

25 March 2022

Attention: The Western Cape Government
Minister A Bredell
Provincial Minister: Local Government, Environmental Affairs and Development
Planning

Per E-Mail: magdalena.griesel@westerncape.gov.za

And to: Mr Piet van Zyl
Head of Department: DEA-&DP

Per E-mail: Pieter.vanZyl@westerncape.gov.za

And to: Mr Achmad Bassier
Director: Environmental Law Enforcement

Per E-mail: Achmad.bassier@westerncape.gov.za

And to: Ms. K Shippey
Chief Director: Environmental Sustainability

Per E-mail: Karen.Shippey@westerncape.gov.za

And to: Mr. G Hill-Lewis
Executive Mayor: City of Cape Town

Per E-mail: mayor.mayor@capetown.gov.za

CC: Cllr Z Badroodien
Mayoral Committee Member: Water and Waste

Per E-mail: zahid.badroodien@capetown.gov.za

CC: Mr. M Webster
Executive Director: Water and Waste

Per E-mail: Michael.Webster@capetown.gov.za

CC: Ms. Zena Nair
Provincial Manager: South African Human Rights Commission
Western Cape

Per E-mail: wcf frontline@sahrc.org.za

Good day Sir/s,

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

ORGANISATION UNDOING TAX ABUSE NPC

Reg No.: 2012/064213/08

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

Non-Executive Directors: W Modisapodi (Chair), P Majoji, LJJ Pauwen, T Pillay Van Graan, Dr H Volmink, T Skweyiya, S Ndlovu, Z Mukwevho

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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. 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.
3. We refer to previous correspondence and your department’s final report on compliance by the City of Cape Town (“the City”) with the conditions of the Modified Directive, as well as the quarterly meeting that was held with representatives of your department (“DEA&DP”), the City and the Department of Water and Sanitation (“DWS”) on 16 February 2022.
4. It has become apparent that DEA&DP has not been able to effectively protect the Diep River and Milnerton lagoon from ongoing catastrophic non-compliant discharges of millions of litres of inadequately treated effluent from the Potsdam Waste-Water Treatment Works (“WWTW”), despite the issuing of the Modified Directive in January 2021. It is very likely causing irreversible damage to the Diep River ecosystem. DEA&DP also failed to ensure that remediation is done after these repeated non-compliant discharge events.
5. OUTA is of the opinion that the City has not been effective with the implementation of the action steps stipulated in the modified Directive (issued on January 2021). Amongst others:
 - 5.1 The City has not implemented any meaningful intervention at the Erica Road outlet other than intermittent over-pumping seven hours a day, five or six days per week, when equipment is available. During the other 120 plus hours per week, the fast-flowing, highly polluted discharge flows continuously into the Diep River.

OUTA’s testing from 23 August 2021 to 21 February 2022 showed water with e-Coli levels of up to 70 million cfu/100ml (on 21/02/2022) still flowing into the river. On only two of the eight occasions during this period, samples showed results of less than 16.2 million, with the lowest value 5.8 million.

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Only recently has a functional system (nets, grid etc.) to trap solid waste been installed (as directed in the City action plan by 30 November 2021 (item 14)) at this site. None was installed at any other stormwater outlet.

- 5.2 The City has not reduced pollution levels in the Theo Marais Canal and large volumes of fast-flowing highly polluted water continues to be discharged into the Diep River. Between 10 December 2021 and 17 January 2022, the City's results show e-Coli levels measuring over 1 million cfu/100ml on three of the four occasions measured (the fourth result was 400 000) at RTV03. The comparable City results in the Theo Marais Canal a year ago on 22 January 2021 were e-Coli > 100 000 cfu/100ml and 3 700 cfu/100ml on 17 December 2020.

OUTA's results show similarly high levels (900 000 cfu/100ml on 3 December 2021 and 156 000 cfu/100ml on 29 December 2021).

- 5.3 Since the start of the year on 1 January, 2 February, 18 February and 2 March 2022, the Milnerton suburb was subjected to what could only have been massive discharges of highly polluted water into the lagoon, as borne out by a toxic smell that permeated for several days after each discharge. There were reports of green foam forming on the surfaces of swimming pools which raised serious questions about the air quality and the impact that it could have on residents' health.

It is OUTA's understanding that several complaints have been submitted to, amongst others, the MAYCO member responsible for water and waste and the City Manager. These incidents also received wide coverage on social media and in the press, yet we understand that decent and timely responses from the City, at both executive and administrative levels, were (and still are) conspicuous absent.

At other times, a foul smell continues to linger in areas immediately adjacent to the lagoon. It would seem that the wind's direction has not favoured the City since the start of the year, as they have often turned north-westerly, carrying with them proof of contamination that would otherwise go undetected.

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This means that the pollution of the Diep River and Milnerton lagoon is ongoing and severe.

- 5.4 On 3 March 2022, the sandy bed of the lagoon was strewn with small, dead fish, which could be seen where the incoming tide had caused the murky dark river water to clear. Dead fish was also spotted on the banks. The City's response was that they would "investigate" the cause, which was both disingenuous, as anyone, including City officials, would have known that it was the result of severe contamination of the lagoon, as borne out by water sample results, water colour and the stench emanating from the lagoon.

In fact, the lagoon has now officially been closed by the City due to the growth of blue-green algae. This came as no surprise, given that the water has received large volumes of nutrients needed for the algae to bloom and flourish.

6. We should also pause to reflect on the quarterly meeting that was held on 16 February 2022. It can be summarised as follows:
- 6.1 The low flow diversion system at Milky Way is not functional and the City's best answer was that re-engineering would be costly and that the City was waiting for a consultant's report.
- 6.2 No answer was provided on whether the source has been identified that causes the Theo Marais canal to often be fast-flowing with highly polluted water above the Koeberg Road pump station outlet or not.
- 6.3 On 6 December 2021, no pump was available to prevent the discharge of raw sewage from the Koeberg Road pump station into the canal yet again, and upon being questioned about the steps that the City was taking to prevent this from re-occurring in the future, the response was that upgrades would be done in the long term and that the City was looking at getting additional pumps.
- 6.4 On whether the City would adhere to DEA&DP's deadlines for certain upgrades, such as the Potsdam WWTW and Koeberg Road pump station, or not, the answer that was given, was again

evasive. It was unclear as to whether the City would be able to get back on track to meet these deadlines.

- 6.5 DEA&DP has levied no penalties against the City for its non-compliance with the Modified Directive. As for the prospect of laying a criminal complaint, DEA&DP was not optimistic and claimed to be duty bound to work with the City to assist in resolving the matter. DEA&DP was in fact far from clear on its obligations to act in response to the City's non-compliance with the Modified Directive. DEA&DP indicated that a further compliance audit will only be conducted "if deemed necessary".
7. The above points lead OUTA to an inescapable conclusion that the City has not complied with a number of its obligations under NEMA and the Modified Directive, and has failed to satisfy a number of the conditions of its water use licence. DEA&DP and DWS as the regulatory authorities that are constitutionally mandated to enforce compliance with these instruments, have failed to do so effectively.
8. We expressed our reservation about the inter-governmental task team (comprising representatives of DEA&DP, the City and DWS) formed to collaborate with a view to ensuring compliance and bringing an end to the pollution of the river system because of the potential of such collaboration detracting from an arm's length decision-making. Despite our reservation, we nevertheless noted it as a positive development at the time. However, given the current (regressing) state of affairs, we have no reason to believe that the task team's engagements and activities have yielded any tangible results.
9. We have, in this regard, not been provided with any feedback on the task team's meetings and resolutions, which ought reasonably to have been provided to OUTA in the interest of transparency and accountability. In fact, we have been compelled to submit PAIA requests for the information that we require to monitor the situation on behalf of the public and particularly the affected residents of Milnerton who have had to bear the brunt of government dysfunction for more than six years.

10. The City's and DWS's insistence that we resort to a PAIA Application to obtain access to information also leads to the conclusion that the City is not meeting its obligations to comply with the Modified Directive and is not satisfying the conditions of its water use license. If the contrary were true, the information would have been readily available and forthcoming. Complaints would have also been properly and timeously answered by the responsible office bearers and senior officials of the City.
11. We are aware of at least one complaint by a resident, submitted more than three weeks ago, which has solicited no response from the City Manager's office, save for an acknowledgement of receipt.
12. It is appropriate, at this juncture, to point out that DEA&DP's only constitutional mandate apart from development planning, is to protect the environment. It is the department's core business. In the event of an abdication of this responsibility, there is no longer any reason for the department's existence. Whilst the issuing of the directive, its modification in January 2021, and the compliance audit which DEA&DP undertook last year, were all demonstrative of an intention to give effect to this mandate, the lack of any known enforcement action on your part since then, is not.
13. In our view, it is time for DEA&DP to do what it is duty-bound to do. DEA&DP ought to take proper and effective action to hold the City to account by instituting criminal and/ or civil legal proceedings. There has been a lot of talking, engaging, inter-governmental collaborating and investigating, none of which has had a positive impact. On the contrary, the river system continues to be decimated by unlawful discharges and alleged "other sources of pollution".
14. Since the inception of OUTA's involvement in the pollution of the river system, we have heard on numerous occasions that various other sources of pollution (in other words, over and above all of the known and unknown issues at the flailing Potsdam WWTW) were to blame for the problem. We have to date not seen a list purporting to identify these "other sources" of pollution nor any indication of what the City has done, or intends doing, to properly address these "other sources". Whilst, for example, there might be ongoing abuse of the stormwater

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system, neither the City nor the task team has provided any information to OUTA or the public on any concrete steps that have been taken or measures introduced taken to stop this abuse.

15. In our view and with reference to the City's immediate and interim obligations in terms of the Modified Directive, it is of concern that the City has not compiled a holistic interim action plan to mitigate the risk of further pollution pending the completion of the medium- to long-term infrastructure upgrades which ought to have been submitted to, and monitored by DEA&DP.
16. The suggestion that cooperative government constitutes a valid and lawful reason for inaction from an enforcement perspective, is rejected. NEMA accords DEA&DP the requisite power to take reasonable measures to remedy the situation and/ or apply to a competent court for appropriate relief. In our view, a court would not rule against a regulatory authority when taking legal action against another organ of state when:
 - 16.1 the transgression violates a number of human rights because of an apparent lack of compliance with cooperative government, especially where the facts are common cause;
 - 16.2 there is no dispute between the parties; and,
 - 16.3 there has already been considerable engagement.
17. In a case like this, the regulatory authority steps into the shoes of the community and public whose rights are being infringed. The duty to protect those rights cannot be undermined or trumped by a superficial, convenient reliance on the principles of cooperative government.
18. It is almost unimaginable that DEA&DP would hold back on taking action notwithstanding proven ongoing harm to the environment. The department is legally obligated to prevent ongoing harm to the environment, when:
 - 18.1 it has been almost 14 months since the Modified Directive was issued (pursuant to years of prior abuse of the river system);

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- 18.2 the City is non-compliant with a number of its obligations under the Modified Directive; and,
- 18.3 the situation has since worsened and resulted in the closure of the lagoon. At this rate, the river system will have been irreversibly damaged by the time the long-term upgrades have been completed.
19. OUTA has held back on taking legal action against DEA&DP, DWS and the City, as we considered it fair to afford the new City administration an opportunity to clean up the mess and deal with previous administrations' legacy of dysfunction.
20. We also believe that OUTA should not assume the primary responsibility for taking legal action against the City. That responsibility is, in our view, vested in DEA&DP as the regulatory authority. DEA&DP owns the constitutional mandate to protect citizens of the Western Cape against anyone including but not limited to a municipality (no matter which political party is in power) when their actions and omissions cause harm, especially protracted and ongoing harm, to the environment. Failing to do so, is unconstitutional and unlawful.
21. We will not, however, hold back indefinitely. Unless DEA&DP and DWS (which has received similar correspondence) take concrete action to turn the situation around, to hold the City to account and to provide sufficient information to demonstrate that their actions are having the required impact from both an enforcement and environmental protection perspective, we will not hesitate to take legal action ourselves. We believe that a court would take a dim view of the explanations and excuses that have been proffered to date to justify the City's ongoing transgressive conduct since the contamination of the river system that started more than six years ago.
22. We trust that DEA&DP will provide us with a comprehensive response as a matter of priority.
23. We have copied in, not only the relevant office bearers and senior managers of the City, but also the Provincial Manager (responsible for the Western Cape) of the South African Human Rights Commission. We believe that the Commission has a direct interest in the matter as the

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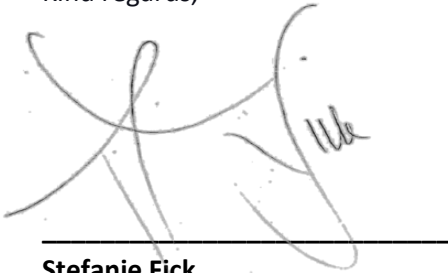
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Commission assumed responsibility for monitoring on and reporting of other instances of pollution in the country that has given rise to similar human rights violations.

24. Should you have any queries, kindly contact OUTA's Senior Legal Project Manager, Ms. Andrea van Heerden, on andrea.korff@outa.co.za
25. We trust that you find the above in order.

Kind regards,



Stefanie Fick
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