

Ports Regulator Access guide

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1. Purpose of the guide

The purpose of this guide is to provide interested parties with brief information about the role of the Ports Regulator and the services it renders. This guide also outlines the process whereby stakeholders may access the services of the Ports Regulator.

2. What is the Ports Regulator?

The Ports Regulator is a Public Entity established in terms of Section 29 of the National Ports Act, 2005 (Act No 12 of 2005("the Act")), to regulate the ports environment in line with government objectives. In order to carry out its business, the Ports Regulator has to create awareness of its functions to various stakeholders.

The Ports Regulator is a Public Entity that falls under the National Department of Transport, and its structure is comprised of part- time Members, a Chief Executive Officer and Secretariat.

3. What are the functions of the Ports Regulator?

The main functions of the Ports Regulator are the following:

- 3.1. Exercise economic regulation of the ports system in line with government's strategic objectives.
- 3.2. Promote equity of access to ports and facilities and services provided in ports.
- 3.3. Monitor the activities of the National Ports Authority to ensure it functions in accordance with the Act.
- 3.4. Hearing appeals against decision of the National Ports Authority from any port user or licensed operator.

3.5. Investigate complaints from persons against the National Ports Authority on the following grounds:

- 3.5.1. Access to ports and ports facilities are not provided in a non-discriminatory, fair and transparent manner.
- 3.5.2. Small and medium sized enterprises owned by historically disadvantaged groups do not have an equitable opportunity to participate in the operation of facilities in the ports environment.
- 3.5.3. Transnet is treated more favorably and that it derives an unfair advantage over other transport companies.
- 3.5.4 NPA is not performing its functions in accordance with the National Ports Act, as set out in clause 6 hereunder.

4. Jurisdiction of the Ports Regulator

The Ports Regulator has regulatory jurisdiction over the following ports:

- 4.1. Richards Bay (KwaZulu-Natal Province)**
- 4.2. Durban (KwaZulu-Natal Province)**
- 4.3. East London (Eastern Cape Province)**
- 4.4. Nqura (Eastern Cape Province)**
- 4.5. Port Elizabeth (Eastern Cape Province)**
- 4.6. Mossel Bay (Western Cape Province)**
- 4.7. Cape Town (Western Cape Province)**
- 4.8. Saldanha Bay (Western Cape Province)**
- 4.9. Port Nolloth (Northern Cape)**

5. What is the National Ports Authority?

National Ports Authority (“NPA”) is a division of Transnet; a State Owned Enterprise (“SOE”). The mandate of the NPA is to manage, own, control and administer ports in South Africa and to ensure their efficient and economic functioning.

NPA, through Transnet reports to the Ministry of Public Enterprises. Transnet has five divisions comprising of NPA, Transnet Freight Rail, Transnet Rail Engineering, Transnet Port Terminals and Transnet Pipelines.

The activities of NPA are monitored by the Ports Regulator in terms of the Ports Act.

6. What are the functions of the National Ports Authority?

The main function of the NPA is to own, manage, control and administer ports to ensure their efficient and economic functioning. NPA manages the nine commercial ports.

The NPA also has the following functions:

- Plans, provides, maintains and improves port infrastructure.
- Prepares and periodically updates a port development framework plan for each port, which must reflect the Authority’s policy for port development and land use within such port.
- Provides for or arranges road and rail access within ports.
- Maintains the sustainability of the ports and their surroundings.
- Regulates and controls the development of ports.

- Controls land use within ports, and has the power to let land under such conditions as the Authority may determine.
- Arranges services such as water, lights, power, and sewage and telecommunications within ports.
- Maintains the sustainability of the ports and their surroundings.
- Regulates and controls the loading, unloading and storage of cargo and the embarkation and disembarkation of passengers.
- Regulates and controls off-shore cargo-handling facilities.
- Regulates and controls pollution and the protection of the environment within the port limits.
- Regulates and controls the enhancement of safety and security within the port limits.
- Prescribes the limits within which and the levels to which dredging may be carried out in the ports and the approaches thereto.
- Ensures that adequate, affordable and efficient port services and facilities are provided.
- Exercises licensing and controlling functions in respect of port services and port facilities.
- Ensures that any person who is required to render any port services and port facilities is able to provide those services and facilities efficiently.
- Promotes efficiency, reliability and economy on the part of the licensed operators in accordance with recognized international standards and public demand.
- Promotes the achievement of equality by measures designed to advance persons or categories of persons

historically disadvantaged by unfair discrimination in the operation of facilities in the port environment.

- Promotes the use, improvement and development of ports.
- Advises on all matters relating to the port sector, port services and port facilities.
- Promotes greater representivity, in particular, to increase the participation in terminal port operations of historically disadvantaged persons.
- Exercises the licensing of the erection and operation of off-shore cargo handling facilities and services relating thereto.
- Discharges or facilitates the discharge of international obligations relevant to ports.
- Facilitates the performance any function of any organ of state in a port.
- Promotes research and development in the sphere of port services and facilities.
- Regulates and controls navigation within port limits and the approaches to the ports.
- Regulates and controls entry into ports, stay, movements or operation in and departures from ports of all vessels
- Provides or arranges for tugs, pilot boats and other facilities and services for navigation and berthing of vessels in the ports.
- Provides controls and maintains vessel traffic services.
- In order for the NPA to discharge its functions as listed above, the NPA can elect to enter into agreements or issue licenses to third parties to undertake functions on its behalf.

- Unless a person has a licence or an agreement with NPA, no person may provide port service or operate a port facility.

6.1. What is an appeal?

An appeal is a process whereby a port user or licensed operator (“appellant”), lodges an appeal with the Ports Regulator against a written or unwritten decision of the NPA which affects his or her rights, and requires that the decision be changed or set aside. The appellant shall indicate the relief he/she seeks from the Ports Regulator. The Ports Regulator shall hear such an appeal.

The appellant is required to hand in his or her appeal on a Notice of Intention to Appeal form which may be found on the Regulator website or any office of SAMSA. This may be done either by hand delivery, by post, fax or e-mail. On handing in, the appellant shall be issued with a reference number and the contact details for making enquiries on the appeal progress. The appellant must attach the written confirmation of decision from NPA with the form, if it is available at the time of handing in. The Ports Regulator shall provide the NPA with the notice of appeal. After a specific period which is indicated in the Directives, the appellant is required to send to the Ports Regulator and the NPA, the grounds or reasons which he or she relies on as a basis to lodge the appeal against the decision by the NPA. The reasons or grounds shall be contained in an affidavit. The affidavit must have the NPA written decision as an annexure, if the decision was not attached to the Notice of Intention to Appeal form.

The Ports Regulator shall give the NPA an opportunity to respond to the appeal through an affidavit. Thereafter, the Ports Regulator shall convene a hearing in order to hear the appellant and the NPA. The appellant are allowed to bring legal representation. The parties may request documents held by the other party that is needed for their case. During the hearing, the parties may call witnesses to explain their side of the story. After the hearing, the Ports Regulator shall assess the submissions by the appellant and the NPA, and take a decision whether to uphold the written decision of the NPA, reject it all together, change it or replace it with its own decision. The Ports Regulator shall inform all parties of its decision.

6.2. What is a complaint?

A complaint is a method by which any person (“complainant”) whose rights or interests are affected by any action or failure to act by the NPA, hands in a complaint against the NPA with the Ports Regulator. The basis of the complaint shall either arise due to the fact that NPA is not carrying out its functions as indicated in clause 6 above or alternatively, on the grounds indicated in 3.5.1 to 3.5.4 above.

The complainant must hand in a complaint on an official complaint form that is provided by the Ports Regulator. The form may be accessed on the Ports Regulator website or requested by fax, telephone or email or from SAMSA offices at any port. After lodging the complaint, the complainant shall be issued with a reference number.

When the Ports Regulator receives a complaint, it has to determine whether the complaint is valid or not. Validity of the complaints means whether the complaint relates to grounds

for a complaint as set out in 3.5. It must also determine whether the action or failure to act that the complainant is complaining about may be regarded as the NPA not carrying out its functions.

If the Ports Regulator determines that the complaint is valid, the NPA shall be notified of the complaint. After the NPA is notified, the Ports Regulator shall also determine whether the complaint must be resolved through mediation, investigation or an investigation and hearing process. The mediation process shall involve the complainant and the NPA coming together with the assistance of a mediator (go-between) who is appointed by the Ports Regulator, to try and settle the matter between them.

In order for the Ports Regulator to determine whether the complaint must be resolved via mediation, the Ports Regulator must consider whether the action or failure to act affects only the complainant and the NPA, or whether it affects other parties as well. For example, a complainant lodges a complaint against the NPA on the basis that ports facilities and services provided by NPA are not adequate, affordable and efficient.

The Ports Regulator may be of the view that the complaint may not be settled through mediation because it affects other parties, therefore, it has to be investigated and a hearing conducted for a proper resolution of the complaint.

If the Ports Regulator determines that the complaint must be investigated, the process to be followed shall include requesting relevant information from the NPA, the complainant or any other party, interviewing NPA, the complainant and other relevant and interested parties.

The NPA shall be provided with an opportunity to respond to the complaint, and the complainant shall have the right to respond to the NPA submission. The Ports Regulator has the option to resolve the complaint with or without holding a public hearing.

Complainants may also hand in complaints on a confidential basis. In this instance the Ports Regulator will accept the complaint and the complainant shall not be requested to disclose his or her identity. The Ports Regulator shall therefore investigate and resolve the complaint without the participation of the complainant.

6.3 Right to participate at a Hearing

The following persons may participate at the Ports Regulator hearings:

- Any person appointed by the Regulator.
- The Complainant.
- The Appellant.
- The National Ports Authority.
- Any other person who has a material interest in the hearing, unless the presiding member (Chairperson of the hearing) of the Ports Regulator rules that another participant adequately represents that interest.

In handing in the complaint, the complainant must indicate how the Ports Regulator must resolve the complaint. For example, if the complainant is complaining that the NPA is not providing or arranging for road and rail access within ports, the complainant must indicate how the Ports Regulator shall resolve the complaint.

After the Ports Regulator has heard submissions from both parties it shall arrive at a decision and make an appropriate order as outlined in point 8 below. The Ports Regulator shall thereafter inform the complainant, the NPA and other relevant parties of its decision.

7. What orders may the Port Regulator issue for complaints

7.1. Interim Relief

The Ports Regulator may, if so requested by the complainant, make such interim order as it may deem necessary.

An interim order is an order that aims to provide a temporary solution to a complaint or appeal while the overall matter is being looked at.

7.2. Any other order

The Ports Regulator, in relation to any complaint, may;

- Interdict any conduct or action.
- Declare the whole or part of an agreement to be void or invalid.
- Condone any breach of its rules and procedures on good cause shown.

8. What order may the Ports Regulator issue for appeal

After considering an appeal, the Ports Regulator must either;

8.1. Confirm, set aside or vary the NPA decision.

8.2. Substitute the NPA decision with its own.

What the above means is that the Ports Regulator can overturn or approve the initial written decision of the NPA, for example, if the NPA refuses to issue a license, as contemplated by the Act, to a port user and the port user appeals to the Ports

Regulator, the Ports Regulator may decide to agree with the NPA decision if the Ports Regulator is convinced that the reasons for refusal, as submitted by the NPA, is reasonable. However, if it finds that the reasons for refusal are not sufficient or is unreasonable, it may direct that the NPA issue the license.

9. Register of complaints and appeals

(1) The Ports Regulator shall maintain separate registers for complaints and appeals in which the following information is recorded

(a) All complaints received, with details of the complaint, a brief description of the nature of the complaint, the date the complaint was received and the outcome of the complaint, provided that, if any complaint received is confidential:

(i) The register for complaints shall not reflect the identity of the complainant;

(ii) The Ports Regulator must keep a separate and confidential register which identifies confidential complainants;

(iii) The register identifying confidential complainants will not be available to the public or the Authority nor will not be made known by the Regulator as a result of any requests therefore in terms of the Promotion of Access to Information Act of 2000; and

(iv) All appeals lodged, with details of the name of the appellant, a brief description of the decision appealed against and the grounds of appeal, the date the appeal was received and the outcome of the appeal.

(2) Any interested person may inspect the complaints and appeals registers, but not the confidential complaints register, at the offices of the Ports Regulator during office hours.

10. Offences and penalties

A person shall be regarded as having committed an offence if:

- Having been summoned to appear before the Ports Regulator, a party refuses to appear.
- A party refuses to be sworn in or to make an affirmation after being directed to do so.
- A party refuses to answer, or fail to answer to the best of his or her knowledge, any question put, or
- A party refuses to comply with a requirement to produce a book, document or item specified in the directive summons.
- A party hinders or obstructs a person investigating a complaint lodged against the NPA.

11. National Port Authority Tariffs

The Ports Regulator's other main function is to approve, reject or amend the tariffs that the NPA charges its clients for providing port services and facilities.

The NPA must, annually, before the 1st August, submit its proposed tariffs to the Ports Regulator. The Ports Regulator

must analyse the tariffs and decide whether to approve or reject them.

The Ports Regulator has a right to hold public hearings in order for interested parties to comment on the tariffs. Hearings may be conducted at the Ports Regulator offices or at the respective ports around the country.

12. Location of offices of Ports Regulator

- (1) The offices of the Ports Regulator are open to the public every Monday to Friday, excluding public holidays, from 08h30 to 16h00.
- (2) Any document which is required to be served on, lodged or filed with the Regulator may be –
 - (a) delivered by hand to The Ports Regulator, 11th Floor, The Marine, 22 Dorothy Nyembe Street, Durban, Republic of South Africa; or
 - (b) transmitted by telefax on 27 31 365 7858;
 - (c) mailed by registered post to The Ports Regulator, Private Bag X 54322, Durban, 4000; or
 - (d) Submitted electronically by way of the website of the Regulator at www.portsregulator.org or emailed to tribunaladmin@portsregulator.org
- (3) Any document which is required to be served on the Authority shall be –
 - (a) delivered by hand to The Authority, Carlton Centre, 150 Commissioner Street Johannesburg, Republic

of South Africa, marked for the attention of: "The Transnet Group Chief Executive";

- (b) transmitted by telefax on 27 11 308 2312;
 - (c) mailed by registered post to The Authority, Private Bag X72501, Parkview, Johannesburg, 2122; or
 - (d) Delivered by hand to the Harbour Master at the relevant port closest to the physical address of the appellant or complainant.
- (4) Any document which is required to be served on any complainant or appellant shall be delivered by hand or transmitted by telefax at the address or telefax number indicated on the official complaint form or appeal form.
- (5) If a document is delivered outside of the office hours of the Regulator, that document will be deemed to have been delivered at 09h30 on the next business day.
- (6) A document that is delivered by telefax must include a cover page setting out –
- (a) The name, address, and telephone number of the sender;
 - (b) The name of the person to whom it is addressed, and the name of that person's representative if it is being sent to the representative of a person;
 - (c) The date and time of the transmission;

- (d) The total number of pages sent, including the cover page; and
 - (e) The name and telephone number of the person to contact if the transmission appears to be incomplete or otherwise unsuccessful.
- (7) If any document delivered is an originating complaint or Notice of Appeal, it shall be accompanied by the fee prescribed or proof of payment thereof, failing which the Regulator shall not consider such complaint or appeal.