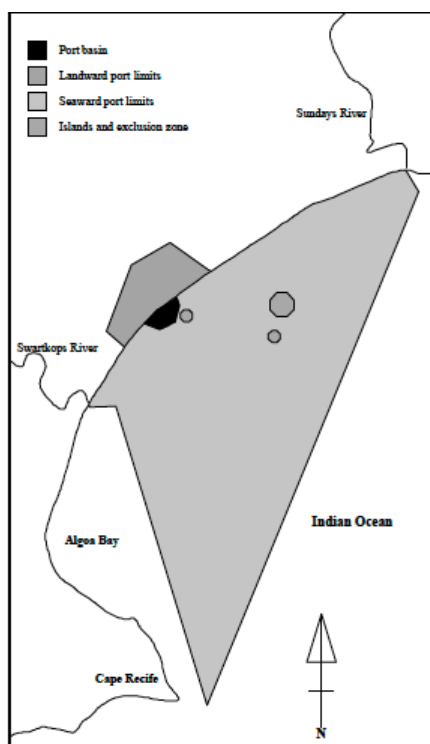


LEGISLATION GOVERNING THE INSTALLATION, OPERATION OF AND IMPLICATIONS OF SHIP-TO-SHIP BUNKERING IN ALGOA BAY, EASTERN CAPE

A. Background

1. The Port of Ngqura was established as such in terms of the Port of Ngqura Establishment Act No. 77 of 1998. The sea area of the Port is defined in terms of section 2 and the Schedule as:

The area bounded by a line commencing at the extreme point on the east bank of the Swartkops River thence due east (true) for a distance of 1609 metres to a point in the Indian Ocean; thence from that point to a second point in the Indian Ocean 1609 metres due east (true) from Cape Recife; thence from that point to a third point in the Indian Ocean 1609 metres south east (true) from the extreme point on the east bank of the Sunday's River; thence along the high water mark between the extreme point of the east bank of the Sunday's River and the extreme point of the Swartkops River, excluding the Islands of Jaheem, St. Croix and Brenton and the 500 metre marine reserve surrounding each island.



2. The construction and operation of the Port of Ngqura commenced in 2002 after an environmental impact assessment (EIA) process was undertaken and an Environmental Authorisation granted. Ship to ship bunkering was not included in the environmental assessment process and therefore potential impacts or mitigation measures relating to ship

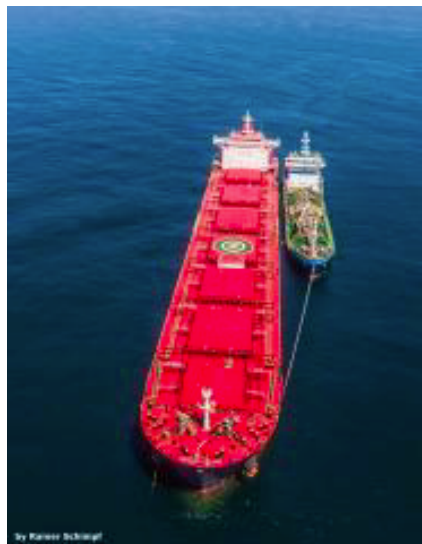
to ship bunkering were excluded from the scope of the EIA, public participation process and subsequent Record of Decision.

3. The issue of a license to operate a bunkering facility within a port is issued by two regulatory bodies:
 - 3.1. The National Ports Authority under the National Ports Act No. 12 of 2005 and the National Port Regulations; and
 - 3.2. SAMSA in terms section 21 of the Marine Pollution (Control and Civil Liability) Act No. 6 of 1981 and Marine Notice No. 3 of 2016 on a ship-by-ship basis.
4. Bunkering activities, if not properly performed, present serious safety and environmental risks and such hazards include explosions and spillage during transfer, resulting in pollution, loss of biodiversity, and ecological disturbances and interruptions to the efficient operations of the port.
5. Bunkering is the process of refuelling vessels by transferring liquid fuel oil from a storage facility (or a barge) to the receiving vessel. As defined in Annex I of MARPOL 73/78 a Bunkering Operation is the transfer of Bunkers (“Fuel oils and other Petroleum Products necessary for the operation of the ship”) to a ship by a Bunker Ship (“an Oil Tanker as defined in regulation 1(4) of Annex I of MAROPOL 73/78). The seagoing ships are positioned alongside each other, either while stationary or underway.
6. According to Transnet, “bunkering” refers to the transfer of “any hydrocarbon mineral oil” by any means, including but not limited to, MDO (Marine Diesel Oil), MFO (Marine Fuel Oil), MGO (Marine Gas Oil), AGO (Automotive Gas Oil), LNG (Liquefied Natural Gas) or lubricating oils used or intended to be used for the operation or propulsion of a vessel, and any residues of such oils¹
7. Bunkering is a port activity under the Port Rules, issued in terms of section 80(2) of the Act. In terms of Port Rule 148 the Authority (SAMSA) is empowered to issue licences to persons who carry out bunkering activities in the ports and at off-shore cargo handling facilities.
8. There are two ways which refuelling may take place outside of the port:
 - 8.1. Ship to ship bunkering whereby a transferring barge is loaded with fuel oil from a mothership tanker vessel at anchor and transported and transferred to the receiving vessel by pumping through coupled hoses whilst the two vessels are anchored together; or
 - 8.2. A single buoy mooring (SBM) whereby a loading buoy is permanently anchored offshore and serves as a mooring point and interconnect for tankers loading or

¹ Transnet Bunkering Licence Manual 2015

offloading gas or liquid products. SBMs are the link between the shore-facilities and the tankers.

9. An SBM is therefore a form of infrastructure in itself and requires the installation or development of further infrastructure and facilities (in the form of sub-sea pipelines etc.) Ship-to-ship bunkering does not require the development of infrastructure.
10. In 2016, ship to ship bunkering commenced in Algoa Bay, within the defined Port of Ngqura, at anchorage. This is the first (and currently the only) offshore fuel service in South Africa. The first operator, Aegean Bunkering Marine Services, was licensed by SAMSA under the authority of the National Ports Authority (TPNA) and since then two further licences have been granted to South African Marine Fuels (2018) and Colt Marine (2019). The licence authorises the applicant to undertake bunker barge transfers and STS bunker transfers within Port Limits, inclusive of anchorage.



11. The Algoa Bay Management Plan states that “the south-eastern Cape coastline is richly populated with marine mammals and seabirds. A centre of this biological diversity is Algoa Bay”. The National Addo Elephant Park Marine Protected Area (Addo MPA) was promulgated on 28 May 2019. The Algoa Bay Island Nature Reserve comprises the Bird and St Croix (St Croix, Jahleel, Seal and Brenton islands) Island groups. Both these island groups have been declared an Important Bird Area (IBA), as they are inhabited by threatened and endangered species. The seals and seabirds, which breed and rest on the islands, play an integral role in the functioning of the marine ecosystem of Algoa Bay. The islands also play a national and international role in the conservation of three seabird species, the Cape gannet, African penguin and Roseate tern. The largest gannet colony in the world is at Bird Island, the largest African penguin colony in southern Africa is at St Croix, and the only confirmed sites where Roseate terns breed in South Africa are at Bird and St Croix islands, with a further possible site being Jahleel Island. The most easterly breeding colony of Cape Fur Seals is situated at Black Rocks in the Bird Island Group.
12. The ship-to-ship bunkering is taking place at anchorage points 1 and 2 of the Port which are situated adjacent to the Addo MPA, Algoa Bay Island Nature Reserve and in line with the ecologically important mouth of the Swartkops River. With the fuelling of very large vessels

such as tankers, the possibility always exists that there could be a catastrophic oil spill such as was the case for MV Treasure in Table Bay. The MV Treasure released 1 139 tonnes of heavy fuel and 56 tonnes of marine diesel into the sea off Robben Island.² A similar spill in Algoa Bay has the potential to impact on the Bird and St Croix island groups as well as the entire coastline within and around the Bay. A spill of this magnitude would impact significantly on various ecosystems within the Bay as well as several industries such as tourism, fishing and mariculture.

13. While spills of this magnitude (>700 tonnes) are unlikely events, with approximately 7.3 occurring worldwide every year, the possibility does exist that such a spill may occur (WSP 2001). If the spill is not contained it could make landfall on any or all the islands to the detriment of the intertidal organisms and birds on the islands. The floating slick will smother any seabirds, especially penguins that encounter it. It could also smother or foul fish. A large spill could therefore have a profoundly negative impact on the ecology of Algoa Bay at large and in turn have negative downstream socio-economic impacts.³
14. The risk of the bunkering operations was raised by various organisations and members of the public, particularly after the 6 July 2019 spill during STS bunkering operations between SA Marine Fuel and Chysanthi S. According to Xtreme Projects Spill Response Report the vessels were approximately 3 nautical miles from shore, across from the Swartkops river mouth. The SAMF Oil Spill Incident Report confirms that the incident was caused by an overflow of one of the MV Chysanthi S valves which resulted in between 200 – 400 litres of oil. While the spill clean-up was taking place, penguins were seen swimming through the oily water. Most of the oiled penguins originated from St Croix Island. On 7 July 2019 the oiled birds were collected from St Croix Island by staff of SanParks (South African National Parks) and taken to SANCCOB's (Southern African Foundation for the Conservation of Coastal Birds), rehabilitation centre near Cape Recife. The last rehabilitated birds were released on 22 November, nearly 4 months after the spill. The spill and the oiling of penguins caused an outcry from the public, scientists and environmentalists. Several newspapers published articles, there were social media posts and discussions and TV news programs highlighted the disaster. This led to the holding of a public meeting by Nelson Mandela Bay Tourism on 1 August 2019 where clients presented to the various concerns. SAMSA, TNPA as well as the bunkering operators were invited to attend but unfortunately declined.
15. Clients have repeatedly called for the ship-to-ship bunkering operations to cease, without success. It is for this reason that Youens Attorneys was instructed to prepare this opinion on the legality of the bunkering operations.

B. Legislation and documentation considered for the purpose of this memorandum

- Port of Ngqura Establishment Act No. 77 of 1998
- Maritime Zones Act No. 15 of 1994
- Marine Pollution (Intervention) Act No. 64 of 1987

² https://en.wikipedia.org/wiki/MV_Treasure_oil_spill

³ Minerva Marine Bunkering SHE Risk Assessment 5 July 2020 ref: (CSIR, January 2013 Chapter 8, Marine Ecology, pg. 8-17)

- Marine Pollution (Prevention of Pollution from Ships) Act No. 2 of 1986
- Marine Traffic Act No. 2 of 1981
- Marine (Control and Civil Liability) Act No. 6 of 1981
- Sea-Shore Act No. 21 of 1935
- National Environmental Management: Integrated Coastal Management Act No. 24 of 2008
- South African Maritime Safety Authority Act No. 5 of 1998 (SAMSA Act)
- National Ports Act No. 12 of 2005
- Port Rules, as published in Government Notice No. 255 on 6 March 2009.
- Guidelines for Agreements, Licences and Permits in terms of the National Ports Act No. 12 of 2005 (“the Guidelines”)
- National Environmental Management Act No. 107 of 1998 (NEMA)
- Environmental impact Assessment Regulations, 2014 (EIA Regulations)
- National Environmental Management: Protected Areas Act No. 57 of 2003
- Marine Spatial Planning Act No. 16. of 2018
- Promotion of Administrative Justice Act No. 3 of 2000 (PAJA)
- SA National Oil Spill Contingency Plan
- SANCOBB Oil Spill Contingency Plan for Oiled Seabirds
- SANS Park Bird Island Plan (Eastern Cape)
- Port Business Continuity Plan
- Port of Ngqura Oil Spill Contingency Plan
- Ngqura Container Terminal Oil Spill Contingency Plan
- Port of Port Elizabeth Oil Spill Contingency Plan
- Incident report 19 July 2019 and related documents
- EMC Bunkering Reports dated February 2017, February 2018, November 2018
- Offshore Bunkering Risk Assessment Environment dated 22 May 2019
- Offshore Bunkering NMB Ports
- TNPA EMC Report May 2017
- EMC Bunkering Operations Committee Meeting Minutes 15 November 2017, draft minutes dated 13 August 2018, and 22 May 2019
- ECO Report to Coega dated 16 November 2016
- Letter from EMC to DEA dated 19 November 2018
- Draft Minutes Coega EMC Meeting 15 August 2016
- Draft Minutes to Coega EMC meeting 15 November 2017
- Bunkering Operations @ anchorage – Aegen- Minerva 2020; Colt-Heron Marine 2020; SAMF 2020
- Agean Minerva SHE Risk Assessment 5 July 2020
- EMP Ngqura HSE Management Plan for Heron Marine 19 June 2020
- ERA-CM-EMP Heron Marine
- SAMF EMP RA for Bunkering in Algoa Bay
- SAMF Oil Soil Management for Algoa Bay
- STS Bunkering RA. Environment
- Transnet Bunkering Licence Manuals (with annexures A - J)
- Condition of Bunkering
- Public Concerns Regarding Ship-to-Ship Bunkering in Algoa Bay, dated 12 December 2019 and prepared by Nelson Mandela Bay Tourism
- Algoa Bay Management Plan
- National Port Plan, 2019
- Environmental Social Management Framework, 2019

- Marine Spatial Plan Algoa Bay, April 2018
- Marine Notice 3 of 2016: Application for Bunker or Fuel Transfer Operation
- Document headed: Bunkering Threat to Algoa Bay
- The Subsequent Environmental Impact Report for the Proposed Port of Ngqura, dated September 2001
- Ecologically or Biologically Significant Marine Areas in the Benguela Current Large Marine Ecosystem: Algoa to Amathole. Prepared by Nelson Mandela University
- Comments on the Biodiversity Management Plan for African Penguins submitted by Ronelle Friend to Minister Creesy in 2019
- Document headed: Algoa Bay biodiversity under threat : Construction and operation of Port of Ngqura twenty Years On : African penguins and other endangered species may be headed for local extinction.
- Various news articles

SAMSA Act

16. The South African Maritime Safety Authority (“SAMSA”) was established in terms of SAMSA Act. Its objectives are:
 - 16.1. to ensure safety of life and property at sea;
 - 16.2. to prevent and combat pollution of the marine environment by ships; and
 - 16.3. to promote the Republic’s maritime interests.
17. In terms of section 2 of the Act, SAMSA is responsible for administering the following legislation:
 - Merchant Shipping Act, 1951
 - Marine Traffic Act, 1981
 - Marine Pollution (Control and Civil Liability) Act, 1981
 - Carriage of Goods by Sea Act, 1986
 - Marine Pollution (Prevention of Pollution from Ships) Act, 1986
 - Marine Pollution (Intervention) Act, 1987
 - Maritime Zones Act, 1994
 - Wreck and Salvage Act, 1996
 - SAMSA Act, 1998
 - SAMSA Levies Act, 1998
 - Ship Registration Act, 1998

18. Generally, SAMSA is charged with the safety and monitoring sea worthiness of sea vessels. When SAMSA issues permission for ship-to-ship bunkering, this is per single ship to ship bunkering operation and not a general right to trade, as it were.
19. In issuing permission for an STS bunkering, SAMSA checks on the Port state inspection history, that there have been no problems with oil spills and clean up to date and that it has proper insurance cover & that the supply tanker has the required equipment and may require oil spill drills etc. SAMSA conducts a desktop inspection of each visiting vessel prior to it commencing operations. Bunker Operator vessels are inspected physically before given the go ahead to supply bunkers.

Marine (Control and Civil Liability) Act

20. This act provides for the protection of the marine environment from pollution by oil and other harmful substances and determines liability in certain respects for loss or damage caused by the discharge of oil from ships, tankers and off-shore installations.
21. "The Authority" means the South African Maritime Safety Authority (SAMSA) established by section 2 of the South African Maritime Safety Authority Act. An "offshore installation" is defined as "a facility situated wholly or partly within the prohibited area and which is used for the transfer of harmful substances from a ship or tanker to a point on land or from a point on land to a ship or tanker or **from bunkering vessel to a ship or tanker...**". The prohibited area is defined as the internal waters, the territorial waters, the exclusive economic zone and "in relation to an offshore installation, includes the sea within the limits of the continental shelf".
22. The ship-to-ship bunkering is therefore and offshore installation in terms of the Act.
23. Section 2(1) provides that:

If any oil is discharged from a ship, tanker or offshore installation, the master of such ship, tanker or offshore installation, also the owner thereof, shall be guilty of an offence, unless the oil-

- (a) was discharged for the purpose of securing the safety of the ship, tanker or installation...;
 - (b) escaped from the ship, tanker or installation as a result of damage...;
 - (c) escaped due to leakage that did not occur as a result of any reasonable care and, as soon as reasonably practical afterwards, reasonable steps were taken to stop or reduce it.
24. Section 4 deals with the powers of the SAMSA to take steps to prevent pollution of the sea where harmful substance is being or is likely to be discharged and, SAMSA is of the opinion that the master and the owner of the ship or tanker are (or would be) incapable of complying with a requirement, SAMSA may take the necessary steps to prevent the pollution.
 25. Section 21 states that no vessel may discharge oil or conduct a ship-to-ship transfer outside a South African harbour without permission of SAMSA. SAMSA issues permits, on a case-

by-case basis, for ship-to-ship bunkering within Algoa Bay (within the defined anchorages) in terms of Section 21(b) of this Act and Marine Notice 3 of 2016.

National Ports Act and Port Rules

26. “Authority” means, subject to section 3, National Ports Authority Limited (TNPA), contemplated in section⁴; “National Ports Authority (Pty) Ltd” means the Transnet subsidiary company contemplated in section 3 (2); “off-shore cargo handling facility” means an off-shore facility within or beyond the port limits used for the transfer of cargo from a vessel to the land and vice versa; “vessel” means any water navigable craft or structure and includes a seaplane and a non-displacement craft.
27. Port Rule 47 deals with granting small vessels, permits. A small vessel is defined as a “vessel used for commercial purposes and includes a tug, fishing vessel, launch, barge, lighter, rowing boat, ski boat, sailing boat, yacht or similar vessel, or a hulk of any of the vessels enumerated, but excludes a pleasure vessel”.
28. The TNPA is empowered to issue licences for the provision of a port service or the operation of a port facility (section 57). In terms of Port Rule 148, issued in terms of section 80(2) of the Act, TNPA is also empowered to issue licences to persons who carry out bunkering activities in the ports and at off-shore cargo handling facilities.
29. A licence is required for bunkering.
30. In addition to the above and based on the Guidelines for Agreements, Licences and Permits in terms of the National Ports Act, the conditions of a bunkering licence must include, amongst others, the following:
 - 30.1. that the Licensee is required to comply at all times with all the provisions of MARPOL Annex I Regulation 13H (7), ISGOTT Manual and the ISM Code, as they may be amended from time to time. The Licensee must also be familiar with the provisions of ISGOTT and the ISM Code and ensure that its personnel know these provisions and apply them;
 - 30.2. with regards to safety, health, environment and efficiency during operations, the Licensee shall ensure that all necessary measures are taken to prevent fuel spillage into the waters of the Port, or onto the quayside. An Environmental Management Plan must be submitted to the Authority which must cover all spill and pollution control measures;
 - 30.3. the Licensee shall have written safety, health, environment and quality programs in place at all times and shall make these available to the Authority for inspection upon request at all reasonable times;
 - 30.4. assessments of the bunkering services that it offers within the Port and shall make these available to the Authority for inspection upon request; and

- 30.5. any incidents or accidents arising out of the licensed operations that may impact in any way on the environment shall be reported immediately to the Authority by the Licensee.
31. Chapter 8 of the Ports Rules (Act 12 of 2009) addresses licences. Activities include bunkering in the port and at offshore cargo handling facilities. Port as defined in the National Ports Act as port of Ngqura/Port Elizabeth etc. (i.e., within the breakwaters) ⁴
32. TNPA issues a bunkering licence in terms of the National Ports Authorities Act for bunkering within the Port.
33. TNPA undertakes an annual audit and plays an oversight role in terms of the bunkering licence (issued by TNPA). The licence sets certain conditions that need to be complied with.
34. Marine Notice 6 of 1981 speaks to Marine Pollution. DEA Oceans & Coasts is responsible for pollution prevention and cleaning up of oil spills. SAMSA is responsible for preventing pollution and safety / security. DEA issues directives for cleaning up of pollution in terms of the polluter pays principle (NEMA).

National Environmental Management Act and EIA Regulations

35. "Environment" is defined in NEMA as "the surroundings within which humans exist and that are made up of – the land, water and atmosphere of the earth; micro-organisms, plant and animal life [...]."⁵
36. The principles of NEMA⁶ include pursuing the best practicable environmental option⁷ and taking into account the interests, needs and values of all interested and affected parties. These principles are the benchmark against which the significance and acceptability of impacts on the environment are measured in the EIA process and subsequent decision making. They include:
- 36.1. that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions;
- 36.2. global and international responsibilities relating to the environment are discharged in the national interest. the environment is held in public trust for the people;
- 36.3. the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.
37. Off-shore ship-to-ship bunkering poses a significant risk to the marine environment. Any party whose activities cause or are likely to cause environmental damage must bear the full cost of preventive and restorative measures. This principle is enforced by section 2(4)(p)

⁴ Note that in terms of the definitions Port includes Port limits

⁵ Section 1, National Environmental Management Act 107 of 1998.

⁶ Section 2

⁷ Section 2(4)(b)

which provides that those responsible for harming the environment pay for the 'costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects.'

38. The precautionary principle is central to NEMA and puts into effect the Rio Declaration, an international agreement signed at the 1992 UN Conference on Environment and Development (the Earth Summit) in Rio de Janeiro. The concept remains at the heart of many environmental policies aiming at cleaner production and the prevention of pollution. It has appeared in treaties, declarations and protocols the world over, such as the North Sea Treaty of 1987, the Maastricht Treaty of September 21, 1994, the United Nations Framework Convention on Climate Change of May 9, 1992, and the 1998 Wingspread Statement on the Precautionary Principle (1998), which summarises the principle as follows: "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically."
39. Section 28 provide that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.
40. The measures required in terms of subsection (1) may include:
 - 40.1. measures to-investigate, assess and evaluate the impact on the environment;
 - 40.2. inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;
 - 40.3. cease, modify or control any act, activity or process causing the pollution or degradation;
 - 40.4. contain or prevent the movement of pollutants or the causant of degradation;
 - 40.5. eliminate any source of the pollution or degradation; or
 - 40.6. remedy the effects of the pollution or degradation.
41. Section 30 of NEMA deals with incidents which, for these purposes means "an unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property". This is relevant in relation to any spills that have or will occur as a result of ship-to-ship bunkering in the bay. When such an incident occurs, the responsible person⁸ must, within 14 days, report to the Director-General, provincial head of

⁸ Defined as any person responsible for the incident, or owns (or was in control of) any hazardous substance involved in the incident.

department and municipality such information as is available to enable an initial evaluation of the incident, including:

- 41.1. the nature of the incident;
 - 41.2. the substances involved and an estimation of the quantity released and their possible acute effect on persons and the environment and data needed to assess these effects;
 - 41.3. initial measures taken to minimise impacts;
 - 41.4. causes of the incident, whether direct or indirect, including equipment, technology, system, or management failure; and
 - 41.5. measures taken and to be taken to avoid a recurrence of such incident.
42. The EIA regulations published under NEMA aim to regulate the procedure relating to applications for environmental authorisation (EA) for activities listed in the Schedules to the regulations. Depending on which Schedule the activity is listed in, the applicant is guided on whether a basic assessment scoping and EIA application should be followed.
43. "dangerous goods" means goods containing any of the substances as contemplated in South African National Standard No. 10234, supplement 2008 1.00: designated "List of classification and labelling of chemicals in accordance with the Globally Harmonized Systems (GHS)" published by Standards South Africa, and where the presence of such goods, regardless of quantity, in a blend or mixture, causes such blend or mixture to have one or more of the characteristics listed in the Hazard Statements in section 4.2.3, namely physical hazards, health hazards or environmental hazards.
44. "development" means the building, erection, construction or establishment of a facility, structure or infrastructure, including associated earthworks or borrow pits, that is necessary for the undertaking of a listed or specified activity, but excludes any modification, alteration or expansion of such a facility, structure or infrastructure, including associated earthworks or borrow pits, and excluding the redevelopment of the same facility in the same location, with the same capacity and footprint.⁹ Quite clearly, ship-to-ship bunkering does not fall within this definition.
45. EIA regulation, Listing Notice 2, Activity 4¹⁰ requires an EA for "the development of facilities or infrastructure for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of more than 500 cubic metres".
46. There is no question that the bunker fuel used in the ship-to-ship transfer falls within the definition of dangerous goods. However, the mother ships and transfer vessels do not fall with the required definition of "development". For this reason, Activity 4 would not apply. Similarly, Activity 6 would not apply either.

⁹ Definition of "development" substituted by Government Notice 325 in Government Gazette 40772 dated 7 April 2017. Emphasis added.

¹⁰ Government Notice R983 in Government Gazette 38282, 4 December 2014.

47. As part of the environmental process associated with the establishment of the Coega IDZ and Ngqura Port an Algoa Bay Management Plan (ABMP) was produced 1999¹¹. Running in parallel, but independently with the development of the ABMP, was the development of the National White Paper for Sustainable Coastal Development in South Africa (DEAT 2000). Subsequent to the production of these reports, the White Paper has been translated into a provincial document termed the Eastern Cape Coastal Management Plan (ECCMP)¹² and published in the provincial gazette on 26 March 2014 in terms of section 46(1) of NEM: ICMA.
48. In 2014, 'Operation Phakisa' was launched in South Africa as an initiative to accelerate execution of the National Development Plan.¹³ The primary focus of Phakisa is to unlock the economic potential of South Africa's oceans. Marine spatial planning (MSP) is a key component of this integrated governance framework, and the development of MSP legislation during 2016 was prioritised as 'critical' to achieving the Operation Phakisa objectives.
49. A paper published in 2018 titled: "Working together for our oceans: A marine spatial plan for Algoa Bay"¹⁴ used Algoa Bay as a case study for the first South African Marine Area Plan and fed directly into the process for developing a national Marine Spatial Plan as set out by the MSP Bill (2017).¹⁵ Algoa Bay was chosen as the "ideal planning region for a case study, given the substantial body of biophysical data that exists for the area" and "[t]he diversity of habitats, oceanographic processes and the socio-economic reliance on the marine environment in Algoa Bay provide[s] dynamic natural laboratories for conducting multidisciplinary, multi-institutional field-based research that can be applied to other regions."
50. The Marine Spatial Planning Act, 2018 only commenced on 27 January 2021¹⁶ and although it provides for the development of a marine spatial planning framework¹⁷ and marine area plans, none have been developed yet.
51. In terms of Section 10 of Listing Notice 3,¹⁸ of the EIA regulations in the Eastern Province section, an EIA is required for the development and related operation of facilities or infrastructure for the storage, or storage and handling of a dangerous good in sensitive areas **as identified in an environmental management framework** as contemplated in chapter 5 of the Act **and as adopted by the competent authority**.
52. It is submitted that ship-to-ship bunkering falls within the ambit of "related operation of facilities for the storage and handling of a dangerous good". However, the question is whether the second aspect of the requirement is triggered; that being: is the ECCMP an

¹¹ http://fred.csir.co.za/project/CIP_EIA/pages/Algoa_Bay_Management_Plan_Dec99.pdf

¹² <https://cer.org.za/wp-content/uploads/2010/10/20140326-Provincial-Gazette-for-Eastern-Cape-No-3150-of-26-March-2014-Volume-21.pdf>

¹³ National Planning Commission. National Development Plan 2030: Our future – make it work. Pretoria: National Planning Commission; 2012. Available from: <https://www.gov.za/sites/www.gov.za/files/Executive%20Summary-NDP%202030%20%20Our%20future%20-%20make%20it%20work.pdf>

¹⁴ http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0038-23532018000200010

¹⁵ Marine Spatial Planning Bill [B 9—2017]. Department of Environmental Affairs. Government Gazette no. 40726 of 28 March 2017.

¹⁶ GNR. 244 No. 4, 1 April 2021.

¹⁷ Section 6(a)

¹⁸ Government Notice R985 in Government Gazette 38282 dated 4 December 2014.

environmental management framework and, if so, is Algoa bay identified as a sensitive area?

53. Unfortunately, while the ECCMP is an environmental management framework, Algoa Bay is not mentioned in it as a sensitive area. Strangely, given the sensitivity of Algoa Bay and the protected islands as well as the Marine Protected Area, there appears to be no environmental management framework in place that has been adopted by the competent authority that identifies Algoa Bay as “a sensitive area”. Therefore, this listed activity does not apply.
54. Where an EIA is done, the submission of an environmental management programme (EMP) must be submitted.¹⁹ The EMP must contain information on any proposed management, mitigation, protection or remedial measures that will be undertaken to address the environmental impacts that have been identified in a report contemplated in subsection 24(1A).
55. The Environmental Impact Report (EIR) of 2001 and RoD that approved the port construction and operation, states that port operations were envisaged to be conducted within the precincts of the port and all the environmental risk assessments arising from port operations confined to the waters within the harbour (as contained between the breakwaters) or from vessels underway to the port arising from vessel collision or collision with large marine cetaceans. *“Application is, however, made for all construction activities associated with building the port and providing the required infrastructure for the core development zone below the N2 (see Chapter 3). Application is also made for the operation of the port, which includes the bulk, break bulk and container terminals and infrastructure in the back-of-port area (logistics park, offices, transport corridors, workshops, container terminal).”*²⁰ *The approach taken in this EIA will be to identify and discuss potential issues associated with the future development scenarios rather than discuss specific impacts. These future developments will obviously be subject to Environmental Impact Assessments and the issues identified in this EIA should provide an important framework for that process.*²¹
56. *The operation of the port is expected to continue over an extended period of time (more than 100 years). During this period, it is expected that development of the port will continue within the present boundaries as a function of increasing traffic and changing commodities. This section addresses port operations based on what is currently understood to be the type and volume of shipping traffic.*²²
57. Chapter 3.4 outlines perceived future developments. *“The port is expected to be developed in phases over a number of years as the function of prevailing demand. ...the details of each phase will depend on the needs of the existing and anticipated users at the time. Future berthing areas will be created by extending the the south-western and north- eastern quay walls of phase 1 inland and constructing separate quay walls in the outer basin. A new EIA will be required for any additions to the port as described in this chapter.”*²³

¹⁹ NEMA, section 24N

²⁰ EIR, p 8

²¹ EIR, p10

²² EIR, 3.2.4, p43

²³ EIR 3.4.1 Possible Future Developments: Port,p50

58. Chapter 7.1 confirms that during the construction of the port there are a number of project actions that could significantly impact on the marine and nearshore environment but that “[t]he operational activities associated with the port are less defined as no confirmed clients exist for the IDZ and thus the type of activities that will occur in the port have not been finalised. At present it is envisaged that the port will handle three types of cargoes, viz. bulk, breakbulk and containers. The products being moved could vary from various ores, cement, chemicals, refined petroleum products, various iron products, vehicles and other containerised goods. The operational activities at the port would involve the :

- 58.1. refuelling and general servicing of vessels;
- 58.2. unloading and loading of various cargoes; and
- 58.3. light repairs and maintenance.”²⁴

59. “The fact that most pollution spills occur during transfers or normal port operations indicates that these accidents should be able to be managed. The sound management of the port should reduce the occurrence of any spills but emergency containment plans must be drawn up in line with best practice standards around the world so that, in the case of a spill, it can be contained within the port.”²⁵ The potential for a catastrophic oil spill²⁶ was considered as having the potential to impact on the Bird and St Croix island groups as well as the entire coastline within and around the Bay: “[t]he proposed deep water harbour will be visited by very large ships and the possibility always exists that there could be a catastrophic oil spill such as was the case for MV Treasure in Table Bay. The MV Treasure released 1 139 tonnes of heavy fuel and 56 tonnes of marine diesel into the sea off Robben Island. A spill of this magnitude would impact significantly on various ecosystems within the Bay as well as a number of industries such as tourism, fishing and mariculture.”

60. Even though the EIAR did not envisage the possibility of a catastrophic spill as a result of ship-to-ship bunkering but rather for day-to-day operations and the potential risk was therefore low, the overall environmental significance of this impact was still rated as being **very high**. The reason given is the potential damage that a major oil spill could have on sensitive areas such as the various island groups in the Bay.²⁷

61. As ship-to-ship bunkering was not contemplated as one of the potential port operations at the time of the EIA, no specific risk assessment for ship-to-ship bunkering was done. Given the oil spill risk associated with ship-to-ship bunkering, read with the repeated statements in the EIAR that a new EIA will be required for any additions to the port it is understandable that the public is concerned that no EIA was done for this activity. Although is not a Listed Activity in the EIA regulations, it would have prudent for the TNPA or SAMSA to take a risk-averse and cautious approach and call for an EIA prior to making the decision to allow ship-

²⁴ EIR Chapter 7 : Marine Impacts And Mitigation : Project actions and activities associated with construction and operations of the port: p119

²⁵ EIAR Chapter 7.3 p132

²⁶ EIAR Chapter 7.3 p133

²⁷ The seals and seabirds, which breed and rest on the islands, play an integral role in the functioning of the marine ecosystems of Algoa Bay. The islands also play a national and international role in the conservation of three seabird species, the Cape gannet, African penguin and Roseate tern. The largest gannet colony in the world is at Bird Island, the largest African penguin colony in southern Africa is at St Croix, and the only confirmed sites where Roseate terns breed in South Africa is at Bird and St Croix islands, with a further possible site being Jahleel Island.” EIAR Chapter 6.4.1 The Algoa Bay Islands: General Description, p110

to-ship bunkering at anchorage. Not having done so does not, however, render the activity illegal.

National Environmental Management: Integrated Coastal Management Act

62. The Act defines “coastal waters” as (a) the internal waters, territorial waters, exclusive economic zone and continental shelf of the Republic referred to in sections 3, 4, 7 and 8 of the Maritime Zones Act, 1994, respectively; and
63. The bunkering is operating within the Exclusive Economic Zone, forming part of the coastal waters,²⁸ and consequently, is situated within the coastal zone, as defined in NEM:ICMA.
64. Chapter 7 of the NEM: ICMA provides measures for protecting the coastal environment as well as assessing and regulating detrimental activities. It requires that reasonable measures be taken by users of coastal public property, owners and occupiers of land, coastal managers and other responsible persons to avoid causing adverse impacts on the coastal environment in accordance with Section 28 of NEMA.
65. Section 21 states that the managing and or controlling of activities in coastal waters must be done in the interests of the whole community and in accordance with the Republic’s obligations under international law.
66. Within four years of the commencement of this Act,²⁹ the MEC for each coastal province and each coastal municipality must adopt a provincial and municipal coastal management programme respectively for managing the coastal zone or specific parts of the coastal zone. Before adopting the programme, members of the public must be invited to submit comments on or objections to the programmes. (Section 46 - 48). Section 52 ensures t that there is consistency between coastal management programmes and other statutory plans and may mean “a plan, policy or programme adopted by an organ of state that may affect coastal management and may include an integrated development plan adopted by a municipality in terms of the Municipal Systems Act; the national biodiversity framework referred to in section 38 of the Biodiversity Act and a bioregional plan prepared in terms of that Act; a provincial strategic policy and plan concerned with promoting sustainable development and a provincial or municipal development plan. The MEC may at any time review a municipal coastal management programme.³⁰ As the act commenced in 2015, some of these management plans have been adopted already. The ECCMP being one.
67. If the Minister or MEC has reason to believe that a person has, either prior to or after the commencement of this Act, carried out, is carrying out, or intends to carry out, an activity that has, is having, or is likely to have, an adverse effect on the coastal environment then, subject to subsection (2), he or she may issue a written coastal protection notice to the person responsible for that activity:

67.1. Prohibiting that activity

²⁸ Coastal waters is defined as (a) the internal waters, territorial waters, 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), respectively; and (b) an estuary

²⁹ 1 May 2015

³⁰ Section 55

- 67.2. Instructing that person to take appropriate steps to protect the environment or investigate and evaluate the impact of the activity on the coast environment in terms of Chapter 5 of NEMA; or to stop or postpone the activity for a reasonable period to allow for the investigation to be carried out.
68. Section 63 of NEM:ICMA details specifically the factors that a competent authority must take into account when an environmental authorisation in terms of NEMA is required for coastal activities. The competent authority is also required to ensure that the conditions of the EA are consistent with any applicable coastal management programmes and the attainment of coastal management objectives in the area concerned.³¹
69. Coastal activities are defined as “activities listed or specified in terms of Chapter 5 of the National Environmental Management Act which take place— (a) in the coastal zone; or (b) outside the coastal zone but have or are likely to have a direct impact on the coastal zone”.³²
70. Unfortunately, section 63 **only applies where an environmental authorisation (EA) in terms of Chapter 5 of NEMA is required for coastal activities**. In those instances, the competent authority must take into account the following:
- 70.1. the extent to which the applicant has in past complied with similar authorisations;³³
 - 70.2. whether coastal public property, the coastal protection zone or coastal access land will be affected, and if so, the extent to which the proposed development or activity is consistent with the purpose for establishing and protecting those areas;³⁴
 - 70.3. the socioeconomic impact if the activity— (i) is authorised; (ii) is not authorised;³⁵
 - 70.4. the likely impact of coastal environmental processes on the proposed activity;³⁶
 - 70.5. whether the activity is likely to cause irreversible or long-lasting adverse effects to any aspect of the coastal environment that cannot satisfactorily be mitigated;³⁷
 - 70.6. whether the activity is likely to be significantly damaged or prejudiced by dynamic coastal processes;³⁸ and
 - 70.7. whether the activity would be contrary to the interests of the whole community.³⁹
71. As the ship-to-ship bunkering does not require EA, section 63 does not apply.

³¹ Section 63(5) of NEM:ICMA.

³² Coastal zone is defined as: “the area comprising coastal public property, the coastal protection zone, coastal access land, coastal protected areas, the seashore and coastal waters, and includes any aspect of the environment on, in, under and above such area

³³ Section 63(1)(b) of NEM:ICMA.

³⁴ Section 63(1)(d) of NEM:ICMA.

³⁵ Section 63(1)(e) of NEM:ICMA.

³⁶ Section 63(1)(g) of NEM:ICMA.

³⁷ Section 63(1)(h)(iv) of NEM:ICMA.

³⁸ Section 63(1)(h)(v) of NEM:ICMA.

³⁹ Section 63(1)(h)(vii) of NEM:ICMA.

72. On 19 December 2016, the Department of Economic Development, Environmental affairs and Tourism published the “Establishment of Coastal Lines for Nelson Mandela Bay”⁴⁰ in terms of section 25 and 53 of NEM:ICMA.
73. The DEDEAT presented for consideration the request from the Minister of Environmental Affairs and Tourism that certain land be excluded from coastal public property in terms of Section 27(4) of NEM: ICMA, including all ports. Since each of these ports were extensive with larger reserved areas, the Portfolio Committee had felt this proposal could not be permitted.
74. The Portfolio Committee therefore introduced Section 27(2) -27(4) which allowed exceptions by ministerial proclamation and ratification by Parliament. There was agreement for the exclusion of confined port areas.
75. Based on the above, the port operational areas, as submitted by Transnet and approved by parliament, are excluded from NEM: ICMA and therefore coastal management lines falling within the port limits or concurrent to the port limits have been removed. While this has no bearing on the ship-to-ship bunkering in the bay it will mean that the future port expansion and SBM plans will not be affected by coastal lines.

Promotion of Administrative Justice Act (PAJA)

76. “administrative action” means any decision taken, or any failure to take a decision, by an organ of state, when:
 - 76.1. exercising a power in terms of the Constitution or a provincial constitution; or
 - 76.2. exercising a public power or performing a public function in terms of any legislation;which adversely affects the rights of any person and which has a direct, external legal effect.
77. Section 3 of PAJA provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. In order to give effect to the right to procedurally fair administrative action, an administrator must give that person (among other things) adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations
78. Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
79. Section 6 of PAJA provides that any person may institute proceedings in a court for the judicial review of administrative action, and the court has the power to judicially review an administrative action if:

⁴⁰ <https://cer.org.za/wp-content/uploads/2009/12/Nelson-Mandela-Bay.pdf>

- 79.1. the administrator who took it-
 - 79.1.1. was not authorised to do so by the empowering provision;
 - 79.1.2. acted under a delegation of power which was not authorised by the empowering provision; or
 - 79.1.3. was biased or reasonably suspected of bias;
 - 79.1.4. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

- 79.2. the action was procedurally unfair;

- 79.3. the action was materially influenced by an error of law.

- 79.4. the action was taken-
 - 79.4.1. for a reason not authorised by the empowering provision.
 - 79.4.2. for an ulterior purpose or motive;
 - 79.4.3. because irrelevant considerations were taken into account or relevant considerations were not considered;
 - 79.4.4. because of the unauthorised or unwarranted dictates of another person or body;
 - 79.4.5. in bad faith; or
 - 79.4.6. arbitrarily or capriciously.

- 79.5. The action itself-
 - 79.6. Contravenes a law or is not authorised by the empowering provision; or
 - 79.7. is not rationally connected to-
 - ~ the purpose for which it was taken.
 - ~ the purpose of the empowering provision;
 - ~ the information before the administrator; or
 - ~ the reasons given for it by the administrator.

- 79.8. the action concerned consists of a failure to take a decision.

- 79.9. the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

- 79.10. The action is otherwise unconstitutional or unlawful.

- 80. There are **two parts** to the meaning of procedural fairness and **both** must be present:
 - 80.1. The first is that it is usually seen to be unfair for an administrator to make a decision that adversely affects someone without consulting them first. An administrator should not make a decision affecting someone without first hearing what they have to say. This idea is covered by the Latin phrase 'Audi alteram partem' - which means one should hear what the person who will be affected by the decision has to say before deciding.

80.2. The second is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially because they have or appear to have a private or personal interest in the matter. As is often said, "justice must both be done and must be seen to be done".

81. There are two kinds of administrative action that require procedural fairness:

81.1. First, an administrative action is a decision that affects the rights of **members of the public**. Such decisions could have:

- ~ A particular impact; they affect the rights of a particular individual (for example Raggy Charters); or
- ~ A more general impact; they affect the public - for example, the public right to have Algoa Bay protected from oil spills.

82. PAJA deals with the procedures to be followed by an administrator before making decisions that affect both a particular person or people⁴¹ and those that affect the public generally⁴². Certain procedures are mandatory and others are discretionary.

83. The mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons are that the affected person/s must, before the decision is taken, be given:

- 83.1. Adequate notice of the nature and purpose of the proposed administrative action;
- 83.2. A reasonable opportunity to make representations;

After the decision is taken:

- 83.3. A clear statement of the administrative action;
- 83.4. Adequate notice of any right of review or internal appeal and
- 83.5. Adequate notice of the right to request reasons in terms of s 5 of the PAJA.

84. In addition to the mandatory procedures outlined above, to ensure fairness, every administrator must consider the following three additional procedures:

- 84.1. Providing assistance in responding to the action.
- 84.2. A person should be given an opportunity to present information and arguments in their favour and to challenge information and arguments against them.
- 84.3. A person affected may need to be given the opportunity to appear in person before the administrator.

85. Section 4 of the PAJA states that the administrator has to decide which public procedures should be followed when administrative action has a general impact. These public procedures are designed to involve the public in the decision, to provide accountability, and to gather information to help the administrator. They are:

- 85.1. A public inquiry
- 85.2. A notice and comment procedure; or

⁴¹ Section 3

⁴² Section 4

- 85.3. Another fair procedure.
86. It is mandatory to make this decision, but the administrator has a discretion to choose which procedures to use.
87. Any proceedings for judicial review in terms of section 6(1) must be instituted **without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons.**

C. Summary of risk, assessment and mitigation

88. Having regard to the documentation provided through the PAIA process, the following is evident:
- 88.1. The Guidelines for Agreements, Licences and Permits in terms of the National Ports Act, specifically with regard to bunkering, states that the conditions of a bunkering licence must include that the Licensee ensures that all necessary measures are taken to prevent fuel spillage into the waters of the Port, or onto the quayside and that an Environmental Management Plan must be submitted to the Authority which must cover all spill and pollution control measures.
- 88.2. The TNPA 2015 Bunkering Licence Manual (Annexure D) sets out a list of annexures that need to be included in the bunkering application form which include:
- An acceptable Risk Assessment (RA) Report dealing with safety, health and the environmental obligations contemplated in the Bunkering Licence; and
 - Acceptable Plan for reducing risk, i.e., specific/inherent risk/s relative to the obligations contemplated in the Bunkering Licence.
 - Both the RA and the Plan have to be verified and signed off as acceptable by the designated Risk representative; an individual or separate Risk Assessment is required for all categories (activities) that are being applied for.
89. **3 August 2018** EMC Bunkering Operations Committee Meeting minutes reflects:
- 89.1. SAMSA
- *has placed a **limit on ship-to-ship bunkering** in respect of ships that may be refuelled in the Bay at 90 000 gross tons, this is because Port Elizabeth does not have a salvage tug to assist vessels in need in the Bay and therefore SAMSA cannot accommodate vessels above 90 000 gross tons. This may change if a salvage tug is brought into the port.*

- *will not issue a permit in the event of any current oil spill in the Bay until it has been cleaned up and any STS bunkering underway is stopped. If there is a spill in the bay while other bunkers operations are taking place any bunkering operation will be suspended so as to consolidate availability of clean up resources.*

89.2. An **oil spill exercise was done in August 2018** for SAMF and one for Aegean will be held in November 2018 (held by DEA Oceans & Coasts)

- **Contingency plans** are in place in the event of an oil spill and depending on their severity, are dealt with as **TIER 1 (local)**, **TIER 2 (DEA Oceans and Coasts)**, **TIER 3 (government & international)**.
- *Ships not complying with SAMSA's requirements or having to wait for bunkering, may get refuelled in the Port, however they do not normally go for this option, as it is more expensive.*
- *Subject to the outcome of the assessment to be commissioned by the Harbour Master, TNPA and SAMSA to liaise with one another in the issuing of licenses/permits to avoid congestion.*

90. The Transnet Environmental Management Status Report of **November 2018** reads:

90.1. **STS Risk assessment in progress**, currently under review by the Environmental Department.

90.2. Oil Spill Response training and simulation to take place from the 26th - 30th November 2018 headed by DEA.

91. The Bunkering Environmental Working Group was established in April 2019 by SAMSA. The working group is a sub-committee of the Bunker Stakeholder Forum and apparently represents Interested and Affected Parties in Algoa Bay. Its purpose is "to ensure environmental issues are considered when bunkering applications are made". The working group meets every two months and is chaired by SAMSA. The outcomes are reported to the Bunkering Stakeholder Forum. Members include SAMSA, Transnet EM, DEA O&C, DEDEAT, SANParks, CDC EM and SANCCOB. No members of the public are involved in the group and no public participation takes place during the bunkering licence application process.

92. **In January 2020** South African Marine Fuels (Pty) Ltd (SAMF) prepared an Environmental Management Programme (EMP) specific to its proposed activities within Algoa Bay. The EMP includes a risk assessment, applicable for ship-to-ship bunkering within the Port Limits and an adapted Oil Spill Contingency Plan to include the identified risks. According to the EMP, it is distributed to "stakeholders, which includes the DEA's Oceans & Coast, SANParks, SANCCOB, DAFF, TNPA and the Algoa Bay Municipality. Stakeholders had an opportunity of review the EMP and Risk Assessment to provide comments. SAMF states in

the EMP that it is willing to participate in a working group, if required by interested stakeholders.”⁴³

93. The risk assessment lists bunkering as a **high risk** in the following activities:

- 93.1. collisions of mother/daughter vessel
- 93.2. Equipment failure
- 93.3. Inadequate emergency preparedness
- 93.4. Adverse weather and sea conditions
- 93.5. Commencing ship to ship authorisations
- 93.6. Improper hose connection
- 93.7. Inadequate hose connection
- 93.8. **Oil spill due** to leakage, overflow

These activities were all classified as a 3 with regard to the probability for occurring (sometimes, presumably once a year), with the exception of oil spill which was classified as a **high probability of 4** (regular, presumably once a month). After mitigation, all classified as **low risk** with the probability of occurring reduced to 2 (possible, presumably once every 10 years).

94. In **July 2020**, Heron Marine prepared and HSE Management Plan for the bunkering and ship-to-ship transfer of fuel in Algoa Bay. The environmental risk analysis identifies the loss of containment during bunkering as **major (20)** with a low probability of occurring (4). After mitigation measures the risk is still **major (15)** but with a slighter lower probability of occurring (3).

95. The same document notes exposure to elements (weather) as a **high risk (12)** with a **high probability of 4**. After mitigation this drops to a **medium risk of 6** and a low probability of 2. The mitigation measures are that the anchorage and bunkering/STS operation be conducted inside Algoa Bay as the Bay provides a degree of shelter against the elements.

96. Loss of containment during bunkering/STS is classified as a **major risk (20)** with a **high probability of 4 with a high severity rating of 5**. Even with mitigation (use of spill booms etc) the risk is **still major (15)**, and the severity **rating remains 5**.

97. Similarly, fire or explosion during bunkering is rated as a **major risk (20)** with **high severity and risk rating of 4** each. After mitigation (stop the bunkering operation and, if possible separate the vessels etc), the **risk remains major (15)** and the severity remains **4**.

98. Also, in **July 2020** Minerva Bunkering Marine Services Pty Ltd commissioned Zingce Environmental Solutions (ZES) to develop a site-specific Risk Assessment for its bunkering operations in the Algoa Bay including anchorage 1 and 2 of Port of P.E and Port of Ngqura.

99. The impact of overflow of fuel into the bay, water pollution, fire/explosion during ship-to-ship transfer was identified as **high risk**⁴⁴ (12). The probability is identified as 3 (occasional:

⁴³ EMP, p19

⁴⁴ Interoperable and mitigation measures must be put in place to reduce the risk rating. The risk needs to be continually monitored.

possibility of occurring sometime once every 5 years) and a **consequence category of 4** (major pollution/full scale response and major national and international impact). With mitigation (such as risk assessment training and procedures in place) the risk is reduced to **medium**⁴⁵ (9), the probability remains at 3 and the consequences drop to 3 (moderate pollution).

100. Similarly, damage to vessels, marine fuel oil leakages, water pollution and smothering of marine life are also identified as **high risk (12)** with a high probability rating of 4. After mitigation the risk is reduced to **medium (9)** and the probability to **3 (considerable impact by moderate pollution)**.
101. Collision of mother/daughter vessels resulting in sinking, fire/explosions, major oils pollution etc is rated as **high risk (16)** with consequence and severity rating both **being high (4)**. Even after mitigation measures are put in place, the **risk remains high (12)**, the **consequence rating remains 4** and the probability reduces slightly to 3.
102. Adverse weather and sea conditions resulting in damage to vessels and resultant oil spill is rated as a **high risk (16)** with consequence and probability rating both being high (4). Even after mitigation the risk remains high as does the consequence rating. The probability of the risk occurring drops slightly to a 3.
103. Improper ship-to-ship transfer, i.e., improper hose connections or leaks resulting in marine fuel oils spillage is classified as **high risk (16)** with consequence and probability rating both being high (4). After mitigation the risk **remains high (12)** as does the probability **rating (4)**. The consequence rating drops to 3.
104. Inadequate spill response capacity is identified as a **high risk (16)** with consequence and probability rating both **being high (4)**. After mitigation the **risk remains high (12)** as does the **probability rating (4)**. The consequence rating drops to 3.
105. Non-compliance with applicable legislation and improper evacuation of marine life during and post major pollution are both identified as **high risk (16)** with consequence and probability rating both **being high (4)**. After mitigation the **risk remains high (12)** as does the **probability rating (4)**. The consequence rating drops to 3.
106. This Risk Assessment states that "*MINERVA has been conducting ship to ship transfers on this site since April 2016 and have supplied more than 3500 vessels with fuel. Minerva supplies vessels with Marine Fuel Oil and Marine gas oil. This activity poses several environmental, health and safety risks which if not properly managed could be detrimental. The Risk Assessment is attached as Annexure A and has been compiled in line with the International Safety Management Code (ISM Code) and ISO 14001 Environmental Management System Requirements*". About 3500 vessels have been serviced since operations commenced.⁴⁶
107. It is noted that no public participation took place during the risk assessment or preparation of the EMPs and that the EMPs were prepared AFTER the licences were issued. (Aegean Bunkering Marine Services (2016) South African Marine Fuels (2018); and Colt Marine

⁴⁵ Tolerable risk however mitigation measures must be put in place and it must be monitored.

⁴⁶ p15

(2019). It is not clear whether the licences have been converted to Minerva and Colt Marine. This should be investigated further as the EMPs are not done in the name of the licence holders.

108. If the risk assessments had been done prior to the licences been issued, given the number of high risks that remain high risks even after mitigation, these activities would or should not have been authorised.

D. Conclusions and Recommendations

109. No Listed Activities in terms of the EIA activities were triggered and therefore no EIA was required prior to the issuing of bunkering licences and the operation thereof. The bunkering operations have complied with all the necessary legislation and are operating legally.
110. Clients and other stakeholders are of the opinion that inadequate measures are taken to prevent the damage to the marine biodiversity in Algoa Bay during bunkering operations. Due to the toxicity of bunker fuel to the aquatic environment and the long-lasting effect in the waters, control measures should be in place, such as adequate spill control equipment, booms around the vessels, oil dispersants, no bunkering during night-times, personnel with know-how on dealing with spills on the transferring vessel and not relying on contractors from ashore to deal with spills. Furthermore, clients are concerned that no procedures seem to be place for dealing with oiled marine wildlife.
111. The document obtained during the PAIA application suggests that there are many procedures in place during the bunkering licencing process to assess the risks. There is also a Bunkering Working Group that meets to discuss issues and concerns.
112. The 2020 risk assessments and EMPs suggest that there is reason to be concerned as the bunkering activities in the bay remain high risk even after mitigation measures are put in place. If these documents are read with sections 2 and 28 of NEMA, section 21 of NEM: ICMA and in the context of biological diversity of Algoa Bay, the Addo MPA, Algoa Bay Island Nature Reserve, IBAs, threatened and endangered species and the national and international role in the conservation of three seabird species, Cape Fur Seals and penguins, the decision to allow ship-to-ship bunkering in the bay is unreasonable and in conflict with NEMA and NEM: ICMA. From the documentation provided, it seems the magnitude of the risk was only properly assessed after the licences were issued.
113. Client and other representatives of the public must insist that they are part of the Bunkering Environmental Working Group. Thereafter they should:
 - 113.1. push for bunkering to take place within the confines of the harbour and not at anchorage. Given the ecological sensitivity of the Bay, and the identified risks in the 2020 risk assessments, this is a reasonable request. Bunkering within the harbour would mitigate the risk of further penguin population decline and the risk of harm to other marine and bird life.
 - 113.2. Insist that any bunkering licence applications include an EIA process and EMP (as done in 2020) which includes a public participation process. This is in accordance

with PAJA. This requirement for an EIA and EMP should be included in the Transnet Bunkering Guideline document and the SAMSA checklist.

- 113.3. Follow up on the issues raised in previous meetings that don't seem to have been addressed:

15 August 2016:

- 113.3.1. *bunkering project is moved away from the St Croix Island group*
113.3.2. *next annual Oil Spill response drill organised by SAMSA and Oceans & Coast should be held in Algoa Bay*

16 November 2016:

The document headed: Quarterly Report to the Coega/Ngqura Environmental Monitoring Committee: EMC Meeting prepared by *Dr Paul Martin Coega / Ngqura Environmental Control Officer*:

- 113.3.3. *DEA Oceans & Coast are able to perform its functions in terms of the Coastal Oil Spill Contingency Plan (Dias) i.e., does it have the necessary equipment or personnel in the region since the concern was raised after the 2016 spill?*
113.3.4. *Has the Ngqura Harbour Spill Contingency Plan & Working Manual, been revised to update the contact to dovetail with SANParks Seabird Rescue Plan (updated May 2011) & Aegean Offshore Bunkering?*

3 August 2018 EMC Bunkering Operations Committee Meeting minutes:

- 113.3.5. *Extreme projects are the only emergency response operators currently equipped to deal with larger spills.⁴⁷*
113.3.6. *Consideration should be given to finding out whether the emergency response equipment of the fuel storage tank operators in the Port of PE could be made available in the event of a spill.*
113.3.7. *Extreme projects are developing an oil trajectory app, which will assist them in predicting the spread of a spill. They are also in the process of purchasing a drone and getting their drone pilot's license.*
113.3.8. *SAMF to sign MoU with SANCCOB and will take out environmental insurance to cover cleaning of oiled birds in the event of a spill.*
113.3.9. *The Bunkering Environmental Working Group should extend an invitation to other stakeholders and parties, including WESSA and BirdLife.*

⁴⁷ There is concern that Extreme projects may not have the capacity to attend to multiple oil spills should this occur, although this may be mitigated by ceasing operations of all bunkering transfers when a spill occurs.

- 113.4. obtaining details of all incidents and ensuring that they are reported in terms of section 30 of NEMA.
- 113.5. push for the comments on the Penguin Management Plan (which has yet to be finalised) be included in the final draft.
- 113.6. Take part in all future EIA process that will take place in the proposed additional port developments which include:
- Extension of the eastern breakwater
 - Port expansion towards the north and west. This expansion includes land reclamation to provide additional quay lengths. TNPA other land area increased by 190 ha.
 - New Single Point Mooring (SPM) to be constructed.
114. Is a High Court Review possible in terms of PAJA against SAMSA and/or the TNPA for the administrative action that was taken in issuing licences for ship-to-ship bunkering?
- 114.1. The TNPA and SAMSA were authorised to do issue the licences and acted under a delegation of power which was authorised by the empowering provision in the SAMSA and the NPA Act. Recent articles however suggest that the SAMSA may have been biased.⁴⁸
- 114.2. The action was not materially influenced by an error of law nor is the action unconstitutional or unlawful.
- 114.3. Given the sensitivity of Algoa Bay, the close proximity of the islands, the pristine environment, and the high-risk of spills during bunkering, the decision to allow ship-to-ship bunkering (as opposed to in-harbour bunkering) could be considered **so unreasonable** that no reasonable person could have so exercised the power or performed the function. Although there is no legal requirement for an EIA, these have subsequently been done by Minerva, Heron and SAMF. All the risk assessments and/or EMPs identified bunkering operations are identified as high risk. Two of the three reports identified several aspects of bunkering as high risk **even after mitigation measures**. Had these conclusions been reached prior to the licences having been issued, and the information before SAMSA at the time of making the decision, the decision would have been unreasonable. Unfortunately, the risks were only assessed after the decision was made and therefore it could be argued that the decision was not made unreasonably.
- 114.4. It could however be said that the action (decision) was taken **because relevant considerations were not considered, i.e. the relevant impacts**.
- 114.5. Was the decision to allow ship-to-ship bunkering procedurally fair? The bunkering licences were issued without consultation with individuals or the public. Given the

⁴⁸ <https://www.ubusobethu.co.za/post/disabled-people-of-south-africa-takes-samsa-to-court-over-corruption-and-maladministration>

potential impact of the decision taken, the people who will be affected by the decision should have had been informed of the application/s and the opportunity to make representations. It may be argued that the failure to do so renders the administrative action procedurally unfair. However, several years have passed since the bunkering licences were first issued and while it may be possible to convince a court to hear a review that was not issued within the 180 day timeframe required by PAJA, it is not assured.

115. It is submitted that the court approach would be a risky one but could be explored further with an advocate's opinion.

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