

14 November 2024

TO: Minister of Forestry, Fisheries and the Environment

Honourable Dion George

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COPY TO: Minister of Transport

Honourable Barbara Creecy

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FROM: BIODIVERSITY LAW CENTRE

kate@biodiversitylaw.org

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Total pages: 5 [37 including annexures]

Our ref: BLC/Penguins1/011

Your ref: MCE 222068;
MCE231641; MCE245325

Dear Minister George

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

DIRECTORS
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Reg No. 2021/631341/08
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1. We refer to our correspondence dated 16 May 2024, and the response received from your office dated 18 June 2024 (**Response**). We attach both letters for ease of reference as “**Annexure 1**” and “**Annexure 2**” respectively.
2. In our letter, we set out some of the history of our engagements with your office, the Transnet National Ports Authority (**TNPA**) and the South African Maritime Safety Authority (**SAMSA**) in relation to offshore bunkering and ship-to-ship fuel transfer (referred to here as “**STS Bunkering**”). In doing so:
 - 2.1. We referred to previous correspondence concerning the absence of proper regulation of STS Bunkering which has been acknowledged, from its inception in 2016, as having significant environmental impacts in terms of oil and other contaminants, and since at least 2022¹ as having significant impacts on noise pollution in Algoa Bay with consequent negative impacts on the African Penguin breeding colonies within this sensitive environment.
 - 2.2. We also referred to developments during the period February to April 2024 which indicated that SAMSA (and TNPA) appear to have lifted the moratorium on the issuance of new STS Bunkering operator licences. In this regard, we noted that the moratorium had been imposed in April 2019 due to environmental concerns and that pre-conditions for it being lifted were (a) completion of an environmental risk assessment (**ERA**); and (b) publication of codes of practice by SAMSA. We noted that neither the TNPA’s STS Bunkering ERA, nor SAMSA’s codes of practice had been finalised, which meant the pre-conditions for lifting the moratorium had not been met at the time of SAMSA’s announcement.
 - 2.3. We referred to the specific obligations placed on your office under domestic and international law regarding the protection of threatened species, which include the African Penguin.
 - 2.4. Finally, we called upon the incumbent of your office to engage with the Minister of Transport to ensure that STS Bunkering did not breach the State’s constitutional and international obligations regarding environmental protection, the prevention of pollution and environmental degradation, and ecologically sustainable development and use of natural resources.

Potential interventions and remedies discussed to date

3. To date, we have called upon your office to employ the following regulatory tools to address the environmental risks posed by STS Bunkering:
 - 3.1. listing 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**);
 - 3.2. issuing a coastal protection notice in terms of section 59 of the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (**NEM:ICMA**),

¹ Pichegru *et al.*

- alternatively, listing STS Bunkering as a prohibited activity in terms of section 57(2) of the National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**) with particular regard to the risks to the endangered African Penguin breeding colonies of St Croix and Bird Islands as well as the sensitivity of the Algoa Bay ecosystem;
- 3.3. co-operating with SAMSA and TNPA to ensure that:
- 3.3.1. TNPA's environmental risk assessment (**ERA**) into STS Bunkering which was conducted during 2023 is robust, publicly available and results in meaningful management outcomes; and
- 3.3.2. SAMSA's STS Bunkering Codes of Practice appropriately include environmental checks, requirements for environmental monitoring, mitigation measures and reflected best international practice in respect of maritime regulation.
4. Your office has also mooted the options of conducting a strategic environment assessment (**SEA**) for purposes of STS Bunkering site selection and the development of norms and standards applicable to STS Bunkering. Moreover, the Response indicated that:
- 4.1. the TNPA ERA had been finalised and made available to the DFFE on 11 April 2024;
- 4.2. the DFFE would engage further with TNPA and SAMSA in relation to STS Bunkering; and
- 4.3. the DFFE is developing regulations under NEM:ICMA to address the environmental impacts of STS Bunkering.
5. To date, while noise pollution generated as a consequence of STS Bunkering has been raised as an important environmental issue, there has been no specific attention paid to the proper regulation of marine noise pollution. We draw your attention to the significant regulatory gaps pertaining to marine noise pollution – one of the key consequences of increased use of the maritime zone highlighted by the issues relating to STS Bunkering – and an area requiring your urgent intervention.
6. We note further, that subsequent to our previous exchange of correspondence:
- 6.1. On 1 October 2024, we addressed correspondence to the office of the Minister of Transport, in which you were copied, addressing various concerns pertaining to STS Bunkering. Our correspondence, *inter alia*, called upon the Honourable Minister of Transport to engage with yourself and the DFFE to ensure proper environmental regulation, assessments and protections were pursued in relation to all maritime activities – including STS Bunkering and the related activities of port and maritime industry expansion.
- 6.2. A copy of the final TNPA ERA was obtained in early October 2024 pursuant to a request by a member of the Offshore Environmental Working Group to SAMSA under the Promotion of Access to Information Act, 2 of 2000. We draw your attention to the summary findings which, *inter alia*, recommend discontinuing STS Bunkering at Anchorage 2 due to the impact of underwater noise on the African Penguin population of St Croix Islands; a general speed limitation for vessels entering and leaving Algoa Bay

and a host of critical measures to ensure the adequacy of safety and emergency response. We note that the TNPA ERA has, to date, not been formally circulated to interested and affected parties.

6.3. On 28 October 2024, the conservation status of the African Penguin was uplisted from Endangered to Critically Endangered by the International Union for the Conservation of Nature.

Request for Confirmation

7. We now request an update regarding the above and would appreciate specific confirmation of the following:
 - 7.1. What engagements the DFFE has had with TNPA and SAMSA regarding STS Bunkering during the course of 2024;
 - 7.2. Whether the DFFE will encourage TNPA to formally publish the ERA and ensure it is circulated to all interested and affected parties as required by the constitutional principles of accountability and transparency as well as the environmental management principles relevant to all environmental decision-making which are articulated in section 2 of NEMA (and if not, why not);
 - 7.3. The reasons for addressing environmental impacts of STS Bunkering by means of regulations under NEM:ICMA;
 - 7.4. What progress has been made towards developing regulations under NEM:ICMA and the timing of publication of such regulations for comment;
 - 7.5. Whether the DFFE is still considering the possibility of listing STS Bunkering as an activity requiring environmental authorisation in terms of the EIA Regulations, 2014, and NEMA (and if not, the reasons for excluding this possibility);
 - 7.6. Whether the DFFE is still considering the possibility of conducting a SEA for purposes of STS Bunkering site selection (and if not, the reasons for excluding this possibility);
 - 7.7. Whether your office is considering the issuance of a coastal protection notices in terms of section 59 of NEM:ICMA (and if not, the reasons for excluding this possibility);
 - 7.8. Whether the DFFE is considering the issuance of a notice in terms of section 57(2) to declare STS Bunkering a prohibited activity in light of the endangered status of the African Penguin and Algoa Bay's sensitive ecosystem (and if not, the reasons for excluding this possibility); and
 - 7.9. What steps your office and the DFFE are taking to regulate the harmful impacts of noise pollution of the marine and coastal environment.

Co-operation required to realise State's international and constitutional obligations

8. Finally, we call upon you to engage with the Minister of Transport, TNPA and SAMSA in line with the principles of co-operative governance to address the environmental impacts associated, not only with STS Bunkering, but with maritime transport and protection of our marine and coastal zones more generally.
9. In this regard, we note that the assignment of the suite of legislation giving effect to the various conventions pertaining to maritime activity issued by the International Maritime Organisation is assigned by domestic legislation to the Transport Portfolio. In this regard, the Transport cluster (including TNPA and SAMSA) has certain overlapping competences with your own portfolio and the work of your Department in ensuring protection of the maritime and coastal environment.
10. Moreover, the obligations to address climate mitigation and adaption measures under the United Nations Climate Change Convention and Climate Change Act, 22 of 2024 as well as pursuant to the United Nations Law of the Sea² must inform the manner in which both the Forestry, Fisheries and Environment portfolio and its Transport counterpart address matters such as securing ecologically sustainable development and use of the coastal and maritime zones and the constitutional obligations placed on your departments to prevent pollution of our seas and coasts, degradation of our marine and coastal ecosystems, to promote conservation of our marine environment as a whole – and to ensure the protection of our marine and coastal environment for the benefit of present and future generations.
11. We trust that you will engage with our queries in paragraph 7 above as a matter of urgency, noting the actions of SAMSA and TNPA which appear to contemplate recommencement of STS Bunkering.
12. We look forward to your response and to engaging constructively with you further in ensuring our marine and coastal environment is protected.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC

Per Nina Braude

² See in particular, International Tribunal for the Law of the Sea, *Advisory Opinion on Request submitted to the Tribunal by the Commission of Small Island States on Climate Change and International Law* (Case No. 31), 21 May 2024, available online <https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf> accessed 7 August 2024.

Date: 16 May 2024

TO: Minister of Forestry, Fisheries and the Environment

Honourable Barbara Creecy

Minister@dffe.gov.za

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AND TO: Deputy Director-General: Regulatory Compliance and Sector Monitoring

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c/o Captain Thulani Dibeko and
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COPY TO: South African Maritime Safety Authority

c/o Chief Executive Officer

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Total pages: 5 [30 including annexures]

Our ref: BLC/Penguins1/010

Your ref: MCE 222068;
MCE231641

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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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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



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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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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



NINA BRAUDE | ATTORNEY

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

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

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<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

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From: Nina Braude <nina@biodiversitylaw.org>

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

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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@nemai.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

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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



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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**

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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

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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

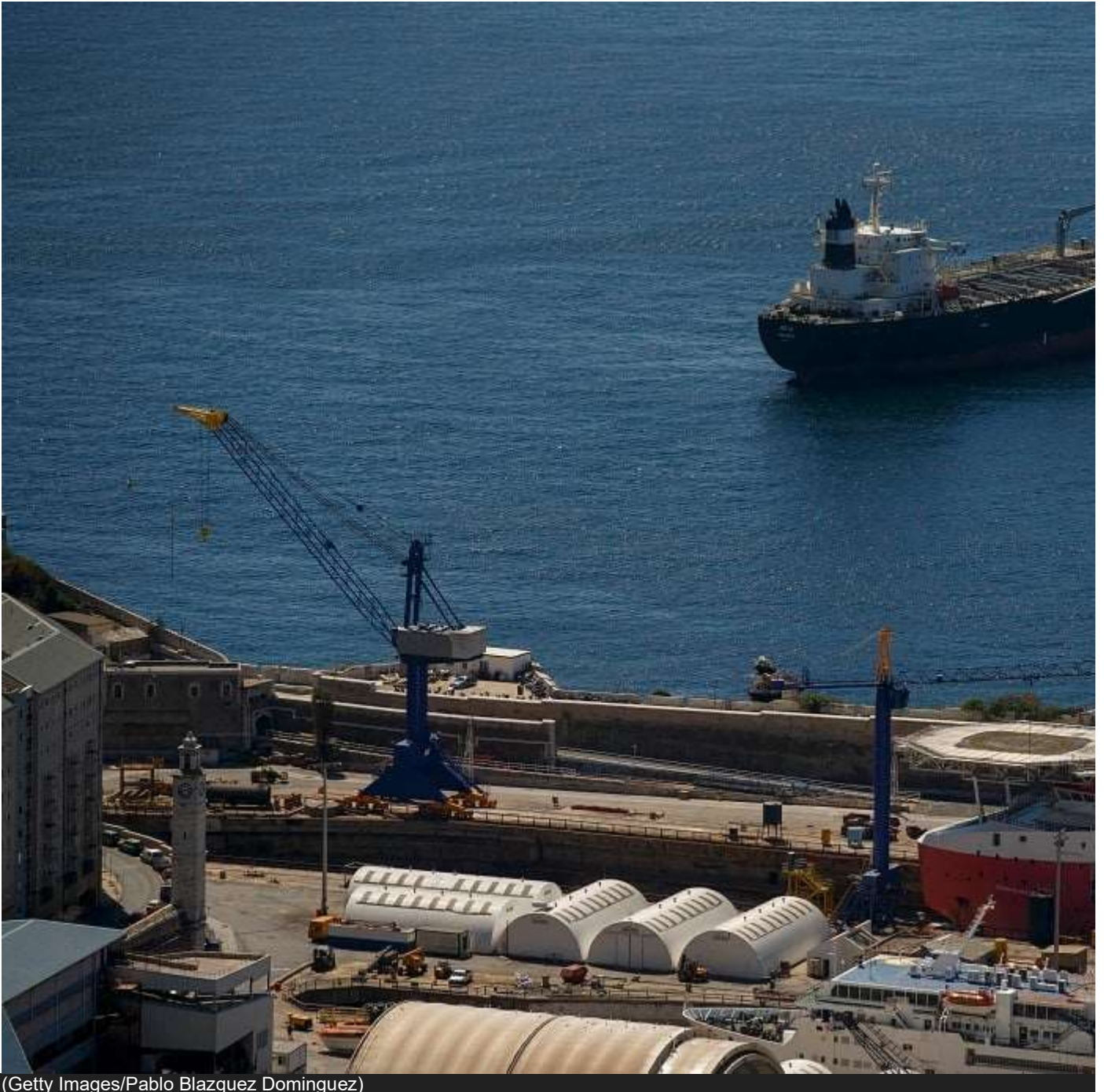
Per Kate Handley and Nina Braude

<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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7708

Email: nina@biodiversitylaw.org

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



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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