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**APPEAL IN TERMS OF SECTION 43(1) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, 1998 AGAINST THE ENVIRONMENTAL AUTHORISATION GRANTED TO KARPOWERSHIP SA (PTY) LTD IN RESPECT OF THE DEVELOPMENT OF A GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDS BAY WITHIN THE UMHLATHUZE LOCAL MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE (AUTHORISATION REGISTER NUMBER: 14/12/16/3/3/2/2007)**

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## INTRODUCTION

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. This appeal is lodged to set aside the decision by the Chief Director: Integrated Environmental Authorisations of the Department of Forestry, Fisheries and the Environment (**DFFE**) to issue an environmental authorisation to Karpowership SA (Pty) Ltd (**Karpowership**) for purposes of "*The Development of a Gas to Power via Powership Project at the Port of Richards Bay within the Umhlathuze Local Municipality in the KwaZulu-Natal Province*" (reference: 14/12/16/3/3/2007) (**the EA**). The EA is attached as "**BLC1**."
3. The EA was granted on 25 October 2023 and made available to Stakeholders and Interested and Affected Parties via an e-mailed link on 2 November 2023. The notification of the EA is attached as "**BLC2**."
4. This appeal is filed in terms of section 43(1) of the National Environmental Management Act, 107 of 1998 (**NEMA**) read with Regulation 4(1)(a) of the National Appeal Regulations, 2014.<sup>1</sup> To the extent possible, an endeavour will be made to make this appeal available to those registered I&APs and organs of state with an interest in the matter, insofar as these are known to the BLC and within time and cost constraints. To this end, we have:
  - 4.1. sent this appeal under cover of an e-mail to Karpowership's Environmental Assessment Practitioner (**EAP**) as well as Ezemvelo KZN Wildlife (**EKZNW**); and

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<sup>1</sup> Published under GNR993 in GG 38303 of 8 December 2014.

- 4.2. requested that the EAP provide us with the list of Interested and Affected Parties (**I&APs**) and relevant organs of state, and in the alternative, that the EAP distribute this appeal on our behalf.
5. Pursuant to section 43(7) of NEMA, an appeal lodged in terms of section 43 suspends an environmental authorisation. Accordingly, we confirm that the EA is suspended until such time as this appeal (and any other appeal) is finally resolved.
6. We submit that this appeal should be upheld, for the reasons which appear below, and that the EA should be set aside.

## **OVERVIEW AND BACKGROUND**

7. This appeal focuses on the conditionality of an EA on “biodiversity offsets” which, it is submitted, are irregular and unlawful, as well as the premature granting of an authorization in the absence of an adequate Environmental Management Programme (**EMPr**) and details regarding the location and specific impacts of the project to which the authorised activities relate.
8. The BLC became aware of the extent of the offset irregularities when, on 6 September 2023, Karpowership released a media statement referring to conclusion of an offset agreement with EKZMW followed by a series of media reports which, *inter alia*, referred to certain undertakings and statements made by representatives of EKZMW.<sup>2</sup> The media statement is attached as “**BLC3**”.
9. The BLC subsequently attempted to locate a Biodiversity Offset Report to assess the context of the reported biodiversity offset.
10. Unable to locate the relevant report, the BLC reviewed the Final Environmental Impact Assessment Report (**FEIR**) and EMPr to determine:
  - 10.1. the full extent of the reported offset agreement and to identify the basis on which both an “out-of-kind” and “like-for-like” offset had been proposed;
  - 10.2. in respect of which residual impacts these had been designed; and
  - 10.3. whether the proposed offsets were in fact capable of fulfilling their stated purpose.
11. It rapidly became apparent that the FEIR and EMPr lacked the necessary information to make these determinations – and that the absence of a Biodiversity Offset Report among the specialist reports included in the FEIR was highly problematic given the primacy of the role of offsets in enabling Karpowership’s development to proceed in a sensitive estuarine area.

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<sup>2</sup> 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/>.

12. Accordingly, and in order to seek the necessary clarity as a stakeholder committed to ensuring the prevention of degradation, conservation and restoration of South Africa's biodiversity, the BLC addressed its concerns to EKZNW on 15 September 2023 (**BLC Letter**). The BLC Letter is attached as "**BLC4**".
13. After considerable delay and a series of follow-up e-mails, the BLC received a response from EKZNW on 24 October 2023 (**EKZNW Response**). The EKZNW Response failed to provide critical explanations regarding the basis for the offset proposals, raised doubts about the viability of the proposed "like-for-like" offset, indicated that no Biodiversity Offset Report had been viewed by EKZNW and referred the BLC, in large part, to Karpowership's Environmental Assessment Practitioner (**EAP**). The EKZNW Response is attached as "**BLC5**".
14. Accordingly, on 3 November 2023, the BLC addressed correspondence to the EAP in which it forwarded the queries that had been raised with EKZNW, explained that EKZNW had recommended that the BLC seek further explanations from the EAP, and requested such explanations. This correspondence is attached as "**BLC6**".
15. To date, the BLC has not received any response to its queries from the EAP.
16. In the interim, and on 2 November 2023, the BLC received notification as an I&AP that an EA had been granted.
17. On further review of the terms and conditions of the EA, it became readily apparent that the EA was premature insofar as:
  - 17.1. the layout of the development and thus its impacts had yet to be determined;
  - 17.2. a suitable EMPr had not been approved (and remained subject to public consultation); and
  - 17.3. both "out-of-kind" and "like-for-like" offsets remained uncertain and subject to approval by EKZNW and the DFFE, but without making provision for public consultation.
18. As set out more fully below, it is submitted that these conditions render the EA materially inconsistent with the provisions of Chapter 5 of the National Environmental Management Act, 107 of 1998 (**NEMA**); the environmental management principles set out in section 2 of NEMA (**Principles**); the Environmental Impact Assessment Regulations, 2014 (**Regulations**) and as a consequence, a breach of the constitutional obligations provided for in section 24(b) of the Bill of Rights. Moreover, it is submitted that the EA is inconsistent with the rule of law, is unlawful and irrational..
19. The BLC thus lodges this appeal and submits that on a proper reading of section 24 of the Constitution, NEMA and the Regulations and on a proper consideration of the role of biodiversity offsets and the information placed before the Competent Authority (**CA**), the EA falls to be set aside.

## SUMMARY OF GROUNDS OF APPEAL

20. This is an appeal focused on the procedural and substantive flaws in the EA, highlighted by the Conditions pertaining to “Offset Requirements” which appear at paragraphs 56-64 of the EA. As set out more fully below, the BLC submits that the decision to grant the EA should be set aside by the Honourable Minister as the flaws addressed in this appeal render the EA non-compliant with the principles and provisions of NEMA, unconstitutional, unlawful and irrational in its entirety.
21. In sum, the BLC submits that the CA’s decision to grant the EA should be set aside on the following grounds:
- 21.1. Ground 1: Failure to consider impacts. The EA contravenes section 24(1) of NEMA and the legislative scheme of Chapter 5 of NEMA in that, in the absence of a final project layout and prior to conclusion of 12-months of further avifauna monitoring, the potential consequences for and impacts on the environment of the Karpowership Richard’s Bay project (**Project**) could not have been adequately considered, investigated and assessed.
- 21.2. Ground 2: Contravention of material requirements for consideration of an EA. Chapter 5 of NEMA read with the Regulations contemplates certain material requirements for consideration of an EA, including a approved EMPr..<sup>3</sup> The EA does not approve the EMPr, and consequently the EA should not have been granted.
- 21.3. Ground 3: Failure by CA to take relevant factors into account. The obligations under section 24O(1) of NEMA to “*comply with this Act*”<sup>4</sup> and to take account of all relevant factors, contemplated in section 24O(2) of NEMA read with the Regulations, have not been complied with. These include:
- 21.3.1. the environmental impact or environmental degradation likely to be caused if the application is approved;<sup>5</sup>
- 21.3.2. measures that may protect the environment from harm and “*prevent, control, abate or mitigate*” any such harms;<sup>6</sup>
- 21.3.3. the applicant’s ability to implement mitigation measures;<sup>7</sup> and
- 21.3.4. guidelines, departmental polices and environmental management instruments adopted.<sup>8</sup>
- 21.4. Ground 4: Unlawfully issuing a conditional EA. The requirements of Regulation 24 have not been complied with. Regulation 24 requires that an application for environmental authorisation should be either “granted” or “refused”.<sup>9</sup> Instead, the

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<sup>3</sup> NEMA, s 24N(1A) read with ss 24N(2)-(3) read with Regulation 23(1)(a) and Appendix 4.

<sup>4</sup> NEMA, s 24O(1)(a).

<sup>5</sup> NEMA, s 24O(1)(b)(i).

<sup>6</sup> NEMA, s 24O(1)(b)(ii).

<sup>7</sup> NEMA, s 24O(1)(b)(iii).

<sup>8</sup> NEMA, s 24O(1)(b)(viii); Regulation 18.

<sup>9</sup> Regulation 24(1).

EA requires further impact assessments, layout design, EMPr design and offset design prior to the commencement of activities. In this manner, the CA has issued a conditional EA, which it is not empowered to do.

21.5. Ground 5: Failure to comply with public participation requirements. The purpose and requirements of public participation as contemplated in Regulations 40 and 43 have not been complied with. This is because the EA contemplates the development of an offset design for both the “out-of-kind” and “like-for-like” offsets without requiring that the offset design document be subject to public participation. Further, critical information has not been provided to the public for comment, including the “agreement” concluded between Karpowership and EKZNW in respect of prospective offsets. In this manner, the EA contemplates a process that is procedurally unfair, unlawful, contrary to the provisions of NEMA and a violation of the rights of I&APs.

21.6. Ground 6: Failure to comply with the environmental management Principles. The EA does not demonstrate that a risk averse and cautious approach – as required by the circumstances – was taken. Further the Richards Bay estuary is a sensitive, vulnerable, highly dynamic or stressed ecosystem which requires specific attention, and this was not considered by the CA.

22. In addition, the BLC submits that the CA’s granting of the EA constitutes administrative action which materially and adversely impacts the rights and legitimate expectations of I&APs and the people of South Africa. Accordingly, the decision is required to comply with the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (**PAJA**). In this regard, and as highlighted below, the BLC notes that the CA’s decision is unlawful, irrational and unreasonable in material respects.

23. This appeal first outlines key aspects of the EA. Thereafter, it addresses the six appeal grounds in detail.

## **ENVIRONMENTAL AUTHORISATION**

24. The EA permits Karpowership to undertake environmental activities listed in Listing Notices 1, 2 and 3 enabling the construction and operation of infrastructure in the Port of Richards Bay, including, *inter alia*, an overhead electricity transmission line, transmission-line towers, two Powerships and a floating storage regassification unit (**FSRU**), subsea gas pipeline and switching station. These activities are authorised with referenced to their potential impacts on a watercourse, the estuarine functional zone, the littoral active zone, wetlands and in the close proximity to a number of protected areas including Richards Bay Nature Reserve and Enseleni Nature Reserve.<sup>10</sup>

25. Included in the EA, is an extensive set of conditions (**Conditions**). Those most relevant to this appeal include:

25.1. *“The final site layout plan(s) for the gas to power via powership and its associated infrastructure... and all mitigation measures as dictated by the final site layout plan,*

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<sup>10</sup> EA pp 3-10.

*must be submitted for approval prior to construction*"; made available for public comment which must be considered by Karpowership. The layout maps must show, the position of the Powerships and FSRU and their mooring positions; the final route of the transmission lines; the switching station, gas pipelines and all "associated infrastructure", sensitive features and no-go and buffer areas";<sup>11</sup>

25.2. The EMPr is "*not approved and must be amended to include measures as dictated by the final site lay-out map(s) and micro-siting, and the provisions of the Environmental Authorisation*". This EMPr must be made available for public comments which Karpowership must consider and submitted to the DFFE for approval.<sup>12</sup> In addition, the EMPr must include details of the offsets described below.

25.3. "*A 12-month pre-construction monitoring must be used to determine and inform the marine "In-Kind offset requirements, the layout plan and EMPr"*.<sup>13</sup>

25.4. An "out-of-kind" offset is contemplated. On the one hand, it is described as the purchase of the Madaka Game Ranch which must be incorporated into Ithala Nature Reserve and registered as a protected area. On the other hand, the conditions state that this offset is still to be designed, detailed, made subject to a formal agreement and submitted to EKZNW as well as two directorates of the DFFE for comment prior to approval by the Chief Directorate: Integrated Environmental Authorisations. This must occur prior to commencement of the activity. The offset design document which must be submitted is required, *inter alia*, to "*provide sufficient detail to properly inform a decision on whether the offset will adequately and sustainably counterbalance the impact*".<sup>14</sup>

25.5. A "Like-for-Like" offset is contemplated with the first requirement being that Karpowership "*design and detail a marine offset in accordance with the National Biodiversity Offset Guideline*" in which the offset area "*must be comprised of the same or similar biodiversity components and landscape features as those in the affected area*". The offset design must be submitted to the same authorities as the out-of-kind offset design for the same approval process.<sup>15</sup>

26. The reasons for decision are provided in Appendix 1 of the EA (**Reasons**).

26.1. These Reasons list information considered by the CA including the various specialist reports (among which is the EMPr prepared by NS Environmental (Pty) Ltd dated May 2023). Pertinently, there is no reference to a Biodiversity Offset Report.

26.2. "Key factors considered in making the decision" are set out at p 26, para 2. These include the statement that "*A sufficient public participation process was undertaken, and the applicant has satisfied the minimum requirements as prescribed in the EIA Regulations, 2014 as amended for public comment*".<sup>16</sup>

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<sup>11</sup> EA p 14, para 12.

<sup>12</sup> EA p 15 para 14.

<sup>13</sup> EA p 19 para 46.1.

<sup>14</sup> EA pp 21-22 paras 57-60.

<sup>15</sup> EA pp 22-23, paras 61-64.

<sup>16</sup> EA p 26, para 2(f).

26.3. The “Findings” set out a pages 26-27, paragraph 3 include the statements that:

26.3.1. *“The proposed mitigation of impacts identified and assessed adequately curtails the identified impacts”*,<sup>17</sup> and

26.3.2. *“EMPr measures for the pre-construction, construction, and rehabilitation phases of the development were proposed and included in the EIAR and will be implemented to manage the identified environmental impacts during the construction phase”*.<sup>18</sup>

## **GROUND 1: FAILURE TO ASSESS IMPACTS**

27. Environmental authorisations are regulated by the “integrated environmental management” provisions set out in Chapter 5 of NEMA.<sup>19</sup> The operative provisions pertaining to the requirements of an environmental authorisation appear in section 24 read with the minimum conditions specified in section 24E, the criteria to be taken into account referenced in section 24O, as well as the further requirements pertaining to consultation, impact assessments and conditions set out sections 24K, 24N, 24Q and the Regulations.

28. Section 24(1) of NEMA makes it clear that *“the potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority”* in order to give effect to the objectives of integrated environmental management set out in section 23.

28.1. The general objectives set out in section 23(2) not only indicate that the Principles should be integrated into the making of all decisions with a *“significant effect on the environment”* and require that adequate public participation is provided, but also include objectives specifically related to the need to properly assess risks of environmental harm and properly assess and manage such harms before the activities commence which may give rise to such harms.

28.2. The importance of predicting actual and potential environmental impacts with the objective of minimising harms and promoting compliance with the Principles is made clear in section 23(2)(b) which indicates the objective of integrated environmental management of activities to:

*“identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2”* (emphasis added)

28.3. The importance of advance consideration of environmental impacts is further emphasised by the objective expressed in section 23(2)(c) to:

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<sup>17</sup> EA p 26, para 3(c).

<sup>18</sup> EA p 27, para 3(d).

<sup>19</sup> NEMA, s 23(2).

*“ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them” (emphasis added).*

28.4. In addition, the objectives emphasise the importance of considering specific environmental attributes and identifying appropriate management tools in light of the Principles as is set out in section 23(2)(e) and (f) which refer to:

*“[ensuring] the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment”*

and

*“[identifying and employing] the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in section 2”*

(emphasis added).

29. For these objectives to be met, it is critical that the impacts of activities are accurately assessed in the context of the Principles (including the *“risk-averse and cautious approach”* contemplated in section 2(4)(a)(vii)) and that such assessment occur before an environmental authorisation is granted and before any activities (as defined) may commence. This procedural design is emphasised by the requirement that *“the environmental impacts, mitigation and closure outcomes as well as the residual risks of the proposed activity must be set out in the environmental impact assessment report”*<sup>20</sup> and the objectives of the EIA process, including that the development footprint on the approved site is identified in the context of a risk assessment and that impacts are properly scrutinised.<sup>21</sup>

30. It follows that where impacts, mitigation measures and reduction of harms have not yet been assessed, no environmental authorisation can be granted.

31. In this case, the conditions of the EA themselves recognise that essential impacts and mitigation measures have not been assessed in advance of the granting of EA.

31.1. Condition 12<sup>22</sup> indicates that *“the final site layout plan(s) for the gas to power via powership and its associated infrastructure... and all mitigation measures as dictated by the final site layout plan, must be submitted to the Department for approval prior to construction”*. This must be made available for public comment and formally approved by the DFFE.

31.2. Condition 14<sup>23</sup> refuses approval of the EMPr and requires that, *inter alia*, measures *“dictated by the final site layout-map(s) and micro-siting”* are accounted for. Like the final site layout plan itself, this EMPr must be made available for public comment.

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<sup>20</sup> Regulations, Appendix 3, item 1(2) with reference to the requirements of an EIAR.

<sup>21</sup> Regulations, Appendix 3, item 2(c)-(h).

<sup>22</sup> EA p 14.

<sup>23</sup> EA p 15.



- 31.3. Condition 46<sup>24</sup> requires a “12-month pre-construction monitoring for avifaunal species... to inform the scale and magnitude of the residual impacts”. The outcome of such monitoring “must be used to determine and inform the marine “In-Kind” offset requirements, the layout plan and EMPr”.
32. Read together, these conditions demonstrate that the process of considering, investigating, assessing and reporting on the potential consequences for or impacts of the proposed activities on birdlife is inadequate to determine “residual impacts” or whether an offset is possible, suitable or appropriate.
- 32.1. In the absence of a final layout plan, it is logically impossible to assess the extent of the impacts, evaluate their severity, determine appropriate mitigation measures, consider their efficacy and (crucially for the purpose of determining offsets) determine residual impacts.
- 32.2. Moreover, Condition 46 expressly recognises that the “scale and magnitude” of residual impacts on birdlife is unknown and is still to be determined. It is thus impossible that the potential harms of the proposed activities and the environmental attributes of the Project site received adequate consideration or that the best modes of environmental management could have been considered and assessed by the CA. It is certainly impossible to indicate that due consideration could have been given to the need and suitability of any kind of offset.
- 32.3. The scheme of Chapter 5 of NEMA makes it clear that these considerations must be placed before the decision-maker prior to the granting of an EA. This information is critical to inform a decision, and should not be left until after an EA is granted.
- 32.4. It is thus inconsistent with section 24(1) and the scheme of Chapter 5 to grant an EA acknowledging that the process of consideration has still to be completed and rendered subject to further public participation and (further) formal authorisation.
33. By granting the EA in the absence of assessment of impacts, determination of mitigation of measures and the ability of the CA to consider whether the resultant risks of environmental harm, the CA has failed to comply with section 24(1) of NEMA.
34. NEMA is key to the obligation placed upon the State by section 24(b) of the Constitution to ensure that legislation and other measures ensure protection of the environment for the benefit of present and future generations by preventing pollution and ecological degradation; promoting conservation and securing ecologically sustainable development. In failing to comply with the requirements of NEMA – particularly those integral to the scheme to prevent environmental harms – the CA has failed to act in accordance with its constitutional obligations and uphold the concomitant environmental rights.
35. Accordingly, the Conditions are a contravention of section 24(1) of NEMA, unconstitutional and unlawful, are fatal to the EA and render the EA liable to be set aside.

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<sup>24</sup> EA pp 19-20.

## GROUND 2: MATERIAL REQUIREMENTS FOR CONSIDERATION OF AN EA APPLICATION ARE ABSENT

36. Section 24(1A) of NEMA requires all applicants to comply with prescribed requirements in relation to pre-application steps including “*any environmental management programme*”.<sup>25</sup>
37. Section 24N(1A) of NEMA prescribes that an EMPr must be submitted before an EA application may be decided. Such EMPr must contain prescribed information<sup>26</sup> including:
- 37.1. time-periods for implementing contemplated measures;<sup>27</sup>
  - 37.2. measures to address environmental damage and pollution inside and outside the operational area;<sup>28</sup> and
  - 37.3. an environmental awareness plan for employees;<sup>29</sup>
38. Regulation 23(1)(a) prescribes that an Environmental Impact Assessment Report (**EIAR**) must be submitted by an applicant for an EA within 106 days of acceptance of a scoping report “*inclusive of any specialist reports, an EMPr .... which must have subjected to a public participation process of at least 30 days and which reflects the incorporation of comments received....*”.
- 38.1. The content of an EMPr is prescribed in Appendix 4 of the Regulations, including details of potential impacts and risks to be “*avoided, managed and mitigated*”; a description of proposed impact management actions to “*avoid, modify, remedy, control or stop any action, activity or process which causes pollution or environmental degradation*” and details regarding monitoring and reporting of such measures.<sup>30</sup>
39. Regulation 26(d)(iv) prescribes that an EA must specify conditions subject to which an activity may be undertaken including those determining “*requirements for the avoidance, management, mitigation, monitoring and reporting of the impacts of the activity on the environment throughout the life of the activity additional those in the approved EMPr....*”.
40. It is clear that:
- 40.1. a requirement of an EA application is that an acceptable EMPr is submitted; and
  - 40.2. a requirement of an EA that is granted is that it approves the EMPr.
41. In this case, Condition 14 does not approve the submitted EMPr. While this Condition, together with Condition 15 contemplate “*amending the EMPr*”, this does not cure the defect.

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<sup>25</sup> NEMA, s 24(1A)(d).

<sup>26</sup> NEMA, s 24N(2) read with Regulation 23(4) and Appendix 4 to the Regulations.

<sup>27</sup> NEMA, s 24N(3)(a).

<sup>28</sup> NEMA, s 24N(3)(b).

<sup>29</sup> NEMA, s 24N(3)(c).

<sup>30</sup> Regulations, Appendix 4, item 1.

- 41.1. EMPr amendments are envisaged by section 24N(6) of NEMA which states that the Minister or MEC “*may at any time after he or she has approved an application for an environmental authorisation approve an amended environmental management programme*” (emphasis added).
- 41.2. As indicated above, Regulation 26(d) (as well as Regulation 26(h)) contemplates an approved EMPr as part of the granting of an EA.
- 41.3. Amendments of EMPrs are contemplated in Regulation 35 (if required by an environmental audit); Regulation 36 (where impact management actions require amendments); and in Regulation 37 (on application by the holder of the EA). All of these scenarios contemplate (a) an existing, authorised EMPr in place; and (b) a change of conditions during the life of the activity which necessitates updating and modification of environmental management actions. This statutory scheme is in fact reflected by Conditions 17 to 23 of the EA.
- 41.4. Accordingly, rejecting an EMPr (essentially for lacking necessary details regarding impacts and mitigation strategies as is evidenced by the terms of Conditions 14 and 15) is tantamount to acknowledging that the EA application is incomplete, inadequate and should not be authorised.
42. In the circumstances, the EA is irregular and does not comply with the requirements of sections 24(1A) and 24N read with the relevant Regulations.
- 42.1. As indicated in paragraph 34 above, the role of NEMA in giving effect to the rights in section 24(b) of the Constitution and providing a framework for complying with the obligations contained in sections 24(b)(i)-(iii) mean that the CA’s failure to comply with the requirements of sections 24(1A) and 24N of NEMA read with the Regulations is a breach of the CA’s constitutional obligations.
- 42.2. Moreover, authorising the activities in the absence of an approved EMPr is unlawful and plainly irrational in light of the clear objectives of the EIA process.
- 42.3. Accordingly, the EA fails to comply with the requirements of NEMA, is unconstitutional, unlawful and irrational and falls to be set aside.

### **GROUND 3: FAILURE TO COMPLY WITH NEMA AND CONSIDER RELEVANT FACTORS**

43. Section 24O of NEMA sets out the peremptory “*criteria to be taken into account*” by decision-makers when considering applications for environmental authorisations.<sup>31</sup> These include compliance with NEMA<sup>32</sup> and “*all relevant factors*”.<sup>33</sup>
44. The list of “relevant factors” provided in section 24O(1)(b) includes (without being limited to):

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<sup>31</sup> *Maccsand (Pty) Ltd v City of Cape Town* 2012 (7) BCLR 690 (CC) para 12; *Philippi Horticultural Area Food & Farming Campaign and Another v MEC for Local Government, Environmental Affairs and Development Planning: Western Cape* 2020 (3) SA 486 (WCC) para 73.

<sup>32</sup> NEMA, Section 24O(a).

<sup>33</sup> NEMA, Section 24O(b).

- 44.1. pollution, environmental impacts and environmental degradation likely to be caused if the application is approved or refused;<sup>34</sup>
- 44.2. environmental protection measures and measures to “*prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation*”;<sup>35</sup>
- 44.3. the “*ability of the applicant to implement mitigation measures*”;<sup>36</sup> and
- 44.4. guidelines, departmental policies and environmental management instruments adopted by the Minister or MEC and any other information possessed by the decision-maker that are relevant to the application.<sup>37</sup>
45. Where a decision-maker fails to consider such factors, the resulting decision is a contravention of NEMA, unlawful and should be set aside.
46. In this case, the conditions of the EA make it clear that the decision-maker was unable to consider relevant factors and thus did not do so. This is particularly so in respect of the proper consideration of impacts, the mitigation hierarchy and offsets which are key to this approval. In this regard, the absence of a Biodiversity Offset Report is a critical omission from the material placed before the CA.
47. In what follows, we address the failures to consider each set of relevant factors highlighted in paragraph 44 above.

#### Failure to consider impacts

48. As indicated above, Condition 46 of the EA requires a 12-month monitoring programme of avifaunal species to “*inform the scale and magnitude of the residual impacts*” and to, *inter alia*, inform design of the (a) layout plan; (b) EMP; and (c) “in-kind” offset.
49. This Condition must be fulfilled prior to the commencement of construction and is distinct from conditions relating to ongoing monitoring expressed in Conditions 47 and 48.
50. It is clear from Condition 46, that it is not possible to finalise the layout plan; EMP; and biodiversity offset in the absence of assessment and consideration of impacts (especially residual impacts) of the project on avifauna – and that the necessary information was lacking.
51. Accordingly, the CA itself has recognized that it could not (and therefore did not) consider key, relevant information.

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<sup>34</sup> NEMA, s 24O(b)(i).

<sup>35</sup> NEMA, s 24O(b)(ii).

<sup>36</sup> NEMA, s 24O(b)(iii).

<sup>37</sup> NEMA, Section 24O(b)(vii).

52. It is also apparent that in the absence of such information, as well as the final layout plan and “in-kind” biodiversity offset plan, the cumulative impacts of the project including the offset activities could not, and were not, considered.<sup>38</sup>
53. This is critical to the design and authorisation of the project – including the justification of both the “marine” and “Madaka” offsets on the basis of the cumulative impact of the Project.<sup>39</sup>
54. It is also critical that the assessment of cumulative impacts has not focused on the inherent interconnectivity of estuarine functions and zones and the manner in which estuarine function in one geographical location may impact and be impacted by ecological processes and systems in another.<sup>40</sup>
55. Finally, the recognition in the Conditions, that public consultation is still required in respect of the EMPr and final layout plan (although not in relation to the proposed offsets) indicates that relevant information that may have been placed before the CA by I&APs has yet to be obtained. Accordingly, it is not possible to conclude that all relevant factors have been considered.<sup>41</sup>

#### Failure to consider environmental protection measures

56. Just as the Conditions of the EA demonstrate that the CA could not have considered activity impacts, they demonstrate that key information pertaining to environmental protection measures was lacking. This is evident, not only from Conditions 14, 15 and 46 addressed above, but starkly illustrated in the “Offset Requirements” appearing as Conditions 57 to 60 in relation to the “out of kind” offset and Conditions 61 to 64 in relation to the “like-for-like” offset.

#### The Out-of-Kind / Madaka offset

57. Condition 57 states (without any clear reasoning in Appendix 1) that “*the Madaka Game Ranch must be incorporated into the Ithala Game Reserve and registered as a Biodiversity Protected Area*” (the **Madaka offset**).
58. There is no explanation as to what specific residual impact or impacts this “out of kind offset” is intended to remedy, nor any indication that consideration was given to whether it can in fact provide such remedy or be implemented.<sup>42</sup> In this regard, the Final Environmental Impact Report (**FEIR**) records:

<sup>38</sup> See FEIR pp 2019-218; see also pp 231, 235, 241, 245, 260, 270, 288, 296, 307, 343-345, 352, 359.

<sup>39</sup> FEIR pp 419-420; 487.

<sup>40</sup> See Van Niekerk, L., Adams, J.B., Lamberth, S.J., MacKay, C.F., Taljaard, S., Turpie, J.K., Weerts S.P. & Raimondo, D.C., 2019 (eds), *South African National Biodiversity Assessment 2018: Technical Report. Volume 3: Estuarine Realm*, CSIR report number CSIR/SPLA/EM/EXP/2019/0062/A, South African National Biodiversity Institute, Pretoria. Report Number: SANBI/NAT/NBA2018/2019/Vol3/A, available online: <<http://hdl.handle.net/20.500.12143/6373>> (Unproofed version) (van Niekerk et al) p 149.

<sup>41</sup> *Sustaining The Wild Coast NPC and Others v Minister of Mineral Resources and Energy* [2022] 1 All SA 796 (ECG) p 32-33; *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) para 113.

<sup>42</sup> See FEIR p 420 and p 434 which suggests that it may not be possible. Further, while the residual impacts appear to be linked to avifaunal and marine impacts (see FEIR p 418; 426), there is also some indication that other impacts

*“Note that if the Madaka Game Ranch cannot be implemented, a similar opportunity will be identified together with EKZNW that meets the requirements of the offset.”*

58.1. This clearly suggests there is inherent uncertainty regarding whether the Madaka offset is possible.

58.2. EKZNW, meanwhile, appears unclear regarding the residual impacts to be offset. This is apparent from the EKZNW Response which (vaguely) notes:<sup>43</sup>

*“There is uncertainty as to the extent and significance of the impact on the natural environment. But Karpowership SA’s specialists were of the opinion that if anything was lost, it would be the temporary loss of habitat. The impacts were mainly disturbances related to the roosting and feeding habits of the migratory birds.”*

59. The sole concrete indication of the purpose of the Madaka offset is to account for delay in implementing the “marine” offset.<sup>44</sup>

60. It is submitted that this is an impermissible use of offsets, misconstrues the purpose and objectives of the mitigation hierarchy in NEMA and requirement to consider environmental protection measures and is thus impermissible in terms of section 24O of NEMA, as well as being unlawful and irrational.

61. This submission is supported by the further conditions pertaining to the Madaka offset:

61.1. Condition 58 refers to the need to conclude a formal agreement regarding the Madaka offset within 18 months from the date of issue of the EA.

61.1.1. Not only is this inconsistent with statements in the FEIR (and media) to the effect that Karpowership has already concluded an agreement with EKZNW,<sup>45</sup> but the 18-month timeline does not appear viable in light of the additional Conditions relating to the need for a 12-month avifaunal assessment which is necessary to complete the layout plan, EMPr and marine offset; period necessary for public consultation and incorporation of comments in respect of layout plan and EMPr; and need for EKZNW and DFFE approvals of the offset plans prior to incorporation into the EMPr.

61.1.2. Given that the Madaka offset attempts to account for harms remaining after consideration of all steps in the mitigation hierarchy and the marine offset, it simply does not seem practicable (or rational) to provide approval for this offset – or to approve the development at all.

61.2. Condition 59, in fact, confirms that the Madaka offset has not yet been designed by requiring that Karpowership must “*design and detail the Madaka Game Ranch*

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are (speculatively) linked to an offsetting strategy. In this regard see FEIR p 414 with reference to offsetting efforts by Karpowership potentially yielding “*positive climate change impacts*”.

<sup>43</sup> See EKZNW Response para 7.3.3.

<sup>44</sup> FEIR p 421.

<sup>45</sup> FEIR p 434; 439; 442; 493; 496; 522; 539. See also EMPr, p 116. The FEIR and EMPr are themselves inconsistent as other references to the offset agreement do indicate that it is not yet concluded.

offset” in terms of specific criteria, including the achievement of net environmental gain.

- 61.2.1. No specific detail regarding any aspect of the effects of the Madaka offset are provided in the FEIR which relies only on bald statements to the effect that the offset *“will increase biodiversity targets (elephants, black and white rhino populations) and contribute to national strategic conservation programmes”*<sup>46</sup> and general, unsupported statements regarding the growth of rhino and elephant populations and statements regarding contributions to protections of *Protea comptonii* and the Southern Barred Minnow.<sup>47</sup>
- 61.2.2. The relevance of these benefits; their location in national (or provincial strategy); relationship to the specific impacts on the estuarine zone; assessment of any “trading up” resulting from these conservation efforts; whether this offset will result in no-net loss and a net gain for biodiversity;<sup>48</sup> the extent of Karpowership’s obligations; whether Karpowership’s role, funding or other obligations will contribute to an offset that achieves its purpose; what such purpose in fact is in the context of the Richard’s Bay Karpowership project; or any other reasoned and supported justification is entirely lacking from the FEIR.
- 61.2.3. It is entirely unclear whether the Madaka offset is in fact an out-of-kind offset or merely a form of environmental compensation (which may attract different considerations).<sup>49</sup> In this regard, the following concessions in the EKZNW Response are pertinent:
  - a) *“It may be (correctly) argued that the Madaka Game Ranch is not an offset in that it falls outside the offset guidelines. Thus, it should be considered as ‘ecological compensation’ in lieu of the potential delays in the marine offset becoming functional.”*
  - b) *“As noted above, ‘trading-up’, therefore, cannot be applied to or used to describe the Madaka Game Ranch as the purchase of this property is ecological compensation’ rather than a biodiversity offset.”*<sup>50</sup>
  - c) *“No ratios or criteria were used to establish the out-of-kind offset, given that there are no tools which have been developed to determine such.”*<sup>51</sup>
- 61.2.4. EKZNW’s concessions are deeply concerning, as it appears that this so-called “offset” is not clearly conceptualised, has not been grounded in any principle,

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<sup>46</sup> FEIR p 432.

<sup>47</sup> FEIR p 433.

<sup>48</sup> See FEIR p 419 which states that the goal of *“the offset / ecological compensation is to... achieve net-zero biodiversity impacts, and if possible, a net gain of biodiversity”* (emphasis added).

<sup>49</sup> See FEIR p 416 which states *“Residual impacts will be managed in accordance with the biodiversity offset / Ecological compensation agreement as per below”* with the heading at para 7.9.1 reading *“Biodiversity Offsets / Ecological Compensation”*. See also FEIR p 417 *“In instances where the essential requirements of biodiversity offsets cannot be fulfilled and where the proposed remediation would be overwhelmingly in favour of the conservation of biodiversity in general, it is recognised that such remediation would not be termed a ‘biodiversity offset’, but may be characterised as ‘ecological compensation’”* (emphasis added).

<sup>50</sup> See para 7.7.4 of the EKZNW Response.

<sup>51</sup> See para 7.4 of the EKZNW Response.

policy or legislative framework, and, accordingly has little if any rational connection with Project – let alone the remedying of residual impacts

- 61.2.5. A further statement regarding the purpose of the Makada offset is still more problematic:

*“To act as a precedent, i.e. to hold developers accountable for biodiversity impacts arising from delays in offsets becoming functional; [and] for Karpowership SA to make a significant contribution to the conservation of biodiversity and protected area network in KZN as a means to compensate for potential impacts resulting from a delay in the estuarine offsets becoming functional.”<sup>52</sup>*

- 61.2.6. It is inconsistent to refer to developer accountability in the context of a scheme that appears to exist entirely outside the statutory provisions which deal with accountability for the impacts of environmental harms. The relevant accountability provisions (including those pertaining to financial provisioning) have not been invoked, nor is there any clear indication that the developer in this case should be held accountable for delays in the marine offset. In such circumstances, any precedent set by the Madaka offset would be contrary to the fundamental principles of lawful and rational environmental decision-making and NEMA.

- 61.2.7. The irregularity and regulatory vacuum surrounding the Madaka offset is highlighted by the absence of a Biodiversity Offset Report providing the necessary level of detail and information for the CA to determine what is intended by the Madaka offset. The nature and extent of the Madaka offset is left to be gleaned from the high-level information in the FEIR and offset-related actions in the EMPr (which has not been approved). This is particularly strange as the FEIR references the KZN Biodiversity Offset Norms and standards (specifically requiring a detailed Offset Report), while the EA itself refers to the National Biodiversity Offset Guidelines, 2023 (which similarly require a Biodiversity Offset Report).<sup>53</sup>

- 61.2.8. Had a Biodiversity Offset Report been properly developed during the EIA process, it would have been subject to public comment; placed before the decision-maker; and would, of necessity, have included an offset design. This has clearly not been the case.

- 61.3. Condition 60 requires that the Madaka offset design be detailed and submitted to EKZNW as well as the DFFE’s Directorates of Biodiversity and Conservation and Protected Area Management for “review and comment”. It is only after such comments are considered that the design will be considered “final” and ripe to be submitted to the DFFE for approval. It is clear from the further requirements of Condition 60 (including Condition 60.2 which contemplates inclusion of the offset

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<sup>52</sup> See para 7.7.1 of the EKZNW Response.

<sup>53</sup> FEIR p 129; EA p 22, Condition 61.



design in the EMPr and Condition 60.4 referring to the roles of “all the parties”) that this offset has only been conceptualized in the vaguest terms. In particular:

- 61.3.1. Condition 60.1 specifies that an offset design document must “*provide sufficient detail to properly inform a decision on whether the offset will adequately and sustainably counterbalance the impact*”.
- 61.3.2. “Sufficient detail” should have been before the CA prior to its consideration of the EA application (and subject to public comment as addressed further at paragraphs 84 to 90 below).
- 61.3.3. Indicating that such detail is necessary to “*properly inform a decision*” is peculiar in circumstances where the legislative requirements specify that all relevant information must be before a decision-maker prior to making a decision regarding an EA, failing which, the EA should be refused.

*The Like-for-Like / marine offset*

- 62. Condition 61 states that Karpowership must “*design and detail a marine offset in accordance to [sic] the National Biodiversity Offset Guideline*” (“**marine offset**”), providing five specific criteria for such design.
- 63. Like the Madaka offset, the absence of an offset design and details of a marine offset are fatal to EA: in the absence of such information, the CA could not have properly determined the suitability of the offset; its purpose; the residual impacts it was to remedy; whether it in fact could reasonably achieve such remedy (let alone, net-biodiversity-gain). The CA consequently failed to consider relevant considerations, and the EA should be set aside on this basis.
- 64. This contention is again supported by the contemplation, in the conditions of the EA, that “*sufficient detail to properly inform a decision on whether the offset will adequately and sustainably counterbalance the impact*”.<sup>54</sup>
- 65. In addition, and unlike the Madaka offset, Condition 63 makes it clear that there is no certainty as to where the marine offset area is to be (or whether such area in fact exists). The FEIR suggests that it is doubtful that a marine offset area has or can be identified:
  - 65.1. At pp 426-432 of the FEIR, four like-for-like offset options are presented – each an estuarine area on the KZN coast. The “optimum” location is described in a single paragraph as being “*the uMhlathuze Estuary, or equivalent*”:

*“This offset, given the 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 gave rise to equivalent determinations supported by estuarine management*

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<sup>54</sup> EA p 23, Condition 64.1.

*plans, strategic assessments as well as the out-of-kind recommendation by EKZNW, accepted by Karpowership”.*<sup>55</sup>

65.2. Nothing further is said about the uMhlathuze Estuary – and the quoted text suggests that it was in fact not suitable. The lack of suitability of the uMhlathuze Estuary is borne out by the EKZNW Response which states:

*“Karpowership SA specialist proposed the ‘uMhlathuze Estuary/Sanctuary.’ Ezemvelo is not convinced that this site, given a number of significant challenges, is an appropriate receiving site for the marine offset. It is for this reason that Karpowership SA/Triplo-4 started considering other potential receiving sites. Unfortunately, these investigations were not completed by Triplo-4. Hence Ezemvelo insisted on ‘equivalent’ or alternative marine offset receiving areas.”*<sup>56</sup>

65.3. Each of the remaining three options is rejected in the FEIR on the basis of complexity<sup>57</sup> or existing funding being in place.<sup>58</sup>

65.4. No part of this assessment includes an assessment of the inherently dynamic and unique ecosystem functions of the Richards Bay estuarine system<sup>59</sup> and whether it is even capable of offset.

65.5. In the absence of a Biodiversity Offset Report, it is impossible to determine whether the marine offset is viable. In this regard, the EKZNW Response notes that: *“Given that Ezemvelo has not received the offset report or the offset management plan, we cannot comment on the ‘long-term viability of the marine offset’.”*<sup>60</sup>

65.6. Notwithstanding this omission, none of the options presented in the FEIR appear viable on the version provided by the FEIR and which served before the CA. It is thus clear that relevant factors pertaining to the nature of estuarine functions, harms, project impacts and the possibility of mitigation of such impacts (if at all) were not – and could not have been – considered.

#### Failure to consider applicant’s ability to implement mitigation measures

66. Conditions 60 and 64 of the EA both require provision of *“suitable resource provision”* for implementing the Madaka and marine offsets respectively.

67. There is no indication in the FEIR (nor can there be in the absence of offset design) that Karpowership can, in fact, implement the offsets. Insofar as these are considered “mitigation measures”, the CA did not (and could not) have incorporated these factors in its decision-making.

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<sup>55</sup> FEIR p 426.

<sup>56</sup> See EKZNW Response, para 7.6.1.

<sup>57</sup> uMvoti (FEIR pp 426-427); iNhlabane (FEIR pp 431-432).

<sup>58</sup> Thukela MPA (FEIR pp 429-430).

<sup>59</sup> Van Niekerk et al, p 30.

<sup>60</sup> See para 7.6.5 of the EKZNW Response.

68. As is the case with the lack of information regarding the project layout; consequent impacts; resultant mitigation needs; residual impacts; offset purpose, design, suitability and viability; this is critical information that must be placed before the decision-maker before a decision to authorize activities can be taken. Absent such assurance, any suggestion of offsets or mitigation of harms is uncertain, highly speculative, and should be rejected on the basis of the principle of taking a risk averse and cautious approach.
69. In the circumstances, approving the EA is premature, a contravention of section 24O of NEMA and is both irrational and unlawful.

#### Failure to consider relevant guidelines

70. The FEIR refers to the draft National Biodiversity Offset Policy, 2017, draft biodiversity offset guideline, March 2022 (amending this to the finalized National Biodiversity Offset Guidelines, 2023)<sup>61</sup> and cites portions of the EKZNW biodiversity policy, 2013.<sup>62</sup> In doing so, the FEIR states:

*“While both the draft policy and subsequent draft guideline provide valid context, it should be noted that the latter only applies to the terrestrial and freshwater realms, but not to offshore marine areas or estuarine ecosystems. Dr Andy Blackmore, a conservation planner and an environmental law and conservation scientist at the Scientific Services Division of EKZNW – the conservation agency in KwaZulu-Natal (South Africa) in discussions regarding the aspects associated with estuaries confirmed that estuaries are complex to address due to significant anthropogenic influences and aspects”.*<sup>63</sup>

71. The National Biodiversity Offset Guideline was published on 23 June 2023 (**Offset Guideline**).<sup>64</sup> The Offset Guideline was thus in force at the time the application for an EA was lodged and at the time the decision to grant the EA was made. However, as acknowledged in the FEIR, the Offset Guideline expressly states that it is not applicable “*in the offshore marine realm and estuarine ecosystems*”.<sup>65</sup>
72. To the extent that Condition 61 requires that the marine offset must be “*designed and detailed*” in accordance with the Offset Guideline, this Condition is inconsistent with the Offset Guideline, alternatively, has failed to consider its scope, purpose and applicability and is an error of law.
- 72.1. This is particularly clear in relation to Condition 61.2 which requires “*the offset ratios for the calculation of the offset area [to be] determined in accordance with the National Biodiversity Offset Guideline*”.
- 72.2. Annexure A of the Offset Guideline which contains the Biodiversity offset ratios look-up table does not contain Biodiversity offset ratios for the estuarine or marine realms.

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<sup>61</sup> FEIR pp 127-128.

<sup>62</sup> FEIR p 419; see also FEIR p 129.

<sup>63</sup> FEIR p 417.

<sup>64</sup> Published as GN3569 in GG 48841 of 23 June 2023 (**Offset Guideline**).

<sup>65</sup> Offset Guideline para 1 “Introduction”.

73. To the extent that the Offset Guideline may serve to guide the process for determining whether an offset is appropriate and the form it should take, it is submitted that the CA has had no regard to the procedures it contemplates. For example:

73.1. The “Principles for biodiversity offsetting” set out in paragraph 4.2 state that:

- 73.1.1. offsets are the final option in the mitigation hierarchy;
- 73.1.2. ecological equivalence (like-for-like) is the preferred offset type with “trading-up offset types” only being considered under certain circumstances in respect of priority areas of greater importance;
- 73.1.3. no offsets are possible for residual impacts on irreplaceable biodiversity;
- 73.1.4. offsets must be additional to biodiversity conservation measures required by law (or which would otherwise have occurred);
- 73.1.5. the significance of residual impacts must be considered when making biodiversity offset decision;
- 73.1.6. connectivity with the landscape is necessary;
- 73.1.7. long-term protection and management of priority biodiversity is required;
- 73.1.8. biodiversity offset design must be evidence-based and transparent;
- 73.1.9. offsets must follow a risk averse and cautious approach;
- 73.1.10. offsets must be fair and equitable;
- 73.1.11. offsets should take place before impacts of an activity occur (or as soon after such impacts occur as possible); and
- 73.1.12. offsets must be measurable, auditable and enforceable.

73.2. In this case, in the absence of offset designs; a Biodiversity Offset Report; clear consideration of the proposed measures; their relationship to residual impacts; lack of clarity regarding specific residual impacts to be offset; lack of clarity through an EMPr regarding the mitigation measures to be implemented to minimize harms and counteract environmental impacts; lack of public consultation regarding the EMPr and offsets; and lack of detail regarding the roles, duties and responsibilities of Karpowership in relation to the proposed offsets, it is impossible to say that any of these principles have been considered by CA.

73.3. Similarly, the systematic procedure for determining biodiversity offset requirements; preparing a Biodiversity Offset Report; and preparing biodiversity offset conditions as contemplated in paragraph 5.1 of the Offset Guidelines is entirely absent.

74. Accordingly, it is clear that the Offset Guidelines, including their scope and applicability, were not properly considered by the CA – if at all. In this respect, the CA’s decision to

grant the EA fails to comply with section 24O of NEMA, in addition to being unlawful and thus falls to be set-aside.

### Conclusion on appeal ground 3

75. In the result, the FEIR (particularly in the absence of a Biodiversity Offset Report) did not contain sufficient information to address the extent of environmental impacts, the need for mitigation and whether offsets of any kind were appropriate. The uncertainty regarding the nature and extent of the Madaka and marine offsets and their structure and viability is echoed in the EKZNW Response. Accordingly, the CA could not have considered relevant factors and certainly could not have considered the nature of such offsets or whether estuarine impacts could even be offset.

76. In addition, it is apparent that the Offset Guideline was not properly considered – if at all. In particular, the specific considerations relevant to estuarine and marine habitats were entirely ignored – notwithstanding this being flagged in the FEIR and Offset Guidelines themselves.

77. Accordingly, the CA's decision has breached section 24O of NEMA and falls to be set aside, in that it has:

77.1. failed to adhere to peremptory criteria prescribed under section 24O; and

77.2. failed to take account of all relevant factors in making the decision.

78. In addition, the failure to adhere to the peremptory criteria in section 24O renders the CA's decision unconstitutional. This is because the requirements and provisions of Chapter 5 of NEMA are designed to give effect to the constitutional obligations placed on the state by section 24(b) of the Bill of Rights to take legislative and other measures to prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development for present and future generations.

### **GROUND 4: PROVISION OF AN INTERIM OR CONDITIONAL AUTHORISATION**

79. Regulation 24 empowers a CA either to “grant” or “refuse” an EA.<sup>66</sup>

80. A CA may grant an EA in respect of all or part of an activity for which an application is received.<sup>67</sup> However, no provision is made in NEMA or the Regulations for the CA to “conditionally grant” an EA or, in other words, to grant an EA which is subject to further resolute decision-making.

81. To the extent that an EA is expected to contain conditions, these are restricted to those premised on the completeness and lawfulness of the EIA process.

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<sup>66</sup> Regulation 24(1).

<sup>67</sup> Regulation 24(1)(a).

81.1. Section 24E of NEMA, for example, prescribes minimum “conditions” relating to adequate provision for management and monitoring and impacts; specification of the property, site or area and provision for transfer of rights and obligations.

81.2. Similarly, section 24Q of NEMA contemplates “terms and conditions” to ensure compliance with EA conditions and to monitor progress.

81.3. These provisions of NEMA refer to “conditions” in the context of parameters for conduct. They do not contemplate that an EA may be an interim decision subject to further decision-making.

82. In this case, however, an EA has been granted which not only defines the parameters of the management of authorised activities, but also, impermissibly authorises a further round of “resolutive” decision-making:

82.1. As outlined above, Conditions 12, 14, 15, 46 and 57 to 64 make it clear that further impact assessments, layout design, EMPr design and offset design are necessary prior to the commencement of activities.

82.2. Further, these Conditions include requirements for public consultation in respect of layout plan / site map and EMPr and inter-departmental consultation in respect of the offset design – rendering all these elements of the development subject to further decision-making.

82.3. The effect of these Conditions is to create a further “mini” EIA process subject to further decision-making.

82.4. It is on the basis of that, subsequent, decision-making that the project will be finally authorised.

83. It is submitted that, this staged approach is entirely impermissible, at odds with the provisions of NEMA and, moreover, fundamentally at odds with the principles of legal certainty and procedural fairness which are part-and-parcel of the rule of law and principles of just administrative action. Accordingly, we submit that the EA falls to be set aside.

## **GROUND 5: FAILURE TO COMPLY WITH PUBLIC PARTICIPATION REQUIREMENTS**

84. Public participation is a core principle of all environmental decision-making<sup>68</sup> and facilitation of an adequate and appropriate opportunity for public participation in environmental decision-making is an express objective of integrated environmental decision-making.<sup>69</sup> Accordingly, it is critical that the procedures ensuring public participation as set out in the Regulations are properly adhered to throughout the EIA process.<sup>70</sup> In this instance, we draw attention to two particular requirements:

84.1. Regulation 40 requires that an EIAR and EMPr are subject to a public participation process in which I&APs are granted at least 30 days to comment. During such

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<sup>68</sup> NEMA, s 2(4)(f).

<sup>69</sup> NEMA, s 23(2)(d).

<sup>70</sup> See NEMA, s 24(4)(a)(v) read with Chapter 6 of the Regulations.

process, I&APs must be furnished with “*all information that reasonably has or may have the potential to influence any decision with regard to an application*”.<sup>71</sup>

- 84.2. Regulation 43(1) grants all registered I&APs the right to comment in writing on “*all reports or plans submitted.... And to bring to the attention of the proponent or applicant any issues which that party believes may be of significance to the consideration of the application...*”
85. It is clear from these requirements that I&APs have the right to all information pertaining to proposed activities and to comment on it in advance of a decision being taken to authorise such activities.
86. Contrary to this requirement, the EA has been granted while including Conditions that recognise that a final layout plan, EMPR and offset design have not been prepared – and thus could not have been made available for comment.
- 86.1. While Conditions 12 and 14 contemplate further public participation in respect of the final layout plan and EMPr, no such public participation is contemplated in respect of the offset design.
- 86.2. No such requirement for public participation is provided in relation to the Madaka and marine offset designs (which are limited to consultation with specified organs of state).
- 86.3. Without conceding that it is competent to authorise further public participation for incomplete portions of an EA application, it is entirely inappropriate to contemplate that offset designs could be approved without these being provided to I&APs for consideration and in the absence of providing I&APs with the opportunity to exercise their right to provide comments.
87. Accordingly, the EA on its own terms is contrary to the objectives, principles, provisions of NEMA and Regulations setting out the rights, procedures and obligations relevant to public participation. The EA thus contravenes the provisions of NEMA, is unlawful and fails to have regard to the rights of all persons to be involved in environmental decision-making and to fair and rational procedure.
88. We note that Karpowership has previously submitted an application for an EA for the Richards Bay project which was refused by the CA and subject to appeal before the Honourable Minister. Karpowership’s appeal was denied, *inter alia*, due to a finding of insufficient information and an inadequate public participation process. Here again, information critical to the environmental management of this project and the KZN estuarine system more broadly has not been provided (and will not be provided) to I&APs who, moreover, will not be afforded the opportunity to comment in relation to offsets which are not contemplated by governmental policy or Guidelines and which are, on the version of Karpowership and EKZNW “novel”.

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<sup>71</sup> Regulation 40(2).

89. We pause to note that in the BLC Letter, we specifically requested a copy of the agreement, which is material to the viability of the Madaka offset and consequently to the EA itself. We did not receive a denial of the existence of such agreement, but were advised that it was not a public document and hence falls within the scope of the Promotion of Access to Information Act, 2 of 2000 (PAIA). *“An application in terms of this Act would, therefore, need to be made to Ezemvelo’s Information Officer.”*<sup>72</sup>

89.1. It is inconsistent with objectives of Chapter 5 of NEMA and the rights in respect of public participation (addressed further below) to treat the agreement which is core to the offset design as disclosable only in accordance with PAIA. NEMA requires availability of information for purposes of public participation in the context of processes giving effect to environmental rights. To restrict information which is part of that process ignores the scope and purpose of public participation and the role of public comment in integrated environmental management.

89.2. Accordingly, it is a critical deficiency that I&APs have not had the opportunity to consider and comment on the agreement.

90. We submit that the seriousness of flawed public participation process alone, should render the CA’s decision to grant the EA liable to be set aside.

## **GROUND 6: FAILURE TO COMPLY WITH ENVIRONMENTAL MANAGEMENT PRINCIPLES**

91. A key objective of integrated environmental management is to *“identify, predict and evaluate the actual or potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management set out in section 2”*.<sup>73</sup>

92. Any decision regarding the impacts of an activity affecting the environment, the means of mitigating negative impacts and addressing consequent environmental harms must, therefore, adhere to the Principles set out in section 2 of NEMA.

92.1. These Principles include the requirement that development is *“socially, environmentally and economically sustainable”*<sup>74</sup> and outline eight relevant factors that must be considered in respect of such “sustainability”.<sup>75</sup>

92.2. Five of these factors require avoidance or prevention of environmental harms and where such avoidance or prevention is impossible, require minimising and remedying of such harms.<sup>76</sup>

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<sup>72</sup> See para 8 of the EKZNW Response.

<sup>73</sup> NEMA, s 23(2)(b).

<sup>74</sup> NEMA, s 2(3).

<sup>75</sup> NEMA, s 2(4)(a).

<sup>76</sup> NEMA, s 2(4)(a)(i) *“That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied”*; s 2(4)(a)(ii) *“that pollution and degradation of the*



92.3. The remaining factors relate to conserving the existence and integrity of non-renewable and renewable resources<sup>77</sup> and that *“a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”*.<sup>78</sup>

92.4. Nowhere is there express contemplation that the socially, environmentally and economically sustainable development can “offset” harms to ecosystems, biological diversity, cultural heritage, the environment or environmental rights through pollution, degradation, disturbance or waste by improving another ecosystem, biological diversity elsewhere, alternative cultural heritage or other environments. However, environmental management practice and DFFE policy has recognised the utility of “biodiversity offsets” in specific, constrained circumstances.<sup>79</sup>

92.5. As elaborated above, such circumstances do not include estuarine systems. These habitats, moreover, are subject to a section 2 Principle of their own, namely, that *“Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure”*.<sup>80</sup>

92.6. The Richards Bay estuarine and port environment is precisely such a system – subject to extensive development pressure.

93. In the circumstances, any decision which reflected these Principles, would need to carefully consider actual or potential impacts on the Richards Bay estuarine system. The sensitivity<sup>81</sup> and inherent dynamism of this system would also necessitate an extremely risk-averse and cautions approach in respect of offsets given:

93.1. the absence of Guidelines regarding estuarine offsets including the absence of estuarine offset ratios;

93.2. indications in the FEIR that suitable possibilities for estuarine offsets are limited and, at best, speculative;

93.3. the clear absence of information regarding avifaunal impacts recognized in the Conditions of the EA;

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*environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied”; s 2(4)(a)(iii) “that the disturbance of landscapes and sites that constitute the nation’s cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied”; s 2(4)(a)(iv) “that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner”; s 2(4)(a)(vii) “that negative impacts on the environment and on people’s environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied”.*

<sup>77</sup> NEMA, s 2(4)(a)(v) and (vi).

<sup>78</sup> NEMA, s 2(4)(a)(viii).

<sup>79</sup> See Offset Guidelines.

<sup>80</sup> NEMA, s 2(4)(r).

<sup>81</sup> See FEIR p 308.

- 93.4. lack of “*project-specific literature*” regarding plankton mortality<sup>82</sup> which is considered on in Conditions 53 and 54 requiring a baseline assessment and monitoring after construction of the project;
- 93.5. lack of information regarding noise and night-light impacts on particularly sensitive habitats reflected in Condition 56 providing for a baseline study after construction of the project;
- 93.6. lack of public participation in relation to offset design;
- 93.7. the absence of a final site plan; conclusive determination of impacts and necessary mitigation measures;
- 93.8. a clear, comprehensive and scientifically supportable Biodiversity Offset Report that has been subject to a public participation process;
- 93.9. recognition of the existing state of degradation of the Richards Bay estuary;<sup>83</sup> and
- 93.10. recognition of the unique ecosystem functions provided by the Richards Bay estuary, notwithstanding its degraded state.<sup>84</sup>
94. The lack of precaution inherent in these aspects of the CA’s decision, together with the lack of particular regard for a sensitive ecosystem, the requirements of public participation and careful consideration of impacts and their avoidance, mitigation and remedy – and the premature and irregular authorization of activities without clarity regarding a layout plan, EMPr or offset designs is a clear contravention of the Principles.
95. Accordingly, the CA’s decision to grant the EA fails to comply with the requirements of environmental decision-making, is unlawful and falls to be set aside.

## CONCLUSION

96. The Chief-Director’s decision to grant the EA fails to comply with the provisions of NEMA, the Regulations and Principles in that it omits consideration of key information pertaining the impacts of the proposed activities, mitigation of such impacts and the suitability, viability or design of proposed biodiversity offsets in relation to potential impacts on an estuarine environment which requires particular application of a risk-averse and cautious approach.
97. EA Conditions which have sought to cure the absence of information has resulted in a “conditional grant” of an EA and a procedure of staged authorisation which is not permitted under law and is, moreover, inconsistent with principles of fair administrative action, rationality and the rule of law.
98. The flaws in the EIA process (including the absence of a properly considered EMPr, impact assessment and Biodiversity Offset Report) render the EIA contrary to the purposes and objects of integrated environmental management; the objectives of ensuring that everyone

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<sup>82</sup> FEIR p 326.

<sup>83</sup> FEIR p 188; 189; 191; 196; 289; 302.

<sup>84</sup> FEIR p 185; 189; 191-192; 195-196; 197; 213; 214.

has an opportunity to participate in decision-making relevant to their environment; and as a result, clearly contravenes key legislative measures designed to give effect to the constitutional right to have the environment protected for the benefit of present and future generations.

99. In these circumstances, we submit that this appeal should succeed and the EA granted to Karpowership should be set aside.

**DATED at CAPE TOWN on this the 22<sup>nd</sup> day of NOVEMBER 2023.**



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**Per BIODIVERSITY LAW CENTRE**

Centre for Biodiversity Conservation  
Kirstenbosch Botanical Gardens  
Rhodes Drive, Newlands

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Ref: KPS/RB



# forestry, fisheries & the environment

Department:  
Forestry, Fisheries and the Environment  
REPUBLIC OF SOUTH AFRICA

"BLC1"

Private Bag X 447· PRETORIA ·0001· Environment House ·473 Steve Biko Road, Arcadia· PRETORIA

**DFFE Reference:** 14/12/16/3/3/2/2007

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Mr Mehmet Katmer  
Karpowership SA (Pty) Ltd  
PO Box 619  
**PRETORIA**  
0001

Telephone Number: +90 212 295 47 37 - 121  
Email Address: Mehmet.Katmer@karpowership.com

## PER E-MAIL

Dear Mr Katmer

### **APPLICATION FOR ENVIRONMENTAL AUTHORISATION IN TERMS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT, ACT NO. 107 OF 1998, AS AMENDED: FOR THE DEVELOPMENT OF A GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDS BAY WITHIN THE UMHLATHUZE LOCAL MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE**

With reference to the above application, please be advised that the Department has decided to grant authorisation. The Environmental Authorisation (EA) and reasons for the decision are attached herewith.

In terms of Regulation 4(2) of the Environmental Impact Assessment Regulations, 2014, as amended (the EIA Regulations), you are instructed to notify all registered interested and affected parties, in writing and within fourteen (14) days of the date of the decision as well as the provisions regarding the submission of appeals that are contained in the Regulations.

In terms of the Promotion of Administrative Justice Act, Act No. 3 of 2000, you are entitled to the right to fair, lawful, and reasonable administrative action; and to written reasons for administrative action that affects you negatively. Further, your attention is drawn to the provisions of the Protection of Personal Information Act, Act No. 4 of 2013 which stipulate that the Department should conduct itself in a responsible manner when collecting, processing, storing, and sharing an individual or another entity's personal information by holding the Department accountable should the Department abuse or compromise your personal information in any way.

Your attention is drawn to Chapter 2 of the National Environmental Management Act, Act No. 107 of 1998 National Appeal Regulations published under Government Notice R993 in Government Gazette No. 38303 dated 08 December 2014 (National Appeal Regulations, 2014), which prescribes the appeal procedure to be followed. Kindly include a copy of this document (National Appeal Regulations, 2014) with the letter of notification to interested and affected parties in this matter.

Should any person wish to lodge an appeal against this decision, he/she must submit the appeal to the appeal administrator, and a copy of the appeal to the applicant, any registered interested and affected party, and any organ of state with interest in the matter within twenty (20) days from the date that the notification of the decision

was sent to the registered interested and affected parties by the applicant; or the date that the notification of the decision was sent to the applicant by the Department, whichever is applicable.

**Appeals must be submitted in writing in the prescribed form to:**

The Director: Appeals and Legal Review of this Department at the below-mentioned addresses.

By email: [appeals@dfpe.gov.za](mailto:appeals@dfpe.gov.za)

By hand: Environment House  
473 Steve Biko  
Arcadia  
Pretoria  
0083; or

By post: Private Bag X447  
Pretoria  
0001

Please note that in terms of Section 43(7) of the National Environmental Management Act, Act No. 107 of 1998, as amended, the lodging of an appeal will suspend the environmental authorisation or any provision or condition attached thereto. In the instance where an appeal is lodged, you may not commence with the activity until such time that the appeal is finalised.

To obtain the prescribed appeal form and for guidance on the submission of appeals, please visit the Department's website at [https://www.dffe.gov.za/documents/forms#legal\\_authorisations](https://www.dffe.gov.za/documents/forms#legal_authorisations) or request a copy of the documents at [appeals@dfpe.gov.za](mailto:appeals@dfpe.gov.za)

Yours faithfully



**Mr Sabelo Malaza**  
**Chief Director: Integrated Environmental Authorisations**  
**Department of Forestry, Fisheries and the Environment**  
**Date:** 25/10/2023

cc:	Ms Aletta Plomp	Triplo4 Sustainable Solutions (Pty) Ltd	Email: <a href="mailto:hantie@triplo4.com">hantie@triplo4.com</a>
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## forestry, fisheries & the environment

Department:  
Forestry, Fisheries and the Environment  
REPUBLIC OF SOUTH AFRICA

# Environmental Authorisation

In terms of Regulation 25 of the Environmental Impact Assessment Regulations, 2014, as amended

### THE DEVELOPMENT OF A GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDS BAY WITHIN THE UMHLATHUZE LOCAL MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE

#### King Cetshwayo District Municipality

<b>Authorisation register number:</b>	<i>14/12/16/3/3/2/2007</i>
<b>Last amended:</b>	<i>Second issue</i>
<b>Holder of authorisation:</b>	<i>Karpowership SA (Pty) Ltd</i>
<b>Location of activity:</b>	<i>Remainder of Lot 223 uMhlathuze No 16230, Portion 21 (of 8) of Erf 5333 Richards Bay, Portion 45 of Erf 5333 Richards Bay, Remainder of Erf 5333 Richards Bay, Remainder of Portion 8 of the Erf 5333 Richards Bay, Remainder of Erf 6363 Richards Bay, uMhlathuze Local Municipality, King Cetshwayo District Municipality, KwaZulu-Natal Province</i>

This authorisation does not negate the holder of the authorisation's responsibility to comply with any other statutory requirements that may be applicable to the undertaking of the activity.

*MS*

## Decision

The Department is satisfied, on the basis of information available to it and subject to compliance with the conditions of this Environmental Authorisation, that the applicant should be authorised to undertake the activities specified below.

Non-compliance with a condition of this Environmental Authorisation may result in criminal prosecution or other actions provided for in the National Environmental Management Act, Act No. 107 of 1998, as amended and the EIA Regulations, 2014, as amended.

Details regarding the basis on which the Department reached this decision are set out in Annexure 1.

## Activities authorised

By virtue of the powers conferred on it by the National Environmental Management Act, Act No. 107 of 1998, as amended and the Environmental Impact Assessment Regulations, 2014, as amended, the Department hereby authorises –

### **KARPOWERSHIP SA (PTY) LTD**

with the following contact details –

Mr Mehmet Katmer  
Karpowership SA (Pty) Ltd  
PO Box 619  
**PRETORIA**  
0001

Telephone Number: +90 212 295 47 37 - 121  
Email Address: Mehmet.Katmer@karpowership.com

to undertake the following activities (hereafter referred to as "the activity") indicated in Listing Notice 1, Listing Notice 2 and Listing Notice 3 of the EIA Regulations, 2014 as amended:

Activity number	Activity description
<p data-bbox="188 349 507 383"><u>Listing Notice 1, Activity 11</u></p> <p data-bbox="188 405 831 495"><i>"The development of facilities or infrastructure for the transmission and distribution of electricity-</i></p> <p data-bbox="204 517 831 658"><i>(i) outside urban areas or industrial complexes with a capacity of more than 33 but less than 275 kilovolts."</i></p>	<p data-bbox="853 405 1441 875">Application is made for this listed activity for the transmission line proposed between the Shark and Khan Powerships moored within the Port of Richards Bay (opposite, and not within, the 600-berth series). The power generated on the ship will be converted by the on-board High Voltage substation (110kV-170kV) and transmitted along the 132kV twin conductor overhead transmission line.</p> <p data-bbox="853 954 1441 1373">The port is zoned as "Harbour" and this zoning provides for a number of permitted uses, including harbour infrastructure, conservation, industry (general, light, service) and agriculture. The fact that a project is situated within the harbour does not denote that the activities are associated with industry or that the harbour is exclusively an Industrial Complex.</p> <p data-bbox="853 1451 1441 1980">Based on the permitted uses, existing activities, and development footprint/infrastructure (or the absence thereof) in the vicinity of the proposed evacuation route within the port / harbour and that different interpretations have been received for projects within the vicinity of the Coast, the precautionary approach was applied as explained. This approach was undertaken despite EDTEA's correspondence that in their view, the port falls within an urban setting, as EDTEA is not the CA</p>



	<p>for this project and significant motivation was provided that the transmission line will be established in nonurban areas and outside an industrial complex.</p>
<p><u>Listing Notice 1, Activity 12</u>  <i>"The development of</i>  <i>(ii) infrastructure or structures with a physical footprint of 100 square meters or more, where such development occurs</i>  <i>(a) within a watercourse or</i>  <i>(c) within 32 meters of a watercourse, measured from the edge of a watercourse."</i></p>	<p>Application is made for this listed activity for the proposed route of the transmission line, and the locations of the proposed towers, as well as switching station and the temporary construction facilities, as these developments will take place within a watercourse (wetland) and within 32 metres of a watercourse, outside urban areas, as explained above. As per lay-out and sensitivity plans, the areas were indicated as "watercourses", and the potential impacts were assessed and mitigated as such.</p>
<p><u>Listing Notice 1, Activity 15</u>  <i>"The development of structures in the coastal public property where the development footprint is bigger than 50 square metres, excluding—</i>  <i>(iv) activities listed in activity 14 in Listing Notice 2 of 2014, in which case that activity applies."</i></p>	<p>The transmission line and temporary construction facilities trigger this activity. These components will have the effect of increasing the footprint of the port. The contractor facilities and associated activities will exceed 6 weeks. This Listed Activity is accordingly applied for. The gas pipeline and mooring structures were applied for as per Activity 14 in Listing Notice 2 (2014) and is excluded from this activity.</p>
<p><u>Listing Notice 1, Activity 17</u>  <i>"Development—</i>  <i>(i) in the sea</i>  <i>(ii) in an estuary,</i>  <i>(iii) within the littoral active zone,</i>  <i>(v) if no development setback exists, within a distance of 100 metres inland of the high-water</i></p>	<p>This Listed Activity is triggered since the mooring systems, the secured gas pipeline, the proposed towers for the transmission line, the switching station and the temporary construction facilities will cumulatively exceed a footprint of 50 square meters within the sea, estuary (port is situated in</p>

<p><i>mark of the sea or an estuary, whichever is the greater,</i>  <i>in respect of-</i>  <i>(e) infrastructure or structures with a development footprint of 50 square metres or more.”</i></p>	<p>an estuarine functional zone and described as an estuarine bay) and littoral active zone.</p>
<p><u>Listing Notice 1, Activity 18</u>  <i>“The planting of vegetation or placing of any material on dunes or exposed sand surfaces of more than 10 square metres, within the littoral active zone, for the purpose of preventing the free movement of sand, erosion or accretion.”</i></p>	<p><u>This Listed Activity is triggered since:</u></p> <ul style="list-style-type: none"> <li>- sections of the transmission line will need to be stabilised to prevent erosion on the substrate where the transmission line is established,</li> <li>- rehabilitation for the terrestrial footprint related to the stringing yard will be required. Although the area has already been transformed due to port activity, it will require the planting of vegetation on exposed sand surfaces of more than 10 square meters to ensure proper environmental management; and</li> <li>- Ongoing maintenance to prevent erosion associated with the operational phases must also be ensured, as per the maintenance management plan included in the EMPr.</li> </ul>
<p><u>Listing Notice 1, Activity 19</u>  <i>“The infilling or depositing of any material of more than 10 cubic metres into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 10 cubic metres from a watercourse;”</i></p>	<p>The proposed transmission line and the temporary construction facilities will take place within a watercourse (i.e., floodplain wetland and unchannelled valley bottom wetland) and will require the infilling or depositing of material of more than 10 cubic meters into, and the excavation, removal or moving of material of more than 10 cubic meters from a watercourse. The infrastructure is deemed to increase the development footprint of the port. Application for this activity is also made in regard to the</p>

	<p>maintenance management plan, forming part of the EMPr for the activity required to maintain the infrastructure and operations.</p>
<p><u>Listing Notice 1. Activity 19A</u></p> <p><i>“The infilling or depositing of any material of more than 5 cubic metres into, or the dredging, excavation, removal or moving of soil, sand, shells, shell grit, pebbles or rock of more than 5 cubic metres from-</i></p> <p><i>(i) the seashore,</i></p> <p><i>(ii) the littoral active zone, an estuary or a distance of 100 metres inland of the highwater mark of the sea or an estuary, whichever distance is the greater, or</i></p> <p><i>(iii) the sea;”</i></p>	<p>This Listed Activity is triggered since the mooring systems, the secured gas pipeline, the erection of the towers for the transmission line and the construction facilities will require the infilling or depositing, excavation, removal or moving of more than 5 cubic metres of material from the littoral active zone, an estuary or within a distance of 100 meters of an estuary and the sea. These structures and infrastructure are deemed to increase the development footprint of the port and thus are not excluded from this activity. Application for this activity is also made in regard to the maintenance management plan, forming part of the EMPr for the activity required to maintain the infrastructure and operations.</p>
<p><u>Listing Notice 1. Activity 27</u></p> <p><i>“The clearance of an area of 1 hectare or more, but less than 20 hectares of indigenous vegetation, except where such clearance of indigenous vegetation.”</i></p>	<p>This Listed Activity is triggered. The switching station and the temporary construction facilities will cumulatively require clearance of more than 1 hectare of indigenous vegetation.</p>
<p><u>Listing Notice 2. Activity 2</u></p> <p><i>“The development and related operation of facilities or infrastructure for the generation of electricity from a non-renewable resource where the electricity output is 20 megawatts or more.”</i></p>	<p>This Listed Activity is triggered since the project’s design capacity is 540MW and the contracted capacity will be 450MW of electricity to be supplied to the national grid. Electricity will be generated by up to 27 reciprocating engines, each having a heat input in excess of 10MW (design capacity of 18.32MW each at full capacity). Heat generated by operation of the reciprocating engines is captured, and that energy is used to</p>

	<p>create steam to drive three steam turbines that each have a heat input of circa 15.45MW. Related operation of facilities or infrastructure include the facilities and infrastructure on the Powerships, the FSRU, gas pipeline and evacuation of power from the on-board substation.</p>
<p><u>Listing Notice 2, Activity 4</u></p> <p><i>“The development and related operation of facilities or infrastructure, for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of more than 500 cubic metres.”</i></p>	<p>This Listed Activity is triggered since the storage of LNG on the FSRU will exceed 500 cubic meters (maximum estimated storage is 175 000 cubic meters at any given time).</p>
<p><u>Listing Notice 2, Activity 6</u></p> <p><i>“The development of facilities or infrastructure for any process or activity which requires a permit or licence or an amended permit or licence in terms of national or provincial legislation governing the generation or release of emissions, pollution or effluent.”</i></p>	<p>This Listed Activity is triggered since the engines used for electricity generation are a Listed Activity under GN 893 of 22 November 2013 (as amended) in terms of section 21 of the NEM:AQA Sub-Category 1.5: Reciprocating Engines. In the case of the proposed project, the Powerships will have a combined sum of 27 engines that each have a heat input capacity of more than 10MW. The three steam turbines have a heat input capacity of less than 50MW, but more than 10MW. These units are therefore declared Controlled Emitters and they will be regulated in terms of GN 831 of 1 November 2013 for Small Boilers.</p>
<p><u>Listing Notice 2, Activity 7</u></p> <p><i>“The development and related operation of facilities or infrastructure for the bulk transportation of dangerous goods—</i></p> <p><i>(i) in gas form, outside an industrial complex, using pipelines, exceeding 1 000 metres in length, with a throughput capacity of more than 700 tons per day.”</i></p>	<p>This Listed Activity is triggered since a subsea gas pipeline for transportation of gas in gas form, exceeding 1000 meters, is proposed. This Listed Activity does not exclude pipelines in the “sea” or within a port. The exclusion of “within an industrial complex” is open to dispute and interpretation, as clarified above, so it cannot be relied upon.</p>

<p><u>Listing Notice 2, Activity 14</u></p> <p><i>“The development and related operation of—</i></p> <ul style="list-style-type: none"> <li><i>(i) an anchored platform; or</i></li> <li><i>(ii) any other structure or infrastructure — on, below or along the seabed.”</i></li> </ul>	<p>This Listed Activity is triggered since the Powerships and FSRU will be anchored and moored in the port utilising the vessel's anchoring system. The transmission of the regassified LNG will flow via a gas pipeline from the moored floating storage regasification unit (FSRU) ship along the seabed to the main generation ship (the Powerships) for processing. The subsea gas pipeline is proposed to be installed, operated and maintained between the FSRU and Powerships to ensure gas supply for power generation.</p>
<p><u>Listing Notice 3, Activity 10</u></p> <p><i>“The development and related operation of facilities or infrastructure for the storage, or storage and handling of a dangerous good, where such storage occurs in containers with a combined capacity of 30 but not exceeding 80 cubic metres.</i></p> <p><i>d. KwaZulu-Natal</i></p> <ul style="list-style-type: none"> <li><i>i. In an estuarine functional zone,</i></li> <li><i>vi. Within 500 metres of an estuarine functional zone,</i></li> <li><i>ix. Critical biodiversity areas as identified in systematic biodiversity plans adopted by the competent authority or in bioregional plans,</i></li> <li><i>xii. Sensitive areas as identified in an environmental management framework as contemplated in chapter 5 of the Act and as adopted by the competent authority,</i></li> <li><i>xiii. Outside urban areas:</i> <ul style="list-style-type: none"> <li><i>(aa) Areas within 10 kilometres from national parks or world heritage sites or 5 kilometres from any terrestrial protected area identified in terms of NEMPAA,</i></li> </ul> </li> </ul>	<p>This Listed Activity is triggered due to the proximity of the project to various identified protected areas. The Richards Bay Nature Reserve lies less than 1km to the southwest of the site, and the Enseleni Nature Reserve is located approximately 10km to the north of the site. Since quantities of between 30 and 80 cubic meters of LNG is anticipated to be contained in the proposed facilities or infrastructure (the gas pipeline itself) at any given time. The storage of up to 175 000 cubic meters of LNG in the FSRU is also obviously covered by Listed Activity 4 (LN2) above.</p>

<p><i>(bb) Areas within 1 kilometre from the high-water mark of the sea if no such development setback line is determined; or</i></p> <p><i>(cc) Areas within a watercourse or wetland; or within 100 metres from the edge of a watercourse or wetland."</i></p>	
<p><u>Listing Notice 3, Activity 12</u></p> <p><i>"The clearance of an area of 300 square metres or more of indigenous vegetation</i></p> <p>d. KwaZulu-Natal</p> <p>v. <i>Critical biodiversity areas as identified in systematic biodiversity plans adopted by the competent authority or in bioregional plans,</i></p> <p>vi. <i>Within the littoral active zone or 100 metres inland from the high-water mark of the sea, whichever distance is the greater, excluding where such removal will occur behind the development setback line on erven in urban areas,</i></p> <p>xii. <i>Sensitive areas as identified in an environmental management framework as contemplated in chapter 5 of the Act and as adopted by the competent authority; or</i></p> <p>xiii. <i>In an estuarine functional zone."</i></p>	<p>This Listed Activity is triggered since indigenous vegetation exceeding 300 square metres will be cleared for the establishment of the transmission line towers and servitude, the switching station and the temporary construction facilities within the areas as specified by the sub-categories. Application for this activity is also made in regard to the maintenance management plan, forming part of the EMPr for activities required to maintain the infrastructure and operations.</p>
<p><u>Listing Notice 3, Activity 14</u></p> <p><i>"The development of—</i></p> <p><i>(i) infrastructure or structures with a physical footprint of 10 square metres or more,</i></p> <p><i>where such development occurs—</i></p> <p><i>(a) within a watercourse,</i></p>	<p>This Listed Activity is triggered due to the proximity of the project to various identified protected areas, and as the proposed infrastructure or structures (transmission line and corridor and temporary construction facilities) with a footprint of more than 10 square meters will be developed within a watercourse (i.e., floodplain</p>

<p>(c) <i>if no development setback has been adopted, within 32 metres of a watercourse, measured from the edge of a watercourse,</i></p> <p><i>KwaZulu-Natal</i></p> <p>i. <i>In an estuarine functional zone,</i></p> <p>vii. <i>Critical biodiversity areas or ecological support areas as identified in systematic biodiversity plans adopted by the competent authority or in bioregional plans,</i></p> <p>viii. <i>Sensitive areas as identified in an environmental management framework as contemplated in chapter 5 of the Act and as adopted by the competent authority,</i></p> <p>x. <i>Outside urban areas:</i>  <i>(aa) Areas within 10 kilometres from national parks or world heritage sites or 5 kilometres from any terrestrial protected area identified in terms of NEMPAA,</i>  <i>(bb) Areas within 1 kilometre from the high-water mark of the sea if no such development setback line is determined."</i></p>	<p>wetland and unchannelled valley bottom wetland) and within 32 metres of a watercourse, within the littoral active zone and in an estuarine functional zone. This Listed Activity must be applied for. These infrastructure and structures are deemed to increase the development footprint of the port and thus are not excluded from this activity.</p>
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as described in the final Environmental Impact Assessment Report (EIAR) dated 30 August 2023 at:

<b>Properties</b>	<b>21 SG Codes</b>	<b>Longitude</b>	<b>Latitude</b>
Remainder of Lot 223 uMhlatuzi No.16230 <b>Powerships, FSRU &amp; gas pipeline</b>	N0GV00000001623000000	32°1'32.46" E	28°47'39.14" S
Portion 21 (of 8) of Erf 5333 Richards Bay <b>Transmission line</b>	N0GV04210000533300021	32°1'27.60" E	28°47'36.35" S
Portion 45 of Erf 5333 Richards Bay <b>Transmission line</b>	N0GV04210000533300045	32°1'10.78" E	28°47'22.84" S
Remainder of Erf 5333 Richards Bay	N0GV04210000533300000	32°00'42.22" E	28°46'51.22" S

<b>Transmission line and switching station</b>			
Remainder of Portion 8 of the Erf 5333 Richards Bay	N0GV04210000533300008	32°1'27.60" E	28°47'36.35" S
<b>Transmission line</b>			
Remainder of Erf 6363 Richards Bay	N0GV042100000636300000	32°00'48.3" E	28°46'45.4" S
<b>Switching station</b>			

- for the 450MW Gas to Power Powership Project at the Port of Richards Bay within the uMhlathuze Local Municipality in the KwaZulu-Natal Province, hereafter referred to as "the property".

The project infrastructure will include the following:

- Powerships and Floating Storage Regasification Unit (FSRU): Berthing and mooring of the Powerships and FSRU

The Powerships are assembled off-site and will be delivered fully equipped and functional to the Port of Richards Bay. These ships have been fitted with the necessary operational equipment, including reciprocating engines, steam turbines, and a high voltage substation to generate and transmit electricity using natural gas (NG) as a fuel. The fuel is supplied by a separate vessel, a Floating Storage Regasification Unit (FSRU) which stores the LNG and converts it to a gaseous state for delivery to the Powerships through a gas pipeline. An LNG carrier shall periodically supply LNG to the FSRU for a 2 – 3 day period every 20 – 30 days and will temporarily stay in the location while offloading the LNG cargo.

- Transmission lines

The electricity generated on the ship is converted by a high voltage substation on board and the electricity is transmitted along a 132kV monopole transmission line of approx. 3.6km in length, to tie in point to the Eskom line, at a connection point (including an establishment of a switching station) in proximity to the existing Bayside Substation.

- Switching station

The electricity generated on the ship is required to be integrated into the Eskom National grid via a switching station. The location of the switching station is on shore. The switching station is part of the Eskom self-build process and will be built by Karpowership and handed to Eskom for their ownership and operation. The switching station will facilitate the control of the incoming lines from the Powership and the outgoing lines to the existing Impala – Bayside network line. The switching station will measure approximately 17 898m<sup>2</sup> in size and will comprise of an incoming circuit for the lines from the ship, a busbar system to distribute the electricity and an outgoing circuit for the electricity to Eskom. The switching station further comprises of



landing gantries, breakers, isolators, current transformers, voltage transformers and a control room for the monitoring, measurement and control of the power.

- Gas pipelines

A gas line is required between the FSRU and Powerships to ensure gas supply for power generation. The FSRU discharges gas via 2no flexible risers to the FSRU pipeline end manifolds (PLEM) on the seabed next to the FSRU. The FSRU PLEM incorporates shutoff valves and pigging connections for maintenance. The gas is then transported from the FSRU PLEM to the Shark class Powership PLEM via a 24" steel pipeline with 50mm concrete weight coating, installed on the seabed. The Shark class Powership PLEM positioned adjacent to the Shark class Powership manifold, incorporates shutoff valves, expansion spools and 2no 12" flexible risers delivering gas to the Shark class Powership manifold flange.

The gas supply then continues from the Shark class Powership PLEM to the Khan class Powership PLEM via a 24" steel pipeline with 50mm concrete weight coating, installed on the seabed. The Khan class Powership PLEM positioned adjacent to the Shark class Powership manifold, incorporates shutoff valves, pigging connection, an expansion spool and 2no 12" flexible risers delivering gas to the Khan class Powership manifold. The subsea gas pipeline connecting the FSRU to the Powerships will be installed on the seabed. It is anticipated that the subsea pipeline will have a servitude of approximately 50m either side of the pipe centre line.

## Conditions of this Environmental Authorisation

### Scope of authorisation

1. The development of a 450MW gas to power powership project at the Port of Richards Bay within the uMhlathuze Local Municipality in the KwaZulu-Natal Province as described above is hereby approved.
2. Authorisation of the activity is subject to the conditions contained in this Environmental Authorisation, which form part of the Environmental Authorisation and are binding on the holder of the authorisation.
3. The holder of the authorisation is responsible for ensuring compliance with the conditions contained in this Environmental Authorisation. This includes any person acting on the holder's behalf, including but not limited to, an agent, servant, contractor, sub-contractor, employee, consultant, or person rendering a service to the holder of the authorisation.
4. The activities authorised may only be carried out at the property as described above.
5. Any changes to, or deviations from, the project description set out in this Environmental Authorisation must be approved, in writing, by the Department before such changes or deviations may be affected. In assessing whether to grant such approval or not, the Department may request such information as it deems necessary to evaluate the significance and impacts of such changes or deviations and it may be necessary for the holder of the authorisation to apply for further Environmental Authorisation in terms of the regulations.
6. The holder of an Environmental Authorisation must apply for an amendment of the Environmental Authorisation with the Competent Authority for any alienation, transfer, or change of ownership rights in the property on which the activity is to take place.
7. This activity must commence within a period of two (02) years from the date of issue of this Environmental Authorisation. If the commencement of the activity does not occur within that period, the authorisation lapses, and a new application for Environmental Authorisation must be made in order for the activity to be undertaken.
8. Construction must be completed within two (02) years of the commencement of the activity on site.

### **Notification of authorisation and right to appeal**

9. The holder of the authorisation must notify every registered interested and affected party, in writing and within 14 (fourteen) calendar days of the date of this Environmental Authorisation, of the decision to authorise the activity.
10. The notification referred to must –
  - 10.1. specify the date on which the authorisation was issued;
  - 10.2. inform the interested and affected party of the appeal procedure provided for in the National Appeal Regulations, 2014;
  - 10.3. advise the interested and affected party that a copy of the authorisation will be furnished on request; and
  - 10.4. give the reasons of the Competent Authority for the decision.

### **Commencement of the activity**

11. The authorised activity shall not commence until the period for the submission of appeals has lapsed as per the National Appeal Regulations, 2014, and no appeal has been lodged against the decision. In terms of Section 43(7), an appeal under Section 43 of the National Environmental Management Act, Act No. 107 of 1998, as amended will suspend the Environmental Authorisation or any provision or condition attached thereto. In the instance where an appeal is lodged, you may not commence with the activity until such time that the appeal has been finalised.

### **Management of the activity**

12. The final site layout plan(s) for the gas to power via powership and its associated infrastructure, as determined by the detailed engineering phase and micro siting, and all mitigation measures as dictated by the final site layout plan, must be submitted to the Department for approval prior to construction. A copy of the final site layout map must be made available for comments to registered Interested and Affected Parties and the holder of this Environmental Authorisation must consider such comments. Once amended, the final development layout map must be submitted to the Department for written approval, prior to commencement of the activity. All available biodiversity information must be used in the finalisation of the layout map. The layout map(s) must indicate the following:

- 12.1. The position of the powerships and Floating Storage Regasification Unit (FSRU): Berthing and mooring positions of the Powerships and FSRU,
  - 12.2. The transmission lines final route alignment,
  - 12.3. Switching station,
  - 12.4. The gas pipelines,
  - 12.5. All associated infrastructure,
  - 12.6. The location of the powerships and its associated infrastructure must be located 230m away from the spring low tide margin of the sandspit.
  - 12.7. All sensitive features; and
  - 12.8. All "no-go" and buffer areas.
  13. The generic Environmental Management Programmes (EMPrs) for the substation infrastructure and overhead transmission lines, submitted as part of the EIAR dated 30 August 2023, are approved. The approved final site layout plan indicating the substation infrastructure and overhead transmission lines, must be appended to the generic EMPrs.
  14. The Environmental Management Programme (EMPr) for the gas to power powership facility, submitted as part of the EIAR is not approved and must be amended to include measures as dictated by the final site lay-out map(s) and micro-siting, and the provisions of this Environmental Authorisation. The EMPr must be made available for comments to registered Interested and Affected Parties and the holder of this Environmental Authorisation must consider such comments. Once amended, the final EMPr must be submitted to the Department for written approval prior to commencement of the activity.
  15. The EMPr amendment must include the following:
    - 15.1. The approved offset plans as detailed in conditions 57 – 64 herein.
    - 15.2. The specific conditions of this Environmental Authorisation, condition 34 - 64.
    - 15.3. All recommendations and mitigation measures recorded in the EIAR, and the specialist reports as included in the final EIAR dated 30 August 2023.
    - 15.4. A re-vegetation and habitat rehabilitation plan. Restoration must be undertaken right after completion of construction activities to reduce the amount of habitat converted at any one time and to speed up the recovery to natural habitats.
    - 15.5. A traffic management plan for the site access road to ensure that no hazards would result from the increased truck traffic and that traffic flow would not be adversely impacted. This plan must include measures to minimise impacts on local commuters e.g., limiting construction vehicles travelling on public roadways during the morning and late afternoon commute time and avoid using roads through densely populated built-up areas, so as not to disturb existing retail and commercial operations, including farming operations.
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- 15.6. An erosion management plan, for monitoring and rehabilitating erosion events associated with the facility. Erosion mitigation must form part of this plan to prevent and reduce the risk of any potential erosion;
  - 15.7. A chance-finds procedure must be implemented in the event of fossils being uncovered;
  - 15.8. An effective monitoring system to detect any leakage or spillage of any hazardous substances during their transportation, handling, use or storage. This must include precautionary measures to limit the possibility of oil and other toxic liquids from entering the soil or storm water systems;
  - 15.9. A fire management plan; and
  - 15.10. The final site layout map(s).
16. Once approved, the EMPr must be implemented and strictly adhered to. It shall be seen as a dynamic document and shall be included in all contract documentation for the development when approved.
  17. Changes to the approved EMPr must be submitted in accordance with the EIA Regulations applicable at the time.
  18. The Department reserves the right to amend the approved EMPr should any impacts that were not anticipated or covered in the EIAr be discovered.

#### **Frequency and process of updating the EMPr**

19. The EMPr must be updated where the findings of the environmental audit reports, contemplated in Condition 26 below, indicate insufficient mitigation of environmental impacts associated with the undertaking of the activity, or insufficient levels of compliance with the Environmental Authorisation or EMPr.
20. The updated EMPr must contain recommendations to rectify the shortcomings identified in the environmental audit report.
21. The updated EMPr must be submitted to the Department for approval together with the environmental audit report, as per Regulation 34 of the EIA Regulations, 2014 as amended. The updated EMPr must have been subjected to a public participation process, which process has been agreed to by the Department, prior to submission of the updated EMPr to the Department for approval.
22. In assessing whether to grant approval of an EMPr which has been updated as a result of an audit, the Department will consider the processes prescribed in Regulation 35 of the EIA Regulations, 2014 as amended. Prior to approving an amended EMPr, the Department may request such amendments to the EMPr as it deems appropriate to ensure that the EMPr sufficiently provides for avoidance, management, and mitigation of environmental impacts associated with the undertaking of the activity.

23. The holder of the authorisation must apply for an amendment of an EMPr if such amendment is required before an audit is required. The amendment process is prescribed in Regulation 37 of the EIA Regulations, 2014, as amended. The holder of the authorisation must request comments on the proposed amendments to the impact management outcomes of the EMPr or amendments to the closure objectives of the closure plan from potentially interested and affected parties, including the competent authority, by using any of the methods provided for in the Act for a period of at least 30 days.

### **Monitoring**

24. The holder of the authorisation must appoint an experienced Environmental Control Officer (ECO) for the construction phase of the development that will have the responsibility to ensure that the mitigation/rehabilitation measures and recommendations referred to in this Environmental Authorisation are implemented and to ensure compliance with the provisions of the approved EMPr.
- 24.1. The ECO must be appointed before the commencement of any authorised activities.
- 24.2. Once appointed, the name and contact details of the ECO must be submitted to the *Director: Compliance Monitoring* of the Department.
- 24.3. The ECO must keep a record of all activities on site, problems identified, transgressions noted, and a task schedule of tasks undertaken by the ECO.
- 24.4. The ECO must remain employed until all rehabilitation measures, as required for implementation due to construction damage, are completed and the site is ready for operation.

### **Recording and reporting to the Department**

25. All documentation e.g., audit/monitoring/compliance reports and notifications, required to be submitted to the Department in terms of this Environmental Authorisation, must be submitted to the *Director: Compliance Monitoring* of the Department.
26. The holder of the Environmental Authorisation must, for the period during which the Environmental Authorisation and EMPr remain valid, ensure that project compliance with the conditions of the Environmental Authorisation and the EMPr are audited and that the audit reports are submitted to the *Director: Compliance Monitoring* of the Department.
27. The frequency of auditing and submission of the environmental audit reports must be as per the frequency indicated in the EMPr, taking into account the processes for such auditing as prescribed in Regulation 34 of the EIA Regulations, 2014 as amended.

28. The holder of the authorisation must, in addition, submit environmental audit reports to the Department within 30 days of completion of the construction phase (i.e., within 30 days of site handover) and a final environmental audit report within 30 days of completion of rehabilitation activities.
29. The environmental audit reports must be compiled in accordance with Appendix 7 of the EIA Regulations, 2014 as amended and must indicate the date of the audit, the name of the auditor, and the outcome of the audit in terms of compliance with the Environmental Authorisation conditions as well as the requirements of the approved EMPr.
30. Records relating to monitoring and auditing must be kept on-site and made available for inspection to any relevant and competent authority in respect of this development.

#### **Notification to authorities**

31. A written notification of commencement must be given to the Department no later than fourteen (14) days before the commencement of the activity. Commencement for the purposes of this condition includes site preparation. The notice must include a date on which it is anticipated that the activity will commence, as well as a reference number.

#### **Operation of the activity**

32. A written notification of operation must be given to the Department no later than fourteen (14) days prior to the commencement of the activity operational phase.

#### **Site closure and decommissioning**

33. Should the activity ever cease or become redundant, the holder of the authorisation must undertake the required actions as prescribed by legislation at the time and comply with all relevant legal requirements administered by any relevant and Competent Authority at that time.

#### **Specific conditions**

34. The powerline to be constructed must be designed using the preferred monopole structure.
35. No linear 3m footprints must be cleared of vegetation within the wetland areas including reed beds, as well as in natural areas. Individual drilled foundations must be used.

36. The only source of fuel to be utilised for the generation of power from the powerships must be natural gas.
37. Potential residual impacts, especially with regard to disturbance of FP03/Transformed Swamp Forest must be monitored biannually by an appointed ECO and be included in the auditing reports.
38. All buffers and no-go areas stipulated in the final EIAR and specialist reports must be adhered to.
39. No activities, which require a water use license, must be allowed to encroach into a water resource without a water use authorisation being in place from the Department of Water and Sanitation.
40. A permit must be obtained from the relevant Department for the removal or destruction of indigenous, protected, or endangered plant or animal species (if any) and a copy of such permit/s must be submitted to the Department for record keeping.
41. If any evidence of archaeological sites or remains (e.g., remnants of stone-made structures, indigenous ceramics, bones, stone artefacts, ostrich eggshell fragments, marine shell, and charcoal/ash concentrations), unmarked human burials, fossils or other categories of heritage resources are uncovered during construction, work in the immediate area must be halted, the KwaZulu-Natal Amafa and Research Institute must be alerted immediately, and a professional archaeologist or palaeontologist (depending on the nature of the finds) must be contacted to inspect the finds.
42. An integrated waste management approach must be implemented that is based on waste minimisation and must incorporate reduction, recycling, reuse, and disposal where appropriate. Any solid waste must be disposed of at a landfill licensed in terms of Section 20 (b) of the National Environment Management Waste Act, 2008 (Act No.59 of 2008).
43. Waste, which is not authorised for disposal on site as part of the approved development, must be dealt with according to relevant legislation or the Department's policies and practices.
44. The holder of Environmental Authorisation must prevent the occurrence of nuisance conditions or health hazards.

#### Avifauna

45. The powerships and its associated infrastructure must be located 230m away from the spring low tide margin of the sandspit.
  46. A 12-month pre-construction monitoring for avifaunal species must be undertaken to inform the scale and magnitude of the residual impacts.
    - 46.1. The outcome of monitoring must be used to determine and inform the marine "In-Kind" offset requirements, the layout plan and EMPr.
    - 46.2. The monitoring must be undertaken prior to construction commencing.
-



47. A further 12-month monitoring programme must commence as soon as construction is complete. Results from the monitoring will inform implementation of and any enhancement to the proposed mitigation measures to ensure that the development does not have a long-term impact on the SCCs and migratory waders in the area.
48. A follow-up assessment on avian biodiversity and species abundance within the assessment area and surrounding areas must be conducted within one year after the facility has been in operation and must be repeated every 03 (three) years. Information obtained from the monitoring must be provided to BirdLife South Africa.
49. Waterbird counts of the full site including both the Richards Bay Port and the Richards Bay Game Reserve must be implemented and continue annually in both summer and winter.
50. No development must take place in the sandspit and Kabeljous Flats.
51. The holder of the EA must appoint a suitably qualified specialist to undertake ongoing monitoring of the Sand Spit and adjacent Kabeljous Flats for the duration of the operation of the facility, this must be incorporated in the adaptive managed conservation plan developed for these areas.

#### Coastal, Estuarine and Marine

52. The powerships and its associated infrastructure must not traverse and impact/disturb the mangroves and swamp forest.
53. A plankton and nekton monitoring programme must be undertaken prior to the powerships becoming operational to determine a baseline assessment of these organisms.
54. A plankton and nekton monitoring programme must be conducted during the operational phase of the development to determine the impacts of entrainment in the cooling system on the plankton and fish larvae in the Port, as well as providing adaptive management to address the negative impacts of the cooling water intake on plankton and fish larvae.
55. Monitoring of turbidity levels must be undertaken daily during the pipe laying and anchorage operations. Total suspended solid levels must not exceed 20mg/l.
56. A night light audit on a moonless night and 24-hour noise audits in accordance with SANS 10103:2008 on the sandspit and Kabeljous Flats must be undertaken before operations commence to determine the baseline once operations start and annually thereafter.

## Offset Requirements

### "Out-of-Kind" Offset:

57. The Madaka Game Ranch must be incorporated into the Ithala Game Reserve and registered as a Biodiversity Protected Area.
58. A formal agreement to this effect must be concluded within 18 months from the date of issue of this Environmental Authorisation and records must be submitted to the Department for record keeping.
59. The holder of the Environmental Authorisation must design and detail the Madaka Game Ranch offset which must meet the following criteria –
  - 59.1. The offset area must be protected by declaring it as a protected area under the National Environmental Management: Protected Areas Act (Act 57 of 2003).
  - 59.2. The offset must contribute to an increase in biodiversity targets (elephants, black and white rhino populations).
  - 59.3. The offset must achieve a net environmental gain.
  - 59.4. The offset must contribute to national strategic conservation programmes and increase biodiversity targets (elephants, black and white rhino populations).
  - 59.5. The offset detail and design must follow an ecosystem-based approach.
60. The offset design detailing the proposed offset interventions must be submitted to the Ezemvelo KZN Wildlife, the Department of Forestry, Fisheries and the Environment: Directorate: Biodiversity and Conservation as well as the Directorate: Protected Area Management for review and comment and the holder of this Environmental Authorisation must consider such comments. Once amended based on the comments, the final offset design as well as the comments received must be submitted to the Department: Chief Directorate: Integrated Environmental Authorisations for written approval prior to commencement of the activity. The offset design document to be submitted for consideration must –
  - 60.1. Provide sufficient detail to properly inform a decision on whether the offset will adequately and sustainably counterbalance the impact;
  - 60.2. Be structured in a way that facilitates its inclusion in the Environmental Management Programme;
  - 60.3. Provide a description of, and contact details for all the parties required to ensure the efficient and effective implementation of the offset;
  - 60.4. Provide evidence that all the parties required to ensure the success of the offset fully understand their role in the offset and their willingness to fulfil this role;
  - 60.5. Provide evidence of suitable resource provision (human, financial and/or technical resources) for, and contractual commitment to, implementing the offset including: (i) Land acquisition – the

probable costs of acquiring or securing a sufficient area of suitable land, including transaction costs; (ii) Protection – the costs associated with obtaining formal protection, including advertising and public participation costs; (iii) Restoration and maintenance - the costs of restoration and management of the offset area for a period of no less than thirty (30) years, including the costs of any environmental impact assessment required for restoration works where applicable; and (iv) Compliance monitoring and reporting – the costs of monitoring and auditing performance and compliance for a period of no less than thirty (30) years.

#### “Like-for-Like” Offset

61. The holder of the Environmental Authorisation must design and detail a marine offset in accordance to the National Biodiversity Offset Guideline which must meet the following criteria –
  - 61.1. The offset area must be comprised of the same or similar biodiversity components and landscape features as those in the affected area;
  - 61.2. The offset ratios for the calculation of the offset area must be determined in accordance with the National Biodiversity Offset Guideline.
  - 61.3. The offset detail and design must follow an ecosystem-based approach.
  - 61.4. The offset area must be protected by declaring it a protected area under the National Environmental Management: Protected Areas Act (Act 57 of 2003).
  - 61.5. The offset must contribute to the long-term protection of biodiversity priority areas and improve their ecological conditions and functioning, thereby resulting in tangible and measurable positive outcomes for biodiversity conservation in the region.
62. A formal agreement to this effect must be concluded within eighteen (18) months from the date of issue of this Environmental Authorisation.
63. The offset area must be at least in good or better condition compared to the impacted areas and must contain viable populations of the majority of impacted species. The offset area must be declared as a protected area under the Protected Areas Act, and must be adjacent to an existing protected area, or at a minimum facilitate ecological connectivity in the region.
64. The offset design, detailing the proposed offset interventions must be submitted to the Ezemvelo KZN Wildlife, the Department of Forestry, Fisheries and the Environment: Directorate: Biodiversity and Conservation as well as the Directorate: Protected Area Management for review and comment and the holder of this Environmental Authorisation must consider such comments. Once amended based on the comments, the final offset design as well as the comments received must be submitted to the Department:

Chief Directorate: Integrated Environmental Authorisations for written approval prior to commencement of the activity. The offset design document to be submitted for consideration must –

- 64.1. Provide sufficient detail to properly inform a decision on whether the offset will adequately and sustainably counterbalance the impact;
- 64.2. Be structured in a way that facilitates its inclusion in the Environmental Management Programme;
- 64.3. Provide a description of, and contact details for, all the parties required to ensure the efficient and effective implementation of the offset;
- 64.4. Provide evidence that all the parties required to ensure the success of the offset fully understand their role in the offset and their willingness to fulfil this role;
- 64.5. Provide evidence of suitable resource provision (human, financial and/or technical resources) for, and contractual commitment to, implementing the offset including: (i) Land acquisition – the probable costs of acquiring or securing a sufficient area of suitable land, including transaction costs; (ii) Protection – the costs associated with obtaining formal protection, including advertising and public participation costs; (iii) Restoration and maintenance - the costs of restoration and management of the offset area for a period of no less than thirty (30) years, including the costs of any environmental impact assessment required for restoration works where applicable; and (iv) Compliance monitoring and reporting – the costs of monitoring and auditing performance and compliance for a period of no less than thirty (30) years.

## **General**

65. A copy of this Environmental Authorisation, the audit and compliance monitoring reports, and the approved EMPr, must be made available for inspection and copying-
  - 65.1. at the site of the authorised activity;
  - 65.2. to anyone on request; and
  - 65.3. where the holder of the Environmental Authorisation has a website, on such publicly accessible websites.

66. National government, provincial government, local authorities or committees appointed in terms of the conditions of this authorisation or any other public authority shall not be held responsible for any damages or losses suffered by the holder of the authorisation or his/her successor in title in any instance where construction or operation after construction be temporarily or permanently stopped for reasons of non-compliance by the holder of the authorisation with the conditions of authorisation as set out in this document or any other subsequent document emanating from these conditions of the authorisation.

Date of Environmental Authorisation: 25/10/2023



**Mr. Sabelo Malaza**

**Chief Director: Integrated Environmental Authorisations  
Department of Forestry, Fisheries and the Environment**

## Annexure 1: Reasons for Decision

### 1. Information considered in making the decision

In reaching its decision, the Department took, *inter alia*, the following into consideration -

- a) The listed activities as applied for in the application form received on 30 August 2023.
- b) The information contained in the final EIAr dated 30 August 2023.
- c) The comments received from interested and affected parties as included in the final EIAr dated 30 August 2023.
- d) Mitigation measures as proposed in the final EIAr and the EMPr dated 30 August 2023.
- e) The information contained in the specialist study contained within the appendix 9 of the final EIAr dated 30 August 2023 and as appears below:

Title	Prepared by	Date
Hydrological Assessment	GSC Water & Environmental Consultants	October 2022
Baseline Aquatic Assessment	GSC Water & Environmental Consultants	October 2022
Desktop Hydrogeology Assessment	GSC Water & Environmental Consultants	October 2022
Geohydrological Assessment	GSC Water & Environmental Consultants	October 2022
Water Balance Assessment	GSC Water & Environmental Consultants	February 2021
Wetland Delineation & Functional Assessment	Triplo4 Sustainable Solutions	October 2022
Wetland Rehabilitation Plan	Triplo4 Sustainable Solutions	October 2022
Heritage Impact Assessment	Umlando: Archaeological Surveys and Heritage Management	October 2022
Terrestrial Ecological Assessment	Leigh-Ann de Wet	October 2022
Avifauna Impact Assessment	Anchor Environmental	May 2023
Avifauna Monitoring Plan	The Biodiversity Company	May 2023
Background Noise Monitoring	Subacoustech Environmental	January 2023
Underwater Noise Assessment	Subacoustech Environmental	January 2023
Underwater Heritage Compliance Letter	Vanessa Maitland	June 2023
Coastal, Estuarine and Marine Impact Assessment	Coastwise Consulting, GroundTruth and Anchor Environmental	May 2023
Atmospheric Impact Assessment	uMoya-Nilu	May 2023

Terrestrial Noise Assessment	Safetech	October 2020
Ghana Ambient Noise Assessment	Subacoustech Environmental	October 2022
Climate Change Impact Assessment	Promethium Carbon	October 2022
Socio-Economic Impact Assessment	Social Risk Research	December 2022
Small Scale Fishers Engagements	Afro Development Planning	January 2023
Tourism Impact Research	Business Fusion	Undated
Traffic and Transportation Evaluation	Fulcrum Development Consultants	October 2022
Visual Impact Assessment	Environmental Planning & Design	October 2022
Risk Assessment	MHR Consultants	January 2023
EMPr	NS Environmental (Pty) Ltd	May 2023

## 2. Key factors considered in making the decision.

All information presented to the Department was taken into account in the Department's consideration of the application. A summary of the issues which, in the Department's view, were of the most significance is set out below.

- a) The appeal decision LSA 207022 dated 01 August 2022.
- b) The findings of all the specialist studies conducted and their recommended mitigation measures.
- c) The need for the project stems from the provision of electricity to the national grid.
- d) The final EIAr dated 30 August 2023 identified all legislations and guidelines that have been considered in the preparation of the EIAr.
- e) The methodology used in assessing the potential impacts identified in the final EIAr dated August 2023 and the specialist studies have been adequately indicated.
- f) A sufficient public participation process was undertaken, and the applicant has satisfied the minimum requirements as prescribed in the EIA Regulations, 2014 as amended for public involvement.

## 3. Findings

After consideration of the information and factors listed above, the Department made the following findings -

- a) The identification and assessment of impacts are detailed in the final EIAr dated 30 August 2023 and sufficient assessment of the key identified issues and impacts have been completed.
- b) The procedure followed for impact assessment is adequate for the decision-making process.
- c) The proposed mitigation of impacts identified and assessed adequately curtails the identified impacts.

- d) EMPr measures for the pre-construction, construction, and rehabilitation phases of the development were proposed and included in the EIAr and will be implemented to manage the identified environmental impacts during the construction phase.

In view of the above, the Department is satisfied that, subject to compliance with the conditions contained in the Environmental Authorisation, the authorised activities will not conflict with the general objectives of integrated environmental management laid down in Chapter 5 of the National Environmental Management Act, 1998 and that any potentially detrimental environmental impacts resulting from the authorised activities can be mitigated to acceptable levels. The Environmental Authorisation is accordingly **granted**.



Date: 02 November 2023

14/12/16/3/3/2/2007: NOTIFICATION OF APPROVAL IN TERMS OF THE APPLICATION FOR ENVIRONMENTAL AUTHORISATION IN TERMS OF THE NATIONAL ENVIRONMENTAL MANGEMENT ACT, ACT 107 OF 1998 AS AMENDED: FOR THE DEVELOPMENT OF A GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDS BAY WITHIN THE UMHLATHUZE LOCAL MUNICIPALITY IN THE KWAZULU-NATAL PROVINCE

Dear registered I&AP,

**NOTIFICATION OF APPROVAL OF THE APPLICATION FOR ENVIRONMENTAL AUTHORISATION**

Notice is hereby given in accordance with regulation 4(2) of the EIA Regulations, 2014 (as amended) that:

- A record of decision was issued by DFFE for the environmental authorisation application, Reference 14/12/16/3/3/2/2007 on the 25 October 2023 as per copy attached to the notification, specifying detailed reasons.
- In accordance with Chapter 2 of the National Appeal Regulations, 2014 which regulates the appeal process, should you wish to appeal any aspect of the decision, you must within 20 days of the date of notification of the decision, submit your appeal on the prescribed form and including supporting documents to the appeal administrator by any of the following means:

The Director: Appeals and Legal Review of DFFE at the below addresses:

POSTAL/FAX/EMAIL:	PHYSICAL:
Private Bag X447 Pretoria 0001  E-Mail: <a href="mailto:appeals@dffe.gov.za">appeals@dffe.gov.za</a>	Environment House 473 Steve Biko Arcadia Pretoria 0083

PO Box 6595, Zimbali, 4418  
E-mail: [richardssbayksa@triplo4.com](mailto:richardssbayksa@triplo4.com)

Phone: (032) 9463213  
Fax: (032) 9460826

Yours faithfully



**Mrs. Hantie Plomp (M.Inst.D) | Managing Director  
Masters Environmental Management (Cum Laude)  
Pr.Sci.Nat; EAPASA**



## Media Statement

### Karpowership SA reaches Landmark Biodiversity Offset Agreement with Ezemvelo Wildlife in KwaZulu Natal

06 September 2023, Johannesburg – In line with its final environmental impact report (EIR) submitted on 30 August 2023 for its Richards Bay project to the Department of Forestry Fisheries and Environment (DFFE), Karpowership SA has reached a biodiversity offset agreement with Ezemvelo Wildlife in KwaZulu Natal. This follows Karpowership SA's detailed submission of biodiversity offsets proposed to mitigate residual environmental impacts, by agreeing to implement both estuarine and land-based biodiversity offsets, demonstrating the company's unwavering commitment to the environmental sustainability of its projects. The Port of Richards Bay presents a unique circumstance where the active industrial port, used largely for coal exports, operates within an estuarine bay.

Although a relatively novel practice in South Africa, biodiversity offsetting is a form of impact mitigation. It commonly involves securing an area and managing the biodiversity offset site for a given period.

Even though the present ecological state of the Mhlathuze Estuary was identified as heavily modified due to surrounding industrial activities, ongoing port operations and coal export activities, biodiversity offsetting is an important tool for conserving biodiversity within this area. It is fundamental to the health and well-being of people, as well as economic activity and socio-economic upliftment.

In a letter shared with DFFE, Ezemvelo KZN Wildlife indicates that it has been party to and has witnessed the growing success of offset interventions by various role players along the KwaZulu-Natal coastline. As a demonstration of support for Karpowership SA's ambitious environmental conservation endeavor, Ezemvelo has indicated that it will not object to the environmental authorisation being issued.

Biodiversity offsetting is one of the ways in which South Africa's protected and conservation areas can be expanded, thereby promoting conservation, as well as securing ecologically sustainable development together with economic and social development.

Karpowership SA hopes to partner with the South African government to eliminate the country's worsening energy crisis. According to Central Bank estimates, the nation's electricity crisis is costing the economy as much as US\$51 million per day, with South Africans desperate for a glimmer of light and an end to the crippling loadshedding the country experiences daily.

Karpowership owns and operates the world's largest fleet of floating power plants. The company already has a strong presence in Africa and 16 operational projects around the World.

-END-

Date: 15 September 2023

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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**).<sup>1</sup> 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*".<sup>2</sup>
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:<sup>3</sup>

*"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".*

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<sup>1</sup> 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/>.

<sup>2</sup> FEIAR, p 181.

<sup>3</sup> 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.<sup>4</sup> 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*”;<sup>5</sup>

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<sup>4</sup> FEIAR, p 422.

<sup>5</sup> 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*”;<sup>6</sup>
- c) despite these “complexities”, an “in kind” estuary offset is still contemplated – but it has not yet been designed;<sup>7</sup>
- d) the intention is that the estuarine offset will be regulated through the existing Umhlathuze Estuary Management Plan which informs the Agreement;<sup>8</sup>
- 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*”;<sup>9</sup>.

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*”;<sup>10</sup>
- b) EKZNW’s interest in Madaka Game Ranch relates to black and white rhinoceros and elephant conservation and “*national strategic conservation programmes*”;<sup>11</sup>
- c) the “out of kind” offset will be managed through the existing Management Plan for the Ithala Game Reserve which informs the Agreement;<sup>12</sup>
- 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);<sup>13</sup>

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*

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<sup>6</sup> FEIAR, p 426.

<sup>7</sup> FEIAR, p 422.

<sup>8</sup> FEIAR, p 439.

<sup>9</sup> FEIAR, p 439.

<sup>10</sup> FEIAR, p 432.

<sup>11</sup> FEIAR, p 432.

<sup>12</sup> FEIAR, p 439.

<sup>13</sup> 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**



**E Z E M V E L O**  
**K Z N W I L D L I F E**

Conservation, Partnerships & Ecotourism

**"BLC5"**

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24 October 2023

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Dear Nina and Kate

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

With reference to your communication dated 15 September 2023, I have taken the liberty of extracting your questions from your document and have added the answers in blue below them. I have also retained your original numbering.

Please bear in mind that many of these questions should be directed to Triplo-4, particularly those questions referring to documents they have drafted on behalf of Karpowership SA. Therefore, Ezemvelo's response to your questions is, thus, provided without prejudice.

**Questions Raised**

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:

Ezemvelo is unaware of an offset report and, hence, unable to advise on this matter.

7.1.1. When was the Biodiversity Offset Report prepared, and by whom?

See above.

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7.1.2. When was the Biodiversity Offset Report made available for public comment?

See above.

7.1.3. Who contributed to developing the "agreement" contemplated at p 98 and 189 of the EMPr (cited at para 6.1 above).

Members of the Ezemvelo IEM division and senior staff formed part of the discussions prior to the agreement being drafted. Karpowership SA was represented by their senior managers, Triplo-4, the marine specialist and their attorney. The 'offset agreement' was drafted by Karpowership SA's attorney.

7.1.4. We would appreciate your forwarding a copy to the BLC.

See the explanation below.

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).

It is unknown what is meant by an 'optimum type of biodiversity offset.' This question needs to be put to Triplo-4.

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.

Based on the Karpowership SA' marine specialist report, the impacts are the potential displacement of resident and migratory birds, damage to and potential loss of feeding and roosting areas.

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).

The Operational phase.

7.3.2. Please indicate where these are referenced in the FEIAR and/or Specialist Studies.

Ezemvelo noted that the residual impacts are referred to in the DEIR in Section 7.5.8.4; 7.5.11.5; 7.9.1.1, Section 4 of the Avifaunal Report, and Section 8 of the Coastal, Estuary and Marine Ecology Report.

7.3.3. Please clarify whether these impacts entail any loss of irreplaceable biodiversity and/or biodiversity underpinning important ecosystem services.

There is uncertainty as to the extent and significance of the impact on the natural environment. But Karpowership SA's specialists were of the opinion that if anything was lost, it would be the temporary loss of habitat. The impacts were mainly disturbances related to the roosting and feeding habits of the migratory birds.

- 7.4. Please explain how the adequacy of the offset has been calculated, including ratios and criteria used.

The in-kind offset ratios and criteria for offset receiving areas are still to be finalised in the Environmental Authorisation if such is issued. Ezemvelo is of the opinion that a 1:30 ratio should be applied as per the prevailing guidelines.

No ratios or criteria were used to establish the out-of-kind offset, given that there are no tools which have been developed to determine such.

- 7.5. Please provide any records of consultation with local communities in relation to the uMhlathuze/estuarine and Madaka Game Ranch offsets.

This question needs to be directed to Triplo-4 as they were required to undertake the public participation exercise in accordance with the provisions of the National Environmental Management Act 107 of 1998 and the Regulations thereto.

Notwithstanding, there is no legal requirement for Karpowership SA or Ezemvelo to consult with local communities prior to the purchase of land. Should Madaka Game Ranch be declared as a nature reserve, public consultation would be required in terms of the provisions of National Environmental Management: Protected Areas Act 57 of 2003.

- 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).

Karpowership SA specialist proposed the 'uMhlathuze Estuary/Sanctuary.' Ezemvelo is not convinced that this site, given a number of significant challenges, is an appropriate receiving site for the marine offset. It is for this reason that Karpowership SA/Triplo-4 started considering other potential receiving sites. Unfortunately, these investigations were not completed by Triplo-4. Hence Ezemvelo insisted on 'equivalent' or alternative marine offset receiving areas.

- 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?

See the above answer.

The Richards Bay Nature Reserve was proclaimed in 1974 as an estuarine-protected area.

Improved management of the Richards Bay Nature Reserve may have a positive impact on the resident and migratory bird community. However, as mentioned above, there are serious challenges that cannot be overcome with the ease the offset requires — for instance, the neighbouring community's gill netting and associated disturbance.

Therefore, I suggest that you ask Triplo-4/Karpowership SA this question.

- 7.6.3. What are the “complexities” leading to delays in implementing an estuarine offset?

Compared to terrestrial offsets, which generally involve just a developer-landowner agreement, the marine environment is considered relatively complex. For instance, the marine environment consists of, in this instance and at least, offshore, inshore, estuarine and beach environments. It, therefore, from an organ-of-state perspective, involves the Department of Forestry, Fisheries and the Environment, the KZN Department of Economic Development, Tourism and Environmental Affairs, the district and local municipalities, the Department of Water Affairs and Sanitation, and Ezemvelo KZN Wildlife where the proposed offset abuts a marine or terrestrial protected area. The offset may also involve private and/or communal landowners. Thus, depending on the nature and extent of the offset, these role-players will need to be consulted and various agreements, permissions, permits and authorisation obtained.

- 7.6.4. Please explain what is contemplated in terms of a delayed offset strategy in relation to an estuarine offset.

What is being asked here is unclear, and Ezemvelo is unaware of any ‘delayed offset strategy’.

- 7.6.5. Please clarify how the estuarine offset will be functionally viable in the long term.

An offset is deemed functional when it compensates for the residual impacts caused by the development.

Given that Ezemvelo has not received the offset report or the offset management plan, we cannot comment on the ‘long-term viability of the marine offset’

- 7.6.6. Please confirm how the estuarine offset will contribute to KZN’s conservation plans and targets.

The Convention of Biodiversity, of which South Africa is a signatory, Target 3, known colloquially as “30x30,” calls for 30% of the world’s terrestrial, inland water, and coastal and marine areas, to be effectively protected and managed by 2030. This Target is now a national and KZN target. The target may be achieved through the establishment of protected areas in terms of the National Environmental Management: Protected Areas Act 57 of 2003, or other effective conservation measures (OECMs). The offset, if not a declared protected area, would be one of the many measures that qualify as an OECM.

- 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).

As mentioned, Ezemvelo has not received the Offset Report and hence is unable to comment on this statement. Nevertheless, this question should be put to Karpowership SA's environmental assessment practitioner, Triplo-4, who drafted the EMPr.

- 7.6.8. What guarantees are in place in relation to the management of the uMhlathuze or "equivalent" offset area?

The Environmental Authorisation, if issued, may include the conditions for the establishment and management of the offsets. The conditions housed in this authorisation will be binding on Karpowership SA. Thus, the Environmental Authorisation is the first 'guarantee' that the offsets will be delivered.

- 7.6.9. Please provide details regarding:

- a) the offset activities to be undertaken in relation to the uMhlathuze or "equivalent" area;

See above.

These will need to be determined by Karpowership SA's specialists. Ezemvelo will review these when they are provided to this organisation.

- b) the responsibilities for undertaking various offset activities (including the parties responsible for managing, monitoring and auditing the offset)

As per the provisions of the National Environmental Management Act 107 of 1998 and the Regulations thereto, Karpowership SA will be responsible for offset management. This activity (not responsibility) can be transferred to a third party. DFFE (the Competent Authority) will be responsible for monitoring and auditing.

- c) the responsibilities applicable to Karpowership as contemplated in paragraph 7.6.8 of the EMPr cited in para 6.2.2 above);

Answered above.

- d) the timeframes for delivery and completion of the offset activities;

Answered above.

- e) the duration of the relevant offset activities;

Answered above.

- f) the "estuarine management plans, strategic assessments" referenced in the FEIAR and cited at para 6.5.1.b) above).

These are DFFE's Estuarine management plans for the Port/Mhlathuze estuaries and the approved EMF for the City of uMhlathuze.



- 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?

Again, Ezemvelo is not responsible for Karpowership SA's offsets or the submission of the application to the Competent authority.

Furthermore, Ezemvelo does not receive a copy of the documents submitted by an Applicant. Therefore, this organisation cannot say for sure what was placed before the Competent Authority.

- 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).

This question must be directed to Triplo-4, the authors of this document.

Nevertheless, neither provincial nor national offset guidelines deal with estuaries *per se*. It is, therefore, surmised that this statement relates to this circumstance.

- 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.

Ezemvelo is unaware of an 'accurate description' and hence is unable to advise on this matter. Therefore, it is suggested that you put this question to Karpowership SA/Triplo-4.

- 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)?

As explained herein, you have unfortunately incorrectly conflated or been allowed to conflate the so-called 'out-of-kind offset' with the marine (in-kind) offset. The same appears to be the case with 'estuarine complexities' and biodiversity.

#### 7.7. In relation to the Madaka Game Ranch offset:

- 7.7.1. Please clarify the precise purpose of the Madaka Game Ranch offset.

The purpose of the Madaka Game Ranch offset is as follows, in no particular order and admitting that they are overlapping:

- a. To be an out-of-kind offset for any potential delays in the residual impacts being counterbalanced by the marine offset.
- b. To be an additional deterrent in terms of the principles of offsets.

- c. To act as a precedent, i.e. to hold developers accountable for biodiversity impacts arising from delays in offsets becoming functional.
- d. For Karpowership SA to make a significant contribution to the conservation of biodiversity and protected area network in KZN as a means to compensate for potential impacts resulting from a delay in the estuarine offsets becoming functional.

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.

All types of offsets are considered to be ‘compensation.’ The purchase of Madaka Game Ranch is to compensate for the potential delay in the marine offsets being functional.

It may be (correctly) argued that the Madaka Game Ranch is not an offset in that it falls outside the offset guidelines. Thus, it should be considered as ‘ecological compensation’ *in lieu* of the potential delays in the marine offset becoming functional.

7.7.3. How was the adequacy of the Madaka Game Ranch offset determined and “translated” into financial terms?

There was no formal process to determine ‘adequacy’ or adequate compensation for delays in offsets becoming functional. This suggestion is uncharted territory for at least KZN. One of the purposes of this exercise is to open the ‘precedent door’ to holding developers responsible for any delays in the offset becoming functional, as well as an added deterrent to encourage developers to avoid sensitive areas.

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?

Where the offset involves habitats and, in some limited instances, species, then a trading-up offset would target securing more endangered biodiversity. Thus ‘trading-up’ could only be applied to the marine offset if such opportunity existed.

As mentioned above, you have inexplicably conflated ‘time’ (the temporal delay which equates to lost opportunities) with marine habitat.

As noted above, ‘trading-up’, therefore, cannot be applied to or used to describe the Madaka Game Ranch as the purchase of this property is ecological compensation’ rather than a biodiversity offset.

7.7.5. How does the Madaka Game Ranch offset compensate for loss of estuarine ecosystem services?

It was not intended to compensate for the loss of estuarine ecosystem services. See the ‘conflation’ explanations above.

- 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)?

The “Reasonable costs of management” will be guided by current management costs for Ithala Nature Reserve, taking into consideration the specific challenges peculiar to that property. The principle to be applied is that there cannot be a net cost to Ezemvelo for the life of the offset.

- 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 EKZMW (as contemplated in the text cited at para 6.5.2.d) above).

The “duration of the project” means for as long as Karpowership is operational or until the marine offsets are fully functional, whichever is longer. The national guidelines require offsets to be in place and funded for 30 years.

- 7.7.8. Please clarify the process of receipt of funds from Karpowership in relation to the Madaka Game Ranch funding.

Answered above.

It is intended for Ezemvelo KZN Wildlife to manage the Madaka Game Ranch as part of Ithala Game Reserve and in accordance with the protected area management plan, which will need to be updated to incorporate the Ranch. If Karpowership SA’s application is approved, Ezemvelo will enter into discussions on the most effective method for Karpowership SA to pay for the management costs of the Ranch.

The Competent Authority audits/monitors compliance with the Environmental Authorisation. Karpowership SA would be entitled to audit/monitor Ezemvelo’s management of the property.

Finally, all protected areas managed by Ezemvelo are subjected to regular Management Effectiveness assessments. These results are publicly available.

- 7.7.9. What financial guarantees are in place in relation to the management of the Madaka Game Ranch offset area?

These guarantees are still to be negotiated with Karpowership SA.

- 7.7.10. Please provide details regarding:

- a) the offset activities to be undertaken in relation to the Madaka Game Ranch area;

Answered above.

- b) the responsibilities for undertaking various offset activities (including the parties responsible for managing, monitoring and auditing the offset);

Answered above.

- c) the timeframes for delivery and completion of the offset activities;

Answered above and this question should be posed to Karpowership SA/Triplo-4

- d) the duration of the relevant offset activities.

The national offset guideline specifies that the developer must fund offsets for a minimum of 30 years.

- 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.

The FEIR does refer to the Madaka-specific components in Section 7.9.1.4 (on page 416), but it is uncertain whether this amounts to an 'accurate description.' If not, it is suggested that the question be put to Triplo-4, who authored this document.

- 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.

Ezemvelo had previously been of the opinion that this application had undue impacts on biodiversity, and the residual impacts were unclear or unknown. Here, reference is made to an earlier submission to the Competent Authority by Triplo-4, where, in Ezemvelo's opinion, the biodiversity impacts were poorly investigated.

On resubmission, Karpowership SA/Triplo-4 appointed Dr Barry Clarke of Anchor Environmental to assess the impacts on the marine environment and make suggestions on the nature and extent of the offset. Given that Karpowership SA undertook to set in place a substantive offset in keeping with the 1:30 offset multiplier, Ezemvelo gained some comfort that the residual impacts would be adequately addressed, i.e. at least a no-net-loss, if not a net-gain, will be achieved.

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

Ezemvelo has made no such agreement, i.e. not to oppose the application. However, Ezemvelo agreed that it would not oppose the application on the grounds that the offset had to be defined and set in place before the application to the Competent Authority is made, and if the Environmental

Authorisation, if issued, captures, as a minimum, the recommended offsets are reasonably secured before the operation phase of the development.

Ezemvelo will review the Environmental Authorisation, if issued, to determine whether biodiversity is adequately safeguarded. For instance, Ezemvelo will consider whether the authorisation is complete and enforceable and the desired outcomes are achievable. Should this authorisation compromise biodiversity, Ezemvelo retains its right to lodge an appeal with the national Minister.

- 7.8.3. Does this "agreement" not to oppose the Karpowership EA application indicate that EKZMW 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)?

See the above.

The agreement with Karpowership SA is constrained to the offsets and does not limit or prohibit Ezemvelo from exercising its mandate and cooperating with the Competent Authorities with respect to those concerns you raise and others.

- 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?

There are no other agreements between Ezemvelo and Karpowership SA other than the initial offset agreement. It is a common cause that specific agreements will need to be entered into if and when the Environmental Authorisation is issued. The nature of the agreements will, naturally, be guided by the conditions on the authorisation and incorporation of Madaka Game Ranch into Ithala Game Reserve.

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

See above.

- 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).

This question should be directed to Karpowership SA/Triplo-4 as Ezemvelo has not entered into a 'framework' agreement with the former. The only agreement in place is the offset agreement. Ezemvelo, however, acknowledges that Triplo-4 and Karpowership SA have mentioned the need for 'agreements' to be in place post-authorisation.

- 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.

Ezemvelo has made recommendations that can be converted into conditions by the Competent authority. Furthermore, the Competent Authority has not requested Ezemvelo to draft precise or other conditions for it to consider.

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.

All submissions made to the Competent Authority with respect to the application are a public record.

While Ezemvelo is happy to provide a copy of the agreement concluded with Karpowership SA, the agreement is not a public document and hence falls within the scope of the Promotion of Access to Information Act 2 of 2000. An application in terms of this Act would, therefore, need to be made to Ezemvelo's Information Officer using Ms Cecelia Samson's email address. Naturally, should the Karpowership SA application be refused by the competent authority, this agreement will cease to exist as the conditions therein are dependent on an authorisation being granted.

In closing, thank you for your well-placed questions. Unfortunately, many of these should have been directed to the Karpowership SA and/or Triplo-4. Nevertheless, we have tried to answer your questions as best we can and provide as much clarity as possible.

If you have any additional questions or clarity, please do not hesitate to contact me.

Yours sincerely,

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Dr Andy Blackmore  
Scientific Manager: Conservation Planning  
For and on behalf of the acting Chief Executive Officer  
Ezemvelo KZN Wildlife

Date: 3 November 2023

TO: **Mrs Hantie Plomp**  
**Managing Director, Triplo4**  
**Sustainable Solutions**

Email: [richardsbayksa@triplo4.com](mailto:richardsbayksa@triplo4.com)

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Total 2  
pages: [11 including annexure]

Our ref: BLC/KPRB/002

Dear Mrs Plomp

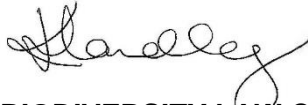
**RE: Queries regarding application of biodiversity offsets in respect of Karpowership project in Richards Bay**

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, during the course of September 2023, Karpowership SA (Pty) Ltd (**Karpowership**) 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**). Subsequent to this, we addressed correspondence to EKZNW requesting further clarity about this statement and related media reporting. Our queries to EKZNW are enclosed marked "1".
3. EKZNW has sought to answer our queries, however, noted that Triplo4 Sustainable Solutions would be best placed to respond to provide a complete response. This is because our queries are based on statements in the Final Environmental Impact Assessment Report and EMPr; relate to the Biodiversity Offset Report (which we have not

been able to locate); or seek clarification regarding assessments apparently undertaken during the Environmental Impact Assessment Process.

4. We would very much appreciate your considering our queries as contained in our letter to EKZNW and responding to these as comprehensively as possible. In addition, we would appreciate your providing us with a copy of Biodiversity Offset Report used to inform the offset strategy set out in the FEIAR.

Yours faithfully,



**BIODIVERSITY LAW CENTRE NPC**

**Per Nina Braude and Kate Handley**



Date: 15 September 2023

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

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AND  
TO: **Dr Andy Blackmore**  
**Manager Protected Area Planning &**  
**IEM**  
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AND  
TO: **Mr Lehlohonolo Joe Phadima**  
**Wildlife General Manager of**  
**Conservation Services**  
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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**).<sup>1</sup> 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*".<sup>2</sup>
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:<sup>3</sup>

*"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".*

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<sup>1</sup> 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/>.

<sup>2</sup> FEIAR, p 181.

<sup>3</sup> 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.<sup>4</sup> 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*”;<sup>5</sup>

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<sup>4</sup> FEIAR, p 422.

<sup>5</sup> 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*”;<sup>6</sup>
- c) despite these “complexities”, an “in kind” estuary offset is still contemplated – but it has not yet been designed;<sup>7</sup>
- d) the intention is that the estuarine offset will be regulated through the existing Umhlathuze Estuary Management Plan which informs the Agreement;<sup>8</sup>
- 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*”;<sup>9</sup>.

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*”;<sup>10</sup>
- b) EKZNW’s interest in Madaka Game Ranch relates to black and white rhinoceros and elephant conservation and “*national strategic conservation programmes*”;<sup>11</sup>
- c) the “out of kind” offset will be managed through the existing Management Plan for the Ithala Game Reserve which informs the Agreement;<sup>12</sup>
- 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);<sup>13</sup>

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*

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<sup>6</sup> FEIAR, p 426.

<sup>7</sup> FEIAR, p 422.

<sup>8</sup> FEIAR, p 439.

<sup>9</sup> FEIAR, p 439.

<sup>10</sup> FEIAR, p 432.

<sup>11</sup> FEIAR, p 432.

<sup>12</sup> FEIAR, p 439.

<sup>13</sup> 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**