

COMMENT ON THE GOUKOU RIVER ESTUARY DRAFT ESTUARINE MANAGEMENT PLAN (PUBLISHED AUGUST 2021) IN RESPONSE TO THE NOTICE AND INVITATION TO SUBMIT WRITTEN REPRESENTATIONS AND OBJECTIONS ON THE DRAFT EMP

INTRODUCTION

1. On 28 January 2022, a notice was published in the *Provincial Gazette Extraordinary* 8538, inviting written representations and objections on the draft Goukou River Estuary Estuarine Management Plan (“the Goukou EMP”) before or on 4 March 2022.
2. These comments and objections are delivered on behalf of the Goukou River Property Owners Association (“GRIPPOA”).
3. The Goukou River Estuary covers approximately 250 ha, is 19 km in length, and is part of the Still Bay Marine Protected Area (“MPA”) formally promulgated on 17 October 2008 (*Government Gazette* No. 31513).
4. GRIPPOA represents the riparian landowners on both sides of the Goukou River, a substantial portion of which forms part of the Goukou Estuary. Members’ land holdings generally falls within an agricultural zoned area where small-scale agricultural activities are practised on the lower lying areas adjacent to the Goukou River. The waterward boundaries of such holdings generally extend to the middle of the Goukou River.

ISSUES

5. Paragraph 2 of Table 3 on page 18 of the Goukou EMP (*‘Suggested management actions’*) provides that:

2. The ecological water requirement (“reserve”) should be implemented with immediate effect to ensure that the estuary receives the minimum baseflow needed to sustain a healthy system. The requirement amount of water should be released at all times
6. Paragraph 5 of Table 3 on page 18 of the Goukou EMP (*‘Suggested management actions’*) provides that:

5. Fences across the floodplains (less than 5 m above mean sea level) should be removed and public access needs to be ensured in compliance with the Integrated Coastal Management Act.
7. Paragraphs 6 and 7 of the same table provides as follows:

6.No new low-lying developments should be established without the appropriate authorisation (e.g. environmental authorisation through the EIA process). Developments in this area should be restricted to essential infrastructure (e.g. bridges).

7.The establishment of a land use setback would address the issues of riparian infrastructure impacting on the system.

8. For the detailed reasons that follow, GRIPOA objects *inter alia* to the inclusion of paragraphs 2, 5 and 6 in the EMP.

9. Three main aspects arise in connection with these paragraphs: (A) Minimum baseflow; (B) the removal of fences, (C) ensured public access and (D) a development set-back. These may be divided into the following sub-issues:

9.1 (A) Minimum baseflow:

9.1.1 First issue: this provision is no more than aspirational. In it meaningless in the absence of the scientific determination of the baseflow, and a detailed review of upriver water rights; and

9.2 (B) Removal of fences:

9.2.1 Second issue: the designated riverine buffer of '5 m above mean sea level' ("5m amsl") is meaningless, not conducive to certainty, and would be impossible to police; and

9.2.2 Third issue: the preclusion of fences below the 5m amsl mark, is unreasonable in that it fails to have regard to the basic imperative of delineating boundaries, keeping livestock enclosed and safe, the possibility of alternatives, and the costs thereof.

9.3 (C) Ensured public access:

9.3.1 Fourth issue: the legislative purpose of an EMP is not to create public access servitudes or coastal set-back lines;

9.3.2 Fifth issue: the proposed servitude is arbitrary in that it fails to distinguish between different topographic areas occurring on the various properties (i.e. a one-size-fits-all approach is adopted) and there has not been any on-site verification studies to justify that this approach is appropriate in all circumstances;

- 9.3.3 Sixth issue: the proposed servitude appears to provide unrestricted access to privately-owned coastal properties, and accordingly, is invasive of privacy, infringes on owners' property rights, and also threatens the security of such properties (including the safety of the livestock); and
- 9.2.4 Seventh issue: it is irrational to create or to encourage public access to a marine protected area, especially where a large portion of the area has been classified as a restricted zone.
- 9.4 Eighth issue related to both (B) and (C): is that paragraph 5 appears to be disproportionate to the ends sought to be achieved by the Goukou EMP.
- 9.5 (D) Development set-back:
 - 9.5.1 Ninth issue: lack of clarity as to what this provision means and how it is to be implemented; and
 - 9.5.2 Tenth issue: necessity for an evidence based set-back determination.
- 10. This comment is structured as follows:
 - 10.1 Synopsis of the relevant statutory and factual events;
 - 10.2 Account of the statutory context;
 - 10.3 Analysis of paragraphs 5 and 6 in further detail;
 - 10.4 Elaboration of each of the nine issues;
 - 10.5 Brief comparative analysis to other draft estuarine management plans; and
 - 10.6 Conclusion.

SYNOPSIS OF RELEVANT STATUTORY AND FACTUAL EVENTS

- 11. In order to understand this objection in context, it is helpful to understand the relevant statutory and factual events which have preceded the current Goukou EMP.
- 12. As appears below, an extensive period of public consultation under the auspices of CapeNature has preceded the publication of the draft EMP for public comment.

13. Despite the energy and resources that GRIPOA devoted to this process, it is disappointed to note that not a single of its inputs has found its way into the draft advertised for public comment. In fact, the draft is the same in all respects as the one that was first tabled in the public process.
14. On 14 October 2005, the Minister of Environmental Affairs and Tourism (“the Minister”) gave notice of his intention to declare the Stilbaai Marine Protected Area in terms of section 43 of the Marine Living Resources Act, 18 of 1998 (“the MLR Act”) and to prescribe management and protection measures in terms of section 77(2)(x)(i) of that Act, and, to that end, called for public comment.¹
15. In terms of section 4 of such notice, the relevant Marine Protected Area (“MPA”) was described as “*the area between Noordkapperspunt and Rietvleivywers, and includes the estuary of the Goukou River to a point 15 km upstream*”.
16. The landward boundary of the MPA was defined as (emphasis added):
- ..the high water mark as it runs from Noordkapperspunt..., along Skulpiesbaai, around Morris Point, through the harbour, along the western shore of the estuary to 34° 17'.810 S; 021 18'.608 E, approximately 15 km upstream, and then back along the eastern shore of the estuary to the mouth and from there to Rietvleivywers...*
17. It is apparent from this description that the estuary portion of the MPA extends to the high water mark on both its eastern and western shores.
18. The waterward boundaries of the properties along the estuary extend to the middle point of the Goukou River. This means that the Goukou MPA includes those parts of such properties as extend from the high water mark to the middle point of the Goukou River.
19. The National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (“ICMA”) was assented to on 9 February 2008. The date of commencement of its relevant provisions was 1 December 2008. These provisions are considered in further detail below.
20. The stated purpose of ICMA is:
- [t]o establish a system of integrated coastal and estuarine management in the Republic, including norms, standards and policies, in order to promote the conservation of the coastal environment, and maintain the natural attributes of coastal landscapes and seascapes, and to ensure that development and the use of natural resources within the coastal zone is socially*

¹ GN No. R1012 dated 14 October 2005.

and economically justifiable and ecologically sustainable...

21. The preamble to the ICMA notes in the context of the socially justifiable use of natural resources in the coastal zone that:

the economic, social and environmental benefits of the coastal zone have been distributed unfairly in the past.

22. **The social aspects of the ICMA are mentioned because of the coastal access public servitudes considered further below in this objection.**
23. In August 2008, the Stillbaai Marine Protected Area Management Plan was prepared for the World Wildlife Fund and the Department of Environmental Affairs and Tourism.²
24. On 17 October 2008, the Minister proclaimed the Stilbaai Marine Protected Area and prescribed relevant management and protection measures.³
25. This proclamation created “*Restricted*” zones and one “*Controlled*” zone within the MPA. One such Restricted Zone is defined to include that part of the estuary that lies between “*position 34° 20'.463 S; 021 24'.187 E (approximately 2.3 km upstream of the R323 road bridge) and position 34° 17'.792 S; 021 18'.592 E (approximately 15 km upstream from the mouth)*” with the remainder of the MPA being a Controlled Zone.
26. In broad terms, no fishing is allowed in any of the Restricted Zones within the MPA. Bait collection within the estuary is only permissible in the controlled zone of the estuary downstream of position 34° 20'.463 S; 021 24'.187 E (i.e. from about 2.3 km upstream downward toward the mouth), and then only along the eastern bank. There are also restrictions on scuba diving and spearfishing in the marine protected area.
27. **These restrictions are raised because any purported public need to access the shores of the estuary must be seen against the activities that are permissible there.**
28. Reverting to the ICMA, section 33(1) provides that all estuaries within the Republic must be managed in a co-ordinated and efficient manner and “*in accordance with a national estuarine management protocol*”.

² Although the plan preceded the proclamation of the MPA, the Minister had already given notice of his intention to proclaim the MPA on 14 October 2005.

³ GN No. R1108 dated 17 October 2008.

29. In terms of section 33(2) the Minister was required within four years of the commencement of that ICMA to prescribe such protocol, which (subsection (3)) was required *inter alia* to: set standards for the management of estuaries; establish procedures or give guidance regarding how estuaries must be managed and how the management responsibilities are to be exercised by different organs of state and other parties; establish minimum requirements for estuarine management plans; and identify who must prepare estuarine management plans and the process to be followed in doing so.
30. In this regard, section 34 of the ICMA governs estuarine management plans, providing as follows:
- (1) The responsible body contemplated in section 33(3)(e) who develops an estuarine management plan must —*
- (a) follow a public participation process in accordance with Part 5 of Chapter 6; and*
- (b) ensure that the estuarine management plan and the process by which it is developed are consistent with—*
- (i) the national estuarine management protocol; and*
- (ii) the national coastal management programme and with the applicable provincial coastal management programme and municipal coastal management programme referred to in Parts 1, 2 and 3 of Chapter 6.*
- (2) An estuarine management plan may form an integral part of a provincial coastal management programme or a municipal coastal management programme.*
31. The National Estuarine Management Protocol was not proclaimed until 2013. In the interim, however CapeNature set in motion the process of workshopping an EMP for the Goukou River Estuary.⁴
32. In May 2009, the CSIR published a draft situation assessment titled “C.A.P.E [Cape Action Plan for the People] Estuaries Programme Development of the Goukou Estuary Management Plan”. This report effectively scoped the issues that needed to be dealt with in the EMP in due course. The report discusses subsistence fishing and the gathering of marine resources by the local community but does not identify access to these estuarine services as requiring attention. Existing “*man-made hard structures below 5m amsl [above mean sea level]*”, and “*livestock grazing within the*

⁴ CapeNature is the executive arm of the Western Cape Nature Conservation Board, which was established in terms of Western Cape Nature Conservation Board Act, 15 of 1998. CapeNature is an organ of state responsible for nature conservation in the province.

riparian zone [not defined]” are both listed as issues adversely impacting the ecological health of the estuary.

33. On 20 May 2010, CapeNature coordinated an inaugural “stakeholder” meeting in order to decide on a strategic vision for the EMP to be adopted for the Goukou Estuary. GRIPOA was represented at that meeting and at all subsequent meetings of this forum. Discussions were led by Pierre de Villiers of CapeNature and three members of the CSIR (including Lara van Niekerk, a specialist in the hydrodynamics of estuaries). Stakeholders raised a variety of issues including “*existing man-made hard structures (below 5m MSL)*”.
34. On 25 October 2010, a further meeting of this forum was held specifically to discuss fishing and boating issues.
35. On 29 July 2011, the forum held an all-day workshop to refine its draft vision and to articulate its strategic objectives. Van Niekerk presented a “*situation assessment report*” and in that context noted that the “*boundaries of the EMP [were] at the 5m contour from the mouth to as far as tidal influence is experienced*”. It appears that this was an attempt to describe the geographic boundaries of the area subject to the EMP, but, as shown further below, the concept of “the 5m contour” remains unclear.
36. The vision for the estuary that was agreed upon at this meeting was “*the Goukou Estuary is conserved and upgraded through evidence-based information as a geographic and spiritual place that sustains and nurtures biodiversity and human well-being*”. Strategic objectives included those relating to infrastructural development, including the mitigation of agricultural impacts and the regulation of jetties.
37. **It is important to note, that the issue of inadequate access to the estuary and its shores was not an issue that was flagged at this meeting, nor had it been identified as an issue at the previous two meetings of the forum.**
38. In September 2011, Van Niekerk produced a first draft of the EMP titled ‘C.A.P.E Estuaries Programme Goukou Estuary Management Plan’.
39. The report listed a series of important issues that had been identified and their potential impacts on the estuary. Included amongst such issues were those related to “*riparian infrastructure (e.g. fences and low-lying developments)*”, of which the following was said:

Salt marshes and natural riparian vegetation in the Goukou system have been, and continue to be, degraded by low-lying developments and infrastructure. This encroaches on natural buffers and unique estuarine habitats along the estuary and reduces the mitigation effect that natural vegetation provides against wave action (caused by tidal action and water skiing) and floods.

40. The report summarised the various issues that had been identified as impacting on the estuary, as well as proposed management actions. The report cited various management actions to achieve its strategic objectives. This included the paragraph 5 management action – **despite the report itself not having identified inadequate public access to the estuary or its shores as an issue.**
41. On 11 July 2012, a further meeting of the estuary forum was held. The management structure of the forum was one of the issues that was discussed.
42. On 28 September 2012, the forum met again. At the meeting the EMP was said to have been in its last draft, and it was stated that it was anticipated that it would be approved by the forum *“at the next meeting when there is [sic] more people in attendance”*. It is clear from this statement that the EMP was at that point a product of the work of the CSIR, and its content had not been developed or approved by the forum.
43. On 10 May 2013, the National Estuarine Management Protocol was published by the Minister in terms of s 33(2) of ICMA.⁵ In terms thereof, strategic objectives for effective integrated management of estuaries were said to include *“to conserve, manage, and enhance sustainable economic and social use, without compromising the ecological integrity and functioning of the estuarine ecosystems”*.
44. Paragraph 5 of the protocol dealt with the management authorities responsible for the preparation of EMP's. Section 5.5 stipulates that *“where an estuary is within a protected area..., the management authority responsible for the protected area must develop an EMP in consultation with relevant government departments”*.
45. Paragraph 6 of the protocol stipulates the minimum requirements of an EMP which include:
 - 45.1 That an EMP must be *“in line”* with the national coastal management programme, provincial coastal management programme and/or municipal coastal management programme; and

⁵ GN R341 dated 10 May 2013.

- 45.2 *“a list of management objectives and activities, that at a minimum addresses the following: conservation and utilization of living and non-living resources....; social issues; land-use and infrastructure planning and development; water quality and quantity; climate change; education and awareness; compliance and enforcement, and any other activities that will be required to maintain and/or improve the condition of the estuary”.*
46. Paragraph 7 of the protocol deals with the procedures for developing an estuarine management plan and stipulates three distinct phases: a scoping phase; an objective setting phase; and a development of the EMP phase.
47. Each of these phases includes the assessment, or management, of social impacts. The scoping phase is required to describe the *“levels of dependence of local communities on the estuary”*, whilst the two subsequent phases must each consider *“social issues”*.
48. A minute of the Goukou Protected Area Advisory Committee Forum held on 30 January 2014 states that the *“estuary management plan has been approved”*, although no further detail is given.
49. In 2016, the Western Cape Government adopted the Western Cape Coastal Management Programme, as envisaged in terms of s46 of ICMA. In terms of s46 of ICMA, the purpose of such programme is *“managing the coastal zone in the province”*.
50. Paragraph 3 page xv of this management plan records that one of the goals of s management programmes in regard to *“facilitation of coastal access”*, is to *“promote coastal access and accessibility that is both equitable and sustainable and has as an objective the enabling of physical public access to the sea, and along the seashore, on a managed basis”* (we return to the emphasised phrase further below).
51. Table 3 of that programme described the various components of the coastal zone as identified in ICMA.
52. One such component was *“coastal access land”* constituted by land designated as such in terms of s18 of ICMA (discussed further below). The **authority responsible for such coastal access land is stated to be the municipality**, with its intention being *“to ensure that the public can gain access to the coastal public property via public access servitudes”*.

53. Another component was “estuaries” whose functional zone is described to be “by default approximated as the 5m topographical contour (i.e. 5m above mean sea level), **but should be confirmed by on-site verification, especially in smaller estuaries**”. This functional zone was said to include “the open water area, estuarine habitat (sand and mud flats, rock and plant communities) and floodplain area”. The authority responsible for estuaries is stated to be “national, provincial, local government or conservation agencies”.
54. A topographical contour is a (contour) line which connect points of equal elevation. Contours are drawn on a topographical map in order to quantify the elevation at any point on the map.
55. The “5m topographical contour” appears to refer to the contour for the 5m above mean sea level (“amsl”) elevation in close proximity to the estuary. In context it appears to be used to designate the outer reaches of an estuary’s influence.
56. As demonstrated further below, the upper reaches of the estuary are at an elevation considerably higher than 5m amsl (approximately 70m amsl). This makes the proposed topographic contour inapplicable to the description of the estuarine functional zone there.
57. During 2016, the draft Goukou EMP was revised to incorporate the minimum requirements set by the protocol, which had been published two years after its preparation. Bait collection was identified as a threat to non-targeted species such as amphipods. Illegal netting in the estuary was also identified as a threat that required continued monitoring.
58. During 2018, RoyalhaskoningDHV, an engineering firm compiled a further draft of the EMP.
59. **In July 2018, GRIPOA provided written comment on the current draft EMP. In response to the paragraph 5 management action it stated “Point 5 is irrational with the typical conditions along a river vs coast. How would owners be compensated for the loss of land and use. There is no public access on any farm”.**
60. On 29 May 2019, a meeting was held between members of GRIPOA on one hand, and Caren George (Control Environmental Officer at Department of Environmental Affairs and Development Planning (Western Cape) and Marlene Laros (Director:

Biodiversity and Coastal Management in the Department) on the other. The purpose of the meeting was to discuss GRIPOA's input and concerns in connection with the EMP.

61. On 8 July 2019, GRIPOA's attorney held a meeting with CapeNature's local representative, Mr Jean de Plessis (Conservation Manager for the Geelkrans Complex of Nature Reserves; "De Plessis") to work through GRIPOA's detailed concerns in connection with the draft EMP and to propose alternative formulations to some of the management actions:

61.1 At this meeting, and in relation to the paragraph 5 management action, *"it was recorded that GRIPOA was not in agreement with either the removal of fences or the fact that public access be ensured. These references needed to be removed in its totality and will not now or in the future be accepted by riparian owners. In the event of stakeholders not accepting this, the management plan will be opposed in its totality"*.

61.2 Another relevant issue discussed at this meeting concerning coastal set-back lines. Under the heading "*climate change*" paragraph 3 of the management actions provided as follows:

There is not much that can be done locally to mitigate the causes of global climate change. However, a climate change strategy and action plan has been compiled for the Western Cape to [sic] this regard. This document can serve as a guide for climate mitigation measures to be implemented in and around the Goukou Estuary. Enforcing set-back lines and allocating fresh water flows will ensure that the Goukou Estuary is buffered as much as possible against climate pressures. ("the paragraph 3 management action")

61.3 The paragraph 3 management action ought to be read with paragraph 7 (like paragraph 5, also under the heading of "*riparian infrastructure (including fences and low-lying developments)*"), which provides that "*[t]he establishment of land use setback would address the issues of riparian infrastructure impacting on the system"*.

61.4 GRIPOA agreed to the paragraph 5 management action subject to its comments made in regard to paragraph 7. In the latter regard GRIPOA, was "*willing to discuss a set-back that will not impact existing property rights whatsoever or impact any existing usage or activity including existing infrastructure or infrastructure to which rights have been approved"*.

61.5 However, GRIPOA was not willing to make any concessions in relation to set-

back lines when there was no scientific evidence supporting the notion in paragraph 3 that “*enforcing set-back lines and allocating fresh water flows will ensure that the Goukou Estuary is buffered as much as possible against climate pressures*”. In other words, any such interventions should be justified by scientific evidence.

- 61.6 It was agreed at this meeting that that these provisions would be omitted, or amended as applicable, in a revised draft of the plan.
62. On 16 October 2020, Du Plessis advised that “*further stakeholder participation*” was envisaged before the plan could be finalised.
63. In November 2020, the “final” Goukou River Estuarine Management Plan was published. Inexplicably, it was not initially furnished to GRIPOA.
64. On inquiry, a copy of this document was sent to GRIPOA, however none of the changes that had been agreed with Du Plessis had been incorporated.
65. On 22 April 2021, a virtual meeting of the Goukou Protected Area Advisory Committee Forum was held. Keith Spencer, a Marine & Coast scientific specialist of CapeNature chaired the meeting.
66. Paragraph 5 of the minute deals with the EMP and records Ms George as having said the following:
- DEADP has asked municipalities and other organs of state for a joint publication of the [EMP] for final comments, so it's the last round of public participation before it gets approved. [She] has prepared a Gazette notice and advertisements, also consulted with legal services where they have been informed to wait until the National Estuarine Management Protocol amendments are published before inviting public to comment on the EMP for the last time before it gets approved.*
67. Spencer is recorded to have said the following in connection with the EMP:
- Comments from GRIPOA, for the Goukou EMP, has been received and will be incorporated into the final draft and sent to CG [Caren George]*”.
68. On 4 May 2021, Spencer addressed an email to GRIPOA attaching the “*finalized EMP for final review (my Supervisor) and submission to DEADP for Public Participation Process which will include an advertising, commenting, incorporation of comments and finalization for ministerial approval*”. He further asked GRIPOA to respect the fact that it was a draft and to confirm that its comments and concerns had been considered.

69. **The draft that was attached did not reflect any of the changes requested by GRIPOA.** After a further exchange of mails, on 1 July 2021 Spencer said that he would endeavor to source the latest draft and send it to GRIPOA. He noted that GRIPOA should “rest assured” in that “a formal Public Participation Process commenting period will still be part of the approval process and any adjustments or info in the EMP can still be commented on”.
70. A draft endorsed as “Final June 2021” was subsequently furnished to GRIPOA from which it was apparent that its comments had been incorporated. The paragraph 5 management action now read:
- This is still very contentious and not practical. There is public access in the town of Stilbaai to the system. Upstream there are agricultural activities necessitating fences to the riparian zone for livestock management. It would be appropriate to legislate fencing off of livestock from the riparian zone to prevent degradation of riparian vegetation and related erosion such as can be seen along the estuary currently. An assessment of these areas should be undertaken during the establishment of a set-back line. No new lying developments should be established without the appropriate authorization (e.g. environmental authorization through the EIA process). Developments in this area should be restricted to essential infrastructure (e.g. bridges).*
71. The paragraph 7 management action (now paragraph 6) was amended to reflect the need for an evidence-based assessment of the benefits and impacts of a set-back line, to state as follows (emphasis added):
- The establishment of a land use set back would address the issues of riparian infrastructure impacting on the system. There should be a Goukou Estuary specific high confidence set back line exercise inclusive of the riparian owners.*
72. On 18 June 2021, the Minister published amendments to the National Estuarine Management Protocol.⁶
73. The reason for these amendments was that it had been found by the Supreme Court of Appeal in *Abbott v Overstrand Municipality*⁷ that the assignment of estuarine management functions to municipalities in the existing protocol presented constitutional challenges as the assignment should have been affected through ICMA, and not the protocol.
74. Accordingly, paragraph 5 of the protocol was amended to assign the provincial environmental departments as responsible management authorities to develop EMP’s and to coordinate their implementation, in consultation with the affected local

⁶ GG Vol 672 (Notice No. 44724) dated 18 June 2021.

⁷ [2016] ZASCA 68 (20 May 2016).

and district municipalities. In terms thereof, provinces may enter into agreements with municipalities willing to take the function of developing the EMPs pursuant to section 156 (4) of the Constitution and continue with the estuarine management function.

75. The provisions of paragraph 5(5) (now paragraph 5(3)) of the protocol remained unchanged insofar as EMP's in Marine Protected Areas are concerned ⁸ and accordingly, did not directly impact the work already done by CapeNature on the Goukou EMP.
76. Other relevant sections of this Protocol include the following:
- 76.1 The Protocol describes "*estuarine management*" to be a "*dynamic process that requires careful planning and implementation of management decisions*" (last paragraph page 3);
- 76.2 The Protocol's purpose is to provide "*guidance*" for the management of estuaries, where the EMPs seek "*to achieve greater harmony between ecological processes and human activities*" (page 4);
- 76.3 One of the Protocol's objectives is to "*manage estuaries co-operatively through all spheres of government; and to engage the private sector/entities and civil society in estuarine management*" (paragraph 3.2.3 on page 5);
- 76.4 One of the Protocol's "*management standards*" provides that "[m]anagement actions should be based on sound scientific evidence and where lacking, the precautionary approach should prevail." (paragraph 4.4 page 6);
- 76.5 The Protocol also makes it clear that every estuary must be dealt with on the merits of that particular estuary (paragraph 4.7 page 6);
- 76.6 The Protocol also deals with the scoping phase and prescribes that "*it is imperative that local knowledge is considered during this phase*" (page 10);
77. The Protocol also prescribes that there should be "*Situation Assessment Reports (SAR)*", which at minimum must "*[d]escribe in a socio-economic context (demographic, economic profile, etc.) and all the level/s of dependence of local*

⁸ Sections 16(1)(c)(ii), read with s 16(1)(e) the Nature Conservation Ordinance 19 of 1974 (Cape) confer powers on CapeNature to take such steps as may be necessary or desirable for the achievement of the objects and purposes of the ordinance, including the management of inland waters (which include estuaries).

communities on the estuaries" (paragraph 7.1.3 page 10).

78. On 29 July 2021, a meeting was held between CapeNature and stakeholders. During the meeting, Spencer advised that the June 2021 EMP had been submitted to his supervisor, De Villiers, who had been unwilling to submit that draft for public comment. De Villiers stated that he had not had enough time to consider the GRIPOA comments before the DEADP process deadline.
79. Spencer recorded that the November 2020 draft would now be advertised in the Government Gazette during August 2021 and that all stakeholders would be informed to enable them to take part in the public participation process that would follow thereafter. In effect then, CapeNature declined to include the content of the Goukou EMP, that had been agreed between it and GRIPOA, in the draft that would be published for public comment.
80. **In the circumstances, it is necessary for GRIPOA to make representations and objections in connection with paragraphs 5 and 6 of the Goukou EMP, as the agreed formulation of the three (two and one) issues which concerned its members the most was not incorporated in the published draft.**

STATURY CONTEXT

81. In this section, a brief account of the statutory context is offered in relation to:
- 81.1 (i) Access to coastal public property;
- 81.2 (ii) coastal set-back lines; and
- 81.3 (iii) the difference between an Estuarine management plan and a coastal management programme.

(i) Access to coastal public property

82. The starting point in understanding what "*coastal public property*" is section 7 titled "*composition of coastal public property*". In terms thereof such property comprises *inter alia* "coastal waters":

"Coastal waters", are, in turn defined to mean "(a) *the internal waters, territorial waters, exclusive economic zone and continental shelf of the Republic referred to in*

sections 3, 4, 7 and 8 of the Maritime Zones Act, 1994 ...respectively; and (b) an estuary”

83. In terms of section 7 coastal public property also includes the “sea shore”, which is, in turn, defined to mean “the area between the low-water mark and the high-water mark”.
84. Section 9 of ICMA empowers the Minister to acquire private land for the purpose of declaring that land as coastal public property. It provides:
- (1) *The Minister, acting with the concurrence of the Minister of Land Affairs, may acquire private land for the purpose of declaring that land as coastal public property, by-*
- (a) *purchasing the land;*
- (b) *exchanging the land for other land; or*
- (c) *if no agreement is reached with the owner, by expropriating the land in accordance with the Expropriation Act, 1975 (Act No. 63 of 1975).*
- (2) *Land may be acquired in terms of this section only if it is being expropriated for a purpose set out in section 8(1) [extending coastal property].”*
85. These powers arguably extend to the acquisition of land required to be used for “coastal access” because in terms of section 7A(1)(a), coastal public property is established *inter alia* to “improve access to the sea shore”, which would include the area between the low-water mark and the high-water mark of an estuary.
86. Section 11 of ICMA, titled “ownership of coastal public property” provides as follows:
- (1) *The ownership of coastal public property vests in the citizens of the Republic and coastal public property must be held in trust by the State on behalf of the citizens of the Republic.*
- (2) *Coastal public property is inalienable and cannot be sold, attached, or acquired by prescription and rights over it cannot be acquired by prescription.*
87. Section 13, titled “access to coastal public property” provides as follows (emphasis added):
- (1) *Subject to this Act and any other applicable legislation, any natural person in the Republic–*
- (a) *has a right of reasonable access to coastal public property; and*
- (b) *is entitled to use and enjoy coastal public property, provided such use-*
- (i) *does not adversely affect the rights of members of the public to use and enjoy the coastal public property;*

(ii) does not hinder the State in the performance of its duty to protect the environment; and

(iii) does not cause an adverse effect.

(1A) Subject to subsections (2) and (3), no person may prevent access to coastal public property.

(2) This section does not prevent prohibitions or restrictions on access to, or the use of, any part of coastal public property –

(a) which is or forms part of a protected area;

(b) to protect the environment, including biodiversity;

(c) in the interests of the whole community;

(d) in the interests of national security; or

(e) in the national interest.

....

88. Prior to the enactment of ICMA, a member of the public who wished to physically access coastal public property from above (i.e. from the landward side) of the high-water mark and across privately-owned land could only do so in the following circumstances:

88.1 where the State had reserved a right of public access in terms of the original deed of grant; or

88.2 the landowner had registered a public right of access; or

88.3 under limited common law grounds, including: (i) *vetustas* (immemorial user) where there is proof that a public servitude had existed for longer than anyone could remember, in which case such use is deemed to have been lawfully acquired;⁹ (ii) by means of the doctrine of implied dedication, where members of the public have, for example, made use of a road or path for a considerable period of time and the owner has acquiesced in this use, particularly when the road or path has been constructed or maintained at public expense;¹⁰ and (iii) by means of the doctrine of custom, where the public or a portion of it has customarily used a road or path to gain access to the coast and this custom is

⁹ See, for example: *Community of Grootkraal v Botha NO and Others* 2019 (2) SA 128 (SCA); *Langebaan Ratepayers' and Residents' Association v Dormell Properties 391 (Pty) Ltd* 2013 (1) SA 37 (WCC).

¹⁰ *Durban City Council v Athlone Gardens Hotel (Pty) Ltd* 1971 (3) SA 812 (D) at 814 F-G.

reasonable, established, uniformly observed and is certain.¹¹

89. **There is no evidence of fishermen, bait gatherers, or other members of the public, historically accessing the estuary through riverine properties.**

90. Section 18, titled "*designation of coastal access land*" now makes provision for coastal access as follows (emphasis added):

(1) Each municipality whose area includes coastal public property must within four years of the commencement of this Act, make a by-law that designates strips of land as coastal access land in order to secure public access to that coastal public property.

(2) Coastal access land designated in terms of subsection (1) is automatically subject to a public servitude in terms of which members of the public may use that land to gain access to coastal public property.

(3) A municipality must implement subsection (1) subject to –

(a) the other provisions of this Act, including-

(i) any prohibitions or restrictions referred to in section 13(2); and

(ii) the national and applicable provincial coastal management programmes; and

(b) any other applicable national or provincial legislation.

.....

(6) If a municipality fails to designate strips of land as coastal access land in terms of subsection (1), the MEC, and failing the MEC, the Minister, may designate such access land by notice in the Gazette.

(7) The MEC may not take any measures under subsection (6) without first consulting the municipality and giving it a reasonable opportunity to make representations.

(8) The Minister may not take any measures under subsection (6) without first consulting the municipality and the relevant MEC and giving them a reasonable opportunity to make representations.

(9) Each municipality approving the rezoning, subdivision or development of a land unit within or abutting on coastal public property must ensure that adequate provision is made in the conditions of approval to secure public access to that coastal public property.

91. **It does not appear that any section 18 designation processes incorporating any Goukou riverine properties have been undertaken by the municipality, or the MEC or the Minister.**

¹¹ *Van Breda v Jacobs* 1921 AD 330 at 334; *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at [54] in which the Constitutional Court stated that by virtue of the Constitution the customary use must have been reasonable.

92. Section 19, titled “*process for designating and withdrawing designation of coastal access land*” provides as follows (emphasis added):

Before designating land as coastal access land or withdrawing any such designation, a municipality must—

(a) assess the potential environmental impacts of doing so;

(b) consult with interested and affected parties in accordance with Part 5 of Chapter 6; and

(c) give notice of the intended designation or withdrawal of the designation to the owner of the land.

93. **Equally, there has been no consultation with any members of GRIPOA in connection with the designation of coastal access routes by the municipality, or any other authority.**

94. Section 20 provides for the responsibilities of municipalities in relation to such land. The obligations are onerous and include: signposting the land, controlling its use; maintaining it; the provision of facilities; and its protection against environmental degradation. This means that if land is designated coastal access land the municipality acquires the obligation to manage and control the access servitudes for public use.

(ii) Coastal set-back lines

95. Section 25, titled “*establishment of coastal set-back lines*” provides as follows:

(1) An MEC must in regulations published in the Gazette—

(a) establish or change coastal set-back lines—

(i) to protect coastal public property, private property and public safety;

(ii) to protect the coastal protection zone;

(iii) to preserve the aesthetic values of the coastal zone; or

(iv) for any other reason consistent with the objectives of this Act; and

(b) prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of that coastal set-back line.

(2) Before making or amending the regulations referred to in subsection (1), the MEC must—

(a) consult with any local municipality within whose area of jurisdiction the coastal set-back line is, or will be, situated: and

(b) give interested and affected parties an opportunity to make representations in accordance with Part 5 of Chapter 6.

(3) A local municipality within whose area of jurisdiction a coastal set-back line has been established must delineate the coastal set-back line on a map or maps that form part of its zoning scheme in order to enable the public to determine the position of the set-back line in relation to existing cadastral boundaries.

(4) A coastal set-back line may be situated wholly or partially outside the coastal zone.

96. **To date, the MEC has not officially gazetted any regulations relating coastal set-back lines along the Goukou River, nor has the municipality delineated the set-back line on a map.**

(iii) Estuarine management plan; coastal management programmes

97. Chapter 4 of ICMA is titled “*estuaries*” and makes provision in section 33 for a national estuarine management protocol (discussed above) and section 34 for an estuarine management plan (quoted above).
98. As stated, section 33(3) provides for the content of the national estuarine management protocol and, in this regard, s33(3)(d) provides that such protocol must “*establish minimum requirements for estuarine management plans*”, whilst s33(3)(e) provides that such protocol should “*identify who must prepare estuarine management plans and the process to be followed in doing so*”.
99. Section 34 provides that the responsible body contemplated in section 33(3)(e) that develops an EMP must comply with the public participation process envisaged in terms of Part 5 of Chapter 6.
100. This means meaningful public participation which engages the public in decision-making and considers public input in making that decision – and not merely “going through the motions” as occurred between CapeNature and GRIPOA.
101. It must also ensure that the EMP is consistent with the national estuarine management protocol, the national coastal management programme and with the applicable provincial coastal management programme. An EMP may form part of a provincial coastal management programme or a municipal coastal management programme .
102. Chapter 6 of the ICMA deals with the obligation to prepare national, provincial and municipal coastal management programmes for the integrated management of the

“*coastal zone*” as defined (and which includes “*coastal access land*”).

103. This means that coastal management programmes should incorporate plans for coastal access, including coastal access land.
104. Notably, there is a difference between an “estuarine management plan” which is dealt with in Chapter 4, and national, provincial and municipal coastal management programmes for the integrated management of the coastal zone which are dealt with in Chapter 6. There is no provision in ICMA for an EMP to make provision for the integrated management of coastal access land.
105. Of final relevance is Part 5 of Chapter 6, titled “*public participation*” with which the publication of both an EMP and the coastal management programmes must comply. It (section 53) provides as follows:

(1) Before exercising a power, which this Act requires to be exercised in accordance with this section, the Minister, MEC, municipality or other person exercising that power must—

(a) consult with all Ministers, MECs or municipalities whose areas of responsibilities will be affected by the exercise of the powers in accordance with the principles of co-operative governance as set out in Chapter 3 of the Constitution;

(b) publish or broadcast his or her intention to do so in a manner that is reasonably likely to bring it to the attention of the public; and

(c) by notice in the Gazette—

(i) invite members of the public to submit, within no less than 30 days of such notice, written representations or objections to the proposed exercise of power; and

(ii) contain sufficient information to enable members of the public to submit representations or objections.

ANALYSIS OF PARAGRAPH 5

106. Before offering an account of each issue, it is useful to consider the purpose and wording of the paragraphs.
107. The Goukou EMP identifies key issues and their related potential impacts on the Goukou River Estuary. The issue related to paragraph 5 (as set out on pages iii and 12 of the Goukou EMP) is:

Riparian Infrastructure (e.g. fences and low-lying developments): *Saltmarshes and natural riparian vegetation in the Goukou system have been, and continue to be, degraded by low-lying developments and infrastructure. This encroaches on natural buffers and unique estuarine habitats along the estuary and reduces the mitigation effect that natural vegetation*

provides against wave action (caused by tidal action and water-skiing) and floods. (“riparian infrastructure issue”)

108. Paragraphs 5 and 6 are two of the “*proposed management actions for further consideration*” in response to the riparian infrastructure issue, as set out above.
109. This riparian infrastructure issue should be understood and read in light of the environmental impacts raised in Table 1 on pages 14 -15, which cites key activities linked to potential environmental problems, including: “*riparian infrastructure (fences and low-lying developments); in-stream infrastructure (jetties and boat launching sites); bait collection, agriculture: livestock grazing of riparian zone, power-boating and water-skiing and kite and wind surfing*”, amongst others.
110. Accordingly, paragraphs 5 and 6 purport to be the proposed management actions or solutions to deal with this riparian infrastructure issue.
111. However, paragraphs 5 and 6 actually proposes three distinct actions or solutions to the riparian infrastructure issue:
- 111.1 (a) Fences (which are less than 5m amsl) across the floodplains must be removed; and
- 111.2 (b) Public access needs to be ensured.
- 111.3 (c) No new “*low-lying developments*” should be established; and, “*[d]evelopments in this area should be restricted to essential infrastructure (e.g. bridges)*”
112. It must be highlighted that on a purely semantic reading of paragraph 5, the suggested action points are in conflict:
- 112.1 On the one hand, fences need to be moved in order to minimise the potential damage caused by the low-lying structures and/or livestock, but
- 112.2 In stark contradiction, human access needs to be ensured – despite the expressly cited environmental impacts of human activities such as: bait collection, power-boating, water-skiing, kite surfing and wind surfing.
113. In the premises and *prima facie*, paragraph 5 – on a purely semantic level – is logically inconsistent.

114. It also needs to be emphasised that not one of the other proposed draft estuarine management plans contain any such clause or management plan that is identical to paragraph 5. [check]
115. Regarding paragraph 6, the main issues are: (i) uncertainty in what constitutes a “*low-lying area*”, and (ii) how are the proposed restrictions in this area intended to be achieved?

MAIN ISSUES RAISED IN OBJECTION

116. In this section, each issue pertaining to paragraphs 5 and 6 will be discussed

First Issue

117. The first issue relates to the regulation of the baseflow into the estuary.
118. Whilst GRIPOA agrees with the aspirational sentiments expressed in Paragraph 2, the statement contained herein is meaningless in relation to:
- 118.1 a scientific determination of the optimal baseflow into the estuary; and
- 118.2 a detailed review of upriver registered water rights and uses.
119. Baseflow determinations cannot be made without respecting upriver registered water rights and uses.
120. The clause should therefore be deleted until both such investigations have been carried out and reconciled.

Second Issue

121. The second issue refers to the designated riverine buffer of 5m amsl, which GRIPOA submits is meaningless, not conducive to certainty, and would be impossible to police.
122. To the extent that the 5m amsl management action is seeking to give rise to a coastal access servitude within the 5m amsl contour, a key question that needs to be answered is: “*What is meant by the 5m amsl contour?*”
123. The ICMA contains definitions of both the high and low-water marks but there is no definition of “*mean sea level*”.

124. Wikipedia ¹² defines this concept as follows (footnotes omitted):

Mean sea level (MSL) (often shortened to sea level) is an average surface level of one or more among Earth's coastal bodies of water from which heights such as elevation may be measured. ... A common and relatively straightforward mean sea-level standard is instead the midpoint between a mean low and mean high tide at a particular location. ...

Precise determination of a "mean sea level" is difficult because of the many factors that affect sea level. Instantaneous sea level varies quite a lot on several scales of time and space. This is because the sea is in constant motion, affected by the tides, wind, atmospheric pressure, local gravitational differences, temperature, salinity and so forth.

125. GRIPOA consulted with an expert, Richard Abrahamse, a land surveyor with extensive experience, and a partner of the firm David Hellig + Abrahamse and requested him to assist with the plotting of the 5m amsl contour line that appears to be envisaged by the paragraph 5 management action.
126. Abrahamse began by plotting the proclamation points of the Goukou MPA on Google Earth. He did so in relation to both the seaward and landward boundaries of the MPA. The seaward boundary is depicted as starting at the Still Bay harbour (which has an elevation of 0m amsl) and ending at the terminal point of the MPA about 15km up the Goukou River.¹³ Abrahamse ascertained that this terminal point has an elevation of approximately 70m amsl – this means that the highest point of the Goukou MPA is 70 m above the sea level at the harbour.
127. He concluded that the 5m amsl contour is actually a line roughly parallel to the coastline at a height of 5m above mean sea level. There is only one 5m amsl contour on the estuary and that is a line roughly parallel to the seashore and close to the mouth of the estuary, running across the estuary, perpendicular to its banks.
128. The elevations below this point and closer to the sea are less than 5m amsl, and those above it leading to the terminal point of the estuary are higher than 5m amsl, eventually reaching an elevation of approximately 70m.
129. Abrahamse was of the opinion that:
- 129.1 What might be meant was a distance 5m from the eastern or western river bank, or a given distance from the middle of the river, which was a concept better understood in land surveying practice and more reliable given the propensity for river banks to ambulate, through processes of erosion or

¹² https://en.wikipedia.org/wiki/Sea_level accessed on 24 February 2022.

¹³ The plotted aerial image can be made available to interested readers.

accretion. These curvilinear lines obviously need to be surveyed and plotted.

129.2 Another possibility would be to survey the ascending elevation of both the high- and low water marks all along the river until the terminal point of the estuary is reached, and then the survey of a contour five meters above the median of such changing elevations on each of the banks of the river – but that this would be practically impossible to plot given the numerous readings needed all along the river course to determine the high- and low-water marks.¹⁴

129.3 However, he thought that from a land surveying point of view, the easiest way to describe a servitude along the river would be by reference to the waterward cadastral boundary which is usually described in the relevant survey diagram by reference to the middle of a river or its eastern or western bank.

130. Further research into this issue indicates that the concept of the 5m contour appears to derive from the South African National Biodiversity Institute (“SANBI”)’s *National Biodiversity Assessment 2018 Synthesis Report* which, when describing the Estuarine Functional Zone states (“EFZ”) as follows (emphasis added):¹⁵

In South Africa, estuaries are primarily spatially defined by the +5 m topographical contour that includes all the estuarine open water area, habitat and adjacent floodplain area. It, therefore, encompasses not only the estuarine water body, but also all areas that support physical and biological processes that characterise an estuarine system (e.g. tidal action, mixing zones, backflooding areas and long-term sedimentary processes). It encapsulates all estuarine associated habitats (e.g. saltmarsh, mangroves, swamp forest, reeds and sedges, mud/sand banks) as well as ‘estuarine shores’ to the back of the surfzone.

131. It is notable that this contour is not equivalent to the 5m amsl contour line, but appears to be that which is described by Abrahamse in paragraph 129.2 above – namely a topographical contour line 5m higher than the mean tidal water level adjacent to the contour line.

132. Even then:

132.1 This is only a rule of thumb and cannot obviate the need for a detailed consideration of the functional zone processes present at that point; and

¹⁴ The Act defines the high-water mark as “the highest line reached by coastal waters, but excluding any line reached as a result of— (a) exceptional or abnormal floods or storms that occur no more than once in ten years; or (b) an estuary being closed to the sea”; and the low-water mark as “the lowest line to which coastal waters recede during spring tides”.

¹⁵ pp114-115.

- 132.2 Such contour line requires detailed survey.
133. No attempt has been made in the Goukou EMP to describe what is meant by the 5m amsl contour, or how it is to be determined. If what is meant is 5m above the elevation of the mean water level at any given point, then the more gradually land slopes down to the river, the further such contour will intrude into the riverine property itself. By contrast, the steeper the river embankment the narrower the strip of land culminating in the 5m contour.
134. It would seem to be entirely arbitrary to use the “one size fits all” 5m amsl contour (whatever it might mean) without regard for the particular topography of each riverine property, having regard to
- 134.1 Coastal processes;
- 134.2 Estuarine influence;
- 134.3 Encroaching structures, such as buildings and fences; and
- 134.4 The apparent needs of coastal access by humans.
135. GRIPOA submits that a continuous servitude along each bank of the river (if this is what is envisaged) does not constitute a “*strip of land*” as envisaged in terms of section 18(1) of ICMA because this expression seems to envisage as little encroachment as possible upon private land.

Third issue

136. The third issue pertains to the fact that the preclusion of fences below the 5m amsl mark, is unreasonable in that it fails to have regard to the basic imperative of keeping livestock enclosed and safe, the possibility of alternatives, and the costs thereof.
137. It would be unreasonable to impose a bar on agricultural fencing within a set distance from the river’s edge without considering the:
- 137.1 Exact environmental impact;
- 137.2 Agricultural reasons for fencing and how alternative steps for enclosure might be achieved (electric impulse wires strung between stakes); and
- 137.3 At whose cost.

138. Furthermore, GRIPOA submits that in any event, it is doubtful whether agricultural fencing would constitute a “*structure*” as envisaged in terms of section 25 “*establishment of coastal management lines*” of the ICMA.

Fourth issue

139. The fourth issue is that the legislative purpose of an estuarine management plan is not to create public access servitudes or coastal set-back lines.
140. Whilst an estuarine management plan should, according to the national estuarine protocol, contain a list of management objectives and activities that address “*social issues*” as well as “*land-use and infrastructure planning and development*”, it is not the legislative function of an estuarine management plan to create or provide for the management of public access servitudes. That legislative responsibility falls to the ICMA.
141. It is also not its function to create coastal set-back lines, which is what it would effectively be doing if it prevented fencing or building infrastructure within the 5m amsl contour (which as set out above is a confused designation, and as vague as “low-lying area” in consequence).
142. Accordingly, to the extent that the 5m amsl management action seeks to create coastal access or a coastal set-back line, it would be *ultra vires* its empowering legislation and subject to being set aside on review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”).¹⁶
143. It is apparent also from section 34(1)(c) of the ICMA that it is the responsibility of the “*responsible body*” (in the present case, CapeNature) to “*ensure the relevant legislation is enacted to implement an estuarine management plan*”.
144. In the case of a coastal access servitude, such can only be created by municipal by-law designating “*strips of land as coastal access land*” in terms of section 18(1), or, if the municipality fails to so designate land, the MEC or Minister may do so in terms of subsection 18(6) after due consultation with the municipality.

¹⁶ In terms of s6(2)(a)(i) in that the administrator who took the decision was not authorised to do so by the empowering provision; or s6(2)(c)(i) in that the action was taken for a reason not authorised by the empowering provision; or s6(2)(f) in that the action itself was not authorised by the empowering provision.

145. In all events, this cannot happen without consultation with interested and affected parties in accordance with Part 5 of Chapter 6 and after giving notice of the intended designation “to the owner of the land” (subsections 19(b) and (c)).
146. In the case of coastal set-back lines, the MEC is required in terms of section 25(2)(b) to give interested and affected parties the opportunity to make representations in accordance with Part 5 of Chapter 6.
147. Furthermore, it is instructive to note that the three phases that gave rise to the final draft of the Goukou EMP did not identify a lack of access to the perimeter of the estuary by members of the public or fishermen, as an issue that needed to be dealt with in the Goukou EMP.
148. Creating public access when it has not been expressly raised as a social need would, thus, also appear to be an arbitrary legislative intervention.

Fifth issue

149. The fifth issue is that the proposed servitude is arbitrary in that it fails to distinguish between different topographic areas occurring on the various properties (i.e. a one-size-fits-all approach is adopted) and there has not been any on-site verification processes to justify that this cookie-cutter approach is appropriate in the circumstances
150. The vision of the Goukou EMP is clearly expressed on page v:
- The Goukou River estuary is conserved and improved through evidence based information as a geographical and spiritual space that sustains and nurtures biodiversity and human well-being. [emphasis added]*
151. GRIPOA takes issue with the fact that despite the Goukou EMP paying lip-service to its purported reliance on “*evidence-based information*”, no attempt has been made to undertake any on-site verification studies to determine:
- 151.1 That this proposed 5m amsl servitude is indeed physically feasible;
- 151.2 Its environmental impact given the imperatives of the MPA; and
- 151.3 The implications for the riparian landowners would be – especially where land adjoining the river is flat in gradient.

Sixth issue

152. The sixth issue is that the proposed servitude appears to provide unrestricted access to privately-owned coastal properties, and accordingly, is invasive of privacy, infringing on owners' property rights, and also threatens the security of such properties (including the safety of the livestock).
153. GRIPOA submits that an attempt to create a public servitude by means of the Goukou EMP would constitute "administrative action" as envisaged in terms of PAJA¹⁷ which would be capable of being set aside on review in terms of PAJA, for reasons set out in this objection.
154. Should the Goukou EMP maintain this designation of a 5m amsl servitude, GRIPOA submits that it would give rise to legal controversy as to whether such measures constitute legitimate regulation, or expropriation without compensation in violation of section 25 of the Constitution.¹⁸
155. Sections 25(1) and (2) ("*property*") of the Constitution provides as follows:
- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of law of general application—*
- (a) for a public purpose or in the public interest; and*
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
156. GRIPOA submits that an indiscriminate creation of a public servitude, of indeterminate width, across all Goukou riverine properties appears to be arbitrary and also disproportionate to the purpose of section 13 of the ICMA.

Seventh Issue

157. The seventh issue is that it is irrational to create or to encourage public access to a marine protected area, especially where a large portion of the area has been classified as a restricted zone.

¹⁷ See section 1 of PAJA, which defines administrative action to mean *inter alia* any decision taken by an organ of state, exercising a public power, or performing a public function, which adversely affects the rights of any person, and which has a direct, external legal effect.

¹⁸ See the discussion on this topic in *Environmental Law in South Africa (supra)* at par 11.8.4 pp 11-43 to 11-47.

158. As mentioned above, in the lead up to the Goukou EMP, the need for public access was never once raised as an issue.
159. Furthermore, GRIPOA would like to know why the public needs access to the Restricted Zone of the MPA (from the 2.3km upstream, for a further 13 km to its terminal point) where fishing and bait collection are prohibited.
160. In this regard, it is to be recalled that section 13(2)(a) provides that section 13 (“*access to coastal public property*”) should not prevent prohibitions applicable to, or restrictions on access to, or the use of any part of, coastal public property which “*is, or forms part of, a protected area*”. This provision specifically envisages the need to protect an MPA from coastal access.
161. The Goukou EMP also expressly lists human-related activities (such as: bait collection, power-boating, water-skiing, kite surfing and wind surfing), which all negatively impact the estuary.
162. In the premises, GRIPOA submits that it is irrational – in light of the Goukou EMP which includes a significant MPA with a Restricted Zone – to propose indiscriminate and unmanaged public access along the estuary. In this regard, both the ICMA and the 2016 Western Cape Coastal Management Programme bear out the necessity of managing coastal access.
163. An MPA is an area in which human activity is to be discouraged, and, in the case of fishing, spear-fishing and bait gathering prohibited. Coastal access routes in these areas are bound to facilitate easy routes of access and egress for poachers, particularly because of their remote locations. Further, as noted, the paragraph 5 intervention makes no provision for any form of management.

Eighth issue

164. The eighth issue is that the action plans prescribed in paragraph 5 appear to be disproportionate to the ends sought to be achieved by the Goukou EMP.
165. The purpose of the Goukou EMP is stated in its vision (set out above), and which can be summarised as follows:
- 165.1 The Goukou River estuary must be conserved and improved;
- 165.2 Using evidence-based information; and

- 165.3 That biodiversity and human well-being is sustained and nurtured.
166. The issue that GRIPOA takes with paragraph 5 is that if it were to be implemented, it would not achieve the ends sought to be achieved as expressed in its vision, in fact – there would be negative and contrary impacts:
- 166.1 Encouraging indiscriminate public access in a MPA, would encourage human activities which would negatively impact the estuary;
- 166.2 No evidence-based information in the form of independent topographical studies have been undertaken, so setting a 5m amsl boundary is an arbitrary intervention;
- 166.3 The benefits of “*human wellbeing*” purportedly being enhanced by the public access to the estuary must be measured against the costs associated with (1) the increased human environmental impact on the estuary, (2) increased costs of resources to police and manage the public access, and (3) the negative impact to the riparian landowners’ wellbeing and their property rights to be safe and have their livestock secure; and
- 166.4 The biodiversity will be negatively impacted by indiscriminate public access and will increase the need for more vigilant policing, thus unnecessarily increasing the resources required to maintain the integrity and environment of this estuary.
167. Furthermore, creating a “blanket action plan” (as paragraph 5 purports to do) will not solve the riparian infrastructure issue (which is the target issue), if anything, this plan will disproportionately create more issues.

ANALYSIS OF PARAGRAPH 6

168. Paragraph 6 provides as follows:

No new low-lying developments should be established without the appropriate authorisation (e.g. environmental authorisation through the EIA process). Developments in this area should be restricted to essential infrastructure (e.g. bridges).

169. The motivation for this proposed management intervention is the same as paragraph 5 (as set out on pages iii and 12 of the Goukou EMP) and has been quoted above.

ANALYSIS

170. In essence, this paragraph seeks to govern two issues:

170.1 That “*new low-lying developments*” should require environmental approval;
and

170.2 Such new low-lying developments should be confined to essential infrastructure.

Ninth issue

171. The ninth issue is a lack of clarity as to what this provision in paragraph 6 (read with paragraph 7) means and how it is to be implemented.

172. Four issues arise in this connection:

172.1 The phrase “low-lying” is relative and undefined. It is accordingly nebulous in the sense that law-abiding citizens are unable to determine the prohibition or govern their behaviour by it;

172.2 It takes no account of infrastructure that may be indicated by farming best practice;

172.3 In the context of paragraph 14 of Table 3, which proposes restricting the use of agribeals in a setback zone, such set-back needs to be scientifically ascertained. Further, account needs to be taken of agricultural best practice in the area. This too, can only be ascertained by means of detailed investigation;

172.4 The requirement of environmental approval presupposes a statutory restriction which is unclear.

173. The only means of bringing certainty to this issue is by reference to set-back lines, which may either be:

173.1 Development set-back lines established in terms of the various listing notices in terms of the 2014 EIA Regulations (as amended in 2017); or

173.2 in terms of coastal set-back lines established by the MEC by regulation published in terms of section 25 of ICMA (to date no such regulations have been published).

174. It is not the legislative function of an estuarine management plan to establish coastal set back zones. That is the function of the MEC in terms of section 25 of the ICMA.
175. In addition thereto, section 25(2)(b) of the ICMA requires that interested and affected parties be given the opportunity to make representations in accordance with Part 5 of Chapter 6 in relation to proposed set-back lines.
176. Legal certainty is then achieved by means of section 25(3) which provides that local municipality within whose area of jurisdiction a coastal set-back line has been established *“must delineate the coastal set-back line on a map or maps that form part of its zoning scheme in order to enable the public to determine the position of the set-back line in relation to existing cadastral boundaries”*.

Tenth issue:

177. The tenth issue in relation to paragraph 6 is the necessity for an evidence based set-back determination.
178. Any regulation determining a coastal set-back must be rationally connected to the purpose of the set-back and could be judicially reviewed for want of such connection.
179. The obligation to seek public representation, provided that such is meaningful, should go some way to ensuring rationality, and, in particular that the set-back is not proclaimed in the manner of “one size fits all”.
180. Such set-back cannot, however, be lawfully imposed under the auspices of an estuarine management plan.

COMPARATIVE ANALYSIS OF OTHER DRAFT EMPS

181. GRIPOA has considered the other draft EMPS published for public comment at the same time,¹⁹ and the now promulgated Breede River EMP.
182. GRIPOA submits that not one other draft EMP has the exact or even similarly worded section to the Goukou EMP’s paragraph 5. This makes paragraph 5 an anomaly and certainly not standard practice.
183. Some of the draft EMPS did reference the issue of fencing, buffer zones or the need

¹⁹ <https://www.westerncape.gov.za/eadp/about-us/meet-chief-directorates/environmental-sustainability/biodiversity-and-coastal-management> accessed on 23 February 2022.

to address public access, but none appeared to indiscriminately create arbitrary and disproportionate public servitudes where all fences had to be removed.

184. When regard is had to the other EMPS which were studied by GRIPOA, it is clear that the real intention is to regulate and protect sensitive areas in close proximity to the estuary. Most of these other plans (including the final Breede River plan) allow for further studies to formulate buffer zones, which studies will have to take into consideration specific sensitive areas and the impact on existing activities (such as agriculture).
185. The other EMPs appear to suggest that the only manner to legally formulate these buffer zones would be to deal with all the properties along the estuary individually and consider the impact of the activities on that specific property and/or on a particular area. The other EMPs appear to also acknowledge the importance of ensuring that all recommendations and suggested management plans ought to be based and motivated on scientific evidence, as per paragraph 4.4 of the Protocol.
186. Unfortunately, the Goukou EMP presents a poorly drafted, non-compliant management plan, without having any regard to the public participation process which took place over a period of 11 years. Neither does it consider the individual activities that exist on the riparian land. Rather the Goukou EMP adopts a blanket approach in applying its own definition of a buffer zone, with the consequence that GRIPOA's members' private property rights and the use thereof are unlawfully impacted by the Goukou EMP.
187. Furthermore, it is evident that the plan was drafted with little or no scientific evidence to underwrite the management plan, despite the Goukou EMP's vision clearly paying lip-service to the need for "*evidence-based information*".
188. In order to substantiate these comments above, GRIPOA now offers a brief comparative analysis of the Goukou EMP to other plans, through the lens of specific topics.
189. The **Breede River EMP** has already been promulgated. The Breede River EMP is an excellent example of where a different (and more rational and reasonable) approach has been taken:
 - 189.1 In paragraph 5.1 on page 44 (the second bullet point), it records that detrimental activities in the estuarine area are to be identified and then dealt

with. Again, an individualised target-based approach is adopted.

189.2 Pages 23 to 25 are instructive as they highlight how the role-players agreed that the first zonation plan presented was deemed too complex and an attempt was made to simplify zonation.

189.3 The second last paragraph on page 23 provides as follows:

[e]conomies around estuaries change, and as new activities come into existence the zonation should be adjusted to manage and potential conflicts new and different interests now and in the future. On the spatial level of the zonation plan it is desired to have all interests represented appropriately, identified sensitive areas be protected, and that there is clarity on where certain activities are permitted.

189.4 The second paragraph under 6.3.1 on page 24 states that “*an inherent problem with defining conservation/protected zones in the Breede River estuary is the spatial configuration of developments (both infrastructural and agricultural) and the levels of water-based recreation that already exist on this estuary.*” The plan acknowledges that the nature of such estuaries makes identification of priority areas for conservation more difficult: “*the challenge will therefore, with the assistance of estuary experts, be to identify the high priority sites and adequate representation thereof. Only then can different levels of compliance management be afforded to these areas in terms of how much disturbance, if any, is permissible.*” (emphasis added)

189.5 Paragraph 6.3.2 on page 26 (last bullet point) also recognises the need to “*take into consideration the possible implications of the 5m contour line and the determined flood lines, in terms of existing and proposed developments and activities*”. Again, an individualised target-based approach is adopted, and not a blanket, one shoe fits all approach.

189.6 It is clear that the Breede River EMP has a far more “hands-on” process, involving participation of each party impacted rather than taking a blanket approach to a buffer zone line.

189.7 It is clear that this approach is vastly different to the one adopted in the **Goukou EMP**. With the Goukou EMP, the initial Management Plan (which existed before public participation) has been used; and has ignored all public feedback by taking a blanket approach and drawing a line where the buffer zone is applied, notwithstanding (or in ignorance of) the activities of riverine owners.

Topic 1: Buffer Zones and Provisions Relating to Agricultural Practices

190. When considering the various EMPs relating to buffer zones, the approaches differ:

190.1 Notably, **Goukou EMP**, contains no definition of a buffer zone. The only reference to something akin to this concept seems to be on pages 18 and 19 in paragraphs 1,5,7 and 14 which refers to “*land use setbacks*”, “*5 m amsl line*” and “*riparian buffer zones*”. The reader is left confused. These paragraphs furthermore instruct that fences be removed in this area, agri-chemicals be prohibited and that these issues will be dealt with the establishment of “*land use setbacks*”. However, it is clear from the “5m amsl provision” under paragraph 5, that a “*land use setback*” – in principle – has already been decided upon and is intended to be binding on riparian owners.

190.2 The **Klein Brak EMP**, deals in detail with the different zones under the chapter “*SPATIAL ZONATION*” (page 20). On pages 20 – 31 paragraph 5.1 under the heading of “*Estuarine Boundaries*”, the “*5m contour line*” is referenced. The Klein Brak EMP records the following:

[a]ccording to the protocol, the geographical boundary for the estuary is that which encompasses the estuarine functional zone, delineated by the 5m contour line prescribed by the RSA national biodiversity institute (SANBI). This extends from the estuary mouth, as the downstream boundary, to the point at which the 5m contour crosses the river course, as the upstream boundary, and laterally to the 5m contour along each bank.

190.3 Furthermore the Klein Brak EMP deals with the definition of a coastal protection zone in Paragraph 5.4.1 on page 25 “*Coastal Protection Zone (CPZ)*” as being land per definition within 100m from the high watermark at any place in a tidal river. It must be noted that the aim of this Coastal Protection Zone includes “*to avoid increasing the effect or severity of natural hazards*”; “*to maintain the natural functioning of the littoral active zone*” and “*to maintain productivity of the coastal zone*” (emphasis added).

190.4 It appears that Klein Brak EMP has no intention to abolish any farming activities on the riparian land.

190.5 Furthermore, on page 27 paragraph 5.4.3.2 of the Klein Brak EMP deals with the “*100m from High-Water Mark*” in the Development Buffer Zone. It provides for the following:

[e]xisting farming activities should be reviewed in order to prioritise any areas where

current activities are detrimental to the estuarine environment (including the terrestrial environment) and these should be remedied, curtailed or modified to reduce the impact.

- 190.6 Then on page 42 under the heading “*Land Use and Infrastructure*”, the Klein Brak EMP provides that part of its action plan includes the need to “*engage with farming association to negotiate agricultural activities within buffers ...*”
- 190.7 At the very least, this guideline action entails that there must be individual reviews of the actual farming activities on each farm i.e. the process envisaged appears to be an individual farm-by-farm specific assessment with the goal on one hand being, on one hand the protection of particular, and prioritised, processes in the EFZ, and on the other the preservation as far as possible of agricultural activities.
- 190.8 In the **Gouritz EMP** in paragraph 5.3 “*Land Use & Infrastructure*” on page 23, there is a proposed “riparian buffer zone” with ban of all agriculture within 100m of the high water mark.
- 190.9 Then in the second paragraph on page 28, it is suggested 5 m amsl line is not practical due to extended flood plains and, notably, are “*seen as excessive in terms of a no-go area*”, which is then further discussed in paragraph 6.2.4 on page 40.
- 190.10 The **Breede River EMP**, in paragraph 6.3.2 on page 26, deals with the development of buffer zones. It records under the sixth bullet point that in the development of buffer zones “*it must take into consideration the possible implications of the 5m contour line and the determined flood lines, in terms of existing and proposed developments and activities.*”
- 190.11 Then, under paragraph 6.3.2.2 on page 26, where the Breede River EMP references the 32m buffer zone, it states that a priority is to only “*discourage*” activities like ploughing within 32 m of river (emphasis added). This is a very different approach to the prescriptive provisions of the Goukou EMP.
- 190.12 The **Duivenhoks EMP** (page 25) recognises the need for “*fence removal*” but also recognises the need for “*guidelines*” and “*ongoing relationship with the farmers*” to be developed; and regarding public access it acknowledges that a legal opinion is required in “*respect to the provision of access taking cognizance of private land*” and that the provision of access must first be

negotiated (page 33).

190.13 The **Keurbooms EMP** and Kleinbrak EMP both refer to the issue of fencing in passing, but there is no broad action providing that all fences need to be removed from a certain area.

190.14 **Heuningnes River Estuary Draft EMP**: at page 31 under paragraph 5.3(f) it was recorded that meetings were held with farmer's associations, minuted and riparian setback agreed. It is respectfully stated that this is an eminently sensible approach to the issue, and demonstrates the importance of consultation of farmers in order to procure their support of the plan and its proposed interventions.

191. What this brief comparative analysis demonstrates – is that at the very least – these alternative approaches indicate that a study ought be undertaken to determine the impact of applying the 5 m amsl line on different properties in respect of the **Goukou EMP**.

Topic 2: Public access to private land

192. When considering paragraph 2(c) on page 4 and paragraph 3.2.3 on page 5 of the Protocol 2021, it is evident that an essential purpose of an EMP is to provide guidelines and establish procedures on the management of estuaries, where the procedure has been developed through the engagement of the private sector and civil society (amongst other things).

193. When comparing the approaches of various EMPs relating to public access to private land, the approaches differ:

193.1 In the **Goukou EMP**, paragraph 5 on page 18 prescribes that public access must be ensured in compliance to ICMA.

193.2 Despite extensive efforts on the part of GRIPOA and others to obtain clarity as to the meaning and extent of this provision, and to demonstrate its dangers, no changes have been made to this provision, despite an agreed reformulation thereof.

193.3 In the **Klein Brak EMP**, in paragraph 4.3.2 page 19, of the management objectives (page number not visible), it is recorded that: *"[i]mplement[ion] of an estuary zonation plan that directs infrastructural development and other*

land use practices (e.g. agriculture) within the various floodlines, coastal management lines, buffer zones and overlay zones”

- 193.4 There is no further mention that public access to these sensitive areas needs to be ensured.
- 193.5 In the **Gouritz EMP** there is no mention of public access that must be legalised to the estuarine area.
- 193.6 On the contrary, pages 53 – 56 dealing with “Actions” for “*Land use and infrastructure*” seems to have at its heart the formulation of plans in conjunction with role players to minimise human activity and not to increase it.
- 193.7 In the **Breede River EMP**, the only reference to access is found in paragraph 5.3 on page 16 (third bullet point): “*facilitate equitable access for both pedestrian and vehicular access. This entails ensuring boat launch sites are licensed and access is not restricted.*”
- 193.8 The reference above has a limited application and is clearly not a provision that will allow people access to private land.
- 193.9 Pages 47 and 48 of the **Breede River EMP** records the action plans towards “*Land Use and Infrastructure*” and makes no mention of public access.
- 193.10 The **Goukamma EMP** (page 54) recognises the need to create specific access points which are subject to adequate control:
- Establishment of a specific access points along the estuary that allows people access to the estuary in a managed manner. The TPC (threshold of potential concern) would be if uncontrolled access across and into the estuary were allowed.* ^[L]_[SEP]
- 193.11 The **Klein River EMP** takes a similar realistic, and lawful, approach to public access in that it envisions only providing the “*public access to the estuary at suitable locations*” (page 95) and also recognises that private ownership limits public access: “*A major constraint is the large amount of adjacent land in private ownership. This results in limited public access*” (page 9).
- 193.12 **Uikraals EMP** speaks about the “*equitable access provided for various user groups*” (page 14), “*facilitation of access*” (page ii) and in improving access: “*designated recreational zones assigned*” and “*public amenities and controlled access provided and maintained*” (page 43).

193.13 **The Blinde River EMP** at page 14 onwards (“Management Objective and Actions”) at paragraph 5.5(b) suggest that controlled access and access points be provided by adjacent properties to what is clearly a reference to existing boardwalks.

193.14 **Wadrift Estuary Draft EMP** at page 5 under Table 3 (“Priority Management Objectives and Associated Activities”), makes it clear that no access or user of the vlei is allowed as it is located on private property.

194. This comparative analysis demonstrates that there are alternative approaches to these issues that are more rational, proportionate, and realistic – given all the competing interests at stake.

CONCLUSION

195. GRIPOA respectfully submits that for all the reasons set out above, paragraphs 2, 5, 6 and 7 should be removed in their entirety from the Goukou EMP, alternatively redrafted to ensure that their meanings are clear and their provisions *intra vires* the provisions of ICMA governing EMP’s.

196. Should there be an opportunity for oral representations, GRIPOA requests to be given the opportunity to make such submissions in further support of their objections.

Stilbaai

3 March 2022