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## GENERAL NOTICES • ALGEMENE KENNISGEWINGS

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### DEPARTMENT OF TRANSPORT

#### NOTICE 594 OF 2019

### **PUBLICATION FOR COMMENTS: DRAFT MARINE OIL POLLUTION (PREPAREDNESS, RESPONSE AND COOPERATION) BILL, 2019**

The draft Marine Oil Pollution (Preparedness, Response and Cooperation) Bill, 2019 is hereby published for public comments.

Interested persons are requested to submit written comments and inputs within 30 days from the date of publication of this Notice.

Comments may be sent to the Director General of Department of Transport for the attention of Ms Moloko Machaka and Ms Glory Semanya

By post to the following address:

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**REPUBLIC OF SOUTH AFRICA**

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

**BILL**

*(As introduced in the National Assembly as a section 76 Bill; explanatory summary of  
Bill published in Government Gazette No. 42815 of ..... 31 October ..... 2019.)  
(The English text is the official text of the Bill)*

**(MINISTER OF TRANSPORT)**

020218ce

## **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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### *Sections*

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## CHAPTER 1

### INTRODUCTORY PROVISIONS

#### Definitions

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;

**"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);

**"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);

**"Committee"** means the National Marine Pollution Preparedness, Response and Cooperation Committee established in terms of section 11;

**"Constitution"** means the Constitution of the Republic of South Africa, 1996;

**"Department"** means the Department of Transport;

**"Director-General"** means the Director-General of the Department;

**"Incident Commander"** means the person appointed as an Incident Commander in terms of section 10(3);

**"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;

**"Incident Response Commander"** means the Incident Response Commander referred to in section 14(1);

**"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;

**"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;

**"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:

- (a) Any installation, including a pipeline, which is used for the transfer of any substance to or from—
  - (i) a ship;
  - (ii) a research, exploration or production platform; or
  - (iii) the coast of the Republic;
- (b) any exploration or production platform used in prospecting for, or the mining of, any substance;

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

(d) a telecommunications line as defined in section 1 of the Post and Telecommunications-Related Matters Act, 1958 (Act No. 44 of 1958);

**"oil"** means petroleum in any form including crude oil, fuel oil, sludge, oil refuse and refined products;

**"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;

**"OPRC Convention"** means International Convention on Oil Pollution Preparedness, Response and Cooperation Convention, 1990;

**"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 to 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;

**"prescribed"** means prescribed by regulation or notice;

**"Republic"** means the Republic of South Africa;

**"seaports and oil handling facilities"** means those facilities that present a risk of an oil pollution incident and includes, amongst others, ports, oil terminals, 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;



**"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;

**"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, and 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;
  - (b) provide for the effective cooperation with neighbouring countries in matters pertaining to marine pollution preparedness, response and control;
  - (c) incorporate into law of the Republic, the relevant provisions of the international convention relating to marine pollution preparedness, response and cooperation; and
  - (d) reduce and control the pollution of the marine environment by oil from ships, offshore installations, seaports and oil handling facilities.

## **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 OPRC Convention under article 14 if those changes are binding on the Republic in terms of section 231 of the Constitution.

(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, coastline or related interests.

(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 ship or any offshore installation or any port facility or any oil 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.

(3) This Act does not apply to warships or naval auxiliary vessels of another State.

(4) This Act binds the State and all organs of State.

## CHAPTER 2

### MARINE POLLUTION PREPAREDNESS

#### Risk assessments

5. (1) The Authority must cause to be undertaken a national marine pollution risk assessment within one year after this Act 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 pollution incidents affecting South African waters or coastline, whichever comes first.

(2) The risk assessments undertaken under subsection (1) must, as a minimum, define—

- (a) the main shipping routes and characterise the types, quantities and frequencies of marine pollutants carried on each route;
- (b) the locations and describe marine pollution risks for all offshore installations;
- (c) the locations and describe marine pollution risks for all ports;
- (d) the highest risk areas for marine 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 pollution; and
- (f) protected environmental sensitive sea areas.

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

(4) The owner and operator of any port facility, oil facility or offshore installation, must, at its cost, undertake a marine pollution risk assessment for such facility or installation within one year after this Act comes into operation and align such assessment with the risk assessment contemplated in subsection (1), if that risk assessment has been published.

(5) The owner and operator referred to in subsection (4) must review the risk assessment thereafter at least every five years, or when there is a new development that may alter the risk of marine pollution incidents from such facilities or installation, whichever comes first in future, and upon application, provide a risk assessment report.

(6) The owner and operator referred in subsection (4) must, prior to the decommissioning of all or part of the port facility, oil facility or offshore installation, at its cost, undertake risk assessment associated with the intended decommissioning of that facility or installation.

(7) A risk assessment undertaken in terms of subsections (4), (5) and (6) 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) contain risk mitigation measures; and
- (e) be lodged with the Authority and upon finalisation made available as public reports, as prescribed.

(8) The proponent or developer of any proposed new port facility, new oil facility or new offshore installation must, at its cost, undertake a marine 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 (1) to (6).

(9) The results of any risk assessment contemplated in subsection (7) must be lodged with the Authority, the Department of Environmental Affairs and any other interested and affected organs of State and upon finalisation made available as a public report, as prescribed.

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

### **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 Minister must publish the approved NOSCP in the *Government Gazette* for public information.

(3) The Department must prepare the NOSCP and submit it to the Minister for approval.

## **Site-specific pollution contingency plan**

7. (1) All owners or operators of port facilities, oil facilities or offshore installations must, six 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 pollution incidents resulting from their activities and such plans must be consistent with the NOSCP.

(2) The plans contemplated in subsection (1) must, where applicable, detail measures that must be taken to protect, rescue, rehabilitate and release all wildlife affected in the case of a marine pollution incident and also refer to the prescribed guidelines.

(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 Committee and any other prescribed criteria.

(4) An owner or operator contemplated in subsection (1) must ensure that regular training and exercises are undertaken in relation to a site-specific plan and implement any recommendations in a training calendar developed by the Committee.

## **Marine pollution response equipment inventory**

8. (1) The Authority must arrange for the establishment and maintenance of a national marine 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—

- (a) Government;
- (b) Authority;
- (c) relevant organs of State; and
- (d) owners and operators of port facilities, oil facilities or offshore installations.

(2) All owners and operators of port facilities, oil facilities or offshore installations which pose a risk of marine pollution incidents must procure, operate and maintain, in a state of constant readiness including personnel that are competent to deploy the pollution response equipment, a stockpile of marine pollution response equipment being appropriate to the level and type of risk of marine pollution incidents resulting from the facility or installation, and being suitable for local conditions.

(3) In determining equipment needs under subsection (2), each owner or operator of a port facility, oil 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 pollution response equipment inventory.

(4) The Authority must repair or replace equipment with such costs being recovered from the polluter if possible and consistent with the administrative arrangements developed under subsection (6).

(5) In order to facilitate the use of equipment, personnel and other resources under subsection (2), the Authority and the private sector, with the advice of the Committee, must jointly develop and agree to a national administrative arrangement as a standard operating procedure for the use of national marine

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 with 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 Committee, as and when necessary.

(6) The Authority may, by notice, require that owners or operators of a ship carry on board and maintain—

- (a) marine pollution response equipment for the containment, recovery or disposal of any pollutant that may be discharged by the ship into South African waters;
- (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
- (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).

## **Training and exercise**

9. (1) The Authority, together with the Committee, must develop and implement an annual programme of training and exercises in marine pollution control and clean-up for relevant officials from all organs of State that are members of the



Committee and the outcomes of such training and exercises must be used to update and improve the NOSCP and related arrangements.

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

(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.

### **Appointment of Incident Commander**

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.

(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 Head of the Centre for Sea-watch and Response, acting as Incident Response Commander, must initiate steps provided for in the NOSCP to inform the Director-General to activate the incident management system organisation.

(3) As part of the activation of the incident management system organisation, the Minister must appoint from within the staff of the Authority or the Department, an Incident Commander and Deputy Incident Commander.

(4) The persons appointed as Incident Commander and as Deputy Incident Commander must have undertaken the approved Incident Command Course or equivalent Disaster Management Course and have the appropriate experience for the role of Incident Commander.

(5) The Incident Commander must, within the framework of the NOSCP and with the advice 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.

(6) 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.

## **National Marine Pollution Preparedness, Response and Cooperation Committee**

11. (1) The National Marine Pollution Preparedness and Response Committee is hereby established, comprising of the following persons or their designated representative, as a minimum:

(a) The Director-General;

- (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
- (f) the heads of such relevant Government bodies as may be deemed necessary by the Authority.

(2) Where relevant, representatives from the following sectors, through their national representative bodies, may be invited to be members of the Committee:

- (a) The shipping industry;
- (b) the oil and mining industries;
- (c) the fishing industry;
- (d) a nationally representative environment non-government organisation; or
- (e) any other sector deemed necessary by the Authority, if membership of the Committee remains balanced and relevant to its role under subsection (6).

(3) The Committee must be presided over by the Director-General or his or her representative.

(4) The Authority must act as Secretariat to the Committee.

(5) The role of the Committee must be on an ongoing basis, providing coordinated advice, recommendations and support to the incident management system organisation, 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 Committee members' organisations;
- (c) the establishment and maintenance of the national pollution response equipment inventory under section 8;
- (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 pollution preparedness, response and cooperation as required by this Act.

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

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

(8) The Committee may, subject to any written directions of the Authority, regulate its own procedure as it deems fit.

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

(10) The Department must facilitate the conclusion of a multi-party agreement for the co-operative, Joint Government-Industry Institutionalisation and

Standardised Maritime Emergency Incident Response Management System for the oil and shipping sectors.

### **Regional cooperation**

**12.** (1) The Authority must, upon the request of any neighbouring country in the Southern African Development Community, that is affected or is likely to be affected by a pollution incident, and after obtaining the approval of Cabinet, in consultation with the Committee 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.

(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.

(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
  - (b) the expeditious movement into, through, and out of, the Republic, of personnel, cargoes, materials and equipment referred to in paragraph (a).
- (4) The Parties to the Abidjan Convention and the Nairobi Convention must be informed of the national system.

- (5) Since the Republic is a Party to the Abidjan Convention and the Nairobi Convention and their emergency protocols, the Department must be the national focal point for the implementation of the two Protocols.
- (6) The Department must 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**

## **MARINE 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:

- (a) The duty to report incidents also applies to the owner or operator of an oil facility or the owner of any place on land where a spill occurs and enters South African waters; and
- (b) the Minister, in terms of this Act, prescribing additional measures and procedures for the reporting of incidents.

## **Initial response actions**

**14.** (1) Whenever the Authority receives a report of a marine pollution incident, it must initiate a response in accordance with the NOSCP guidelines and the first actions of the Authority must be to—

- (a) designate an Incident Response Commander and Deputy Incident Response Commander;
- (b) designate an Incident Response Command Centre; and
- (c) 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 and to designate the incident to a response Tier level as follows:

- (a) 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;
- (b) 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
- (c) 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.

(3) In designating an incident to a Tier level, the Incident Response 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 Response Commander and with the support of the Incident Response Team, must oversee, coordinate and control the response to a marine pollution incident in accordance with the contingency plan relating to the designated Tier level.

### **Incident Commander to coordinate response**

**15.** (1) During the response to any marine 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—

- (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;
- (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.

(2) For the duration of the response to a marine 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 80% 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).

(3) The Incident Commander has overall authority and responsibility for conducting incident operations and is responsible for the management of all incident operations at the incident site.

(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 pollution incident.

## **Support of disaster forums**

16. (1) In the case of a Tier two or Tier three spill, the Incident Commander 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).

(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.

(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.

## **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.

(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 responsible for environmental affairs 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—

- (a) natural resource damage assessment and monitoring;
- (b) environmental restoration and rehabilitation;
- (c) investigation and enforcement procedures; and
- (d) cost recovery and compensation procedures.

(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.

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

### **Cost recovery and compensation**

**18.** (1) Where possible, all reasonable costs associated with responding to, and cleaning up of, any marine pollution incident, including the payment of compensation for economic loss and pollution and environmental damage 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).

(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 and damage must be claimed from the International Oil Pollution Compensation Funds within the limitations and provisions of such funds.

## **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 Intervention Protocol, the Government, represented by 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 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.

(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;

- (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
- (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).

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

- (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; or
- (e) the taking over of control of the ship or part of the ship.

(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, to whose master the instructions are to be given—

- (a) instruct, in writing, the master of any South African ship, or the master of any other vessel within South African waters, to render assistance to any vessel that is, or is likely to be, a marine casualty;
- (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

- (iv) assist in any operations for the cleaning up, removal or dispersal of any oil or pollutant; and
- (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.

(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.

### **Measure to be safe, reasonable and proportional**

**20.** (1) Before taking any measure under section 19 and for the duration of the measure, the Authority must use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance 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.

(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 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;
  - (b) the likelihood of those measures being effective; and
  - (c) the extent of the damage that may be caused by such measures.

### **Consultation and notification**

**21.** (1) Before taking any measure under section 19, the Authority 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, notify any person—

- (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.

(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.

(5) The Authority must immediately notify the States affected by the marine casualty 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**

**22.** (1) If any action taken by the Authority or any person in accordance with instructions 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,

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

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

- (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
- (c) the extent of the damage that has been caused by the measures taken.

(3) Where any measure has 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.

### **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.

## **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.

(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.

## 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;
- (b) appoint ship surveyors or any suitably qualified person whom the Chief Executive Officer deems fit, as inspectors, for the purposes of this Act; and
- (c) subject to 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.

(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.

(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.

## **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—

- (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—

- (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.

(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—

- (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.

(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 or 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.

(5) An inspector may require any person on board a ship to which this section applies, who the inspector finds committing, or who 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.

(6) Subject to subsection (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 the ship.

(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.

(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 on that ship.

### **Access to premises, offshore installation, oil 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 facility or a port facility, enter such premises, offshore installation, oil facility or port facility for performing the functions of an inspector under section 28.

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

(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, offshore installation, oil 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
- (b) the issue of a warrant is reasonably required for the purpose of this Act, the magistrate may grant a warrant authorising the inspector to enter premises, an offshore installation, an oil facility or a 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 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; and
- (d) observe the undertaking of operation and activities relating to this Act, including response to actual marine pollution incidents and the carrying out of training and exercises.

(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 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 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 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 negligently pollutes the marine environment;
  - (b) fails to comply with sections 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 two million rand or to imprisonment for a period not exceeding five years, or to both such fine and imprisonment.

## **Regulations**

- 31.** The Minister may make regulations regarding—
- (a) any matters referred to in sections 5(3), 5(7)(c), 5(7)(e), 5(9), 6(1), 7(2), 7(3), 8(4) and 11(6); and



- (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 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 facility, port facility or of any other equipment relating to the offence, as the case requires.

### **Time limit for prosecutions**

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

### **Short title and commencement**

**34.** This Act is called the Marine Oil Pollution (Preparedness, Response and Cooperation) Act, 2019, and comes into operation on a date fixed by the President by proclamation in the *Gazette*.

**Schedule**  
**Amendment of laws**

<b>No. and year of Act</b>	<b>Short title</b>	<b>Extent of amendment</b>
Act No. 5 of 1998	South African Maritime Safety Authority Act, 1998	<b>1.</b> Amendment of section 3 by the substitution for paragraph (b) of the following paragraph: "(b) to prevent, <u>prepare, respond</u> and combat pollution of the marine environment by ships; and".

## **MEMORANDUM ON THE OBJECTS OF THE MARINE OIL POLLUTION (PREPAREDNESS, RESPONSE AND COOPERATION) BILL, 2019**

### **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 co-operation 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 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 pollution preparedness, response and control;
- to incorporate into the law of South Africa, the relevant provisions of the international convention relating to marine pollution preparedness, response and cooperation; 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 of the Bill 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, being 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 ("the NOSCP"). 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 marine 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 South African Maritime Safety Authority ("the Authority") is obligated to recover from polluters the costs for maintaining the equipment. The Authority and the private sector, with the advice of the Committee, must jointly develop and agree to a national administrative arrangement as a standard operating procedure for the use of national marine pollution response resources, in respect of both private sector-owned and government-owned equipment and resources, as well as personnel, consistent with the envisaged Act with the Marine Pollution (Control and Civil Liability) Act, 1981 (Act No. 6 of 1981).

## **2.8 Clause 9**

Clause 9 provides that the Authority must develop and implement an annual programme of training and exercises in marine 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 Pollution Preparedness, Response and Cooperation Committee ("the Committee"). In order to ensure ongoing coordinated advice, recommendations and support, the Minister appoints the National Marine Pollution Preparedness and Response Committee which must be chaired by the Director-General: Transport. The Committee comprises 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 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 the 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 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 situated within the national capability and resources of 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 essential in ensuring that there are no ambiguities 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 pollution incident. This provision is to remove the unnecessary bureaucracy and red tape that is not helpful during a marine 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 the 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 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 ship 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 pollution incident. The Authority must use its best endeavours to avoid any risk to human life, and to afford persons in distress any assistance 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 or other States.

## 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 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 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 the offences under the Bill and penalties. Clause 30 sets the maximum fine of up to two million rand or 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 Departments of Environmental Affairs, Transnet National Ports Authority, 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 pollution preparedness. The Authority must undertake a national marine 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 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 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 pollution incident in South African waters or which threatens South African waters or coastline. Chapter 2 provides for the establishment of the Committee, which will provide and coordinate advice, recommendations and support to the incident management system organisation, including the Authority and the Incident Commander.

6.8 Chapter 3 provides for marine pollution response and in this respect makes provision for the duties of the owner or operator of an oil 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 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 facility or a port facility, enter such premises, offshore installation, oil 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 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.