

1 October 2024

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Dear Minister Creecy

RE: LEGAL INTERVENTIONS TO PREVENT FURTHER DECLINE IN AFRICAN PENGUIN NUMBERS IN ALGOA BAY IN LIGHT OF INTENDED RECOMMENCEMENT OF OFFSHORE BUNKERING AND SHIP-TO-SHIP TRANSFER

1. We address this correspondence on behalf of SANCCOB, BirdLife South Africa (**BLSA**) and the Biodiversity Law Centre.
2. We refer to our correspondence dated 16 May 2024, addressed to the office of the Minister of Forestry, Fisheries and Environment (**Environment Minister**) and copied, *inter alia*, to the Minister of Transport. We refer further to the response signed by yourself, in your capacity as the Environment Minister, dated 18 June 2024 (**Response**). We attach both letters for ease of reference as “**Annexure 1**” and “**Annexure 2**” respectively.
3. As you will recall in our letter, we urged you, in your capacity as Minister responsible for environmental affairs to “*immediately engage with the Minister of Transport regarding the imperatives of ensuring that STS Bunkering does not breach the State’s constitutional and international obligations regarding environmental protection; the prevention of environmental degradation and pollution; and ensuring that use of the environment is consistently ecologically sustainable*”.
4. In the Response, we were advised, *inter alia*, that the Department of Forestry, Fisheries and the Environment (**DFFE**) would further engage on bunkering-related issues with the Transnet National Ports Authority (**TNPA**) and the South African Maritime Safety Authority (**SAMSA**). No mention was made of engagement with the Minister of Transport.
5. We now address you in your capacity as Minister of Transport, with responsibility for maritime transport and pollution control and as the designated executive member under the National Ports Act, 12 of 2005 (**Ports Act**), South African Maritime Safety Authority Act, 5 of 1998 (**SAMSA Act**) and the suite of legislation giving effect to the South Africa’s International Maritime Organisation obligations, including the Marine Pollution (Control and Civil Liability) Act, 6 of 1981 (**Control and Civil Liability Act**), Marine Pollution (Prevention of Pollution from Ships) Act, 2 of 1986 (**Prevention of Pollution Act**) and Merchant Shipping Act, 57 of 1951 (**Merchant Shipping Act**).
6. While cognisant of your familiarity with much of the history of ship-to-ship fuel transfer and offshore bunkering (collectively, **STS Bunkering**) and the related environmental concerns, we repeat some of this background below in order to formally bring it to the attention of the office of your current Ministry. Accordingly, we have copied this correspondence to the Deputy Minister of Transport, the Honourable Mkhuleko Hlengwa, as well as Director General Advocate James Mlawua and the Deputy Director General of the Maritime Branch, Mr Mthunzi Madiya.
7. In doing so, we are mindful of the economic importance and scope of the Transport portfolio and the particular role that it plays in relation to maritime regulation and protection of the marine environment. This requires a high degree of expertise as well as inter-governmental co-operation, accountability and transparency. For this reason,

and in the interests of ensuring that all government stakeholders are aware of our engagement with your office, we have copied this correspondence to the Honourable Minister of Forestry, Fisheries and the Environment, Dr Dion George as well as the Chief Executive Officers and key representatives of SAMSA and TNPA.

8. In sum:

8.1. We request that your ministry, together with the Department of Transport, SAMSA and TNPA (collectively, **the Transport Cluster**) take all necessary steps to investigate whether STS Bunkering is in fact a justified economic activity and can withstand constitutional scrutiny in terms of its environmental impacts and the obligations imposed on the state in relation to the environmental rights expressed in section 24 of the Constitution.

8.2. We call upon the Transport Cluster to engage pro-actively with Honourable Minister George and the Department of Forestry, Fisheries and the Environment (**DFFE**) to ensure that proper environmental regulation, assessments and protections are pursued in relation to all maritime activities – including STS Bunkering and the related activities of port and maritime industry expansion.

8.3. We further call upon your Ministry and the Transport Cluster as a whole to ensure that all international maritime environmental obligations are properly domesticated, implemented and enforced.

9. Below, we provide the background of our interest in the matter as well as a brief history of STS Bunkering in Algoa Bay. Thereafter, we outline certain of the key constitutional and legal obligations informing our engagements with your office and the Transport Cluster. We conclude by setting out our requests for intervention and critical actions by your office to further the interests of all South Africans and those engaging with our marine spaces and maritime sector. These requests are made in the context of furthering the constitutional values of accountability, transparency and co-operation and fulfilling the guarantee of environmental rights to everyone, both now and in the future.

A) Background

Our interest in STS Bunkering

10. The Biodiversity Law Centre (**BLC**) is a non-profit organization and law clinic, registered in 2021. Our vision is flourishing indigenous species and ecosystems that support sustainable livelihoods in Southern Africa and our mission is to use the law to protect, restore and preserve indigenous ecosystems and species in the region. Since the year of our inception, the BLC has been engaging with the DFFE, TNPA and SAMSA in relation to the impacts of STS Bunkering in Algoa Bay with particular regard to the fragility and stressed nature of this ecosystem,¹ increasing development and maritime pressure

¹ Algoa Bay includes the Addo Elephant Marine Protected Area, declared in 2019 for purposes, *inter alia*, of linking the system of shore, estuarine, bay, island and shore ecosystems and their associated biodiversity and ecosystem processes; the Amathole (Offshore of Port Elizabeth) Ecologically and Biologically Significant Area, designated due to its unique ecological features including rare habitat types, an important benthic and pelagic area that supports ecological processes, seabird breeding and foraging areas, fish spawning and nursery areas used by

in the bay, and the specific impacts on the two key African Penguin breeding colonies at St Croix and Bird Islands.

11. SANCCOB is a registered non-profit organisation with the primary objective to reverse the decline of seabird populations through the rescue, rehabilitation and release of ill, injured, abandoned and oiled seabirds particularly endangered species such as the African Penguin. SANCCOB has responded to every oil spill affecting seabirds along the South African coastline since 1968, and is the identified and mandated organisation to respond to oiled seabirds as per the National Oil Spill Contingency Plan. Moreover, SANCCOB is a member of both the Offshore Environmental Working Group (**OEWG**) and Offshore Operators Stakeholders Forum (**OOSF**).
12. BLSA is a registered non-profit organisation, the mission of which is to conserve birds, their habitats and biodiversity through scientifically-based programmes, through supporting the sustainable and equitable use of natural resources, and by encouraging people to enjoy and value nature. BLSA has been engaging with the DFFE, TNPA and SAMSA in relation to STS Bunkering in Algoa Bay since at least 2021. BLSA, together with SANCCOB, is working with scientists and engineers at Nelson Mandela University, the University of Paris, and the University of Cape Town to develop technologies to monitor the impacts of marine noise pollution on coastal and seabirds, including African Penguins, in Algoa Bay. In addition, BLSA is engaged with an Automated Penguin Monitoring System to gauge the response of penguins to human activities in the bay.

STS Bunkering in Algoa Bay

13. As you are aware, STS Bunkering commenced in Algoa Bay in 2016. Three operators were ultimately licenced and continued to operate until during or about September 2023 when, we understand, the South African Revenue Service (**SARS**) detained various vessels pursuant to an investigation – the details of which are not publicly available.
14. To date, STS Bunkering has resulted in four oil spills in Algoa Bay. Moreover, a study published in 2022² noted that declines in African Penguin populations (particularly that of St Croix Island) were correlated with the advent of STS Bunkering activities and the related increased noise levels in the marine environment. These environmental impacts are familiar to the DFFE and Environment Minister, SAMSA and TNPA, having been raised through various letters addressed to the Environment Minister, comments submitted to SAMSA in relation to draft codes relating to STS Bunkering in 2022 and 2024; and in submissions provided to TNPA during the course of their (retrospective) environmental risk assessment focused on STS Bunkering which was conducted during the course of 2023 (the **TNPA ERA**) as well as in relation to the Port of Ngqura's Strategic Environmental Assessment (**SEA**) questionnaire and draft scoping report in 2023/2024.
15. STS Bunkering operators have conducted their activities pursuant to a licence granted by TNPA and permission granted by SAMSA.

endangered leatherback turtles; includes the Algoa Bay Islands and Addo Elephant National Park Important Bird Area which are key breeding areas for seabird, shorebird and terrestrial birds; and has been declared a Hope Spot by Dr Sylvia Earle in 2014 and a Whale Heritage Site in 2021.

² Pichegru et al (2022) "Maritime Traffic Trends around the Southern Tip of Africa – Did Marine Noise Pollution Contribute to the Local Penguins' Collapse?" *Science of the Total Environment*, 849, 157878, available online <<http://dx.doi.org/10.1016/j.scitotenv.2022.157878>>, accessed 7 August 2024.

- 15.1. SAMSA purports to be authorised to permit STS bunkering in terms of section 21 of the Control and Civil Liability Act read with Marine Notice No. 3 of 2016.
- 15.2. TNPA ostensibly grants permits pursuant to section 80(2) of the Ports Act read with Rule 148 of the National Ports Rules.³
16. We have been advised by TNPA and SAMSA that new operator licences were not granted subsequent to the imposition of a moratorium imposed by the OOSF on 9 April 2019.⁴ The moratorium appears to have been imposed specifically due to environmental concerns. This was conveyed in SAMSA Notice MIN 10-22 dated 6 September 2022 which indicated that the lifting of the moratorium was contingent on (a) completion of an ERA; and (b) completion of new Codes of Practice for bunkering (**Codes**). Neither of these requirements for lifting the moratorium has been met.
 - 16.1. TNPA initiated its ERA by way of a tender issued on 15 July 2022.
 - 16.1.1. During the course of 2023, a number of stakeholder engagements were held. A draft ERA and Environmental Management Plan were published for comment in November 2023. The comment period (including extensions granted to certain interested and affected parties) closed on 31 January 2024.
 - 16.1.2. In the Response, you indicated that the DFFE had received a final version of the TNPA ERA on 11 April 2024. However, to date the final TNPA ERA has not been published, nor circulated to interested and affected parties. Further, and despite requests for clarification that we have sent to both TNPA and its environmental consultants, there has been no formal notification of next steps.
 - 16.1.3. Accordingly, it is not clear that the ERA is in fact final.
 - 16.2. Two sets of draft codes have been published to date – neither of them finalized:
 - 16.2.1. On 6 September 2022, separate bunkering and ship-to-ship transfer codes of practice were published together with MIN 10-22. Final versions were not published.
 - 16.2.2. On 19 February 2024, a further draft bunkering code was issued by SAMSA for comment (with no ship-to-ship transfer code published). The draft bunkering code had removed all reference to environmental assessment, risks and protections – despite these falling within the ambit of SAMSA. We made this clear in our comments dated 8 March 2024.
 - 16.2.3. We have received no confirmation of finalization of this 2024 draft and no finalised bunkering code has been published on the SAMSA website.
 - 16.2.4. Accordingly, the requirement of publication of Codes has not been met.
17. Notwithstanding the TNPA ERA and Codes not being final, it appears that SAMSA and TNPA have recommenced processing STS Bunkering licences.

³ GN 255 in GG 31986 of 6 March 2009.

⁴ Correspondence from TNPA to the BLC dated 25 October 2023.

- 17.1. This process was anticipated in SAMSA's Notice of 19 February 2024. It was subsequently confirmed at a stakeholder consultation convened by SAMSA on 30 April 2024 as well as a series of media reports published during the same period.
- 17.2. There has been no formal communication regarding the recommencement of STS Bunkering to the OOSF, nor to the OEWG. As you acknowledged in the Response both groups had their most recent meetings (scheduled for 8 March 2024) cancelled with no indication of rescheduling.
- 17.3. Similarly, there has been no communication to interested and affected parties involved in the TNPA ERA, nor to those commenting on the Codes.
- 17.4. SAMSA's approach is contrary to the intergovernmental co-operation required of organs of state – and also fails to reflect the constitutional standards of accountability and transparency to which organs of state are bound.
18. According to an explanation provided at a roundtable of bunkering stakeholders on 30 April 2024, the lifting of the moratorium appears to have been at the instance of the Minister of Transport.
19. If this is, in fact, the position, we draw this to your attention as a potential irregularity which requires rapid clarification and remedy by your office.

B) The critical importance of the constitutional principles of co-operative governance and environmental rights

20. As you are aware, the Transport Cluster is bound by the principles of cooperative government set out in section 41(1) of the Constitution as well as those applicable to the public administration in section 195. These include the principles of lawfulness and constitutionality, as well as those of co-operation, accountability and transparency.
21. The Transport Cluster also bears the obligations articulated in section 7(2) of the Constitution to respect, protect, promote and fulfil the Bill of Rights – including everyone's right to an environment that is not harmful to health and well-being expressed in section 24(a) and everyone's right to have the environment protected for the benefit of present and future generations expressed in section 24(b).
22. Section 24(b) imposes specific obligations on the Transport Cluster to:
 - 22.1. prevent pollution and ecological degradation (for example, through measures that, *inter alia*, prevent pollution of the marine environment by oil, other polluting chemical agents, air emissions, noise and light; prevent degradation of marine ecosystems and habitats through introduction of algal blooms; ensure marine space is not used beyond the limits of its ecological carrying capacity; and protect the integrity of the inter-tidal and coastal zones falling within the Transport Cluster's jurisdiction);
 - 22.2. promote conservation (for example by, *inter alia*, respecting limits imposed by conservation measures such as marine protected areas and the identification of Critical Biodiversity and Ecological Support Areas in the National Coastal and Marine Spatial Biodiversity Plan, and Ecologically or Biologically Significant Marine Areas⁵ and by pro-actively incorporating international best practice and guidelines pertaining

⁵ <https://www.cbd.int/ebsa/>.

to maritime trade and traffic into domestic plans, guidelines and legislation within the Transport Portfolio); and

22.3. secure ecologically sustainable development and use of natural resources while promoting justified social and economic development.

23. Given the economic and social importance of the Transport Cluster and your portfolio, this last obligation, articulated in section 24(b)(iii) of the Constitution, is particularly critical. When considered with reference to maritime activity, it includes two primary sets of obligations:

23.1. First, it is essential that all economic and social development initiated or overseen by the Transport Cluster is fully justified, properly reasoned, proportionate and founded in sound evidence. In relation to maritime transport, such justification must have regard to the standard of best available science which is integral to relevant international conventions by which South Africa is bound, including those administered by the International Maritime Organisation (**IMO**), the United Nations Law of the Sea Convention (**UNCLOS**) and United Nations Framework Convention on Climate Change (**UNFCCC**). The best available science standard, not only requires that economic and social data is robust and well-founded, but also supports incorporation of the tools and data of South Africa's Natural Capital Accounting system⁶ into the Transport Cluster's assessment of whether particular development initiatives are properly "justified" as required by section 24(b)(iii) of the Constitution.

23.2. Second, no development (however justified) can lawfully proceed if doing so means that the ecologically sustainable development and use of natural resources is not "secured". This obligation does not rest solely on the DFFE. It also binds the Transport Cluster and means that maritime development initiatives cannot be promoted, implemented or operated if they fail to fully safeguard the long-term integrity of marine and coastal ecosystems.

23.2.1. This is a critical consideration in relation to the development of measures such as SAMSA's Codes and standard operating procedures developed on the basis of the TNPA ERA or port expansion.

23.2.2. It also provides a Constitutional context for the environmental obligations under the IMO treaties which are assigned to the Transport Cluster as well as those cross-sectoral obligations arising from UNCLOS and the UNFCCC.

23.2.3. In this regard, we note that there is a constitutional imperative for the Transport Cluster ensuring proper domestication of the international treaty regime applicable to the maritime sector.

⁶ Department of Statistics South Africa (2021) *National Natural Capital Accounting Strategy: A ten-year strategy for advancing Natural Capital Accounting in South Africa*, available online < <https://www.statssa.gov.za/publications/04-01-00/04-01-002021.pdf>>, accessed 6 August 2024. Note in particular the importance of Goal 1 ("NCA is used for integrated planning, decision-making, monitoring and evaluation across a range of sectors").

- 23.2.4. There is also a sound constitutional basis for incorporating voluntary guidelines supporting ecological sustainability into regulation within Transport's functional area such as the *Revised Guidelines for the Reduction of Underwater Radiated Noise from Shipping to Address Adverse Impacts on Marine Life* (MEPC.1/Circ.906) of 22 August 2023 (**IMO Noise Guidelines**).
24. It is with this constitutional framework in mind, which is recognised in the White Paper on National Transport Policy 2021,⁷ that we turn specific interventions relating to STS Bunkering and our request that you take action.

C) Our request for action in respect of STS Bunkering

25. As indicated above, in our most recent correspondence to the Environment Minister, we enjoined that office to engage with the Minister of Transport to ensure that STS Bunkering was in fact properly regulated. We now request that you, in your capacity as Minister of Transport take the initiative to engage with the Environment Minister, mindful of your familiarity with the history of STS Bunkering and the need for proper environmental assessment and regulation.
26. In presenting this request, we are mindful of the urgent need for co-operation between the Ministries responsible for transport and environmental affairs. This is necessary to expedite the process of closing the regulatory gaps surrounding STS Bunkering (a process already initiated, but apparently not concluded, by SARS within its functional area). It is also essential for purposes of ensuring proper regulation of maritime pollutants which is an imperative in terms of protecting marine ecological processes as well as marine ecological services (including those relevant to climate mitigation and adaptation).
27. For this reason, we urge the Transport Cluster to co-operate with the Environment Minister and DFFE in undertaking a nation-wide SEA to consider the impacts of proposed port expansion activities and plans for expansions in maritime trade and traffic with particular regard to the ecological carrying capacity of South Africa's coastal zones, the impacts of increased maritime activity of marine noise pollution, and South Africa's international obligations in respect of biodiversity conservation, migratory species, maritime pollution, climate change and the law of the sea.
28. In the short term, we request that you confirm:
- 28.1. whether your office has been briefed regarding the conduct and outcomes of the TNPA ERA (and if not, to request such briefing);
- 28.2. what engagements, if any, you have had with SAMSA regarding its decision to lift the moratorium on the issuance of new STS Bunkering operator licences and to remedy the irregularity that appears to have arisen in this regard;
- 28.3. what engagements, if any, you have had with TNPA regarding STS Bunkering, beyond the TNPA ERA; and

⁷ GN1050 in GG 46422 of 27 May 2022.

- 28.4. whether the Department of Transport has a policy on STS Bunkering (and if so, if this can be provided).
29. Finally, we draw attention to specific interventions which fall within the functional area of the Transport Cluster and which require urgent attention in respect of closing regulatory gaps pertaining to STS Bunkering as well as marine pollution control more generally. In this regard, we call upon you to:
- 29.1. engage with the office of the President to ensure that the Marine Pollution (Prevention of Pollution from Ships) Amendment Bill [B5-2022] is signed into law and commences;
- 29.2. take the necessary steps to ensure that all support is provided to parliament as the Marine Pollution (Preparedness, Response and Cooperation Bill) [10B-2022] is revived and taken through the parliamentary process;
- 29.3. ensure that the Revised Guidelines for the Reduction of Underwater Radiated Noise from Shipping to Address Adverse Impacts on Marine Life (MEPC.1/Circ.906) of 22 August 2023 are incorporated into South African law by way of regulation under the Marine Pollution (Prevention of Pollution from Ships) Act 2 of 1986 or the Merchant Shipping Act, 57 of 1951;
- 29.4. proactively regulate marine noise pollution within marine spaces within the jurisdiction of TNPA, SAMSA and the Department of Transport; and
- 29.5. ensure the domestication and implementation of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004.

D) Conclusion

30. We trust that you will receive our correspondence in the spirit in which it is sent, namely, as a call upon you to employ your knowledge and expertise accrued during your tenure of Minister responsible for environmental affairs, to ensure that the critical Transport portfolio gives effect to everyone's rights to an environment that is not harmful to health and well-being as well as to have the environment protected for the benefit of present and future generations.
31. We would welcome engagement with you and your Department to discuss practical measures through which this can be achieved in the biodiversity space.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC
Per Nina Braude

Date: 16 May 2024

TO: **Minister of Forestry, Fisheries and the Environment**

Honourable Barbara Creecy

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Dear Minister Creecy

RE: LEGAL INTERVENTIONS TO PREVENT FURTHER DECLINE IN AFRICAN PENGUIN NUMBERS IN ALGOA BAY IN LIGHT OF RECOMMENCEMENT OF OFFSHORE BUNKERING AND SHIP-TO-SHIP TRANSFER

1. We refer to your correspondence dated 1 November 2022 (**November Letter**) and 6 February 2024 (**February Letter**) as well as our correspondence dated 5 June 2023 and 20 September 2023 and address this response on behalf of the Biodiversity Law Centre, SANCCOB and BirdLife South Africa.
2. As we pointed out in our previous correspondence:
 - 2.1. Your November Letter indicated that the Department of Forestry, Fisheries and the Environment (**DFFE**) was investigating the desirability of listing offshore bunkering and ship-to-ship transfer (collectively, **STS Bunkering**) as an activity which may not commence without authorisation pursuant to section 24(2) of the National Environmental Act, 107 of 1998 (**NEMA**), in addition to considering whether a strategic environmental assessment was an appropriate tool for site selection.
 - 2.2. In this same correspondence, you indicated that the DFFE had been working with the South African Maritime Safety Authority (**SAMSA**) and Transnet National Ports Authority (**TNPA**) “to ensure the veracity of the [TNPA] risk assessment as well as to ensure that SAMSA’s Codes of Practice, as a minimum incorporate certain environmental aspects of the activity”.
 - 2.3. You again indicated in the “*Note to Editors*” accompanying publication of your statement issued on 4 August 2023 in respect of release of the “*Report of the International Review Panel Regarding Fishing Closures Adjacent to South African Penguin Breeding Colonies and Declines in the Penguin Population*” that you were undertaking a risk assessment of oil bunkering in Algoa Bay by DFFE and its “conservation partners”.
3. In our September correspondence we sought clarification, *inter alia*, regarding whether this “risk assessment” was the study currently being undertaken by the TNPA and the DFFE’s role in this process. To date, we have not received the clarification requested.
4. In your February Letter, you responded to our letter addressed on 5 June 2023 (without reference to our September correspondence), indicating, *inter alia*, that:
 - 4.1. the DFFE was “*engaging with other role-players... on an approach to mitigate the potential impact of bunkering operations, beyond what is already in place or being developed, such as the SAMSA Bunker Codes of Practice and the TNPA Environmental Risk Assessment*”;

- 4.2. the DFFE would be in a “*better position to consider the measures*” of issuance of a coastal protection notice in terms of section 59 of the National Environmental Management Integrated Coastal Management Act, 24 of 2008 and section 57(2) of NEMA (as well as other potential measures) once the TNPA Environmental Risk Assessment (**TNPA ERA**) had been finalised; and
- 4.3. it would be “premature” *to take such measures “without being in possession of all the relevant facts and information”*.
5. Accordingly, we have received no response regarding whether the DFFE has commenced the process of examining whether STS Bunkering should be included as a Listed Activity, as contemplated by the EIA Regulations, 2014, nor any clarification regarding engagements between the DFFE and other stakeholders, including SAMSA, TNPA and the consultants engaged with the TNPA ERA.
6. This non-response and the apparent inaction of the DFFE is of increasing concern, given that:
 - 6.1. On 13 February 2024, TNPA’s environmental consultants indicated that comments on the draft Environmental Risk Assessment were still being collated; that the comments and updated ERA Report had not yet been provided to TNPA; and that TNPA had not yet clarified next step. By 10 May 2024, it appears that comments had been collated, however, there was no further clarity regarding updating of the draft ERA Report or next steps. The relevant chain of correspondence is attached, marked “1”.
 - 6.2. On 16 February 2024, SAMSA issued notice MN 01-24(C) entitled “*SAMSA Bunkering Code of Practise [sic]*” and confirmed SAMSA’s intention to “*release the procedures and requirements wrt the implementation of the Code of Practice for Bunkering in South African waters*” together with a draft SAMSA Bunkering Code of Practice (**2024 Code**) for comment.
 - 6.3. As indicated in our comments submitted to SAMSA on 8 March 2024 (attached marked “2”), the 2024 Code significantly rolled back on the inclusion of environmental considerations which had been apparent in earlier draft codes dated 2022; appeared to ignore the conduct of the TNPA ERA (or its findings); did not appear consonant with representations from your office regarding the co-operative process that was underway; and was in other material respects not fit for purpose.
 - 6.4. The Offshore Environmental Working Group meeting scheduled for 8 March 2024 was cancelled on 4 March 2024, while the Offshore Operators Stakeholders Forum (**OOSF**) scheduled for 22 March 2024 was initially rescheduled for 8 March 2004 and then abruptly cancelled on 7 March 2024. In neither case were reasons provided for the cancellations, and neither meeting has been rescheduled. Both meetings were to have provided updates

on the TNPA ERA while the OOSF was to specifically discuss the status of the moratorium. The cancellation of these meetings deviates markedly from the approach to co-operative governance and emphasis on stakeholder participation which has been pursued to date and, once again, runs contrary to your office's emphasis on co-operation.

- 6.5. At a roundtable convened by SAMSA on 30 April 2024, and including representations from various government stakeholders, including SAMSA, TNPA and the DFFE, the SAMSA CEO confirmed that the moratorium on new STS Bunkering licences had been lifted pursuant to a decision of the SAMSA Board and, it appears, at the instance of the Minister of Transport – and that two new licences were being processed.
- 6.6. In a news report dated 13 May 2024, marked “3”, “spokespeople from SAMSA and TNPA both confirmed the processing of new bunkering licences
7. In the circumstances, it appears that notwithstanding the indication from your offices that it is premature to implement measures to ensure that environmental safeguards are in place to mitigate against harms of STS Bunkering, this is not the case: SAMSA and the Minister of Transport have clearly determined that STS Bunkering will recommence, notwithstanding the finalisation or otherwise of the TNPA ERA.
8. This is particularly so given the evidence available regarding the impacts of oil and noise pollution on the sensitive Algoa Bay environment – information which is already available (and acknowledged) by the DFFE and not subject to doubt. Also beyond doubt is the critical status of the African Penguin – which has two of its seven largest remaining breeding colonies in Algoa Bay. As pointed out in our September Letter, it was confirmed that in 2023, there were only 783 breeding pairs of African Penguins on St Croix Island – in other words a 38% decrease since the 2022 count and below the critical threshold of 1,000 breeding pairs.¹ The African Penguin is already classified as Endangered by the International Union for Conservation of Nature (IUCN) and Threatened or Protected Marine Species Regulations (TOPSM).² The African Penguin is subject to international protections in terms of various treaties, including CITES, the Convention on Migratory Species Convention and the African Eurasian Waterbird Agreement and its threatened status requires heightened conservation obligations in terms of the National Environment Management: Biodiversity Act, 10 of 2004 (NEM:BA).
9. In the of context of these legal obligations – as well as the state of knowledge regarding the impact of STS Bunkering on the African Penguin and SAMSA's recommencement of STS Bunkering activities, it is certainly not premature to take steps to institute measures in terms of either section 59 of the National Environmental Management: Integrated Coastal Management Act, 2008 (NEM:ICMA) or section 57(2) of NEM:BA.

¹ DFFE: Unpublished data.

² GN 476 in *Government Gazette* 40875 of 30 May 2017.

It is, similarly, not premature to initiate the process regarding declaring STS Bunkering to be a Listed Activity as contemplated by the EIA Regulations, 2014. This is particularly so, given the risk averse and cautious approach required under NEMA.

10. We would also urge your office to immediately engage with the Minister of Transport regarding the imperatives of ensuring that STS Bunkering does not breach the State's constitutional and international obligations regarding environmental protection; the prevention of environmental degradation and pollution; and ensure that use of the environment is consistently ecologically sustainable.
11. We look forward to your response regarding:
 - 11.1. the involvement of the DFFE and your office in the TNPA ERA process;
 - 11.2. your engagements with SAMSA and the Minister of Transport regarding the recommencement of STS Bunkering activities; and
 - 11.3. the immediate steps to be taken by your office and the DFFE in terms of the powers afforded under NEM:ICMA, NEM:BA and NEMA to intervene to ensure that South Africa's international and constitutional obligations are maintained and the right to have an environment that is protected for present and future generations is upheld.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC
Per Nina Braude

From: Nina Braude
Sent: Friday, 10 May 2024 14:55
To: 'Donavan Henning'
Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet
National Ports Authority NGQ; Kate Handley
Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer
Environmental Risk Assessment

Tracking:	Recipient	Delivery	Read
	'Donavan Henning'		
	mdelarue@prdw.com		
	Zimasa.Sani@transnet.net		
	Thulani Dubeko Transnet National Ports Authority NGQ		
	Kate Handley	Delivered: 2024/05/10 14:56	Read: 2024/05/11 13:55

Dear Donavan

Many thanks for your prompt response which we appreciate.

Could you confirm whether the draft ERA was amended in light of the comments received and, if so, when this will be made available?

In addition, could you confirm the next steps with TNPA and revert to all stakeholders who, we are sure like us, would appreciate an update.

Kind Regards
Nina

From: Donavan Henning <DonavanH@nema.co.za>
Sent: Friday, May 10, 2024 1:12 PM
To: Nina Braude <nina@biodiversitylaw.org>
Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet National Ports Authority NGQ <Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>
Subject: Re: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Nina

Thank you for your email.

The Comments and Responses Report was updated with all comments received on the draft Environmental Risk Assessment and Management Plan.

TNPA will need to advise on the status and way forward.

Regards

Donavan Henning

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Email : donavanh@nemai.co.za

Address : 147 Bram Fischer Drive Ferndale, 2194, South Africa

Postal Address : PO Box 1673, Sunninghill, 2157



From: Nina Braude <nina@biodiversitylaw.org>

Sent: 10 May 2024 08:49

To: Donovan Henning <DonavanH@nemai.co.za>

Cc: mdelarue@prdw.com <mdelarue@prdw.com>; Zimasa.Sani@transnet.net <Zimasa.Sani@transnet.net>; Thulani Dubeko Transnet National Ports Authority NGQ <Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Donovan

Further to your update sent below on 13 February 2024, we would appreciate your confirming whether all comments have been captured and the document submitted to TNPA. In addition, could you let us know the status of the ERA and the “way forward” contemplated by TNPA.

We would very much appreciate your assistance.

Kind Regards
Nina



NINA BRAUDE | ATTORNEY

nina@biodiversitylaw.org

079 248 5663

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A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

From: Donovan Henning <DonovanH@nemai.co.za>
Sent: Tuesday, February 13, 2024 2:21 PM
To: Nina Braude <nina@biodiversitylaw.org>
Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet National Ports Authority NGQ <Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>
Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Nina

We are in the process of capturing all comments received on the draft Environmental Risk Assessment and Management Plan in a Comments and Responses Report and updating the overall document, which will be submitted to TNPA.

TNPA is to advise on the way forward thereafter.

Regards
Donovan Henning

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Address : 147 Bram Fischer Drive Ferndale, 2194, South Africa
Postal Address : PO Box 1673, Sunninghill, 2157



From: Nina Braude <nina@biodiversitylaw.org>
Sent: Monday, February 12, 2024 10:05 AM
To: Donovan Henning <DonovanH@nemai.co.za>
Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet National Ports Authority NGQ <Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>
Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Donovan

Following the submission of our comments on 31 January 2024 and your acknowledgment of receipt, we would appreciate your confirming the next steps in the ERA process as well as the relevant timelines.

Kind Regards
Nina Braude

From: Donovan Henning <DonovanH@nemai.co.za>
Sent: Thursday, February 1, 2024 7:26 AM
To: Nina Braude <nina@biodiversitylaw.org>
Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet National Ports Authority NGQ

<Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Nina

Thank you very much. We acknowledge receipt of your comments.

Regards

Donavan Henning

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From: Nina Braude <nina@biodiversitylaw.org>

Sent: Wednesday, January 31, 2024 3:00 PM

To: Donavan Henning <DonavanH@nemai.co.za>

Cc: mdelarue@prdw.com; Zimasa.Sani@transnet.net; Thulani Dubeko Transnet National Ports Authority NGQ <Thulani.Dubeko@transnet.net>; Kate Handley <kate@biodiversitylaw.org>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Donavan

Please see attached the Biodiversity Law Centre's comments on the TNPA ERA for your consideration.

Kind Regards

Nina



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A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

From: Donavan Henning <DonavanH@nemai.co.za>

Sent: Thursday, January 11, 2024 5:02 PM

To: Nina Braude <nina@biodiversitylaw.org>; mdelarue@prdw.com; Zimasa.Sani@transnet.net

Cc: Kate Handley <kate@biodiversitylaw.org>; Nicky Stander <Nicky@sanccob.co.za>; Monica Stassen

<monica@sancob.co.za>; Katta Ludynia <katta@sancob.co.za>; Melissa Lewis <Melissa.Lewis@birdlife.org.za>;
Alistair McInnes <alistair.mcinnnes@birdlife.org.za>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Nina

Thank you for your well wishes. Also hope that you have a wonderful 2024.

We had a team meeting this afternoon with TNPA and it was confirmed that you can receive an extension until 31 January 2024. This is to allow for the subsequent completion of the project within the contract period.

Regards
Donavan Henning

Nemai Consulting

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Postal Address : PO Box 1673, Sunninghill, 2157



From: Nina Braude <nina@biodiversitylaw.org>

Sent: Wednesday, January 10, 2024 4:11 PM

To: Donavan Henning <DonavanH@nemui.co.za>; mdelarue@prdw.com; Zimasa.Sani@transnet.net

Cc: Kate Handley <kate@biodiversitylaw.org>; Nicky Stander <Nicky@sancob.co.za>; Monica Stassen <monica@sancob.co.za>; Katta Ludynia <katta@sancob.co.za>; Melissa Lewis <Melissa.Lewis@birdlife.org.za>;

Alistair McInnes <alistair.mcinnnes@birdlife.org.za>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Donavan

Happy New Year! We hope you had a restful break.

Many thanks for confirming receipt. We wondered whether you had received feedback from the project team in respect of our request (sent on behalf of ourselves as well as SANCCOB and BirdLife South Africa) to provide comments by 9 February 2024.

Kind Regards
Nina

From: Donavan Henning <DonavanH@nemui.co.za>

Sent: Thursday, January 4, 2024 12:39 PM

To: Nina Braude <nina@biodiversitylaw.org>; mdelarue@prdw.com; Zimasa.Sani@transnet.net

Cc: Kate Handley <kate@biodiversitylaw.org>; Nicky Stander <Nicky@sancob.co.za>; Monica Stassen

<monica@sancob.co.za>; Katta Ludynia <katta@sancob.co.za>; Melissa Lewis <Melissa.Lewis@birdlife.org.za>;

Alistair McInnes <alistair.mcinnnes@birdlife.org.za>

Subject: RE: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Nina

We take note of your request to provide comments on the draft Environmental Risk Assessment and Management Plan by 9 February 2024. We are awaiting feedback on this matter from the project team and will advise in due course.

Regards

Donavan Henning

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From: Nina Braude <nina@biodiversitylaw.org>

Sent: Tuesday, December 12, 2023 10:48 AM

To: Donavan Henning <DonavanH@nemai.co.za>; mdelarue@prdw.com; Zimasa.Sani@transnet.net

Cc: Kate Handley <kate@biodiversitylaw.org>; Nicky Stander <Nicky@sancocob.co.za>; Monica Stassen <monica@sancocob.co.za>; Katta Ludynia <katta@sancocob.co.za>; Melissa Lewis <Melissa.Lewis@birdlife.org.za>;

Alistair McInnes <alistair.mcinnnes@birdlife.org.za>

Subject: Nelson Mandela Bay Offshore Bunkering and Ship to Ship Transfer Environmental Risk Assessment

Dear Donavan

Please find the attached correspondence for your attention.

Kind Regards

Nina



NINA BRAUDE | ATTORNEY

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A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

Date: 8 March 2024

TO: **South African Maritime Safety Authority**

Chairman of the Board

submissions@samsa.org.za

FROM: **BIODIVERSITY LAW CENTRE**

kate@biodiversitylaw.org

nina@biodiversitylaw.org

Total 11
pages:

Our ref: BLC/Penguins1/009

COMMENTS: BUNKERING CODE OF PRACTICE

1. Introduction

- 1.1. We refer to the South African Maritime Safety Authority's (**SAMSA**) notice MN 01-24(C) issued on 16 February 2024 which is entitled "*SAMSA Bunkering Code of Practise [sic]*" and which states SAMSA's intention "*to release the procedures and requirements wrt the implementation of the Code of Practice for Bunkering in South African waters*" and the draft SAMSA Bunkering Code of Practice dated February 2024 (**2024 Code**).
- 1.2. The Biodiversity Law Centre (**BLC**) is a public interest law centre focused on protection of biodiversity and has been engaging with the Transnet National Ports Authority (**TNPA**), Minister for Forestry, Fisheries and the Environment (**Minister**) as well as SAMSA regarding its concerns about the impacts that offshore bunkering and ship-to-ship transfers have on marine ecosystems – in particular the sensitive Algoa Bay habitat and African Penguins which have been shown to be adversely affected by the impacts of offshore bunkering (**Bunkering**) and ship-to-ship fuel transfer activities (**STS Transfer**). We have previously made submissions regarding:
 - 1.2.1. SAMSA's draft Bunkering Code dated September 2022 (**2022 Code**) (BLC comments dated 22 September 2022 referred to below as the "**2022 Submissions**"); and

DIRECTORS
Kate Handley (Executive)
Cormac Cullinan
Jenitha John
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Ian Little
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- 1.2.2. the TNPA's draft *Provisional of Specialist Services for Offshore Bunkering and Ship to Ship Transfer of Liquid Bulk in the Nelson Mandela Bay Ports: Environmental Risk Assessment & Management Plan* dated November 2023 (**TNPA ERA**) (BLC comments dated 31 January 2024).
- 1.3. This comment on the 2024 Code accordingly has regard to the TNPA ERA, 2022 Code as well as SAMSA's draft Bunkering Code dated October 2021 (**2021 Code**). We note that the 2024 Code deals only with Bunkering and not STS Transfers. At the outset, we flag this as an important omission, as it is clear that the two sets of activities are integrated in practice and that both are required for purposes of enabling the full operation of the offshore bunkering supply chain. Similarly, we flag that SAMSA's approach to regulating Bunkering without integration with quayside refuelling and fuel storage regulation, standards and guidelines presents a fragmented approach to regulation which is at odds with the need for integrated environmental management contemplated by South Africa's environmental management framework. We have not elaborated further on this omission but rather restricted the remainder of our submission to SAMSA's approach to Bunkering as expressed in the 2024 Code.

2. Summary of submissions regarding the 2024 Code

- 2.1. We have far-reaching concerns regarding SAMSA's authority to issue the 2024 Code at this time as well as the manner in which it has done so given the status of, and findings reported in, the TNPA ERA; previous work undertaken by SAMSA, together with the TNPA and Department of Forestry, Fisheries and the Environment (**DFFE**) in relation to the 2021 and 2022 Codes; the environmental management framework and principles governing all environmental decision-making and its effect on how SAMSA carries out its functions and fulfils its regulatory purpose; and the constitutional principles and requirements of co-operative government which bind SAMSA.
- 2.2. Critically, we note that SAMSA's mandate to "*ensure safety of life and property at seas; to prevent and combat pollution of the marine environment by ships; and to promote the Republic's maritime interests*"¹ necessarily requires its co-operation on environmental regulation with, *inter alia*, TNPA and DFFE. Further, it requires that SAMSA have regard to all international treaties, customary laws and guidelines relevant to South Africa's obligations and best practice in respect of pollution of the marine environment by ships as is consonant with South Africa's constitutional obligation to "*prevent ecological pollution*" as provided by section 24(b)(i) of the Constitution – as well as the additional constitutional obligations to protect the environment for the benefit of present and future generations expressed in section 24(b) through, *inter alia*, the securing of "*ecologically sustainable development*".
- 2.3. We contend that the 2024 Code does not properly consider the relevant set of principles, norms and obligations. Accordingly, the 2024 Code should be withdrawn

¹ South African Maritime Safety Authority Act, 5 of 1998 (**SAMSA Act**), s 3.

and SAMSA should take no further steps regarding the publication of Bunkering Codes or the lifting of the current moratorium on new bunkering operator licences, until such time as:

- 2.3.1. it has consulted with, and co-ordinated its regulation of these development activities, with the TNPA, DFFE and any other relevant organs of state;
 - 2.3.2. the TNPA ERA is completed; its findings publicised and subjected to public consultation; confirmation that its findings are environmentally tenable and robust; a comprehensive approach to inter-governmental co-operation resulting from such findings is published, subjected to public consultation and confirmed as constitutionally and scientifically justified; and such inter-governmental co-operation pays specific attention to preventing ecological pollution and securing ecologically sustainable development; and
 - 2.3.3. SAMSA has given proper consideration to whether it is in fact able to grant offshore bunkering permits in terms of the Marine Pollution (Control and Civil Liability) Act, 6 of 1981 (**Civil Liability Act**) when read with the environmental principles in section 2 of the National Environmental Management Act, 107 of 1998 (**NEMA**) which apply to all decisions effecting the environment.
- 2.4. We urge SAMSA to engage with the DFFE to address the consequences of the failure to have Bunkering and STS Transfer included as listed activities for the purposes of application of Chapter 5 of NEMA and, in particular, the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations**). In this regard, we note that the omission of these development activities from the EIA Listings places an undue burden on SAMSA to adhere to its national and international obligations to prevent and combat pollution from ships while leaving it at risk of authorising activities which are a breach of everyone's environmental rights to have the environment protected for the benefit of present and future generations.

3. It is premature for SAMSA to be announcing the processing of new bunkering applications given the status of the TNPA ERA

- 3.1. SAMSA, together with TNPA, DFFE, the Department of Transport (**DoT**) and "industry stakeholders" imposed a moratorium on the issuance of new bunkering licences in 2019.² We understand that this moratorium was motivated by concerns regarding the environmental impacts and environmental regulation of Bunkering and STS operations.

² Correspondence from TNPA to BLC dated 25 October 2023 including responses from SAMSA regarding the origin of the moratorium and referring to the decision of the Offshore Operators' Stakeholder Forum meeting dated 9 April 2019.

- 3.1.1. The TNPA ERA records that the moratorium on new bunkering licences will remain in place “*until the completion of the ERA and consideration of the findings*”.³ (See also the statements regarding the background to the moratorium and 2022 Code reflected in MIN10-22 addressed at paragraph 3.1.1 below).
- 3.1.2. Subsequent to the provision of the BLC’s submissions on 31 January 2024, the BLC followed-up on the next steps and timelines relating to the TNPA ERA process with Nemaï Consulting (**Nemaï**). On 13 February 2024, Nemaï advised that comments received on the TNPA ERA were being compiled and updates being attended to for submission to TNPA. We were further advised that TNPA would advise on next steps once in receipt of this Nemaï’s update. To date, we have heard nothing further. It thus seems clear that the TNPA ERA remains under consideration and has by no means been “completed”.
- 3.1.3. We note that the TNPA ERA has been commissioned with the recognition that “*STS bunkering operations pose risks different and greater than those normally expected for standard shore-to-ship re-fuelling operations*” and that TNPA commissioned the ERA “*to inform the regulation of STS transfers and bunkering within port limits....*”.⁴ While we appreciate that these are TNPA’s objectives, it is contrary to the principles of co-operative government, and also an approach to effective management of dynamic ecosystems such as ocean spaces, for SAMSA to operate independently of TNPA in considering the appropriate regulatory environment and publishing regulatory guidelines such as the 2024 Code.
- 3.1.4. In particular, while SAMSA has purported to explain that its jurisdiction over ocean-spaces extends further into South Africa’s exclusive economic zone than that of the TNPA, the marine ecosystem pays no regard to such jurisdictional distinctions (to the extent that SAMSA’s interpretation of the legal position is correct). It is thus critical that SAMSA and TNPA co-ordinate their regulation of Bunkering and STS Transfer activities to give effect to the imperatives and principles of environmental regulation within the coastal waters, maritime spaces and maritime activities under South Africa’s regulatory control. These include the principle in section 2(4)(r) of NEMA which specifies that “*Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure*”. Marine areas where offshore Bunkering activities are contemplated are just such ecosystems. This is illustrated by

³ ERA p 8.

⁴ TNPA ERA p 1.

the draft Marine and Coastal Environmental Risk Assessment included with the TNPA ERA (**MCERA**) which acknowledged that Algoa Bay was a formally recognised vulnerable ecosystem, contained a reef system recognised as vulnerable, included important estuaries and was subject to particular development pressure.⁵

3.2. It is in this context that we draw SAMSA’s attention to its publication of the draft 2024 Code as premature. It is certainly entirely inappropriate to signal that SAMSA intends to lift the moratorium on bunkering operator licences by processing new bunkering operator applications, as has been suggested by MN 01-24 (C).

4. The 2024 Code is inconsistent with SAMSA’s approach to developing codes to regulate Bunkering and STS Transfer since 2021

4.1. By way of example, MIN10-22 which announced the comment period for the 2022 Code, expressly stated that oil spills occurring between 2016 and 2019, resulting from Bunkering activities had led government to decide “*to review all policies, procedures and processes for the application, approval and management of these activities*”.⁶

4.2. MIN10-22 also stated that conditions for lifting the moratorium in Algoa Bay were both completion of the TNPA ERA and publication of the Codes of Practice (and that the latter was also a condition for lifting the moratorium on bunkering elsewhere in South Africa).

4.3. The 2022 Code was clearly published in an attempt to address environmental considerations and as a response to the recognition that Bunkering posed significant environmental risks. While the BLC’s 2022 Submissions noted critical difficulties with the 2022 Code, this 2022 draft did represent a consistent attempt to meet the objectives articulated by SAMSA. It is thus concerning, that the 2024 Code appears to roll back key aspects of environmental regulation mooted in this earlier draft including the chapters addressing Noise and Environmental Risk Management Plans.

4.4. We draw SAMSA’s attention to the requirement that regulatory interventions, such as the 2024 Code, must have a rational connection to the purpose for which they are initiated. It is clear from the text of the 2024 Code that these are a continuation of SAMSA’s earlier efforts. Accordingly, they must be read as an attempt to give effect to the purpose of management of the self-same environmental risks previously identified (and which have also given rise to the TNPA ERA). It is simply inconceivable that the 2024 Code could reverse key environmental protections. Removing these sections which appeared in the 2022 Code (rather than refining and improving them) is a clear indication that the 2024 Code is not rationally connected with its environmental risk management purpose.

⁵ MCERA, pp 10, 26, 58, 77-78, 78-79.

⁶ MIN 10-22, para (1).

- 4.5. In addition to inconsistency with its purpose, the 2024 Code reflects a departure from the clear approach to co-operative government reflected in previous drafts. We flag that MIN 10-22 and the 2022 Code expressed a clear approach to co-operative government between DFFE, SAMSA, TNPA and the Department of Transport⁷ as well as a sound approach to public participation. By way of example, the 2022 Code clearly attempted to consider inputs regarding noise pollution from ships⁸ and, in this regard, made significant strides towards proper regulation since publication of the 2021 Code (albeit still reflecting some major difficulties).
- 4.6. It is concerning that the 2024 Code takes a step backwards. Not only does this undermine the purpose and objects of the very idea of “Codes” themselves, but it also suggests a flawed procedure and raises questions regarding wasted time, effort and expenditure developing the Bunkering guidelines since 2021 (if not earlier). This is contrary to the principles of accountability applicable to all organs of state and is also contrary to the international obligation placed on South Africa in terms of the IMO Instruments Implementation Code (III Code), Part 1, clauses 11 to 14 to continually review and improve South Africa’s performance in terms of, *inter alia*, environmental protection.⁹

5. The 2024 Code fails to give effect to SAMSA’s constitutional, statutory and treaty obligations pertaining to the environment and prevention and combatting of pollution

- 5.1. Section 24(b) of the Constitution provides that everyone is entitled to have the environment protected for the benefit of present and future generations through a range of measures, including legislation, which prevent pollution and environmental degradation; promote conservation; and secure ecologically sustainable development. Government has an obligation to respect, protect, promote and fulfil this right – and thus attracts obligations to prevent pollution and ecological degradation; promote conservation and secure ecologically sustainable development. This is an obligation borne by all organs of state, including SAMSA, when engaging in activities affecting the environment. Bunkering is self-evidently such an activity. As indicated above, this is acknowledged by SAMSA.
- 5.2. The 2024 Code correctly identifies that one of SAMSA’s objectives is to “*prevent and combat pollution of the marine environment by ships*”.¹⁰ Similarly, the 2024 Code correctly identifies that SAMSA is required to implement the Marine Pollution (Civil and Control Liability) Act, 6 of 1981 (**Civil Liability Act**) and Merchant Shipping (Civil Liability Convention) Act, 25 of 2013 which are relevant to SAMSA’s regulation of

⁷ See 2022 Code p 7; 14.

⁸ MIN10-22, “Draft Codes” para (3)

⁹ IMO, Resolution A. 1070(28), *IMO Instruments Implementation Code (III Code)* adopted on 4 December 2013.

¹⁰ SAMSA Act, s 3(b).

maritime oil and hazardous discharge. However, these two statutes are by no means the sole legislation relevant to SAMSA's obligations vis-à-vis Bunkering.

- 5.3. Most obviously, SAMSA has omitted the Marine Pollution (Prevention of Pollution from Ships) Act, 2 of 1986 (**Prevention of Pollution Act**) and obligations flowing from this Act's domestication of the International Convention for the Prevention from Ships, 1973 as amended by the 1978 Protocol (**MARPOL**). SAMSA, however, is the primary South African implementing authority. While certain of the requirements in the checklists attached to the 2024 Code appear to reflect certain of the domestic and international obligations under the Prevention of Pollution Act, MARPOL and the related International Maritime Organisation (**IMO**) instruments, the 2024 Code would benefit from express reference to these instruments. This would not only ensure that all relevant statutory and international obligations are accounted for and SAMSA itself is held accountable for implementing its mandate, but also so that Bunkering guidelines are properly situated within their legal context and capable of being understood with reference to the various international standards which support the framework of maritime safety and pollution instruments which SAMSA must enforce.
- 5.4. Critically, however, the 2024 Code omits reference to:
- 5.4.1. section 24(b) of the Constitution which must provide the interpretive context for the Civil Liability Act, Prevention of Pollution Act and all SAMSA's pollution management objectives; and
- 5.4.2. NEMA which contains environmental management principles applicable to all environmental management decisions, and definitions of, *inter alia*, "pollution" which must inform SAMSA's interpretation of its powers and duties in relation to Bunkering regulation.
- 5.5. While the EIA procedures in NEMA do not yet apply to Bunkering activities, the environmental management principles set out in section 2 of NEMA do. These must be used in respect of all environmental decision-making, including decisions which SAMSA purports to make in terms of section 21 of the Control and Civil Liability Act and the decisions made in respect of regulation of Bunkering through instruments such as the 2024 Code. The 2024 Code clearly does not have regard to these principles – including the principle regarding particular consideration of marine ecosystems already referenced above, but also the critically important precautionary principle which is inherent to ensuring that all environmental management decisions are grounded in the best available science and take a risk averse and cautious approach taking into account scientific unknowns.¹¹ I expand on this below.
- 5.6. In addition, the definition of "pollution" in NEMA must inform how SAMSA interprets its statutory obligation to "*prevent and combat pollution of the marine environment by ships*". NEMA's definition of "pollution" includes "*noise, odours, dust or heat*" which

¹¹ NEMA, s 2(4)(a)(vii).

are emitted from any activity which has an impact, *inter alia*, on the “*composition, resilience and productivity of natural or managed ecosystems*”.¹² Noise – and particularly underwater noise – therefore must fall within the scope of the “pollution” with which SAMSA is tasked with preventing and combatting. Further, SAMSA is not just tasked with stopping noise pollution. It is enjoined to “combat” or actively fight against it. In this regard, SAMSA

5.7. The 2022 Code acknowledged that prevention and combatting of underwater noise pollution fell within SAMSA’s mandate. However, the relevant chapter has now been entirely removed (let alone updated to confirm with subsequent science, international obligations and best practice). In this regard:

5.7.1. We again draw attention to the evidence of significant and detrimental impacts of underwater noise associated with Bunkering on the African Penguin population of Algoa Bay. SAMSA will, by now be familiar with the relevant study led by L Pichegru, entitled “*Maritime traffic trends around the southern tip of Africa: Did marine noise pollution contribute to the local penguins’ collapse?*”.¹³ This was provided to SAMSA as an annexure to the BLC’s 2022 Submissions and has since been provided to both TNPA and the DFFE by the BLC. We do not repeat the details of this study here, however, note that it indicated that the increase of bulk carriers, attracted by offshore Bunkering, had led to a major increase in ocean-based noise. This in turn appeared to be an important contributor to changes in African Penguin behaviour – including their foraging behaviour and these endangered seabirds’ ability to forage effectively. This is critical as this has exacerbated difficulties experienced by the Algoa Bay African Penguins’ in accessing their prey due to competition with the small pelagic purse-seine fishing industry. Accordingly, Bunkering has had a significant impact on further declines of the already-stressed African Penguin populations of Algoa Bay.¹⁴

5.7.2. These impacts have been acknowledged in the MCERA which also acknowledges a similar concern with behaviour responses to “*the non-impulsive noise emissions from in-transit marine traffic and from stationary bunkering operations*” in relation to the Indian Ocean humpback dolphin.¹⁵ It also acknowledges the impacts of increased maritime-induced noise linked to Bunkering on other species. For example, it highlights that underwater explosions associated with bunkering activities could lead to the injury to fish with swim bladders (causing swim bladders to rupture with resulting damage to kidneys, liver and spleen) and injury to mammals

¹² NEMA, s 1(1).

¹³ Pichegru et al “Maritime traffic trends around the southern tip of Africa – Did marine noise pollution contribute to the local penguins' collapse?” *Science of the Total Environment* 849 (2022) page 1.

¹⁴ Pichegru et al, page 7.

¹⁵ MCERA, p 157. See also TNPA ERA p 65 and 66.

(primarily trauma of various organs such as lungs, ears and the intestinal tract).¹⁶ Despite its various deficiencies, the MCERA in fact indicated that even post-mitigation, underwater noise had a “very high” significance. This should be sufficient to indicate that Bunkering in Algoa Bay should not be permitted at all. It is likely that the same findings would arise in all South Africa’s megadiverse coastal waters. Given this position, it is entirely untenable that the 2024 Code should not even contemplate regulation of noise impacts.

5.7.3. SAMSA is the key organ of state in South Africa which implements the various marine pollution and safety instruments associated with the International Maritime Organisation (**IMO**). We have already referred in this regard to MARPOL and SOLAS. The MARPOL annexures go beyond oil pollution and discharge of hazardous substances to expressly contemplate emissions associated with climate change. Similarly, the IMO has taken steps to address ocean-based noise by publishing the IMO Revised Guidelines for the Reduction of Underwater Radiated Noise from Shipping to Address Adverse Impacts on Marine Life.¹⁷ This means, of necessity, that SAMSA must have regard to the developing understanding of pollution in the international legal context in which it operates. The relevant international norms clearly recognise that maritime noise requires regulation. When considered against the background of the domestic environmental principles and definitions which must guide SAMSA’s conduct, it is simply inexplicable that noise pollution arising from Bunkering activities should not be addressed in the 2024 Code.

5.7.4. The obligations placed on SAMSA are reinforced by further international commitments made by South Africa under the Convention on the Conservation of Migratory Species of Wild Animals, 1979 (**Bonn Convention**) and Agreement on the Conservation of African-Eurasian Migratory Waterbirds (**AEWA**). The Bonn Convention has developed specific guidelines regarding the impact of marine noise which SAMSA cannot ignore.¹⁸ In addition, the Rolling Work Plan 2021-2025 of the AEWA Benguela Coastal Seabirds International Working Group provides specifically for regulation of noise impacts generated by, *inter alia*, Bunkering.¹⁹

¹⁶ MCERA pp 101-103.

¹⁷ MEPC.1/Circ 906 of 22 August 2023.

¹⁸ See Resolution 12.14 on the *Adverse Impacts of Anthropogenic Noise on Cetaceans and other Migratory Species*, 2017 and its annex, the *CMS Family Guidelines on Environmental Impact Assessments for Marine Noise generating Activities*, available online <https://www.cms.int/sites/default/files/document/cms_cop12_res.12.14_marine_noise_e.pdf>.

¹⁹ Developed at the first meeting of the Benguela Coastal Seabirds International Working Group held on 3-4 March 2021.

6. The 2024 Code ignores the regulatory lacunae of an absence of EIA Regulations

- 6.1. We have previously raised our concerns regarding the omission of offshore bunkering and STS Transfer activities from inclusion as Listed Activities for purposes of the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations**). In our 2022 Submission, we indicated that SAMSA should be engaging with the DFFE in this regard, rather than seeking to regulate offshore bunkering through the 2024 Code. We remain of the view that should Bunkering be permitted at all, the proper regulatory mechanism is an Environmental Authorisation, issued by the DFFE, preceded by an Environmental Impact Assessment (**EIA**).
- 6.2. We emphasise that the draft TNPA ERA (together with its annexures) reflected a number of flaws which the BLC pointed out in our comments. These issues notwithstanding, the draft TNPA ERA strongly indicated that the detrimental impacts on the marine environment rendered the continuation of Bunkering and STS Transfer unlawful in the absence of EIA – and potentially entirely unviable in the context of the constitutional requirement that all development is “justified” and ecologically sustainable. To date, no such justification, within the meaning of the law, has been publicized with the socio-economic benefits of offshore bunkering and STS transfer remaining opaque.
- 6.3. In this context, and noting the mandate, purpose and functions of SAMSA, it is concerning that references to “EIA where applicable” which appeared in the 2022 Code have been omitted. This means that the 2024 Code does not cater for the possibility of Bunkering being listed for purposes of the EIA Regulations in the future (including if this is indicated by the results of the TNPA ERA). We repeat our view that this is an eventuality that must happen if the regulation of marine shipping activities is to remain consonant with constitutional requirements. SAMSA’s ignoring of this eventuality is thus inconsistent with a proper interpretation of the law.
- 6.4. We would contend that, to the extent that SAMSA (and TNPA) have identified the difficulties with the non-regulation of Bunkering by the DFFE, this is a legislative gap which leaves both SAMSA and TNPA vulnerable. For this reason alone, we would urge SAMSA (together with the TNPA) to engage with the DFFE to ensure that Bunkering is properly regulated by those authorities with the proper authority to administer the appropriate regulatory instruments.
- 6.5. This does not preclude SAMSA from co-ordinating a process of drafting and gazetting codes of good practice in conjunction with other relevant regulatory authorities. It is in the interests of transparent and accountable regulation, to have gazetted procedures in place confirming the various obligations to imposed on any bunkering operator. The expressed attempt to do so in the 2022 Code, with reference to the separate mandates of SAMSA, the TNPA and DFFE was laudable. This is now entirely absent from the 2024 Code which seem to assume for SAMSA a core regulatory function – including outside port limits. This approach is not aligned with

the obligations placed on SAMSA to engage in co-operative government and appears to be an instance of over-reach in terms of the scope of SAMSA's powers.

7. Conclusion

- 7.1. The BLC has pointed out a number of key legislative – and particularly important constitutional – obligations placed on SAMSA that require that it regulate Bunkering with regard to principles of co-operative government and environmental management applicable to all organs of state. These mean that it is not authorised to publish unilateral guidelines to address Bunkering – particularly in the context of previous drafts having expressly acknowledged these constitutional and legislative obligations. What is more, the 2024 Code omits regulation of critical pollutants such as noise and fails to make it clear whether SAMSA has in fact considered the integration of all legal requirements imposed by domestic and treaty law, for which it is responsible and which apply to Bunkering.
- 7.2. In addition, SAMSA appears to have issued the 2024 Code prematurely and without regard to the procedures and outcomes of the TNPA ERA. In this regard, and given the links between publication of Bunkering “Codes” and the implementation of an ERA to address historic environmental concerns, the 2024 Code is unrelated to its purpose and thus irrational.
- 7.3. Finally, we acknowledge the difficulty faced by SAMSA in seeking to regulate Bunkering within the scope of its objects, powers and functions and in the absence of EIA Regulation. Accordingly, we urge SAMSA to address this issue with the DFFE and Minister and seek to have Bunkering (as well as STS Transfer) listed for the purpose of appropriate environmental oversight. It is only if this is done that SAMSA can ensure that it does not commit a breach of section 24(b) of the Constitution in its attempt to regulate Bunkering.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC

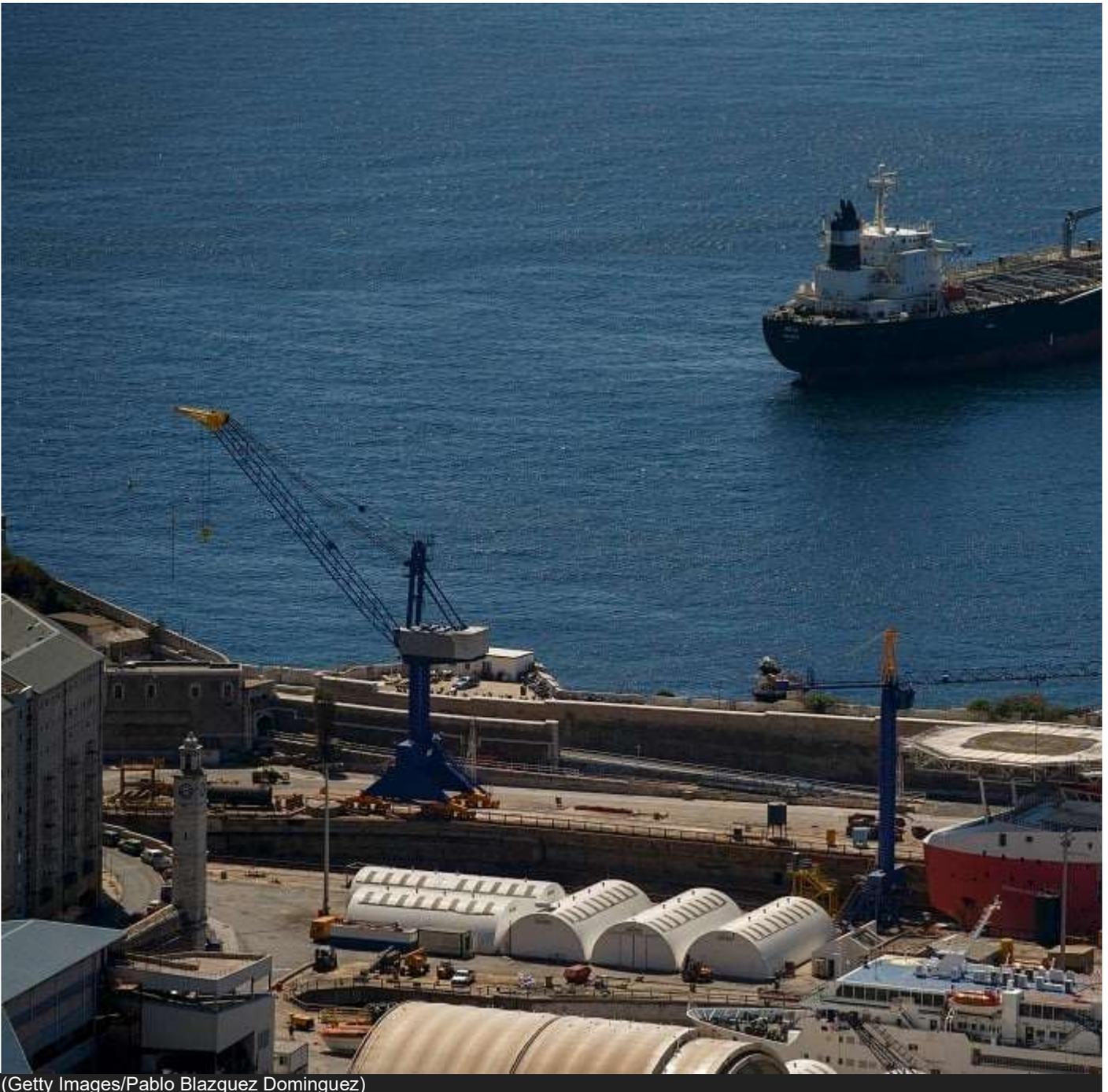
Per Kate Handley and Nina Braude

<https://www.news24.com/fin24/economy/months-after-sars-detained-bunkering-vessels-uncertainty-about-refueling-still-prevails-20240513>

Na'ilah Ebrahim

Months after SARS detained bunkering vessels, uncertainty about refueling still prevails

08:33



- **Despite new tax rules for offshore bunkering not yet being finalised, SA's maritime authority says bunkering activity in Algoa Bay can continue.**
- **Last year, numerous vessels were detained by SARS for violating tax laws related to offshore bunkering, amid a gap in the rules.**
- **Port operator Transnet has also said it is busy processing for pending and new applications for bunkering.**
- **For more financial news, go to the [News24 Business front page](#).**

The South African Revenue Services (SARS) has said it is still finalising legislation for tax rules related to ship-to-ship refuelling or offshore bunkering, months after it detained vessels off the Eastern Cape coast in Algoa Bay.

The service detained four bunker tankers and an oil drilling ship belonging to Minerva Bunkering and Heron Marine last year for violating tax rules of the Customs and Excise Act.

While bunkering services have halted at the bay since the detention and caused a R7 billion loss to the fiscus, the South African Maritime Safety Authority (Samsa) recently said it is open to reopening bunkering services. Transnet National Ports Authority (TNPA) is also open to issuing new licences for operators.

Prevailing 'uncertainty'

At a recent [briefing](#) hosted by Samsa, SARS chief litigation officer Wayne Broughton said it was willing to engage with maritime stakeholders to amend the provisions of the act to "provide certainty and clarity" related offshore bunkering tax rules.

This includes providing licensing and monitoring of barges (vessels used to store and transport fuel), vessels for controlled storage areas, special sea-based storage warehouses, and the use of marine removers of fuel-levy goods.

Broughton said the deadline for public comments on the amendments had been postponed to 10 May, after it previously closed in January this year.

The comments by Broughton came after the Eastern Cape High Court acknowledged the "uncertainty" around bunkering tax laws in March this year in a novel case that utilised tankers as floating storage facilities for fuel stocks. These were sold to foreign-going vessels and supplied through ship-to-ship transfers within ports.

READ | [Fears about fuel crunch after SARS impounds ships](#)

In an urgent application to the court, Heron Marine had applied for an amendment of SARS's detention notice and the release of their three vessels, *MT Avatar*, *MT Vemadignity*, and the *MT Vemaharmony*.

[According to the judgment](#), the bunkering service company failed to register its bunkering operations in Algoa with SARS for two years since it began bunkering in the region in 2020.

While the court dismissed the application as moot, Judge Denzil Potgieter said:

There does appear to be some uncertainty concerning the regulation of the specific bunkering operations conducted by [Heron Marine]. There is a lacuna [meaning gap] in the act, which also appears in the rules, in that neither covers the type of operations conducted by the applications.

Potgieter said while the amendments had been agreed upon in 2014, it had yet to be introduced formally.

"Suffice to say that this unwholesome situation would in all likelihood have been averted if the applicants had approached SARS for clarity and guidance prior to and not two years after the commencement of the bunkering operations," the court noted, however.

Potgieter also said there had been an immense economic loss while the vessels were detained and interrupted.

"The estimated loss presently suffered while the [bunkering] operations are interrupted is stated to amount to approximately R300 million per month. SARS has estimated that the loss of revenue to the fiscus amounts to R7 billion."

News24 [previously reported](#) that, since 2021, nearly 6 200 vessels had visited Algoa to refuel their ships. Some 2 million metric tonnes of fuel are sold in the region each year.

Will bunkering continue?

According to Samsa, the resumption of bunkering operations is on track, with applications from Samsa and TNPA open for safety permits and licences. However, interested parties would need to ensure they comply with tax rules.

Samsa CEO Tau Morwe said: "We remind applicants that we are not the only regulator [...] They need to make sure that they are compliant with SARS. If that is in place, nothing prevents applicants or operators from conducting their operations. That is the status [of operations]."

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In February, Samsa [notified](#) all shipping agents and port authorities that applications for permits were open and said it would process applications without delay.

As the marine authority, Samsa is responsible for issuing permits for offshore bunkering operations outside of port limits and ensuring bunkering operators meet safety standards to prevent pollution.

TNPA executive manager for legal and compliance, Justin Uren, said the ports authority was processing pending and new applications for bunkering operations.

All operators and bunker barges must have a licence from the ports authority for bunkering activities inside of port limits.

This is after a moratorium was placed on all new licences from TNPA pending the findings of an [environmental risk assessment](#) released in November last year.

The risk assessment aimed to investigate whether the refuelling will adversely impact the African penguin population on the St Croix Island. The region has had four oil spills related to bunkering since 2016, with three leading to the oiling of birds.

The deadline for public comments on the assessment was 22 January this year.

READ | [African penguin under threat due to ship-to-ship refuelling in Algoa Bay, warn conservationists](#)

Speaking about the risk assessment, Uren said TNPA would continue to engage with new operators and stakeholders to mitigate the environmental impact of ship-to-ship refuelling.

However, it is unknown whether the moratorium was lifted.

Maritime Business Chamber executive chairperson Unathi Sonti, meanwhile, is doubtful whether bunkering operations will continue with legislation still being finalised by SARS.

Sonti said that with no operations taking place since the detention of vessels last year, there is still confusion about how authorities will monitor it.

He said:

The main problem is that offshore bunkering is not [officially] recognised by SARS. Even if they bring in new players and the licensing and permit applications are successful, if the operator does not meet SARS's requirements, they cannot operate.

Sonti also warned that authorising new bunkering operators would be difficult, with the country facing huge "reputational damage" since the SARS crackdown.

He said the country also missed opportunities to exploit the shipping crisis caused by the ongoing conflict in the Red Sea and the recent drought in the Panama Canal, with larger vessels being forced to travel along the Cape of Good Hope.

The number of ships passing the Cape of Good Hope has nearly [doubled](#), from 3 815 in 2023 to 7 078 this year. By comparison, the country's busiest port in Durban had fewer ships dock there during the same period, according to the [Outlier](#).

Meanwhile, according to [Bloomberg](#), bunker stops at Walvis Bay in Namibia and Port Louis in Mauritius have become increasingly popular for vessels amid the conflict.

Speaking about when there will be certainty for bunkering rules, Sonti said that SARS was only likely to finalise tax rules within four to five months.

Docking in Durban

Durban's port has not experienced an increase in arrivals despite the ongoing crisis in the

Ships per month



Source: **Transnet National Ports Authority Cargo statistics** (monthly)

(Supplied/The Outlier)

Supplied

**Heron Marine and SARS did not comment on questions received by News24.*

**News24 did send questions to TNPA regarding the environmental risk assessment and the moratorium placed on new licences. Their comments will be added once received.*



Annexure 2

**MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA**

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Ref: EDMS MCE245325

Ms Nina Braude
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Dear Ms Braude

LEGAL INTERVENTIONS TO PREVENT FURTHER DECLINE IN AFRICAN PENGUIN NUMBERS IN ALGOA BAY IN LIGHT OF RECOMMENCEMENT OF OFFSHORE BUNKERING AND SHIP-TO-SHIP TRANSFER

I refer to your letter of 16 May 2024.

In your correspondence, you requested information regarding the involvement of the Department of Forestry, Fisheries and the Environment (DFFE) in Transnet National Ports Authority's (TNPA) Environmental Risk Assessment (ERA) process; details on the DFFE's engagements with the South African Maritime Authority (SAMSA); and the steps to be taken by the DFFE to regulate the environmental impacts of bunkering and ship-to-ship transfer (collectively STS bunkering).

In respect of the ERA, this was commissioned by TNPA and the DFFE was a commenting authority in this process. The DFFE provided its comments on numerous occasions. Insofar as you seek clarification that the "risk assessment" to which I referred to in my previous correspondence was the TNPA ERA, I can confirm that this is the case.

The DFFE attended the SAMSA hosted offshore regulators meeting on 21 February 2024. The purpose of this meeting was to engage authorities following its announcement that the SAMSA Board had decided to lift the moratorium and to process applications in terms of section 21(1)(b) of the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No 6 of 1981) pertaining to offshore operations in Algoa Bay and other potential areas. The final ERA Report was thereafter made available to the DFFE on 11 April 2024.

The DFFE will further engage on the bunkering related issue with TNPA and SAMSA. It should, however, be noted that offshore bunkering operations are currently suspended pending investigations



The processing of personal information by the Department of Forestry, Fisheries and the Environment is done lawfully and not excessive to the purpose of processing in compliance with the POPI Act, any codes of conduct issued by the Information Regulator in terms of the POPI Act and / or relevant legislation providing appropriate security safeguards for the processing of personal information of others.

LEGAL INTERVENTIONS TO PREVENT FURTHER DECLINE IN AFRICAN PENGUIN NUMBERS IN ALGOA BAY IN LIGHT OF RECOMMENCEMENT OF OFFSHORE BUNKERING AND SHIP-TO-SHIP TRANSFER

by the South African Revenue Services (SARS).

As a result of the removal of the environmental aspects from SAMSA's Code of Good Practice, the DFFE is in the process of developing regulations to address the environmental impacts of bunkering which the DFFE intends, in due course, to publish for public comment under the National Environmental Management: Integrated Coastal Management Act, 2008. This decision to develop regulations would have been communicated to stakeholders at the Offshore Environmental Working Group and the Offshore Operators Stakeholders Forum meetings scheduled for March 2024. However, as you are aware, these meetings were cancelled. The listing of bunkering and ship-to-ship transfer as an activity under section 24(2) of the National Environmental Management Act, 1998, is still under consideration.

We look forward to your input on the Draft Regulations once published for public comment.

Yours sincerely



MS B D CREECY, MP
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 15/6/2024