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29 November 2024

TO: **Select Committee on Public Infrastructure & Minister in the Presidency, NCOP**
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Total pages: 18

Our ref: BLC/Comments/OPRC Bill

Dear Honourable Members

RE: Submissions regarding Marine Oil Pollution (Preparedness, Response and Cooperation) Bill [B10B-2022]

INTRODUCTION

1. These submissions are made by the Biodiversity Law Centre (**BLC**), SANCCOB BirdLife South Africa (**BLSA**), The Green Connection and Natural Justice in response to the call for comment by the Select Committee on Public Infrastructure and Minister in the Presidency (**Select Committee**) regarding the Marine Oil Pollution (Preparedness, Response and Cooperation) Bill [B10B-2022] (**Bill**).

The organisations

2. The 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 while our mission is to use the law to protect, restore and preserve indigenous ecosystems and species in the region.

2.1. We have a particular interest in the protection of marine biodiversity and ensuring that all social and economic development (including those in the maritime sector) are conducted in a manner which gives proper effect to everyone's right to an environment which does not harm health and wellbeing and everyone's right to have the environment protected for the benefit of present and future generations.

2.2. We have recently alerted the Select Committee to issues pertaining to the proper regulation of offshore ship-to-ship bunkering and fuel transfer (**STS Bunkering**). These are concerns that the BLC has addressed since its inception – with particular

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focus on the sensitive Algoa Bay ecosystem and presence of the critically endangered African Penguin.

2.3. As part of our mandate, we have an interest in ensuring that South Africa adheres to best international practice and all international obligations – including in relation to treaties concluded under the auspices of the International Maritime Organisation (**IMO**) as well as the United Nations Convention on the Law of the Sea (**UNCLOS**), Convention on Biological Diversity (**CBD**) and United Nations Convention on Climate Change (**UNFCC**).

3. 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.

3.1. SANCCOB has responded to every oil spill affecting seabirds along the South African coastline since 1968, and is the mandated organisation to respond to oiled seabirds as per the National Oil Spill Contingency Plan.

3.2. Moreover, SANCCOB is a member of both the Offshore Environmental Working Group (**OEWG**) and Offshore Operators Stakeholders Forum (**OOSF**).

3.3. In addition, SANCCOB has previously engaged with the Transport Portfolio Committee in relation to adoption of the Marine Pollution (Prevention of Pollution from Ships) Amendment Bill [B5-2022] (since passed by the National Assembly on 7 March 2023 and National Council of Provinces on 16 May 2024, and currently before the President, awaiting assent). It has also appeared before the Transport Portfolio Committee in relation to the previous draft of the Bill currently under consideration.

4. 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.

4.1. BLSA has been engaging with the DFFE, TNPA and SAMSA in relation to STS Bunkering in Algoa Bay since at least 2021.

4.2. BLSA is a member of both the Offshore Environmental Working Group (**OEWG**) and Offshore Operators Stakeholders Forum (**OOSF**).

4.3. 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.

5. The Green Connection is a non-profit company, that believes that economic growth and development, improvement of socio-economic status and conservation of natural resources can occur only in a commonly understood framework of sustainable development. It aims to provide practical support to both the government and non-governmental / civil society sectors which are an integral part of sustainable development.

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5.1. The Green Connection works extensively with coastal communities across South Africa to ensure the protection of the ocean and aims to empower local communities to use their tools and knowledge for sustainability. Its work is focused on ensuring that communities are able to engage with decision-makers for the protection of our oceans for all South Africans.

6. Natural Justice is a non-profit organisation, registered in South Africa in 2007. Its goal is to protect biodiversity and to ensure its sustainable use by empowering local communities and indigenous peoples to make their own decisions.

6.1. The organisation aims make it easier for Indigenous peoples and local communities to participate fully and effectively in the formulation and application of laws and policies pertaining to the preservation and traditional uses of biodiversity as well as the protection of related cultural assets.

6.2. Natural Justice works at the local, national, regional, and international levels with a wide range of partners. In addition to making sure that advancements made in international fora are upheld at lower levels, Natural Justice works to ensure that community rights and duties are reflected and upheld on a larger scale.

Focus of submissions and further engagement

7. It is with our focus on marine biodiversity, endangered seabirds, ecological carrying capacity of our coasts and ocean spaces, international obligations and obligations under section 24 of the Constitution that we provide our submissions below. Moreover, we have had particular regard to the importance of ensuring biodiversity mainstreaming across all sectors as envisaged by the White Paper on Sustainable Use and Conservation of Biodiversity – while also noting the importance of ensuring integration between the marine and maritime pollution legislation within the transport portfolio with the overarching environmental framework legislated under the National Environmental Management Act, 107 of 1998 (**NEMA**).

8. We welcome the opportunity to engage further with the Select Committee on these important issues and in respect of ensuring that all laws within its portfolio withstand Constitutional scrutiny.

GENERAL SUBMISSIONS

9. Support for domestication:

9.1. We support the long-overdue domestication of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (**OPRC**) and the express domestication of OPRC through clause 3. In this regard, we encourage the Select Committee to drive the process to conclusion expeditiously.

9.2. We, further encourage the Select Committee to continue monitoring the process through presidential signature to implementation – in particular by ensuring that the Minister of Transport (**Minister**) promulgates the necessary regulations without delay and by exercising oversight over responsible entities within the Transport cluster, including the South African Maritime Safety Authority (**SAMSA**). For the envisioned legislation to be effective, it is critical that the Minister ensures that all necessary clarity is provided, consonant with international standards and best practice. Moreover, it is key that SAMSA is empowered, capacitated, properly funded and accountable in the

exercise of its mandate. Certainty and capacity in relation to oil response is fundamental if South Africa is to justify maritime development while securing the ecologically sustainable development and use of its marine and coastal environment.

10. Objectives should state that the Bill gives effect to environmental rights and obligations under UNCLOS

10.1. We note that the objectives set out in clause 2 of the Bill are closely aligned to those of the OPRC. However, we submit that the objectives may be clarified in two respects.

10.2. First, it is appropriate for the Bill's objectives to reflect its relationship with the rights in section 24 of the Constitution – in particular section 24(b) providing that "*everyone has the right to have the environment protected through reasonable legislative and other measures".* We submit that the Bill is such reasonable legislation and this should be clearly expressed in clause 2.

10.3. Second, we note that the recitals of OPRC expressly refer to Part XII of the United Nations Convention on the Law of the Sea which addresses "Protection and Preservation of the Marine Environment". In this regard, we submit that the Bill's objectives clause should make express reference to these obligations which have binding effect on South Africa separate to the obligations under OPRC.[1] We refer in particular to the importance of decision-making based on the standard of "due diligence" and best available science.[2] Providing this clarity would assist in integrating the Bill effectively into South Africa's existing international and domestic framework for prevention and control of marine pollution.

11. Application of environmental principles should be express

11.1. The Bill concerns environmental management decision-making. As such, it is subject to the environmental management principles set out in section 2 of NEMA which "*apply throughout the Republic to the actions of all organs of state that may significantly affect the environment…*".[3] We submit that it would be consistent with principle of legislative clarity as well as the obligation on all branches of government to respect, protect, promote and fulfil the rights in the Bill of Rights,[4] for the Bill to expressly indicate that section 2 of NEMA applies to decisions made in terms of the Bill.

11.2. This approach remains consistent with the language of the OPRC which requires integration of the relevant systems and processes into national law. Moreover, the environmental management principles are consistent with the underlying principles of OPRC including the principle of prevention and the "polluter pays" principle.[5]

12. Consistency of language with NEMA and specific environmental management acts

12.1. The Bill concerns decision-making, obligations and conduct which affects South Africa's marine environment as well as its coastline and biodiversity. These are areas of environmental management (and pollution management) that involve a large number of government agencies as well as private actors. These stakeholders are

[1] See OPRC, art 11.
[2] See confirmation of applicability of these principles under UNCLOS in the Advisory Opinion on Climate Change issued by the International Tribunal for the Law of the Sea on 21 May 2024 (C31)
[3] NEMA, s 2(1).
[4] Constitution, s 7(2).
[5] OPRC, Recitals.

not only bound by legislation falling within the Transport portfolio, but also by NEMA and the specific environmental management acts (**SEMAs**). To avoid confusion and assist all stakeholders, as well as supporting principles of co-operative governance, we would recommend aligning key terms with defined terms and use of language with important overlapping legislation concerned with environmental matters.[6]

12.2. We draw particular attention to:

12.2.1. clause 2(a) which concludes with the phrase "*South African waters, aquatic resources, coastline or related interests"*;

12.2.2. clause 4(1) which concludes with "*South African waters, coastal aquatic resources or coastline"*; and

12.2.3. clause 26(4) which refers to damage or threat of substantial damage to "*the coastline, resource or related interests of the Republic".*

12.3. We submit that the following amendments would ensure alignment with the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (**NEM:ICMA**), National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**) and the Marine Living Resources Act, 18 of 1998 and limit any possible confusion:

12.3.1. both clause 2(1) and 4(1) should be amended to read: "*South Africa's biodiversity and marine living resources, and South Africa's coastal waters and coastal zone as defined in NEM:ICMA"*.

12.3.2. clause 26(4) should be amended to read "*South Africa's biodiversity, marine living resources, the coastal zone or economic interests"*.

12.4. We note that while "South African waters" is defined in the Bill as including internal waters, territorial waters, and the exclusive economic zone, this definition should be broadened to "coastal waters". The purpose would be, first, to align with NEM:ICMA, and second, to extend application of the Bill to the continental shelf. The term "South African waters" as it is used in the Bill should accordingly be replaced by "*coastal waters*".

13. <u>Omission of obligations pertaining to ships flying the South African flag</u>

13.1. Article 3(1)(a) of OPRC requires that "*Each Party shall require that ships entitled to fly its flag have on board a shipboard oil pollution emergency plan…"*. However, the application of the Bill to South African ships is not clear (despite this being the effect of incorporation of OPRC into South African law by virtue of clause 3).

13.2. Accordingly, we submit that it is necessary to incorporate an additional provision in clause 4 ("Application") to provide for the Bill's application to all ships entitled to fly the South African flag.

13.3. In addition, we note that:

[6] In our specific comments, we have also drawn attention to the merits of aligning terminology with that used in the Mineral and Petroleum Resources Development Act, 28 of 2002 and Upstream Petroleum Resources Development Act 23 of 2024.

13.3.1. Clause 5 does not appear to contemplate oil pollution risk assessments to be undertaken by ships and/or shipping companies. Accordingly, we submit that specific provision should be made through insertion of a new clause to provide that all ships flying the South African flag must have an oil pollution contingency plan.

13.3.2. While clause 7(5) refers to "*any new ship or fleet*", this obligation is "hidden" in a provision entitled "*Site-specific pollution contingency plans*" and existing ships are not considered. We submit that this omission should be remedied.

13.3.3. Moreover, addressing the requirement of ships' oil pollution contingency planning is consonant with the risk assessment to be undertaken in clause 8(2) for "*shipping companies*" to take steps to ensure oil pollution readiness.

13.4. Similarly, the obligations on ships flying the South African flag to report oil pollution incidents when outside of South African waters (as contemplated by Article 4(1) of OPRC) is not accounted for in the Bill. We submit that this is a significant omission in terms of ensuring South African registered ships and shipping companies comply with South African environmental standards as well as provisions of international law.

14. Query omission of specific provision / support for research, development and technical co-operation:

14.1. Articles 8 and 9 of the OPRC entail international obligations to co-operate in relation to research and development and in technical matters. These provisions do not appear to have been accounted for in the Bill.

14.2. We submit that it is important to clarify which organ of state is responsible for South Africa's international obligations in relation to research and development on the one hand, and technical assistance on the other. Such clarity is critical to ensure accountability and transparency in this regard – and also for all government and non-state parties engaged in the relevant activities to have a full appreciation of their obligations.

SPECIFIC COMMENTS

15. We address comments pertaining to specific clauses below:

Clause	Comments
Clause 1 "new development"	**Submission** 1) We submit that this definition should be removed. Alternatively, noting the request for clarity posed by public submissions made to the Portfolio Committee on Transport, we suggest the following definition is inserted: "***new development*** *means any alteration, addition or removal made in respect of a new or existing port facility, oil-handling facility or offshore installation".* **Reasons** 2) The definition of "new development" inserted during the last round of public consultation is difficult to understand – particularly as it seems to contemplate something ("*whichever*") that alters the risk of marine oil pollution in a port facility, oil-handling facility or offshore installation. Linguistically, it is difficult to interpret "whichever". 3) The term "*new development*" appears in clauses 5(1) and 5(7) but does little to assist interpretation which is otherwise guided by the plain meaning of a "development" as some change, addition or removal affecting port facilities, oil-handling facilities or offshore installations. Moreover, including the language "*alters the risk of marine oil pollution"* assumes the outcome of a risk assessment triggered by some change to the status quo regarding port facilities, oil-handling facilities or offshore installations.
Clause 1 "offshore installation"	**Submission** 1) To ensure that the definition unequivocally includes tankers and bunker barges, we recommend that a new subparagraph (d) is inserted which reads "*Any installation, mechanism or vessel which is used for transfer or storage of a substance involved in bunkering operations".* 2) In addition we submit that: a) paragraph (a)(ii) should be amended to read "*a research, exploration, prospecting, production or mining platform"* to account for both oil and gas as well as mining activities; b) Paragraph (b) to read "*any research, prospecting, mining, exploration or mining platform used in the prospecting, mining, exploration or production of any substance"*; and c) Paragraph (c) to read "*any research, prospecting, mining, exploration or production vessel used in the prospecting, mining, exploration or production of, any substance"* **Reasons** 3) Our recommendation in (1) will ensure that STS Bunkering is expressly addressed in the legislation. The definition of "offshore installation" gives meaning to a "new development" (also in clause 1). This, in turn triggers the requirement for an oil risk assessment in clause 5(1). Accordingly, the suggested amendment would clarify that any new STS Bunkering barge

	operations would require an oil risk assessment. This is material as each additional and/or new licenced operator introduces a new / different / cumulative risk and warrants such oversight. 4) Our submission in (2) is directed at avoiding confusion and ensuring alignment with the Mineral Resources and Petroleum Act, 28 of 2002 and Upstream Petroleum Resources Development Act, 23 of 2024 as well as the language used in the mineral, petroleum and gas industries.
Clause 5(1) and 5(5)	**Submission** 1) We submit that both the national marine oil pollution risk assessment contemplated in clause 5(1) and the risk assessments to be undertaken by each owner or operator contemplated in clause 5(5) should be undertaken: a) within <u>one</u> year of the legislative commencement date; b) alternatively, the language of clauses 5(1) and 5(5) should be amended to state that such assessments should be "*concluded and the results published within two years*" of the legislative commencement date in order to provide a clear deadline for compliance. **Reasons** 2) There does not appear to be a practical reason to extend the period for the baseline risk assessments beyond this recommended timeframe (which would seem to be a sufficient time for promulgation of the relevant regulations and the relevant tender processes for service providers to be undertaken). Avoidance of delay is particularly important, given the long passage of time since South Africa's ratification of OPRC and the urgent need for domestication (coupled with the lengthy period the Bill has been before Parliament). It should also provide impetus to the Minister to ensure that any necessary regulations are expedited and to ensure that critical gaps in oil pollution regulation are closed. 3) The alternative language in (1)(b) is suggested to ensure completion of both processes, allowing for the time period which may be required for oil modelling as part of the oil risk assessment process (as well as the gazetting of regulations and any tender process which must be undertaken).
Clause 5(7)	**Submission** 1) We submit that the clause should be amended to read "*The owner and operator… must review the approved marine oil pollution risk assessment…. Thereafter at least every five years, <u>and</u> when there is a new development, <u>and</u> upon request by the Authority* ***[,]*** *provide a risk assessment report".* **Reason** 2) As the clause currently reads, there is lack of clarity regarding whether operators / owners must produce risk assessments in the event of new developments. However, this creates legal uncertainty – as well as practically being unworkable (it is not clear how one determines whether a risk assessment is required, without carrying one out). See also our submissions regarding the definition of "new development" above.

	3) In addition, it appears that the requirement to provide a risk assessment report to the Authority should be supplementary to the obligations to carry out the risk assessments. Accordingly, the word "and" should replace "or". Moreover, removal of the comma will clarify the relationship of the phrase "*provide a risk assessment report"* to the rest of the clause (as this is currently unclear).
Clause 5(8)	**Query and Submission** 1) It is not clear to us which activities may have *"no contact with the environment*". In this regard, the final provision in clause 5(8) appears superfluous.
Clause 5(9)	**Submission and reason** 1) We recommend that acceptable methods / protocols for a risk assessment are published by way of gazetted notice and/or regulation at regular intervals and that the Bill includes the obligation for the Minister to publish such methods / protocols. 2) If this is not feasible, we propose that there is a mechanism built into the legislation which ensures that an appropriate method is approved and gazetted prior to risk assessment being undertaken to avoid wasted costs and to provide legal certainty for owners, operators and their consultants.
Clause 5(10)	**Submission and Reasons** 1) We welcome the inclusion of the oil risk assessment as part of the environmental impact assessment (**EIA**) process under NEMA read with the relevant regulations. However, we note that certain activities, particularly ship-to-ship fuel transfer and offshore bunkering, are not currently listed activities under the EIA Listing Notices. 2) We note that the Department's response to public submissions made to the National Assembly indicated that all activities, including ship-to-ship fuel transfer and offshore bunkering, were intended to be included within the scope of clause 5. 3) To the extent feasible, we submit that the Schedule should include the necessary amendments to the EIA Listing Notices. In this regard, we note the urgent need for engagement with the Department of Forestry, Fisheries and the Environment and the Minister of Forestry, Fisheries and the Environment, to ensure that the regulations are amended in advance of commencement of the Bill to ensure that ship-to-ship fuel transfer and offshore bunkering are in fact included in the EIA Listing Notices.[7]
Clause 6	**Submission** 1) We support the requirement for publication of the approved NOSCP in the *Government Gazette*.

[7] We refer to the need to avoid the situation arising in P*harmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000).

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	2) We submit that, given the importance of the NOSCP, the legislation should also require its publication on the website of the Department as well as the website of the Authority. 3) We further submit that clear provision for public participation should be included in relation to regulations regarding the procedures and timeframe for development of the NOSCP and its minimum contents as well as the NOSCP itself. We recommend that guidance may be derived from the relevant processes applicable to EIA. 4) In addition, we note that no provision is made for submission of the NOSCP to the IMO as required by Article 6(3)(c) of the OPRC. We submit that the reporting obligations to the IMO under Article 6(3) should be expressly included in the Bill with obligations placed on the Authority to ensure that the relevant information is provided and updated as required. **Reason** 5) It is appropriate to ensure ease of access to the NOSCP given that it is foundational to all risk assessments to be carried out by other stakeholders including by foreign operators / owners. Constitutional principles of transparency, accountability and access to information also support the need for ease of access. 6) Public participation is integral to South Africa's conception of participatory democracy and the principles of environmental decision-making. In the absence of specific public participation procedures set out in the Bill, the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (**PAJA**) apply by default to (a) the prescribing of procedures and timeframe for the development and approval of the NOSCP; and (b) the NOSCP itself. No general provision for public participation appears in relation to regulations in clause 31 and none appears elsewhere in the Bill as a self-standing provision. This leaves room for uncertainty regarding the types of public participation process appropriate for purposes of taking administrative decisions under the Bill and leaves decision-makers vulnerable to constitutional challenge. 7) In addition: a) We note the critical importance of a wide range of stakeholders outside government who play the role of service providers and hold expertise in relation to oil preparedness and response.[8] b) Omission of specific provision for public participation undermines the reasoning presented in clause 2.6 of the Explanatory Memo for the system of contingency planning which contemplates that the NOSCP is *"developed with stakeholder participation*".

[8] See as an indicative reflection of the range of expertise the Stakeholder Engagement Plan included in TNPA's recent Environmental Risk Assessment into *Offshore Bunkering and Ship to Ship Transfer of liquid bulk in the Nelson Mandela Bay Ports* (29 February 2024).

Clause 7(1)	**Submission** 1) We submit that clause 7(1) should be separated into two separate provisions as follows: a) "*All owners or operators of existing port facilities, oil-handling facilities or offshore installations must, within nine months of publication of the NOSCP, develop and maintain site-specific pollution contingency plans for their facilities or installations, which are appropriate to the level and type of risk of marine oil pollution incidents resulting from their activities and such plans must be consistent with the NOSCP.*" b) "*All management authorities or persons otherwise in control of marine protected areas and marine bird and mammal colonies must, within nine months of publication of the NOSCP, develop and maintain site-specific pollution contingency plans which are consistent with the NOSCP.*" **Reason** 2) As currently worded, the obligation placed on persons and/or organisations and/or organs of state responsible for Marine Protected Areas (**MPAs**) or otherwise responsible for management of marine wildlife colonies does not align with the activities and source of risk for these areas (which are not primarily responsible for handling of products / substances likely to cause oil pollution). (We assume that clause 7(1) contemplates Marine Protected Areas within the meaning of section 9(c) of the National Environmental Management: Protected Areas Act, 57 of 2003. It may assist to include this reference as a definition of "marine protected area" in clause 1). 3) It is critical to ensure clarity of language in this provision given the offence created in clause 30(1)(b). We note that this offence applies to organs of state which serve as management authorities of MPAs and/or wildlife colonies including, for example, SANParks, Cape Nature; and KZN Ezemvelo Wildlife.
Clause 7(5)	**Query and Submission** 1) We query whether the deadline for provision of a site-specific pollution contingency plan should be provided *"before operations begin"* or prior to approval of operations. **Reason** 2) The legislative scheme appears to contemplate that all new port facilities, oil facilities and offshore installations require approvals which include an EA. The EIA process requires that an Environmental Management Programme is in place and that risk mitigation measures are contemplated, considered and approved before an EIA is granted. For this reason, it would be sensible for the site-specific pollution contingency plan to be prepared as part of this process and to be considered together with other risk mitigation measures required for purposes of approvals. This, in turn, may alleviate wasted costs for developers in relation to developments which are otherwise ready for operation being delayed by the need for further approvals.

Clause 9(2)(a)-(b)	**Submission** 1) We welcome the inclusion of the requirement for oiled wildlife response training. To clarify the meaning of "colony" in clause 9(2)(a) we recommend that the clause is amended to read "*wildlife colony*". 2) We further recommend that specific provision is made in the NOSCP for funding of non-government organisations responsible for such training (if contemplated) and that clause 31 is amended to contemplate the passing of appropriate regulations to enable such funding. **Reason** 3) The word "colony" is not defined elsewhere. 4) The costs carried by non-governmental organisations (**NGOs**) in relation to skill-development and responsibility ought to be expressly contemplated given that, in practice, these NGOs are the relevant service providers.
Clause 10 and clause 11	**Submission** 1) Given the applicability of the Bill to a South African naval base (as contemplated in clause 4(4)), we submit that it is important for the Authority to ensure appointment of an Incident Commander able to address incidents within the jurisdiction of the navy. Moreover, it is important that a naval representative should be included in the Incident Management Organisation as contemplated in clause 11(2). 2) We note that 11(3) contemplates that representatives of various sectors "may" be invited to be members of the Incident Management Authority. We submit that this provision should be amended to state that such representatives "*must"* be invited. 3) In respect of clause 11(11) we recommend clarifying who must sign the multi-party memorandum of cooperation i.e. whether only representatives on the Incident Management Organisation or which other stakeholders. **Reasons** 4) Our recommendation in (1) above is made with regard to the jurisdictional and security considerations pertaining to naval bases – and particularly given the proximity of the Simon's Town naval base to the Simon's Town African Penguin colony and Marine Protected Area as well as the general sensitivity of the False Bay environment. Further, we note the potential capacity support provided by the navy where large-scale incidents occur along the South African coast. It appears most appropriate to specify the appointment of a naval representative in clause 11(2) dealing with government representatives, rather than clause 11(3) concerning non-government / private stakeholders. 5) Our recommendation regarding clause 11(3) in (2) above reflects the *de facto* position in relation to the expertise provided by NGO and private parties as well the necessity for information sharing and co-ordination with industry bodies.

Clause 12(1)	**Submission** 1) It is not clear why approval of Cabinet is required for the provision of advisory services, technical support and equipment to a neighbouring country with which South Africa has already concluded a regional agreement. We submit that the requirement of Cabinet approval is superfluous and should be removed. **Reasons** 2) While the Explanatory Memorandum indicates that Clause 12 is intended to give effect to Article 10 of the OPRC, it is also necessary that clause 12 is aligned with Articles 6 and 7 and that it in fact allows for expeditious sharing of resources and regional cooperation in the case of emergency. 3) Article 6(2)(d) of the OPRC provides that "*each Party, within its capabilities either individually or through bilateral or multilateral co-operation and, as appropriate, in co-operation with the oil and shipping industries, port authorities and other relevant entities, shall establish…a mechanism or arrangement to co-ordinate the response to an oil pollution incident with, if appropriate, the capabilities to mobilize the necessary resources*". 4) Article 7 deals expressly with "International co-operation in pollution response" including agreement, in Article 7(1) to "*co-operate and provide advisory services, technical support and equipment for the purpose of responding to an oil pollution incident, when the severity of such incident so justifies, upon the request of any Party affected or likely to be affected".* Article 7(1) includes the provision that such agreement to co-operate is "*subject to [a party's] capabilities and the availability of relevant resources*". 5) The requirement for Cabinet approval undermines the international commitment made through both OPRC and regional co-operation agreements which require emergency response (see for example Article 12 of the Abidjan Convention and Article 12 of the Nairobi Convention). This is because the nature of incident response requires rapid action – this is unlikely if Cabinet approval is required. 6) Further, the requirement of Cabinet approval seems to contemplate rolling back on international commitments which threatens to undermine the treaty regime to which South Africa has committed. 7) Finally, the effect of clause 12(1) is to provide the conditions applicable to international co-operation in pollution response with "neighbouring countries" (presumably, including Namibia, Mozambique, Madagascar and potentially Angola – all of which have ratified the OPRC). It is inappropriate for clause 12(1) to impose further conditions on co-operation than those provided in Article 7(1) – which is the case if also requiring Cabinet approval. Doing so also creates complications for understanding how the Authority is to give effect to obligations under the Abidjan and Nairobi Conventions insofar as these are applicable.
Clause 13(a)	**Submission** 1) We assume that the relevant provisions of the Marine Pollution (Control and Civil Liability) Act, 6 of 1981 are those in section 3. To the extent that this

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	is the extent of the cross reference, we recommend that this is clarified in the text of clause 13(a). 2) In addition, we note that the definition of an "*oil pollution incident*" (referred to in the heading of clause 13) may fall within the definition of an "*incident*" as contemplated in section 30(1)(a) of NEMA. In this regard, it may be helpful to amend the word "*incidents*" in clause 13(a) to read "*oil pollution incident*". Such an amendment would make the section applicable to oil pollution incidents specifically, and not the broader definition of "*incident"* as contemplated in NEMA. 3) Further, we recommend that the Bill is amended to clarify that the reporting requirement in clause 13(a) is in <u>addition</u> to reporting requirements under NEMA (a step we support, noting the different purpose of each reporting requirement and the need for co-ordination with the DFFE in case of oil pollution incidents and their potential to cause wider impacts, in addition to the contemplation of inter-agency co-operation in the Bill). 4) To ensure co-ordination and clarity, we submit that consideration should be given to amending section 30(1)(c) of NEMA by insertion of the duty to report an oil pollution incident to the principal officer (as defined in the Marine Pollution (Control and Civil Liability) Act, 6 of 1981. Similarly, provision should be made in section 30(2) of NEMA for steps to be taken by the Authority in the event of an oil pollution incident. Such amendments should be referenced in the Schedule of the Bill (Amendment of Laws). 5) Two reporting obligations contemplated in Article 5 of OPRC do not appear to be accounted for in the Bill: a) Clause 13 does not reflect the obligations in Article 5(2) of the OPRC for oil pollution incidents to be reported to the IMO and/or through relevant regional organisations "*when the severity of such oil pollution incident so justifies"*. We submit that clarity is required as to when such reports must be made either in clause 13 or among the steps set out in clause 14. b) Similarly, no provision is made for situations where an oil pollution incident occurs in a neighbouring state and South Africa is affected (and must engage its oil response strategy and, *inter alia,* adhere to its reporting obligations). We submit that this should be addressed by the insertion of appropriate language into clause 13. **Reasons** 6) We acknowledge that different expertise is required for control of different types of "incidents" as defined in NEMA and for the specific consequences of "oil pollution incidents" as contemplated in the Bill and OPRC. We also note that oil pollution incidents may have impacts beyond the expertise of the Authority (particularly in the event of Tier 2 and Tier 3 events). 7) Aligning and coordinating the duty to report in the Bill with the duty to report (and take action) in NEMA will clarify the position for operators / owners and also promote the principles of co-operative governance and co-ordination

	contemplated in international law, the Constitution and inherent in the approach of the Bill. 8) Further, in order to ensure full domestication of OPRC, the Bill should clarify which organ of state is responsible for fulfilling South Africa's international reporting obligations. To the extent that the Authority is a creature of statute and must adhere to such obligations, its duties should be express.
Clause 13(b)	**Submission** 1) We recommend that "*may*" is altered to "*must*" in relation to the Minister's obligation to prescribe additional measures. 2) We further submit that the text should include reference to best international practice. **Reasons** 3) We support provision for the Minister prescribing a threshold warranting response, timeframes, means of communication and incident reporting procedures provided these are determined with proper consultation and with regard to best international practice. 4) We emphasise that it is critical that such requirements are in fact determined through regulation, gazetted, published widely and not restricted to codes of conduct or standard operating procedures. This is essential to ensure legal certainty regarding the status of such requirements; to provide clarity for all stakeholders; and to ensure accountability. Certainty, clarity and accountability are requirements of the rule of law and critical to enabling appropriate oversight of activities which carry inherent pollution and safety risks.
Clause 14(1)-(4)	**Submission** 1) We submit that the introductory sentence of clause 14(2) should be amended to read "*The first action of the Incident Response Team must be to assess the incident for purposes of the Incident Commander designating the incident to a response Tier level as follows….*" 2) We further submit that clause 14(3) should be amended to read "*The Incident Commander must designate the incident to a Tier level within [x hours] of the Authority being notified of an oil pollution incident, provided that the Incident Commander must be prepared to increase the Tier level should the magnitude or severity of an oil pollution incident increase*". **Reasons** 3) We understand the purpose of clause 14 to be to set out the immediate response steps and persons / bodies responsible for them. In this regard, we submit that the language of clause 14(2) and 14(3) could be clarified in terms of the function of the Incident Response Team as opposed to the function of the Incident Commander. 4) The suggested amendments would avoid vagueness and ensure certainty – a requirement of the rule of law. In particular, they are proposed to clarify

	the persons responsible for particular actions and to clarify the circumstances in which preparation for a higher Tier level is required.
Clause 15(1)(f)	**Submission** 1) We recommend amendment of the phrase "*impact of the incident on human-health, the ecology and the economy"* to read "*impact of the incident on human and animal health and wellbeing, biodiversity, the coastal zone* and *economy"*. **Reasons** 2) This amendment would ensure consistency with the language of section 24(a) of the Constitution, NEM:BA, NEM:ICMA and NEMA.
Clause 17	**Submission** 1) We submit that clause 17(1) should be amended to provide for termination of an incident response in the ordinary course on grounds of ecological assessment with further provision for termination due to a cost/benefit analysis as currently contemplated. 2) We submit that provision should be made in clause 17 for the Minister to prescribe, through regulation to be gazetted within a specified period from the legislative commencement date, how: a) the Incident Commander is to determine which organ of state(s) and/or non-state actors are to assume responsibility for follow-up activities; and b) the monitoring and reporting process. **Reasons** 3) Our submission in (1) is made with regard to the unintended consequences of the language of 17(1) read with 17(2) which seems to suggest that cost is the primary determinant of termination of an incident response. We query whether this is appropriate. It would appear that an ecological assessment of the effectiveness of mitigation / remediation should be the primary reason for termination and a transition to follow-up activities as contemplated in clause 17(3). The need for the cost-benefit analysis contemplated in clause 17(1) would seem to be more appropriate where comprehensive "clean up" is no longer feasible (and this consideration may not arise in all situations). 4) Regulation of the procedures relevant to follow-up activities will create legal certainty and provide legal protection for the Incident Commander in terms of following appropriate administrative steps.
Clause 30(1)(b)	**Submission** 1) We understand the offences in this clause to entail a threshold of "non-compliance". In this regard, we welcome the stringent regime applicable to the operator obligations in clause 5 and 7. However, it is not clear whether reference to clause 7(4) means that the Chief Executive Officer of the Authority is guilty of an offence if failing to approve a site-specific pollution contingency plan within 60 days of submission. 2) We note that the implications of the offences contemplated in clause 7(1) to (3); 8(2) and 9(2) are far-reaching and may entail criminal liability for organs

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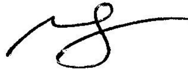
	of state. We regard this as a strong statement of intent and support this approach, however, caution the importance of ensuring that all relevant parties are fully aware of their obligations and consequences for not fulfilling these through clear and consistent communication by the Department and Authority. Moreover, we consider it essential that all regulations contemplated in the Bill are published as a matter of priority on commencement of this legislation and to avoid any lack of clarity regarding obligations – particularly where a high degree of co-ordination is required, *inter alia*, in relation to the various plans contemplated in the Bill.
Clause 30(3) to (5)	**Submission and reasons** 1) We note that clause 30(3) read with clause 30(5) appears to provide for an "admission of guilt fine" to be paid without court oversight. a) In this regard we draw attention to section 57B of the Criminal Procedure Act, 51 of 1977 which provides that statutory offences may be identified as those for which an admission of guilt fine may be paid provided certain elements of the offence are absent, including *inter alia*, that the offence does not contain an element of violence, involve damage to property, involve an element of dishonesty, be an offence against the administration of justice, and/or cause economic loss to another person. The offences contemplated in clause 30(1) do not seem (are not?) aligned with these requirements. b) Moreover, we have concerns regarding the ability of the Authority to oversee such admission of guilt fines without court oversight. This appears contrary to the requirements of section 35 of the Constitution. 2) Moreover, clause 30(4) contemplates a right of appeal to the Minister and refers to a "penalty" being levied in relation to the "offences" in clauses 30(1)(c); (d); (e) and (f). The consequence is to "convert" criminal offences into administrative non-compliance – which is impermissible. This clause should be removed in its entirety: the offences contemplated in clauses 30(1)(c)-(f) are not of the character of administrative decisions. The effect of clause 30(4) is to provide for a "collateral administrative challenge" when a person is charged with an offence. This is wrong in law and entirely unworkable.
Clause 31(a)	**Submissions and reasons** 1) Clause 31(a) should be amended to also refer to the following clauses which contemplate regulation: - Clause 5(6) - Clause 5(11) - Clause 13(b) 2) In addition, to ensure that regulations are in fact gazetted, we submit that the Minister's obligation should be framed in terms of the word "must" not "may".

Clause 33(1)(b)	**Submission** 1) We have concerns regarding the limitation period in relation to offences under the Bill. While we regard the two year period after the offence comes to the complainant's knowledge as reasonable given the nature of the offences, it is not appropriate to limit this period to three years from date of commission. 2) We submit that offences under the Bill should be subject to section 18 of the Criminal Procedure Act, 71 of 1977 (dealing with issues of prescription).

16. We would welcome the opportunity to answer questions regarding our submissions mindful of the wider implications for South Africa's maritime industry and unique coastal and marine environment.

Yours faithfully,



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***Per* Nina Braude**