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Dear Donovan

RE: Port of Ngqura Strategy Environmental Assessment – Draft Scoping Report (February 2024)) Comments

1. As previously advised in our response to the Port of Ngqura: Strategic Environmental Assessment Questionnaire response dated 8 December 2023 (**Questionnaire Response**), the Biodiversity Law Centre (**BLC**) uses the law to protect and restore indigenous species and ecosystems in Southern Africa and is particularly concerned about the impact of port activities on endangered sea birds, including specifically the Africa Penguin.
2. At the outset, the BLC wishes to emphasise that it supports all efforts by organs of state, including the Transnet National Ports Authority (**TNPA**) to integrate environmental considerations into its short, medium and long-term decision-making. This submission regarding the draft *Port of Ngqura Strategic Environmental Assessment: Scoping Report (Scoping Report)* is thus made with regard to the requirements flowing from South Africa's environmental management framework, including the rights and obligations enshrined in section 24 of the Constitution, the environment principles established in section 2 of the National Environmental

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Management Act, 107 of 1998 (**NEMA**) and objects and norms of integrated environmental management contained in Chapter 5 of NEMA.

3. Given the nature of the Scoping Report, we have provided our comments at the level of generality only with due regard to the rationality, procedural fairness and lawfulness of the Strategic Environmental Assessment process (**SEA**). We reserve our right to raise additional legislation, existing approvals / permits, policies, strategies, plans, programmes, guidelines or other documents for consideration as the interested and affected parties (**IAPs**) are afforded an opportunity to comment on the relevant reports.

4. **General comments and approach taken in this submission**

4.1. It is not possible to meaningfully comment on the Scoping Report at this stage, as it, in essence, appears to summarise the issues and concerns raised by interested and affected parties (**IAPs**) who submitted questionnaires issued at the commencement of the SEA. While we welcome the inclusion of these comments – including those highlighting noise impacts and cumulative effects – this approach ignores a key reality of the Port of Ngqura and Algoa Bay environment which is the presence of existing development; previous detailed environmental impact assessments (**EIAs**) including public comments and, in some cases internal appeals; and previously issued environmental authorisations (**EAs**), water use licences (**WULs**), atmospheric emissions licences (**AELs**) and other permits, including those relating to waste issued by the Municipality.

4.2. The Scoping Study alludes to such documentation, however, these previous assessment processes and authorisations have not been itemised anywhere in the Scoping Study and are not easily available to IAPs – save for the reference to aspects of the Port of Ngqura’s port expansion activities which are expressly omitted from the SEA.¹

4.3. In order to accurately establish the issues relevant to the SEA, it is logical that this information would be scrutinised at the scoping stage – and not some time in the future. To the extent that this analysis is contemplated in the “Situation Assessment” stage,² this is not entirely rational. This is because, deferring an analysis of the existing projects may well result in a scoping exercise that fails to properly understand projects associated with the PDFP, identify the appropriate geographical and temporal boundaries of the assessment, and define the terms of reference.³ This would defeat the purpose and objects of the Scoping phase of the SEA⁴ (and potentially render the SEA as a whole, irrational). We urge the TNPA and its consultants to take the necessary steps to mitigate this risk. Including updating the Scoping Report prior to proceeding to the Situation Assessment and, at the very minimum, allowing for a

¹ Scoping Report, p iv.

² Scoping Report, pp 18 and 20.

³ Scoping Report, p 18.

⁴ Scoping Report, p 25.

- revision of scope during the Situation Assessment with clear timelines for publication and public comment on the Situation Assessment report.
5. We emphasise that our concerns relate both to those projects identified as part of the Port of Ngqura's expansion and expressly omitted from consideration as part of the SEA as well as those of developments in the vicinity of the Port of Ngqura (including those relevant to the Coega IDZ and related township and roads developments) as well as Algoa Bay and the ports of Port Elizabeth and East London.
 - 5.1. It is simply not possible to accurately identify upstream and downstream impacts of the Port of Ngqura's expansion plans without considering the interaction between these sites and both interrelated impacts as well as cumulative environmental and socio-economic impacts. This is required of all environmental management decisions – including SEAs.
 - 5.2. In this regard, we draw the consultants' attention to section 2(3) of NEMA read with section 24(b)(iii) of the Constitution requiring that all development must be socially, environmentally and economically "ecologically sustainable" and the environmental management principle in section 2(4)(i) of NEMA requiring evaluation and assessment of all environmental, social and economic impacts. We also highlight the principle expressed in section 2(4)(b) of NEMA that environmental management must be "*integrated, acknowledging that all elements of the environment are linked and interrelated, and... must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option*". It is not possible to adhere to this principle if the Port of Ngqura and decisions relating to its expansion, are not considered in their appropriate context.
 6. Following from the above, there are two important limitations in the Scoping Report which we urge TNPA and its consultants to address.
 - 6.1. First, the Scoping Report does not provide a road-map which will enable cumulative impacts including both upstream and downstream impacts, to be adequately assessed and evaluated.
 - 6.2. Second, the omission of certain information from the SEA documentation may render the SEA subject to challenge in terms of failure to provide for adequate transparency and public participation.
 7. We elaborate briefly on these two limitations below.
 8. **The importance of addressing cumulative impacts and correctly defining the geographic scope**
 - 8.1. We note that the Scoping Report correctly includes cumulative impacts in its description of the SEA Temporal Scope at paragraph 6.3. However, in defining the

SEA Geographic Scope at 6.2, it states that the “*study area will be limited geographically to activities occurring within the functional area of the Port, based on the proposed developments contained in the PDFP, where TNPA have direct jurisdiction*”. We submit that this is an inappropriate approach to the geographic scope due to the interlinked nature of the Port of Ngqura, its activities and developments with the Ports of Port Elizabeth and East London, activities occurring in Algoa Bay and in the related coastal and terrestrial zones. In this regard, we urge TNPA and its consultants to better define the geographic scope, mindful that the Scoping Report already indicates a degree of flexibility that “*will depend on the physical extent of potential impacts.... during Stage 3 of the SEA*”. We emphasise that failure to appropriately define the geographic scope at an early stage to ensure that existing development activity and impacts are accurately scoped and captured will likely skew the data examined at a later stage of the SEA.

- 8.2. The need to ensure that interlinked impacts and activities are considered at this early stage are a requirement of a SEA when placed in its legislative context of Chapter 5 of NEMA. In particular, we draw the consultants’ attention to the objectives of integrated environmental management, set out in section 23 of NEMA which apply to all management tools – including SEAs. Accordingly, a SEA must, *inter alia*:
- 8.2.1. “*identify, predict and evaluate the actual and potential impact on the environment, socioeconomic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2*” (section 23(2)(b));
 - 8.2.2. “*ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them*” (section 23(2)(c)); and
 - 8.2.3. “*ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment*” (section 23(2)(e)).
- 8.3. It is critical that impacts are identified and assessed in a manner that has proper regard for cumulative impacts – not only in time, but also in space. This is a key requirement of EIAs and also critical to permitting relating to the coastal environment. Where an environmental management tool such as a SEA, by definition, seeks to evaluate impacts of a longer-term programme, policy or development strategy, it is still more critical that cumulative effects are assessed. However, in order to do so, it is necessary to accurately identify the space in which such cumulative impacts will be assessed. We have concerns that the Scoping Report does not provide an adequate framework for doing so.

- 8.4. In the first instance, the list of individual projects relating to the Port of Ngqura development identify, as separate projects, certain developments which are clearly designed to be cumulative (for example, Projects 3 and 15 over the Short-term; and Project 3 over the medium-term). There are also clearly projects which are connected in terms of being closely related (and potentially contingent upon each other for their successful operation and “need and desirability” including Projects 14, 15 and 17 over the short-term; 3 and 4 over the medium-term, and many of the projects identified over the long-term). In some cases the initial phase is excluded from the SEA due to already having undergone an EIA process. We submit that this is an inappropriate approach:
- 8.4.1. First, the very definition of cumulative impacts requires that regard is had to cumulative development. It is simply impossible to assess whether a particular strategy for incrementally developing a particular site is ecologically sustainable if the full scope of the final development is not assessed, along with other developments in the vicinity.
- 8.4.2. Second, and related to the above, it is irrational to omit detailed consideration of the EIAs for the first phases of developments which are to form part of the scope of the SEA. The existing EIAs need to form a foundation for the relevant evaluation and assessment, including regard being paid to the risk ratings generated through such studies, the caveats and conditions attached to such risk ratings, the mitigation measures indicated, the final EIAs (including any conditions) as well as related licences and permits and their conditions / assessments including WULs and AELs. This must serve as a baseline in order to identify risks / opportunities / mitigation measures and whether a plan is ecologically sustainable to 2052 and beyond.
- 8.5. In addition, it is critical that the cumulative impacts of the development as a whole are considered in the context of the carrying capacity of Port of Ngqura but also in terms of the ecological carrying capacity of Algoa Bay. In this regard, it is simply impossible to accurately assess the long-term impacts and ecological sustainability of the Port of Ngqura’s expansion plans without having regard to existing and planned activities linked to the Port of Port Elizabeth – but also the Port of East London.
- 8.5.1. In the case of the Port of Port Elizabeth, there is a directly relationship between these two ports’ development strategies. This is critical for assessing cumulative impacts on the coastal, marine and terrestrial environment of Algoa Bay and the relevant municipalities. It is simply impossible to accurately evaluate the environmental, social and economic impacts of the planned developments without having regard to these interlinked ports, the surrounding infrastructure and settlements and the intended use of these ports.

8.5.2. In the case of the Port of East London, there is a clear assumption regarding the intended purpose and economic focus of each of the ports around Algoa Bay. Omission of the Port of Port Elizabeth from the SEA will thus likely skew the assessment of cumulative impacts on the bays' carrying capacity as well coastal and inland impacts.

9. The importance of ensuring proper public access to information

9.1. Public participation and transparency are integral principles to all environmental management decisions as emphasised in sections 2(4)(f), (g) and (k) as well as section 23(2)(d) of NEMA.⁵ This includes the requirement that sufficient information is made available for IAPs to be able to comment meaningfully on a particular environmental development and/or environmental management decision.

9.2. We note that there is no centrally located and easily accessible database of previous EIAs, EAs, WULs, AELs and so on. Moreover, it is difficult to connect the projects identified in the list of projects at page 13 with the specific EIAs referenced to the extent these are publicly available. It is not possible to understand the scope of the proposed port expansion and the relevant environmental, social and economic benefits in the absence of access to this documentation. Accordingly, it should be collated and made available to IAPs in order to render the SEA lawful in accordance with the public participation and transparency requirements of all environmental management process.

9.3. Similarly, the Ports Framework and policy context for the SEA should be made available and be easily accessible to all IAPs. Without these documents, it is not possible to understand the incremental approach to development of the Port of Ngqura, the policy considerations and strategic approach behind such expansion and the relationship with port developments in Algoa Bay and the rest of the country. This is a critical omission as the expansion plans for the Port of Ngqura that are central to the SEA are clearly linked to broader strategic considerations relating to ports – but also to transport infrastructure generally (particularly those relating to the concentration of manganese exports from the Port of Ngqura). Once again, should this information not be easily accessible to IAPs, the SEA risks falling short of the statutory requirements for all environmental management decision-making and processes.

10. Specific observations regarding content of the Scoping Report

10.1. While we have not commented extensively on every aspect of the Scoping Report, we have included some specific observations regarding certain of the “Opportunities,

⁵ See also SEA Information Guide p 7; Protocol on Strategic Environment Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context (**SEA Protocol**), art 1(d).

risks and constraints linked to environmental topics” listed in Table 8 at pp 38-40 which bear consideration.

10.2. Atmospheric

10.2.1. In addition to climate and air quality factors, noise pollution / impacts need to be considered (see e.g. noise controls in NEM:AQA).

10.2.2. Note also potential impacts of the Climate Change Bill once promulgated and the plans passed in terms of such legislation (which will include impacts on TNPA). Consider also impacts on carbon tax (to the extent that this effects whether the economic developments contemplated through port expansion are “justifiable” as well as ecologically sustainable).

10.3. Estuarine & Marine Environments

10.3.1. It is concerning that at this early stage, no opportunities have been identified in relation to bathymetry and hydrodynamic functioning. In this regard, we note the importance of estuarine environments, the potentially far-reaching impacts on other estuarine environments along the coast due to modifications / degradation (or improvements) of estuaries in Algoa Bay. For this reason, the opportunities for mitigation, remedy and rehabilitation need to pro-actively assess opportunities for addressing these functions.

10.3.2. We welcome the inclusion of noise and vibration effects on wildlife as a risk being included. We emphasise that this should include specific attention to underwater / ocean-based noise.

10.3.3. We note that reference is made to “*Pollution of the terrestrial environment*”. This should be extended to pollution to the freshwater, coastal and marine environments. Similarly, disturbance to fauna and flora in the landside environment, should include impacts on coastal and marine biota.

10.4. Landside Environment

10.4.1. We flag that the various categories here also need to account for climate impacts in assessing the climate resilience of the landside environment in relation to the proposed Port developments.

10.5. Socio-economic environment

10.5.1. We note that, in this case, the SEA would benefit from a rigorous socio-economic assessment – which encompasses the interconnections between the Port, SEZ, surrounding area and also the ports of Port Elizabeth and East London. It is unrealistic to assess the socio-economic impacts of Port expansion without considering the changed strategic use of the Port of Port

Elizabeth and how all three Algoa Bay ports effect the Eastern Cape economic, transport / supply lines and shipping in the bay.

10.5.2. Specific attention should be paid to impacts on tourism and the fishing as well as aquaculture industries. The socio-economic assessment would benefit from clear statistics regarding the purpose for which the Port is used including numbers of vessels per use type. This, together with the same data for the Ports of Port Elizabeth and East London are critical to understand how the contemplated Port developments may lead to increase shipping traffic, change of vessel type and thus a proper appreciation of both environmental and social impacts. This in turn is essential for purposes of assessing whether the expansion as a whole and over the long-term remains ecologically sustainable and justifiable.

10.5.3. Once again, we welcome the inclusion of noise and vibration. We emphasise that this should incorporate noise and vibration impacts on people as well as other biota. It should also incorporate the social and economic impacts arising from terrestrial, sub-terranean and ocean-based noise and vibrations.

10.6. We would add to the above, that when reading Table 9 together with Table 7, it is apparent that all developments take place in a sensitive coastal environment. In this regard, we emphasise that climate impacts should be identified for all projects – and that such climate assessments should be considered with regard to relevant adaptation requirements pertinent to coastal zones and marine impacts.

11. We trust that you will pay due attention to the above comments and, once again, encourage the consultants and TNPA to ensure that the SEA is as robust as possible to ensure that TNPA adheres to its environmental obligations under all relevant legislation and the constitution. We remain committed to assisting with such process to the extent possible in the interests of ensuring that all development is transparent, lawful and in fact ecologically sustainable. This can only be achieved if impacts on biodiversity, vulnerable ecosystems such as those in the coastal zones and marine spaces are appropriately scoped, evaluated and assessed.

Yours faithfully,



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Per Kate Handley and Nina Braude