



Date: 15 September 2023

TO: **Mr Sihle Mkhize**
Acting Chief Executive Officer
Ezemvelo KZN Wildlife

Email:
Cecilia.Sampson@kznwildlife.com

AND
TO: **Dr Andy Blackmore**
Manager Protected Area Planning &
IEM
Ezemvelo KZN Wildlife

Andy.Blackmore@kznwildlife.com

AND
TO: **Mr Lehlohonolo Joe Phadima**
Wildlife General Manager of
Conservation Services
Ezemvelo KZN Wildlife

lehohonolo.phadima@kznwildlife.com

FROM: BIODIVERSITY LAW CENTRE

kate@biodiversitylaw.org /
nina@biodiversitylaw.org

Total 9
pages:

Our ref: BLC/KPRB/001

Dear Sirs

RE: Queries regarding application of biodiversity offsets in respect of Karpowership project in Richards Bay

1. The Biodiversity Law Centre (**BLC**) is a non-profit organisation and law clinic, registered in 2021. Our vision is flourishing indigenous species and ecosystems that support sustainable livelihoods in Southern Africa. The BLC's mission is to use the law to protect, restore and preserve indigenous ecosystems and species in Southern Africa. In furtherance of our mission, we have particular interest in the proper implementation of South Africa's international, national and provincial biodiversity commitments; the legislation, policies and guidelines through which these are implemented and the lawful

application of relevant biodiversity instruments by the state in furtherance of its constitutional, statutory and international obligations.

2. As you are no doubt aware, Karpowership SA (Pty) Ltd (**Karpowership**) recently released a media statement referring to conclusion of an offset agreement with Ezemvelo KwaZulu Natal Wildlife (**EKZNW**) in respect of the Richards Bay Karpowership project (**Media Statement**). The Media Statement, *inter alia*, referred to a letter from EKZNW to the Department of Forestry, Fisheries and the Environment (**DFFE**) in which you indicated that EKZNW would not object to an Environmental Authorisation (**EA**) being issued on the basis that an offset agreement (**Agreement**) had been concluded.
3. Subsequently, a set of media reports have raised concerns regarding the Agreement, including EKZNW's apparent acceptance of an "out of kind" offset and undertaking not to oppose the EA (the **Reports**).¹ The Reports have, further, drawn attention to passages of concern in the Final Environmental Impact Assessment Report (**FEIAR**) relating to the application of offsets in respect of an "*almost entirely irreplaceable CBA*".²
4. Given the BLC's mission, we are particularly concerned by the Agreement (the terms of which have not been disclosed) and the implications its conclusion may have: (a) on EKZNW's conservation mandate, particularly in the context of offsets; and (b) for the future use of offsets.
5. Accordingly, we address this correspondence to you in the interests of clarifying the position in relation to the use of biodiversity offsets, noting your conservation mandate and the obligations on all organs of state to adhere to EIA Regulations.

Information provided to date and the need for further clarity

6. The Agreement is referred to several times in the FEIAR and Environmental Management Programme (**EMPr**):
 - 6.1. The EMPr refers to an "agreement" in respect of the post-construction and operational phases stating:³

"An agreement must be concluded with EKZNW on an appropriate biodiversity offset to compensate for residual impacts on waterbirds that cannot be effectively avoided, minimised, or mitigated through implementation of measures. It is noted that an agreement has been developed with input from EKZNW and detailed in Chapter 7 of the EIA Report".

¹ See, for example, Susan Comrie (7 September 2023) "Karpowership to buy government a game farm", *amaBhungane*, available online <https://amabhungane.org/stories/karpowership-to-buy-government-a-game-farm/>; Tony Carnie (11 September 2023) "Karpowership game ranch 'donation' raises new stink over green offset schemes", *Daily Maverick*, available online <https://www.dailymaverick.co.za/article/2023-09-11-karpowership-game-ranch-donation-raises-new-stink-over-green-offsets/>.

² FEIAR, p 181.

³ FEIAR, pp 98 and 189.

- 6.2. The section of the EMPr which clearly focuses on offsets, however, appears at paragraph 7.6.8 of the EMPr (under the heading “Planning and Design Phase & Pre-Construction Activities & Offset”).
- 6.2.1. The relevant Impact Management Outcome reads “*Ensure ecological sustainability of the project through mitigation of residual medium-high and medium impacts through offset and ecological compensation to achieve net-zero biodiversity impacts*”.
- 6.2.2. The first of the listed “Impact Management Actions” states “*Ensure implementation and compliance with the Offset agreement entered into between EKZN Wildlife in terms of the roles and responsibilities applicable to Karpowership*”.
- 6.2.3. Further actions include development, review and amendment of a management plan for “*in-kind estuary offset*” in addition to review of “*performance of out-of-kind, as per management plan*”.
- 6.3. The Impact Management Actions in the EMPr appear to respond to the need to address impacts on the marine/estuarine environment and, in particular, key avifauna habitats and the Richard’s Bay sandspit.⁴ However, it appears that the offset plan has not identified a single equivalent marine/estuarine offset area but has determined that both a “*like for like*” and “*out of kind*” offset are required.
- 6.4. The details appear from number of statements in the FEIAR. However, as set out below, further clarity is required for the Competent Authority to be able to make a reasonable and rational decision in terms of NEMA and the EIA Regulations, 2014 in relation to the offset. This is in addition to ensuring that the entire EIA process meets the requisite standards of transparency, public participation, sound environmental governance and due process:
- 6.5. Insofar as the FEIAR provides information regarding the “like-for-like” offset; “out of kind” offset and Agreement, we have identified the following details:
- 6.5.1. In respect of the “in-kind estuary offset” it appears that:
- a) the best estuarine offset location is the uMhlathuze Estuary “*or equivalent*” – but entails “*complexities regarding anthropogenic aspects, inclusive of landownership and proposed Port long term strategies as well as numerous stakeholders involved in the estuarine health and ecosystem improvements*”;⁵

⁴ FEIAR, p 422.

⁵ FEIAR, p 426.

- b) these “complexities” led to “*equivalent determinations supported by estuarine management plans, strategic assessments as well as the out-of-kind recommendation by EKZNW*”;⁶
- c) despite these “complexities”, an “in kind” estuary offset is still contemplated – but it has not yet been designed;⁷
- d) the intention is that the estuarine offset will be regulated through the existing Umhlathuze Estuary Management Plan which informs the Agreement;⁸
- e) costing of the “like for like” offset has not yet been determined with Karpowership to “*determine the costing... and ensure adequate funding for programming... securing, rehabilitation and management with monitoring and evaluation of the offset over the life of the project*”;⁹.

6.5.2. In respect of the “out of kind” offset, it appears that:

- a) the Madaka Game Ranch is an area identified by EKZNW and EKZNW has been looking for an opportunity to purchase the property for “*many decades*”;¹⁰
- b) EKZNW’s interest in Madaka Game Ranch relates to black and white rhinoceros and elephant conservation and “*national strategic conservation programmes*”;¹¹
- c) the “out of kind” offset will be managed through the existing Management Plan for the Ithala Game Reserve which informs the Agreement;¹²
- d) it entails a funding agreement in terms of which Karpowership funds the purchase of Madaka Game Ranch as well as “*reasonable costs of management... for the duration of the project as part of its sustainable offsets commitment*” (with costs to be determined annually);¹³

6.5.3. The “Agreement” is referenced in paragraph 7.9.1.5 at p 421-422 of the FEIAR which states:

“It was acknowledged and agreed between Karpowership and EKZNW that the coastline in the vicinity of the Project, including the Richards Bay Nature Reserve (commonly known as the ‘Sanctuary’) was highly conducive as the marine/estuarine

⁶ FEIAR, p 426.

⁷ FEIAR, p 422.

⁸ FEIAR, p 439.

⁹ FEIAR, p 439.

¹⁰ FEIAR, p 432.

¹¹ FEIAR, p 432.

¹² FEIAR, p 439.

¹³ FEIAR, p 439.

offset receiving environment. *The Marine / Estuarine Offset (in-kind) will be realised after the commencement of the operation of the Project as the development thereof is constraint by the absence of legislative guidance (policy and guideline) and existence of anthropogenic complexities. Thus, an out-of-kind offset was agreed to, to compensate biodiversity for such delays.*

The best type thus, following consideration of the anthropogenic complexities associated with estuaries and the absence of a specific guideline for estuaries and marine offshore projects were:

- 1. Like-for-Like (In-Kind); and*
- 2. Out-of-Kind.*

Karpowership has made a commitment to EKZNW to minimise and remedy any identified material loss of biodiversity resulting from the project and both an “In-Kind” and “Out of Kind” Biodiversity Offset / Ecological Compensation will be implemented as an intervention to counterbalance the residual negative impacts of the activities on biodiversity. This will ensure increased protection with appropriate management to duly compensate for residual environmental impacts that could potentially occur by following the implementation of the mitigation hierarchy.” (emphasis added).

- 6.5.4. An apparent summary of the offsets is provided at p 432 of the FEIAR which states:

*“The preferred offset sites comprise a **combination of the like-for-like** marine offset at the coastline in the vicinity of the Project that includes the Richards Bay Nature Reserve (commonly known as the ‘Sanctuary’) as the preferred location / receiving environment (with equivalent options should this be required), **together with the ‘out-of-kind’** at Madaka Game Ranch to be incorporated within the Ithala Game Reserve.*

In determining the approach to offset for the coastal, estuarine and marine environments, discussions with EKZNW ensued and a framework agreement was agreed to, with EKZNW in accordance with co-operative governance, engaged with the Competent Authority on an acceptable approach and agreement. EKZNW advised on the like-for-like offset in addition to combined annual planning and implementation and the best option to acquire the Madaka property” (underlining added; bold original emphasis).

- 6.5.5. Finally, we note that paragraph 7.9.1.3 of the FEIAR reflects the process set out in the Concise Guideline: Biodiversity Offsets in KwaZulu Natal. This includes the requirement to prepare a biodiversity offset report. We note, however, that no such report appears among the documentation available on the Environmental Assessment Practitioner’s website as an annexure to the FEIAR.

Request for clarification

7. In light of the above, the BLC would appreciate EKZNW providing the following information / clarifications:
 - 7.1. Is EKZNW in possession of the Biodiversity Offset Report? If so:
 - 7.1.1. When was the Biodiversity Offset Report prepared and by whom?
 - 7.1.2. When was the Biodiversity Offset Report made available for public comment?
 - 7.1.3. Who contributed to developing the “agreement” contemplated at p 98 and 189 of the EMPr (cited at para 6.1 above).
 - 7.1.4. We would appreciate your forwarding a copy to the BLC.
 - 7.2. Please confirm what was determined to be the optimum type of biodiversity offset, in light of the combination of a “like for like” and out-of-kind offset (which is also referred to as monetary compensation).
 - 7.3. Please confirm the specific residual impacts in respect of which an offset has been determined, as it is not possible to discern this from the FEIAR.
 - 7.3.1. In respect of which “phase” of the development project do these refer (noting the text referenced in paragraph 6.1 and 6.2 above).
 - 7.3.2. Please indicate where these are referenced in the FEIAR and/or Specialist Studies.
 - 7.3.3. Please clarify whether these impacts entail any loss of irreplaceable biodiversity and/or biodiversity underpinning important ecosystem services.
 - 7.4. Please explain how the adequacy of the offset has been calculated including ratios and criteria used.
 - 7.5. Please provide any records of consultation with local communities in relation to the uMhlathuze/estuarine and Madaka Game Ranch offsets.
 - 7.6. In relation to the estuarine offset:
 - 7.6.1. Please clarify whether the estuarine offset will, in fact, occur in the uMhlathuze Estuary / “Sanctuary” (see reference to an “equivalent” cited in para 6.5.1.a) above).
 - 7.6.2. Is the uMhlathuze Estuary subject to existing protected areas / biodiversity / coastal conservation obligations? If so, how does this justify its use as an offset area?

- 7.6.3. What are the “complexities” leading to delays in implementing an estuarine offset?
- 7.6.4. Please explain what is contemplated in terms of a delayed offset strategy in relation to an estuarine offset.
- 7.6.5. Please clarify how the estuarine offset will be functionally viable in the long term.
- 7.6.6. Please confirm how the estuarine offset will contribute to KZN’s conservation plans and targets.
- 7.6.7. Please confirm how the specific estuarine offset will “*ensure ecological sustainability of the project*” (see para 7.68 of the EMPr cited at para 6.2.1 above).
- 7.6.8. What guarantees are in place in relation to the management of the uMhlathuze or “equivalent” offset area?
- 7.6.9. Please provide details regarding:
- a) the offset activities to be undertaken in relation to the uMhlathuze or “equivalent” area;
 - b) the responsibilities for undertaking various offset activities (including the parties responsible for managing, monitoring and auditing the offset)
 - c) the responsibilities applicable to Karpowership as contemplated in paragraph 7.6.8 of the EMPr cited in para 6.2.2 above);
 - d) the timeframes for delivery and completion of the offset activities;
 - e) the duration of the relevant offset activities;
 - f) the “*estuarine management plans, strategic assessments*” referenced in the FEIAR and cited at para 6.5.1.b) above).
- 7.6.10. To the extent that any of these details have not yet been determined (as suggested by the text cited at para 6.5.1.e) above), what information will be placed before the Competent Authority to enable them to assess the viability and lawfulness of this offset?
- 7.6.11. Please explain how the estuarine offset will be determined in the “*absence of legislative guidance*” as indicated in the text at paragraph 7.9.1.5 of the FEIAR cited at para 6.5.3 above).

- 7.6.12. Please indicate where the accurate description of the offset activities relating to the uMhlathuze or “equivalent” offset appears in the FEIAR and Specialist Reports.
- 7.6.13. How will the “*out-of-kind recommendation by EKZNW*” address complexities relating to estuarine offsets (see text from FEIAR cited at para 6.5.1.b) above)?
- 7.7. In relation to the Madaka Game Ranch offset:
- 7.7.1. Please clarify the precise purpose of the Madaka Game Ranch offset.
- 7.7.2. To the extent that the Madaka Game Ranch offset is referred to as both “out of kind” and “compensation”, please clarify the type of offset contemplated.
- 7.7.3. How was the adequacy of the Madaka Game Ranch offset determined and “translated” into financial terms?
- 7.7.4. In what respects does acquisition of the Madaka Game Ranch entail “trading up” insofar as this requires securing a habitat of a higher conservation priority than the effected estuarine area which is designated as a CBA?
- 7.7.5. How does the Madaka Game Ranch offset compensate for loss of estuarine ecosystem services?
- 7.7.6. How will “*reasonable costs of management*” of the Madaka Game Ranch be determined (as contemplated in the text cited at para 6.5.2.d) above)?
- 7.7.7. Please confirm the “duration of the project” as contemplated in relation to the funding arrangements for the Madaka Game Ranch agreed to between Karpowership and EKZNW (as contemplated in the text cited at para 6.5.2.d) above).
- 7.7.8. Please clarify the process of auditing / monitoring of receipt of funds from Karpowership in relation to the Madaka Game Ranch funding.
- 7.7.9. What financial guarantees are in place in relation to the management of the Madaka Game Ranch offset area?
- 7.7.10. Please provide details regarding:
- a) the offset activities to be undertaken in relation to the Madaka Game Ranch area;
 - b) the responsibilities for undertaking various offset activities (including the parties responsible for managing, monitoring and auditing the offset);
 - c) the timeframes for delivery and completion of the offset activities;

d) the duration of the relevant offset activities.

7.7.11. Please indicate where the accurate description of the offset activities relating to the Madaka Game Ranch offset appears in the FEIAR and Specialist Reports.

7.8. In respect of EKZNW's letter to the DFFE and the Agreement:

7.8.1. Please explain the context of EKZNW's letter to DFFE which is described and partly quoted in the Reports.

7.8.2. On what basis has EKZNW "agreed" not to oppose the Karpowership EA application?

7.8.3. Does this "agreement" not to oppose the Karpowership EA application indicate that EKZNW will not raise any concerns regarding aspects of the project unrelated to the offset agreement (for example, matters pertaining to air emissions; need and desirability; procedural compliance and so on)?

7.8.4. In light of what is stated at p 98 and p 189 of the EMPr (cited in para 6.1) is the Agreement already concluded or still to be concluded?

a) In the event that there are a series of agreements and/or MOUs contemplated, please clarify.

b) Please explain what is meant by the "*framework agreement*" referenced at p 432 of the FEIAR and cited at para 6.5.4 above).

7.9. Please indicate the precise conditions relating to the offsets which are to be presented to the Competent Authority for consideration in relation to the EA.

8. Finally, we would urge EKZNW to publish the letter of 22 August 2023 to DFFE alluded to in the Reports in addition to the agreement concluded between EKZNW and Karpowership, and request that copies of both be furnished to us.

9. We trust you will consider the above in light of the requirements of procedural fairness; just administrative action and consonance with NEMA; in addition to ensuring ease of use and coherence for the benefit of all prospective EIA stakeholders.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC
Per Nina Braude and Kate Handley