24 March 2025

TO:	**Directorate: Coastal Pollution Management, Department of Forestry, Fisheries and the Environment** c/o Ms Lona Nondaka	bunkeringregs@dffe.gov.za
FROM:	**BIODIVERSITY LAW CENTRE**	kate@biodiversitylaw.org nina@biodiversitylaw.org
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Dear Ms Nondaka

RE: Consultation on the Draft Regulations for the Environmental Management of Offshore Bunkering | Biodiversity Law Centre Submissions

INTRODUCTION

1. These submissions are made by the Biodiversity Law Centre (**BLC**) in response to the Draft Regulations for the Environmental Management of Offshore Bunkering, issued in terms of the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 (**NEM:ICMA**) under Government Notice 5886 in *Government Gazette* 52151 of 21 February 2025 (**Draft Regulations**).

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 developments (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. The BLC has engaged extensively with the issue of proper regulation of offshore ship-to-ship bunkering and fuel transfer (**STS Bunkering**) since its inception in 2021 – with particular focus on the sensitive Algoa Bay ecosystem and presence of the Critically Endangered African Penguin.

3. 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[1] – 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**).

4. Our submissions have been made with regards to the Environmental Risk Assessment commissioned by Transnet National Ports Authority (**TNPA ERA**); the South African Maritime Authority (**SAMSA**) Ship to Ship Transfer and Bunkering Codes of Practice dated October 2021 (**2021 Codes**); SAMSA's Draft Codes of Practice for both Bunkering and Cargo Transfers issued under MIN 10-22 on 6 September 2022; NEMA; the Environmental Impact Assessment Regulations, 2014 (**EIA Regulations**) together with the relevant Listing Notices;[2] relevant legislation purportedly authorising ship-to-ship bunkering and fuel transfer (**STS Bunkering**) and the International Maritime Organisation's scheme for regulating maritime safety and pollution as domesticated and in relation to bills currently under consideration including the Marine Pollution (Preparedness, Response and Preparation) Bill [B10 of 2022] (**OPRC Bill**) and Merchant Shipping Bill [B12 of 2023] (**Merchant Shipping Bill**).

5. Below, we set out:

5.1. Submissions relating to the Minister's powers and functions and concerns relating to the Minister's decision to issue regulations under NEM:ICMA, rather than co-operating with the Ministry of Transport, Department of Transport (**DoT**) and SAMSA to issue regulations under the Merchant Shipping Act, 57 of 1951 (**Merchant Shipping Act**); Marine Pollution (Prevention of Pollution from Ships) Act, 2 of 1986 (**MARPOL Act**); or with regard to the forthcoming OPRC Bill or Merchant Shipping Bill, and the failure by the Minister to preform functions and exercise powers which are more appropriate in the circumstances under NEM:ICMA as well as those available under NEMA and the National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**);

5.2. General submissions pertaining to the contents of the Draft Regulations; and

5.3. Detailed submissions pertaining to specific Draft Regulations.

A) SUBMISSIONS RELATING TO MINISTER'S POWERS AND FUNCTIONS

6. We welcome the initiative taken by the DFFE and Minister to publish regulations to address the environmental impacts of STS Bunkering. However, we have particular concerns regarding the powers and functions exercised by the Minister in issuing the Draft Regulations which entails the exercise of powers under section 83(1) read with section 85 of NEM:ICMA. We are also concerned that the process followed by the Department of Forestry, Fisheries and the Environment (**DFFE**), together with the transitional provisions set out in Draft Regulations 11 and 9(5) undermines the utility of the Draft Regulations in addressing the immediate threats posed by STS Bunkering to African Penguins in Algoa Bay and which are better managed through (1)

[1] GN3537 in *GG485* of 14 June 2023.
[2] GNR982, GNR983, GNR984 and GNR985 in *GG38282* of 4 December 2014.

issuance of an emergency verbal instruction in terms of section 92 of NEM:ICMA; and (2) gazetting of a notice in terms of section 57(2) of NEM:BA.

Scope of Minister's powers to issue regulations under NEM:ICMA

7. The scope of the Minister's powers and functions under section 83(1) read with section 85 of NEM:ICMA must be determined with reference to the plain language of these provisions in the context of in NEM:ICMA; the broader applicable environmental and maritime legislative context; the constitutional obligations placed on the Minister; and the purpose and scope of the power granted to the Minister to issue regulations under section 83(1) of NEM:ICMA.[3]

8. Section 83(1) provides that the Minister:

> "*may make regulations relating to any matter which this Act requires to be dealt with in regulations or that may be necessary to facilitate the implementation of this Act, including, but not limited to, regulations relating to* [41 contemplated matters listed in section 83(1)(a) to (r)]".

8.1. This means that the Minister may issue regulations in two scenarios:

8.1.1. First, where specific sections of NEM:ICMA require that a matter is dealt with through regulation; and

8.1.2. Second, where regulations are "*necessary to facilitate the implementation of*" NEM:ICMA, including but not limited the 41 matters identified.

8.2. The subject matter of the Draft Regulations is not expressly "required" by any section of NEM:ICMA. Accordingly, the Draft Regulations are only competent if they are "*necessary to facilitate the implementation of*" NEM:ICMA. There are three sets of reasons why this relatively high threshold is likely not met by the Draft Regulations as currently drafted.

8.2.1. First, the subject matter of the Draft Regulations does not appear to reflect the objects of NEM:ICMA. This makes it unlikely that the Draft Regulations meet the threshold of "necessity" for NEM:ICMA's implementation.

8.2.2. Second, the subject matter of the Draft Regulations does not appear consonant with the types of matters which are identified in section 83(1)(a) to (r) and in fact appear precluded by sections 83(1)(f)(xiii) and 83(1)(o).

8.2.3. Third, certain "mischief" which the Draft Regulations seek to address seems better remedied through regulation under provisions of NEM:ICMA designed for this purpose together with functions and powers under other legislation.

9. The Draft Regulations do not appear to reflect the objectives of NEM:ICMA

9.1. The objectives of NEM:ICMA are set out in section 2, namely:

> *"(a) to determine the coastal zone of the Republic;*
> *(b) to provided, within the framework of the National Environmental Management Act, for the co-ordinated an integrated management of the coastal zone by all spheres of government in accordance with the principles of co-operative governance;*
> *(c) to preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations;*
> *(d) to secure equitable access to the opportunities and benefits of coastal public property;*
> *(dA) to provide for the establishment, use and management of the coastal protection zone; and*

[3] *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 74 (CC) para 28.

(e) to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment."

9.2. The overarching purpose expressed by section 2 is to co-ordinate and integrate management of the "coastal zone".

9.2.1. Section 2(b), in particular, makes it clear that such management must be within the NEMA framework, not isolated from it (a matter we address at paragraphs 18-24 and 31 as well as in relation to Draft Regulation 9 below). Moreover, it expressly contemplates that the principles of co-operative governance apply.[4]

9.2.2. The Draft Regulations fall short by failing to indicate where and how co-operative governance is catered for in relation to STS Bunkering regulation. This is particularly apparent when regard is had to the absence of any reference to SAMSA which is the designated "Authority" in respect of international anti-pollution measures and commercial shipping[5] of which bunkering operators and operations are a sub-sector.[6]

9.2.3. Considering the powers and obligations of SAMSA under the Merchant Shipping Act and marine pollution legislation, this is a critical flaw – and likely renders these regulations open to challenge as contrary to the principles of co-operative governance.

9.2.4. This is more so because it is not in fact clear that the Draft Regulations are directed at protecting coastal public property, the coastal protection zone, or the coastal zone i.e. it is unclear whether the Draft Regulations intervene at the level of integrated environmental management of the dynamic coastal environment as a whole. Rather, the contents of the Draft Regulations appear to be lifted from recommendations made in the TNPA ERA without considering the relationship between the harms to species that these recommendations seek to mitigate, and the appropriate legislative basis for ensuring the threats posed by STS Bunkering are avoided or mitigated.

9.3. Because the Draft Regulations are not in fact addressing the objectives of NEM:ICMA, it is difficult to understand how they can be "necessary" to its implementation. It is also difficult to understand how it serves to apply the provisions of NEMA to the specific context of the coastal environment.[7] This is still more problematic when regard is had to Chapter 7 of NEM:ICMA which provides specific powers for the Minister to fulfil the "*duty to avoid causing adverse effects on* [the] *coastal environment*" through the determining that the impact of an activity (such as STS Bunkering) as having and "adverse effect".[8] The Draft Regulations cannot be regarded as "necessary" where these powers appear elsewhere in NEM:ICMA.

[4] See also Long Title and Preamble; Constitution, s 41.
[5] See amongst other shipping legislation Control and Civil Liability Act, s 1 read with s 4; Intervention Act, s 1 read with Schedule 1, particularly Article I(1) and Schedule 2; MARPOL Act, s 1 read with Annexes 1 to VI; Marine Traffic Act, 2 of 1981 s 1; Merchant Shipping Act, s 2 read with s 4. See also OPRC Bill, cl 1 and Merchant Shipping Bill, cl 1.
[6] See Comprehensive Maritime Transport Policy, 2017, p 52.
[7] NEM:ICMA, s 5(1).
[8] NEM:ICMA, s 58(1)(a) read with section 58(2) and section 59.

10. The subject matter of the Draft Regulations as currently drafted does not appear consonant with the matters which may be "necessary" which are identified in section 83(1)(a) to (r)

10.1. While the list of matters in sections 83(1)(a) to (r) does not cover every possible "necessary" regulation that may be issued, it does indicate the range of matters which are contemplated. We draw particular attention to:

10.1.1. section 83(1)(o) which refers to "*the presence and recreational use of vessels on coastal waters*"; and

10.1.2. section 83(1)(f)(xii) which provides that national norms, standards and frameworks may be issued in respect of "*any activity which has an adverse impact on the coastal environment*".

10.2. Both these provisions suggest that the Draft Regulations are not within the scope of the powers to regulate under section 83(1).

10.3. In respect of section 83(1)(o) and reference to "recreational use of vessels", there is no equivalent provision that provides for regulation of the commercial use of vessels in coastal waters.

10.3.1. The principle that "specific inclusion of one implies the exclusion of the other"[9] suggests that the inclusion of reference to recreational or vessels as a matter for regulation implies exclusion of regulation of commercial vessels (including STS Bunkering vessels) from the scope of Ministerial powers under section 83(1).

10.3.2. While not a hard "rule", this principle of interpretation is supported when regard is had to the additional principles of interpretation that (a) words in legislation have a purpose;[10] and (b) Parliament is presumed to know the law.[11] It is not clear that regulation of STS Bunkering as related to commercial vessels is "necessary to facilitate the implementation of" NEM:ICMA.

10.3.3. This is because commercial vessels are regulated under the Merchant Shipping Act and suite of marine pollution legislation (in particular, the MARPOL Act; Control and Civil Liability; and Marine Pollution (Intervention) Act, 64 of 1987). By way of example, the Merchant Shipping Act provides for the Minister of Transport making regulations addressing, *inter alia*, construction and design of vessels and machinery;[12] navigation;[13] ballast;[14] conditions pertaining to installing, working and use of anchors;[15] pre-sea training of seafarers.[16]

10.3.4. We note that the Merchant Shipping Bill, currently before Parliament, expands the range of potential areas of regulation – and we have made specific recommendations in this regard. Moreover, the OPRC Bill (also before Parliament)

[9] *National Director of Public Prosecutions v Mohamed NO* 2003 (4) SA 1 (CC) para 40; *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) para 50.
[10] See *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) para 99.
[11] See *Moodley v Kenmont School* 2020 (1) SA 410 (CC) para 40; *Road Accident Fund v Monjane* 2020 (3) SA 641 (SCA) para 12.
[12] Merchant Shipping Act, s 356(1)(xxv) and (xli).
[13] Merchant Shipping Act, s 356(1)(xxvii).
[14] Merchant Shipping Act, s 356(1)(xxxi).
[15] Merchant Shipping Act, s 356(1)(xxxii).
[16] Merchant Shipping Act, s 356(1)(xxxvii).

specifically contemplates marine oil pollution risk assessments;[17] equipment requirements;[18] training requirements;[19] and reporting duties.[20]

10.3.5. As our comments submitted to Parliament regarding both the Merchant Shipping Bill and OPRC Bill reflect,[21] the existing marine pollution and maritime statutory regime does not necessarily cater for all matters (particularly in relation to noise pollution). However, it is clear that the Draft Regulations likely tranche on the powers of the Minister of Transport in regulating commercial shipping – and certainly do not account for the process of legislative and regulatory reform currently in process through the Transport portfolio. This is contrary to the principles and obligations of co-operative government – but also is at odds with the purpose and objects of NEM:ICMA, which is directed at integrating management of South Africa's coast.

10.4. Section 83(1)(f)(xii) which empowers the Minister to issue norms and standards pertaining to activities with an "adverse impact on the coastal environment" very clearly suggests that the Draft Regulations fall outside the scope of the Minister's powers. When read in the context of NEM:ICMA as a whole, section 83(1)(f)(xii) is only "triggered" if the Minister has in fact determined that STS Bunkering is an activity which has an "adverse impact on the coastal environment". The power to do so lies in section 58(2)(a).

10.4.1. It is only once the Minister has in fact determined that STS Bunkering has an adverse impact on the coastal environment by following the provisions of section 58(2) that he may issue regulations establishing national norms, standards and frameworks "*including systems, guidelines, protocols, procedures, standards and methods"* concerning STS Bunkering in terms of section 83(1)(f)(xiii).

10.4.2. The Minister has not gazetted a notice in terms of section 58(2)(a) which means that the Draft Regulations cannot be norms and standards within the meaning of section 83(1)(f)(xii).

10.4.3. Moreover, insofar as they are intended to be such norms and standards, they have been issued absent the necessary step of the Minister having first determined that STS Bunkering falls within the class activities for which norms and standards may be issued under this section.

11. The subject matter of the Draft Regulations as currently drafted appears to have a "legislative home" in other legislation.

11.1. The Draft Regulations appear to fall into five categories:

11.1.1. General measures which relate to the national coastal environment;[22]

11.1.2. Measures directed at protecting African Penguins in Algoa Bay or other specific species;[23]

[17] OPRC Bill, clause 5.
[18] OPRC Bill, clause 8.
[19] OPRC Bill, clause 9.
[20] OPRC Bill, clause 13.
[21] These are available on request.
[22] Draft Regulations 3(1); 3(2); 3(3)(a)
[23] Draft Regulations 3(3)(b); 3(4); 3(5).

11.1.3. Measures relevant to navigation and/or vessel construction and seafarer training;[24]

11.1.4. Measures pertaining to oil / ballast pollution prevention;[25]

11.1.5. Measures relating to environmental management planning / oil response planning.[26]

11.2. Absent provision for co-operative governance and co-operation between the DFFE, the "Green Scorpions", SAMSA and TNPA in relation to these measures and in the absence of declaring STS Bunkering an activity that adversely affects the environment, it would appear that the regulation of measures directed at protecting species; navigation, vessel construction and seafarer training; oil / ballast pollution prevention; and environmental management / oil response planning properly fall under powers granted to the Minister in NEM:BA or NEMA – or in fact lie within the jurisdiction of the Minister of Transport.

11.3. Below we set out the powers available to the Minister and what we submit are both required and recommended regulatory steps to address both current STS Bunkering operations and prospective STS Bunkering.

Recommended actions to protect African Penguins in Algoa Bay

12. The objects and purpose of NEM:BA are specifically targeted at protecting biodiversity with particular powers granted to the Minister in Chapter 4 in respect of the protection of threatened ecosystems and species.[27] The purpose of Chapter 4 is expressly set out in section 51(a) to (e) as being to:

> "*(a) provide for the protection of ecosystems that are threatened or in need of protection to ensure the maintenance of their ecological integrity;*
> *(b) provide for the protection of species that are threatened or in need of protection to ensure their survival in the wild;*
> *(c) give effect to the Republic's obligations under international agreements regulating international trade in specimens of endangered species;*
> *(d) ensure that the utilisation of biodiversity is managed in an ecologically sustainable way; and*
> *(e) provide for the regulation of threatened or protected indigenous species to ensure that the utilisation of these species is managed in an ecologically sustainable manner."*
>
> (emphasis added)

12.1. The objectives specified in sections 51(a) and (b) are particularly relevant to the contents and apparent objectives of the Draft Regulations as they pertain to the protection of African

[24] Draft Regulation 4; 5; 6; 8.
[25] Draft Regulation 7.
[26] Draft Regulation 9.
[27] Section 2 of NEM:BA provides that the objects of NEM:BA are:
"(a) within the framework of the National Environmental Management Act, to provide for –
(i) the management and conservation of biological diversity within the Republic and of the components of such biological diversity;
(iA) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;
(ii) the use of indigenous biological resources in a sustainable manner;
(iii) the consideration of the well-being of animals in the management, conservation and sustainable use thereof; and
(iii) the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources;
(b) to give effect to ratified international agreements relating to biodiversity which are binding on the Republic;
(c) to provide for co-operative governance in biodiversity management and conservation; and
(d) to provide for a South African National Biodiversity Institute to assist in achieving the objectives of this Act."

Penguins;[28] marine mammals and turtles. This does not mean that regulations cannot be published in terms of section 83(1) of NEM:ICMA that incorporate protections for these species as part of the coastal zone. It does mean, however, that if the objective and purpose of regulations is to regulate STS Bunkering so as to avoid or mitigate negative impacts on African Penguins (and any other species listed as "threatened" or "protected" in terms of section 56(1) of NEM:BA), the more appropriate regulatory route is to restrict STS Bunkering in terms of section 57(2) of NEM:BA which provides:

> "*The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit the carrying out of any activity –*
> *(a) which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and*
> *(b) which is specified in the notice…."*

12.2. The Minister's powers and duties under section 57(2) are supported by the power in section 97(1)(b)(ii) to make regulations relating to the implementation and enforcement of a section 57(2) notice as well as specific powers to issue regulations pertaining to the well-being of animals;[29] and the minimising of a the threat of survival in the wild of a listed threatened species[30] (STS Bunkering posing such a threat to African Penguins).

12.3. As a matter of legal principle, it is more appropriate for the Minister to exercise these specific powers in respect of the purpose to be achieved by the Draft Regulations insofar as it relates to recommendations pertaining to species protections than the general powers under NEM:ICMA.

13. Insofar as the Draft Regulations are amended so that they in fact focus on integrated management of species protections within the context of also ensuring co-operative governance with, *inter alia*, SAMSA and the monitoring and control of vessels engaged in the activity of STS Bunkering, we emphasise that it is incumbent on the Minister to consider whether his constitutional and statutory duties to protect species, including but not limited to the African Penguin, is discharged by issuing regulations under NEM:ICMA.

13.1. There are separate obligations applicable under Chapter 4 of NEM:BA and we submit that the Minister must issue a notice in terms of section 57(2) of NEM:BA which specifies that the carrying out STS Bunkering in Algoa Bay does or may negatively impact on the survival of African Penguins.

13.2. Such notice would trigger the consultation requirements in sections 99 and 100 of NEM:BA which means that this would not be a "quick fix". However, neither is the issuance of the Draft Regulations. In this regard, we refer to our submissions below in relation to the Minister's emergency powers under section 92 of NEM:ICMA.

[28] Draft Regulations 3(3)(b); 3(4); 4; and 5.
[29] NEM:BA, section 97(1)(aA).
[30] NEM:BA, section 97(1)(b)(v).

Regulating navigation, vessel construction and seafarer training and oil / ballast pollution prevention

14. These matters are already provided for in the Merchant Shipping Act with scope for amendment through the Merchant Shipping Bill and OPRC Bill currently progressing through Parliament.

15. It is inappropriate for the DFFE to assume responsibility for regulating these areas in the absence of proper consultation with the Transport cluster so that SAMSA is able to integrate these areas within their existing (and contemplated) operations. As already noted above, this would be contrary to the objective of integrated management required by NEM:ICMA.

16. There is also risk of duplication and contradiction between:

16.1. the specific training contemplated in clause 9 of the OPRC Bill and Draft Regulation 8; and

16.2. the requirements specified in Draft Regulations 4; 5; 6; 7; 9(2)(f), (h), (i), and (j) and the obligations placed on vessel operators and builders, the powers of the Minister of Transport, and procedures and obligations followed by SAMSA in relation to regulation of navigation and ship construction under the Merchant Shipping Act, Maritime Traffic Act, MARPOL Act and the amendments to the shipping legislation contemplated by the Merchant Shipping Bill and OPRC Bill.

17. We have addressed these issues in more detail in our specific submissions below.

Inappropriate approach to environmental management plan

18. The basis for a bunkering operator developing an environmental management plan (**EMP**) as contemplated by Draft Regulation 9(1) is entirely unclear. Importantly, it would seem that contemplation of an EMP is linked to the process of environmental risk assessment set out in Chapter 5 of NEMA. It is certainly entirely consonant with the purpose and objects of Chapter 5 of NEMA[31] as well as the known impacts of STS Bunkering itself to require applicants for STS Bunkering operator licences to apply for environmental authorisation, and to carry out environmental impact assessments.

19. As noted above, NEM:ICMA must be "*interpreted and applied in conjunction with the National Environmental Management Act*".[32] It is thus difficult to understand how and why an EMP is required by Draft Regulation 9(1), when the Minister has not listed STS Bunkering for purposes of environmental authorisation nor taken any other related steps in terms of Chapter 5 of NEMA which provides expressly for integrated environmental management.

20. This is still more puzzling when regard is had to the role and function of oil management plans contemplated under OPRC and the OPRC Bill (which appear to be aligned with procedures and planning undertaken during environmental impact assessment (**EIA**) processes). In this regard, we also draw attention to the incorporation of an underwater noise mitigation and management plan in Draft Regulation 9(2)(g) and the international position which emphasises the need for

[31] NEMA, s 23.
[32] NEM:ICMA, s 5(1).

appropriate environmental assessments to be undertaken to address and abate underwater noise pollution.[33]

21. For these reasons it appears entirely anomalous that the Draft Regulations contemplate an EMP without the Minister listing STS Bunkering for purposes of requiring environmental authorisation in terms of section 24(2)(a)[34] read with section 24(1)[35] of NEMA (and following through by designating an appropriate competent authority in terms of section 24C).

22. The intention to regulate STS Bunkering through regulations issued under NEM:ICMA does not preclude listing STS Bunkering under section 24(2) of NEMA and application of the EIA process. It is clear from the current Listing Notices that the developments in areas defined as the "coastal zone" under NEM:ICMA have been included[36] as have activities in listed ecosystems defined as threatening process in terms of section 53(1) of NEM:BA;[37] development and operation of facilities or infrastructure relating to dangerous goods and processing of petroleum resources.[38]

23. Moreover listing STS Bunkering would be consonant with both historic and future approaches to listing activities:

23.1. Historically, activities were "listed" under section 21 of the Environmental Conservation Act, 73 of 1989 if they were *"activities that will probably have detrimental effect on [the] environment*". Listed activities included construction and extension of storage and handling facilities for hazardous substances.

23.2. Prospectively, it bears consideration that the amendments to the listing notices issued for comment on 4 August 2023,[39] expressly contemplated insertion of the definition of "offshore activities".[40] Insofar as STS Bunkering entails offshore storage and handling of hazardous

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[33] See by way of example CMS Resolution 9.19; CMS Resolution 10.24; CMS Resolution 12.14; CBD Decision VIII/28; CBD Decision XII/23. See also UNEP (2017) *Technical Support Information to the CMS Family Guidelines on Environmental Impact Assessment for Marine Noise-Generating* Activities, UNEP/CMS/COP12/Inf.11/Rev.1 (18 September 2017), available online < https://www.cms.int/sites/default/files/document/cms_cop12_inf.11_rev1_tsi-noise-eias_e.pdf>, Section G "Principles of EIAs"; UNEP (2017) CMS Family Guidelines on Environmental Impact Assessment for Marine Noise-generating Activities (UNEP/CMS/Resolution 12.14/Annex, available online < https://www.cms.int/sites/default/files/document/cms_cop12_res.12.14_annex_marine-noise_e_0.pdf>, in particular section V.

[34] NEMA, s 24(2)(a) reads "*The Minister… may identify activities which may not commence without environmental authorisation from the competent authority…. Provided that where an activity falls under the jurisdiction of another Minister or MEC, a decision in respect of paragraphs (a) to (d) must be taken after consultation with such other Minister or MEC".*

[35] NEMA, s 24(1) reads "*In order to give effect to the general objectives of integrated environmental management laid down in this Chapter, the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority… except in respect of those activities that may commence without having to obtain an environmental authorisation in terms of this Act".*

[36] See Environmental Impact Assessment Regulations Listing Notice 1 of 2014 published under GNR983 in *GG* 38282 of 4 December 2014 (**Listing Notice 1**), Appendix 1, Item 17; 52; 54; 55; 65; Environmental Impact Assessment Regulations Listing Notice 2 of 2014 published under BNR984 in GG38282 of 4 December 2014 (**Listing Notice 2**), Appendix 1, Items 14; 23; 26.

[37] Listing Notice 1, Appendix 1, Item 31.

[38] Listing Notice 1, Appendix 1, Items 4; 5; 7; Listing Notice 3, Appendix 1, Item 10.

[39] GN3773 in *GG* 49081 of 4 August 2023.

[40] Paragraph 3(e) includes the definition of "offshore activities" meaning "*activities as identified in the Environmental Impact Assessment Regulations Listing Notice 1 of 2014, Listing Notice 2 of 2014 or Listing Notice 3 of 2014, published in terms of the Act, which activities are proposed within the exclusive economic zone and continental shelf of the Republic referred to in sections 3, 4, 7 and 8 of the Maritime Zones Act, 1994 (Act No. 15 of 1994)".*

substances, this definition would have the effect of drawing STS Bunkering within the scope of the EIA Regulations.

24. It is thus not only consistent with the integrated environmental management framework in NEMA and NEM:ICMA to list STS Bunkering under section 24(2)(a) of NEMA, but failing to do so would run counter to the obligations and duties imposed on the Minister under Chapter 5 of NEMA to ensure that harm-causing activities are effectively assessed, regulated and managed in an integrated manner. Insofar as NEM:ICMA requires application of NEMA to coastal management and emphasises integrated coastal management, failing to list STS Bunkering also renders regulations such as those contemplated in Draft Regulation 9 without proper legislative foundation.

Recommendations to address STS Bunkering immediately in relation to threats to coastal environment

25. We recognise that there are two sets of regulatory problems to be addressed in relation to STS Bunkering.

25.1. The first is the ongoing threat posed by existing STS Bunkering operations in Algoa Bay.

25.2. The second is the long-term regulation of STS Bunkering both in Algoa Bay and, to the extent that it commences elsewhere, nationally.

26. Even absent the difficulties with the Draft Regulations pointed out in these submissions, the ordinary rule that regulations operate only prospectively means that regulations under NEM:ICMA cannot address the existing threats to marine life in Algoa Bay – nor the specific threat posed by STS Bunkering to St Croix Island's African Penguin population. For the same reasons, listing of STS Bunkering is not an intervention which is capable of halting existing and ongoing harms. We address the recommended approach to future regulation below.

27. To address the ongoing and immediate impact of STS Bunkering we recommend that the Minister engage a series of powers afforded to him through NEM:ICMA and NEM:BA which will enable an approach which is both targeted at immediate and specific threats and provides a sound legislative basis for long-term regulation. Our recommendations entail a number of steps.

28. Step 1: Emergency intervention to prevent continued harms caused by STS Bunkering to St Croix Island's Penguins using section 92 of NEM:ICMA

28.1. Section 92 of NEM:ICMA provides for "Urgent action" by empowering the Minister to issue a verbal directive to a responsible person to stop an activity if that activity poses an "*an immediate risk of serious damage, or potentially significant detriment, to the environment*".[41]

28.2. Section 92, accordingly, empowers the Minister to act in cases where urgent action is required. The known risks posed by STS Bunkering (as well as the known harms already caused), warrant an urgent intervention in relation to STS Bunkering in Algoa Bay in terms of section 92 of NEM:ICMA. This is particularly so, given the apparent imminent

[41] NEM:ICMA, s 92(1)(b).

commencement of STS Bunkering by a new STS Bunkering operator notwithstanding the absence of proper regulation.

29. Step 2: Immediate steps to protect the African Penguins of Algoa Bay from the threat of STS Bunkering through gazetting a notice in terms of section 57(2) of NEM:BA

29.1. The African Penguin is, as the DFFE is well aware, a listed threatened species – and is, internationally, Critically Endangered. It is now well recognised that STS Bunkering has contributed to increased vessel traffic (and thus noise) in Algoa Bay with a material detrimental impact on the population of St Croix Island.[42] The best scientific evidence available, clearly indicates that STS Bunkering is an activity which meets the threshold of one which "*may negatively impact on the survival of a listed threatened… species"* which triggers the Minister's duties to gazette a notice under section 57(2) of NEM:BA.

29.2. It is difficult to identify a basis on which the Minister can avoid the obligation to issue such a notice, given the measures articulated in the Draft Regulation which are clearly aimed at avoiding negative impacts on Algoa Bay's African Penguins. In the circumstances, we submit that the Minister must issue a section 57(2) notice applicable to Algoa Bay in terms of section 57(5)(a)(i) and applicable to all STS Bunkering operators.

29.3. Because a notice issued in terms of this section triggers the consultation process envisaged in sections 99 and 100 it is necessary that the Minister also exercise his emergency powers under section 92 of NEM:ICMA (as contemplated above) to cover the consultation period. We also underscore that the consultation requirements in section 99(2)(a) of NEM:BA will ensure that any subsequent regulations issued in terms of section 97(1)(b)(ii) read with sections 97(1)(aA) and 97(1)(b)(v) of NEM:BA would be capable of adaptation to an integrated coastal management regime under NEM:ICMA at a later stage to encompass regulations pertaining to the coastal environment of Algoa Bay as a whole.

30. Step 3: Steps to ensure integrated coastal management is properly undertaken

30.1. As indicated above, section 58(2)(a) of NEM:ICMA provides the power in terms of which STS Bunkering may be presumed to result in an adverse effect on the coastal environment until the contrary is proven. It is not clear why the Minister has not in fact already gazette a notice to this effect, given the apparent decision to issue regulations under NEM:ICMA.

30.2. Once such notice is gazetted, it is not only possible for the Minister to legitimately consult with the Transport cluster and develop regulations setting out norms and standards as contemplated by section 83(1)(f)(xii) but also to issue a coastal protection notice in terms of section 59 of NEM:ICMA to address ongoing STS Bunkering activity.

30.3. We recommend that a notice in terms of section 58(2)(a) is issued without delay to remedy the absence of this step prior to the gazetting of the Draft Regulations. We further recommend that such section 58(2)(a) notice is followed by a section 59 coastal protection

[42] TNPA ERA, pp II; TNPA ERA Ecological Risk Assessment pp 81; 95-96; Pichegru, L et al (2022) "Maritime Traffic Trends Around the Southern Tip of South Africa – Did marine Noise Pollution Contribute to the local Penguins' Collapse?" *Science of the Total Environment*, 849, 157878. See also legal recognition of related scientific evidence in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (2) SA 585 (ECG) para 53.

notice and the gazetting of draft STS Bunkering norms and standards after consultation and co-development with the Transport cluster, mindful of the requirements of co-operative governance, the jurisdiction of SAMSA over commercial shipping operations; the powers and functions of SAMSA as the recognised "Authority" as well as obligations imposed on STS Bunkering operators by the suite of shipping legislation.[43]

31. Step 4: Ensure consonance with shipping regulatory regime and intention to require EMP by listing STS Bunkering and identifying appropriate competent authority

31.1. To support the regulatory regime provided by NEM:ICMA and ensure that the regulatory gaps created by the absence of EIA listing are closed, we recommend that the Minister urgently list STS Bunkering as contemplated by section 24(2)(a) of NEMA and identify the appropriate competent authority as well as any particular procedural requirements necessary to ensure that the EIA process is effectively integrated with the risk assessment processes contemplated in IMO Treaties, guidelines and their domestication through, *inter alia,* the Merchant Shipping Act, MARPOL Act and the contemplated OPRC Bill

B) GENERAL SUBMISSIONS REGARDING CONTENTS OF DRAFT REGULATIONS

32. We note that the Draft Regulations have sought to implement the recommendations of the TNPA ERA, however, there are some odd deviations including failure to prohibit STS Bunkering at Anchorage 2.

32.1. We understand the Draft Regulations to be, at least in part, a response to the TNPA ERA (which deals only with Algoa Bay). However, there are a number of inconsistencies including the following.

32.1.1. First, The transitional provisions set out in Draft Regulation 11 contemplate the continuation of STS Bunkering in Anchorage 2. While the Draft Regulations have not included Annexure 1 (which potentially renders the comment and public participation process irregular),[44] we understand that the references to Anchorages 1 and 2 are those already in existence and which are the gazetted anchorages identified in the TNPA ERA.[45] In this regard, the TNPA ERA provides an express recommendation to "*discontinue bunkering at anchorage 2 due to the impact of underwater noise on the African Penguin population on St Croix Island*".[46] It is, accordingly, unclear why the transitional provisions nevertheless enable ongoing STS Bunkering in this area. Perhaps more concerning is the mitigation measure identified at p 149 of the TNPA ERA's Ecological Risk Assessment which, in addition to compliance with MARPOL 73/78 requirements states "*STS transfer operations underway should not be permitted outside or within port limits*".[47]

[43] We make this recommendation with regard to the 2021 Codes, contents of the 2022 Codes and the failure to issue new Codes. Whilst the Codes are not enforceable, replacing them with norms and standards under NEM:ICMA would provide for enforceable norms and standards.
[44] See *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 66.
[45] TNPA ERA, p III, Figure 1-1.
[46] TNPA ERA, p II; p 40.
[47] See also HAZOP Register, p 1, B2 which indicates that even after mitigation insufficient or inadequate searoom to conduct STS underway remains a very high risk.

32.1.2. Second, recommendations pertaining to management of ballast water and light pollution provided in the TNPA ERA[48] appear to have been largely ignored without any clear reason being provided (there being no explanatory memorandum addressing the reasons behind the contents of the Draft Regulations).

32.1.3. Third, a number of the specific mitigation in Tables 4-2; 4-3; 4-5 to 4-7 of the TNPA ERA HAZOP Study[49] do not appear to have been accounted for either expressly or through cross-reference to relevant regulations (particularly those relevant to the Merchant Shipping Act and marine pollution legislation). We note, in particular, that the Draft Regulations do not consider specific mitigations relating to licencing of individual bunkering vessels[50] and retain the approach of licencing operators (including in relation to the cap on vessels indicated in Draft Regulation 3(5)). Moreover, it is not clear why Draft Regulations have been issued which appear to overlap with technical requirements ordinarily relevant to SAMSA-controlled inspections and requirements, while omitting the specific hazard mitigations referenced in the TNPA ERA's HAZOP Study. An integrated approach to regulation should integrate these recommendations – and the role of TNPA and SAMSA in regulating STS Bunkering activities in addition to the existing safeguards in place (particularly in relation to Algoa Bay).[51]

32.1.4. Fourth, it is not clear that the Local Code of Practice developed as part of the TNPA ERA has been considered (and the relationship between these recommendations, the existing Bunkering Codes issued by SAMSA and the Draft Regulations is entirely unclear). Insofar as this Local Code of Practice is intended to be adopted in relation to Algoa Bay, the Draft Regulations do not indicate that this is the case, nor how they are to interact with any codes of practice developed for areas other than Algoa Bay should STS Bunkering be permitted elsewhere in the future.

33. The attempt to mitigate noise impacts is welcomed, however, the manner of doing so is questionable.

33.1. We welcome the attempt made in the Draft Regulations to mitigate noise associated with STS Bunkering operations. In this regard, we note that Draft Regulations 4(1) and 4(3)(a) appear to have reference to two of the four "*Control Measures"* articulated at page 96 of the TNPA ERA Ecological Risk Assessment (i.e. "*As per the IMO Guidelines for the Reduction of Underwater Noise from Commercial Shipping give consideration to vessel design adaptations to effectively reduce underwater noise*" and "*Reduce vessel transit speed to 8 knots (15 km/her) when entering Algoa Bay"*). We further note that Draft Regulation 3(5) appears to have regard to a third Control Measure listed which is reads "*Limit the number of vessels permitted to bunker in the bay"*. However, the fourth and final Control Measures articulated at p 96 is omitted ("*Assess anchorage locations in terms of proximity to sensitive receptors (e.g. penguin feed grounds) based on the outcome of a noise modelling study"*).

33.2. While the Draft Regulations appear to reflect an intention to follow the recommendations of the TNPA ERA's Ecological Risk Assessment in relation to noise mitigation, there are

[48] TNPA ERA, Ecological Risk Assessment, pp 91; 92.
[49] TNPA ERA, HAZOP Study Report, pp 13; 15; 16-17.
[50] TNPA ERA, HAZOP Study Report, p 16, Table 4-5.
[51] See Nelson Mandela Bay HAZOP Operational Risk Assessment included in the TNPA ERA.

significant difficulties with the manner in which this has been attempted and with the provisions of Draft Regulation 4.

33.3. First, we assume that the reference to the "International Maritime Organisation Guidelines for the Reduction of Underwater Noise from Commercial Shipping" refers to the IMO's *Revised Guidelines for the Reduction of Underwater Radiated Noise from Shipping to Address the Adverse Impacts on Marine Life*[52] (**Noise Guidelines**).

33.3.1. While we support the domestic adoption of the Noise Guidelines, these are not capable of direct adoption by bunkering operators and "compliance" is thus not possible.

33.3.2. This is made clear by the purpose of the Noise Guidelines which is expressed in paragraph 3.1, namely, to:

> "*1 provide an overview of approaches applicable to designers, shipbuilders and ship operators to reduce the URN* [Underwater Radiated Noise] *of any given ship; and*
>
> *2 assist relevant stakeholders in establishing mechanisms and programmes through which noise reduction efforts can be realised".*

33.3.3. The contents of the Noise Guidelines reinforce the impossibility of "compliance" by bunkering operators.

a) By way of example, section 5 addresses URN Management Planning and includes an explanation of "opportunities" to support such planning by a range of stakeholders including shipowners, designers, ship-builders; operators, suppliers and manufacturers and maritime authorities. In referring to maritime authorities (which, in South Africa, would include SAMSA), the Noise Guidelines state "*take supportive actions that enable and advance URN Management Planning, for example, supporting deployment of tools to measure ship noise levels, support innovation and adoption of noise reduction technologies, and communicate URN information"*.[53]

b) This is clearly a reference to specific actions which a State may incorporate through detailed regulation specifying which tools should measure noise levels and with incentives for shipping stakeholders to reduce noise and communicate URN information.

c) At a very simplistic level, the Draft Regulations do not include any details of what URN information should be communicated by bunkering operators; what technologies should be used; how noise levels should be measured and so on either in Draft Regulation 4, or in Draft Regulation 9(g) dealing with the requirement of a URN plan.

33.3.4. Even if assuming that Draft Regulation 4 is only intended to refer to "design adaptations" it is not entirely clear what is required of bunkering operators. The Noise Guidelines refer to "*Design and technical noise reduction approaches"* in paragraph 6.2 followed by general considerations regarding hull, propeller and machinery design in paragraphs 6.3 to 6.14. However, these are expressed at a level of generality and are also described in a section of the Noise Guidelines which

[52] MEPC.1/Circ.906, 22 August 2023.
[53] Noise Guidelines, para 5.4.5.

addresses approaches to URN management with reference to the more detailed considerations outlined in the "Ship underwater radiated noise technical report and matrix" dated 8 March 2019.[54] There is no indication in the Draft Guidelines as to how these considerations are to be utilised by bunkering operators and/or enforced or incentivised by SAMSA, the DFFE or any other body;[55] which of the range of URN measurement standards identified in the Noise Guidelines are to be applied;[56] or which computational models are to be used.[57]

33.3.5. As a consequence, Draft Regulation 4(1) is not only a regulation with which bunkering operators are unable to comply, but it is also impermissibly vague.

33.4. Second, it is not clear why the Draft Regulations (nor the TNPA ERA, for that matter), have singled out design adaptations articulated in the Noise Guidelines, when Section 6 of the Noise Guidelines makes it clear that a number of design, maintenance and operational adaptations (including those overlapping with energy efficiency guidelines) operate collectively as "approaches" to URN reduction and also addresses specific considerations regarding the interrelationship between URN reduction, energy efficiency and greenhouse gas reduction.[58] Absent any explanation, the approach to regulation of noise appears to be irrational.

33.5. Third, insofar as STS Bunkering in Algoa Bay has been shown to increase the levels of URN, the cause is not solely (or even primarily) the design of vessels used by operators (i.e. the relevant bunkering barges – or even tankers involved in STS Bunkering operations). Rather it is the overall increase in vessel traffic resulting from the introduction of STS Bunkering operations.[59] In this regard, we support the requirement of minimum design standards for bunker barges and tankers operating in South African waters – as well as operational strategies such as speed reduction in the vicinity of sensitive ecological areas. However, these mitigation strategies are insufficient to cure the "mischief" of noise impacts caused by STS Bunkering operations and which need to be capable of application to international shipping and vessels which are neither stationed in South African waters for extended periods of time nor have South Africa as their flag state.

33.6. Fourth, we support the introduction of an URN mitigation and management plan for STS Bunker operators as contemplated by Draft Regulation 9(2)(g). However, it is not clear how this should be developed (see comments regarding the absence of EIA above). It is equally unclear what standards and procedures should be used to inform the "best practices" adopted – nor how such operator-level plans should relate to an Underwater Noise Mitigation and Management plan applicable to port as a whole[60] (which, one would anticipate, should be developed by TNPA in collaboration with SAMSA).

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[54] MEPC 74/INF.28.
[55] See Noise Guidelines, sections 8-9.
[56] Noise Guidelines, Appendix 1.
[57] Noise Guidelines, Appendix 2.
[58] Noise Guidelines, section 7.
[59] See TNPA ERA, Ecological Risk Assessment, pp 150-151; 157-158. We note that the Traffic Noise Study Technical Note indicates that in the period January 2022 to February 2023 39% of vessels were exclusively engaged in offshore bunkering. This proportion of vessel traffic (and the associated URN impacts) is significant even though it can only be treated as a snapshot.
[60] See recommendations in TNPA ERA's Underwater Noise Assessment, p v; 40.

33.7. Fifth, it is entirely unclear how these requirements interrelate with the outputs of the GloNoise project.

34. We have made recommendations for the DoT to incorporate provision for noise reduction requirements to be incorporated into the Merchant Shipping Bill (particularly through regulation by the Minister of Transport). We recommend that the DFFE engage with both SAMSA and the DoT to establish how the Noise Regulations may be adapted for use within the South African domestic context to:

34.1. regulate minimum design, maintenance and operational standards for bunker barges and tankers engaged in STS Bunkering in South African Waters;

34.2. regulate minimum operational standards for bunker barges, tankers and vessels taking on bunker through STS Bunkering in Algoa Bay with particular reference to speed reduction and other operational requirements specific to this bay; and

34.3. establish the noise carrying capacity of Algoa Bay in order to enable SAMSA and TNPA to limit overall increases in URN generated by the increase in vessel traffic facilitated by STS Bunkering operations.

35. Transitional provisions counter the effectiveness of the Draft Regulations in mitigating harms caused by ongoing STS Bunkering and absence of key transitional provisions render the Draft Regulations impermissibly vague.

35.1. The Draft Regulations contain inconsistencies in relation to obligations placed on existing STS Bunkering operators:

35.1.1. Draft Regulation 4(2) allows for a two-year period before existing STS Bunkering operators comply with the requirements of the Noise mitigation measures required by Draft Regulation 4(1).

35.1.2. Draft Regulation 9(5) permits existing STS Bunkering operators a six-month period for submission of an EMP.

35.1.3. The "*Transitional arrangements"* in Draft Regulation 11 indicate that existing STS Bunkering operators may continue operating in Anchorage Areas 1 and 2 of Algoa Bay.

35.1.4. There are no transitional provisions providing for compliance by existing STS Bunkering operators with the requirements that:

a) a written appointment must be made for persons to keep watch for marine mammals, penguins and turtles contemplated in Draft Regulations 5(1) and 5(2); and

b) all crew members receive environmental awareness training as contemplated in Draft Regulation 8.

35.2. This scheme gives rise to a number of problems including the following.

35.2.1. First, without limitation to what has been stated above regarding the application of the Noise Guidelines and the problems associated with the EMP requirement, the two-year compliance period for ensuring bunkering barges and/or tankers are appropriately designed to mitigate noise is too short a period given the urgent need to intervene in respect of mitigation of noise impacts on the Critically Endangered

population of St Croix Island's African Penguins. Assuming that the Draft Regulations can be modified so that appropriate noise regulations may be drafted in co-operation with the Transport Cluster, this period should be aligned with the six-month period contemplated in relation to the EMP.

35.2.2. Second, in addition to the anomalous treatment of Anchorage 2 (addressed above), Draft Regulation 11 is offered without any time-limit. It is not clear why existing STS Bunkering operators should be permitted to continue operations at all in Anchorage 2, nor why a time-limit should not be placed on the ability to continue operating in areas contemplated in Draft Regulations 3(1)(b) and 3(1)(d). Further, without limitation to queries regarding the workability of the prohibitions in Draft Regulation 3(1) read as a whole addressed below, it is unclear why existing STS Bunkering operators should be permitted to continue operations within the zones prohibited by Draft Regulations 3(1)(b) and 3(1)(d), while being bound by the prohibitions in Draft Regulation 3(1)(c) and 3(1)(e) (Draft Regulation 3(1)(a) reflecting the existing legal position in any event). These inconsistencies leave the Draft Regulations open to challenge on the basis of irrationality which is enormously problematic if they are to prove effective.

35.2.3. Third, without limitation to the workability of Draft Regulations 5 and 8 and what is stated in relation to training requirements elsewhere in these submissions, transitional periods for training and appointments are necessary in the interests of procedural fairness and certainty.

35.2.4. Fourth, there is no indication in the Draft Regulations that permit conditions should be reviewed or updated to incorporate the requirements which the DFFE seeks to impose. This creates room for vagueness and is contrary to the mitigation measure identified in the TNPA ERA's Ecological Risk Assessment at p 149 to "*Review permit conditions of all operators to ensure that adequate safeguards against the risk of oil pollution are included…".*

36. Query whether STS Bunkering is economically justified as an activity which may take place in South African waters

36.1. The Constitution requires that legislation and other measures to protect the environment must, *inter alia*, secure the ecologically sustainable use and development of natural resources while also promoting justified social and economic development.[61] No economic development may be supported without proper justification based on sound data. The TNPA ERA raises significant concerns that any economic stimulus lent to the regional economy of the Eastern Cape by STS Bunkering in Algoa Bay may be undermined by the destruction of other economic sectors (including, but not limited to, ecotourism and fisheries). This is in addition to lack of ecological sustainability in terms of the ecological carrying capacity of Algoa Bay and the ecological sensitivities the ERA highlights. While the TNPA ERA is restricted to Algoa Bay, we anticipate that similar sensitivities would likely be identified in other areas along South Africa's coastline – and the Draft Regulations do not indicate how this to be assessed in relation to specific bunkering operations.

36.2. In relation to Algoa Bay and existing STS Bunkering operations, the TNPA ERA found that the primary STS Bunkering value chain lay outside South Africa's borders (from the

[61] Constitution, s 24(b)(iii).

Bunkering operators themselves being foreign entities, to the source of fuel being foreign).[62] Moreover, it found that potential value to the fiscus had not been realised (as reflected in the SARS dispute).[63] Significant questions regarding benefit to the national economy have thus been raised.

36.3. We note that on 22 November 2024, amendments to the rules under sections 21(1), 60 and 64DA of the Customs and Excise Act were gazetted.[64] However, it remains unclear whether this intervention resolves the matter of economic justification. This is because the TNPA ERA has raised significant questions regarding the knock-on effects of developing economic activity linked to STS Bunkering on other critical regional economic activities.

36.4. While the TNPA ERA found that there was evidence of regional economic stimulus linked to secondary industries (i.e. chandlery services and logistics linked to crew changes),[65] the study also cautioned that figures pertaining to stimulus of chandlery services should be treated with caution, indicating only a 60% accuracy of financial estimates.[66] Moreover, it identified that STS Bunkering may harm tourism, fisheries and aquaculture industries (which it was tasked with examining) unless "stringent" rules and regulations were in place to address environmental harms.[67]

36.5. In sum, it found that negative socio-economic impacts associated with STS Bunkering (including pollution, oil spill cleanup costs, impacts on fishing, aquaculture, water-based tourism)[68] may outweigh economic stimulus.[69]

36.6. We note the critical importance of ensuring that any economic stimulus passes constitutional muster. This means that government initiatives to develop any new industry must be economically justified but also ensure that the right to have the environment protected is respected, protected, promoted and fulfilled. For this reason, an investigation remains warranted – and should include investigation of government efforts to promote other regional industries as well as scope for social and economic development generated by initiatives such as crime prevention in the Nelson Mandela Bay Municipality, public works and potential for eco-tourism development in respect of Algoa Bay and links with the Addo Elephant Park and MPA.

36.7. We further note that South Africa's Natural Capital Accounting system should be considered in relation to the risk of environmental harms from this activity as part of a comprehensive consideration of whether the development of an STS Bunkering industry is constitutionally justified. Similarly, the impacts of development on South Africa's climate obligations and emissions should be part of such consideration – noting that central to a "just transition" is the development of economic activity that is compatible with low emissions as well as protection and preservation of biodiversity which itself mitigates climate effects.

36.8. It is noticeable that there is no provision for any assessment relating to these risks at operational level in the Draft Regulations. This reflects the absence of links to the EIA

[62] TNPA ERA, Socio-Economic Assessment Study pp 24; 53; 54.
[63] TNPA ERA, Socio-Economic Assessment Study p 31.
[64] GNR5562 in GG51627 on 22 November 2024 (effective 30 November 2024).
[65] TNPA ERA, Socio-Economic Assessment Study pp 31-32
[66] TNPA ERA, Socio-Economic Assessment Study pp 30; 59.
[67] TNPA ERA, Socio-Economic Assessment Study pp 43-44; 46-47; 49-50; 61-65. See also the extent of mitigation measures and assumptions at pp 48-49 of the Oil Spill Modelling Specialist Study.
[68] TNPA ERA, Socio-Economic Assessment Study p 43.
[69] See TNPA ERA, Socio-Economic Assessment Study pp 61-65 compared to pp 65-67.

process (including the "Need and Desirability" requirement). However, we call upon the DFFE to fully investigate the financial justification for offshore bunkering activities as a whole.

C) SPECIFIC COMMENTS

37. We address comments pertaining to specific clauses below:

Draft Regulation 1 – Definitions "bunkering"	**Submission and reasons** 1) We welcome the broad definition of "bunkering" to include all forms of STS transfer (as defined in Draft Regulation 1). 2) We understand "fuel" as used in this definition to refer to fuel in the widest sense so that it is compatible with the definitions of: a) "oil fuel" used in Annex I of MARPOL 73/78 ("*any oil used as fuel in connection with the propulsion and auxiliary machinery of the ship in which such oil is carried"*); and b) "fuel oil" used in Annex VI of MARPOL 73/78 ("*any fuel delivered to and intended for combustion purposes for propulsion or operation on board a ship, including gas, distillate and residual fuels"*); and c) "bunker oil" in Article 1 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001 ("*any hydrocarbon mineral oil, including lubricating oil, used or intended to be used for the operation or propulsion of the ship, and any residues of such oil"*. 3) To the extent that this needs clarification, we propose that a definition of "fuel" is provided in the Regulations which reads: "***fuel*** *means any oil, gas, distillate, hydrocarbon mineral oil including lubricating oil used or intended propulsion or operation of a ship"*.
Draft Regulation 1 – Definitions "bunker operator"	**Submission** 1) This definition should be amended to read: **"*bunkering operator*** *means the holder of a licence to conduct bunkering operations issued by the National Ports Authority and all necessary permits for such operations issued by the South African Maritime Safety Authority".* **Reasons** 2) We note that this definition ignores the current requirement of licencing by TNPA in terms of section 57 of the National Ports Act, 12 of 2005 (**Ports Act**).
Draft Regulation 2 "Scope"	**Submissions** 1) The Scope provision is insufficient in that it fails to establish to which persons and/or entities and/or organs of state the Draft Regulations apply and in which areas the Draft Regulations apply. This leaves open a range of important questions including whether the Draft Regulations apply to South African flag state vessels / non-South African flag state vessels; whether the Draft Regulations apply both within Port Limits and outside Port Limits (and whether they apply throughout the coastal waters under South African jurisdiction); and whether they apply within harbour limits that are not designated Ports within the meaning of the Ports Act. Leaving these

	questions unanswered results in vagueness and important unresolved jurisdictional considerations pertaining to responsible authorities, enforcement, capacity and how management of offshore bunkering is in fact "integrated" in conformance with the purposes and objectives of integrated coastal management and co-operative governance required of regulations issued under NEM:ICMA (and as addressed above). 2) We note that certain of the Draft Regulations appear to refer only to Algoa Bay and much of its contents rest on assumptions linked to the TNPA ERA which considered only Algoa Bay which has unique characteristics. In this regard, section 85(3)(b)(i) of NEM:ICMA provides that "*Regulations made in terms of section 83 or 84 may – apply generally throughout the Republic or province, as the case may be, or only in a specified area or category of areas*". 3) The relationship between the scope of application of the Draft Regulations and the Application of NEM:ICMA to South Africa's coastal waters, the Prince Edward Islands and, in respect of dumping and incineration at sea, South African flag vessels outside areas under South African jurisdiction[70] is unclear. **Recommendations** 4) Insofar as the intention is to have certain regulations apply nationally and others to apply only to Algoa Bay, we recommend that a separate chapter is created in the Draft Regulations catering for Algoa Bay and that Draft Regulation 2 is amended to identify which Chapter/s apply only to Algoa Bay and which apply nationally. 5) Further consideration is required to determine whether general, national regulations are in fact capable of promulgation or whether, the nature of avoidance and mitigation of risks associated with STS Bunkering operations requires area-specific regulation. 6) We further recommend that the Scope: a) Specifies that the Draft Regulations apply to all bunkering operators regardless of nationality, which operate within South African coastal waters (as defined in NEM:ICMA); b) Clarifies whether the Draft Regulations apply within and outside Port limits; within and outside harbour limits and considers the need for insertion of regulations catering for these various scenarios; and c) Clarifies the relationship between the Draft Regulations and other applicable legislation and regulation and the applicability or otherwise to organs of state (and which ones).
Draft Regulation 3(1)	**Submissions** 1) We support the prohibition on STS Bunkering within the areas identified in Draft Regulation 3(1), however, have concerns regarding the workability of these prohibitions which appear to cover the entirety of both Anchorages 1 and 2 and the port limits of both the Port of Ngqura and Port of Port Elizabeth.

[70] NEM:ICMA, s 4.

	In this context, it is irrational that existing STS Bunkering operations may continue in both existing Anchorages; and irrational to contemplate the continuation of STS Bunkering in Algoa Bay at all. It is, moreover, unclear what the impact of these prohibitions would be nationally, should STS Bunkering be contemplated at other locations (which should each entail a full assessment as to ecological carrying capacity and whether the ecological sustainability of developing STS Bunkering operations can be secured given the unique and dynamic coastal zones of each specific ocean-area). 2) We note that the Sea-Use Guidelines accompanying the National Coastal and Marine CBA Map Version 1.2 indicate that Bunkering is not compatible with CBA areas and has only restricted compatibility with Ecological Support Areas (**ESAs**).[71] Almost all of Algoa Bay is categorised as an ESA area (if not classified as a CBA or MPA area). a) The category of "restricted compatibility" is defined broadly to require "*A robust site-specific, context-specific assessment… to determine the activity compatibility depending on the biodiversity features for which the site was selected. Particularly careful attention would need to be paid in areas containing irreplaceable to near-irreplaceable features where the activity may be more appropriately evaluated as not permitted. The ecosystem types in which the activities take place may also be a consideration as to whether or not the activity should be permitted, for example. Where it is permitted to take place, strict regulations and controls over and above the current general rules and legislation would be required to be put in place to avoid unacceptable impacts on biodiversity features….*".[72] b) This suggests that national regulations pertaining to STS Bunkering may not be appropriate in the absence of mechanisms to assess whether STS Bunkering may in fact be prohibited as a consequence of ESA classification. c) There is also no indication that the transitional provisions relevant to STS Bunkering in Algoa Bay have in fact considered the role of ESA restrictions. Moreover, there is no indication as to whether the Draft Regulations themselves are sufficient as the requisite controls in the context of ESA compatibility (the TNPA ERA not specifically having considered the particular purposes for which the areas of Algoa Bay designated as an ESA has been identified as such).
Draft Regulation 3(2)	**Submission** 1) We welcome prohibition on nighttime / dusk / dawn STS Bunkering which is in line with recommendations of the TNPA ERA and also likely to reduce adverse impacts of light pollution caused by STS Bunkering and associated activities.

[71] Harris, L et al (2022) *National Coastal & Marine Spatial Biodiversity Plan* V1.2 (Released 12-04-2022), Technical Report, available online <https://cmr.mandela.ac.za/cmr/media/Store/documents/EBSA/CBA%20Map%20v1/NCMSBPV1.2_Technical-report.pdf> (accessed 20 March 2025), p vi , 195(**MSBP Technical Report**).
[72] MSBP Technical Report, p 193.

Draft Regulation 3(3)	**Submissions** 1) "Substance" is not defined in the Draft Regulations (nor in NEM:ICMA). The term "substances" is used (presumably with its ordinary grammatical meaning) within the definition of "pollution" in section 1 of NEMA. It is not clear that this meaning is what is intended in Draft Regulation 3(3) particularly when regard is had to the meaning of "harmful substance" and "discharge" in legislation concerning maritime activity and marine pollution. 2) Article (2) of the MARPOL Convention (incorporated into the MARPOL Act and Control and Civil Liability Act) defines "harmful substance" as "*any substance which, if introduced into the sea, is liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea, and includes any substance subject to control by the present Convention"*. Moreover "discharge" in relation to a harmful substance is specifically defined "*in relation to harmful substances or effluents containing such substances, means any release howsoever caused from a ship and includes any escape, disposal, spilling leaking, pumping, emitting, or emptying"*. This language is reflected in the Ports Act[73] as well as the Intervention Act. 3) The Control and Civil Liability Act in fact <u>prohibits</u> the discharge of oil entirely absent SAMSA's permission to transfer oil or another prescribed harmful substance from between ships and tankers.[74] 4) It is thus unclear what precisely is meant by Draft Regulation 3(3) and it is not clear that it is compatible with the existing suite of environmental, marine pollution and shipping legislation and treaties, including MARPOL[75] and the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (**Ballast Water Convention**) relation to ballast water exchange and sediment management.[76] **Recommendations** 5) We recommend that the meaning and scope of "substance" and "discharge" is defined in the Draft Regulations with reference to existing maritime obligations and that, to the extent that Draft Regulation 3(3) seeks to provide requirements additional to those in the Control and Civil Liability Act, it does so expressly.
Draft Regulation 3(4)	**Submissions** 1) We note that this provision appears to be specific to Algoa Bay. We refer in this regard to what we have recommended in relation to area-specific regulations being inserted into a self-standing chapter (see comments relating to Draft Regulation 2 above).

[73] Ports Act, ss 56(1)(d); 65; 86; 99; 105; 111-113; 152;
[74] Control and Civil Liability Act, s 2 read with s 21(1)(b).
[75] In this regard, we note that Draft Regulation 3(3)(a) appears to be directly related to the mitigation measure identified in relation to "Routine operational discharges to sea" at p 89 of the TNPA ERA's Ecological Risk Assessment which states "*Prohibit operation discharges when transiting through MPAs and EBSAs during transit to and from the anchorage"*.
[76] See TNPA ERA, Ecological Risk Assessment, pp 90-91 with reference to Ballast Water Convention, Regulation B-4 and Regulation B-5.

	2) In addition, it is unclear what is intended by prohibiting vessels awaiting bunkering from traversing "between" Bird Island, Algoa Bay and the mainland. This is because Bird Island lies within Algoa Bay.
Draft Regulation 3(5)	**Submissions and recommendations** 1) While we welcome a cap on the number of bunker operators and vessels at any given time in Algoa Bay, the source of this limit is unclear. 2) Similarly, the ordinary meaning of "vessel" includes a "tanker". For this reason, it is appears that this Draft Regulation would preclude STS Transfer between an operator's tanker and that same operator's bunkering barge in Algoa Bay. If this is not the intention, the definition of "vessel" and/or the details of the cap need to be provided and/or amended.
Draft Regulation 4	**Submissions** 1) While the attempt to regulate (and mitigate) noise impacts is welcome, we refer to what we have stated above regarding the reference to the Noise Guidelines and the two-year period contemplated in Draft Regulation 4(2) as well as the vessels speeds contemplated in Draft Regulation 4(3) which appear at odds with the recommendations of the TNPA ERA.
Draft Regulation 5	**Submissions** 1) We support the intention to create detailed requirements to mitigate the negative impacts of STS Bunkering operations on wildlife. We similarly support the intention to address recommendations made in the TNPA ERA and its supporting studies in this regard. We particularly support the requirement that STS Bunkering operators are responsible for ensuring that a sonobuoy system is in place because placing this obligation on operators is consonant with the "polluter pays" and precautionary principles (as well as in line with recommendations of the TNPA ERA). 2) However, we question the practicality of a number of the provisions of Draft Regulation 5 – and particularly whether they are properly incorporated as operational requirements, rather than mitigation controls linked to ongoing monitoring and research which are better allocated to SAMSA and/or TNPA and/or the DFFE (and ideally a co-ordinated monitoring and regulatory regime regulated through principles of co-operative governance). In this regard, we have had regard to the context and formulation of the Project Controls and Mitigation table set out in section 4.1 of the TNPA ERA's Ecological Risk Assessment together with the underlying findings in preceding sections of that study. a) We note that the TNPA ERA does contemplate persons "on watch" for mammals, penguins and turtles at various points during STS Bunkering operations. However, the manner in which this is incorporated into the Draft Regulations appears unworkable and impractical (particularly given the speeds at which vessels travel, the size of vessels and absence of an indication as to use of appropriate technologies to identify the presence of wildlife). b) Similarly the rationale for reduction of speed when a turtle, penguin or marine mammal is within 1 km of a vessel appears to be impractical and

	the distance of 500m contemplated as a reason to avoid STS Bunkering operations appears at odds with the impacts of STS Bunkering over much larger areas identified in the various reports accompanying the TNPA ERA. c) Little attention appears to have been paid to the practical processes involved in oil wildlife preparedness and response – including those detailed in the Oiled Wildlife Preparedness & Response Plan included in the TNPA ERA.
Draft Regulation 6	**Submissions** 1) We note that Draft Regulation 6 largely reflects recommendations in the TNPA ERA. However, Draft Regulation 6(2)(a) contemplates bunkering in conditions where the wind force is less than 25 knots while the TNPA ERA indicates that bunkering operations should be limited to conditions when the wind force is less then 10m/s i.e. less than 20 knots. The discrepancy is unexplained (and it is not clear that these limits are applicable to only Algoa Bay or any site where STS Bunkering may be contemplated in the future).
Draft Regulation 7	**Submissions** 1) It appears that Draft Regulations 7(b) to 7(d) arise from mitigation measures identified in the TNPA ERA's Ecological Risk Assessment which relate to "Routine operational discharges at sea" and not oil spills.[77] In this regard, it is unclear why these are classed solely in relation to oil spill mitigation / avoidance. 2) In respect of the remaining requirements, it is not clear how these interact with the detailed requirements contemplated in terms of OPRC at international level and the particular technical specifications relating to booms are omitted.[78] **Recommendations** 3) We recommend that Draft Regulation 7 is amended to ensure that appropriate requirements in relation to mitigation are detailed in line with existing SAMSA operating procedures as well as to account for the more detailed level of controls indicated by OPRC, the outputs of the TNPA ERA and which conform to the approach to be put in place through the OPRC Bill. 4) We further recommend that specific requirements pertaining to treatment of ballast and other discharges are aligned with the relevant regulations under South African law and applicable international IMO codes, treaties and protocols and that, to the extent that these need to be specifically highlighted or modified for purposes of regulating bunkering activities and/or STS Bunkering in a particular area, that the relevant conditions are integrated into operator licences and careful reconsideration is given as to what is appropriate at the level of regulation under NEM:ICMA as opposed to under marine pollution and merchant shipping regulation.

[77] TNPA ERA, Ecological Risk Assessment, pp 88-89.
[78] See TNPA ERA, Oil Spill Modelling Study pp 34-35.

Draft Regulation 8 "Training requirements"	**Submissions** 1) In principle, we support the training requirements set out in Regulation 8, however, note that, in material respects, these duplicate those contemplated under the OPRC Bill in terms of content whilst differing from the OPRC Bill's annual training requirements and threshold for accreditation.[79] 2) As currently drafted, it is thus not clear whether the training requirements in Draft Regulation 8 are intended to be additional to those organised by SAMSA and the Incident Management Organisation as contemplated in the OPRC Bill (as well as training requirements under the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (**STWC**), Merchant Shipping Act, and contemplated training provisions in the Merchant Shipping Bill).[80] Moreover, there is no indication of requirements for accreditation and/or minimum standards for training courses and training providers. 3) It is not clear who must fund such training. To the extent that it is implied that costs are to be borne by bunkering operators, we would support such obligation as commensurate with the "polluter pays" principle. **Recommendations** 4) We recommend clear alignment with the training requirements contemplated in clause 9 of the OPRC Bill. 5) Mindful of the existing Seafarer Certification Standards of Training & Assessment issued by SAMSA pursuant to STCW requirements; ISO Standards for such training and existing standards applied to NOSCP and Integrated Management System training[81] we recommend that the DFFE engage with SAMSA as well as SANCCOB (as a member of the Global Oiled Wildlife Response Service) and other relevant stakeholders to further develop appropriate oiled wildlife response and IMS training designed for STS Bunkering operators (and their crews) as self-standing training standards and/or modules. In the alternative, we recommend that existing relevant training models are updated to ensure coverage of the relevant subject-matter. We make this recommendation in order to ensure publicity and formalisation of such training modules through regulation under either NEM:ICMA or the OPRC Bill (once passed) to promote accountability and enforceability, rather than relying on codes and standards which may have less certainty in terms of legal compliance and enforcement possibilities. 6) To the extent that regulation is required in relation to training prior to commencement of the OPRC Bill, we would recommend that consideration is given to framing training requirements through regulations issued under NEM:ICMA and that these are framed in transitional terms with consideration

[79] OPRC Bill, Clause 9.
[80] We note, for example, the SAMSA-issued Standards of Training & Assessment STCW Code A-V/1-1-1; STCW Code A-V/1-2-2; STCW Code A-V/1-2-3; STCW Code A-V/1-2-1 applicable to "special ships" all of which are dated 2021 and likely need updating.
[81] We refer to information contained in SAMSA's blog post "Revised SA national oil spill contingency plan on a roadshow for public awareness: IMOrg-SAMSA" dated 18 October 2023, available online < https://blog.samsa.org.za/2023/10/18/revised-sa-national-oil-spill-contingency-plan-on-a-roadshow-for-public-awareness-imorg-samsa/>.

	of removal of such regulations once the OPRC Bill and relevant regulations issued in terms of the resulting legislation have been issued and commence. 7) We further recommend that engagement with SAMSA, TNPA and other relevant stakeholders (including accredited training providers) is undertaken to ensure that the relevant standards already supporting implementation of the NOSCP are incorporated. In this regard, we support SAMSA, TNPA and the DFFE co-operating to ensure that the relevant oil response and oiled wildlife response trainings standards are in fact gazetted as regulation (rather than being contained in Codes) to promote transparency, accountability, public accessibility and ensure enforceability. In this regard the objectives of integration under NEM:ICMA makes it appropriate that these standards and requirements <u>are</u> issued under NEM:ICMA to the extent that the OPRC Bill remains under consideration.
Draft Regulation 9	**Submissions and recommendations** 1) In principle, we welcome the requirement for a bunker operator to have in place an EMP developed by an independent specialist and approved by the Minister as well as the inclusion of assessments pertaining to oil response and an underwater noise mitigation and management plan. We similarly, welcome the inclusion the requirement of a monitoring programme and the relationship between the requirements of the EMP set out in Draft Regulation 9 and the various mitigation recommendations of the TNPA ERA. 2) However, the EMP requirements present a number of legal and procedural difficulties which need remedy if they are to withstand legal scrutiny and be capable of effective implementation: a) <u>First</u>, as already indicated, it is unclear what procedures are to be followed by the operator and the independent specialist in order to develop the EMP. The requirement of the EMP strongly indicates the need for EIA listing of STS Bunkering under section 24(2) of NEMA and the requirement of an EIA process. b) <u>Second</u>, there is no provision for public participation in the development of the EMP which is problematic – particularly given the wide range of stakeholders involved in oiled wildlife response, noise management, use of the coastal zone – and the need for <u>integrated</u> management in the context of regulations promulgated under NEM:ICMA (which is focused also on the interrelationship between socio-economic and environmental values of the coastal zone). Regulation through the EIA process would remedy this omission and render the public participation requirements of the EIA regulations (and public participation guidelines) applicable. c) <u>Third</u>, it is not clear how the components of the EMP relating to oil contingency planning relate to obligations under OPRC and the OPRC Bill. In this regard, we draw particular attention to Clauses 5(5) to 5(13) of the OPRC Bill. Similarly, we draw attention to the scheme in which individual oil spill contingency plans are to be developed with reference to clauses 5-7 read as a whole as well as the requirements of a marine oil pollution response equipment inventory in clause 8.

	d) Fourth, the consequences for the Minister's decision-making contemplated in Draft Regulation 9(3) are not specified. It is recommended that this is clarified, rather than relying on the need to have recourse to the Promotion of Administrative Justice Act, 3 of 2000 (**PAJA**) and potential interpretive difficulties in reconciling the general position under PAJA with the statutory scheme of NEMA:ICMA which must be read with NEMA as well as PAJA. The need to read these statutes together to establish what the consequences are results in undue complexity and unnecessary vagueness. This threatens to render this regulation unlawful and unconstitutional. Specifying the consequences and steps to be taken by operators / other interested parties in relation to Ministerial decision-making would cure this potential difficulty.
Draft Regulation 9(4)	**Submissions** 1) We submit that the data, results and information obtained from implementing an EMP (as well as the studies undertaken in formulating the EMP and all generated by all monitoring of the EMP) should be publicly available as necessary to the public interest. The public interest in such information, need for accountability and transparency and principles of integrated environmental management (including that the public should be able to participate in decisions affecting the environment) strongly supports the inclusion of express provisions in the Draft Regulations to ensure that such data is not withheld from public scrutiny on grounds of "commercial sensitivity" (or otherwise erroneously refused).[82] **Recommendations** 2) We recommend insertion of language to this effect which species "*such data, results and information shall be made publicly available by the bunker operator and be provided to the public on request made to the Department".*
Draft Regulation 10	**Submissions** 1) It is not clear why the obligation in Draft Regulation 6(2) is not included among the listed offences. 2) We note that the penalty limitations in Draft Regulation 10(2) reflect the limits provided in section 85(2) of NEM:ICMA. However, clause 30(2) of the OPRC Bill provides for penalties of update R35 million and/or 10 years imprisonment for failure to undertake and update a marine oil pollution risk assessment (clauses 5(5); 5(7); 5(8); 5(10)); failure to put in place site-specific pollution contingency plans (clause 7(1)-(3)); failure to have appropriate emergency response equipment in place (clause 8(2)) and failure to ensure appropriate training (clause 9(2)). Given the overlap in obligations, it is not clear whether the penalties under the Draft Regulations are intended to be cumulative with those under the OPRC Bill. 3) It is clear that the value placed on compliance under the OPRC Bill far exceeds that possible under NEM:ICMA. In this regard we note that same is

[82] See the comparable example in *Smuts N.O. and Others v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism and Others* (1199/2021) [2022] ZAECMKHC 42 (26 July 2022).

	true of compliance with environmental impact assessment which, in terms of NEMA and the EIA Regulations attracts penalties of R10 million and/or 10 years imprisonment. **Recommendations** 4) We recommend that careful consideration is given to the need for (a) EIA Listing of STS Bunkering; and (b) issuing appropriate regulations under the OPRC Bill (once enacted) to ensure that the parliamentary policy relating to the seriousness of offences of failure to assess impacts of environmental harms (including adopting the precautionary principle inherent to EIA procedures) and for failure to comply with the preventative principle in relation to oiled hazards (inherent to the OPRC Bill) are upheld in relation to STS Bunkering operations.
Draft Regulation 11	**Submissions** 1) As already indicated above, it is unclear why continued STS Bunkering at Anchorage 2 is contemplated.
Draft Regulation 12	**Submissions** 1) Subject to what is stated above, we support the immediate commencement of the Draft Regulations.

38. 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,

BIODIVERSITY LAW CENTRE NPC

***Per* Nina Braude**