

REPUBLIC OF SOUTH AFRICA

**MARINE OIL POLLUTION
(PREPAREDNESS, RESPONSE AND
COOPERATION) BILL**

*(As introduced in the National Assembly (proposed section 76); explanatory summary of
Bill and
prior notice of its introduction published in Government Gazette No. 45983 of
28 February 2022)
(The English text is the official text of the Bill)*

(MINISTER OF TRANSPORT)

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GENERAL EXPLANATORY NOTE:

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To give effect to the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

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SCHEDULE

CHAPTER 1

INTRODUCTORY PROVISIONS

Definitions		25
1. In this Act, unless the context indicates otherwise, any meaning ascribed to a word or expression in the OPRC Convention bears the meaning so ascribed, and		
“ Abidjan Convention ” means the Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region, 1984;		30
“ Authority ” means the South African Maritime Safety Authority established by section 2(1) of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);		
“ Centre for Sea-watch ” means the SAMSA’s operational unit responsible for marine domain awareness and communication;		35
“ Chief Executive Officer ” means the Chief Executive Officer of the Authority appointed in terms of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998);		
“ Constitution ” means the Constitution of the Republic of South Africa, 1996;		
“ Department ” means the Department of Transport;		40
“ Director-General ” means the Director-General of the Department;		
“ flag state ” means the jurisdiction under whose laws the vessel is registered;		
“ immediate-incident-responding-party ” means the party that is first to react to the incident as it occurs;		
“ Incident Commander ” means the person appointed as an Incident Commander in terms of section 10(3);		45
“ incident command course ” means the compulsory course provided to all incident commanders;		
“ Incident Management Organisation ” means the Incident Management Organisation established in terms of section 11;		50
“ incident management system ” means the safe, effective and efficient management of response, the command and deployment of all types and forms of resources for marine pollution incidents;		
“ International Maritime Organization ” means the specialised United Nations organisation established on 17 March 1948 in terms of the International Maritime		55

Organization Convention of the United Nations concluded in London, United Kingdom in 1948;

“International Oil Pollution Compensation Funds” means funds in terms of the Merchant Shipping (International Oil Pollution Compensation Fund) Contributions Act, 2013 (Act No. 36 of 2013); 5

“Intervention Convention” means the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 1969;

“Intervention Protocol” means the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substances other than Oil, 1973;

“marine casualty” means an event, or a sequence of events, that has resulted in severe damage to the environment, or the potential for severe damage to the environment, brought about by the damage of a ship or ships; 10

“Minister” means the Cabinet member responsible for transport;

“Nairobi Convention” means the Convention for the Development, Protection, Management and Development of the Marine and Coastal Environment of the Western Indian Ocean, 1985; 15

“NOSCP” means the South African National Oil Spill Contingency Plan;

“offshore installation” means any of the following situated within the internal waters, territorial waters or the Exclusive Economic Zone, or on, or above, the continental shelf: 20

(a) Any installation, or mechanism, including a subsea pipeline or vessel, which is used for the transfer of any substance to or from—

(i) a ship;

(ii) a research, exploration or production platform; or 25

(iii) the coast of the Republic;

(b) any exploration or production platform used in prospecting for, or the mining of, any substance; or

(c) any exploration or production vessel used in prospecting for, or the mining of, any substance;

“oil” means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products; 30

“oil and gas infrastructure” means oil and gas fields, individual wells and rigs, pipelines, transshipment centres and refineries;

“oil pollution incident” means an occurrence or series of occurrences having the same origin which results or may result in a discharge of oil and which poses or may pose a threat to the marine environment, or to the coastline or related interests of the Republic, and which requires emergency action or other immediate response; 35

“OPRC Convention” means the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990; 40

“organ of state” means organ of state as defined in section 239 of the Constitution;

“owner”, in relation to a ship, means the person or persons registered as owner of the ship, or in the absence of registration, the person or persons in whom the authority to operate the ship is vested, but in relation to a ship belonging to a State and which is operated by a person registered as the operator of the ship, the person so registered; 45

“place of refuge” means a place where a vessel in distress can be safely taken to, in order to prevent further damage or deterioration of the ship;

“prescribed” means prescribed by regulation or notice; 50

“Republic” means the Republic of South Africa;

“seaports and oil-handling facilities” means ports, oil terminals including mobile and immobile off-shore ship-to-ship bunkering, pipelines and other oil-handling facilities;

“ship” means a vessel of any type whatsoever, operating in the marine environment, and includes hydrofoil boats, air-cushion vehicles, submersibles and floating craft of any type; 55

“South African ship” means any ship having South African nationality as contemplated in section 3 of the Ship Registration Act, 1998 (Act No. 58 of 1998);

“South African waters” includes internal waters, territorial waters and exclusive economic zone as referred to in sections 3, 4 and 7 of the Maritime Zones Act, 1994 (Act No. 15 of 1994), respectively; and 60

“this Act” includes regulations made in terms of this Act.

Objects of Act

2. The objects of this Act are to—
- (a) provide for the safe, effective and efficient management and deployment of resources in response to, cooperation in and control of, spills of oil, or any other pollutant from ships or any other sources within South African waters or which pollute or threaten to pollute South African waters, aquatic resources, coastline or related interests; 5
 - (b) provide for the effective cooperation with neighbouring countries in matters pertaining to marine oil pollution preparedness, response and control;
 - (c) incorporate into law of the Republic, the relevant provisions of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990; and 10
 - (d) reduce and control the pollution of the marine environment, wildlife and associated impacts on biodiversity and ecological processes by oil from ships, offshore installations, seaports and oil-handling facilities. 15

Incorporation of OPRC Convention into law

3. (1) Subject to this Act, the OPRC Convention has the force of law in the Republic.
 (2) The Minister may, by notice in the *Gazette*, publish for general information any amendments made to the OPRC Convention under article 14 if those changes are binding on the Republic in terms of section 231 of the Constitution. 20
 (3) For the purpose of this Act, the English text of the OPRC Convention prevails for the purpose of interpretation.

Application of Act

4. (1) Unless expressly provided otherwise, this Act applies to all spills or possible spills of oil, from any or all sources that may pollute or threaten to pollute South African waters, coastal aquatic resources or coastline. 25
 (2) This Act applies to the Republic and to the Prince Edward Islands as referred to in section 1 of the Prince Edward Islands Act, 1948 (Act No. 43 of 1948), including any privately owned ship, offshore installations, port facilities, oil-handling facilities or any offshore installation or any port facility or any oil-handling facility owned or partly owned or chartered or otherwise operated by an organ of state except that it does not apply to any ship or offshore installation of the South African National Defence Force in times of war, conflict or emergency. 30
 (3) This Act does not apply to warships or naval auxiliary vessels of another State.
 (4) Notwithstanding all the above, this Act will apply to an oil spill casualty occurring at a South African Naval Base. 35
 (5) This Act binds the State and all organs of State.

CHAPTER 2

MARINE OIL POLLUTION PREPAREDNESS

Risk assessments 40

5. (1) The Director-General must cause the Authority to undertake a national marine oil pollution risk assessment within two years after coming into operation of the envisaged Marine Oil Pollution (Preparedness, Response and Cooperation) Act, and thereafter at least every five years or whenever there is new development that alters the risk of marine oil pollution incidents in a port facility, oil-handling facility or offshore installation, whichever comes first. 45
 (2) The risk assessments undertaken under subsection (1) must be reported to the Director-General and lodged further with the Incident Management Organisation and must, as a minimum, define—
 (a) the main shipping routes and characterise the types, quantities and frequencies of marine pollutants carried on each route; 50
 (b) the locations and describe marine oil pollution risks including spatial zone of influence of a potential pollution event, for all present offshore installations

and lodged oil and gas exploration, extraction or decommissioning applications for such;

- (c) the locations and describe marine oil pollution risks including spatial zone of influence of a potential pollution event, for all ports;
- (d) the highest risk areas for marine oil pollution incidents, including shipping accidents, other sea-based resources and land-based sources;
- (e) those parts of South African waters and the coastline which are most at risk of a negative impact from marine oil pollution;
- (f) protected environmental sensitive sea areas; and
- (g) high risk biodiversity features and ecological processes that may be affected by marine oil pollution events.

(3) The Minister after consultation with Cabinet must use the findings of the risk assessment undertaken under subsections (1) and (9) to inform the approval or otherwise of any proposed new port facility, new oil facility or new offshore installation.

(4) The risk assessment must use internationally accepted risk assessment methods including up-to-date data collection, analysis and modelling and presentation methods and, upon public comment and finalisation, the Director-General must publish the risk assessment as a public report, as prescribed.

(5) The Director-General must within two years after this Act comes into operation cause that the marine oil pollution risk assessment be undertaken by the owner and operator of any port facility, oil-handling facility or offshore installation, at its cost.

(6) The marine oil pollution risk assessment undertaken subsection (5) must be presented to the Director-General for approval in the prescribed manner.

(7) The owner and operator referred to in subsection (5) must review the approved marine oil pollution risk assessment for consideration by the Director-General thereafter at least every five years, or when there is a new development that may alter the risk of marine oil pollution incidents from such facilities or installation, whichever comes first, and upon request by the Authority, provide a risk assessment report.

(8) The owner and operator referred in subsection (5) must, prior to the decommissioning of all or part of the port facility, oil-handling facility or offshore installation, at its cost, undertake risk assessment associated with the intended decommissioning of that facility or installation including the rehabilitation process for these areas where appropriate and possible, once the decommissioning process has been finalised.

(9) A risk assessment undertaken in terms of subsections (5), (6) and (7) must, as a minimum—

- (a) use national and internationally accepted risk assessment methods, including up-to-date data collection, modelling, analysis and presentation methods;
- (b) be consistent and coordinated with, and provide inputs to, the national risk assessments carried out under subsection (1);
- (c) contain any other information or requirements, as prescribed;
- (d) identify risk mitigation measures, responsible parties and appropriate timelines for implementation; and
- (e) be lodged with the Authority and upon finalisation made available as public reports, as prescribed.

(10) The proponent or developer of any proposed new port facility, new oil facility or new offshore installation or operation must, at its cost, undertake a marine oil pollution risk assessment for the proposed new facility or installation as part of the planning and environmental impact assessment process for such proposed development under the National Ports Act, 2005 (Act No.12 of 2005), and the National Environmental Management Act, 1998 (Act No. 107 of 1998), consistent with the requirements for risk assessments as outlined in subsections (4) to (7).

(11) The results of any risk assessment contemplated in subsection (7) must be lodged with the Director-General, and upon approval made available as a public report, as prescribed.

(12) The result of the risk assessments carried out under subsections (1) to (9) must be used to inform the development of the marine pollution contingency plans required under sections 6 and 7 and the marine oil pollution response equipment inventories required under section 8.

(13) The Director-General may appoint review panels when considering marine oil pollution risk assessments reports under this section.

South African National Oil Spill Contingency Plan

6. (1) The Minister must prescribe the procedures for the development and approval of the NOSCP and prescribe the minimum contents thereof.
- (2) The Department must prepare the NOSCP in consultation with the Authority and the Incident Management Organisation and submit it to the Minister for approval. 5
- (3) The Minister must publish the approved NOSCP in the Government *Gazette* for public information.

Site-specific pollution contingency plan

7. (1) All owners or operators of existing port facilities, oil-handling facilities or offshore installations, designated marine protected areas and marine bird and mammal colonies must, nine months after publication of the NOSCP, develop and maintain site-specific pollution contingency plans for their facilities or installations, which are appropriate to the level and type of risk of marine oil pollution incidents resulting from their activities and such plans must be consistent with the NOSCP. 10
- (2) The plans contemplated in subsection (1) must detail measures that must be taken to adequately protect, rescue, rehabilitate and release all wildlife affected in the case of a marine oil pollution incident and also refer to the National Oiled Wildlife Contingency Plan. 15
- (3) The plans must be submitted to the Authority for approval and before approving such plans, the Authority must consider internationally accepted best practice in contingency planning, the advice of the Incident Management Organisation and any other prescribed criteria. The plan so submitted must be approved by the Authority within 60 days of submission. 20
- (4) Any new port facilities, oil facilities or offshore installations require the site-specific pollution contingency plan before operations begin. 25

Marine oil pollution response equipment inventory

8. (1) The Authority with the support of the National Marine Oil Pollution Preparedness and Cooperation Incident Management Organisation must establish and maintain the national marine oil pollution response equipment inventory, taking into account the findings of the risk assessments required under this Act, and such inventory must comprise of equipment owned and maintained by the— 30
- (a) Government;
 - (b) Authority;
 - (c) relevant organs of state;
 - (d) owners and operators of port facilities, oil-handling facilities or offshore installations and 35
 - (e) relevant non-governmental organisations.
- (2) All owners and operators of port facilities, oil-handling facilities or offshore installations which pose a risk of marine oil pollution incidents must procure or enter into service agreement to operate and maintain, in a state of constant readiness including personnel that are competent to deploy the pollution response equipment, a stockpile of relevant and current marine oil pollution response equipment being appropriate to the level and type of risk of marine oil pollution incidents resulting from the facility or installation, and being suitable for local conditions including equipment that is suitable to respond to marine oil pollution incidents in ecologically sensitive areas and the assessment of such equipment. 45
- (3) In determining equipment needs under subsection (2), each owner or operator of a port facility, oil-handling facility or offshore installations must take into account the findings of the risk assessments undertaken under section 5 and must liaise with the Authority, in order to ensure compatibility and inter-operability with the national marine oil pollution response equipment inventory. 50
- (4) The Authority and all keepers of stockpiled equipment must repair or replace equipment with such costs being recovered from the polluter if possible and consistent with the administrative arrangements developed under subsection (5).
- (5) In order to facilitate the use of equipment, personnel and other resources under subsection (4), the Authority and the private sector, with the advice of the Incident Management Organisation, must jointly develop and agree to a national administrative 55

arrangement as a standard operating guidelines for the use of national marine oil pollution response resources, in respect of both private sector-owned and government-owned equipment and resources, as well as personnel, consistent with the provisions of this Act and the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981), and such administrative arrangements must be reviewed in consultation with the Incident Management Organisation, as and when necessary. 5

(6) The Authority may, by notice, require that owners or operators of a ship falling within the MARPOL regime or oil and gas infrastructure carry on board and maintain—

- (a) marine oil pollution response equipment for the containment, recovery or disposal of any pollutant that may be discharged by the ship into South African waters; 10
- (b) the type and quantity of equipment that is sufficient to allow an initial response to the pollution incident, as determined by the Authority in consultation with the owner or operator, taking into account limitations of the crew and the practicalities of operations at sea; and 15
- (c) the type and quantity of equipment that is specified in any Shipboard Oil Pollution Emergency Plan required of the ship under the relevant provisions of the Marine Pollution (Prevention of Pollution from Ships), 1986 (Act No. 2 of 1986).

(7) The Director-General or any official appointed in writing by him or her must annually audit the pollution response equipment and other resources listed in the inventory. 20

Training and exercise

9. (1) The Authority, together with the Incident Management Organisation, must develop and implement an annual programme of training and exercises in marine oil pollution control and clean-up for relevant officials from all organs of state that are members of the Incident Management Organisation and the outcomes of such training and exercises must be used to update and improve the NOSCP and related arrangements. 25

(2) (a) The owners and operators of port facilities, oil-handling facilities or offshore installations must ensure through accredited third parties that an annual programme of training and exercises in marine oil pollution control and clean-up including basic oiled wildlife response, for relevant staff from their organisations. 30

(b) The programme contemplated in paragraph (a) must be consistent, coordinated and, as far as possible, integrated with the national training and exercise programme established under subsection (1) and the outcomes of such training and exercises must be used to update and improve the owners' and operators' site-specific pollution contingency plans and be reported to the Authority. 35

(3) The Authority must report annually to the Director-General on training and exercises undertaken under subsections (1) and (2).

Appointment of Incident Commander 40

10. (1) As soon as practicable, after the Authority receives a report of an incident, the Head of the Centre for Sea-watch and Response, in collaboration with the Incident Response Team, must conduct an assessment to determine the capability of the immediate-incident-responding-party and monitor the effectiveness of the immediate-incident-responding-party. 45

(2) In the event that it is established that the incident is severe and is beyond the capacity of the management of the source of the immediate-incident-responding-party, the Authority, acting as Incident Commander, must initiate steps provided for in the NOSCP to inform the Director-General to activate the Incident Management Organisation. 50

(3) Within six months of this Act coming into force the Minister must appoint from within the staff of the Authority a panel of competent persons who may act as an Incident Commanders or Deputy Incident Commanders.

(4) The Authority must appoint from within the panel of competent persons an Incident Commander and Deputy Incident Commander in the event of an oil spill incident contemplated in this Act. 55

(5) The persons appointed to the panel of competent persons should have the requisite technical maritime skills and must have undertaken the approved Incident Command

Course or equivalent Disaster Management Course and have the appropriate experience for the role of Incident Commander.

(6) The Incident Commander must, within the framework of the NOSCP and with the consensus and support of the Incident Response Team, assume the powers, roles and responsibilities outlined in section 15 for the duration of the response to the incident only. 5

(7) The Deputy Incident Commander must fulfil the role of Incident Commander when the Incident Commander is absent or when directed to do so by the Incident Commander.

(8) The Authority shall develop and submit for approval by the Minister the standard operating guideline for the appointment of Incident Commander and Deputy Incident Commander. 10

(9) The Director-General or his delegated Senior Manager may appoint a Deputy Incident Commander to respond to marine incident as part of the Unified Command Incident Management Structure. 15

National Marine Oil Pollution Preparedness, Response and Cooperation Incident Management Organisation

11. (1) The Incident Management organisation is hereby established.

(2) The Incident Management Organisation consists of the following persons or their designated representatives: 20

- (a) The Director-General or his or her senior technical appointee;
- (b) the head of the department responsible for environmental affairs;
- (c) the head of the department responsible for fisheries;
- (d) the head of the department responsible for disaster management;
- (e) the head of the department responsible for petroleum and energy; and 25
- (f) the heads of such relevant government bodies as may be deemed necessary by the Director-General in consultation with the Authority.

(3) Where relevant, representatives from the following sectors, through their national representative bodies, may be invited to be members of the Incident Management Organisation: 30

- (a) The shipping industry;
- (b) the oil and mining industries;
- (c) the fishing industry;
- (d) relevant environmental non-governmental organisations; and
- (e) any other sector deemed necessary by the Authority, if membership of the Incident Management Organisation remains balanced and relevant to its role under subsection (6). 35

(4) The Incident Management Organisation must be presided over by the Director-General or his or her representative.

(5) The Authority must act as Secretariat to the Incident Management Organisation. 40

(6) The role of the Incident Management Organisation must be on an ongoing basis, providing coordinated advice, recommendations and support to the Authority and the Incident Commander on the following matters:

- (a) The undertaking of risks assessments under section 5;
- (b) the development, approval and maintenance of marine pollution contingency plans required under sections 6 and 7, including the designation of roles and responsibilities of Incident Management Organisation members' organisations; 45
- (c) the establishment and maintenance of the national pollution response equipment inventory under section 8; 50
- (d) the development and implementation of the national training and exercise programme under section 9;
- (e) the participation of the Republic in any bilateral, multilateral or regional marine spill contingency plans and related arrangements; and
- (f) any other matter related to marine oil pollution preparedness, response and cooperation as required by this Act. 55

(7) Members of the Incident Management Organisation or their designated representatives must, during an actual response to a specific marine oil pollution incident, assume the role of the Incident Response Team under the direction of the Incident Commander. 60

(8) The Incident Management Organisation must convene at least biannually for routine business, and must avail itself as members of the Incident Response Team whenever a marine oil pollution incident occurs.

(9) The Incident Management Organisation may, subject to any written directions of the Authority, regulate its own procedure as it deems fit. 5

(10) The Chairperson of the Incident Management Organisation must, by 31 March of each year, submit the annual report of the Incident Management Organisation to the Minister, outlining the activities of the Incident Management Organisation and summarising the advice given to the Authority during the previous calendar year, and the Minister must table such report in Parliament. 10

(11) The Department must facilitate the conclusion of a multi-party memorandum of cooperation to support the objectives of this Act.

Regional cooperation

12. (1) The Authority must, upon the request of any neighbouring country with which South Africa has concluded a regional agreement, that is affected or is likely to be affected by a pollution incident, and after obtaining the approval of Cabinet, in consultation with the Incident Management Organisation and subject to capability and the availability of relevant resources, cooperate with or provide advisory services, technical support and equipment as are appropriate, to such country. 15

(2) Any assistance provided by the Authority in terms of subsection (1) must be in line with the relevant provisions set out in the OPRC Convention. 20

(3) The Authority must take such necessary measures as are appropriate, to facilitate—

(a) the arrival and utilisation in, and departure from, the Republic, of ships, aircraft and other modes of transport engaged in responding to a pollution incident or transporting personnel, cargoes, materials and equipment required to deal with such an incident; and 25

(b) the expeditious movement into, through, and out of the Republic, of personnel, cargo, materials and equipment referred to in paragraph (a).

(4) The Parties to the Abidjan Convention and the Nairobi Convention must be informed of the objectives of this Act. 30

(5) The Department will facilitate the conclusion of bilateral or multilateral cooperation on mutual aid and promote cooperation with neighbouring countries in the fulfilment of its obligations.

CHAPTER 3

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MARINE OIL POLLUTION RESPONSE

Duty to report incidents

13. The provisions of the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981), apply to this Act with the necessary changes required by the context, subject to the following additional requirements: 40

(a) The duty to report incidents also applies to the owner or operator of an oil-handling facility or the owner of any place on land where a spill occurs and enters South African waters; and

(b) the Minister may in terms of this Act prescribe additional measures that may include threshold that would warrant a response, timeframes, means of communication and procedures for the reporting of incidents. 45

Initial response actions

14. (1) Whenever the Authority receives a report of a marine oil pollution incident, it must initiate a response in accordance with the NOSCP guidelines, and the first actions of the Authority must be to report to the Incident Commander appointed as such by the Minister under section 10(3) and as directed by him or her— 50

(a) designate an Incident Response Command Centre; and

(b) mobilise the Incident Response Team to the Incident Response Command Centre.

- (2) The first action of the Incident Response Team must be to assess the incident, to designate the incident to a response Tier level as follows:
- (a) In respect of Tier one, which involves small spills that are within the national capability and resources of the NOSCP, the response and clean-up must be conducted by the owner or operator of that port or other facility under its site-specific contingency plan, with oversight and support from the Authority and the Incident Response Team as required; 5
 - (b) in respect of Tier two, which involves medium spills that are within the national capability and resources of the NOSCP, the response and clean-up must be controlled directly by the Incident Commander and the Authority under the NOSCP with support from the Incident Response Team and the parties, as required; or 10
 - (c) in respect of Tier three, which involves large oil spills that are of a magnitude and severity that is beyond the response capability and resources of the Republic and such spills impact or threaten to impact across jurisdictions in one or more neighbouring countries, the response and clean-up is controlled directly by the Incident Commander and the Authority under the NOSCP, with support from the Incident Response Team and from neighbouring countries and other external assistance, in accordance with the procedures contained in any bilateral or multilateral memorandum of understanding, contingency plan and related arrangements in place at the time. 15 20
- (3) In designating an incident to a Tier level, the Incident Commander must be prepared to involve the next higher Tier level.
- (4) Once the incident has been designated to a Tier level, the Authority, through the Incident Commander and with the support of the Incident Response Team, must oversee, coordinate and control the response to a marine oil pollution incident in accordance with the contingency plan relating to the designated Tier level. 25

Incident Commander to coordinate response

- 15.** (1) During the response to any marine oil pollution incident in South African waters or which threatens South African waters or coastline, the Incident Commander must, within the framework of the NOSCP, and with the advice and support of the Incident Response Team— 30
- (a) set objectives and priorities of the response efforts;
 - (b) determine the size of the incident management system;
 - (c) monitor all the ongoing incident management activities and consider the best response practices; 35
 - (d) evaluate prior decisions, priorities and task assignments;
 - (e) manage and coordinate all operations; and
 - (f) in consultation with relevant organs of state, direct the use of all resources necessary to prevent and minimise the impact of the incident on human-health, the ecology and the economy, and assign the clean-up of the pollution or the rehabilitation of the environment before the response is terminated in accordance with section 17. 40
- (2) For the duration of the response to a marine oil pollution incident, the Incident Commander must coordinate all national assets and resources that are deemed necessary to deal with the incident, and has the power to spend and commit such funds as are reasonable in the circumstances, on the advice of the Incident Response Team and approval of the Chief Executive Officer, up to 50 per cent of the amount contained in the Maritime Pollution Fund established in terms of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998). 45 50
- (3) The Incident Commander has overall authority and responsibility for conducting incident operations and is responsible for the management of all incident operations which may necessitate directing a vessel to place of refuge which place shall include any port operated by the Transnet National Ports Authority and is responsible for the management of all incident operations at the incident site. 55
- (4) In carrying out his or her responsibilities, the Incident Commander must be supported by the staff and resources of the Authority, as well as by the staff and resources of other organisations that are members of the Incident Response Team.
- (5) The Incident Commander must be free to act without recourse to higher authority and has overall responsibility for monitoring and managing a response to a marine oil pollution incident. 60

Support of disaster forums

16. (1) In the case of a Tier two or Tier three spill, the Incident Commander, in line with a formal Mutual Assistance Agreement entered into between relevant bodies and appropriate, may request the support of the National Disaster Management Advisory Forum or a Provincial Disaster Management Advisory Forum, established in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002). 5

(2) The support contemplated in subsection (1) may include the establishment of the Incident Command Post at a Municipal Disaster Management Centre, a Provincial Disaster Management Centre or the National Disaster Management Centre. 10

(3) If the Incident Command Post is established by virtue of subsection (2), the Incident Commander and the Authority must remain in operational control of the technical response to the incident, and the Disaster Management Centre in question must provide the supporting role in terms of coordinating the provision of resources, labour and logistics and assisting the coordination between Government departments and authorities. 15

Termination of response

17. (1) The Incident Commander must, in consultation with the Incident Response Team, at the point when further response efforts and expenditure become unreasonable and can no longer be supported on the grounds of environmental effectiveness relative to cost, declare the response terminated. 20

(2) In making a decision under subsection (1), the Incident Commander must consider the advice of scientific and environmental experts on the Incident Response Team, including that of the Department of Environment, Forestry and Fisheries as well as any advice provided through external assistance.

(3) Once the response and clean-up is declared terminated, follow-up activities may continue, including but not limited to— 25

- (a) natural resource damage assessment and monitoring;
- (b) environmental restoration and rehabilitation including oiled wildlife rehabilitation and post-release monitoring;
- (c) investigation and enforcement procedures; and 30
- (d) cost recovery and compensation procedures,

as the Incident Commander may determine.

(4) As soon as practicable but not later than a date six months after the termination of the response, the Authority must convene an independent, external evaluation and review of the response, which must be a published report, and the Authority must ensure that any lessons and findings of the evaluation and review are used to improve and update the NOSCP and any relevant site-specific contingency plans. 35

(5) The Authority must submit the report referred to in subsection (4) to the Incident Management Organisation for information.

Cost recovery and compensation 40

18. (1) Where possible, all reasonable costs associated with responding to, and cleaning up of, any marine oil pollution incident, including the payment of compensation for economic loss and pollution, environmental damage and the rehabilitation of damaged areas resulting from the incident, must be recovered from the polluter in accordance with the Merchant Shipping (Civil Liability Convention) Act, 2013 (Act No. 25 of 2013). 45

(2) In the event that the polluter is not or cannot be identified or for any other reasons, costs and compensation for economic loss and pollution damage and rehabilitation of damaged areas must be claimed from the International Oil Pollution Compensation Funds within the limitations and provisions of such funds. 50

CHAPTER 4

MARINE CASUALTIES AND POWERS OF INTERVENTION

Powers of intervention

19. (1) Without prejudice to any right or powers of the Republic exercisable under international law, and in accordance with the Intervention Convention and the 55

Intervention Protocol, the Government, represented by the Authority, may as directed by the Incident Commander take such measures in South African waters and on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to South African waters or its coastline or related interests, from pollution or the threat of pollution, following a marine casualty or acts related to such a casualty, which may reasonably be expected to result in a substantial harmful consequence. 5

(2) Actions that may be undertaken by the Authority under subsection (1) include—

- (a) the issue of the necessary directions, in writing, to the master, owner or agent of a ship to which the marine casualty relates, or to any person in charge of any salvage operation in respect of the ship or its cargo and any employee or agent of that person; 10
- (b) the issue of directions in writing to the owner, master or any person in charge of conducting operations on any platform, requiring any specified action to be taken or that no specified action be taken with respect to the platform or operations on the platform; or 15
- (c) the taking of any measures whatsoever with respect to the ship or its cargo or to the platform or operations thereon, whether or not the Authority has issued directions under paragraph (a) or (b). 15

(3) The measures the Authority may direct to be taken or may take itself under subsection (2) (c), may include— 20

- (a) the removal, to another place, of the ship or its cargo;
- (b) the removal of cargo from the ship;
- (c) the salvage of the ship or part of the ship or any of its cargo, or both;
- (d) the sinking or destruction of the ship or part of the ship or the destruction of the cargo, or both; 25
- (e) the taking over of control of the ship or part of the ship; or
- (f) the removal of oil and gas infrastructure.

(4) In order to carry out any of the measures referred to in subsection (3), the Authority may, after consulting and reaching an agreement with the owners of the ship, seaports and oil-handling facilities, to whose master or director the instructions are to be given— 30

- (a) instruct, in writing, the master or director of any South African ship, or the master of any other vessel within South African waters, seaports and oil-handling facilities to render assistance to any vessel or facility that is, or is likely to be, a marine casualty; 35
- (b) instruct, in writing, the master of any South African ship to—
 - (i) take on board any equipment;
 - (ii) sail to any place;
 - (iii) render assistance to any ship assisting a marine casualty; or
 - (vi) assist in any operations for the cleaning up, removal or dispersal of any oil or pollutant; and 40
- (c) instruct, in writing, the master of any South African ship to obey the instructions of any person authorised by the Authority to exercise control over, or responsibility for, a maritime casualty.

(5) The master of any ship to whom an instruction is issued under subsection (4) must retain ultimate decision-making powers in relation to the direct safety of the ship and persons on board. 45

(6) This section does not authorise the taking of measures against a warship or other ship owned or operated by a foreign State and used, for the time being, only on government and non-commercial service. 50

Measure to be safe, reasonable and proportional

20. (1) Before taking any measure under section 19 and during its course, the Authority must use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may need, and in appropriate cases, the Authority must facilitate the repatriation of ships' crews, and create no unnecessary and unlawful obstacles to repatriation. 55

(2) Any measure undertaken under section 19 must be proportionate to the pollution damage actual or threatened to South African waters or coastline, and such measure must not go beyond what is reasonably necessary to achieve the end mentioned in section 19 and must cease as soon as that has been achieved, and the said measure must 60

not unnecessarily interfere with the rights and interests of the flag State, third party States and any other persons.

(3) In considering whether the measures under section 19 are proportionate to the damage, an account must be taken of—

- (a) the extent and probability of imminent damage if those measures are not taken; 5
- (b) the likelihood of those measures being effective;
- (c) the extent of the damage to the area that may be caused by such measures; and
- (d) the ability of the damaged area to be rehabilitated after taking the measures.

Consultation and notification 10

21. (1) Before taking any measure under section 19, the Authority as directed by the Incident Commander must consult with other States affected by the marine oil pollution incident, particularly with the flag State or other States, as appropriate.

(2) The Authority must, without delay and as directed by the Incident Commander, notify any person— 15

- (a) known to the Authority; or
- (b) who became known to the Authority during the consultations,

who has interests which may reasonably be expected to be affected by those measures, of the proposed measures to be undertaken, and the Authority must take into account any inputs made by such person. 20

(3) Before any measure is taken, the Authority may consult with independent experts, including those recommended by the International Maritime Organisation.

(4) In cases of extreme urgency requiring measures to be taken immediately, the Authority may take measures considered necessary without prior notification or consultation or without continuing consultations already commenced. 25

(5) The Authority must immediately notify the States affected by the marine oil pollution incident and the known persons concerned, as well as the Secretary-General of the International Maritime Organisation, of any measures that have been taken in terms of section 19.

Right to compensation 30

22. (1) If any action taken by the Authority or any person in accordance with directions pursuant to section 19(2) was—

- (a) in excess of what was reasonably necessary to prevent, eliminate or reduce pollution or the risk of pollution; or
- (b) such that the good of the action or measure taken was disproportionately less than the expense incurred or the loss or the damage suffered because of the action or measure, 35

the person who has incurred expense or loss or damage because of the taking of that action or measure may recover compensation from the Department.

(2) If a claim is brought against the Department for compensation under subsection (1), a court, in determining whether subsection (1)(a) or (1)(b) should apply, must take into account— 40

- (a) the extent and probability of imminent pollution damage if the measures had not been taken;
- (b) the likelihood of the measures taken being effective; and 45
- (c) the extent of the damage that has been caused by the measures taken.

(3) Where any measure having been taken pursuant to section 19 on the high seas and there is a dispute between the Government and the owner of the ship or Government of the State where the ship is registered and negotiations between the parties have not been possible and if the parties do not otherwise agree, the matter must be submitted, upon the request of any of the parties, to conciliation, and if that does not succeed, then to arbitration according to the procedures set out in the Annex to the Intervention Convention. 50

Protection from liability

23. The Incident Commander, the Authority and any person who is authorised by the Authority to take any measure pursuant to section 19(2), as the case may be, subject to section 18, may not incur any civil liability in respect of such action unless such action was due to wilful misconduct or gross negligence. 5

CHAPTER 5

ADMINISTRATION, ENFORCEMENT AND MISCELLANEOUS PROVISIONS

Administration and enforcement

24. (1) The Authority has primary responsibility for the administration and enforcement of this Act, and any person appointed as an inspector under this Act is under the supervision of the Authority. 10

(2) The Chief Executive Officer or his or her delegate may, after consultation with the National Prosecuting Authority, cause prosecutions to be instituted and conducted for offences under this Act. 15

Appointment of inspectors

25. (1) The Chief Executive Officer may, in line with section 5 of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998)—

- (a) appoint such officers as the Chief Executive Officer considers necessary for the administration and enforcement of this Act, including proper officers as defined in the Merchant Shipping Act, 1951 (Act No. 57 of 1951), as inspectors; 20
- (b) appoint ship surveyors or any suitably qualified person whom the Chief Executive Officer deems fit, as inspectors, for the purposes of this Act;
- (c) subject to the approval of the Minister and with the concurrence of the Ministers of the relevant Departments, delegate by notice in the *Gazette* the responsibility for certain duties required to be performed in order to meet the objectives of this Act, to other government departments or agencies; and 25
- (d) submit the list of inspectors so appointed with their full credentials to the Minister, who shall submit a request to the Minister responsible for justice to have these officers declared to be peace officers in terms of section 334 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). 30

(2) The Authority must ensure that all persons that are appointed as inspectors receive proper and regular training in order to assist them to carry out their duties and functions in a competent and responsible manner. 35

(3) Inspectors must be issued with an identity card by the Authority in a form approved by the Authority.

(4) Where a person in possession of an identity card issued to him or her under subsection (3) ceases to be an inspector, he or she must forthwith return the identity card to the Authority. 40

Boarding of ships by inspectors

26. (1) Where there are reasonable grounds to believe that a ship has violated any provision of this Act, or if there is in, or on, that ship any item that may afford evidence as to the commission of an offence under this Act and the ship is— 45

- (a) within the territorial waters of the Republic; or
- (b) a South African ship anywhere,

an inspector may, with such assistance as he or she deems necessary, board that ship for the purposes of performing any of the functions of an inspector under section 28, and may, for that purpose, stop and detain that ship.

(2) If there are reasonable grounds to believe that a ship has violated any provision of this Act— 50

- (a) while in the exclusive economic zone of the Republic; and
- (b) the ship is within South African waters,

the Authority or an inspector may require the person in charge of the ship to give information regarding—

- (i) its identity and port of registry;
- (ii) its last and next port of call; and
- (iii) any other relevant information required to establish whether a violation of this Act has occurred. 5

(3) Where there are reasonable grounds to believe that a ship has violated any provision of this Act while in the exclusive economic zone of South Africa, resulting in a substantial discharge causing, or threatening, significant pollution of the marine environment and the ship— 10

- (a) is within South African waters; and
- (b) has refused to give information as outlined under subsection (2) or the information supplied appears to be at variance with the evident factual situation,

an inspector may, with such assistance as he or she deems necessary, board that ship for the purpose of performing any of the functions of an inspector under section 28. 15

(4) Where there is evidence that a ship has violated any provision of this Act while in the exclusive economic zone of the Republic resulting in a discharge causing substantial damage or threat of substantial damage to the coastline, resource or related interests of the Republic and the ship is within South African waters, an inspector may, with such assistance as he or she deems necessary, board that ship for the purpose of performing any of the functions of an inspector under section 28, and may for that purpose stop and detain the ship. 20

(5) An inspector may require any person on board a ship to which this section applies, whom the inspector finds committing, or whom the inspector suspects on reasonable grounds of having committed, an offence under this Act, to state his or her full name and usual place of residence. 25

(6) Subject to subsections (1) to (4), if an inspector believes on reasonable grounds that a ship to which this Act applies is in South African waters and has been used or otherwise involved in the commission of an offence under this Act, the inspector may bring, or require the person in charge of the ship to bring, the ship to the nearest port in the Republic to which it is safe and practicable to bring. 30

(7) An inspector may, for the purpose of this Act, require the person in charge of a ship to which this section applies, to give information concerning the ship and its crew and any other person on board the ship. 35

(8) Where an inspector boards a ship to which this section applies, or makes a requirement of a person under this section, the inspector must produce his or her identity card for inspection by that person and the person in charge of the ship and, if the inspector fails to do so, he or she is not authorised to remain or to require any person assisting him or her to remain, on board that ship and may not detain that ship or make any requirement of a person in that ship. 40

Access to premises, offshore installation, oil-handling facility or port facility

27. (1) An inspector may, with the consent of the owner or person in charge of any premises, including an offshore installation, an oil-handling facility or a port facility, enter such premises, offshore installation, oil-handling facility or port facility for performing the functions of an inspector under section 28. 45

(2) If an inspector has reason to believe that there is, in certain premises, an offshore installation, oil-handling facility or port facility, any item that may afford evidence as to the commission of an offence under this Act, the inspector may make an application to a magistrate for a warrant authorising the inspector to enter the premises, offshore installation, oil-handling facility or port facility, for the purpose of performance the functions of an inspector under section 28. 50

(3) If, on an application under subsection (2), the magistrate is satisfied, by information under oath or affirmation that—

- (a) there is reasonable ground for believing that there is on the premises, an offshore installation, oil-handling facility or port facility to which the application relates, any item that may afford evidence as to the commission of an offence under this Act; and 55

(b) the issue of warrant is reasonably required for the purpose of this Act, the magistrate may grant a warrant authorising the inspector, with such assistance as the inspector deems necessary, to enter such premises, offshore installation, oil-handling 60

facility or port facility, during such hours of the day or night as the warrant specifies or, if the warrant so specifies, at any time, if necessary by force, for the purpose of performing a function of an inspector under section 28.

Functions of inspectors

28. (1) The functions of an inspector who boards a ship under section 26 or enters premises, an offshore installation, an oil-handling facility or a port facility under section 27 are to—

- (a) assess compliance with this Act;
- (b) search for, and take possession of, any item that may afford evidence relating to the commission of an offence under this Act;
- (c) search for, inspect, take extracts from, and make copies of, any document that relates to the requirements of this Act;
- (d) observe the undertaking of operation and activities relating to this Act, including response to actual marine oil pollution incidents and the carrying out of training and exercises;
- (e) collect samples for laboratory testing and analysis;
- (f) take photographic evidence or video evidence; and
- (g) use individuals with expertise who are not designated inspectors to further investigations.

(2) For the purpose of carrying out his or her functions under subsection (1), an inspector may cause to be opened by any necessary means, any hold, compartment, container or other receptacle on a ship, premises, offshore installation, oil-handling facility or port facility, if the owner or person in charge refuses to open such hold, compartment, container or other receptacle, upon the reasonable request of the inspector.

Powers of arrest of inspectors

29. (1) An inspector may, without warrant, arrest any person, if the inspector believes on reasonable grounds that the person is committing or has committed an offence under this Act when the penalty for such offence includes imprisonment.

(2) Where an inspector arrest a person under subsection (1), the inspector must produce his or her identity card for inspection by that person.

(3) Where an inspector makes an arrest under subsection (1), the inspector must cause the arrested person to be brought before a court or other proper authority to be dealt with in accordance with the law, except—

- (a) in the case where the person arrested may be the master of a ship or person in charge of an offshore installation or a person in charge of the premises; or
- (b) if the immediate removal of the person might pose a threat to the safe operation of the ship, premises, offshore installation, oil-handling facility or port facility,

in which case such person must be permitted to carry on any tasks that are critical to the safe operation of the ship, premises, offshore installation, oil-handling facility or port facility, until such time that such person can be satisfactorily relieved.

(4) Nothing in this section prevents the arrest of a person in accordance with any other law.

Offences and penalties

30. (1) A person is guilty of an offence if he or she—

- (a) wilfully or as a result of gross negligence pollutes the marine environment;
- (b) fails to comply with section 5(4), (5), (6) and (8), 7(1), (2), (3) and (4), 8(2) or 9(2);
- (c) fails to comply with any instructions issued by the Authority or by any person duly authorised by the Authority, pursuant to section 19;
- (d) wilfully obstructs a person duly authorised by the Authority pursuant to section 19;
- (e) wilfully obstructs the Authority from exercising its powers in terms of this Act; or
- (f) fails to comply with section 25(4).

(2) Any person convicted of an offence in terms of subsection (1), is liable on conviction to a fine not exceeding 35 million rand or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

(3) If any person—

- (a) admits to the Authority that he or she has contravened any provision of this Act, or that he or she has failed to comply with any such provision with which it was his or her duty to comply; 5
- (b) agrees to abide by the decision of the Authority; and
- (c) deposits with the Authority such sum as may be required of him or her, but not exceeding the maximum fine which may be imposed upon a conviction for the contravention or failure in question, 10

the Authority may, after such enquiry as it deems necessary, determine the matter summarily and may, without legal proceedings, order by way of penalty the whole or any part of the said deposit to be forfeited.

(4) There shall be a right of appeal to the Minister from a determination or order by the Authority under subsection (1) whereby a penalty exceeding R15 000 is imposed, provided that such right is exercised within a period of three months from the date of such determination or order. 15

(5) The imposition of a penalty under subsection (1) shall not be deemed to be a conviction of a criminal offence, but no prosecution for the relative offence shall thereafter be competent. 20

Regulations

31. The Minister may make regulations regarding—

- (a) any matters referred to in sections 5(3), 5(4), 5(7)(c), 5(7)(e), 5(9), 6(1), 7(2), 7(3), 7(4) and 11(6); and 25
- (b) any other ancillary, incidental administrative or procedural matter that is necessary to prescribe for the proper implementation and administration of this Act.

Recovery of fines by distress

32. Where a court orders a person convicted of any offence under this Act to pay any fine or other costs and that person is the owner or master or person in charge of a ship, premises, offshore installation, oil-handling facility or port facility to which this Act applies, and the fine or other costs are not paid within the time and in manner specified by the order of the court, the court may, in addition to any other power it may have to compel payment and dispute in terms of any other Act, direct the amount remaining unpaid to be levied by distress or by the sale of any ship, premises, offshore installation, oil-handling facility, port facility or any other equipment relating to the offence, as the case requires. 30 35

Time limit for prosecutions

33. (1) A prosecution for an offence under this Act must start— 40

- (a) within two years after the commission of the offence; or
- (b) within two years after the offence comes to the complainant's knowledge, but within three years after the commission of the offence.

(2) A statement in a complaint of an offence under this Act that the matter of the complaint came to the knowledge of the complainant on the stated day is *prima facie* evidence of when the matter came to the complainant's knowledge, subject to confirmation by the relevant court. 45

Short title and commencement

34. This Act is called the Marine Oil Pollution (Preparedness, Response and Cooperation) Act, 2022, and comes into operation on a date fixed by the President by proclamation in the *Gazette*. 50

Schedule

Amendment of laws

No. and year of Act	Short title	Extent of amendment
Act No. 5 of 1998	South African Maritime Safety Authority Act, 1998	<p>1. Amendment of section 3 by the substitution for paragraph (b) of the following paragraph: <u>“(b) to prevent, prepare, respond and combat pollution of the marine environment by ships, seaports, oil handling facilities and offshore installation; and”</u>.</p> <p>2. Amendment of section 37 by the addition in subsection (1) of the following paragraph: <u>“(g) any assets in the form of marine and air surveillance and patrol crafts required for execute the objectives of the Authority.”</u>.</p> <p>3. Amendment of section 38 by the substitution for the title of the following title: <u>“Maritime Pollution Preparedness and Response Fund”</u>.</p> <p>4. Amendment of section 38 by the substitution for subsections (1), (3) and (4) of the following subsections, respectively: <u>(1) A fund, called the Maritime Pollution Preparedness and Response Fund, is hereby established under the control of the Minister.</u> <u>(3) There is to be paid to the Fund amounts equal to amounts received by way of levies from seaports, oil-handling facilities and offshore installations, penalty, fine or forfeiture by the State for contraventions in terms of the laws referred to in section 2(2).</u> <u>(4) Money in the Fund may be applied only for the purpose of furthering the objectives of the Authority referred to in section 3 (b)”</u>.</p>

No. and year of Act	Short title	Extent of amendment
		<p>5. Amendment of Schedule by the addition of the following: <u>“Marine Oil Pollution (Preparedness, Response and Cooperation) Act, 2022.”</u>.</p>
Act No. 6 of 1998	South African Maritime Safety Authority Levies Act, 1998	<p>1. Amendment of section 1 by the addition of the following paragraphs: <u>“(c) the presence and operation of seaports and oil-handling facilities; and (d) the presence of an offshore installation.”</u>.</p>

MEMORANDUM ON THE OBJECTS OF THE MARINE OIL POLLUTION (PREPAREDNESS, RESPONSE AND COOPERATION) BILL, 2022

1. BACKGROUND AND PURPOSE

- 1.1 The Department of Transport (“the Department”) seeks to introduce the Marine Oil Pollution (Preparedness, Response and Cooperation) Bill (“the Bill”), through the Minister of Transport (“the Minister”). The Bill seeks to give effect to the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990 (“the OPRC Convention”). The OPRC Convention was adopted on 30 November 1990 and entered into force on 13 May 1995. The OPRC Convention is an International Maritime Convention establishing measures for dealing with marine oil pollution incidents nationally and in cooperation with other countries.
- 1.2 In accordance with the OPRC Convention and its Annex, State Parties (including South Africa) to the OPRC Convention undertake, individually or jointly, to take all appropriate measures to prepare for, and respond to, oil pollution incidents. The OPRC Convention encourages State Parties to cooperate in the following areas of spill preparedness:
- development of contingency plans;
 - equipment stocks;
 - research and development initiatives;
 - training and exercise programmes; and
 - appropriate spill notification procedures for shipping.
- 1.3 The purpose of the Bill is to incorporate into the law of South Africa the relevant provisions of the OPRC Convention.

2. CLAUSE-BY-CLAUSE ANALYSIS

2.1 Clause 1

Clause 1 of the Bill contains definitions which are intended to assist in the interpretation of the Bill.

2.2 Clause 2

Clause 2 provides for the objects of the Bill, namely—

- to provide for the safe, effective and efficient management and deployment of resources in response to, cooperation in, and control of, spills of oil, or any other pollutant from ship or any other sources within South African waters or which pollute or threaten to pollute South African waters, aquatic resources, coastline or related interests;
- to provide for the effective cooperation with neighbouring countries in matters pertaining to marine oil pollution preparedness, response and control;
- to incorporate into the law of South Africa the relevant provisions of the International Convention on Oil Pollution Preparedness, Response and Cooperation, 1990; and
- to reduce and control the pollution of the marine environment by oil from ships, offshore installations, seaports and oil-handling facilities.

2.3 **Clause 3**

Clause 3 incorporates the OPRC Convention to have the force of law in South Africa.

2.4 **Clause 4**

Clause 4 provides for the application of the envisaged Act i.e. it generally applies to oil spills or possible oil spill from any sources which may pollute or threaten to pollute South African water and coastal aquatic resources.

2.5 **Clause 5**

Clause 5 provides for risks assessments at different levels, including offshore, to be undertaken every five years. In order to ensure standardisation of plans, clause 5(2) provides minimum guidelines that include the identification of routes, quantities as well as frequencies of such assessments. This level of detail is critical during planning especially when deciding on resources that will be required when mobilising a response.

2.6 **Clauses 6 and 7**

Clauses 6 and 7 provide for a system of contingency planning. Clause 6(1) empowers the Minister to prescribe in the regulations, the procedures for development and approval of a National Oil Spill Contingency Plan. Regulating it in this way ensures that the contingency plan is developed with greater stakeholder participation. Clause 7 obligates industry entities to develop and have an approved site-specific contingency immediately following the adoption of the national contingency plan in terms of clause 6. The reason for this is to ensure proper alignment and consistency between all plans. In order to keep different operators and entities response-ready, clause 7(4) provides for regular training and continuous exercises to be undertaken.

2.7 **Clause 8**

Clause 8 provides for a marine oil pollution response equipment inventory. In order to ensure a direct link with the level of risk and exposure, it is required that this inventory must take into account the outcome of the assessment. The inventory will contain a list of all equipment, whether publicly or privately owned. The South African Maritime Safety Authority (“the Authority”) is obligated to recover from polluters the costs for maintaining the equipment.

2.8 **Clause 9**

Clause 9 provides that the Authority must develop and implement an annual programme of training and exercises in marine oil pollution control and clean-up in respect of the relevant officials from organs of state.

2.9 **Clause 10**

Clause 10 provides for the appointment of an Incident Commander. One of the serious challenges in incident response is the lack of a single command to make decisions during a response to an incident. Clause 10 obligates, as soon as the Authority receives a report of an incident, the Head of the Centre for Sea-watch and Response to assume the position of an incident commander and appoint an Incident Response Team that will conduct an assessment to determine the capability of the immediate-incident-responding-party and to monitor the effectiveness of the immediate-incident-responding-party.

2.10 **Clause 11**

Clause 11 provides for the National Marine Oil Pollution Preparedness, Response and Cooperation Incident Management Organisation (“the Incident

Management Organisation”). In order to ensure ongoing coordinated advice, recommendations and support, the Minister appoints the National Marine Oil Pollution Preparedness and Response Incident Management Organisation, which must be chaired by the Director-General: Transport. The Incident Management Organisation comprises of the head of the Department, the head of the department responsible for environmental affairs, the head of the department responsible for fisheries, the head of the department responsible for disaster management, the head of the department responsible for petroleum and energy and the head of any relevant government bodies as may be deemed necessary by the Authority.

2.11 Clause 12

Clause 12 provides for regional cooperation. Article 10 of the OPRC Convention provides for the promotion of bilateral and multilateral agreements for oil pollution preparedness and response. The cooperation is very important for the reason that sometimes, and depending on the severity of the incident and the possibility of a prevailing weather at the time of the incident, the incident may result in the oil crossing borders of neighbouring States’ territorial waters. In such cases, cooperation helps in ensuring successful coordination efforts. Clause 12 provides for the expeditious sharing of resources and the facilitation of the free movement of equipment and personnel in the likelihood of an incident requiring regional cooperation. Clause 12 is in line with Article 10 of the OPRC Convention.

2.12 Clause 13

Clause 13 provides for the duty to report incidents. Article 4 of the OPRC Convention requires States Parties to require masters or other persons who are in charge of ships and installations handling oil to report incidents that involve the discharge of oil. This is one of the critical pillars of the OPRC Convention to trigger a reaction of the contingency plan mechanisms. Clause 13 is in line with Article 4 of the OPRC Convention.

2.13 Clause 14

Clause 14 provides for initial response actions. In order for the appropriate response to be given to an incident, best practice requires that incidents be categorised. Clause 14 provides for a three-tier system of incident categorisation, where Tier one will be those incidents that are on a site within the national capability and resources of the South African National Oil Contingency Plan (“the NOSCP”), Tier two an incident within the national capability but where resources to be used will be controlled by the Incident Commander and Tier three being a very large incident whose magnitude and severity is beyond the response capability and resources under the control of the Incident Commander. The incident may also affect or threaten to impact across jurisdiction in one or more neighbouring countries.

2.14 Clause 15

Clause 15 provides for the Incident Commander to coordinate the response to a marine oil incident. Clause 15 empowers the Incident Commander and Incident Response Team to set up the necessary systems within the NOSCP. This empowerment is highly essential in ensuring that there is no ambiguity in terms of who is supposed to do what and at what point such actions have to be undertaken. This is also in fulfilment of Article 5 of the OPRC Convention, in terms of which State Parties are expected to take specific actions on receipt of oil pollution reports. Clause 15 authorises the Incident Commander to be free to act without recourse to higher authority and has overall responsibility for monitoring and managing a response to a marine oil pollution incident. This provision is to remove the unnecessary bureaucracy and red tape that is not helpful during a marine oil pollution incident.

2.15 Clause 16

Clause 16 provides for the support for disaster structures. In respect of Tier two or Tier three incidents, the Incident Commander may request support from the National Disaster Management Advisory Forum or Provincial Disaster Management Advisory Forum. The provision is to empower the Incident Commander to pull existing resources from the other disaster management mechanisms. These bodies will also be members of the NOSCP mechanism.

2.16 Clause 17

Clause 17 provides for the termination of a response. An incident response must have a beginning and an end. This is essential in cases where a claims process will be initiated on termination of the response to an incident. Clause 17 empowers the Incident Commander in consultation with the Incident Response Team to be able to make the determination taking into account cost benefit analysis of the continued response. An incident response report must be published six months after an incident.

2.17 Clause 18

Clause 18 provides for cost recovery and compensation. The cost of damage recovery is the nightmare of incidents and the standard practice is to recover cost as much as is possible from the polluter. There have however been cases where the polluter cannot be located. Clause 18 provides for this eventuality and directs that costs, compensation for economic loss and pollution damage may be claimed from the International Oil Pollution Compensation Funds.

2.18 Clause 19

2.18.1 Clause 19 provides for powers of intervention. South Africa is party to the Protocol Relating to Intervention on the High Seas in Cases of Marine Pollution by Substance other than Oil, 1973, and is therefore obligated by that protocol to intervene on high seas. Clause 19 provides that the Authority may take such measures in South African waters and on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to South African waters or its coastline or related interests, from pollution or threat of pollution, following a marine casualty or acts related to such a casualty, which may reasonably be expected to result in a substantial harmful consequences. Such provisions are common in all maritime jurisdictions as a first line of defence to respond to possible threats to the marine environment.

2.18.2 Furthermore, the Authority may issue the necessary directions which may include communicating with owners, masters or agents of a ships identified as a threat to the marine environment.

2.19 Clause 20

Clause 20 provides that the intervention and measures taken by the Authority under clause 19 must be safe, reasonable and proportional to the marine oil pollution incident. The Authority must use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance of which they may need, and in appropriate cases to facilitate the repatriation of ships' crews, and to raise no obstacle to repatriation.

2.20 Clause 21

Clause 21 provides for consultation and notification. Before taking any measure under clause 19, the Authority must consult with other States affected by the marine casualty, particularly with the flag State.

2.21 Clause 22

Clause 22 provides for the right to compensation. In terms of clause 22, a person who has incurred expense or loss or damage because of an action or measure taken by the Authority may recover compensation from the Government. The action or measure taken by the Authority must have been in excess of what was reasonably necessary to prevent, eliminate or reduce pollution or the risk of pollution. Furthermore, such action or measure must have been disproportionately less than the expense incurred or the loss or the damage suffered because of the action or measure.

2.22 Clause 23

Clause 23 provides for protection from liability. Where the Incident Commander, the Authority or any person authorised by the Authority has taken any measure pursuant to clause 19(2) to prevent marine oil pollution, then, subject to clause 18 (which provides for the recovery of damages from the International Oil Pollution Compensation Funds), the Authority or that person, as the case may be, will not incur any civil liability in respect of any act or omission.

2.23 Clause 24

Clause 24 provides for the administration, enforcement, prosecution and jurisdiction. The administration of the Act is assigned to the Authority. This is standard for all legislation of this technical nature in line with international practice and standard.

2.24 Clauses 25, 26, 27, 28 and 29

Clauses 25, 26, 27, 28 and 29 provides for the mandate that the Authority already has in terms of the Merchant Shipping Act, 1951 (Act No. 57 of 1951), for the appointment of inspectors, boarding of ships by inspectors, access to premises where an offence under the Bill is committed, functions of inspectors and powers of arrest of inspectors.

2.25 Clause 30

Clause 30 lists offences and penalties. It sets the maximum fine of up to two million rand or to imprisonment for a period not exceeding five years, or both, in respect of the offences committed.

2.26 Clause 31

Clause 31 provides for the Minister's power to make regulations.

2.27 Clause 32

Clause 32 provides for the recovery of fines by distress.

2.28 Clause 33

Clause 33 provides for the time limit for the institution of prosecutions, for instance a prosecution under the Bill must be instituted within two years after the commission of the offence.

2.29 Clause 34

Clause 34 provides for the short title and commencement of the Act.

4. PARTIES CONSULTED

- 4.1 The Department has consulted the Department of Environmental Affairs, the Transnet National Ports Authority, the South African Maritime Safety Authority and the Operation Phakisa Joint Government Industry Emergency Drills (Initiative B1).
- 4.2 The Department held a two-day drafting meeting and the Draft Bill was presented to the B1 Working Group workshop held in March 2017. Subsequent to the workshop, the B1 Working Group submitted extensive input to the Department and these inputs were accordingly incorporated.

5. FINANCIAL IMPLICATIONS

There will be no financial implications to the budget of the Department.

6. PARLIAMENTARY PROCEDURE

- 6.1 The Constitution prescribes the procedure for the classification of Bills. A Bill must be correctly classified so that it does not become inconsistent with the Constitution.
- 6.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 6.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the Provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the Provinces, the more say the Provinces should have on the contents of the Bill.
- 6.4 Therefore the issue to be determined is whether the proposed provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 6.5 The Bill seeks to give effect to the OPRC Convention, which is an International Maritime Convention establishing measures for dealing with marine oil pollution incidents nationally and in co-operation with other countries. The purpose of the Bill is to incorporate the relevant provisions of the OPRC Convention into the law of South Africa.
- 6.6 Chapter 1 of the Bill provides for introductory provisions such as the definitions, objects of the Bill, the incorporation of the OPRC Convention into law and the application of the Bill.
- 6.7 Chapter 2 provides for marine oil pollution preparedness. The Authority must undertake a national marine oil pollution risk assessment within one year after the Bill comes into operation, and thereafter at least every five years or whenever there is a substantial new development that may alter the risk of marine oil pollution incidents affecting South African waters or coastline. The Department must prepare the NOSCP, which is a contingency plan aimed at alleviating marine oil spills. Owners or operators of port facilities must develop and maintain site-specific pollution contingency plans or industry oil spill contingency plans. The Authority must establish and maintain a national marine oil pollution response equipment inventory and also develop training and exercise programmes. An Incident Commander must be appointed by the

Minister and such individual will manage and coordinate all operations in response to any marine oil pollution incident in South African waters or which threatens South African waters or coastline. Chapter 2 provides for the establishment of the Incident Management Organisation, which will provide and coordinated advice, recommendations and support to the incident management system organisation, including the Authority and the Incident Commander.

- 6.8 Chapter 3 provides for marine oil pollution response and in this respect makes provision for the duties of the owner or operator of an oil handling facility or the owner of any place on land where a spill occurs and enters South African waters, to report oil pollution incidents, for the initial response actions by the Incident Response Team, coordination of the response by the Incident Commander, support of disaster structures in coordinating the provision of resources, labour and logistics and assisting the coordination between government departments and authorities, termination of response, cost recovery and compensation for pollution damages from the polluter or the International Oil Pollution Compensation Funds.
- 6.9 Chapter 4 provides for marine casualties and powers of intervention. The Chapter deals with powers of intervention by the Authority to take such measures in South African waters and on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to South African waters or its coastline or related interests, from pollution or threat of pollution, which measures must be safe, reasonable and proportional to the pollution damage. Before taking any measures, the Authority must consult and notify any other State affected by the marine oil pollution incident. If the action taken by the Authority was in excess of what was reasonably necessary to prevent, eliminate or reduce pollution or the risk of pollution or the action or measure taken was disproportionately less than the expense incurred or the loss or the damage suffered because of the action or measure, the affected a person has the right to compensation from the Government. Furthermore, the Incident Commander, the Authority and any person who is authorised by the Authority to take any lawful measure may not incur any civil liability in respect of such action.
- 6.10 Chapter 5 provides for the administration and enforcement of the Bill, including miscellaneous provisions. The Authority has the power to administer and enforce the envisaged Act. In order to enforce the Bill the Authority may appoint inspectors and ship surveyors. In this respect, Chapter 5 provides for the powers and functions (including the power to arrest) of the inspectors, for instance, to board ships where there are reasonable grounds to believe that a ship has violated any provision of the Bill. An inspect may also, with the consent of the owner or person in charge of any premises, including an offshore installation, an oil handling facility or a port facility, enter such premises, offshore installation, oil handling facility or port facility in order to assess the compliance with the Bill or to search for, and take possession of, any item that may afford evidence relating to the commission of an offence under the Bill. Chapter 5 also provides for offences and penalties, regulations, recovery of fines by distress and time limits for prosecutions.
- 6.11 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.
- 6.12 In our view the subject matter of the Bill falls within a functional area listed in Schedule 4, namely “Pollution control”. We are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 76 of the Constitution.

- 6.13 The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional and Khoi-San Leaders in terms of section 39(1)(a) of the Traditional and Khoi-San Leadership Act, 2019 (Act No. 3 of 2019), since it does not directly affect traditional or Khoi-San communities or pertain to customary law or customs of traditional or Khoi-San communities and does not pertain to any matter referred to in section 154(2) of the Constitution.