



**MINISTER  
ENVIRONMENTAL AFFAIRS  
REPUBLIC OF SOUTH AFRICA**

**Reference: LSA 141396**

**APPEAL DECISION**

**APPEALS LODGED AGAINST THE ENVIRONMENTAL AUTHORISATION (EA)  
ISSUED TO TRANSNET CAPITAL PROJECTS FOR THE PROPOSED DEEPENING,  
LENGTHENING AND WIDENING OF BERTHS 203 TO 205 AT PIER 2 CONTAINER  
TERMINAL, PORT OF DURBAN, KWAZULU NATAL PROVINCE**

**1. INTRODUCTION**

In terms of regulation 36 (1) of the Environmental Impact Assessment Regulations, 2010, published by Government Notice (GN) No. R. 543 of 18 June 2010 (2010 EIA Regulations), regarding activities identified under section 24 of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), the Deputy Director-General: Legal, Authorisations, Compliance and Enforcement (DDG: LACE) of the Department of Environmental Affairs (the Department) authorised Transnet Capital Projects (the applicant), to proceed with the deepening, lengthening and widening of berths 203 to 205 at pier 2 container terminal, port of Durban, KwaZulu Natal Province.

## **2. BACKGROUND**

- 2.1. Transnet Capital Projects lodged an application on 13 February 2012 for the proposed deepening, lengthening and widening of berths 203 to 205 at Pier 2, Container Terminal, Port of Durban, KwaZulu Natal Province.
- 2.2. The proposed expansion was necessitated by the growing concern that the Port of Durban cannot accommodate the growth in containerised cargo. The existing Blockwork Quay wall structure along Pier 2 Berth 203 to 205 was designed in the 1970s and is presently operating beyond its original design limitations, which is a safety concern and hinders the efficiency of port operations. It is on this basis that the applicant lodged an application for the proposed deepening, lengthening and widening of berths 203 to 205.
- 2.3. The applicant commissioned an independent environmental consultancy, namely NEMAI Consulting, to conduct an Environmental Impact Assessment for the above mentioned proposed project. The final Environmental Impact Assessment Report (FEIR) was received by the Department on 7 August 2014.
- 2.4. The Department was satisfied that the minimum requirements in terms of the 2010 EIA Regulations had been complied with and that the assessment was adequate for an informed decision to be taken.
- 2.5. As a result thereof, the Department granted an EA to the applicant on 21 January 2015 for the proposed expansion of berths 203 to 205.

## **3 THE APPEAL AND CONDONATION**

In terms of section 43 (1) of NEMA, the Directorate: Appeals and Legal Review received two separate appeals, from Earthlife Africa Durban (first appellant) and the South Durban Community Environmental Alliance (second appellant) against the EA issued to the applicant on 21 January 2015.

In terms of Regulation 63 of the 2010 EIA Regulations, answering statements by the appellants were due to be submitted on 26 May 2015, but were only received from the second appellant on 19 June 2015, which was 24 days outside of the prescribed timeframes. As a result of the foregoing, before proceeding with the merits of the appeals by the appellants, I must first consider the application for condonation for the late filing of the second appellant's answering statement.

In this regard, the second appellant contends that the reason for requesting an extension was because it was awaiting expert technical opinion and advice on the applicant's response to the appeal. The second appellant thus requested an extension until 19 June 2015 to submit its answering statement.

In terms of section 47C of NEMA, as well as Regulation 63 (3) of the 2010 EIA Regulations, I have the legal authority to grant an extension or condonation for the submission of answering statements which are out of time.

Section 47C of NEMA provides as follows, "*The Minister or an MEC may extend, or condone a failure by a person to comply with, a period in terms of this Act or a specific environmental management Act, except a period that binds the Minister or MEC.*"

Regulation 63 (3) of the EIA Regulations stipulates that: "*The Minister, MEC, Minister of Mineral Resources or designated organ of state, as the case may be, may, in writing, on good cause extend the period within which responding statements in terms of subregulation (1) or an appellant's answering statement in terms of subregulation 2 (b) must be submitted.*"

In a long line of cases in respect of extensions of statutory time periods, the courts have held that in considering whether good cause is shown to extend a time period, the following factors must be taken into account: the degree of lateness, the explanation thereof, and the prospects of success on the merits and the importance of the case. The courts have held further that although these factors are interrelated, they are not individually decisive and must be weighed against each other.

Having evaluated the reasons advanced by the second appellant in support of the application for condonation, I have considered these with reference to the applicable case law, as well as the appeals guideline of the Department, which sets out the factors that must be considered in deciding whether or not to grant condonation.

Bearing in mind that the delay in submitting the answering statement is not significant, I am of the view that there will not be any prejudice suffered by the applicant should condonation be granted to the second appellant.

As a result of the foregoing, I have decided that it is in the interests of justice to grant the second appellant's request for condonation for the late submission of its answering statement. I therefore accede to the aforementioned request for condonation by the appellant.

Having ruled in favour of the granting of condonation for the late submission of the second appellant's answering statement, the legal provisions relating to the appeal, the grounds of appeal put forward and a discussion in respect thereof are set out below.

#### **4. DECISION**

- 4.1 In reaching my decision on the appeal against the aforementioned EA, I have taken the following into consideration:
  - 4.1.1 Material information contained in the project file (14/12/16/3/3/2/275);
  - 4.1.2 The grounds of appeal submitted by the first appellant dated 12 March 2015;
  - 4.1.3. The grounds of appeal submitted by the second appellant, dated 09 March 2015,
  - 4.1.4 The response to the grounds of appeal submitted by NEMAI Consulting on behalf of the applicant, received on 22 April 2015;

- 4.1.5. The answering statement submitted by the first appellant received on 26 May 2015, to the extent that the responding statement introduced new information;
- 4.1.6. The answering statement submitted by the second appellant received on 19 June 2015, to the extent that the responding statement introduced new information;
- 4.1.7 The comments received from the Chief Directorates: IEA, Climate Change Adaptation and Oceans and Coastal Research of the Department pertaining to the grounds of appeal;
- 4.1.10 The outcomes of the Consultation between the Directorate: Appeals and Legal Review and the applicant and the appellants on 10 June 2015;
- 4.1.12. The outcomes of the Consultation between the Directorate: Appeals and Legal Review and the eThekweni Municipality on 11 June 2015;
- 4.1.13 The observations of the site visit conducted at the Durban Port on 10 June 2015;
- 4.1.14 Correspondence received from the eThekweni Municipality, dated 13 July 2015; and
- 4.1.15 The specialised comments received from the Chief Directorate: Oceans and Coastal Research dated 15 July 2015.
- 4.2 In terms of section 43 (6) of NEMA, I have the authority, after considering the appeals, to confirm, set aside or vary the decision, provision, or condition of the Department, or to make any other appropriate decision. Having considered the above mentioned information, I have decided to:
  - 4.2.1 Dismiss the appellants' grounds of appeal in respect of paragraphs 4.3.1 to 4.3.7; and paragraphs 4.3.9.to 4.3.13 below.

4.2.2 Amend the EA in line with the appellants concerns in respect of 4.3.8 below. To this end, the activity/project description under GN R. 544 Items 14 and 16 of the aforementioned EA is amended as follows:

- *Lengthen berth 203 eastwards by 100m (involving the removal of the Ro-Ro ramp) and lengthen berth 205, westwards by 170m (involving the demolition of the current South-East corner as well as excavation of a portion of the central sandbank).*

4.2.3 Amend the EA in line with the appellants concerns in respect of 4.3.14 below. To this end, the aforementioned EA is amended to include the following condition:

- *After discussions with the Department and prior to the commencement of construction, the applicant must commit to offsets, to the satisfaction of the Department, should there be substantial biodiversity loss resulting from any unsuccessful sandbank expansion.*

4.2.4 Amend the EA in line with the eThekweni Municipality's concerns in respect of 4.3.14 below. To this end, the aforementioned EA is amended to include the following condition:

- *The eThekweni municipality is to be involved in the baseline monitoring of the sandbank and must ensure that the outcomes of the baseline monitoring inform the central sandbank mitigation plan. The monitoring of compliance against the baseline monitoring must solely be the responsibility of the ECO and be independent of the applicant. Construction activities on the central sandbank may only commence upon the successful implementation of the central sandbank mitigation plan.*

4.3 In arriving at my decision on the appeal, it should be noted that I have decided, where appropriate, to combine the grounds of appeal submitted by the appellants due the similarities contained in their respective submissions. It should, however, also be noted that I have not responded to each and every statement set out in the appeal, and where a

particular statement is not directly addressed, the absence of any response should not be interpreted to mean that I agree with or abide by the statement made. The reasons for my decision are as follows:

#### **4.3.1 *Need and desirability for the proposed expansion***

The first appellant avers that the rationale for the proposed expansion is flawed, in that the Coega Port in Port Elizabeth is underutilised. The first appellant contends therefore that there is no need to expand the Durban Port any further and consequently risk damaging the environment in the process when the required facilities already exist.

The second appellant avers that the applicant did not provide it with any documents which indicate a comprehensive justification for the proclaimed need to expand berths 203 to 205.

In response to this ground of appeal, the applicant contends that the concerns regarding the rationale for the project were raised and addressed as part of the Environmental Impact Assessment (EIA) process. The applicant further states that the Economic Impact Assessment compiled was aimed at determining the economic impact of the development. In this regard, the applicant contends that the study found that there will be a loss of handling capacity if this expansion does not occur, which will have a direct spend loss impact of approximately R1,961 million, an induced spend loss of approximately R1,569 million, as well as port related employment losses of approximately 852 jobs.

The applicant contends furthermore that the aforementioned economic impact assessment noted that additional transportation costs would in turn be passed onto the cargo owner should larger vessels call at Coega. The applicant further contends that, in addition to the negative impact to the Durban Economy, the climate change impacts would be greater if freight was to be shipped to Coega and then transported by truck to Durban.

In evaluating this ground of appeal, as well as the response thereto, I note that the Department evaluated the need and desirability of the project at the EIA stage, taking into

consideration, among other factors, socio-economic impacts and concluded that the proposed development meets the requirements of the need and desirability. I have noted furthermore that according to final EIAR, the total cargo revenue at the Port of Durban is made up predominately from containerised cargo. However, there is a growing concern that the Port of Durban cannot accommodate this growth in containerised cargo. I note further that the existing Blockwork Quay wall structure along Pier 2, Berth 203 to 205, was designed in the 1970s and is thus presently operating beyond its original design limitations. In addition, I note that recent studies have concluded that the existing quay walls do not meet the minimum safety standards and thus there is a risk of potential quay wall failure.

It is also imperative to note that the key focus of the port is to ensure safe, orderly and efficient port operations, as required by the National Ports Act, 2005 (Act No. 12 of 2005). In this regard, I note that in addition to the safety of the quay wall, vessel sizes have increased since the original terminal was constructed and berths 203 to 205 can no longer safely accommodate fully loaded new generation container vessels due to insufficient water depth at these berths. This in turn creates an unsafe operating condition and the risk of vessels running aground cannot therefore be ignored.

In light of the above, this ground of appeal is accordingly dismissed.

#### **4.3.2 *Impacts associated with climate change***

The first appellant contends that the expansion of the harbour is designed to accommodate the importation of goods into the country. The first appellant contends furthermore that the importing of goods will increase emissions of greenhouse gases which are responsible for global warming. The first appellant goes on to contend that goods have to then be transported to various locations, mostly by truck, and that this will further increase emissions.

The second appellant states that it is concerned about abnormally high sea levels, taking into consideration the deepened channels around the sandbank. The second appellant states furthermore, that due to a combination of increased wind velocity and a widened harbour mouth, it is foreseeable that that wave action could create far more destructive impacts on the “manipulated” central sandbank.

In response to this ground of appeal, the applicant contends that concerns relating to climate change were raised and addressed as part of the public participation process and a Climate Change Study was undertaken as part of the EIA process. The applicant submits furthermore that the aforementioned study noted that larger vessels have a lower level of greenhouse gas emissions and thus from a greenhouse gas emissions perspective, it is considered desirable for ports to be able to accommodate larger container vessels. According to the applicant, there will not be any increase in traffic volumes during construction, and post construction the terminal will still be operating within its capacity.

In response to the second appellant’s concern, the applicant refers to analysis undertaken of all recorded cyclone tracks from 1945 to 2013. According to the applicant, calculations have taken all the effects referred to into account, including the widening and deepening of the harbour entrance and it has thus modelled up to a 100 year event in the amended EIA report, which demonstrates that even with a 10% increase in wind speed, the berth deepening and construction of the sandbank will have no significant effect on the morphology thereof.

The first appellant, in its answering statement, avers that even though the applicant points out that there will be fewer emissions for larger ships, it is expected that there will be more containers coming through the harbour as a result of the proposed expansion. Therefore, the first appellant contends that the cumulative effect will be higher emissions if the project goes ahead.

The second appellant, in its answering statement, avers that it has doubts in respect of whether or not the correct weather data was used to effectively illustrate the effect of erosion and sedimentation on the central sandbank.

In evaluating this ground of appeal, I note that the Climate Change Specialist Study dated 7 March 2013, which was revised on 2 April 2013 and compiled by WSP Environmental (Pty) Ltd, was undertaken as part of the EIA process. With consideration of the information provided in the above mentioned report, and the comments received from the registered interested and affected parties (I&APs), the applicant was requested to further undertake a climate change risk and vulnerability assessment and to adequately address how climate change risks, such as the sea level rise and coastal storm surges during the construction and operational phase of the proposed development.

I note furthermore that the reports and concerns raised by the I&APs were discussed with the relevant units within the Department prior to the issuance of the EA, which resulted in the inclusion of condition 33 in the EA which specifically states "*All mitigation measures regarding climate change must be taken into account as per the feasibility study of the Effects of Climate Change on Engineering Design dated 23 January 2014 and compiled by ZAA Engineering Projects and Naval Architecture (Pty) Ltd.*"

In light of the above, I find that the issue concerning climate change has been adequately considered and evaluated during the EIA phase, and this ground of appeal is accordingly dismissed.

#### **4.3.3 The need to localise the economy**

The first appellant is of the view that producing goods close to consumption will eliminate the need for shipping and trucking goods at vast distances. The first appellant suggests that there should be an increased tariff for the importing of certain goods, which can easily be produced in South Africa, and that the income generated from this should be invested

in increasing skills which are needed to produce goods locally. The first appellant believes that this would increase jobs, reduce emissions and be good for the local economy.

In response to this ground of appeal, the applicant states that the impact of no development taking place was assessed as part of the Economic Impact Study, which concluded that there would be significant loss of the capacity of a container ship, if the deepening, lengthening and widening of the berths is not undertaken.

In evaluating this ground of appeal, I note the contents of the Economic Impact Assessment compiled by Urban-Econ (Pty) Ltd, which was undertaken as part of the EIA process in order to analyse the effects on the level of economic activity as result of the expansion of the Durban Container Terminal. I am satisfied that this assessment adequately addressed the economic impact should the proposed expansion not occur. In addition to considering the economic impacts associated with the "no-go" option, the assessment considered the economic benefits for extending and deepening the berths at Pier 2 and found that the said benefits are significant and, therefore, warranted full development to go ahead.

In addition, I take cognisance of the first appellant's concern regarding the development of the local economy. However, it is also crucial to note that the proposed expansion of the Durban port is critical for the continued economic growth of South Africa, as well as the local economy. There are therefore considerably greater economic benefits associated with the proposed expansion, as opposed to the no-go option, which I am satisfied has been adequately considered during the EIA process.

In light thereof, this ground of appeal is accordingly dismissed.

#### **4.3.4 *Concern regarding waste***

The first appellant avers that by increasing the importation of goods through the ports, there will be a consequential increase in the amount of waste generated, which in turn

increases the strain on the municipal resources in respect of waste management and disposal.

In response to this ground of appeal, the applicant points out that concern regarding the minimising of waste were raised and addressed as part of the EIA process. The applicant states that while the first appellant only focuses on solid waste produced by importing goods into the country, it does not acknowledge that the largest volume of waste produced by the project is the dredge material. According to the applicant, the preferred option, namely Option 3H, proposes to re-use the dredge material for the expansion of the central sandbank.

In evaluating this ground of appeal and the response thereto, I note that mitigation measures relating to waste management were included in the EMP. In addition, I note that condition 25 of the EA indicates that *"an integrated waste management approach must be implemented that is based on waste minimisation and must incorporate reduction, recycling and re-use options"*. The applicant is therefore obliged to adhere to the conditions incorporated in the EA.

The re-use of the dredged material to expand the central sandbank will also result in a decrease in the amount of waste that is disposed offshore. I am satisfied, therefore, that the mitigation measures incorporated in the EMP adequately deals with the issues in respect of waste disposal and waste management. Furthermore, should the applicant be found to operate outside of the conditions of the EA, it exposes itself to enforcement action, including administrative action in terms of section 31L and section 28 of NEMA, as well as criminal prosecution in terms of section 49A of NEMA.

In light of the afore-going, this ground of appeal is dismissed.

#### **4.3.5 Importance of the Central Sandbank**

According to the first appellant, a separate Transnet Estuarine Management Plan for the Bay of Natal found that the Bay's estuarine ecosystem has been compromised to the point

that it has lost resilience. The first appellant states that the plan emphasises the critical need to protect and enhance the existing estuarine habitats and stabilise the environment within the Bay over the next five year period. According to the first appellant, Durban is one of only three estuarine bays in the country and one of few such habitats on the sub-tropical east coast of Africa, with only 20 hectares of mangrove forests and 14% tidal flats remaining. The first appellant avers that the last sandbanks shelter approximately 30 species of fish and sand prawns and that in addition, the Bay provides a critical breeding ground for reef associated and migratory marine fish.

According to the first appellant, 132 species of birds are found in the bay and 62 species of endangered migratory birds rest and feed in the bay. The first appellant is of the view that the expansion of pier 2 will remove part of this critical sandbank. The first appellant refers to David Allan's study, titled "*Novitates, Waterbirds of the Durban Bay*", which reviews the current and historical population trends of water-birds in Durban Bay. The first appellant states that it is disturbing to note that there is a clearly decreasing trend overall and according to David Allan, the past and ongoing decreases in water-bird populations in the Durban Bay likely indicates, at least to some extent, a diminution and degradation of the Bay's broader ecological values and functioning. The first appellant thus states that an ecologically non-functional Bay is certain to have negative ramifications, the consequences of which would be measured far beyond decreasing numbers of water-birds.

The second appellant states that the central sandbank and little lagoon are the last final remnants of a historic estuarine tidal flats and mangrove habitat and that although the little lagoon is man-made, it is a functional marine ecosystem and area of premier importance. The second appellant states furthermore that because juvenile fish feed on the sandbanks, interference with the remnant sandbank therefore runs a real risk to juvenile fish with issues such as increased turbidity a significant concern.

The second appellant goes on to aver that sand replenishment of the central sandbank is no longer occurring and consequently the historic remnant is now visible, which represents a system that is no longer able to dynamically supplement itself with natural deposition.

According to the second appellant, any interference with the central sandbank structure carries with it the risk of irreparable and fatal harm.

In its response to this ground of appeal, the applicant refers to a summary of the responses made by the Estuarine Biodiversity Specialist and Avifauna Specialist regarding the impact on the central sandbank. The applicant states, in this regard, that because the mangrove trees are situated in lot 10 and some distance from the project area, there are no long-term impacts expected for the mangroves trees as a result of the proposed expansion. This was confirmed by the Directorate: Appeals and Legal Review, as part of their observations of 10 June 2015.

Furthermore, the applicant contends that the Estuarine Biodiversity Specialist Study and the Avifauna Specialist Study noted the importance of the ecological functioning of the estuary and its important role as a significant nursery area for many species of fish. In addition, the applicant contends that the Estuarine Biodiversity Study notes that the Durban Port is an important nursery area for at least 71 estuary associated fish caught in South African fisheries and that 28 species of fish occur in the bioregion that have critical life stages totally dependent on estuaries and are known to occur, or are likely to occur within the Port.

According to the applicant, the authorised option, namely Option 3H will result in a 4.2% increase in low intertidal and 55% increase in shallow subtidal habitat, which are both valuable nursery habitats. Based on this, as well as other mitigation measures, the applicant contends that the proposed project does not have significant impacts which cannot be mitigated. In addition, the applicant indicates that the long-term impacts of the proposed development on key estuarine habitats were assessed by CSIR and the outcome of such indicates that Option 3H adequately mitigates the unavoidable losses associated with berth development, by allowing for extension of the central sandbank habitat.

The applicant further states that the design for the central sandbank extension has been provided by a marine engineer and furthermore that monitoring of the sandbank will be

undertaken by the independent Environmental Control Officer (ECO), which is independent of the applicant and this information will be provided to the Environmental Monitoring Committee (EMC) as required by condition 34 of the EA. The applicant furthermore lists the mitigation measures which have been proposed to limit the impacts of dredging on the central sandbank, which include the extension of Central Sand Bank such that there will be an overall net gain after the proposed development, support mattresses to prevent the Bank from collapsing, turbidity monitoring and reduction methods during dredging to ensure it does not reach a specified threshold and specific times of the day and year whereby dredging within 100m of Centre Bank and its artificial extension are allowed to take place. According to the applicant, there is likely to be a certain amount of mortality and displacement associated with the dredging and artificial extension of the central sandbank on invertebrates such as crustaceans, but that it is envisaged that the sandbank extension will provide suitable habitat for the remaining organisms to colonise and that there will therefore likely be a net gain in crustacean abundance due to a net gain in shallow sandbank habitat.

The applicant furthermore submits that there are active programmes in other countries which are aimed at using dredged material for beneficial use, including creating ecologically valuable habitats to offset past losses. With regard to the second appellant's averment relating to erosion of the central sandbank, the applicant contends that the impact on the central sandbank has been modelled by two specialist studies and the results of these studies indicate there will be no long term erosion associated with Option 3H.

In evaluating this ground of appeal, I note that several risk and vulnerability assessment studies were undertaken to address the concerns relating to the central sandbank. I further note that the reports indicated that the extension of the central sandbank is deemed a rational and acceptable mitigation measure that has a high likelihood of success in terms of colonisation and succession. The Estuarine Biodiversity Specialist Study and the Avifauna Specialist Study also deals with the detailed impacts for different groups of organisms and provides for mitigation of such impacts.

I further note that the aforementioned specialist reports also indicated that the baseline thresholds need to be established in order to confirm the defined maximum/minimum water quality thresholds to confirm the biotic community composition on the existing sandbank and to allow comparisons after the sandbank extension which show whether the extension has been successful. The said baseline thresholds will be determined from ecological baseline data that will be collected over a period of 12-24 months prior to commencement of the project. I note, in this regard, that the applicant has commenced with the baseline monitoring.

In addition, I note that a clearly defined management action has been identified and control measures have been prescribed if the monitoring results detect change. I note furthermore that the Department approved Option 3H after deliberating on the contents of the aforementioned specialist reports and concerns raised by the I&APs. Appropriate conditions, specifically conditions 29 to 31, were included in the EA for this very reason, which addresses the concerns relating to the protection of the central sandbank. Based on this as well as other mitigation measures, I am satisfied that the potential impacts for the central sandbank have been adequately mitigated. The associated impacts relating to the proposed expansion may be reduced to more suitable levels by strict adherence to, and successful implementation of the proposed mitigation measures by the applicant.

With regard to the second appellant's averments relating to the Little Lagoon, I note that because of the distance between the Little Lagoon and location of the proposed expansion, there is no impact on the Little Lagoon. This has also been confirmed by the Directorate: Appeals and Legal Review, following a site visit conducted on 10 June 2015. In addition I note that the applicant is to undertake an extra precautionary measure of erecting a return wall, so as to limit any possible impact on the Little Lagoon.

In light of the foregoing, this ground of appeal is accordingly dismissed.

#### **4.3.6 Application of the 1999 Record of Decision**

The first appellant refers to the record of decision (RoD), issued by the Department in 1999, in which authorisation for Phase 1 of the proposed extension of the berths was refused. The first appellant avers that the application for Phase 1 was similar to the current proposed expansion in that it also proposes the westward extension of berths 203 to 205 and the dredging of the channel through the central banks. The first appellant is of the view, therefore, that the decision to approve the current proposed expansion goes against the 1999 decision.

In response to this ground of appeal, the applicant contends that it obtained clarification from the then Department of Environmental Affairs and Tourism, regarding the condition in the 1999 RoD that no further infilling is allowed beyond the magnitude of 200 000m<sup>2</sup>. The appellant therefore contends that the current project is not in conflict with the aforementioned 1999 RoD. Further to this, the applicant submits that it has not undertaken any infilling of the Bay other than Phase 3 of the 1999 application. The applicant states that the initial sought authorisation involved the complete loss of Little Lagoon habitat but that the current proposal does not have any impacts on the Little Lagoon.

In evaluating this ground of appeal, I note that the 1999 Phase 3 proposal entailed the creation of deepwater berths D to G at the point and the relocation of breakbulk business from Pier 1 to the new terminal without any mitigation measures being taken in respect of the Central Sandbank, whereas the current application entails deepening, lengthening and widening of the already existing berths 203 to 205 at Pier 2 Container Terminal and it does indeed propose mitigation in the form of the creation of a portion of the Central Sandbank

I further note that the 1999 RoD recorded the refusal to grant authorisation for Phase 1 and Phase 2 of the proposed development because it would result in significant negative impacts on the Durban Bay and thus deferred the phases by stipulating that approval is dependent on the *“successful outcome of a habitat rehabilitation, creation and monitoring programme led by Portnet (Transnet)”*. Based on the above, the Department sought a legal

opinion as to whether it would be procedurally correct to approve the current proposed expansion, in light of the 1999 RoD.

The recommendation of the aforementioned legal opinion, is that *"there is no basis in law to impose the conditions of the 1999 environmental authorisation upon the current proposal which in its nature and extent is different to the proposal made 14 years ago"*.

In this regard, the case of *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation Environment & Land Affairs* is illustrative, in that it affirms that attaching determinative weight to a condition of a RoD that was taken 14 years ago in respect of a different application would mean that the relevant authority would now be robbed of its discretionary powers and this would not allow the proper consideration of all relevant factors in a manner consistent with the constitutional and statutory mandate conferred upon the relevant authority.

I concur with the view that the application for environmental authorisation lodged on 13 February 2012 constitutes a new application based on different considerations, and which is consequently unrelated to the RoD issued almost 14 years ago. As a result of the foregoing, I concur with the Department's view that this application be considered and evaluated anew.

In light thereof, this ground of appeal is dismissed.

#### **4.3.7 Concern relating to the artificial sandbank and composition of Environmental Monitoring Committee**

The first appellant contends that condition 26 of the EA requires undertaking of Dredge Footprint 3H, which involves the creating of an artificial sandbank. According to the first appellant, there is uncertainty and risk that the creation of the sand flat will not be fully colonised by invertebrates and will therefore not be successfully ecologically functional.

The first appellant proposes, therefore, that the applicant constructs the Dredge Footprint 3H prior to and as a precondition to the proposed project, as required by the 1999 RoD. The first appellant states that if the creation of the artificial sandbank is not successful, then the loss of habitat will lead to a proportionate loss of water-birds which the Department is committed to protect under the Bonn Convention. The first appellant submits furthermore, that it is as yet unclear as to whether the artificial sandbank will be stable in the long term.

The first appellant contends furthermore that the EA states that an Environmental Monitoring Committee must be appointed but that it is unclear as to how members of the committee will be selected.

In response to this ground of appeal the applicant explains that the construction of the Dredge footprint 3H prior to the proposed project is not possible for three reasons: firstly, dredged material needs to be sourced from both the channel and the central sandbank. Secondly, the extension itself is a listed activity and thus cannot be undertaken prior to the authorisation being approved. Thirdly, dredging the approach channel out of the proposed construction sequence could result in undermining of the existing quay wall due to erosion of the deepened area. According to the applicant, an Engineering Risk Assessment was undertaken to determine the risk of the Sandbank Extension failing and noted that it is possible to assess the potential risks and mitigation measures indirectly through sophisticated computer simulation modelling.

The applicant, in its responding statement, provided details relating to the morphological acceleration factor which has been applied to a 10 day simulation to effectively illustrate the effect of erosion and sedimentation on the central sandbank, after a 50 year period.

With regard to the concerns in respect of membership of the EMC, the applicant contends that the EMPr provided information on the composition of the EMC which, as a minimum, will include the KZN Subsistence Fisherman's Forum, South Durban Community Environmental Alliance (SDCEA), WESSA/Coastwatch, Ezemvelo KZN Wildlife, eThekweni Metropolitan Municipality, Department of Agriculture and Environmental Affairs (DAEA),

Birdlife Port Natal, DEA and Transnet. Further to this, the applicant states that the EA noted that representatives of the public need to be included as part of the EMC and that the EMC Terms of Reference and Membership list is currently being drafted and will include all individuals who participated throughout the EIA process.

In evaluating this ground of appeal, I reiterate that the mitigation measures provided in the EMPr and the EA are aimed at ensuring that the creation of the Sandbank will be successful.

I note furthermore that the amended EIA report indicates a very high likelihood of success of re-colonisation of the new sandflat area given the methods proposed, and also shows its maintained stability under Climate Change scenarios. I am furthermore satisfied that that condition 41.1 of the EA is clear on the membership of the EMC and that the first appellants contentions, in this regard, are unfounded.

In light thereof, this ground of appeal is accordingly dismissed.

#### **4.3.8 Inconsistencies in the EA**

Both appellants aver that there are inconsistencies between the application for EA and the granted EA. The inconsistencies, the appellants suggest, are in relation to the EA authorising the lengthening of berth 205 westward by 215m, when only a 170m lengthening was applied for. Furthermore, the appellant contends that the EA authorises the deepening to 17m, whereas only a depth of 16.5m was applied for.

In response to this ground of appeal, the applicant concurs that the amended application made reference to 170m westward expansion and in addition, the final EIA Report and amended EIA Report both make mention of 170m westward expansion. Furthermore, during the consultation between the applicant and the Directorate: Appeals and Legal Review, the applicant indicated that the excess of 0.5m deepening is needed for dredging purposes and that the final depth will indeed be 16.5m, as applied for.

The Department furthermore acknowledges that it made an error in the EA relating to the approval of the lengthening of berth 205 westward by 215m as opposed to 170m. Accordingly, any reference in the EA to the lengthening of berth 205 westward is to be corrected to read *"The lengthening of the berth 205 westward by 170m"*.

With regard to the approved 17m deepening, I note that an excess of 0.5m deepening has been approved to cater for on-going dredging activity after the main construction. After the dredging has been finalised, the final depth will be 16.5m, which is consistent with the application.

In light of the foregoing, the activity/project description under GN R. 544 Items 14 and 16 of the EA is hereby amended, as per 4.2.2 above, to read as follows:

- *"Lengthen berth 203 eastwards by 100m (involving the removal of the Ro-Ro ramp) and lengthen berth 205, westwards by 170m (involving the demolition of the current South-East corner as well as excavation of a portion of the central sandbank)".*

#### **4.3.9 The decommissioning of nuclear reactors, nuclear fuel and dangerous goods**

The first appellant contends that the EA authorises the decommissioning of the Straddle Crane parking lot, which includes nuclear reactors and the storage of nuclear fuel, as well as the storage and handling of 80 cubic metres of dangerous goods. The first appellant states furthermore that no reference was made to this in the original EIA and that a separate EIA process is therefore required.

In response to this ground of appeal, the applicant submits that there are no nuclear facilities on the proposed site and that there will be no decommissioning of nuclear facilities as part of the Berth 203 to 205 expansion project.

In evaluating this ground of appeal, I note that the EA authorises the decommissioning of existing facilities or infrastructure. I note furthermore that the decommissioning referred to

is in respect of the Straddle Crane parking lot (adjacent to Berth 205) which has previously been used for the storage of dangerous goods and has been authorised to be decommissioned.

I note furthermore that the aforementioned existing infrastructure does not currently store any hazardous substances. The consultation with the applicant and site visit conducted by the Directorate: Appeals and Legal review on 10 June 2015 further confirmed that no dangerous goods were stored in the Straddle Crane parking lot.

In light thereof, this ground of appeal is dismissed.

#### ***4.3.10 The department has not considered substantial comments***

The second appellant contends that the Department has not considered substantial comments relating to the likelihood of permanent and irreversible environmental harm that will be occasioned to the last remaining vestiges of a once abundant and verdant marine eco-system. The second appellant contends furthermore that the Department's interests have been extensively influenced by one sided economic considerations and not by the constitutional requirements to ensure that the environment is protected for the benefit of present and future generations.

In response to the above contention, the Department submits that it has thoroughly considered the comments and responses made by the I&APs in its decision making and that, in addition to those comments, it considered the specialist studies and engineering designs conducted and commissioned during the EIA process. In particular, these studies have shown that the sandbank extension will be successful and stable and will require no long term maintenance. The Department submits furthermore that it is satisfied that the mitigation measures provided in the EMPr and the EA, as well as the monitoring protocol, is sufficient to ensure that the creation of the artificial sandbank will be successful.

In evaluating this ground of appeal, I am therefore satisfied that, subject to compliance with the conditions contained in the EA, the authorised activity will not conflict with the general objectives of integrated environmental management laid down in Chapter 5 of NEMA and furthermore, that any potentially detrimental environmental impacts resulting from the authorised activity can be mitigated to acceptable levels.

I am furthermore satisfied that the Department has adequately considered and evaluated all comments submitted during the public participation process. These comments, including those made by both appellants, informed the findings of some of the specialist studies, and where appropriate, these comments and concerns were addressed prior to the issuance of the EA.

This ground of appeal is therefore dismissed

#### **4.3.11 Concern regarding excessive turbidity**

The second appellant contends that it is a known fact that excessive turbidity will occur over a sustained period and the insertion of condition 33.1 in the EA, relating to "floating curtains" is of unproved effect and benefit. Floating curtains are turbidity barriers which are designed specifically to contain and control the dispersion of floating silt in the water. The second appellant contends furthermore that there is no guarantee that "floating curtains" will be utilised at all, more so because the site is off limits to the public and not available for inspection during the process.

In response this ground of appeal, the applicant submits that turbidity was noted as a potential problem and that several mitigation measures have been proposed to reduce the potential impact that may result as a consequence thereof. These mitigation measures include the setting of a turbidity threshold level whereby operations will be temporarily suspended and or other mitigation measures activated to reduce the concentration of suspended solids; real-time monitoring of turbidity levels adjacent to the central sandbank during dredging operations to ensure that levels are continually below the threshold level set; use of silt curtains at the dredging site should levels reach the threshold; choking of

the dredge hopper overflow; limit of time period of dredging as far as possible to avoid the daily re-suspension of sediments.

The applicant further contends that the EA and EMPr will become legally binding documents and thus it will be required to use silt curtains and other mitigation measures required by the department.

In evaluating this ground of appeal, I note the contents of the Dredging Turbidity and Physical Impact Study, dated 15 March 2013, compiled by ZAA Engineering Projects and Naval Architecture (Pty) Ltd, which was undertaken to determine whether the proposed development may have an impact on the ecosystem due to increased turbidity. I note furthermore that the aforementioned study concluded that there will be no significant negative impacts during or after completion of the works, either to the main sandbank within the port, or to the beaches and coastline outside the port. I further note that turbidity monitoring will be undertaken during the dredging and dumping processes to ensure that specified safe limits are not exceeded.

I am therefore satisfied that the specialist reports relating to turbidity were properly considered and evaluated by the Department prior to the issuance of the EA. Furthermore, I am satisfied that the mitigation measures incorporated under condition 33 of the EA, coupled with the monitoring requirements are sufficient to mitigate the risk of excessive turbidity.

In addition, should the applicant be found to operate outside of the conditions of the EA, it exposes itself to enforcement action, including administrative action in terms of section 31L and section 28 of NEMA, as well as criminal prosecution in terms of section 49A of NEMA.

In light thereof, this ground of appeal is accordingly dismissed.

#### **4.3.12 Cumulative impacts**

The second appellant submits that the cumulative impacts have not been adequately addressed in that the project is one of several developments which the applicant intends pursuing in the Durban Bay and thus cumulative harm should have been considered. According to the second appellant, the combined projects planned by the applicant will increase the risk of destruction of the bay.

In response to this ground of appeal, the applicant points out that the Final EIA Report dealt with cumulative impacts and noted that cumulative impacts can be identified by combining the potential environmental implications of the proposed Berth 203 to 205 expansion with the impacts of projects and activities that have occurred in the past, are currently occurring, or are proposed in the future within the project area. The applicant goes on to address the mitigation measures for main identified cumulative impacts. The applicant indicates that mitigation measures include, the dredging the footprint in such a way to minimise the impact on the central sandbank and prevent further long term erosion and the expansion of the sandbank which will result in an overall net gain of sandbank habitat. On this note, the applicant contends that the proposed extension will fulfil an ecological role that is congruent with the Bay's ecological value as an estuary and thus in the long term will improve the system's ecological value.

In evaluating this ground of appeal, I note from the Final EIA Report that the main cumulative impacts included the loss of Durban Bay Habitat; the deepening and infilling of Durban Bay and resultant changes to the tidal prism; decreased water and sediment quality of Durban Bay; turbidity; and traffic. I note furthermore that the EIA Report described and assessed these cumulative impacts, which resulted in appropriate mitigation measures being incorporated into the EA. I am thus satisfied that the final EIA Report has effectively demonstrated that the project has a net positive impact on the central sandbank. Further to this, I am satisfied that the proposed project does not have any significant impacts which cannot be mitigated.

In light thereof this ground of appeal is dismissed.

#### **4.3.13 Public recreational role of the port undermined**

The second appellant contends that the city of Durban has been forced into a spectator role and its people deprived of access to a magnificent recreational and functioning ecological resource by a parastatal that has never placed the interests of the local community at the forefront. In this regard, the second appellant refers to research papers that have described the port authorities as having "systematically undermined the public recreational role of the port".

The second appellant contends furthermore that the applicant views the Bay as a commodity which it has a sole right to use, and if necessary, destroy according to its own often ill-conceived strategic imperatives. In addition, the second appellant contends that the public participation process was flawed in that important environmental groups and organizations were not considered and that there were no public meetings conducted in different parts of Durban, in order to inform the masses of residents and I&APs about the proposed project.

In response to this ground of appeal, the applicant submits that the citizens of Durban have been very involved in the Berth 203 to 205 Expansion project and that their comments drove the evolution of the alternatives, to the extent that the final approved alternative results in an increase in the ecological resilience of Durban Bay.

In evaluating this ground of appeal, I have noted that the applicant has satisfied the minimum requirements as prescribed in the 2010 EIA Regulations in respect of public participation. In addition, I note that a public open day was held on 31 October 2012 at the Seafarers Club in Durban. Following the aforementioned public open day, a site visit was arranged by the applicant for I&APs, which the second appellant attended. I note furthermore that concerns raised and comments received during the public participation process were responded to by the Environmental Assessment Practitioner (EAP) and adequately addressed during the EIA process.

In light thereof, the ground of appeal is dismissed.

#### **4.3.14 The requirement for offsets**

The second appellant contends that the sandbank represents a nursery and breeding area for many fish species, some of which are targeted commercially and therefore economic benefits can also be attached to its functionality. The second appellant questions further what the economic impact will be on the local and regional sea-fishery industry, should the breeding area be impacted upon. The second appellant states therefore that there has been gross underestimation of the socio-economic benefits associated with the ecological goods and services derived from the central sandbank, even if it cannot be explicitly quantified.

The second appellant states furthermore that neither the proposed EMP, nor the Environmental Authorisation makes any mention of who will accept responsibility should the project outcome result in serious irreversible harm to the marine ecology and the Bay ecosystem ceases functioning.

In addition, the eThekweni Municipality, as a key stakeholder, expressed its concern in a letter dated 13 July 2015 to the Directorate: Appeals and Legal Review. In this correspondence, the municipality indicated that the outcomes of habitat rehabilitation cannot be foreseen and is very risky. The Municipality further contends that the EA fails to provide any guidance on the process to be followed, should the habitat creation fail. As a result of the foregoing concerns, the Municipality proposes that an advisory forum of relevant stakeholders and specialists be formed to ensure the effective implementation of mitigation measures relating to the central sandbank, as per conditions 27 to 32 of the EA.

In response to this ground of appeal, the applicant contends that the proposed project does not have significant impacts, which are not mitigated. The applicant states that it is the opinion of the marine specialists on the project team that, based on evidence from previous attempts of this nature, (both in the Port of Durban and elsewhere) the likelihood of successfully replacing habitat lost through this development is good and hence ecological and socio-economic costs are likely to be low, or even negligible. Despite this, the applicant states that it has agreed to discuss the potential for offsets should this need

arise, but that based on the specialist studies undertaken during the Amended and Final EIA Report, it is very unlikely that any offsets would be required.

Considering the importance of the ecological functioning of the estuary and its role as a significant nursery area for many species of fish coupled, with the recommendations of the eThekweni Municipality, as well as the Department in relation to offsets, I concur that the EA should be amended to include conditions which require the applicant to commit to offsets should the sandbank expansion mitigation measure be unsuccessful and that it should involve the eThekweni Municipality in the baseline monitoring of the sandbank.

In light of the foregoing, the EA is hereby amended, as per 4.2.3 and 4.2.4 above, to include the following conditions:

- *After discussions with the Department and prior to the commencement of construction, the applicant must commit to offsets should there be substantial biodiversity loss resulting from the unsuccessful sandbank expansion.*
- *The eThekweni municipality is to be involved in the baseline monitoring of the sandbank and shall ensure that the outcomes of the baseline monitoring inform the central sandbank mitigation plan. Construction activities on the central sandbank may only commence upon the successful implementation of central sandbank mitigation plan.*

  
MRS B E E MOLEWA, MP

MINISTER OF ENVIRONMENTAL AFFAIRS

DATE: 2015/09/09