures; and
- (d) complete them before a specified reasonable date.

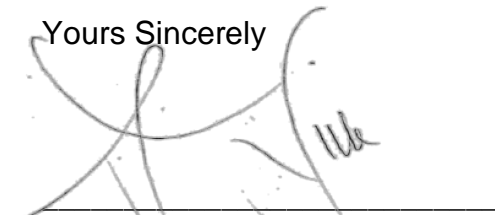
Provided that the Director-General or a provincial head of department may. if urgent action is necessary for the protection of the environment, issue such directive. And consult and give such opportunity to inform as soon thereafter as is reasonable.

29. Furthermore, Section 28 (5) of NEMA also stipulates that the Director-General or a provincial head of department, when considering any measure or time period envisaged in subsection (4), must have regard to the following:

- (a) the principles set out in section 2;

- (b) the provisions of any adopted environmental management plan or environmental implementation plan;
 - (c) the severity of any impact on the environment and the costs of the measures being considered;
 - (d) any measures proposed by the person on whom measures are to be imposed;
 - (e) the desirability of the State fulfilling its role as custodian holding the environment in public trust for the people;
 - (f) any other relevant factors.
30. We therefore humbly submit that the City of Cape Town's Pollution Abatement Plan for the Diepriver Catchment and Milnerton Lagoon is not adequately being implemented, in order to prevent the ongoing pollution and as such call on the Directorate: Environmental Law Enforcement, to issue the City of Cape Town with an official Directive in terms of Section 28(4) of NEMA.
31. We wish to thank the Department for their ongoing intervention in this matter.
32. Should you have any queries, kindly contact OUTA's Senior Legal Project Manager, Ms Andrea Korff at andrea.korff@outa.co.za.
33. Kindly acknowledge receipt of this letter.

Yours Sincerely



Stefanie Fick
Executive Director of the Accountability Division
OUTA – Organisation Undoing Tax Abuse
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