		Date:	1 August 2025
TO:	**The Department of Forestry, Fisheries, and the Environment** Ms Lona Nondaka, Deputy Director General: Oceans and Coasts	Email:	bunkeringregs@dffe.gov.za
FROM:	**The Biodiversity Law Centre**		kirsten@biodiversitylaw.org kate@biodiversitylaw.org
Total pages:	5 94 including annexures	Our ref:	BLC/Comments/ Bunkering Regs/02

Dear Ms Nondaka

RE: Consultation on the Draft Regulations for the Environmental Management of Offshore Ship-to-Ship Transfer | Biodiversity Law Centre Submission

1. The submissions enclosed under cover hereof as **Annexure A** are made by the Biodiversity Law Centre ("**BLC**") in response to the Draft Regulations for the Environmental Management of Offshore Ship-to-Ship Transfer, issued in terms of the National Environmental Management: Integrated Coastal Management Act, 24 of 2008 ("**NEMICMA**") under Government Notice 6397 in *Government Gazette* 52943 of 4 July 2025 (the "**Second Draft Regulations**").

2. The BLC is a non-profit organisation and law clinic, registered in 2021. Our mission is to use the law to protect, restore, and preserve indigenous ecosystems and species in Southern Africa to support ecosystem functioning and sustainable livelihoods. 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.

3. The BLC has engaged extensively with the issue of proper regulation for offshore ship-to-ship transfers and bunkering (collectively, "**STS transfers**") since 2022. The sensitive Algoa Bay ecosystem has been a specific focus for our efforts because of the presence of the two important African Penguin colonies in the bay (a critically endangered species). It is with this focus, as well as our interest in marine biodiversity, other endangered species, ecological carrying capacity of our coasts and ocean spaces, international obligations, and obligations under section 24 of the South African constitution that we provide the attached submission.

4. At the outset, we would like to express our disappointment that the Department of Forestry, Fisheries, and the Environment (the "**Department**") was unable to provide us with their responses to the comments received during the Consultation on the Draft Regulations for the Environmental Management of Offshore Bunkering (the "**First Draft Regulations**").[1] We have attached our comments to the First Draft Regulations as **Annexure B**. In the absence of having had sight of the responses to our comments on the First Draft Regulations, and indeed the responses to all interested and affected parties' comments in this regard, we have been compelled to repeat several of the comments we submitted previously, as they have not been remedied in the Second Draft Regulations and we do not know the reasons for this. We understand that responses to the comments on the First and Second Draft Regulations will be made available after this commenting period. However, we fail to understand why these could not be provided in advance of the current commenting period, and such failure has inhibited our ability to provide comprehensive comments on the Second Draft Regulations. For the sake of transparency, we request that the Department publish these responses so all interested and affected parties can access them, and understand the information and research that went into preparing the responses.

5. Our submission is 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; the National Environmental Management Act, 107 of 1998 ("**NEMA**"), the Environmental Impact Assessment Regulation, 2014 ("**EIA Regulations**") together with the relevant Listing Notices,[2] relevant legislation purporting to authorise STS transfers, and the International Maritime Organisation's scheme for regulating maritime safety and pollution as domesticated and in relation to bills currently under consideration, which includes the Marine Pollution (Preparedness, Response, and Preparation) Bill [B10 of

[1] GN 5886 in Government Gazette 52151 of 21 February 2025.
[2] GNR982, GNR983, GNR984 and GNR985 in GG38282 of 4 December 2014.

2022] ("**OPRC Bill**") and the Merchant Shipping Bill [B12 of 2023] ("**Merchant Shipping Bill**").

6. We also highlight that the final TNPA ERA has never been made available to interested and affected parties, despite having been extensively commented on. We received a copy of the TNPA ERA through a Promotion of Access to Information Act request submitted by another party.

7. Our full submission (**Annexure A**) is enclosed under cover of this correspondence in the format requested by the Department. As our submission is lengthy, we wish to assist the Department by highlighting several main concerns below. Please note that this does not constitute our entire comment on the Second Draft Regulations and aims to serve as a summary only.

8. **The Minister's powers and functions**

8.1. We are concerned that the Second Draft Regulations exceed the Minister's powers under section 83(1) of NEMICMA, read with section 85. In this regard, our comments on both the First and Second Draft Regulations (contained in **Annexures A** and **B**) implore the Minister to take alternative, and more appropriate actions in the short, medium, and long-term.

8.2. Further, the Second Draft Regulations seem to confer powers on the Minister in circumstances where this may not be entirely appropriate. Such instances include instructing an operator to contact an authorised facility to collect and transport oiled wildlife, determining weather conditions that are appropriate for STS Transfers, approving the environmental awareness training programme, and approving the STS environmental management plan.

8.3. Conferring such powers on the Minister creates several difficulties and the Minister may lack the appropriate skills and experience to act effectively. Such powers also compromise efficiency and expediency, as well as create uncertainty about the recourse a person could take if they are adversely affected by the Minister's decision (an internal appeal in terms of section 43 of NEMA would not be available and the only option would be to approach the High Court for relief, which is costly and time-consuming).

9. **STS transfer operations in Algoa Bay**

9.1. Draft regulation 3 of the Second Draft Regulations provides specific prohibitions for STS Transfers. As with all legislative prohibitions, we can only assume that they have been well-researched and provide meaningful environmental protections (because STS Transfers are activities that pose a significant risk to the environment). When the prohibitions are applied to Algoa Bay, as demonstrated in the map included in our comments, it is abundantly clear that Algoa Bay <u>is not at all suitable for STS Transfers</u>.

9.2. However, draft regulation 9 of the Second Draft Regulations seeks to override the prohibitions in draft regulation 3 to allow STS Transfers in Algoa Bay in Anchorages 1 and 2. We have not been provided with any information as to why this is the case (besides a brief explanation in the introduction to the Second Draft Regulations that does not provide a definitive reason).

9.3. Algoa Bay is the only area in South Africa where STS Transfers occur. As such, draft regulation 9 effectively renders the Second Draft Regulations useless because the provisions made as environmental safeguards are completely ignored in the one place where STS Transfers are actually happening (and again, we would like to reiterate that Algoa Bay is completely inappropriate for such operations in the first place).

10. **Critical Biodiversity Areas**

10.1. Reference to Critical Biodiversity Areas ("**CBAs**") was removed from the Second Draft Regulations. The reasons given were that CBAs are not a "legislatively enabled concept", "there is no way of objectively determining exactly where these are and there are no clear maps with GPS coordinates publicly available", and "reference to the concept could be vague, indeterminate, and potentially unfair to those affected by the regulations".

10.2. We have provided a link to the National Coastal and Marine Spatial Biodiversity Plan in our comments (in **Annexure A**), which includes a link to the shapefiles necessary to map CBAs. This information is publicly available.

10.3. Further, we would like to remind the Department that the broader public are affected by the Second Draft Regulations, and not just STS transfer operators (which seems to be implied by the explanation that reference to CBAs could be "unfair to those affected by the regulations"). Environmental protection is in the public interest, and it is in this interest that references to important biodiversity classifications, such as CBAs, are used to achieve the purpose that the classifications set in the first place.

11. **Public participation and transparency**

11.1. There are no public participation requirements included in the Second Draft Regulations, despite the public nature of STS transfers. This is extremely problematic, particularly in the context of the STS environmental management programme where there is a wide range of stakeholders involved in oiled wildlife response, noise management, and use of the coastal zone. We also submit that monitoring data should be made publicly available.

12. **Other inconsistencies with the TNPA ERA**

12.1. There are several inconsistencies between the Second Draft Regulations and the TNPA ERA. Contrary to the TNPA ERA's recommendations, the Second Draft Regulations contain provisions to allow STS Transfers in Anchorage 2. In addition, the TNPA ERA's recommendations on measures to adequately manage underwater noise, ballast water, light pollution, and specific hazards from the HAZOP study and the Local Code of Practice are ignored, as well as the risks associated with nighttime STS transfers. These issues must be addressed by any regulations seeking to regulate STS Transfers.

13. We appreciate the Department's public commitment to protecting South Africa's marine biodiversity. We would welcome further engagement and collaboration on this important process to finalise robust regulations that can both protect our environment and support a resilient ocean economy.

Yours faithfully,

BIODIVERSITY LAW CENTRE NPC

***Per* Kirsten Barratt**

COMMENTS AND RESPONSES REPORT

PROPOSED REGULATIONS FOR THE ENVIRONMENTAL MANAGEMENT OF SHIP-TO-SHIP TRANSFER

NAME & ORGANISATION	GENERAL COMMENT OR REGULATION NUMBER	COMMENT and SUGGESTION	RESPONSE
The Biodiversity Law Centre ("**BLC**")	**General comment:** Minister's powers and functions	COMMENT The BLC provided a detailed comment regarding the Minister's powers and functions in response to the Consultation on the Draft Regulations for the Environmental Management of Offshore Bunkering, 21 February 2025 ("**First Draft Regulations**"). Any reference in these comments to "**Draft Regulations**" can be taken to mean both the First Draft Regulations and the Draft Regulations for the Environmental Management of Offshore Ship-to-Ship Transfer, 4 July 2025 ("**Second Draft Regulations**"). This is done because some comments apply generally to both iterations of the Draft Regulations. Reference to "**STS transfer operations**" in this document includes "**ship-to-ship transfer**" or "**STS**" and "**bunkering**" (as defined in draft regulation 1 of the Second Draft Regulations). For ease of reference, we have attached our comments on the First Draft Regulations to this submission.	

		In summary, the BLC took note of the following – **Concerns about the Minister's powers and legal basis** The Draft Regulations may exceed the Minister's powers under NEMICMA, in particular, section 83(1) read with section 85. This is because regulations pertaining to STS transfers are not specifically required by NEMICMA, and do not appear to be "necessary" to implement NEMICMA (as required by section 83(1) of the Act), nor do they align with the acts objectives or the specific matters listed in section 83(1). There has also been no prior determination by the Minister that STS bunkering operations have an adverse impact on the coastal environment. This is a requirement in terms of section 58(2)(a) and a prerequisite for issuing norms and standards pertaining to activities with an "adverse impact on the coastal environment" as contemplated in Section 83(1)(f)(xii) of NEMICMA. **Failure to observe cooperative governance** The Draft Regulations ignore the cooperation between the DFFE and the Green Scorpions, SAMSA, and TNPA that would be necessary to implement the Draft Regulations meaningfully. This undermines the principles of cooperative governance and creates potential conflicts with existing and evolving maritime legislation, including the Merchant Shipping Bill, MAPROL Act, and the proposed ORPC Bill.	

		Inappropriate legislative framework and approach to environmental management The Draft Regulations seek to address matters that are better regulated under other statues. The protection of species (such as the African Penguin) should be dealt with under NEMBA. Vessel construction, training, and pollution control should be dealt with under the Merchant Shipping Bill and the ORPC Bill, both currently being processed by Parliament. Environmental management planning should occur through NEMA's chapter 5 processes, especially considering environmental authorisation and EIA requirements. STS transfer has not been listed as a listed activity in terms of NEMA, when it arguably should be. **Risk of fragmented regulation** Without proper alignment with NEMA, NEMBA, and maritime laws, the Draft Regulations may duplicate or contradict existing regimes, be challenged legally for procedural or jurisdictional flaws, or fail to effectively protect marine biodiversity or address environmental risks. The BLC also made **recommendations for immediate and long-term action**. The BLC has consistently advocated for the Minister to exercise his powers to halt STS transfer in Algoa Bay because of the immediate, pervasive, and significant threat these activities pose to the marine environment. In the short-term (for immediate threats in Algoa Bay) such actions include issuing an emergency directive in terms of section 92 of NEMICMA to halt current STS transfer operations because of the immediate threat to the environment, and / or gazetting a notice in terms of section	

		57(2) of NEMBA to prohibit STS transfer operations because of the threat posed to the critically endangered African Penguin. This notice should be accompanied by regulations in terms of section 97 of NEMBA and consultation in terms of sections 99 and 100 (and emergency powers in terms of section 92 of NEMICMA should be used concurrently to address harm during this consultation period). Medium and long-term recommendations (for integrated regulation) include issuing a notice in terms of section 58(2)(a) of NEMICA to declare STS transfer operations as an activity with adverse environmental impacts and listing STS transfer as an activity that requires environmental authorisation and an EIA process in terms of section 24(2)(a) of NEMA, as well as to ensure alignment with both local and international environmental standards. <u>CONCLUSION</u> In this regard, the Minister has the abovementioned powers in terms of both NEMBA and NEMICMA to immediately address the threats posed by bunkering. It is incongruous with the constitutional obligation to protect the environment through reasonable legislative measures to issue the Draft Regulations in circumstances where the Minister's powers to do so are murky at best, where STS transfer has been proven to have an immediate, adverse effect on the marine environment[1], and where the Minister has a suite of legislation at his disposal to properly	

[1] 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.

		regulate STS transfers. While we are greatly encouraged that the Minister has decided to take proactive steps to mitigate the impacts of STS transfers, for the reasons set out in these comments, these steps are beyond the Minister's powers under section 83(1) of NEMICMA. For the above reasons, it is clear that the Draft Regulations should not be published under section 83(1) of NEMICMA. However, if the Minister intends to proceed with publishing these regulations under NEMICMA (which we do not recommend), we implore that the comments that follow in this document are considered and that our suggestions are implemented. **We welcome further engagement with the Department in this regard.**	
	General comment: content of Second Draft Regulations	<u>COMMENT</u> The BLC raised certain concerns regarding the general content of the First Draft Regulations, most of which were not dealt with in the Second Draft Regulations. The following concerns remain – **Glaring inconsistencies with the TNPA ERA** 1. The TNPA ERA explicitly recommends that <u>no</u> STS transfer operations occur in Anchorage 2. Despite this, the Second Draft Regulations allow for operations to occur there (although now there are monthly limitations on when such operations can occur, which was absent from the First Draft	

		Regulations). This contradicts the recommendation of the TNPA ERA. 2. Key environmental risks and mitigation measures recommended in the TNPA ERA are not reflected in the Second Draft Regulations, such as measures for ballast water, light pollution, specific hazard mitigations from the HAZOP study, as well as measures from the Local Code of Practice. It is also not clarified how the Second Draft Regulations relate to SAMSA's codes. 3. The TNPA ERA recommends robust underwater noise management to mitigate disturbance to marine wildlife (such as acoustic propagation modelling and noise thresholds for species). The Second Draft Regulations have removed the regulations pertaining specifically no noise mitigation, and instead, noise mitigation requirements are dealt with in terms of the Environmental Management Plan (this is dealt with in more detail in a separate comment below). The Second Draft Regulations lack specificity and no not meet the technical detail or rigor proposed in the TNPA ERA (such as critical recommendations to review anchorage proximity to sensitive habitats). Further, it is not acknowledged that the primary source of underwater noise is increased vessel traffic. This is important in so far at it relates to the number of vessels permitted in an area. 4. The frequency of nighttime STS transfer operations was decreased in 2019 because the risk of an unplanned incident (such as a spill) is higher at night. While nighttime STS	

		transfer operations were not permitted in the First Draft Regulations, they have been permitted under the Second Draft Regulations. The risks associated with nighttime STS transfers noted in the TNPA ERA have not been heeded in the Second Draft Regulations. This is dealt with in a separate comment below. 5. The TNPA ERA advocates for area-specific oil spill modelling and realistic response timelines based on risk scenarios. The Second Draft Regulations require a forecast-based risk assessment and a 30-minute spill response time. Although this partially reflects the intent of the TNPA ERA, the evidence surrounding the 30-minute response time is not clear and the site-specific modelling requirements are vague. **Weak and vague transitional provisions** The Second Draft Regulations gives STS transfer operators six months to submit their environmental management plan and there are no transitional requirements for key protections (such as marine mammal monitoring or environmental training). There are also no requirements to revise existing licences and authorisations to incorporate new environmental standards. **Questionable economic justification** The economic benefits of this venture are unclear and could possibly be negative. The TNPA ERA found most of the economic value of STS transfer operations accrues offshore	

		(foreign operators and fuel sources), the potential benefits to the local economy are uncertain and possibly overstated, and STS transfer operations may also harm key local industries (such as ecotourism, fisheries, and aquaculture). Further, there is no need and desirability assessment. The Second Draft Regulations don't require economic or environmental justification for STS transfer operations at an operational level and there is no link with EIA requirements or South Africa's Natural Capital Accounting and Climate obligations. Given the potential ecological damages and limited economic benefit, the DFFE should assess whether STS transfer operations are constitutionally justifiable. In addition, alternative regional development opportunities should be explored (like ecotourism and public works). **No requirements for public participation** Given the very public nature that the risks of STS transfer operations pose, much of this process needs to be under public scrutiny. The omission of public participation requirements for the STS environmental management plan is particularly problematic because of the multitude of stakeholders who have an interest in the effects STS transfers have on the environment (for example, those involved with oiled wildlife responses).	

		Powers inappropriately conferred on the Minister The Second Draft Regulations contain many instances in which powers are conferred on the Minister in circumstances where this may not be entirely appropriate. For instance – • Under regulation 4(7)(b), the Minister is empowered to instruct an operator to contact an authorised facility to collect and transport oiled wildlife. • Under regulation 5(3), the Minister is empowered to determine weather conditions. • Under regulation 7(2), the Minister must approve the training programme. • Under regulation 8(1)(b), the Minister must approve the STS environmental management plan. The conferral of so many powers to the Minister in the context of STS transfers creates several difficulties – • First, the Minister is obliged to act in circumstances where the Minister lacks the appropriate skills and experience to act (eg: the determination of weather conditions should be done by the South African Weather Service), and determinations should be made by a suitably qualified person. • Second, efficiency and expediency will be compromised in emergency situations if the Minister is the party having to give instructions on, for example, an operator contacting an authorised facility to collect and transport oiled wildlife (would the Minister be on call at all hours to give this instruction, where necessary?).	

		• Third, by conferring the Minister powers to approve STS environmental management plans and training programmes, it is unclear what recourse persons adversely affected by such decisions would have. We say this because no appeal would lie against the Minister's decision in terms of section 43 of NEMA, the Minister being *functus officio*. The only recourse available to affected persons would be to approach the High Court to judicially review the Minister's decision. This is an extremely time and resource consuming exercise in circumstances where an administrative appeal would be a far more appropriate means of addressing administrative decisions that are unlawful, unreasonable, or procedurally unfair. Serious consideration must be given to the conferral of these powers on the Minister, and whether it is not better to empower the Department to make these decisions, or for the Minister to delegate these powers.	
	General comment: removal of noise mitigation measures (previously draft regulation 4 in the First Draft Regulations)	COMMENT We note that the regulation pertaining to noise mitigation measures has been removed from the Second Draft Regulations entirely (noise mitigation is now solely part of the environmental management plan). The reason given is – *"While noise mitigation remains a requirement in terms of the required ship-to-ship environmental management plan, the Draft Regulations no longer require a ship-to-ship bunker operator to comply with the International Maritime Organisation Guidelines*	

		for the Reduction of Underwater Noise from Commercial Shipping as this was noted as an extremely costly exercise for vessels that have already been constricted and are in service. The environmental management plan was therefore considered a more appropriate tool to phase in noise mitigation measures that could be tailored to the specific operations and area." The removal of the noise mitigation measures as a standalone regulation waters down the requirement of reducing underwater noise pollution (a significantly large negative impact associated with STS transfer operations). This is particularly true when examining the TNPA ERA's recommendations on reducing vessel speeds (due to noise impacts). Such regulations have been removed from the Second Draft Regulations and the only explanation given was that "*certain requirements relating to vessel speed have been removed*". The change of noise mitigation from a standalone requirement to only being part of the environmental management plan raises some transparency concerns. As per draft regulation 8(1) of the Second Draft Regulations, the plan must be developed by an independent specialist (as defined) and approved by the Minister. There is no provision for public participation or oversight during this process. Further, economic expedience is not an excuse for sacrificing environmental protection. Noise mitigation measures in compliance with the IMO Guidelines are recognised as best practice for ensuring that noise does not have a disproportionately adverse effect on the marine environment, and it is imperative that provision for compliance with these	

		Guidelines is returned to the Second Draft Regulations. The bunkering industry is a $1.3-billion industry, purely on the sale and movement of bunker fuel volumes within South African ports.[2] It is, accordingly, well within the operators' means to ensure that best practice noise mitigation measures are implemented. This is inconsistent with the polluter pays principle, as well as the precautionary principle, both contained in section 2 of NEMA. <u>SUGGESTION</u> We recommend that the noise mitigation measures, and specifically measures which comply with the IMO Guidelines, are reinstated in the Draft Regulations as a standalone requirement, rather than relying solely on an environmental management plan to mitigate noise impacts. As we note that an "underwater noise mitigation and management plan" is included in the requirements of an environmental management plan across both iterations of the Draft Regulations, we suggest that concrete public participation mechanisms are added to this regulation. This is discussed further in our comments on draft regulation 8 (below).	
	General comment: removal of transitional arrangements (previously draft regulation 11 in the	<u>COMMENT</u> While there were concerns about the transitional arrangements contained in draft regulation 11 of the First Draft Regulations (in that it was unclear why STS transfer operations were	

[2] https://www.freightnews.co.za/article/sa-a-critical-player-in-global-bunkering-market-0?page=2.

	First Draft Regulations)	contemplated at Anchorage 2 when the TNPA ERA expressly advises against it), we submit, for the sake of clarity, that other transitional arrangements are included in the Draft Regulations going forward. As indicated in our comments on draft regulation 8 (below), the obligations for STS transfer operators are not clear during the period from when the regulations are gazetted (and are therefore in effect) to when they need to have their operational procedures in line with the regulations (ie: there is a length of time specified for becoming compliant with the regulations, but no indication of the consequences on STS transfer operations during this time). <u>SUGGESTION</u> In this regard, we suggest that the Draft Regulations provide clarity on the duties of STS transfer operators during the period between the gazetting of the regulations and the time specified for compliance. We recommend that STS transfer operations cease during this period, as this would provide an additional incentive to the STS transfer operators to comply with the regulations as quickly as possible.	
	Draft regulation 1 definition of "**bunkering**"	<u>COMMENT</u> We welcome the amendment of "**bunkering**" so that it can be included within the definition of "**ship-to-ship transfer**" or "**STS**". However, and as per the BLC's comments on the First Draft Regulations, we note that "**fuel**" remains undefined. We understand "**fuel**" to refer to the widest sense so that it is	

		compatible with the definitions in Annex 1 of MARPOL, Annex VI of MARPOL, and Article 1 of the International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. <u>SUGGESTION</u> To the extent that the above needs clarification, we suggest that a definition for "**fuel**" is added to the Draft Regulations. This would read along the lines of "*any oil, gas, distillate, or hydrocarbon mineral oil (including lubricating oil) used or intended to be used in the propulsion or operation of a ship*". This potential definition aligns with both MARPOL and the International Convention on Civil Liability for Bunker Oil Pollution Damage.	
	Draft regulation 1 definition of "**independent specialist**"	<u>COMMENT</u> We welcome the addition of the definition of "**independent specialist**" to the Second Draft Regulations. However, the requirement in (b) of this definition might be the cause of some unnecessary restriction, as it could be difficult to find a specialist with the knowledge and skills required but who also has no interest (past or present) in the maritime industry. For example, someone with 20 years of experience in maritime logistics might be an ideal specialise under (a) of the definition, but would be disqualified in terms of (b) because of their prior involvement in the industry or current connections (such as a former employer, pension, or professional association). In other words, for someone to have the requisite knowledge and skills to be an independent specialist in this field, it follows that they must also	

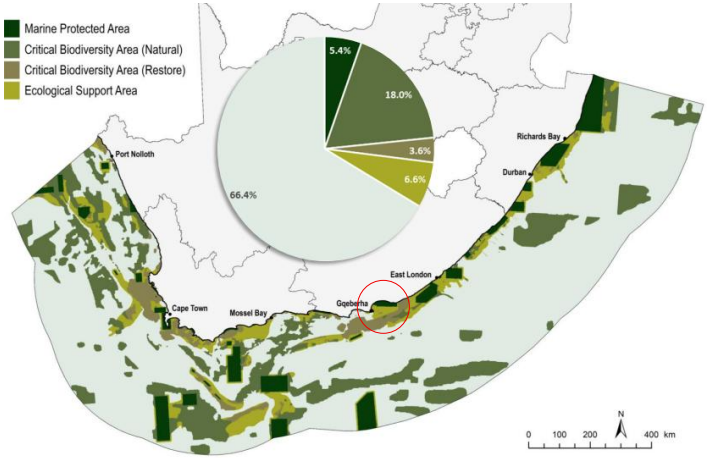
		have some sort of professional interest in the maritime industry. Using the term "other interests" gives the impression that <u>any</u> interest in the maritime sector would be enough to disqualify a person from being an independent specialist, but again, to have the knowledge and skills required for the job, this person needs to understand the maritime industry. <u>SUGGESTION</u> We suggest that the language in (b) is tightened in such a way to provide more clarity on the nature of the interest that the independent specialist cannot have in the maritime industry. For example, (b) could be modified to exclude conflicting or current interests, rather than any interest at all. This modification could be along the lines of "*the person has no current business, financial, or personal interest in any company or entity that may be affected by the outcome of the work*", as this would balance their expertise in the maritime industry with their independence.	
	Draft regulation 1 definition of "**ship-to-ship transfer**" or "**STS**"	<u>COMMENT</u> We welcome the amendment to the definition of "**ship-to-ship transfer**" or "**STS**" to include "**bunkering**" within this definition, as well as broadening the scope of what is included in this definition in terms of the types of substances that might be transferred.	
	Draft regulation 1 definition of "**ship-to-ship transfer operator**"	<u>COMMENT</u> We welcome the addition of "**ship-to-ship transfer operator**" to section 1 of the Second Draft Regulations as a replacement for	

		"**bunker operator**" from the First Draft Regulations. However, and as per the BLC's comment on the First Draft Regulations, this definition still ignores the requirement of obtaining a licence from TNPA to engage in STS transfer operations legally, in terms of section 57 of the National Ports Act, 12 of 2005. This is a separate requirement from the authorisation from SAMSA, and both are necessary to conduct STS transfer operations. SUGGESTION As both an authorisation from SAMSA and a licence from TNPA are necessary for an operator to engage in STS transfer operations legally, we suggest that the requirement of having such licence is included in the definition of "**ship-to-ship transfer operator**".	
	Draft regulation 1 include definition of "**Critical Biodiversity Area**."	COMMENT and SUGGESTION For the reasons set out more fully under the comments on draft regulation 3(1), we recommend that the reference to Critical Biodiversity Areas (**CBAs**) included in the First Draft Regulations should be retained in the Second Draft Regulations.	
	Draft regulation 2 (scope)	COMMENT We welcome the clarity provided by the Second Draft Regulation in that the scope of the regulations applies to everyone, regardless of nationality (as the expansion of "scope" is to include all persons and organs of state), as well as where the regulations apply (as the definitions of "**bunkering**" and "**ship-to-ship**	

		transfer" have been amended to refer to activities outside of an operational harbour). However, there is still no clarification on the relationship between the Second Draft Regulations and other applicable legislation and regulation. Draft Regulation 2 would be an appropriate place in the Second Draft Regulations to make this clarification. <u>SUGGESTION</u> We suggest that the scope is amended to clarify the relationship between the Draft Regulations and other applicable legislation and regulations. We also suggest that further consideration is given to determining whether general, national regulations are actually capable of promulgation or whether the nature of avoidance and mitigation risks associated with STS transfer operations require area-specific regulation as provided by section 85(3)(b)(i) of NEMICMA.	
	Draft regulation 3(1) (prohibitions)	<u>COMMENT</u> We note that the reference to "**critical biodiversity area**" has been replaced with "**aquaculture development zone**" because critical biodiversity areas ("**CBAs**") are "*not a legislatively enabled concept, there is no way of objectively determining exactly where these are, and there are no clear maps with GPS coordinates publicly available. Reference to the concept could be vague, indeterminate, and potentially unfair to those affected by the regulations*".	

		The National Coastal and Marine Spatial Biodiversity Plan ("**Spatial Biodiversity Plan**") is available online.[3] In this regard, we submit that one is able to determine exactly where the CBAs are (the Spatial Biodiversity Plan contains shapefiles that are publicly available) and that the concept of a CBA is not "vague, indeterminate, [or] potentially unfair to those affected by the regulations". The online resource we have provided below contains the information necessary to understand how to use CBA mapping, why CBA mapping is important, as well as the background on how the CBA maps were created. We further submit that is it illogical to cite "unfairness" to those affected by the regulations in the way it has been cited above because it assumes that only those wishing to engage in STS transfer operation are affected by the Draft Regulations. STS transfer operators comprise of a small group of people, while the actual effects of the Draft Regulations on the general public (because environmental safeguards are in the public interest) are much broader. The Spatial Biodiversity Plan comprises of the national coastal and marine CBA map (v1.2) and the accompanying sea-use guidelines. It is intended to inform planning and decision-making in support of sustainable development, and contains a portfolio of biodiversity priority areas that are important for conserving a representative sample of ecosystem times and species to maintaining ecological processes and ecological infrastructure, and for providing ecosystem services.	

[3] The National Coastal and Marine Spatial Biodiversity Plan, as well its shapefiles and technical report, can be found here: https://cmr.mandela.ac.za/Research-Projects/EBSA-Portal/South-Africa/National-Coastal-and-Marine-Spatial-Biodiversity-P/CBA-Map-and-Sea-use-Guidelines-Version-1.

		The overall goal of the Spatial Biodiversity Plan is to provide the best available science to support biodiversity conservation and sustainable development in South Africa's marine environment (something which the DFFE has expressed its support of on multiple occasions). The map below (taken from the Spatial Biodiversity Plan) shows the areas of South Africa's coastal waters that are marine protected areas ("**MPAs**"), CBAs, and ecological support areas ("**ESAs**"). Because STS transfer operations are currently only occurring in Algoa Bay, we will use this area to illustrate our comment (Algoa Bay has been circled in red on the map below). It is apparent from this map that Algoa Bay contains a marine protected area, areas of both natural and restore CBAs, and the remaining area is an ESA. We would like to reiterate that this map is available (for free) online and that the shapefiles used to create it are available for download.  	

		We would also like to point out the percentage of sea area that is included in each of the important biodiversity classifications. Only 5.4% of South African waters is contained in an MPA, 21.6% is classified as a CBA (both natural and restore) and only 6.6% is classified as an ESA (leaving a total of 66.4% of South African waters without a biodiversity classification). Evidently, very little of South Africa's coastal waters is protected. As Algoa Bay is clearly an important biological area, it makes little sense to ignore these classifications (especially considering how little of South Africa is protected in the first place). Below is an extract from the sea-use guidelines for activities in biological sensitive areas. The guidelines indicate the compatibility of the sea-use activity with each category of biodiversity priority area with the aim of guiding recommendations for management so that the broad management objective for each area can be maintained.  It is clear from the above extract that bunkering is <u>not</u> compatible with CBAs, and it has <u>restricted</u> compatibility within ESAs. As seen in the map provided, almost all of Algoa Bay is categorised as an ESA, and the remaining area is either a CBA or an MPA. 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*	

Broad sea use	Associated MSP Zones	Associated sea-use activities	MPA	CBA-N	CBA-R	ESA
Transport	Maritime Transport Zone	Designated shipping lanes (including port approach zones)		R	R	Y
		Anchorage areas		R	R	Y
		Bunkering		N	N	R
		Ports and harbours (new)		N	N	R
		Dumping of dredged material		N	N	R

		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 would be more appropriately evaluated as not permitted. The ecosystem types in which activities take place may also be a consideration as to whether 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…".[4] This suggests that national regulations pertaining to STS transfer operations may not be appropriate in the absence of mechanisms to assess whether such operations may, in fact, be prohibited because of the ESA classification. In this regard, we submit that the critically endangered African Penguin would likely be found to be an "irreplaceable or near-irreplaceable feature" in Algoa Bay. There is no indication that the Second Draft Regulations have considered the biological importance (and relevant classifications) of Algoa Bay at all (beyond the statement that maps are not available and using CBAs would be prejudicial to those affected by the Draft Regulations). We do not understand why a provision to protect this biologically important area has been watered down in such a way, particularly because when this conservation-conscious measure was taken out of the Second Draft Regulations, there was no replacement given to protect the biodiversity of the bay.	

[4] MSBP Technical Report, p 193.

		SUGGESTION Reference to CBAs must be put back into the Draft Regulations. Information on CBAs is readily available online (including downloadable shapefiles for mapping purposes). Further, CBAs (as well as MPAs and ESAs) are important biodiversity safeguards with global significance. As most of South Africa's coastal waters are not classified into one of these classifications, it is even more important to protect the areas that have been identified as ecologically important. In terms of our Algoa Bay example, it is clear from the above that Algoa Bay is not suitable for STS transfer operations. We therefore recommend that STS transfer operations are stopped in Algoa Bay.	
	Draft regulation 3(2) (prohibitions)	COMMENT We note that conditions have been added to the Second Draft Regulations to allow for ship-to-ship transfer between the hours of sunset and sunrise in specific instances ("**nighttime transfers**"). We note further that the majority of spills that have occurred due to STS transfer operations have occurred at night. If such nighttime transfers have to occur, they need to be strictly regulated and information about the technology used to prevent and detect spills at night must be publicly available. This is not a requirement of the Second Draft Regulations. The TNPA ERA recognises that nighttime transfers pose a higher risk of spill. For this reason, the allowance of nighttime transfers	

		needs to be carefully scrutinised to minimise any risks to health, safety, and the environment. In any event, it is noted that it is not safe for people to attend to a spill at night, so it is unclear why the Second Draft Regulations contemplate nighttime transfers in the first place. Not only is the risk of spills higher during nighttime transfers, but so is the risk of collision with wildlife (the TNPA ERA identifies that the risk of collision is twice what it is during daylight hours). High vessel traffic at night compounds this risk. We note again that the effects of light pollution have not been considered in the Second Draft Regulations. In this regard, we would like to reiterate this point and submit that nighttime transfers would be a significant source of artificial light (as identified in the TNPA ERA). Increasing light in this way would disturb and disorientate pelagic seabirds feeding in the area, or result in physiological and behavioural effects of fish and cephalopods, as these are drawn to lights at night where they might be more easily preyed upon by other fish and seabirds. The TNPA ERA expressly states that, if floodlights are required to undergo nighttime transfers, then nighttime transfers should not be permitted. The HAZOP study in the TNPA ERA had the purpose of gaining a better understanding of nighttime transfers and the risks involved. In summary, the HAZOP study does not recommend nighttime transfers for a variety of reasons, due to the hazards created –	

		• Poor visibility for the crew (and navigators) at night will affect mooring and unmooring, as well as personnel transfer between vessels. • Difficulties in correctly placing a boom at night. • Increased risk of spills. • Risk to human safety when cleaning a nighttime spill. In this regard, the HAZOP study (and therefore, the TNPA ERA) recommends limiting nighttime transfers. It is recommended that transfers occur during daylight hours and during certain specified weather conditions. <u>SUGGESTION</u> We suggest that, as per the First Draft Regulations, nighttime transfers are <u>not permitted at all.</u> If it is decided that nighttime transfers have to continue (which, we reiterate, is not safe or necessary), the STS transfer operators' ability to attend to a spill at night must be heavily scrutinised (and made publicly available). The safety to the crew is at risk during a nighttime cleaning operation and, if the crew is therefore unable to clean a spill at night because of safety reasons, nighttime transfers should not be permitted.	
	Draft regulations 3(3) and (4) (prohibitions)	<u>COMMENT</u> We welcome the amendment to draft regulations 3(3) and (4) in that they are no longer specific to Algoa Bay. We also welcome	

		the addition of the prohibition of drifting or anchoring in a marine protected area.	
	First Draft Regulation 3(5)	COMMENT We note that the cap on number of STS transfer operators and vessels operating has now been removed from the Draft Regulations. This is an important omission, as regulating the number of operators permitted to operate at any one time is critical to safeguarding the marine environment from the harmful impacts (particularly noise) resulting from this activity. SUGGESTION Draft Regulation 3(5) relating to a cap of 5 STS transfer operators operating in Algoa Bay needs to be reinstated. However, this Regulation should be included under Regulation 9 insofar as it relates explicitly to STS transfer operations occurring in Algoa Bay.	
	General comments on draft regulation 4 (wildlife monitoring and mitigation)	COMMENT We note that the obligation to detect turtles has been removed from draft regulation 4, except in draft regulation 4(6) where there is a reporting requirement. The reason for this is unclear, as turtles are equally likely to be disturbed by STS transfer operations as penguins and marine mammals and it is not burdensome on the observer to keep watch for turtles (as they will already be watching for penguins and marine mammals).	

		The obligation to avoid contact with, or navigating the vessel over, a marine mammal, penguin, or turtle has been removed. The reason for this is also unclear and it is logical for there to be an enforceable obligation to avoid wildlife, especially when there is an obligation to detect it. In addition, there is no longer the obligation for the vessel to reduce its speed if a turtle, marine mammal, or penguin is detected nearby. No reason was given for this change either. We also submit that penguins are not the only seabird that will be found in the water during an STS transfer operation, and therefore, all seabird species should also be considered in the Draft Regulations. We also note that there is no longer a requirement to have an oil spill response vessel present at the STS transfer site before transfer can commence. However, we note that this requirement has been incorporated into draft regulation 6(1)(g) of the Second Draft Regulations. Further, we question the practicality of several provisions of draft regulation 4, particularly where they are 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 DFFE – ideally as a coordinated monitoring and regulatory regime regulated through principles of cooperative governance). In this regard, we have compared the Second Draft Regulations to the Protect 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 the study. This is further detailed in our more specific comments below. However, it is clear at this point that little attention has been paid to the practical processes involved in	

		oiled wildlife preparedness and response, including those detailed in the Oiled Wildlife Preparedness and Response Plan included in the TNPA ERA. SUGGESTION The environmental safeguards that were removed from draft regulation 4 must be put back into the Draft Regulations. The above removals were not burdensome obligations on STS transfer operators and should be reinstated to provide more effective environmental protections.	
	Draft regulation 4(1) (wildlife monitoring and mitigation)	COMMENT We support this intention to create detailed requirements to mitigate the negative impacts of STS transfer operations on wildlife. We also support the intention to address recommendations made in the TNPA ERA and its supporting studies. We note that the TNPA ERA contemplates persons "on watch" for mammals, penguins, and turtles at various points during STS transfer operations. However, the manner in which this is incorporated in the Second Draft Regulations appears unworkable and impracticable, especially given the speeds at which vessels travel (and there are no obligations to reduce such speeds), the size of the vessels, and absence of an indication to use appropriate technologies to identify the presence of wildlife (beyond the hydrophone, which is a separate requirement).	

		In addition, we submit that observers are not practical in this way during nighttime transfers, especially considering that the TNPA ERA has explicitly stated that such transfers must not go ahead if there is a need for a floodlight (which would be the case for an observer keeping watch during nighttime hours, otherwise they would not be able to do their job and correctly perform their function). SUGGESTION We agree that observers are a necessary requirement. However, more thought needs to be given to enable the observers to correctly perform their role and ensure that STS transfer operations are carried out safely and without endangering wildlife. For example, vessel speed requirements need to be reinstated in the Draft Regulations. We further submit that, because it is impractical to have an observer during nighttime hours (as the TNPA ERA does not recommend STS transfer operations when a floodlight is necessary, and an observer would not be able to see – and therefore perform their function – without a floodlight), STS transfer operations should not be happening at night. It follows that, because observers are a necessary requirement of the Draft Regulations, and observers cannot perform their duties at night, then (logically) STS transfer operations cannot occur at night.	

	Draft regulations 4(2) and (3) (wildlife monitoring and mitigation)	COMMENT We support the change from sonobuoy to hydrophone, and we further support that the hydrophone system is the obligation of the ship-to-ship transfer operator (as this is consistent with the Polluter Pays Principle).	
	Draft regulation 4(4) (wildlife monitoring and mitigation)	COMMENT We note that draft regulation 4(1) requires a person to keep a constant watch for marine mammals and penguins for 30 minutes prior to commencement of STS transfer operations, as well as during the operation. We also note that draft regulation 4(3) states that the hydrophone must be deployed into the water thirty minutes prior to the start of STS transfer operations and during the operation. However, this draft regulation 4(4) states that the operator cannot commence with STS transfer operations if a marine mammal or penguin is sighted within 500m of the intended transfer site or detected through the hydrophone. There is no obligation to cease STS transfer operations if a marine mammal or penguin is sighted or detected during transfer (which is likely to occur, given the dynamic nature of the ocean, particularly in Algoa Bay which is the only area where STS transfer operations are currently occurring).	

		SUGGESTION The Draft Regulations should include an obligation to pause STS transfer operations when a marine mammal, turtle or penguin is sighted or detected (pausing operations should also be considered when other species of seabirds are detected). If this obligation is too burdensome on the STS transfer operator, STS transfer operations in certain areas should be reconsidered entirely. This is particularly recommended for Algoa Bay, given the prevalence of marine mammals and penguins in the area, as well as because of our comments on draft regulation 9 below.	
	Draft regulation 4(5) (wildlife monitoring and mitigation)	COMMENT Draft regulation 4(5) carries the obligation to report sightings or hydrophone detections or marine mammals or penguins that are spotted during STS transfer. However, there is no obligation to report any marine mammals or penguins sighted prior to STS transfer, despite previous subsections stating that someone must be "on watch" and the hydrophone must be deployed 30 minutes prior to commencement. SUGGESTION As it does not seem burdensome to report wildlife spotted prior to the commencement of STS transfer, we suggest that this requirement is added to draft regulation 4(5). This will provide a holistic view of the wildlife in a particular area that may be affected by STS transfer operations.	

	Draft regulation 4(6) (wildlife monitoring and mitigation)	COMMENT We welcome the amendment that reporting must be done through the "most effective means possible" instead of "in writing" as this is more practical. We also welcome the rephrasing of the subregulation to provide clarity on the obligation it carries. However, we note that the requirement to report "any ringed, banded, or tagged seabird" has been removed. SUGGESTION We understand that it might be burdensome on the operator to have to report every sighting of a ringed, banded, or tagged seabird, especially when the animal is not injured, deceased, or otherwise incapacitated. In this regard, we suggest that the requirement to report if an animal is tagged or not should be included instead in draft regulation 4(5) during the monthly reporting to the Department. In addition, draft regulation 4(6) should be amended to include the requirement to report if the injured or deceased animal is tagged, but only if they are injured, deceased, or otherwise incapacitated (ie: if a tagged animal is spotted without issue, it doesn't need to be reported immediately under subregulation 4(6) and can be included in the monthly reporting in terms of subregulation 4(5) instead).	
	Draft regulation 4(7) (wildlife monitoring and mitigation)	COMMENT We welcome the amendment to draft regulation 4(7) so that it provides an obligation to collect and transport all oiled wildlife instead of only oiled seabirds. We also welcome that the capture	

		and transport is done at the expense of the STS transfer operator, as this is consistent with the Polluter Pays Principle. We note that this obligation is placed on the STS transfer operator. However, this obligation might be misplaced, as an STS transfer operator might not necessarily have the correct skills to capture oiled wildlife safely. Further to this, we note that the STS transfer operator's duties are under the instruction of the Minister. The requirement to collect and transport oiled wildlife is therefore at the Minister's discretion. This creates several difficulties and the efficacy of the instruction having to come from the Minister is questionable, particularly if STS transfers are authorised to occur at night (is the Minister going to be standing by to issue an oiled wildlife instruction at all hours?). <u>SUGGESTION</u> The STS transfer operator either needs to be trained correctly to be able to capture and transport oiled wildlife safely, or this subregulation needs to be amended to allow for someone else aboard the vessel (who has the necessary training) to be able to fulfil this role. This is preferable to removing this subregulation and only providing that the STS transfer operator must contact a wildlife facility to collect and transport the oiled wildlife, as the oiled animal needs to be caught and removed from the water immediately. The discretion of the Minister to instruct the STS transfer operator to either collect and transport the wildlife themselves or to contact a wildlife facility to do so seems impractical. Does this mean that the Minister will be "on call" for every STS transfer operator when	

		they are engaging in STS bunkering operations? What if a spill occurs at 2am and the Minister needs to give the instruction then? As it is unclear how this subsection is supposed to work, we suggest that the requirement of instruction from the Minister is removed and that there is a blanket obligation to attend to oiled wildlife.	
	General comments on draft regulation 5 (weather conditions)	<u>COMMENT</u> It is unclear why this draft regulation includes Algoa Bay-specific obligations when regulation 9 is dedicated to Algoa Bay. This placement seems odd, especially since the rest of the Second Draft Regulations have been redrafted to be more general (ie: other regulations that were specific to Algoa Bay have been changed and draft regulation 9 has been added instead). We note the changes between the First Draft Regulations and the Second Draft Regulations, particularly that STS transfer can only occur when the wind force is below 22 knots (changed from below 25 knots) and when the wave height is below 2m (changed from 0.5m). We particularly welcome the addition of subregulation 5(2)(c) in that STS transfer must comply with the South African bunkering code of good practice and ship-to-ship cargo transfer code of good practice (as updated from time to time). However, and as per the BLC's comments on the First Draft Regulations, we note that the TNPA ERA indicates that STS transfer operations should be limited to conditions when the wind force is less than 10m/s (ie: less than 20 knots).	

		There is also no justification given for why the minimum wave height has increased to 2m from 0.5m. The TNPA ERA indicates that there is a high chance of boom failure when the wave height exceeds 1m. Further, there is no longer the obligation for the STS transfer operator to cease transfer until the next suitable weather window if the weather conditions change. No justification is given for this change, especially considering the likely risk to human safety, as well as the environment, if STS transfer operations continued in poor weather conditions. <u>SUGGESTION</u> If it is decided that draft regulation 5 will continue to be specific to Algoa Bay, we suggest (as per the recommendations of the TNPA ERA) the maximum wind speed is amended to less than 20 knots and the maximum wave height is changed to 1m (or below). We further suggest that the obligation to cease STS transfer if the weather conditions change to become less favourable is put back into the Draft Regulations. Alternatively, if the Algoa Bay specific weather conditions are specified in draft regulation 9 instead, we suggest that this draft regulation 5 is amended to be more general (and follow the pattern of the rest of the Second Draft Regulations). Further, it does not make sense to place the obligation of determining weather conditions suitable for STS transfer operations in a specific area on the Minister. It is unlikely that the	

		Minister has such expertise. Suitable conditions should be determined by the South African Weather Service.	
	Draft regulation 6(1) (minimum requirements to avoid or mitigate spills)	<u>COMMENT</u> We welcome the addition of the word "minimum" to describe the requirements to avoid or mitigate spills so that STS transfer operators are encouraged to go over and above what the regulations require, as well as the removal of the word "oil" so that all types of spills are covered by this draft regulation. This is in alignment with the BLC's comments on the First Draft Regulations, as well as the TNPA ERA. We note the removal of the requirement that the STS transfer officer must *"deploy a static towing or holdback tug to maintain heading control for the duration of bunkering"* for the given reason that this would create a safety hazard. We also welcome the amendment in draft regulation 6(1)(d) to ensure that the boom is deployed in such manner and position as to afford the best mitigation for any spill. We note, however, that there are no training requirements necessary for a person to be able to deploy the boom and submit that this is an oversight because boom deployment in this manner is a technical exercise. We also note that the technical specifications relating to booms, as described in the Oil Spill Modelling Study of the TNPA ERA, have been omitted. The addition of draft subregulation 6(1)(g) is also welcomed and we agree that such precaution is necessary when working with	

		flammable gas or vapour. We note this addition is similar to the removed draft regulation 5(9) from the First Draft Regulations (under the wildlife monitoring and mitigation regulations) but has been amended to require that STS transfer tanker to be equipped with gas detection equipment rather than the oil spill response vessel that is on standby. We submit that this is a practical change from the First Draft Regulations. However, it is still unclear how the requirements in draft regulation 6(1) interact with the detailed requirements contemplated in OPRC at international level. <u>SUGGESTION</u> We suggest that this draft regulation is further amended to ensure the appropriate requirements regarding mitigation are delt with 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 other measures that conform to the approach that will be put in place through the ORPC Bill. We further suggest that specific requirements for the treatment of ballast and other discharges are aligned with the relevant regulations under South African law and applicable international IMO codes, treaties, and protocols. To the extent that these need to be specifically highlighted or modified for purposes of regulating STS transfer operations, the relevant conditions must be integrated into the operator licences and careful consideration must be given as to what is appropriate at the level of regulation	

		under NEMICA (as opposed to under marine pollution and merchant shipping regulation). Lastly, we recommend that training requirement for boom deployment are specified in draft regulation 7 (training requirements).	
	Draft regulation 6(2) (minimum requirements to avoid or mitigate spills)	<u>COMMENT</u> We welcome the addition of draft regulation 6(2) to the Second Draft Regulations and note that this is a replacement for the removed draft regulation 5(9) from the First Draft Regulations (the combination of draft regulations 6(1)(g) and 6(2) of the Second Draft Regulations replace draft regulation 5(9) of the First Draft Regulations). We agree that this makes practical sense. However, we note the difference in that draft regulation 6(2) only requires the spill response vessel to be on standby in the proximity and able to respond within 30 minutes of an incident occurring, while the removed draft regulation 5(9) required this response vessel to be present at the transfer site (for what is assumed to be an immediate response). Not reasons were given to why this requirement has been watered down in this way. <u>SUGGESTION</u> Because no reason was given for the change in requirement for the location of the response vessel, we submit that the requirement for the vessel to be on site (and not simply in the	

		proximity and able to respond within 30 minutes) is put back into the Draft Regulations.	
	Draft regulation 7(1) (training requirements)	<u>COMMENT</u> As per our comment regarding the boom deployment above, we note again that there are no training requirements relating to such deployment, despite it being a technical exercise. We support the requirement of all crew members to receive environmental awareness training prior to participating in STS transfer operations but note that there is no longer the requirement that this training must be updated every three years. This is concerning, particularly because of the possible changes that could occur in both the natural and legal landscapes surrounding STS transfer. We welcome the addition to draft subregulation (a) so that training must include the identification or marine mammals and seabirds common to the area in which STS transfer operations will take place. However, despite the BLC's detailed comments regarding the training requirements in the First Draft Regulations, we note very little change between the First Draft Regulations and the Second Draft Regulations. In this regard – • The training requirements in this draft regulation essentially duplicate the requirements contemplated in the ORPC Bill in terms of content, but differ from the ORPC Bill's annual	

		training requirements and threshold for accreditation (in this regard, see clause 9 of the ORPC Bill). • It is still not clear if the Second Draft Regulations' training requirements are intended to be additional to those organised by SAMSA and the Incident Management Organisation as contemplated in the ORPC Bill (as well as the training requirements under the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (**STCW**), Merchant Shipping Act, and contemplated training provisions in the Merchant Shipping Bill). In addition, there is no indication of requirements for accreditation and/or minimum standards for training courses and training providers. • It is also not clear who is responsible for funding this training. To the extent that it is implied that the costs are to be borne by the STS transfer operator, we would support such obligation as it is consistent with the Polluter Pays Principle. <u>SUGGESTION</u> We recommend that the requirement all crew members must update their environmental awareness training every three years is added back to the Draft Regulations under Regulation 7(1). We recommend that a training requirement relating to boom deployment is added to the Draft Regulations. In addition, we recommend clear alignment with the training requirements contemplated in clause 9 of the ORPC Bill.	

		Mindful of the existing Seafarer Certification Standards of Training and Assessment issued by SAMSA pursuant to STCW requirements (as well as ISO Standards for such training and existing standards applied to NOSCP and Integrated Management Systems Training), we recommend the DFFE engages 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 transfer operators (and their crews) as self-standing training standards and/or modules. In the alternative, we suggest that existing relevant training modules are updated to ensure coverage of the relevant subject matter. We have this recommendation to ensure publicity and formalisation of such training modules through regulation under either NEMICMA or the OPRC Bill (once passed) to promote accountability and enforceability, rather than relying on codes and standards that may have less legal certainty and enforcement possibilities. To the extent that regulation is required for training prior to the commencement of the OPRC Bill, we suggest that consideration is given to framing training requirements through regulations issued under NEMICMA and that these are framed in transitional terms with consideration of removal once the OPRC Bill and its relevant regulations have been issued and commence. Finally, we suggest that engagement with SAMSA, TNPA, and other relevant stakeholders (including accredited training providers) is undertaken to ensure the relevant standards already supporting implementation of the NOSCP are incorporated. In this regard, we support SAMSA, TNPA, and the DFFE cooperating to ensure the relevant oil response and oiled wildlife response	

		training standards are gazetted as regulation (rather than being contained in codes) to promote transparency, accountability, public accessibility, and to ensure enforceability. In this regard, the objectives of integration under NEMICA makes it appropriate that these standards and requirements <u>are</u> issued under NEMICMA to the extent that the OPRC Bill remains under consideration.	
	Draft regulations 7(2) and (3) (training requirements)	<u>COMMENT</u> We welcome the addition of draft regulations 7(2) and (3) to the Second Draft Regulations in that the environmental awareness training programme must be approved and that this programme must be developed by an independent specialist (as defined). However, it makes little sense to have such programmes approved by the Minister, as it is doubtful that the Minister has the expertise necessary for making this approval (and the Minister is likely over capacitated as it is). <u>SUGGESTION</u> We suggest that the obligation to review and approve the environmental awareness training programme is placed on a person other than the Minister (but with possible oversight from the Minister). Such person should also be independent and stand to make no profit (or other interest) from STS transfer operations (possibly another member of the Department with the correct background and expertise to oversee an environmental awareness training programme).	

		Further, we recommend that the definition of "**independent specialist**" is amended as per our suggestions under the definition section above, as this will ensure the person compiling the environmental awareness training programme has the correct expertise and is not excluded under part (b) of the definition.	
	Draft regulation 7(4) (training requirements)	COMMENT We welcome the certainty provided in draft regulation 7(4) in that an STS transfer operator has three months to comply with the training requirements in draft regulation 7 after their STS environmental management plan (in terms of draft regulation 8) has been approved. In terms of draft regulation 7(1), no STS transfer operations may occur until this has been complied with.	
	General comments on draft regulation 8 (STS environmental management plan)	COMMENT As was stated in the BLC's comments on the First Draft Regulations, we welcome this requirement of the STS environmental management plan ("**STS EMP**"). However, we submit that the STS EMP requirements still present several legal and procedural difficulties that need to be remedied to withstand legal scrutiny and for the STS EMP to be capable of effective implementation. • First, it is unclear what procedures the STS operator and independent specialist must follow to develop the STS EMP. The requirement of this STS EMP strongly indicates the need to list STS transfer operations as an	

		activity which requires environmental authorisation in terms of NEMA (and therefore requires an EIA process). • Second, it is extremely problematic that there are no provision for public participation in the development of the STS EMP, particularly given the wide range of stakeholders involved in oiled wildlife response, noise management, and use of the coastal zone (as well as the need for integrated management in the context of regulations promulgated under NEMICA, which has focus on the interrelationship between socio-economic and environmental values of the coastal zone). Regulation through the EIA process would remedy this omission and the public participation requirements of the EIA regulations (and the public participation guidelines) would apply. • Third, it is not clear how the components of the STS EMP relating to oil contingency planning relate to obligations under OPRC and the OPRD 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 together, as well as the requirement of a marine oil pollution response equipment inventory in clause 8. SUGGESTION If it is decided that STS transfer operations are not going to be listed as an activity which requires environmental authorisation in terms of NEMA (and therefore an EIA process), there needs to be robust public participation mechanisms for the STS EMP before it	

		can be approved by the Minister. There must also be clear procedures specified that the independent specialist must follow to develop the STS EMP.	
	Draft regulation 8(2) (STS environmental management plan)	<u>COMMENT</u> The following comments resulting from changes between the STS EMP provisions in the First Draft Regulations and the Second Draft Regulations – • Reference to "commercial vessel transits" has been removed from the requirements of the underwater noise mitigation and management plan (ie: the plan now only needs to account for noise generated from activities associated with STS transfer). This is problematic as it ignored the cumulative effects that commercial vessels and STS transfer vessels will have on noise pollution.[5] • It is now necessary to provide details of a spill response vessel that can be on site or just within proximity. It is unclear what "within proximity" means in terms of distance and how quickly this vessel must be able to respond (although it is assumed that the response time must be within 30 minutes as per draft regulation 6(2)). <u>SUGGESTION</u> We suggest that commercial vessels are also accounted for in the underwater noise mitigation and management plan, as this will account for the cumulative noise impacts. Further, and depending	

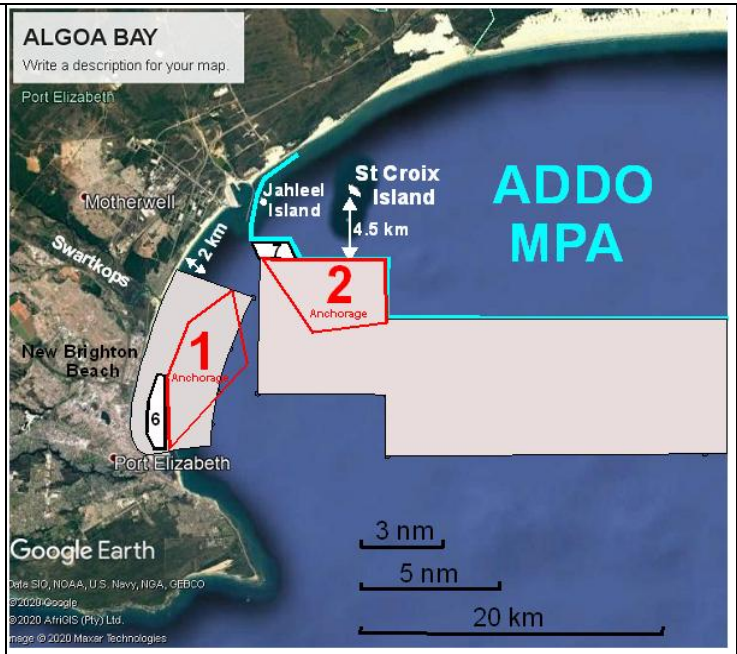
[5] See in this regard *Pichegru et al 2022*.

		on the response to our above comment regarding the location of the spill response vessel, we recommend that the spill response vessel be present at the STS transfer site instead of just "in proximity".	
	Draft regulation 8(3) (STS environmental management plan)	<u>COMMENT</u> We welcome the addition to draft regulation 8(3) that the Minister must act within 90 days of receipt of the STS EMP. However, and as per the BLC's comment on the First Draft Regulations, the consequences for the Minister's decision-making that is contemplated in this draft regulation are not specified. <u>SUGGESTION</u> We suggest that the above 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 NEMICA, which must be read with NEMA as well as PAJA. The need to read these statues together to establish the consequences 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 STS transfer operators (and other interested parties) in relation to the Minister's decision would cure this potential difficulty. In the current form of the Second Draft Regulations, the consequences of the Minister's decision in this regulation 8(3) is	

		not clear. For example, is a right of appeal against the decision accommodated? It will not be possible in law to rely on section 43 of NEMA if the Minister himself is the decision maker and there has been no delegation of this power. This provision demonstrates the difficulty of the Minister being the decision maker in many instances in the Draft Regulations. If the Minister makes the decision, and an interested party / operator is left with no recourse under NEMICMA or NEMA (given that section 43 of NEMA will not apply), the aggrieved party will be left with no choice but to approach the High Court to review the Minister's decision. Careful thought must be given to the appropriateness of leaving the Minister with this decision in the absence of providing expressly for the delegation of these powers to a person within the Department.	
	Draft regulation 8(4) (STS environmental management plan)	<u>COMMENT</u> We submit that the data, results, and information obtained from implementing an STS EMP (as well as the studies taken in formulating the STS EMP and generated by all monitoring of the STS EMP) should be publicly available as necessary to the public interest. The public interest of such information, need for accountability and transparency, as well as 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 provision in the Draft Regulations to ensure that such data is not withheld from public scrutiny on ground of "commercial sensitivity" (or otherwise unjustifiably refused).	

		SUGGESTION We suggest that the following (or similar) is added to the language of draft regulation 8(4) – *"Such data, results, and information shall be made publicly available by the STS transfer operator and be made publicly available on the Department's website, or upon request to the Department".*	
	Draft regulations 8(5), (6), and (8) (STS environmental management plan)	COMMENT We welcome the additions of draft regulations 8(5), (6), and (8) to the Second Draft Regulations. Regarding draft subregulations (5) and (6), in so far as they refer to the "**independent specialist**", we submit that the definition of "**independent specialist**" is amended as per our recommendation above so that a person with the necessary expertise is not excluded under (b) of the current definition.	
	Draft regulation 8(7) (STS environmental management plan)	COMMENT While we welcome the requirement that an STS EMP must be submitted within six months of the date of commencement of the regulations, it is worrying that existing STS transfer operators are able to continue STS transfer operations without the requisite STS EMP (especially because their current EMPs are not publicly available). It is also unclear what the consequences are if an STS transfer operator does not comply with this requirement within six	

		months (this is an offence in terms of draft regulation 13, but there are no requirements to cease STS transfer operations). <u>SUGGESTION</u> We suggest that all STS transfer operations cease until the regulations are complied with. This will also incentivise STS transfer operators to take quick and immediate action to comply with the regulations.	
	Draft regulation 9(1) (Algoa Bay)	<u>COMMENT</u> We have serious concerns surrounding the arbitrariness of this draft regulation 9, particularly when it is linked back to draft regulation 3 (prohibitions). Below is a map of Algoa Bay, showing what the STS transfer restrictions would look like per draft regulation 3 (ie: without draft regulation 9 overriding the prohibitions).	

		 If the prohibitions in draft regulation 3 are applied to Algoa Bay, it is evident that there is very little area left for STS transfer operations to take place in Algoa Bay. The map shows the 5nm restriction from the MPA, which would exclude the entirety of Anchorage 2 (which is already recommended by the TNPA ERA). The presence of Aquaculture Site 7 would also exclude Anchorage 2. Most of Anchorage 1 would be excluded because it is within 3nm of the highwater mark (as can be seen on the map, there is a small corner of Anchorage 1 that would be left available for STS transfer operations). Anchorage 1 is also mostly within 3nm of the shore. Algoa Bay has a thriving tourist population, who will be disturbed by STS	

		transfer operations, and this will have a negative effect on the tourism revenue generated in the area. It is not clear why the prohibitions in draft regulation 3 do not apply to Algoa Bay, especially because the prohibitions, as well as the findings of the TNPA ERA, make it clear that Algoa Bay isn't suited for STS transfer operations at all (which is seen by how little space is left for such operations when the prohibitions are applied), and especially not Anchorage 2. Despite no information provided by the drafters, it can be assumed that the prohibitions in draft regulation 3 have been created for a reason. It makes little sense to ignore them purely for the sake of being able to engage in STS transfer in Algoa Bay (because, again, the prohibitions provided show how unsuitable Algoa Bay is for such an activity). The only justification provided for this is that "*it has been made clear that operations in Algoa Bay are able to continue subject to the cap on the number of ship-to-ship operators that may operate as well as a limitation during African Penguin breeding season in anchorage 2, which is the closer of the two anchorage areas to the breeding colonies*". This justification does not explain <u>what</u> has been made clear in that it provides no evidence to why it is "clear" that operations in Algoa Bay can continue. This is particularly acute given that STS transfers *only occur in Algoa Bay*. Consequently, the effect of draft regulation 9(1) is to make the prohibitions in draft regulation 3 of no force and effect. STS	

		transfer operations currently only occur in Algoa Bay. Draft regulation 9(1) allows such operations to continue and, effectively, ignore the important prohibitions contains in regulation 3. This renders the draft regulation 3 effectively useless, because when provisions are made for environmental safeguards, they are completely ignored in the once place STS transfer operations occur. This is inexplicable, and no reasons have been given to attempt to justify this. Again, we would like to reiterate that Algoa Bay is not suited to STS transfer operations *in the first place*. This is clearly seen in the maps provided in this comment document, as well as the fact that this regulation 9(1) is even necessary (because again, if Algoa Bay was actually suitable for STS transfer operations, the prohibitions in draft regulation 3 wouldn't need overriding because STS transfers would be taking place in a suitable location in line with the prohibitions). STS transfer operations in Algoa Bay are inconsistent with the prohibitions that the Draft Regulations have already set (and no reasons are given as to why such prohibitions can be ignored in Algoa Bay – the only place STS transfer operations are even occurring), as well as being inconsistent with the (detailed) recommendations in the TNPA ERA (which has identified Anchorage 2 as being ecologically inappropriate for STS transfer operations). The ability of the Second Draft Regulations to override its own prohibitions in the only area where STS transfer operations are actually occurring in South Africa waters creates precedent for an alarming pattern. Since Algoa Bay is the only STS transfer site in South Africa, and the prohibitions are already being overridden to allow operations in this aera (again, with no explanation), it's not	

		unreasonable to assume that these prohibitions could easily be overridden again to allow STS transfer operations in other unsuitable areas. Further, we submit that this draft regulation 9(1), as well as the rest of draft regulation 9, is not consistent with the principles set out in section 2 of NEMA (the "**NEMA Principles**"). The NEMA Principles "apply throughout the Republic to the actions of all organs of state that may significantly affect the environment". STS transfer operations are activities that poses a significant environmental risk. In this regard, and to ensure sustainable development (an imperative of the Department), it is noted that the Second Draft Regulations do not – • Avoid the disturbance of ecosystems and loss of biological diversity.[6] • Avoid the pollution and degradation of the environment.[7] • Use and exploit a non-renewable natural resource in a responsible manner.[8] • Apply a risk-adverse and cautious approach that considers the limits of current knowledge about the consequences of decisions and actions.[9] • Appropriately anticipate and prevent the negative impacts to the environment and to people's environmental rights.[10]	

[6] NEMA section 2(4)(a)(i).
[7] NEMA section 2(4)(a)(ii).
[8] NEMA section 4(2)(a)(v).
[9] NEMA section 4(2)(a)(vii).
[10] NEMA section 4(2)(a)(viii).

		Further, section 2(r) *explicitly* states "sensitive, vulnerable, highly dynamic, or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development". This does not seem to be considered in draft regulation 9. <u>SUGGESTION</u> As per the TNPA ERA, we strongly recommend that STS transfer operations are prohibited from occurring in Anchorage 2, at the very least. However, we urge the Department to strongly consider the appropriateness of STS transfer operations in Algoa Bay *at all*, particularly in light of the map included above, the NEMA Principles, and the fact that if the prohibitions in draft regulation 3 are applied (which themselves are indicative of the sensitivity of the Algoa Bay environment) then essentially there is *no appropriate area within Algoa Bay which STS transfer operations may occur*. **We welcome further engagement with the Department on this issue.**	
	Draft regulation 9(2) (Algoa Bay)	<u>COMMENT</u> It is not clear how the drafters of the Second Draft Regulations arrived at the number of "three" STS transfer operators being able	

		to operate in Algoa Bay. The TNPA ERA does not give any specification on vessel numbers and, in the absence of such recommendation from the TNPA ERA (or anywhere – again, the drafters have not given a reason for choosing this number), the number "3" is essentially arbitrary. It is also not clear what is meant by "operate". We are unsure if this means that only three STS operators will be given licences/authorisations to be able to engage in STS transfer operations in Algoa Bay, or if this means that only three STS operators will be able to physically engage in STS transfer operations within Algoa Bay at a time. If this is the latter, it is not clear what happens to the other STS operators who are unable to engage in their operations when Algoa Bay is at capacity. If they are allowed to wait in the area, this will become a marine traffic concern, as well as a concern regarding noise and light pollution, especially if there are no obligations for them to turn their ships' engines off. <u>SUGGESTION</u> In the absence of an explanation as to how the drafters of the Second Draft Regulations arrived at the number of "three" operators, it is impossible to make suggestions on what number is in fact acceptable. However, we do suggest that the Draft Regulation clarify what is meant by "operate". We also recommend, if vessels are waiting for their turn to engage in STS transfer operations, they are given specific	

		obligations and instruction for what must happen while they are waiting (for example, they must turn off their engines).	
	Draft regulation 9(3) (Algoa Bay)	<u>COMMENT</u> As with our comment on draft regulation 9(2), it is not clear how the cap of "six" STS transfer tankers was reached. Again, the TNPA ERA does not make such a recommendation, and no evidence was provided elsewhere regarding the Second Draft Regulations. Again, it is unclear what is meant by "operate". We are unsure if the six STS tankers referred to in this draft regulation 9(3) can only belong to the three STS operators that are licenced/authorised to engage in activities, or if they can belong to other STS operators who are licenced/authorised, but must wait for space in Algoa Bay before they can engage in STS transfer. If it is the latter, then we are unsure of the restrictions on the STS tankers that are waiting for their turn to operate (much like in our previous comment, this will become a marine traffic and noise pollution issue). <u>SUGGESTION</u> As noted above, in the absence of an explanation as to how the drafters of the Second Draft Regulations arrived at the number of "six" transfer tankers, it is impossible to make suggestions on what number is in fact acceptable.	

		Again, we request clarity on what is meant by “operate”, as well as specific instructions / obligations for vessels that are waiting their turn to participate in STS transfer operations.	
	Draft regulation 9(4) (Algoa Bay)	<u>COMMENT</u> We want to reiterate that the TNPA ERA does not recommend Anchorage 2, an ecologically sensitive area close to an important African Penguin breeding colony, as an area for STS transfer operations *at all*. Draft regulation 9(4) assumes a static biological calendar, which is an outdated approach to biodiversity regulation. It is noted by the drafters of the Second Draft Regulations that this “limitation” on STS transfer operations between 1 April to 31 August is because of the African Penguin breeding season, but these dates do not actually coincide with the breeding season in Algoa Bay (which can begin much earlier). It must be noted that penguin breeding, moulting, and foraging extends well beyond April to August and threats from underwater noise and pollution are not seasonal. This seasonal restriction fails to acknowledge ecosystem connectivity and cumulative impacts, including any changes to prey availability (because penguins will not be the only species affected by underwater noise and other kinds of pollution). Given the dire situation of the critically endangered African Penguin population, and the fact that the seasonal allowance of	

		STS transfer operation doesn't make biological sense, STS transfer operations must not occur at Anchorage 2 *ever*. It should also be noted that STS operators will have access to both anchorages during the summer months, which are peak tourism times for South Africa. Lastly, we note that STS transfer may occur in Anchorage 2 during the limitation period in an "emergency" or as a result of a *force majeure*. This is discussed in our comment below in relation to draft regulation 10. SUGGESTION As per our previous suggestions, we recommend that STS transfer operations are prohibited in Anchorage 2 *at all times*.	
	Draft regulation 10 (*Force majeure*)	COMMENT We note that a person who has been authorised by SAMSA to undertake STS transfer because of a *force majeure* or an "emergency" does not have to comply with the requirements of the Draft Regulations. While we welcome the oversight role of SAMSA, it is unclear as to what constitutes an "emergency". Given the risks associated with STS transfer operations, "emergency" should be carefully defined.	

		SUGGESTION Given the environmental risks posed by STS transfer operations, "emergency" needs to be carefully clarified. A strict definition is necessary so that a "minor emergency" can't be used as an excuse to engage in STS transfer operations.	
	Draft regulation 11 (notifications)	COMMENT We welcome the addition of the obligation to comply with section 30 of NEMA (control of incidents) and to notify the relevant management authority (in terms of NEMPAA) in the event of "any spill". This aligns with South Africa's principles of cooperative governance.	
	Draft regulation 12 (ship-to-ship transfer authorisation)	COMMENT As per our pervious comments, we recommend that STS transfer is listed as an activity requiring environmental authorisation in terms of NEMA. At this juncture, we would also like to reiterate our comments made under the "**Minister's powers and functions**" section above in that these regulations under NEMICMA are inappropriate to regulate STS transfer operations and that there are other (better) and more immediate mechanisms available to the Minister to regulate this activity and mitigate environmental damage.	

	Draft regulation 13 (offences and penalties)	<u>COMMENT</u> We note that there are no changes between draft regulation 13(2) between the First Draft Regulations and the Second Draft Regulations. In this regard, and as per the BLC's comments on the First Draft Regulations, we further note that the penalty limitations reflected in draft regulation 13(2) still reflect the limits provided in section 85(2) of NEMICMA. However, clause 30(2) of the OPRC Bill provides for penalties of up to R35 million and/or 10 years imprisonment for failure to undertake and update a marine oil pollution risk assessment (see clauses 5(5), (7), (7), and (10) in this regard), failure to put in place site-specific pollution contingency plans (clauses 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 between the Second Draft Regulations and the OPRC Bill, it is not clear whether the penalties under the Second Draft Regulations are intended to be cumulative with those under the OPRC Bill. It is clear the value places on compliance under the OPRC Bill exceeds what is possible under NEMICMA. In this regard, we note the same is 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. <u>SUGGESTION</u> As per the BLC's comments on the First Draft Regulations, we suggest that careful consideration is given to the need for – (a) EIA listing of STS transfer operations; and	

		(b) issuing appropriate regulations under the OPRC Bill (once enacted) to ensure the parliamentary policy relating to the seriousness of offences of failure to assess the 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 transfer operations. Further, we note that entities engaging in STS transfer operations are likely to be well-capacitated corporations. In this regard, we submit that the payment of a fine might not be enough to deter non-compliance (as a fine of R2 million might not be a limiting factor for some entities, as they are able to afford it easily). For this reason, we suggest that, either the penalty increases for successive contraventions, or STS operators are banned from engaging in STS transfer operations (either for a period, or permanently) for successive non-compliance. Lastly, we suggest that information on non-compliance is made publicly available. It is in the public interest to know which entities are not complying with the regulations, as non-compliance poses significant risks to health, safety, and the environment.	
	Draft regulation 14 (short title and commencement)	<u>COMMENT</u> We welcome the implementation date of the Regulations as the date of its publication in the *Gazette*. We support its immediate commencement.	

Annexure B

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
Total pages:	29	Our ref: BLC/Comments/ Bunkering Regs

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**