



**environment
& tourism**

Department:
Environmental Affairs and Tourism
REPUBLIC OF SOUTH AFRICA

Reference:

MINISTER

URGENT REQUEST FOR INTERVENTION: INTEGRATED COASTAL MANGEMENT BILL

1. PURPOSE

- 1.1 To provide you with a draft response to Dr Sutcliffe, City Manager of eThekweni Municipality.

2. BACKGROUND AND DISCUSSION

- 2.1 Dr Sutcliffe wrote to you regarding the possible impact of the Integrated Coastal Management Bill (ICM Bill) on the proposed Small Craft Harbour development at the Durban Point Development Precinct (They are currently conducting an EIA). He indicated that 20 year leases will hamper the feasibility of this project and propose that a change be introduced in clause 66 of the Integrated Coastal Management Bill to allow for leases of up to 99 years.
- 2.2 Unfortunately it is no longer possible to make any changes to the ICM Bill, as the parliamentary processes have now been concluded. Having gone through an extensive public participation process, the Bill was supported in principle by the National Assembly and formally referred to the National Council of Provinces. Following public hearings and debates in the provinces, the ICM Bill was adopted by the National Council of Provinces

with a number of changes proposed by the Select Committee. These changes were adopted by the National Assembly on 23 October 2008.

- 2.3 Nevertheless, the current version of the Bill includes amendments to allow you to authorize the reclamation of sea areas (similar to the Sea Shore Act, 1945 (Act No. 21 of 1925)) in terms of clause 27(6). Such reclaimed land will form part of coastal public property (State owned land). It further allows you to exclude certain areas from coastal public property for government purposes and allows you to exclude such areas for any other purpose, with the ratification of Parliament. In this regard, I draw your attention to the ICM Bill's current wording in clause 27. Clause 27(2) states: "*The Minister may exclude any area from coastal public property for government purposes, by proclamation*", while clause 7(3) requires the Minister to consult with interested and affected parties. In terms of clause 27(4) "*The Minister may exclude any area from coastal public property for any other purpose with the ratification of Parliament*". There are thus mechanism in the ICM Bill that will allow for reclamation of land, and if necessary, the exclusion of certain areas from coastal public property. Naturally, in considering any applications Parliament and the Minister will have to take into account the purpose of coastal public property. (See further details in attached letter.)

Cannot
And this
in Bill.

- 2.4 In summary, the ICM Bill is now within the jurisdiction of Parliament and you are therefore unable to accede to Dr Sutcliffe's request to introduce a proposed amendment to the ICM Bill. Further, there is an existing mechanism in the Bill that will allow the municipality to apply for the reclamation of land and possible exclusion from coastal public property if 20 year leases are unacceptable. This will entail taking the matter to Parliament. In addition, other procedures and legislation will have to be complied with, such as the EIA procedures and procedures in terms of the State Land Disposal Act, 1961 (Act No. 48 of 1961). Incidentally, the latter two will apply to this proposed development even if the ICM Bill is not enacted.

3. IMPLICATIONS

Specify:

Personnel None.
Financial None.
Legal None
Communication None

4. OTHER BRANCHES /CHIEF DIRECTORATES CONSULTED

CD Legal Services

5. RECOMMENDATIONS

It is recommended that you--

- 5.1 Note the current status of this matter; and
- 5.2 Sign the attached letter.

CHIEF DIRECTOR: LEGAL SERVICES (Acting)
DATE:

RECOMMENDATIONS
6.2 APPROVED/~~NOT APPROVED~~/~~AMENDED~~
6.3 LETTER SIGNED/~~NOT SIGNED~~

DIRECTOR-GENERAL
DATE:

RECOMMENDATIONS
6.2 APPROVED/~~NOT APPROVED~~
6.3 LETTER SIGNED/~~NOT SIGNED~~

Mathew van Schalkwyk

MINISTER
DATE: 07 NOV 2008

APPENDED:
DRAFT LETTER OF REPOSE



environment & tourism

Department:
Environmental Affairs and Tourism
REPUBLIC OF SOUTH AFRICA

Reference: O

MINISTER

EXCLUSION OF CONFINED PORT AREAS FROM COASTAL PUBLIC PROPERTY

1. PURPOSE

- 1.1 To provide a draft Record of Decision in terms of section 27(4) of the National Environmental Management Integrated Coastal Management Act, (Act No. --- of 2008) (ICM Act) for consideration and signature;
- 1.2 To provide a draft Parliamentary memorandum for submission to Parliament for ratification of the Minister's decision in terms of section 27(4) of the ICM Act.

2. BACKGROUND AND DISCUSSION

- 2.1 During the parliamentary process during which the ICM Act was deliberated upon, the Department of Public enterprises and Transnet Ltd raised a number of concerns relating to the impact of the ICM Act on the management and operation of ports by the Transnet National Ports Authority (TNPA).
- 2.2 The ICM Act creates a number of coastal zones, one of the most important being coastal public property, which includes the sea and seashore below the high water mark which includes all port areas. In terms of sections 11 and 12 of the ICM Act coastal public property is inalienable, is held in trust for the benefit of all citizens by the State and cannot therefore be owned. While coastal public property may not be owned, it can however be leased in terms of section 65 and 66 of the ICM Act. However, the maximum period of such a lease

is 20 years. It is this limitation which can potentially have a negative impact on the operations of ports.

- 2.3 The TNPA currently enters into long terms leases for periods of up to 99 years. These leases fund port infrastructure and serve as security for long terms loans which the TNPA rely on to develop and expand port infrastructure. With the inclusion of port areas in coastal public property the TNPA would be restricted to entering into coastal leases for a period not exceeding 20 years. This could potentially undermine the legality of current long term leases and restrict the ability of the TNPA to enter into new long term leases and consequently secure new long term financial resources for development and expansion. This uncertainty could be perceived as a significant risk by financial institutions which could result in current loans being called up and new funding being declined. Transnet has, in its written application, also indicated that its capital investment programme of R80 billion (over a five year period) is creating freight transport capacity to meet the demands of the South African economy. In this respect, it is a critical and strategic role player in initiatives to improve the competitiveness of the South African economy. They also raise concerns that the ICM Act could potentially compromise the ability of the TNPA to carry out its day to day operations as mandated by the National Ports Act, 2005 (Act no. 12 of 1005) as well as its international obligations. Despite these concerns, it is not envisaged that the ICM Act will have the stated impact, but that the major impact on day-to-day operations may occur only in respect of the leases and financial guarantees in the affected areas. Transnet has submitted that the exclusion is an *ad hoc* measure, and that the ICM Act would have to be amended in future to exclude the extended port areas from the ICM Act. Transnet's legal views on the matter are well known, but the Parliamentary Committees have taken a considered view that there is no need for amendments to the ICM Act in respect of the extended port areas.
- 2.4 There are two primary options for addressing the TNPA's concerns relating to leases. The first is to exclude port areas from coastal public property in terms of section 27(2) of the ICM Act for government purposes. However the definition of 'government purposes' is restrictive as it excludes leases for more than 20 years. This would therefore not address the impact outlined above.

2.5 Transnet has therefore applied on behalf of the TNPA for the exclusion of confined port areas from coastal public property in terms of section 27(4), for "any other purpose" which requires the ratification of Parliament. Since there is no similar restriction on leases as is the case with section 27(2), the exclusion of port areas would allow the TNPA the freedom to continue to manage ports in terms of their legislation and enter into long terms leases.

2.6 In terms of the National Ports Act, 2005 (Act No. 12 of 2005) the current boundaries of the ports include a large reserved port area which includes a number of sensitive eco-systems and stretches of coastline. Transnet was therefore requested to submit maps and co-ordinates identifying confined port areas which represent the current operational ports. The exclusion of these identified confined port areas and not the wider reserved port areas stipulated in the regulations published in terms of the National Ports Act will ensure that these important sensitive coastal areas will remain coastal public property and subject to the legislative restrictions. In addition, notwithstanding that the confined port areas are excluded from coastal public property, these areas will still be subject to other provisions of the ICM Act and also other environmental legislation.

3. OTHER BRANCHES\CHIEF DIRECTORATES CONSULTED

Integrated Coastal Management and Legal Services

4. IMPLICATIONS

Personnel: None

Financial: None

Legal: The draft decision and Parliamentary memorandum has been vetted by legal Services.

Communication: In the event that Parliament ratifies the decision to exclude port areas a press release explaining the context of the decision to pre-empt any negative public

perception may be necessary in light of recent negative publicity relating to the sale of the Waterfront.

5. RECOMMENDATIONS

It is therefore recommended the Minister:

- 5.1 Consider and sign the attached Record of Decision;
- 5.2 Consider and approve the attached Parliamentary memorandum.

CHIEF DIRECTOR: LEGAL SERVICES
DATE:

EXCLUSION OF CONFINED PORT AREAS FROM COASTAL PUBLIC PROPERTY

RECOMMENDATIONS SUPPORTED\NOT SUPPORTED

DEPUTY DIRECTOR-GENERAL (CORPORATE AFFAIRS)
DATE:

RECOMMENDATIONS SUPPORTED\NOT SUPPORTED



DIRECTOR-GENERAL (acting)
DATE: 12/11/2008

RECOMMENDATIONS
5.1 ROD SIGNED/\NOT SIGNED

MINISTER
DATE: 13 NOV 2008

Maarten van Steenberg

5.2 APPROVED/NOT APPROVED

Dear Colleagues

The DDG has signed the submission which will be collected by the Ministry within the next hour. Attached, please find the amended ROD for your records (there were 2 very minor typos that have been corrected).

Riaan, we have not included all the maps in the documents that you will collect.

sue

>>> Radia Razack 2008/11/12 01:50 PM >>>

Dear Colleagues,

As requested please find the final documents for further action. Maps will follow as they are too large for one mail. My understanding is that Johann will table in Parliament and try to facilitate a briefing with the chairs of the PC and SC by **Tuesday 18 November 2008**. Dr Mayekiso and Riaan please be aware that this date clashes with a meeting Ntobeko and I are to attend with the Minister on **18 November at 11h30** to discuss fisheries issues.

Kind regards

Radia

>>> Ishaam Abader 11/12/2008 1:02 PM >>>

My comments are attached. If there are no further comments, please accept changes.

Johann & Monwabisi to please attend to tabling and ensure that the debate happens.

>>> Radia Razack 11/12/08 11:46 AM >>>

Dear Ishaam and Monde,

I agree with and have incorporated Linda's changes. I have received no other inputs. **Please advise whether the final documents are ok for submission with the revised maps received from Neil.** In addition Sandra Coetzee (DPE) asked for a copy of the ROD before we send to Parliament. **What are your views?** She also requests information on the time lines and processes henceforth. Johan and Monwabisi can you perhaps guide us on that?

kind regards

Radia



**MINISTRY : ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA**

Private Bag X447, Pretoria, 0001, Tel: (+27 12) 310 3611, Fax: (+27 12) 322 0062
Private Bag X9154, Cape Town, 8000, Tel: (+27 21) 465 7240/1/2, Fax: (+27 21) 465 3216
website: www.deat.gov.za E-mail: ministry@deat.gov.za

Minister Brigitte Mabandla, MP
Minister of Public Enterprises
Private Bag X15
HATFIELD
0028

By facsimile: (012) 431 1031

Dear Colleague

**THE INTEGRATED COASTAL MANAGEMENT (ICM) BILL: RECORD OF DECISION:
EXCLUSION OF PORT AREAS**

Please find attached a copy of the Record of Decision: Exclusion of Port Areas from Coastal Public Property in terms of Section 27(4) of the National Environmental Management Integrated Coastal Management Act.

Kind regards

Marthinus van Schalkwyk

**MARTHINUS VAN SCHALKWYK, MP
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM**

13 NOV 2008

TRANSMISSION VERIFICATION REPORT

TIME : 13/11/2008 13:24
NAME : DEAT MINISTRY
FAX : +27214625237
TEL : +27214657240
SER.# : 000C4J233677

DATE, TIME	13/11 13:20
FAX NO./NAME	0124311039
DURATION	00:04:20
PAGE(S)	17
RESULT	OK
MODE	STANDARD ECM



**MINISTRY : ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA**

Private Bag X447, Pretoria, 0001, Tel: (+27 12) 310 3611, Fax: (+27 12) 322 0082
Private Bag X9154, Cape Town, 8000, Tel: (+27 21) 465 7240/1/2, Fax: (+27 21) 465 3216
website: www.deat.gov.za E-mail: ministry@deat.gov.za

Minister Brigitte Mabandla, MP
Minister of Public Enterprises
Private Bag X15
HATFIELD
0028

By facsimile: (012) 431 1031

Dear Colleague

**THE INTEGRATED COASTAL MANAGEMENT (ICM) BILL: RECORD OF DECISION:
EXCLUSION OF PORT AREAS**

Please find attached a copy of the Record of Decision: Exclusion of Port Areas from Coastal Public Property in terms of Section 27(4) of the National Environmental Management Integrated Coastal Management Act.

Kind regards



**MINISTRY: ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA**

Private Bag X447, Pretoria, 0001, Tel: (27-12) 310 3611 Fax: (27-12) 322 0082
Private Bag X0154, Cape Town, 8000 Tel: (27-21) 465 7240/1/2, Fax: (27-21) 465 3216
www.deat.gov.za

Ms Maria Ramos
CEO
Transnet
PO Box 72501
PARKVIEW
2122

Fax no: (011) 308 3360

Dear Ms Ramos

**THE INTEGRATED COASTAL MANAGEMENT (ICM) BILL: RECORD OF DECISION:
EXCLUSION OF PORT AREAS**

Please find attached a copy of the Record of Decision: Exclusion of Port Areas from Coastal Public Property in terms of Section 27(4) of the National Environmental Management Integrated Coastal Management Act.

Kind regards

Marthinus van Schalkwyk

**MARTHINUS VAN SCHALKWYK, MP
MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM**

13 NOV 2008



TRANSMISSION VERIFICATION REPORT

TIME : 13/11/2008 12:58
NAME : DEAT MINISTRY
FAX : +27214625237
TEL : +27214657240
SER. # : 000C4J233677

DATE, TIME	13/11 12:47
FAX NO. /NAME	0113083360
DURATION	00:10:46
PAGE(S)	17
RESULT	OK
MODE	STANDARD



**MINISTRY: ENVIRONMENTAL AFFAIRS AND TOURISM
REPUBLIC OF SOUTH AFRICA**

Private Bag X447, Pretoria, 0001, Tel: (27-12) 310 3611 Fax: (27-12) 322 0082
Private Bag X9154, Cape Town, 8000 Tel: (27-21) 465 7240/1/2, Fax: (27-21) 465 3218
www.deat.gov.za

Ms Maria Ramos
CEO
Transnet
PO Box 72501
PARKVIEW
2122

Fax no: (011) 308 3360

Dear Ms Ramos

**THE INTEGRATED COASTAL MANAGEMENT (ICM) BILL: RECORD OF DECISION:
EXCLUSION OF PORT AREAS**

Please find attached a copy of the Record of Decision: Exclusion of Port Areas from Coastal Public Property in terms of Section 27(4) of the National Environmental Management Integrated Coastal Management Act.



MINISTRY FOR ENVIRONMENTAL AFFAIRS AND TOURISM

Ref:

Chief Executive Officer
Transnet Limited
P.O. Box 72501
Parkview
JOHANNESBURG
2122

Dear CEO

RECORD OF DECISION: EXCLUSION OF PORT AREAS FROM COASTAL PUBLIC PROPERTY IN TERMS OF SECTION 27(4) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT INTEGRATED COASTAL MANAGEMENT ACT, 2008 (ACT NO. --- OF 2008) (THE ICM ACT)

INTRODUCTION

1. Transnet Limited ("Transnet") submitted a written application in terms of section 27(4) of the ICM Act to have designated confined port areas excluded from coastal public property, setting out their particular concerns. Transnet is a State Owned Enterprise ("SOE") established as such under the Legal Succession to the South African Transport Services

Act, 1990 (Act No. 89 of 1990) and incorporated as a public company. The Government of the Republic of South Africa is the sole shareholder of Transnet.

2. The Director-General of the Department of Public Enterprises (DPE) approached the Department, prior to its application above, indicating a number of concerns relating to the effect that the ICM Act will have on the Transnet National Ports Authority's (TNPA) ability to continue to effectively manage and operate ports in the Republic. Various written submissions and meetings were held to clarify the exact nature of the alleged impact of the ICM Act on port operations.
3. Transnet submitted, *inter alia*, that it is a focused and integrated freight transport company that owns and operates infrastructure in rail, ports and pipelines. Through its capital investment programme, in excess of R80 billion over a five year period, it is creating freight transport capacity to meet the demands of the South African economy. In this respect, it is a critical and strategic role player in initiatives to improve the competitiveness of the South African economy.
4. Transnet further submitted that through its division, Transnet National Ports Authority (TNPA), it has a statutory duty to "*promote the development of an effective and productive South African ports industry that is capable of contributing to the economic growth and development of our country.*" It was also submitted that "In order to safeguard TNPA's ability to comply with this statutory obligation, Transnet hereby requests that, in terms of section 27(4) of the National Environmental Management: Integrated Coastal Management Act, 2008 ("the ICM Act"), the port footprint delineated in the Annexures to this application, be excluded from "coastal public property" as defined in the ICM Act".
5. Transnet has submitted that the exclusion of the port areas is an *ad hoc* measure, and that the ICM Act would have to be amended in future to exclude the extended port areas from the ICM Act. However, the Parliamentary Committees have taken a considered view that there is no need for amendments to the ICM Act in respect of the extended port areas.

GROUNDS FOR EXCLUSION FROM COASTAL PUBLIC PROPERTY

6. The DPE has submitted, amongst other concerns, that the inclusion of port areas as part of coastal public property in terms of the ICM Act could have a significant impact in that the TNPA currently have leases for periods of up to 99 years. Some of their infrastructure reportedly has a life span of 60 – 100 years and in order to obtain funding for new infrastructure, they may need to be able to enter into long term leases to secure funding from financial institutions. These institutions conduct their own due diligence and any uncertainty that may constitute unacceptable risk may lead to the non-approval of loans. This creates uncertainty and therefore there is a risk pertaining to the guarantee of funding to service loans. It may therefore have one of the following impacts:
 - (a) The TNPA will be unable to secure funding for essential port developments due to the unacceptable risks and uncertainty created by the provisions of the ICM Act pertaining to the rights and powers of the TNPA;
 - (b) The current loans may be at risk of being called up.

7. In addition, Transnet has in its application indicated that its capital investment programme of R80 billion (over a five year period), is creating freight transport capacity to meet the demands of the South African economy. In this respect, it is a critical and strategic role player in initiatives to improve the competitiveness of the South African economy. They also raise concerns that the ICM Act could potentially compromise the ability of the TNPA to carry out its day to day operations as mandated by the National Ports Act, 2005 (Act no. 12 of 1005) as well as its international obligations.

DECISION

8. In reaching my decision I have carefully considered the following:
 - (a) The submissions made by DPE;
 - (b) The application from Transnet Ltd;

- (c) The relevant provisions of the ICM Act;
 - (d) The relevant provisions of the National Ports Act, 2005 (Act No. 12 of 2005).
10. The ICM Act which was recently passed by Parliament provides for a novel concept in the Act known as "coastal public property" which, in terms of sections 11 and 12 of the ICM Act, cannot be owned and is held in trust by the State on behalf of the citizens of South Africa. In general terms coastal public property consists of the sea and seashore below the high water mark and thus incorporates all of South Africa's port areas.
11. This inclusion of port areas as part of coastal public property could potentially affect the operations of the TNPA as the management authority currently responsible for the operation of South Africa's ports, specifically with regard to long term leases which the TNPA enter into to fund port infrastructure and which serve as security for long term financial loans as outlined above.
12. Section 65 and 66 of the ICM Act provides for the conclusion of leases within coastal public property up to a maximum of 20 years. Since many of the long term leases entered into by the TNPA are for significantly longer periods, the limited time period for coastal leases may have a negative effect on port operations and restrict the TNPA's ability to manage and fund port development and infrastructure, such as the R80 billion capital investment programme mentioned above. Despite Transnet's concern regarding the impact of the ICM Act on their international obligations and national mandate, I am of the view that the major impact on day-to-day operations will occur only in respect of the leases and financial guarantees related to the affected areas.
13. Section 27 of the ICM Act provides two options for exclusion from coastal public property. In terms of section 27(2), I may exclude any area from coastal public property by proclamation if it is for 'government purposes'. Ordinarily the management of ports would be considered to be for 'government purposes'. However the definition of 'government purposes' is restrictive in that it excludes leases concluded for more than 20 years. The relevant part of the definition reads as follows:

"government purposes" means the exercise of functions by an organ of state that are in the national interest or in the interest of national security, but does not include donation, leases of more than 20 years or alienation by that organ of State;".

14. Section 27(4) however empowers me to exclude an area from costal public property for "any other purpose" subject to the ratification of Parliament. This section does not impose the same limitations as section 27(2) and would therefore allow the TNPA to enter into long term leases within port areas to support port infrastructure and development.
15. Transnet applied to exclude confined port areas from costal public property in terms of section 27(4) of the ICM Act as section 27(2) would not address the identified risks.
16. In terms of the National Ports Act, 2005 (Act No. 12 of 2005) the port areas delineated in the legislation commonly referred to as the "reserved port areas" extend beyond the current boundaries of operational ports and cover a significant area of sea and seashore, some of which include sensitive coastal eco-systems. It is for this reason, and having regard to the objectives of the ICM Act, that I requested Transnet to submit maps and coordinates for the confined port areas. As such, this application for the exclusion of port areas from coastal public property is confined to the current operational port areas, while the remaining "reserved port areas" will continue to be coastal public property and subject to the relevant restrictive and protective provisions of the ICM Act. I am also mindful of the fact that the exclusion of the confined port areas from coastal public property does not negate the application of other provisions of the ICM Act as well as other environmental legislation, relating to for example, environmental impact assessments (EIAs), dumping and dredging permits, and so forth to these excluded areas.
17. For, *inter alia*, the above reasons I am satisfied that the submissions made by Transnet and DPE warrant the approval of their application in terms of section 27(4) of the ICM Act. Other than what is set out above, I am not convinced that the ICM Act will be more burdensome or onerous for Transnet to achieve the objectives of the National Ports Act, 2005 than is currently the position within the existing legislative framework.

18. The application is therefore granted subject to ratification by Parliament. **Coastal public property which falls within the nine confined port areas as identified by the co-ordinates and maps attached as Annexure A hereto, are excluded in terms of section 27(4) of the ICM Act, subject to ratification by Parliament.**

The reasons set out above are not exhaustive and should not be construed as such and I reserve the right to provide comprehensive reasons for the decision should this become necessary.

Martinus van Schalkwyk

MARTHINUS VAN SCHALKWYK, MP

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM

DATE: 13 NOV 2008