



**MINISTER OF
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA**

APPEAL DECISION

Reference: LSA 2007022

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KARPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

Biodiversity Law Centre NPC

Appellant

Karpowership (Pty) Ltd

Applicant

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

Competent Authority

Appeal: This is an appeal lodged by Biodiversity Law Centre NPC (the Appellant) against the decision of the Chief Director: Integrated Environmental Authorisations (CD:IEA) of the Department of Forestry, Fisheries and the Environment (the Department), taken on 25 October 2023 to grant an Environmental Authorisation (EA) to Karpowership (Pty) Ltd (the Applicant), for the

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development of a gas to power via Powership Project, within the Umhlathuze Local Municipality at the Port of Richards Bay, KwaZulu Natal Province.

1. BACKGROUND

- 1.1. On 7 July 2020, the Minister of Mineral Resources and Energy issued a section 34 determination (Determination) under the Electricity Regulation Act, 2006 (Act 4 of 2006) (Electricity Regulation Act) for the procurement of 2000 MW of energy from a range of technologies, including Liquefied Natural Gas (LNG), which was gazetted in Government Gazette 43547 on 24 July 2020.
- 1.2. On 23 August 2020, the Department of Mineral Resources and Energy (DMRE) issued a Request for Qualification and Proposals (RFP) for New Generation Capacity under the Risk Mitigation (Independent Power Producer Procurement Program (RMIPPPP / RMI4P), the objective of which is to alleviate the immediate and future power generation capacity deficit in South Africa. The RMIPPPP forms part of the Energy Strategic Integrated Project No. 20.
- 1.3. The RFP invited bidders to submit proposals for the construction, financing, operation and maintenance of new power generation projects. The RFP succeeded in attracting project proposals featuring a variety of technology combinations including solar PV, wind, liquefied natural gas and battery storage.
- 1.5. On 5 October 2020, the Applicant lodged an application for an EA with the CD: IEA of the Department in respect of the proposed gas to power via powership programme, within the jurisdiction of the Umhlathuze Local Municipality, Kwazulu-Natal Province.
- 1.6. On 6 November 2020 the Strategic Integrated Project (SIP) Steering Committee confirmed that all projects classified with Preferred Bidder status will be regarded as SIP projects to be expedited in terms of Schedule 2 (Section 17(2)) of the Infrastructure Development Act (Act No. 23 of 2014) (Infrastructure Development Act).

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- 1.7. On 18 March 2021, the Applicant was appointed the Preferred Bidder for the project and for two other projects making up 1200MW of the allocated 2000MW required. The three projects proposed by the Applicant, at the Ports of Ngqura (Coega SEZ) in the Nelson Mandela Bay Metropolitan Municipality, Eastern Cape Province, Saldanha Bay and Richards Bay, include various activities listed in the Environmental Impact Assessment (EIA) Regulations per the National Environmental Management Act 107 of 1998 (NEMA), which requires Environmental Authorisation (EA) prior to commencement of the three Projects.
- 1.8. The Minister of DMRE, on 18 March 2021, announced that three projects in which the Applicant is involved received Preferred Bidder status within the RMIPPPP. Accordingly, these projects being SIP projects are to be managed within the requirements of the Infrastructure Development Act.
- 1.9. The applicant lodged a final EIA and EMPr on 26 April 2021. That application was refused by the CD:IEA on 23 June 2021 due to certain identified information gaps in the EIAR and procedural defects in the Public Participation Process (PPP) conducted. The decision was taken in terms of Regulation 4(2) of the 2014 Environmental Impact Assessment Regulations, 2014 (2014 EIA Regulation) as amended, and the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), as amended.
- 1.10. The Applicant lodged an appeal in respect of that decision in terms of section 43 of NEMA on 13 July 2021. After due consideration, owing to identified gaps in information and defects in the PPP, my predecessor was unable to make an informed decision and on 1 August 2022, she remitted the matter back in terms of section 46(3) of NEMA to the CD:IEA for the gaps in information and procedural defects aforesaid, to be addressed and for the reconsideration and re adjudication thereafter of the EA application, provided the time frames prescribed by the 2014 EIA Regulations in respect of the EIA process is adhered to by the Appellant and the CD:IEA.
- 1.11. On 12 April 2023, my predecessor, in terms of sections 42(1), (2) and (2B) of NEMA, delegated powers and duties, relating to the extension of, or condonation of a failure to comply with a period vested in me in terms of section 47C of NEMA to the Director-General of the Department of

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Forestry Fisheries and Environment, together with the power to sub delegate the powers and duties mention to a specific official or to the holder of a specific post in the Department, in respect of applications for the EA for identified activities.

- 1.12. The Director-General of the Department in turn, on 28 April 2023 sub-delegated those powers relating to extension of time periods and condonation applications in terms of section 47C of NEMA, to the CD:IEA of the Department.
- 1.13. The procedure for the submission of appeals as contemplated in section 43(1) of NEMA is outlined in Regulation 4(1) of the National Appeal Regulations, 2014, as amended (2014 Appeal Regulations) stipulates that:

"An appellant 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 20 days: from the date that the notification of the decision for an application for an environmental authorization or a waste management licence was sent to the registered interested and affected parties by the applicant".

- 1.14. Such appeal must be submitted in accordance with the provisions of Regulation 4(2) of the 2014 Appeal Regulations.

2. This appeal is premised under the following grounds:

- 2.1. Failure to assess impacts,
- 2.2. There are no material requirements for the consideration for an EA application;
- 2.3. Failure to comply with NEMA and relevant factors;
- 2.4. Provision of interim or conditional authorization;
- 2.5 Failure to comply with public participation requirements; and
- 2.6. Failure to comply with environmental management principles.

3. **GROUNDS OF APPEAL**

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FIRST GROUND OF APPEAL

Failure to Assess Impacts

The appellant submits as follows:

- 3.1 Environmental Authorisations are regulated by the "integrated environmental management" provisions set out in Chapter 5 of NEMA. They refer in particular to NEMA sections 23, 24, the minimum conditions in section 24E, the criteria in section 24O, as well as the requirements pertaining to sections 24K, 24N, 24Q and the Regulations.
- 3.2 They restate that section 24(1) of NEMA requires 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*" to give effect to the objectives of integrated environmental management set out in section 23 of NEMA.
- 3.3 The importance of predicting actual and potential environmental impacts with the objective of minimising harm and promoting compliance with the principles. This 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)
- 3.4 The importance of advance consideration of environmental impacts is further emphasised by the objective expressed in section 23(2)(c) to:

"ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them" (emphasis added).
- 3.5 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:

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"[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"

- 3.6 It is important that the impacts of activities are accurately assessed in the context of the principles (including a "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"* 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.
- 3.7 It follows that where impacts, mitigation measures and reduction of harms have not yet been assessed, no environmental authorisation can be granted.
- 3.8 The appellant contend that as the EA has been made subject to a number of conditions certain impacts and mitigation measures have not been assessed prior to the granting of EA. These conditions are :
- 3.9 Condition 12 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.
- 3.10 Condition 14 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, this EMPr must be made available for public comment.

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- 3.11 Condition 46 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”.
- 3.12 The appellant avers that the 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.
- 3.13 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.
- 3.14 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.
- 3.15 These considerations must be placed before the decision-maker prior to the granting of an EA and should not be left until after an EA is granted. It is 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.
- 3.16 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.
- 3.17 Section 24(b) of the Constitution places an obligation on the State 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

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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.

3.18 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.

4. APPLICANT'S RESPONSE

4.1 The Applicant submits as follows:

4.2 This ground of appeal is based on the allegation 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 Project could not have been adequately considered, investigated and assessed.

4.3 The EIA complied with such objectives and provisions of NEMA as appears from the numerous and detailed independent specialist studies which considered, investigated and assessed the impacts of the Project.

4.4 The EIA considered the Project within the geographical location and surroundings and the proposed defined area- within the Port. The micro-siting would be within the fully assessed scope and proposed lay-out. The proposed tower positions within the polygon, the proposed positions of the Powerships, FSRU and gas pipeline were clearly provided in the listed activities as well as the lay-outs. All risks have been properly assessed.

4.5 The impacts of the project were clearly communicated via public participation in the EIA phase inter alia by baseline noise modelling, thermal plume modelling and detailed air emissions modelling.

4.6 The EIA complied with section 23 of NEMA to ensure that the effects of activities on the environment are considered before a decision is taken. This is clear from the numerous and

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detailed independent specialist studies which considered, investigated and assessed such impacts to ensure that adequate consideration was taken before actions were taken.

- 4.7 The EIA and the specialist studies considered, investigated and assessed such impacts as to ensure that adequate consideration of environmental attributes was taken into account. The granting of the EA demonstrates, there were no significant environmental impacts (or significant harm) predicted by any of the independent Specialists, who found the impacts to be acceptable and recommended that the Project should proceed subject to the required mitigation measures being in place.
- 4.8 A “risk-averse and cautious approach” as contemplated in section 2(4)(a)(vii)) was adopted and such assessment occurred before the EA was granted and before any activities may commence. The development footprint on the approved site was identified in the context of a risk assessment and the impacts were properly scrutinised.
- 4.9 The applicant contends that conditions in the EA that mitigate environmental impacts are normal practice and are legal and justifiable – the CA is empowered by the NEMA to do this. The EA and the EMPr in particular are living documents which must be improved over time and adapt to best deal with the dynamic Project impacts.
- 4.10 Final site layout plans are submitted to the Department prior to construction. The proposed micro-siting is proposed within the fully assessed scope and proposed lay-out. In addition, the proposed tower positions within the polygon as well as the proposed positions of the Powerships, FSRU and gas pipeline were clearly provided in the listed Activities as well as the lay-outs. All risks were properly assessed.
- 4.11 Where appropriate, regular review and adaptation to changing environmental conditions would be necessary. Continuous improvement, stakeholder engagement, and effective monitoring are essential components of successful environmental management.
- 4.12 The current Project component locations and siting have already been fully approved by the TNPA EXCO and cannot change materially. It must be understood that the Project components will remain in the current positions and may be subject to minor micro-siting adjustments given

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that the Project involves a floating power installation and all overhead powerline infrastructure typically require micrositing informed by insitu geotechnical considerations.

- 4.13 Ongoing monitoring is often required of a project. Extensive avifauna monitoring has already taken place exceeding 12 months during the EIA phase and this together with ongoing monitoring and mitigation measures will ensure that impacts to avifauna are acceptable.
- 4.14 By way of comparison, there were no legal requirements (as for wind farms), or any requirements imposed by the Competent Authority during the EIA process to provide for a 12-month monitoring process before application for authorisation. The information placed before the decision-maker was deemed adequate by the Avifauna Specialist.
- 4.15 NEMA and the EIA Regulations make provision for EAs to be issued subject to conditions. Appropriate and carefully framed conditions are vital components of ensuring sound environmental management and to aid with compliance and enforcement. Given their complexity, biodiversity offsets often require lengthy and specific outcomes-focused conditions.
- 4.16 The complete 12-month monitoring data confirmed the data submitted as in Appendix A10 – the Avifauna Assessment of the FEIR. The data submitted was thus confirmed as applicable and adequate for decision-making.
- 4.17 In assessing residual impacts i.e., impacts after mitigation, the impacts were assessed as low to medium. The legislation requires assessment before and after mitigation. The assessment classified the residual impacts as low to medium and to further mitigate these residual impacts, particularly those of medium intensity, an offset has been proposed in accordance with the mitigation hierarchy.
- 4.18 In the environmental management context, biodiversity offsetting consists of actions that are taken to comply with biodiversity offset outcomes required in conditions in EAs, Biodiversity Offset Implementation Agreements and environmental management programmes (EMPrs). The environmental management system provided by NEMA and the EIA Regulations provide for a CA to grant EAs subject to conditions.

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- 4.19 The appellants' attack on the EA having conditions is misguided. The Conditions cannot be read in isolation but must be considered with all the specialist studies (and the information in turn considered by all the Specialists). When considered within this context, it is clear that the specialist studies and the EIA are comprehensive, and that the independent avifauna Specialists (and others) are correct in their determinations.
- 4.20 No fatal flaws were identified in the EIA by the Specialists from an ecological or socio-economic perspective. Furthermore, the Specialists identified that future generations will not be harmed by the Project (Intergenerational Equity).
- 4.21 The environmental harms resulting from loadshedding was seemingly ignored by the Appellant. In order to ensure sustainability, the Project must be considered within the ecological, micro and macro geopolitical, local and Country's economy as well as the plethora of management measures stipulated in terms of the mitigation hierarchy that was addressed in the EIA.
- 4.22 The appellant has misconstrued the facts. All the relevant information was before the decision maker. The Conditions do not deal with assessment of impacts required during the EIA phase but relate to monitoring and mitigation of impacts during construction and after commencement of operations based on the final site layout.
- 4.23 All impacts were determined during the EIA phase and the Conditions relate to monitoring and mitigation of impacts during construction and after commencement of operations based on the final site layout – that will be situated within the fully assessed lay-out plan submitted for public participation.
- 4.24 The appellant fails to recognise that sustainable development requires the balancing of impacts on the environment on the one hand and the socio-economic advantages of the Project on the other.
- 4.25 Section 24(b) of the Constitution places an obligation on the State 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. The repercussions of loadshedding are

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extensive, impacting human health and well-being, leading to negative biophysical impacts and degradation.

4.26 The assessment demonstrated sustainability through the consideration of aspects and impacts from a macro, micro, cumulative and polycentric (integrative) perspective in terms of the geographical, physical, biological, social, economic and cultural aspect of the environment. Sustainable development, that benefits current and future generations, will be ensured together with the prevention of pollution and ecological degradation while promoting conservation and securing ecological sustainability as per the EMPr and offset commitments.

4.27 The narrow (ecological only) focus of this ground of appeal is not aligned with the NEMA sustainability principles. The Appellant erroneously ignores the current generation's health and well-being together with the availability of water and electricity provided for as basic human rights in the Constitution, including the current degradation of the environment (diesel generator emissions, noise from generators, tree cutting for firewood, sewage into water courses) due to loadshedding. As stated, all these matters were holistically and poly-centrally considered at both macro and micro level.

4.28 Accordingly, the appellants averments regarding Sections 22, 23 and 24(1) of the NEMA are incorrect and with respect this Ground of Appeal has no merit.

5. COMMENTS BY THE CD: IEA

The CD: IEA comments as follows:

5.1 The Department was satisfied with granting an EA on the information provided and the mitigation measures presented. Upon receiving the final layout plan(s) and EMPr with all mitigation measures, the Department and I&APs parties will still have an opportunity to ensure that impacts to the environment are minimised sufficiently.

5.2 The layout plan was not approved as part of the EA, because there were specific conditions included in the EA which necessitated the holder to amend the layout plan. To enable the holder to comply with the conditions, the layout plan could not have been approved.

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- 5.3 Due to the Layout plan needing to be amended, this will require the EMPr also to be amended to address the conditions in the EA. The EA granted included suspensive conditions that need to be fulfilled prior to construction commencing. The changes to the layout plan and the EMPr based on the conditions of the EA still needs to be reviewed and decided upon prior to construction commencing.
- 5.4 Based on the information provided and considered for decision making, the CA had enough information to make an informed decision. With regards to the information relied on to reach its decision, these are captured in point 1 of Annexure 1: Reasons for Decision of the EA.

EVALUATION AND DECISION

- 5.5 I have considered the appellant's submissions, legal provisions and cases referred to as well as the applicant's responses, and the comments by the CD: IEA comments thereto. I therefore determine that:
- 5.6 The EIA is in compliance what section 24 of the Constitution as well as the provisions of the sections in NEMA referred to by the appellant.
- 5.7 The impacts of the activities and the proposed mitigation measures in respect thereof have been properly assessed and a risk averse approach adopted.
- 5.8 The nature of the conditions attached to the EA did not render the impacts of the activities or the mitigation measures incapable of being assessed prior to the granting of the EA. They are focused on the mitigation of impacts, offsets and monitoring as contemplated in the 2014 EIA Regulation 26(d)(iv). Such conditions give effect to the duty of the State encompassed inter alia by section 24 of the Constitution and the principles set out in section 2 of NEMA. There was no contravention of such sections. I have perused condition 12 of the EA in respect of the absence of a final layout plan, which specifically states that: "the final layout plan(s) for the gas to power via powership and its associated infrastructure, as determined by the

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detailed engineering phase and micro-sitting and all mitigation measures as dictated by the final layout plan, must be submitted to the Department for approval prior to construction. A copy of a final site layout map must be made available for comments to the effected and interested parties and the holder of this environmental authorization 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 finalization of the layout map. The layout map(s) must indicate the following":-

- 5.8.1 The position of the powership and Floating Storage Regasification Unit (FSRU): Berthing and mooring positions of the Powerships and FRSU.
 - 5.8.2 The transmission lines final route alignment.
 - 5.8.3 Switching stations.
 - 5.8.4 The gas pipelines.
 - 5.8.5 All associated infrastructure.
 - 5.8.6 The locations of the powerships and its associated infrastructure must be located 230m away from the spring low tide margin of the sandspit;
 - 5.8.7 All sensitive features; and
 - 5.8.8 All "no-go" and "buffer areas."
- 5.8.9 I am therefore satisfied that with the abovementioned condition in the EA, the issue of the absence of the final layout plan has been mitigated upon and reasonably addressed by the competent authority.
- 5.9 I am furthermore mindful of the pronouncement of the court in the case of:
Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries and the Environment [(21525/2020) [2023] ZAGPPHC 434 (19 June 2023),] ("the Eloff Landgoed case") which is distinguishable from this matter, the court stated:

"NEMA envisages that the imposition of conditions on the grant of environmental authorisations is one of the ways in which the legislation gives effect to the "risk averse and cautious approach" to sustainable development mandated in section 2 (4) (a) (vii) of NEMA. Section 2 (4) (a) (vii) acknowledges that such an approach is necessary

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because there are always limits on "current knowledge about the consequences of decisions and actions."

5.10 The facts in the Badenhorst case are also distinguishable from the fact in this matter and is inapplicable.

5.11 For these reasons, I find that this ground of appeal has no merit and is accordingly dismissed.

6. **SECOND GROUND OF APPEAL:**

Material requirements for consideration of an application are absent:

6.1 The appellant submits that:

6.2 Section 24(1A) of NEMA sets out the requirements in relation to pre-application steps including "*any environmental management programme*" and that section 24N(1A) of NEMA prescribes that an EMPr must be submitted before an EA application may be decided and what it must contain.

6.2 Regulation 23(1)(a) prescribes that an 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*".

6.3 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.

6.4 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...*"

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- 6.5 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.
- 6.6 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).
- 6.7 Regulation 26(d) (as well as Regulation 26(h)) contemplates an approved EMPr as part of the granting of an EA.
- 6.8 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). 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 a modification of environmental management actions. This statutory scheme is reflected by Conditions 17 to 23 of the EA.
- 6.9 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.
7. 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. Accordingly, the EA fails to comply with the requirements of NEMA, is unconstitutional, unlawful and irrational and falls to be set aside.

8. RESPONSES BY THE APPLICANT -

The applicant submits as follows:

- 8.1 The EA does approve the Generic EMPr and requires finalisation of the overarching Project EMPr subject to further public participation as part of the standard project lifecycle.
- 8.2 Section 24N(1A) prescribes that an EMPr must be submitted before an EA application may be decided and that the minimum information requirements of the EMPr must be complied with. An

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assessment of the EMPr that was submitted within the prescribed timeframes shows that the EMPr complies with the legal requirements of the NEMA. The EIAR and the EMPr were in fact submitted according to the timeframes prescribed in the EIA Regulations.

- 8.3 Condition 14 of the EA partially approves the EMPr and requires that it be amended in certain respects (notably the final site layout plan and micro-siting). The current Project component locations and siting have already been approved by the TNPA EXCO and cannot change materially. The Project components will remain in the current positions and may be subject to minor micro-siting adjustments given that the Project involves a floating power installation and all overhead powerline infrastructure typically require micro-siting informed by insitu geotechnical considerations.
- 8.4 The appellant fails to mention that the Generic EMPr is approved by Condition 13 of the EA.
- 8.5 The EMPr was not rejected by the CA as alleged. This is incorrect and misleading. Regulations 35, 36 and 37 do not apply in the current circumstances as Regulation 35 applies to EMPr amendments required by audit findings, Regulation 36 applies to where impact management actions require amendments and Regulation 37 applies when the application for amendment of an approved EMPr is applied for by the holder. None of these apply.
- 8.6 As indicated above, the appellant is conflating the facts. All of the relevant impacts have been properly assessed by the independent Specialists. There are minor amendments to the EMPr that may be required by the final site layout plan and micro-siting. This does not support the appellants' argument that the EA application is incomplete, inadequate and should not be authorised. On the contrary, the EA application was comprehensive and went beyond the minimum legal requirements given the complexity of the Project. The decision maker weighs the environmental impacts against the socio-economic benefits and sustainability of the Project. The appellant has simply ignored this vital concept.
- 8.7 The project life cycle commences with the conceptual planning stage, where the project's feasibility and general concepts are explored, defining the project scope, objectives, and potential challenges. This is followed by the preliminary engineering phase, where the project concepts are further developed into preliminary designs, with engineers assessing technical requirements, costs, and potential environmental impacts.

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- 8.8 The detailed engineering phase typically occurs after the completion of the preliminary engineering phase and before the commencement of construction, post environmental authorisation. This critical step involves the development of detailed plans, specifications, and designs based on the concepts established during the preliminary engineering phase. It is during this detailed engineering phase that final site layouts and micro-siting take place.
- 8.9 The final EMPr is a reflection of the integration of environmental considerations into the project's detailed engineering phase. It serves as a guide for project implementation, ensuring that environmental protection measures are effectively carried out during construction and throughout the operational phase.
- 8.10 At no point in the authorisation did the CA state that the EMPr was rejected. Instead, it indicated that the EMPr was to be amended considering the final site layout and micro-siting. Regular reviews and audits of the EMPr will be essential to monitor and improve the environmental performance of the project.
- 8.11 The appellants' arguments regarding the unlawfulness of the EA and its Constitutionality are incorrect.
- 8.12 Many EAs are issued with conditions similar to those in the Karpowership EA. In support of this point, we refer to certain EAs which contain similar conditions in the response to the 4th Ground of Appeal below. Please therefore refer to the response below at Appeal Ground 4 for further clarification.
- 8.13 It is thus not a Karpowership specific approach, but rather a DFFE approach to the issuing of EAs.
- 8.14 However, the DFFE has the authority to vary the EA as per Regulation 37. Although the decision-maker disagrees that any conditions of the EIA Regulations were transgressed, the EA may be varied to accept the EMPr, and all conditions required to be included in the EA will become stand-alone conditions to which the Holder of the EA must ensure compliance.

COMMENTS BY THE CD: IEA

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9. The Department was satisfied to grant an EA on the information provided and the mitigation measures presented. Upon receiving the final layout plan(s) and EMPr with all mitigation measures this Department and I&APs will have an opportunity to ensure that impacts to the environment are minimised sufficiently prior to construction.
10. The layout plan was not approved as part of the EA, because there were specific conditions included in the EA which necessitated the holder to amend the layout plan. As such, to enable the holder to comply with the conditions, the layout plan could not have been approved.
11. As the Layout plan needs to be amended, it will in turn require the EMPr also to be amended to address the conditions in the EA. The EA granted included suspensive conditions that need to be fulfilled prior to construction commencing. It must be noted that the changes to the layout plan and the EMPr based on the conditions of the EA still needs to be reviewed and decided upon prior to construction commencing.
12. Based on the information provided and considered for decision making, the Competent Authority had enough information to make an informed decision. With regards to the information relied on to reach its decision, these are captured in point 1 of Annexure 1: Reasons for Decision of the EA.

EVALUATION AND DECISION

13. In assessing this ground of appeal, I have considered the submissions of the appellants and the legislation referred to as well as the responses of the applicant and the comments by the Department. In the light thereof I make the following determination:
 - 13.1 The EMPr was not rejected by the CA. The CA however required that certain amendments thereto be effected, specifically regarding the final site layout and “micro-siting.” In this regard the CA commented that the layout plan was not approved as part of the EA as there were specific conditions included in the EA which required the holder to amend the layout plan and consequently the EMPr to address the conditions in the EA. In this regard the Department points

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out that upon receipt of the final layout plan the EMPr with mitigation measures, I&APs and the Department would have the opportunity to comment thereon prior to the commencement of construction.

13.2 EIA regulations 35, 36 and 37 were not applicable in the circumstances of this matter.

13.3 Accordingly, I determine that this ground of appeal lacks merit and is dismissed.

14. **THIRD GROUND OF APPEAL:**

Failure to comply with NEMA and consider relevant factors:

The appellant submits as follows:

14.1 Section 24O of NEMA sets out the peremptory "*criteria to be taken into account*" by decision-makers when considering applications for environmental authorisations. This includes compliance with NEMA and "*all relevant factors*". The list of "relevant factors" in section 24O(1)(b) includes:

14.2 pollution, environmental impacts and environmental degradation likely to be caused if the application is approved or refused;

14.3 environmental protection measures and measures to "*prevent, control, abate or mitigate any pollution, substantially detrimental environmental impacts or environmental degradation*";

14.4 the "*ability of the applicant to implement mitigation measures*"; and

14.5 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.

14.6 Where a decision-maker fails to consider such factors, the resulting decision is a contravention of NEMA, unlawful and should be set aside.

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14.7 The conditions of the EA shows that the decision-maker was unable to consider relevant factors, particularly 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.

Failure to consider impacts

14.8 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) EMPr; and (c) “in-kind” offset.

14.9 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.

14.10 It is clear from Condition 46, that it is not possible to finalise the layout plan; EMPr; 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.

14.11 Accordingly, the CA recognized that it could not (and therefore did not) consider key, relevant information.

14.12 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. This is critical to the design and authorisation of the project – including the justification of both the “marine” and “Madaka” offsets based on the cumulative impact of the Project.

14.13 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.

14.14 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.

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Failure to consider environmental protection measures

- 14.15 The inclusion of Conditions in the EA also demonstrates that the CA could not have considered activity impacts, and that key information pertaining to environmental protection measures was lacking. This is evident, not only from Conditions 14, 15 and 46 but 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

- 14.16 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**).

- 14.17 There is no explanation 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. In this regard, the Final Environmental Impact Report (FEIR) records:

"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."

- 14.18 This suggests there is inherent uncertainty regarding whether the Madaka offset is possible.

- 14.19 EKZNW, meanwhile, appears unclear regarding the residual impacts to be offset. This is apparent from the EKZNW Response which (vaguely) notes:¹

"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."

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- 14.20 The sole concrete indication of the purpose of the Madaka offset is to account for delay in implementing the “marine” offset.²
- 14.21 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, and is unlawful and irrational.
15. This submission is supported by the further conditions pertaining to the Madaka offset:
- 15.1 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.
- 15.2 Not only is this inconsistent with statements in the FEIR (and media) to the effect that Karpowership has already concluded an agreement with EKZNW, 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.
- 15.3 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 does not seem practicable (or rational) to provide approval for this offset – or to approve the development at all.
- 15.4 Condition 59 confirms that the Madaka offset has not yet been designed by requiring that Karpowership must “*design and detail the Madaka Game Ranch offset*” in terms of specific criteria, including the achievement of net environmental gain.
- 15.5 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*
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conservation programmes” 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.

15.6 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;³ 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.

15.7 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). In this regard, the following concessions in the EKZNW Response are pertinent:

“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. 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.”

“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.”

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

16. A further statement regarding the purpose of the Madaka offset is still more problematic:

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“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.”

- 16.1 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.
- 16.2 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).
- 16.3 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.
- 16.4 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

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inclusion of the offset 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:

- 16.4.1.1 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*”.
- 16.4.1.2 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 36 to 36.13 below).
- 16.4.1.3 By 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.

Like-for-Like / marine offset

- 16.5 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.
- 16.6 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.
- 16.7 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*”.⁴

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- 16.8 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:
- 16.9 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 plans, strategic assessments as well as the out-of-kind recommendation by EKZNW, accepted by Karpowership”.*
- 16.10 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.”*
- 16.11 Each of the remaining three options is rejected in the FEIR on the basis of complexity or existing funding being in place.
- 16.12 No part of this assessment includes an assessment of the inherently dynamic and unique ecosystem functions of the Richards Bay estuarine system and whether it is even capable of offset.
- 16.13 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*

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received the offset report or the offset management plan, we cannot comment on the 'long-term viability of the marine offset'.

- 16.14 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

- 16.15 Conditions 60 and 64 of the EA both require provision of "*suitable resource provision*" for implementing the Madaka and marine offsets respectively.
- 16.16 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.
- 16.17 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.
- 16.18 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.

- 16.19 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) and cites portions of the EKZNW biodiversity policy, 2013. In doing so, the FEIR states:

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"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.

- 16.20 The National Biodiversity Offset Guideline was published on 23 June 2023 (**Offset Guideline**). 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"*.
- 16.21 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. 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"*.
- 16.22 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.
- 16.22.1 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: The "Principles for biodiversity offsetting" set out in paragraph 4.2 state that:
- 16.22.2 offsets are the final option in the mitigation hierarchy;
- 16.22.2.1 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;
- 16.22.3 no offsets are possible for residual impacts on irreplaceable biodiversity;
- 16.22.4 offsets must be additional to biodiversity conservation measures required by law (or which would otherwise have occurred);

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- 16.22.5 the significance of residual impacts must be considered when making biodiversity offset decision;
- 16.22.6 connectivity with the landscape is necessary;
- 16.22.7 long-term protection and management of priority biodiversity is required;
- 16.22.8 biodiversity offset design must be evidence-based and transparent;
- 16.22.9 offsets must follow a risk averse and cautious approach;
- 16.22.10 offsets must be fair and equitable;
- 16.22.11 offsets should take place before impacts of an activity occur (or as soon after such impacts occur as possible); and
- 16.22.12 offsets must be measurable, auditable and enforceable.
- 16.23 In the case of this authorisation, 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.
- 16.24 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.
- 16.25 Accordingly, 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 240 of NEMA, in addition to being unlawful and thus falls to be set-aside.

Conclusion

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17. 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.
18. 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.
19. Accordingly, the CA's decision has breached section 24O of NEMA and falls to be set aside.

20. **APPLICANT'S RESPONSES**

- 20.1 The applicant asserts that this ground of appeal should be rejected as the impacts of the Project, harms, mitigation measures, laws, policy and relevant factors were considered by the CA and that these issues were considered in-depth over a period of almost three years during the EIA process and were subjected to public and regulatory scrutiny.
- 20.2 No significant negative impacts were predicted by the EIA according to the work of the independent Specialists who found the impacts to be acceptable and unanimously recommended that the Project should proceed subject to the required mitigation measures being in place.
- 20.3 The "relevant factors" in section 24O(1)(b) of NEMA were included in the Project details and impacts and was the result of the EIA process presented to decision-makers. The studies, were thoroughly scoped by independent specialists, are then scrutinised and validated, often through on-site visits. These Specialists are pre-eminent in their fields and must take an oath of independence regarding the findings of such studies.
- 20.4 The appellants allegation concerning the avifauna impacts is incorrect and shows a lack of understanding of the EIA and the avifauna impacts and monitoring by the appellant. 12 months

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of pre-construction avifauna monitoring data has already been compiled by Karpowership. Therefore, this Condition has already been complied with.

- 20.5 The Conditions read in context and with reference to the Specialist studies, shows that the impacts are known. The Specialists defined the residual impacts following mitigation as low to medium. It is not unknown. The CA requested the in-kind offset to be informed by the scale and magnitude of the avifauna monitoring programme. The medium impacts were already considered in the developed of the offset and the out-of-kind was specifically agreed to in accordance with the EKZNW policy to immediately mitigate for residual impacts whilst the in-kind offset is developed. At no stage would any impacts occur without offset.
- 20.6 The final lay-out, is for micro-siting. The coordinates and polygons were provided for the Powerships, FSRU, gas pipeline and transmission line towers. Further, consider the explanation above on detailed engineering.
- 20.7 The allegation that the CA could not (and therefore did not) consider key, relevant information is incorrect, there is no such admission, all key information was before the decision maker.
- 20.8 The Biodiversity Offset Implementation Agreement together with the EA Conditions mean that there are well defined obligations regarding offsets.
- 20.9 Cumulative impacts are assessed within the Coastal, Estuarine and Marine Impact Assessment Report. Assessing cumulative impacts involves examining the impacts of a proposed activity at a coarser scale, and collectively in relation to adjacent and regional projects, developments or activities.
- 20.10 The final micro-siting lay-out plan will be in significant alignment with the lay-out submitted for public participation. The Specialists considered the lay-out together with the micro, macro and cumulative aspects poly-centrally. Offset activities were considered for medium impacts as addressed in the EIA. As indicated above, infrastructure positioning cannot change, but it might be subject to micro-siting.
- 20.11 The Specialist studies are inter-linked and an assessment of cumulative impacts focussed on the inherent interconnectivity of estuarine functions and zones and the manner in which

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estuarine function in one geographical location may impact and be impacted by ecological processes and systems in another.

- 20.12 The appellant has misinterpreted the PPP requirements for the EMPr and final site layout plan. The purpose of this requirement is so that the public is fully informed (and there is a legally compliant and transparent process) around the PPP. It does not mean (or indicate), as alleged by the appellant, that the relevant information was not before the decision maker when the decision was taken.
- 20.13 This averment that 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) by the appellant is rejected. The EIA process was thorough as is apparent from the Specialist studies and the EIA. The Offsets comply with all legal requirements and the conditions in the EA relating to Offsets as well as the Biodiversity Offsets Implementation Agreement means that these obligations are well defined.
- 20.14 An out-of-kind offset to counterbalance this aspect of the offset is desirable and Ezemvelo is of the opinion that the purchase of Farm Madaka for inclusion into Ithala Game Reserve will make a meaningful contribution to the biodiversity status of KwaZulu-Natal and would ultimately benefit, to some extent, the marine ecosystem through securing the ecological services the property provides. It was clear from the information submitted in the EIA that the out of kind Madaka offset was to compensate for the possible delay in implementing the in-kind marine offset.
- 20.15 As per the FEIR, the Madaka Game Ranch will be incorporated into the Ithala Game Reserve, registered as a Biodiversity Protected Area, thereby contributing to the expansion of South Africa's protected areas and improved conservation of priority fauna and flora species within the national climate change mitigation corridor. The Out of Kind offset is certainly very possible as KPS is current in process of finalizing the acquisition of the game farm on behalf of EKZNW.
- 20.16 KPS has already concluded an agreement with EKZNW and completed a 12-month avifaunal monitoring exercise.

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- 20.17 Management plans are high-level, strategic documents that provide the direction for the development and operations of protected areas. They inform management at all levels, from the staff on-site through to the CEO, the Board and the MEC.
- 20.18 It aims to provide the strategic basis for the protection, development and operation of the protected area once Madaka has been incorporated into Ithala Game Reserve. It will be prepared collaboratively by involving stakeholders within Ezemvelo KZN Wildlife, local and provincial government Departments and other key stakeholders.
- 20.19 The Annual Operations Plan will be compiled on an annual basis, with quarterly reviews. It will contain specific goals, actions required for the implementation of the management plan. The Annual Operations Plan combines site-specific goal setting, management interventions required to achieve objectives set out in the Management Plan, and the next steps required to improve the protected area's management effectiveness. It furthermore provides a mechanism to review the Management Plan, assess the requirement for a full review process should substantial changes be required, and it will record minor revisions for updating the Management Plan.
- 20.20 KPS is working with the Nature Reserve Management Committee that will develop the Annual Operations Plan which consist of EKZNW's District Ecologist and scientific advisors and ecological specialists. In this step, the EA holder's specialists, prepares a Biodiversity Offset Management Plan for the biodiversity offset site. A Biodiversity Offset Management Plan sets out the specific measures that must be undertaken to achieve the required biodiversity outcomes on the biodiversity offset site.
- 20.21 As biodiversity offset sites are typically only selected in the post-authorisation phase, it is likely that the Biodiversity Offset Management Plan is prepared in the post-authorisation phase. How soon in the post-authorisation phase the Biodiversity Offset Management Plan is developed depends on whether the biodiversity offset site was identified in the EA or whether a site still needs to be found.
- 20.22 NEMA and the EIA Regulations make provision for EAs to be issued subject to conditions. Appropriate and carefully framed conditions are vital components of ensuring sound environmental management and to aid with compliance and enforcement.

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- 20.23 At the very least, a biodiversity offset condition in an EA must specify the biodiversity outcomes that must be achieved in implementing a biodiversity offset and that the EA holder must be required to enter into a Biodiversity Offset Implementation Agreement with a third party. It must also require the holder of the EA to select a biodiversity offset site, secure that site and prepare a Biodiversity Offset Management Plan for that site. The CA has fully complied to these requirements.
- 20.24 Section 7.9.1 of the EIA is a section dedicated to Biodiveristy Offsets / Ecological Compensation which deals with the elements of the Biodiversity Offset Report. the Applicant with the guidance of EKZNW followed a process in line with the policy and guideline, in designing and locating the offset.
- 20.25 An EA may be granted subject to the condition that, inter alia, ecological compensation is delivered. Should the application for EA be accepted conditional on an offset, then a detailed Offset Report and Offset Agreement would need to be prepared, together with an Offset Management Plan, providing details of how the offset site would be secured, financial requirements and provision, and implementation arrangements. These documents would then be reviewed and accepted by Ezemvelo KZN Wildlife and the CA before the proposed activities could commence.
- 20.26 The Biodiversity Offset Implementation Agreement was signed between KPS and EKZNW in May 2023 (this confidential document was appended to the final EIAR submitted to DFFE). The public copy of the final EIAR does not include copy of the agreement due to it being confidential. A total of 12-months monitoring has been conducted over the period 2020-2023 as part of the pre-construction baseline monitoring. A second 12-month post construction monitoring programme will commence as soon as construction is complete, in keeping with the conditions of the EA.

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- 20.27 The mitigation hierarchy (avoid, reduce, rehabilitate and offset impacts) was implemented in the EIA process, to arrive at the final proposed alternatives with impact management measures and mitigations.
- 20.28 Following all the measures taken and recommendations by the Coastal, Estuarine and Marine as well as Avifaunal Specialists to avoid, minimise and rehabilitate, a residual negative impact of medium and medium high impact remained for the Avifauna Specialist Report, as well as the Coastal, Estuary and Marine Ecology Report, within the Estuarine Bay/Port of Richards Bay. No residual high risks were identified nor were any fatal flaws indicated by any specialist. As per EKZNW, the 2022/23 environmental impact assessment (EIA), reviewed by EKZNW and other Specialists, determined that the maximum impact of the Project on the biodiversity values to be 'moderate' which may be offset or compensated for, or both, to achieve the requirement of a 'no net loss' (or enhancement) of biodiversity rendering the Project ecologically sustainable.
- 20.29 The selection of candidate and optimum offset sites within KZN, was done following an approach and considerations as per the concepts undertaken by the Estuarine, Coastal Specialist and included:
- (a) Consideration that the project is located in the only estuarine bay in KZN (which also supports the active Port activities);
 - (b) Engagement with KZN Provincial EDTEA – Coastal Management on Provincial mandates and priorities including concerns and strategies;
 - (c) Engagement with EKZNW – Coastal, EIA and Conservation; Ecological Advice – Scientific Services comprising numerous meetings, review of proposals, discussions on alternatives' benefits as well as disadvantages and agreement on best type of offset and approach in terms of the like-for-like and out-of-kind;
 - (d) Review of existing databases and information relating to the estuaries within KZN; and
 - (e) Discussions with stakeholders and Specialists involved in Estuarine Management Plan and its initiatives.

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- 20.30 Any remaining work regarding clarification of the Offset will be addressed in the Offset Management Plan, which is underway, and this will comply with the Offset Guidelines.
- 20.31 The applicant submits that in drafting biodiversity offset conditions for EA's, NEMA and the EIA Regulations make provision for EA's to be issued subject to conditions. Appropriate and carefully framed conditions are vital components of ensuring sound environmental management and to aid with compliance and enforcement. Given their complexity, biodiversity offsets often require lengthy and specific outcomes-focused conditions.
- 20.32 The suitability of the Umhlatuze Estuary (or any other similar estuary identified by EKZNW) will be addressed in the Offset Management Plan, which is underway, and this will comply with the Offset Guidelines.
- 20.33 It is Ezemvelo's considered opinion that the immediate surroundings of the proposed Gas to Power Powership project have a high or significant potential for an offset receiving area. Ezemvelo acknowledges the complexity of marine offsets as well as the complexity of land-legal and enviro-legal matters that characterise the interface between the terrestrial, freshwater, and estuarine habitats (which may be privately or communally owned) and the marine environment (below the highwater mark but still considered 'inshore') that is held in trust by the state.
- 20.34 The Project site is located within an existing and operational port, where cumulative negative impacts are already prevalent at a high level (from historical estuarine modification and port development to present day port operations and surrounding industrial land-use activities). With mitigation, all identified medium-high and high significance negative impacts related to the proposed Gas to Power Project can be reduced to be of medium significance, or lower. However, the risk of environmental degradation as a result of further compounding negative impacts within this estuarine ecosystem that is already under pressure, was a concern, consequently, to alleviate the residual risk, KPS, in collaboration with EKZN Wildlife, has committed to a like-for-like and out-of-kind offset agreement. The appellants' allegation that there was a 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

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activities” is clearly incorrect as is demonstrated by the information contained in the EIA and the specialist studies.

- 20.35 NEMA and the EIA Regulations make provision for EAs to be issued subject to conditions. Appropriate and carefully framed conditions are vital components of ensuring sound environmental management and aid with compliance and enforcement. Given their complexity, biodiversity offsets often require lengthy and specific outcomes-focused conditions. The key principles for offset conditions are that the conditions must not be vague (and must therefore be enforceable), they must be rationally related to the purpose for which the condition is being incorporated into the EA, and they must not be unreasonable. EA conditions are binding on the EA holder. Non-compliance with, or contravention of, a condition of an EA is an offence in terms of section 49A of NEMA. An appropriately designated environmental management inspector may also issue a compliance notice to the EA holder for non-compliance with a condition of an environmental
- 20.36 The CA could also specify deadlines for the selection of a biodiversity offset site, the securing of a biodiversity offset site, the completion of a Biodiversity Offset Management Plan and the conclusion of a Biodiversity Offset Implementation Agreement. Those timeframes would depend on what is realistic under the circumstances.
- 20.37 The EIA and related public information contained sufficient information to address the extent of environmental impacts, the need for mitigation and offsets and subsequently, all information was before the decision maker when the decision to authorise the Project was made.
- 20.38 The impact assessment chapter within the final EIAR covers over 200 pages of impacts and mitigation measures, as identified and assessed by the team of Specialists.
- 20.39 The guideline is an implementation guideline contemplated in section 24J of NEMA. It must, in accordance with section 24O of NEMA and Regulation 18 of the EIA Regulations, be taken into account by a CA when considering an application for an EA. The CA has the discretion to deviate therefrom under appropriate circumstances.
- 20.40 The applicant further contends regarding this Ground of Appeal the appellant has not followed proper procedure. The Appeal Regulations, Appeal Guidelines (and appeal forms) require the

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appellant to state whether new information is included in the appeal – this is due to the fact that the appeal deals primarily with the facts that were before the decision-maker when the decision was made. If there are new facts that are introduced by the appellant the appellant must state this. The appellant has not done this and thus co-mingles facts that were before the decision maker and facts that were not before the decision maker (such as information obtained by the appellant from EKZMW). It is submitted that this non-compliance in respect of Ground 3 means that this Ground 3 should be struck from the record.

COMMENTS FROM THE CD:IEA -

21. The CD:IEA comments as follows:
 - 21.1 Upon reviewing the EIAR, the CA was satisfied that the impact assessment undertaken by the EAP, and specialist studies was adequate for decision making, and in line with the requirements of the EIA Regulations.
 - 21.2 The requirement for an offset was contained in the EIAR and its supporting Annexures, which included the specialist reports, as well as the comments received from I&APs.
 - 21.3 The Department was satisfied with granting an EA authorisation on the information provided and the mitigation measures presented. Upon receiving the final layout plan(s) and EMPr with all mitigation measures as dictated by the final site layout plan prior to construction, this Department as well as the I&APs will still have an opportunity to ensure that impacts to the environment are minimised sufficiently.
 - 21.4 The reason the layout plan was not approved as part of the EA, was due to the fact that there were specific conditions included in the EA which required that holder to amend the layout plan. As such, to enable the holder to comply with the conditions, the layout plan could not have been approved.
 - 21.5 Due to the Layout plan needing to be amended, this will result in the EMPr also requiring to be amended to address the conditions in the EA. The EA granted included suspensive conditions

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that need to be fulfilled prior to construction commencing. The changes to the layout plan and the EMPr based on the conditions of the EA still needs to be reviewed and decided upon prior to construction commencing.

- 21.6 Based on the information provided and considered for decision making, the CA had enough information to make an informed decision. With regards to the information relied on to reach its decision, these are captured in point 1 of Annexure 1: Reasons for Decision of the EA.

EVALUATION AND DECISION

22. In regard to this ground of appeal, I have considered the appellant's submissions, the applicant's responses thereto and the comments of the Department. I have therefore determined that:
- 22.1 Contrary to the allegations by the appellant, the EIA complied with the prescripts of section 240 of NEMA including the "relevant factors" therein and the guidelines and policies for decision making by the CA.
- 22.2 I have already, in regard to the second ground of appeal dealt with the issue of conditions incorporated into the EA. In order not to repeat same, I refer to that which I have stated there and direct the appellant and applicant thereto. I reiterate that the conditions concerned the mitigation and monitoring of impacts and offset and was not an indication that the decision maker was unable to consider "relevant factors".
- 22.3 I have noted that the 12 month avifauna impacts and monitoring study and report has already been done and therefore this condition in the EA has already been carried out.
- 22.4 It is apparent from the conditions and the specialist studies which include proposed mitigation measures, that the impacts of the project are not unknown.

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- 22.5 The Coastal, Estuarine and Marine impact Assessment Report shows that the cumulative impacts of the project have been assessed in regard to the adjacent and regional developments or activities.
- 22.6 I noted further the applicant's averment that the final micro-siting layout plan will be "in significant alignment with the layout plan submitted for public participation" and that "infrastructure positioning cannot change but may be subject to micro-siting."
- 22.7 A Biodiversity Offset Implementation Agreement was signed between KPS and EKZNW in May 2023 (this confidential document was appended to the final EIA submitted to DFFE) and which included the out-of-kind offset and who was of the view that that the purchase and inclusion of the farm Mkada for inclusion into the Ithala Game reserve would contribute to the biodiversity status in the Province.
- 22.8 The out-of-kind Madaka offset was intended to compensate for the delay in implementing the in-kind marine offset.
- 22.9 The applicant is stated to be collaborating with the Nature Reserve Management Committee to develop the Annual operation Plan and Management Plan.
- 22.10 The averment that as biodiversity offset sites are selected in the post-authorisation phase, it is likely that the Biodiversity Offset Management Plan is developed in the post-authorisation phase which would include inter alia, details of the financial provision and requirements and implementation arrangements.
- 22.11 The EIA (section 7.9.1) is dedicated to Biodiversity Offsets / Ecological Compensation.
- 22.12 That a process using the policy and guideline was followed in designing and locating the offset.
- 22.13 The selection of candidate and optimum sites was done following an approach and considerations per the concepts undertaken by the Estuarine, Coastal Specialist.

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- 22.14 The suitability of the Umhlathuze Estuary or any other similar estuary identified by EKZNW will be addressed in the Offset Management Plan currently underway.
- 22.15 The project site is located in an existing operational Port where it is stated that cumulative negative impacts are already present at high levels. With mitigation the identified medium -high and high impacts can be reduced to medium.
23. I have further had regard to the Department's comments to the effect that:
- 23.1 Upon review of the EIAr the CA, I was satisfied that the impact assessment, specialist studies, the comments from I&APs were sufficient for decision making and were in line with the requirements of the EIA Regulations.
- 23.2 Furthermore, that upon receipt of the final layout Plan and EMPr with all mitigation measures as dictated by the final site layout, the department and I&APs will have the opportunity to comment thereon.
24. Having regard to the above, I have determined that this ground of appeal lacks merit and is therefore dismissed.

FOURTH GROUND OF APPEAL:

Provision of an interim or conditional authorisation

25. The appellants submit as follows:
- 25.1 Regulation 24 empowers a CA either to "grant" or "refuse" an EA in respect of all or part of an activity for which an application is received. 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.
- 25.2 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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- 25.3 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.
- 25.4 Similarly, section 24Q of NEMA contemplates “terms and conditions” to ensure compliance with EA conditions and to monitor progress.
- 25.5 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.
- 25.6 The EA granted not only defines the parameters of the management of authorised activities, but also, impermissibly authorises a further round of “resolutive” decision-making.
- 25.7 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.
- 25.8 These Conditions include requirements for PPP 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. In effect of these Conditions create a further “mini” EIA process. It is on the basis of that, subsequent, decision-making that the project will be finally authorised.
- 25.9 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.

RESPONSES BY THE APPLICANT:

26. In their response, the Applicant submits that:
- 26.1 It is not illegal for the CA to include conditions in the EA and is in fact common practice for the CA to do so, even to go as far as to request further monitoring and information gathering and assessment. This is because it is not possible for the EIA (and consequently the decision maker)

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to be able to predict all the impacts arising from a project. This has been recognised by our courts for example in the case of *Eloff Landgoed (Pty) Ltd v Minister of Forestry, Fisheries and the Environment*⁶ (“the Eloff Landgoed case”) where the court stated as follows at page 12 and 13, paragraph 27:

“NEMA envisages that the imposition of conditions on the grant of environmental authorisations is one of the ways in which the legislation gives effect to the “risk averse and cautious approach” to sustainable development mandated in section 2 (4) (a) (vii) of NEMA. Section 2 (4) (a) (vii) acknowledges that such an approach is necessary because there are always limits on “current knowledge about the consequences of decisions and actions.”

26.2 In that case the Condition in the EA for an Agronomic Assessment being required failed for two reasons. Firstly, the information should have been before the decision maker before the EA was granted and secondly, the impacts of the Agronomic Assessment were not capable of being mitigated. In this regard, the court held page 13, paragraph 27:

“Where, as in this case, a condition mandates further study of one of the impacts that had to be captured and assessed before the authorisation was granted, I do not see how the condition could be consistent with a “risk averse and cautious approach”.

26.3 Although the *dictum* in the Eloff Landgoed case is important (in terms of conditions of EA’s) it is also very important to distinguish the Eloff Landgoed case from the Karpowership case.

26.4 The unacceptable condition in the (Eloff Landgoed case) EA that was found to be unacceptable was that it required further study (Agronomic Assessment) of an impact and was incapable of mitigation.

26.5 The conditions in the Karpowership EA in relation to, inter alia the EMPr, the Offsets and Avifuana are different to the *Eloff* case Conditions in that the Karpowership conditions are:

- (a) Primarily aimed at mitigation (not the provision of further study to obtain information necessary for the EA, but monitoring information or a mitigation plan, which is acceptable);

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- (b) There is a definite plan of action (Condition 15 for the EMPr and 57 – 64 for the Offsets); and
- (c) The majority must be resolved before construction may commence or relate to ongoing monitoring.

26.6 Whereas the Agronomic Assessment in the *Eloff Landgoed* case would merely show a negative impact and that information was not before the decision maker at the time- therefore it was fatal.

26.7 In relation to the Avifauna studies (conditions 45 – 51 of the Karpowership EA) these conditions are legal as they concern mitigation and ongoing monitoring (i.e., giving effect to the risk averse approach) whereby the Authorities have the mandate to assess and monitor the ongoing impact of the Project.

26.8 A further distinguishing feature is that the specialists in the Eloff Landgoed case, neither the EIA nor the EAP recommend that the project should proceed due to the negative impacts. The EAP only changed her mind when the 6 conditions (including the Agronomic Assessment) were introduced. In the Karpowership case all the independent Specialists and the EAP recommended that the Project should proceed, subject to the relevant mitigation measures.

26.9 The appellant fails to balance its biodiversity argument with considerations of sustainability and economic benefits of the project. This is a legal requirement.

26.10 The EIA contained all the relevant information which was before the decision maker at the time the decision was made.

26.11 The following recent EAs issued confirm the principle that Conditions which require monitoring and further assessment are legally acceptable provided a concrete plan is in place to deal with the results thereof.

26.12 Condition from the EA for: The construction of the Proposed Expansion/ Upgrading Of Three Dams And Associated Infrastructure For The Purposes Of Establishing Orchards As Well As The Construction Of An Airstrip, Hangar And Jetty (issued by the Department of Environmental Affairs and Development Planning in the Western Cape in October 2022) -

2. *The construction phase of the Environmental Authorisation is subject to the following:*

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

2.1 The Holder must finalise the post construction rehabilitation and monitoring requirements within a period of 3-months from the date the development activity (construction phase) is concluded at each of the respective sites.

26.13 Condition from the EA for: Dube TradePort Agrizone Development dated March 2010, issued by DEA -

3.2 The recommendations must be consolidated into an Environmental Management Plan (EMP) for the Agrizone, and this plan must be submitted to the Department for approval. The EMP must extend to the management of wastewater on the site.

Priority 2 sanitation project also had a condition in the EA that the EMP must be amended and submitted to the department for approval.

26.14 Condition from the EA for the: Proposed Exploration Drilling, Western Cape, issued in 2023 -

5.5.2 The holder must, within sixty (60) days prior to the commencement of the proposed drilling operations, submit all specific management plans identified in the ESIA report and the ESMP i.e., Shipboard Oil Pollution Emergency Plan (SOPEP), Emergency Response Plan (ERP), Blowout Contingency Plan (BOCP), Oil Spill Contingency Plan (OSCP), Stakeholder Engagement Plan, Waste, Emissions and Discharge Management Plan, Hazardous Substance Management Plan, Preventative Maintenance Plan, Ballast Water Management Plan, Biodiversity Management Plan and Corrective Action Plan to the Agency.

5.5.3 The holder must undertake pre-drilling surveys at each well site to confirm the presence or absence of any environmentally sensitive features. In the event that the surveys identify the presence of archaeological sites or shipwrecks, the holder must notify the South African Heritage Resources Agency (SAHRA) and the Agency of the discovery.

26.15 Conditions from an EA for an Eskom Battery Energy Storage System, issued by DFFE in April 2023 -

*13. A copy of the final site layout map **must be made available for comments** to the registered IAPs and the holder of this EA 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. (THEN A LIST OF WHAT MUST BE INCLUDED IN THE MAP).*

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

14. *The Environmental Management Programme (EMPr) submitted as part of the final BAR dated December 2022 is **not approved and must be amended** to include measures as dictated by the final site layout map as well as the updated stormwater management plan. The EMPr **must be made available for comments** by the registered IAPs and the holder of this EA must consider such comments. Once amended, the final EMPr **must be submitted to the Department for written approval** prior to commencement of the activity.*

27. The CA has this authority in terms of NEMA and the EIA Regulations and it is common practice and found in many EAs as the EA, EMPr and impacts predicted in the EIA are dynamic and require ongoing changing responses and mitigation in order to mitigate the environmental impacts of a project.
28. The EIA comprised a comprehensive process that complied with the EIA Regulations. Numerous management and monitoring conditions were specified by the Specialists, and these were incorporated within the EMPr.
29. The EA is not an interim decision as alleged by the appellant. It is a final decision that authorises the Project and associated activities. All EAs are issued with conditions which the Holder of the EA must comply with such e.g. appointments, monitoring and reporting. The requirement to amend the EMPr is such a condition..
30. The CA may also vary the EA, authorise the EMPr and include all conditions for the EMPr as conditions of the EA, with a condition that after 5 years when the EMPr is audited, the conditions must be included in the updated EMPr for completeness.
31. The lay-out design is a minor refinement, if any of the lay-out and coordinates submitted with the EIA may change. The EMPr design conforms with the legislative requirements. The impacts were assessed, and the mitigations specified, and residual impacts assessed. The CA requires these assessments to be considered in the in-kind offset. The Madaka Offset is aligned with the updated Ithala Game Reserve Management Plan that was already developed with the consideration of the Madaka Game Reserve.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

32. The Appellant is incorrect to refer to these conditions as a “mini” EIA process. These are specified conditions to be complied with by the Holder of the Authorisation and where deemed applicable and engagement is specified as per the CA's authority.
33. As indicated, the CA is within its mandate to vary an authorisation. The alternative approach is to provide a varied EA which authorises the EMPr. This variation ensures that the EMPr aligns with the conditions set out in the EA, thereby maintaining the integrity of the environmental management process. This approach underscores the CA's commitment to environmental stewardship and sustainable development, thereby ensuring a balance between developmental needs and environmental conservation.

COMMENTS BY THE CD:IEA :

34. The CA did not conditionally grant an EA. It granted an EA subject to conditions which are provided for in the EIA Regulations.

EVALUATION AND DECISION

35. In evaluating this ground of appeal, I have considered the submissions of the appellant, the responses from the applicant and the comments by the Department. I note that the issues raised hereunder are in the main the same as raised by the appellant under its earlier ground of appeal number 3. Accordingly, I do not repeat my reasoning and findings here, I however refer thereto as if incorporated here.

For the sake of clarity, I find that this ground of appeal is without merit and is accordingly dismissed.

FIFTH GROUND OF APPEAL:

Failure to comply with public participation requirements

36. The Appellant submits as follows:

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 36.1 Public participation is a core principle of all environmental decision-making and an adequate and appropriate opportunity for public participation in environmental decision-making is an express objective of integrated environmental decision-making. Accordingly, it is critical that the procedures ensuring public participation as set out in the Regulations are properly adhered to throughout the EIA process.
- 36.2 Regulation 40 requires that an EIAR and EMPr are subject to a PPP in which I&APs are granted at least 30 days to comment. During such 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”*.
- 36.3 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...”*
- 36.4 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.
- 36.5 Contrary to this requirement, the EA was 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.
- 36.6 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.
- 36.7 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).
- 36.8 Without conceding that it is competent to authorise further public participation for incomplete portions of an EA application, it is 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.
- 36.9 Accordingly, the EA is contrary to the objectives, principles, provisions of NEMA and Regulations setting out the rights, procedures and obligations relevant to public participation. The EA is unlawful and fails to have regard to the rights of all persons to be involved in environmental decision-making.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 36.10 Karpowership had 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, 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 EKZMW "novel".
- 36.11 The appellant requested a copy of the offset agreement, which is material to the viability of the Madaka offset and consequently to the EA itself 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."*⁶
- 36.12 It is inconsistent with objectives of Chapter 5 of NEMA and public participation 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.
- 36.13 Accordingly, it is a critical deficiency that I&APs have not had the opportunity to consider and comment on the agreement. The seriousness of flawed PPP alone, should render the CA's decision to grant the EA liable to be set aside.

RESPONSE BY THE APPLICANT:

37. In their response, the Applicant states as follows:
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APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 37.1 The EIAR and EMPr were subjected to public participation and all information that was required to be placed in the public domain, that was required for the EIA (and the proper assessment of such impacts), and which reasonably has or may have the potential to influence any decision with regard to an application was provided as part of the EIA and subjected to public participation as required by law. All relevant public information from the Biodiversity Offsets Implementation Agreement was included in the EIA. The Biodiversity Offsets Implementation Agreement was provided to the decision-maker and was marked as confidential as per request from EKZNW.
- 37.2 I&APs were provided all reports and plans relevant to the assessment of impacts in the EIA. These included the EIAR and Specialist studies that included the Chapter on offsets as well as the Ithala Game Reserve Management Plan that included the incorporation of the Madaka Game Reserve into the Ithala Game Reserve. This was done in advance of the decision taken by the CA.
- 37.3 In addition, and as per the conditions in the EA, the amended EMPr, which must be subject to PPP, must include the approved offset plans as detailed in conditions 57 — 64 of the EA. As the offset plans will be part of the amended EMPr, it will then also be subjected to the PPP. All conditions of the offset had to be included in the EMPr, which had to go out for public participation.
- 37.4 Specialists in the field of biodiversity designed an offset. Given the complexities and requirements, it is not at all possible to design an offset without consultation with the organs of state responsible for biodiversity. The EA proposes participation via the EMPr amendment.
- 37.5 Further please note that while the Biodiversity Implementation Offsets Agreement is confidential, the Offset Management Plan, will be subject to PPP due to its inclusion in the amended EMPr.

COMMENTS BY THE CD: IEA

38. The Departments comments as follows:
- 38.1 Documentation regarding offsets as submitted as part of the EIAR was deemed sufficient by the Competent Authority to make an informed decision.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 38.2 The Public Participation Process for the revised draft EIAr (which included information regarding offsets) ensured inclusion of all registered I&APs and provided them with the opportunity to comment. Furthermore, the said changes were marked-up (highlighted) in the EIA to make it easier for the Interested and Affected Parties to detect where the changes had occurred.

EVALUATION AND DECISION

39. I have considered the appellant's submissions as well as the applicant's responses and the comments from the Department. I acknowledge the importance of the PPP in environmental decision making. I have evaluated these and determined that:
- 39.1 The applicant contends that "all relevant public information from the Biodiversity Offsets Implementation Agreement" was included in the EIA and that the Biodiversity Offsets Implementation Agreement was provided to the decision-maker and was marked as confidential as requested by EKZMW.
- 39.2 I&APs were provided with all reports and plans relevant to the assessment of impacts in the EIA which included the EIAR and Specialist studies that included the Chapter on offsets as well as the Ithala Game Reserve Management Plan that included the incorporation of the Madaka Game Reserve into the Ithala Game Reserve. This was done in advance of the decision taken by the CA.
- 39.3 In addition, the conditions in the EA, requires that the amended EMPr, be subject to PPP, and must include the approved offset plans as detailed in conditions 57 — 64 of the EA. As the offset plans will be part of the amended EMPr, it will then also be subjected to the PPP. All conditions of the offset had to be included in the EMPr, which had to go out for public participation.
- 39.4 The Department added further that- The PPP for the revised draft EIAr (which included information regarding offsets) ensured inclusion of all registered I&APs and provided them with the opportunity to comment. Furthermore, the changes were marked-up (highlighted) in the EIA to make it easier for I&APs to locate where the changes had occurred.
- 39.5 In light if the above I determine that this ground of appeal lacks merit and is accordingly set aside.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

SIXTH GROUND OF APPEAL:

Failure to comply with environmental management principles:

40. The appellant submits as follows:
- 40.1 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"*.⁷
- 40.2 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.
- 40.3 These Principles include the requirement that development is *"socially, environmentally and economically sustainable"*⁸ and outline eight relevant factors that must be considered in respect of such "sustainability".⁹
- 40.4 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.¹⁰
- 40.5 The remaining factors relate to conserving the existence and integrity of non-renewable and renewable resources¹¹ 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"*.¹²
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APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 40.6 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.¹³
- 40.7 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*”.¹⁴
- 40.8 The Richards Bay estuarine and port environment is such a system – subject to extensive development pressure.
- 40.9 In the circumstances, any decision which reflected these Principles, need to carefully consider actual or potential impacts on the Richards Bay estuarine system. The sensitivity¹⁵ and inherent dynamism of this system would also necessitate an extremely risk-averse and cautions approach in respect of offsets given:
- 40.9.1 the absence of Guidelines regarding estuarine offsets including the absence of estuarine offset ratios;
- 40.9.2 indications in the FEIR that suitable possibilities for estuarine offsets are limited and, at best, speculative;
- 40.9.3 the clear absence of information regarding avifaunal impacts recognized in the Conditions of the EA;
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APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 40.9.4 lack of “*project-specific literature*” regarding plankton mortality¹⁶ which is considered on in Conditions 53 and 54 requiring a baseline assessment and monitoring after construction of the project;
- 40.9.5 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;
- 40.9.6 lack of public participation in relation to offset design;
- 40.9.7 the absence of a final site plan; conclusive determination of impacts and necessary mitigation measures;
- 40.9.8 a clear, comprehensive and scientifically supportable Biodiversity Offset Report that has been subject to a public participation process;
- 40.9.9 recognition of the existing state of degradation of the Richards Bay estuary;¹⁷ and
- 40.9.10 recognition of the unique ecosystem functions provided by the Richards Bay estuary, notwithstanding its degraded state.¹⁸
41. 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, EMP or offset designs is a contravention of the Principles.
42. 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.

APPLICANT’S COMMENTS:

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

43. The Applicant submits as follows:
- 43.1 The independent Specialists involved in the EIA took a risk averse approach to their detailed studies of the Richards Bay environment and recommended that the Project proceed subject to the required mitigation measures which are carried through to the EA and EMPr.
- 43.2 There are significant overlaps between the 1st Ground of Appeal and this ground. The responses provided on the environment, sustainable development and the approach to the EIA process are equally applicable.
- 43.3 The impact assessments and mitigation hierarchies applied addressed avoidance, minimising and remedying potential negative impacts. They also addressed the enhancement of positive impacts, that included reduced impacts to air pollution, degradation of water and biodiversity.
- 43.4 The appellant has ignored social and economic sustainability, however, in the EIAR, all three pillars were thoroughly assessed, and appropriate mitigation measures were considered.
- 43.5 The Specialists applied a risk-averse approach where there were limitations due to the Project being a first of its kind in South Africa, which as a developing Country is not averse to numerous projects of its kind, including LPG facilities for energy generation and wind farms.
- 43.6 The EIAR and sustainability reports addressed all the matters mentioned as well as the fact that the Richards Bay Port, in which the Project is situated, comprises a unique situation where the estuarine bay also functions as a dynamic socio-economic hub with daily activities taking place which are normally associated with a bustling Port. This is not a greenfield site and will never be an exclusive conservation zone. The functions of the Port must be balanced with the ecological goods and services that were developed as a result of the creation of such a Port. The EIAR and EMPr balances the three pillars of sustainable development without compromising the ecological benefits in the long term.
- 43.7 Information was provided on plankton as well as noise and light and impacts were assessed by the Specialists. It is the CA's prerogative to specify additional conditions. Conditions specified it not a definitive indicator that the EIAR was inadequate.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 43.8 As the ships are a first of its kind, monitoring before the ships are in the harbour is not possible. Modelling was done, but actual impacts can only be determined after construction as the ships are needed to measure actual impacts. The same principle applies where a Holder of an Authorisation is required to measure water quality AFTER a package plant was built.
- 43.9 The Specialists assessing the impacts and providing the recommendations considered the existing state of the environment as well as the ecosystems and their functions as set out in the various Specialist studies as well as the Sustainability Report that also provided for a risk averse approach.
- 43.10 The assessment process was based on a risk averse and cautious approach where the impacts were considered on a 24-hour basis (although the ships will only operate a maximum period of 16.5 hours a day). In addition, the timeframe of 20 years was deemed "permanent". However, the Specialists all indicated that the impacts were reversible and in many instances reversible immediately once the operational phase closes in 20 years. The CA considered all these impacts and issues carefully, together with the EIAR and EMPr that provided for avoidance, mitigation and ultimately offset for the residual impacts (identified on a risk averse approach).
- 43.11 The EA was granted on sound principles, based on all relevant and accurate information. The CA retains the right to vary the conditions of the EA based on the comments received.
- 43.12 The applicant contends that for these reasons, this Ground of Appeal is flawed and has no merit.

COMMENTS BY THE CD:IEA:

44. The information included in the EIAR and its supporting Annexures, which included the specialist reports, as well as the comments received from Interested and Affected Parties was deemed to be sufficient by the CA to make an informed decision.

45. **EVALUATION AND DECISION**

46. In evaluating this ground of appeal, I have considered the submissions made by the appellant, the applicant's responses thereto as well as the comments from the department. In that regard I particularly noted the following:

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

46.1 The appellant's contention that *"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"*. The appellant however recognises that environmental management practice and DFFE policy has recognised the utility of "biodiversity offsets" in specific, circumstances¹⁹ but alleges that:

46.1.1.1 The CA's decision lacks precaution in regard, *inter alia*, to sensitive ecosystems;

46.1.1.2 The requirements for PPP were not met; and

46.1.1.3 The failure to consider relevant impacts; renders the EA irregular.

46.2 I take the following into consideration:

46.3 The specialist reports adopt a risk averse approach of the Richards Bay environment and recommended that the Project proceed subject to the mitigation measures which are carried through to the EA and EMPr.

46.4 The impact assessments and mitigation hierarchies applied addressed avoidance, minimising and remedying potential negative impacts. They also addressed the enhancement of positive impacts, that included reduced impacts to air pollution, degradation of water and biodiversity.

46.5 While the appellant ignores the social and economic sustainability, in the EIAR all three pillars were assessed, and appropriate mitigation measures considered.

46.6 The EIAR and sustainability reports addressed all the matters raised by the appellant as well as the fact that the Richards Bay Port, in which the Project is situated, comprises a unique situation where the estuarine bay also functions as a dynamic socio-economic hub with daily activities taking place which are normally associated with a bustling Port.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

- 46.7 That the site is not a greenfield site and will never be an exclusive conservation zone. The functions of the Port must be balanced with the ecological goods and services that were developed as a result of the creation of such a Port. The EIAr and EMPr balances the three pillars of sustainable development without compromising the ecological benefits in the long term.
- 46.8 As the ships are a first of its kind for South Africa, monitoring before the ships are in the harbour is not possible. Modelling was done, but actual impacts can only be determined after construction as the ships are needed to measure actual impacts.
- 46.9 The department furthermore stated that- The information included in the EIAr and its supporting Annexures, which included the specialist reports, as well as the comments received from I&APs was deemed to be sufficient by the CA to make an informed decision.
- 46.10 Having regard to all of the above, I determined that this ground of appeal is without merit and is accordingly dismissed.

DECISION

In reaching my decision on this appeal, I have taken the following into consideration:

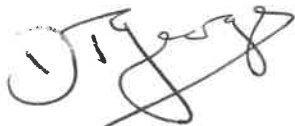
- 46.11 The application for the EA lodged on 30 August 2023;
- 46.12 The information contained in specialist studies contained in the appendices of the BAR dated 30 August 2023;
- 46.13 The decision dated 25 October 2023;
- 46.14 The appeal submitted on behalf of the appellant on 22 November 2023;
- 46.15 The responding statement submitted by the Applicant on 12 December 2023; and
- 46.16 Comments by the Department on 29 January 2024
- 46.17 In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.

APPEAL LODGED AGAINST THE DECISION OF THE COMPETENT AUTHORITY TO GRANT AN ENVIRONMENTAL AUTHORISATION TO KAPOWERSHIP SA (PTY) ON 25 OCTOBER 2023, FOR THE DEVELOPMENT OF THE GAS TO POWER VIA POWERHIP PROJECT AT THE PORT OF RICHARDSBAY, WITHIN THE UMHLATUZE LOCAL MUNICIPALITY, KWAZULU-NATAL PROVINCE

46.18 Having carefully considered the information mentioned in paragraph 46.11 above, and in terms of section 43(6) of NEMA, as I hereby do to dismiss the appellant's appeal and confirm the EA granted to the applicant by the Department dated 25 October 2023.

47 In arriving at my decisions in this internal appeal, I have not responded to each, and every statement set out in the appeal. However, where a particular statement is not directly addressed, the absence of such a response thereto, should not be misconstrued to mean that I agree with or abide by the statement made out in the appeal.

48 Should the Appellants be dissatisfied with any aspect of my decision, they are at liberty to approach a competent court of law to have this decision judicially reviewed. The judicial review proceedings ought to be instituted without undue delay but not later than 180 days of notification hereof, in accordance with the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).



DR DION GEORGE, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 25 July 2024