RE: APPEAL AGAINST THE DECISION TO REFUSE THE APPLICATION FOR ENVIRONMENTAL AUTHORIZATION 14/12/16/3/3/2/2005, APPLIED FOR BY KARPOWERSHIP SA (PTY) LTD FOR THE GAS TO POWER VIA POWERSHIP PROJECT AT THE PORT OF NGQURA WITHIN THE COEGA SEZ IN THE NELSON MANDELA BAY METROPOLITAN MUNICIPALITY, EASTERN CAPE PROVINCE

INTERNAL NEMA APPEAL BROUGHT BY KARPOWERSHIP SA (PTY) LTD

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EXECUTIVE SUMMARY

1. This appeal concerns the refusal by the Department of Forestry, Fisheries and the Environment ("**DFFE**"), to approve a project that was launched in response to the Department of Mineral Resources and Energy's ("**DMRE's**") Request for Qualification and Proposals ("**RFP**").

2. The RFP pertains to new generation capacity under the Risk Mitigation Independent Power Producer Procurement Programme ("**RMIPPPP**"). It is a Strategic Integrated Project ("**SIP**") and is considered vital for alleviating the country's current energy crisis.

3. The RMIPPPP is recognised by the DMRE as being a priority project, which recognises new technologies to meet the energy crisis. This is encapsulated by the DMRE's statement in this regard, as follows: -

> *"The defining and innovative technical feature of the RMIPPPP is that multiple generation facilities located at different geographical locations could be bid as a single dispatchable Project, without being prescriptive on the types of technologies. This was to enable developers to take advantage of the cheaper non-dispatchable technologies that could be bundled together with the dispatchable facility to create an economically competitive dispatchable Project. As all projects are to be dispatchable, the SO will have the choice of*

dispatching each project on the basis of an economic merit order, which will ultimately benefit the South African consumer.

In response to the current supply constrains the RMIPPPP had very tight deadlines to reach commercial operation as soon as possible, but no later than December 2022. The RMIPPPP was specifically aimed at attracting the participation of projects that meet the technical requirements, and that are fully developed or near ready to be able to connect to the national grid and be operational within a short space of time."[1] (Emphasis added)

4. The context to the Port of Ngqura Karpowership Project ("the Project") is that *rapid* delivery of power is required urgently for South Africa's economic development and upliftment, primarily to provide reliable dispatchable power to the national grid to prevent load-shedding. The Project also introduces new and unique technology into the South African energy mix. The Project therefore is a national priority, requiring a degree of urgency and a recognition that the technology is innovative.

5. The RFP required that all authorisations (including the EA) should be unconditionally received by **31 July 2021**. That, together with the SIP timelines, required that EIAs were to be undertaken between **September 2020** and **April 2021** with a final decision on the EIAs

[1] http://www.energy.gov.za/IPP/Risk-Mitigation-in-Context.pdf

required by the DFFE by **25 June 2021**. These are National governmental conditions imposed on the Appellant.

6. Notwithstanding those timelines, the assessment conducted in this project was extremely comprehensive, encompassing both a terrestrial and marine component. Where no National studies could be conducted, because such technology simply does not currently exist in South Africa, international studies were conducted.

7. Public Participation was also comprehensive, and in line with the plan approved by the DFFE and attracted significant comments and responses – all of which were noted and addressed where relevant.

8. The Project also raised significant controversy particularly from the media and NGOs, which we believe to be unfounded and emotive.

9. At the culmination of the process, all of the environmental and socio-economic aspects of the Project having been properly studied, the Environmental Assessment Practitioner ("**EAP**") being Triplo 4 Sustainable Solutions (Pty) Limited ("**Triplo 4**"), concluded that no fatal flaws had been identified, and consequently recommended approval.

10. The DFFE however refused the environmental authorisation ("**the decision**") and provided a number of reasons for that refusal in its decision. On a comprehensive analysis of the final EIA, it is the Appellant's submission that the decision maker erred in refusing to authorise the Project.

11. At the outset and given the time constraints to serve and file this internal appeal, the Appellant reserves its right to supplement the grounds of appeal.

INTRODUCTION

12. For ease of reference, a **List of Acronyms** is attached as Annexure "**CA1**".

13. The sequence of this Appeal is as follows: -

    13.1 **Firstly**, we shall set out the Environmental Application in context an introductory history pertaining to the causa for the Application itself.

    13.2 **Secondly**, we shall the canvass the grounds advanced by the

DFFE in refusing the environmental authorisation under reference number 14/12/16/3/3/2/2006.

13.3 **Thirdly**, we make submissions with regard to the individual grounds of this Appeal to substantiate that the decision by the DFFE is fundamentally flawed, and that the internal appeal should be upheld.

13.4 **Fourthly**, we conclude with our proposed relief as per the Appeal.

A brief history

14. On **23 June 2021**, **KARPOWERSHIP SA (PTY) LIMITED** ("**the Appellant**" or "**our client**") was given written notice of refusal ("**the decision**") of its above application ("**the application**") by the DFFE.

15. The Appellant is aggrieved by the decision and, duly authorised by the Appellant and on its behalf, we hereby lodge an internal appeal against such refusal in terms of **Section 43(2)** of the National Environmental Management Act 107 of 1998 ("**NEMA**"), read together with the Environmental Impact Assessment Regulations 2014 ("**the**

Regulations").

16. The documents relevant to this appeal and from which the submissions are made are drawn from:

16.1 the decision issued on **23 June 2021** by the DFFE.

16.2 a consultation log with the DFFE for the Project.

16.3 the final scoping report dated **17 November 2020.**

16.4 the Draft Environmental Impact Assessment Report ("**Draft EIAR**") dated **26 February 2021**.

16.5 Final EIAR drafted and submitted to the DFFE by the EAP being on 26 April 2021 on behalf of the Appellant.

16.6 Annexures attached to the EIAR including specialised studies and public participation report.

17. These documents are attached as Annexure "**CA2**". Furthermore, the DFFE will, in conjunction with this Appeal, be sent a virtual link with the Appeal as well as supporting Annexures for ease of reference.

18. This RFP was dated **24 August 2020** (tender number DMRE001/2020/2021) and the applicant submitted proposals for 3 gas to power Powership projects to be located in the ports of Richards Bay, the Port of Ngqura and Saldanha Bay.

19. The Project entails the generation of electricity from floating mobile Powerships moored in the Port of Ngqura and Coega SEZ. Construction activities are limited to transmission and gas supply lines, as the vessels are built and assembled internationally and arrive fully equipped in the Port ready for operation. The proposed location of the Project is situated within the existing and operational Port of Ngqura and Coega Industrial Development Zone.

20. In order to conduct the EIA, Triplo4 was appointed as the EAP for the Project. Triplo4 in turn appointed the relevant specialists required to conduct the specialist studies required to gather and analyse relevant information and provide the necessary specialist inputs to the EIA.

21. The meeting with the DFFE required by regulation 8 of the EIA Regulations 2014, as amended was held with the DFFE on **17 September 2020.**

22. The Public Participation Process ("**PPP**") commenced on the **22 September 2020** where site notices were strategically placed along the proposed transmission line route in Nqgura. During this time, the Background Information Document ("**BID"**) was distributed via email to the relevant Stakeholders and Interested and Affected Parties ("**I&APs**"). Advertisments were published in the Herald Newspaper and Daily Dispatch newspaper on the **22 September 2020, 21 and 23 September 2020** respectively requesting I&APs to register to be kept informed throughout the application process, including notice of any meetings that are held and online platform links.

23. A draftScoping Report was distributed to the relevant authorities and to the public for review, for a 30-day comment period (**06 October 2020 to 06 November 2020** – these are extended dates) in which commenting authorities, stakeholders and I&APs were afforded the opportunity to raise any further issues and concerns.

24. The Scoping Report was accepted by the DFFE on **6 January 2021** and the EIAR was available for comment from **26 February 2021 to 31 March 2021**.

25. The Final EIAR was submitted to the DFFE on **26 April 2021**.

26. The Project is unique in that, to comply with the environmental law requirements, an EIA had to be conducted that addressed both the terrestrial and marine components.

27. As already stated, the Appellant was notified of the DFFE's decision on **23 June 2021** and accordingly in terms of the EIA Appeal Regulations, this appeal must be lodged with the Minister within 20 days of such date, thus by **13 July 2021**, the appeal has accordingly been timeously submitted.

SUMMARY OF GROUNDS OF REFUSAL BY THE DFFE

28. The reasons for the refusal are enunciated in the decision by the DFFE, and are the following:

28.1 Public participation was deficient and there was a failure to comply with Section 21(1A)(c) of the NEMA.

28.2 Significant changes were made to and/or significant new information was included in the final EIAR and was not included in the EIAR that was provided for comment during public participation process.

28.3 There was a failure to conduct the public participation process in terms of Regulations 39 to 44, inclusive, of the EIA Regulations 2014, as amended, and the principles of NEMA as outlined in Chapter 2 of the NEMA.

28.4 There was a failure by the EAP to ensure that all relevant listed and specified activities were applied for, were specific and could be linked to the development activity or infrastructure.

28.5 There was a failure to undertake a noise modelling study to gain a more quantitative understanding of the noise produced by the Powership and the cumulative impacts on the surrounding marine environment.

28.6 The SACNASP peer review of the estuary and impact report was excluded from the Final EIAR submissions.

28.7 Specialists indicated in their reports that they either had limited time to properly apply their minds, or that the studies were undertaken in the wrong season.

28.8 Consequent gaps and limitations were identified which raised concerns regarding the validity of findings. These findings will be individually dealt with.

THE GROUNDS OF APPEAL

29. The Appellant's grounds of appeal will be presented in two sections: firstly, the failure of DFFE to have assessed the application in accordance with its obligations under NEMA; and secondly its flawed reasons for refusal.

A. Appeal grounds: A broad overview

30. The grounds of appeal are broadly as follows:

30.1 The DFFE failed to consider that the Port of Ngqura Project is a unique, unprecedented project in South Africa that operates in both the marine and terrestrial environments and as such cannot be modelled or compared to any current project in existence in SA, requiring a robust but practical consideration of the application.

30.2 The DFFE failed to consider the strategic nature of the Project from a needs and desirability perspective given the impacts of the Project on energy risk mitigation and the development and growth of the SA Economy.

30.3 The DFFE gave undue weight to particular components of the application and insufficient weight to others of equal, if not more, importance.

30.4 The DFFE considered comments and objections by environmental groups outside of the PPP timelines and the Applicant through its EAP was not afforded any right of response or reply in contravention of the *audi alteram partem* rule.

30.5 The DFFE failed to assess the Project in accordance with the provisions of Sec 2(4)(l) of NEMA *"There must be inter-governmental co-ordination and harmonisation of policies, legislation and actions relating to the environment*." There was no inter-governmental engagement with regard to the action taken by the DFFE.

30.6 The DFFE failed to consider the inputs of the Appellant as well as Triplo 4 in reaching its decision.

30.7 The DFFE further failed to consider that the Appellant has met the minimum legislated and policy thresholds for public participation.

30.8 The DFFE failed to consider the NEMA Section 2 principles, particularly the socio-economic benefits of the Project as against the decision reached.

30.9 The DFFE failed to consider other relevant Policy and Legislation highlighting the extreme import of the proposed activity.

31. The DFFE further failed to consider that the Appellant's Project is a SIP, as provided for in the ***Infrastructure Development Act*** 23 of 2014 ("**IDA**"), and to take into account the provisions of the IDA when considering the application.

31.1 Given the unique nature of the Project, the SIP status of the Project and from a needs and desirability requirement, the

Appellant respectfully submits that the DFFE should rather have permitted the activity, granted a decision in the Appellant's favour and incorporated any legitimate objections and concerns raised by Interested and Affected Parties (**I&APs**) **into conditions for ongoing mitigation and prevention during the life cycle of the Project** in order to effect a win-win situation for both environmental concerns and the mitigation of electricity risk and development and growth of the South African economy

31.2 The Appellant is able to respond comprehensively and rebut each and every reason set out by the DFFE in the decision, and this response indicates that the finding by the DFFE is fundamentally unsound and based on the incorrect interpretation of facts or assumptions.

GROUND 1: The DFFE failed to consider the strategic nature of the Project from a needs and desirability perspective given the impacts of the Project on energy risk mitigation and the development and growth of the SA Economy

32. It is evident that the DFFE have not properly considered that the Project was launched in response to the DMRE's RFP, for new

generation capacity under the RMIPPPP. It is further a SIP and is vital for alleviating the country's current energy crisis.

GROUND 2: The DFFE heavily relied on particular components of the application and did not holistically assess the application

33. Not only did the DFFE fail to consider the need and desirability of the Project but also the Socio-Economic Assessment of the Project which recommended that the Project should proceed. The Socio-Economic Assessment states at page 66 **:** -

"*Based on the information presented in this report, it is evident that the net positive impacts associated with the development and operation of the proposed Powerships and their associated infrastructure are expected to outweigh the net negative effects. The Project is envisaged to have a positive stimulus on the local economy and employment creation, leading to the economy's diversification and a small reduction in the unemployment rate. The Project should therefore be considered for development. No fatal flaws were identified as part of the socio-economic assessment*."

GROUND 3: The DFFE considered comments and objections by Environmental groups outside of the PPP timelines and the Applicant through its EAP was not afforded any right of response or reply in contravention of the *audi alteram partem* rule.

34. This is dealt with Ground 5, paragraphs 37 – 40.

GROUND 4: The DFFE failed to assess the Project in accordance with the provisions of Sec 2(4)(l) of NEMA "There must be inter-governmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.", in that that there was no inter-governmental engagement with regard to the action taken by the DFFE.

35. Although the Project was declared a SIP and it is important to have the RMIPPPP projects deliver electricity to the grid, there was no co-operative governance and co-ordination between the government departments as required by Section 2(4)(l) of the NEMA.

GROUND 5: The failure to consider the inputs of the appellant and Triplo 4

36. On **18 June 2021** Triplo 4 and the Appellant made specific inputs regarding the Saldanha Bay suspension in comprehensive MEMORANDUM format. Further inputs were sent to the DFFE on **23 June 2021** regarding Richards Bay and the Port of Ngqura, regarding the objections by I&Aps.The MEMORANDUM of 18 June 2021 was sent in response to a letter of suspension of the environmental authorisation process by the DFFE dated **8 June 2021** ("**the suspension**"), but this was never considered by the DFFE.

37. These inputs are attached as Annexures "**CA3A**","**CA3B**" and "**CA3C**". These inputs should be read, *ad seriatum* into the Appeal.

38. It is noteworthy that in these inputs, specific reference is made to the threshold of public participation and the Appellant argued at the time that it had met the minimum threshold for public participation.

39. By ignoring these inputs, the DFFE:

39.1 failed to consider any of the inputs raised by either the Appellant or Triplo 4 in reaching its decision;

39.2 failed to consider relevant input, which should have materially affected the outcome of the decision and;

39.3 failed to consider that the Appellant could adequately respond to every single concern raised by I&APs.

GROUND 6: The DFFE failed to consider that the appellant has met the threshold for public participation

40. The inputs by the Appellant indicated a legal and policy setting, which shall also be amplified and expanded in these grounds of appeal.

41. Specifically, the DFFE failed to consider the aspects of paragraphs 11 to 33 of the Appellant's MEMORANDUM which sets out the minimum

legislation threshold.

42. The MEMORANDUM specifically reiterated compliance by the Appellant with: -

42.1 **Sections 24(4)(a)(v)** of the NEMA.

42.2 Government Notice 320 of 2020 the *Procedures for the Assessment and Minimum Criteria for Identified Environmental Themes* in terms of **Section 24(5)(a)** and **(h)** and 44 of the NEMA.

42.3 Government Notice R982 in Government Gazette 38282 dated 4 December 2014, **Regulations 41 to 44**.

43. None of this input was considered by the decision-maker.

44. It is submitted that the information provided to I&APs was reasonable and adequate for them to make comments thereon. Furthermore, the public participation process itself, met the minimum legislated threshold.

45. It is submitted that on a reading of the public participation provisions of the NEMA, a decision-maker cannot simply rely on the information provided by an objector.

46. It is incumbent upon a decision-maker to consider the other side of the application. In this instance, it was incumbent upon the decision-maker to consider the inputs of the Appellant objectively, fairly, and impartially, in the consideration of reaching its decision. Given the complexity of the Project, it is also noteworthy and surprising that DFFE sought no clarification on any aspect of the assessment at any time from the Appellant.

47. We further quote from the **National Policy Framework for Public Participation**, 2007, page 16 which indicates a definition of consultation as follows:

> *"Community is given information about the Project or issue and asked to comment – e.g. through meetings or survey – but their view may not be reflected in the final decision, or feedback given as to why not. External agents define problems and information gathering processes, and so control analysis. Such a consultative process does not concede any share in decision-making."*

48. The policy further defines informing in terms of public participation as

follows:

> *"Community is told about the Project – e.g., through meetings or leaflets; community may be asked, but their opinion may not be taken into account."*

49. Furthermore, with regards to the response of inputs by I&APs, the policy at page 20 defines the following with regards to the iterative process of public participation:

> *"This is the insight that most people participate to make a positive difference to their own lives. Hence, if they feel that participation is improving service delivery, or local development or municipal policy then they are likely to continue to participate. On the other hand, perhaps the biggest deterrent to participation is the perception or experience that participation makes no difference (Lowndes et al 2001). For people to participate they have to believe that they will be listened to, and that their views will be taken into account. Making community participation 'responsive' is about ensuring feedback, even if that feedback is sometimes negative. In participation terms, bad feedback is better than no feedback at all."* (emphasis added)

50. The policy at page 21 defines the principles of community

participation, which principles were considered by the Appellant.[2]

51. The emphasis on integration is that public participation is iterative and that it is a process. However, the process is defined against a legislated backdrop of consultation and a definite period to make comment. In other words, public participation is not ongoing and exhausting. Public participation must be done in a reasonable, practical manner as per the unique requirements of each project and in conformance with the minimum legislative threshold.

52. Three general functional categories of public participation exist: **education/information, review/reaction** and **interaction/dialogue.**[3] To this extent: -

52.1 There were no “new” studies submitted in the Final EIAR – the core studies obtained were originally made available to all I&APs, and pursuant to specific objection thereto, further studies were obtained in direct answer to objections raised. This is in compliance with the iterative process.

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[2] These principles include inclusivity; diversity; building community participation; transparency; flexibility; accessibility; accountability; trust, Commitment and Respect; and integration.

[3] Wilkinson 1976 *Natural Resource Journal* 119.

52.2 The iterative process is not to the exclusion of the Appellant, and further, it should not be ongoing to the point of exhaustion.

52.3 It was incumbent upon the decision-maker not only to consider the inputs of objectors/ I&APs, but also to consider the Appellant's inputs.

52.4 Such clarification from the decision-maker and incorporation of the Appellant's inputs could have led to the issues raised, as having been incorporated into specific conditions for the implementation of the Project regarding mitigation and prevention. This would have considerable socio-economic benefit, whilst fully considering objection raised.

53. In order to comply with the requirements for procedural fairness set out in the ***Promotion of Administrative Justice Act*** 3 of 2000 (**PAJA**), administrators must ensure (amongst other minimum requirements set out in **Section 3(2)(b)** of the PAJA that any person who may be adversely affected by administrative action is provided:

53.1 adequate notice of the nature and purpose of the proposed

administrative action;

53.2 a reasonable opportunity to make representations; [and]

53.3 a clear statement of the administrative action.

54. Significantly, **Section 3(5**) of the PAJA, provides that:

> *"Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2) [section 3(2) of PAJA], the administrator may act in accordance with that different procedure."*

54.1 This Section is relied upon in terms of the various options provided by the Appellant in the relief sought in the Appeal.

55. While the procedural fairness requirements of a particular administrative process will depend on the circumstances in question, the PAJA also sets out certain considerations which are required to be taken into account in determining whether it is reasonable or justifiable to depart from the requirements of **Section 3(2).**

56. The Project introduces new technology into the Republic, which is a

further reason why the issues in the reasons for the decision could have been more appropriately incorporated into the conditions of a positive environmental authorisation for the Project in terms of mitigation and prevention.

57. Furthermore, as will be detailed below, public participation needs to consider that there has been an overt attempt by the Appellant to ensure that all dimensions of an activity are adequately considered in the EIA process.[4]

58. It is further submitted that despite the fact that there is no internationally accepted definition of public participation, international instruments such as the **Aarhus Convention** can play a crucial role in shaping the definition of public participation.[5]

59. In this instance the Appellant and its EAP met the fundamental

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[4] **Fuel Retailers Association of SA v Director-General, Environmental Management Mpumalanga** 2007 (2) SA 163 (SCA) paragraph 14, reversed by the Constitutional Court in 2007 (6) SA 4 (CC); **BP Southern Africa v MEC for Agriculture, Conservation, Environment and Land Affairs** 2004 (5) SA 124 (W) and **MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil** 2006 (5) SA 483 (SCA)

[5] Convention on Access to Information, Public Participation and Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

tenants of Article 6(2) of the Aarhus Convention.[6]

60. From a case law perspective, the Appellant has considered the matter of **Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism and Another**.[7]

61. In terms of the requisite for information provided to I&APs at paragraph 76:

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[6] *"6(2) The public concern shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective matter inter alia of:*

(a) the proposed activity and the application on which a decision will be taken;

(b) the nature of possible decisions or the draft decision;

(c) the public authority responsible for making the decision;

(d) the envisaged procedure, including, as and when this information can be provided:

(i) the commencement of the procedure;

(ii) the opportunities for the public to participate;

(iii) the time and venue of any envisaged public hearing;

(iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments and questions; and

(vi) an indication of what environmental information relevant to the proposed activity is available ..."

[7] ***Earthlife Africa (Cape Town) v Director General Department of Environmental Affairs and Tourism and Another*** (7653/03) [2005] ZAWCHC 7; 2005 (3) SA 156 (C); [2006] 2 All SA 44 (C); 2006 (10) BCLR 1179 (C) (26 January 2005)

"Access to Material Information

Fairness ordinarily requires that an interested party be given access to relevant material and information in order to make meaningful representations. De Smith Woolf & Jowell summarise the principle as follows:

'If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespec-tive of whether the material in question arose before, during or after the hearing.'

On the other hand, however, it has repeatedly been emphasised that an interested party's right to disclosure of 'relevant evidential material' is not equivalent to a right to complete discovery, as this could 'over-judicialise' the administrative process. 'The right to know is not to be equated to the right to be given "chapter and verse."' What is required in order to give effect to the right to a fair hearing is that the interested party must be placed in a position to present and controvert evidence in a meaningful way. In order to do so, the aggrieved party should know the 'gist' or substance of the case that it has to meet." (emphasis added)

62. And further pertaining to "new" material at paragraph 91: -

"By analogy with the approach adopted in motion proceedings where new matter is raised in reply, I am of the view that, if such new matter is to be considered by the decision-maker, fairness requires that an interested party ought to be afforded an opportunity first to comment on such new matter before a decision is made. Support for this attitude is to be found in the following dictum of Van den Heever JA in Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another:

> *'Were new facts to be placed before the "Administrator" which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected.'*
>
> *Similar sentiments are expressed by De Ville:*
>
> *'Where the final decision-maker is not permitted to take account of new evidence or required to hold an enquiry him/herself, but simply has to take a decision on the evidence (and recommendations) presented to him/her after a full enquiry (complying with the requirements of procedural fairness), a hearing will not be required before the taking of a final decision.'"* (emphasis added)

63. The Appellant submits that the information provided to I&APs between draft and final EIAR stage: -

63.1 Is not new, it is information provided in response to comment already received from I&APs.

63.2 An analysis has been made between the Draft EIAR and the FEIAR as to the variations thereof, and these do not evidence "new facts" which are "prejudicial" to I&APs.

63.3 The information is not prejudicial, on the contrary, the

additional information received in response to the comment received indicates that the impacts of the Project are not excessively harmful.

63.4 Insofar as “site studies” are concerned, it has been reiterated that this is impossible at this stage of the Project given that the Project entails new technology introduced into the Republic. There are no existing “Karpowership” sites. There are also no competitor sites available, nation-wide. The information provided to the I&APs was thus adequate, reasonable and the best available information.

64. The Appellant submits that it has done everything reasonably necessary to meet the minimum legislated thresholds for fair public participation both in terms of the NEMA and the PAJA. On the facts, the Appellant has exceeded the minimum legislated thresholds.

65. In conclusion, the Appellant met the minimum legislated and policy thresholds for public participation which should have been considered by the Appellant prior to a negative decision being made.

GROUND 7: The DFFE failed to consider Section 2 principles of the

NEMA

66. It is submitted that the DFFE failed to comprehensively consider socio-economic benefits of the Project.

67. It is insufficient simply for the department to consider economic impacts to small scale fishers alone. This is a single economic sector, which should have been considered against the socio-economic benefits enumerated in the Final EIAR at pages 105, 128, 211 and 279.

68. As indicated *supra*, the Project is part of the RMIPPPP, dated **24 August 2020**, and the RFP in respect of the proposed gas to power Powerships projects at various ports in South Africa. In this instance, the Appellant's technology is new and ground-breaking to the Republic.

69. The Appellant contends that the decision fails to consider the Integrated Resource Plan **("IRP 2019"**) and the substantiation of the Project from a socio-economic perspective.

70. The IRP 2019 indicates the following at page 10 thereof:

> *"South Africa's National Development Plan (NDP) 2030 offers a long-term plan for the country. It defines a desired destination where inequality and unemployment are reduced, and poverty is eliminated so that all South Africans can attain a decent standard of living. Electricity is one of the core elements of a decent standard of living. The NDP envisages that, by 2030, South Africa will have an energy sector that provides reliable and efficient energy service at competitive rates; that is socially equitable through expanded access to energy at affordable tariffs; and that is environmentally sustainable through reduced emissions and pollution. In formulating its vision for the energy sector, the NDP took as a point of departure the Integrated Resource Plan (IRP) 2010–2030 promulgated in March 2011."* (Emphasis added)

71. The IRP 2019 at page 11 furthermore indicates that South Africa is policy driven towards an expansive energy mix which should include new technologies such as the Appellant's technology. It states:

> *"2.1 **ENERGY MIX***
>
> *South Africa continues to pursue a diversified energy mix that reduces reliance on a single or a few primary energy sources. The extent of decommissioning of the existing coal fleet due to end of design life, could provide space for a completely different energy mix relative to the current mix. In the period prior to 2030, the system requirements are largely for incremental capacity addition (modular) and flexible technology, to complement the existing installed inflexible capacity."*

72. The decision to refuse the environmental authorisation, is in direct contradiction towards the National policy directive of an energy mix as

well as the introduction of new technologies to prevent installed inflexible capacity.

73. Furthermore, natural gas is not seen *per se* at page 13 of the IRP 2019 as being overtly negative. It should be noted that the input into the Project is LNG, which is natural gas that has been cooled for purposes of transportation. It is then re-gasified on the FSRU and natural gas is then used to power the turbines on the Powership.

74. On the contrary insofar as natural gas is concerned, the IRP 2019 policy document states:

> *"Natural Gas: Gas to power technologies in the form of CCGT, CCGE or ICE provide the flexibility required to complement renewable energy. While in the short term the opportunity is to pursue gas import options, local and regional gas resources will allow for scaling up within manageable risk levels. Exploration to assess the magnitude of local recoverable shale and coastal gas are being pursued and must be accelerated. There is enormous potential and opportunity in this respect and the Brulpadda gas resource discovery in the Outeniqua Basin of South Africa, piped natural gas from Mozambique (Rovuma Basin), indigenous gas like coal-bed methane and ultimately shale gas, could form a central part of our energy strategy for regional economic integration within SADC. Co-operation with neighbouring countries is being pursued and partnerships are being developed for joint exploitation and beneficiation of natural gas within the SADC region. SADC is*

developing a Gas Master Plan, to identify the short- and long-term infrastructure requirements to enable the uptake of a natural gas market. Availability of gas provides an opportunity to convert to CCGT and run open-cycle gas turbine plants at Ankerlig (Saldanha Bay), Gourikwa (Mossel Bay), Avon (Outside Durban) and Dedisa (Coega IDZ) on gas."

75. The decision to refuse the environmental authorisation is in direct contradiction towards the National Policy directive of an energy mix, as well as the introduction of new technologies to prevent installed inflexible capacity. These components should have been considered by the decision-maker against **Sections 2(3), 2(4)(a), 2(4)(b), 2(4)(i), 2(4)(l) and 2(4)(m)** of the **NEMA.**

GROUND 8: The DFFE failed to properly assess the impact of the Project being declared a SIP

76. The DFFE further failed to consider that the Appellant's Project is a declared SIP.

77. The project is a declared and Gazetted SIP in terms of the Infrastructure Development Act, as amended, 23 of 2014, namely **Section 8(1)(a)** read with **Section 7(1)**. **Section 7(1)(b)** states:

"(1) A project or group of projects qualifies as a strategic integrated project for

the purposes of this Act if-

(b) it complies with any of the following criteria:

(i) It would be of significant economic or social importance to the Republic.

(ii) it would contribute substantially to any national strategy or policy relating to infrastructure development; or

(iii) it is above a certain monetary value determined by the Commission; and

(c) the Commission has included the project in the national infrastructure plan and has, in terms of section 8, designated the project as a strategic integrated project."

78. It was incumbent upon the DFFE to consider the advantages of the project as against any prejudice (which is denied), to small-scale fishers as against the fact that the project is a declared SIP as well as has ramifications for the IPP projects list on a national level.

79. **Section 2(4)(i)** of the NEMA states:

"The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment."

80. Further at (l):

"There must be inter-governmental co-ordination and harmonisation of policies, legislation and actions relating to the environment."

81. Consequently, the DFFE failed to consider the considerable economic benefits of the Project as against the dire need for electricity in the country which would provide scope for various industries to participate in the economic sector.

B. Appeal grounds: A specific overview to each reason provided by the DFFE to refuse the environmental authorisation

82. **Failure to Comply with Section 24(1A)(c) of NEMA**

82.1 The first ground for refusal reads as follows:

"The Environmental Impact Assessment Process was compromised as the applicant failed to comply with the requirements prescribed in terms of Section 24(1A)(c) of the NEMA in relation to any procedure relating to public consultation and information gathering. The draft EIAr was subjected to public review for a period less than the legislated 30 days as indicated by I&AP's. The documents were removed from the website and were only returned after queries were raised by various I&AP's."

82.2 This finding is incorrect.

82.3 Section 24(1A)(c) of the NEMA requires that every applicant must comply with the requirements prescribed in terms of the NEMA in relation to any procedure relating to public consultation and information gathering.

82.4 The EIAR was made available for a period of **31 days** from the **26th of February** to the **31st of March 2021.** The link was thereafter removed.

82.5 However, in response to requests from certain interested and affected parties for an extension of the legislated minimum 30-day timeframe in which to provide comments, the link was reinstated until the end of the agreed extension period to 6 April 2021 at 17h00

82.6 All I&APs were accordingly provided with access to the draft EIAR for more than the mandatory period, and those interested and affected parties who requested it were granted an additional period for review and comment to 6 April 2021 at 17h00.

82.7 The correspondence indicating the date and time on which the

Draft EIAR and associated documents were uploaded, as well as removed, to the Triplo4 website are attached hereto as Annexure "**CA4**".

83. **Failure to Comply with Regulation 23(1)(b) of the EIA Regulations**

83.1 The second ground for refusal reads as follows:

> *"The EAP failed to enlist the provision of Regulation 23(1)(b) of the EIA Regulations, 2014 as amended, as the EIAr dated April 2021 contains significant changes and/or significant new information which was not contained in the reports consulted during the public participation process before it was submitted to the Competent Authority for decision making. This then comprises the decision-making powers of the Competent Authority as information was not presented to I&APs for their consideration, prior to decision making."*

83.2 The Appellant denies that changes made to the draft EIAR as it was during the public comment period were *"significant"* or that the final EIAR contains *"significant new information"*.

83.3 Attached hereto marked Annexure "**CA5**" is a schedule of all changes effected to the Draft EIAR from beginning to end.

83.4 As the Minister will be aware, the purpose of providing the Draft EIAR for public comment is to ensure that information set out therein is accurate, adequately deals with comments and concerns raised by I&APS and is comprehensive. To a large extent, the body of the draft EIAR and final EIAR contain summaries and a synthesis of expert reports and other supporting documents. In response to comments and submissions, the presentation of that information is often *revised for clarity*.

83.5 Furthermore, in a project such as the one at hand, additional information (for example that the Project has in the interim been gazetted as a SIP) needs to be reflected. This is not new information; it is part of an iterative process on baseline information which has already been submitted to the DFFE as well as I&APs.

83.6 Thus, it is submitted the Final EIAR will always contain revisions and additional information. What needs to be assessed is whether those revisions and additional information are of a nature that necessitates public comment.

83.7 In the Appellant's respectful submission, none of the revisions to the Final EIAR necessitated further comment.

83.8 Indeed, the only distinction between the Draft EIAR and the Final EIAR is further revisions insofar as specific comments being received from I&APs, and such information being provided in response to such comment.

83.9 From a consideration of Annexure "**CA5**", the Minister will note that:

83.9.1 Section 1 (pages 1-11): there were no significant revisions or additional information.

83.9.2 Section 2 (pages 12 - 52): additional technical details were provided simply for clarity.

83.9.3 Section 3 (pages 59 - 71) the Alternative Options for the power evacuation route were updated;

83.9.4 Section 4 (pages 72 - 109): the Marine Ecology Heritage, Climate Change, Wetland, Avifauna and

Ambient Noise reports were updated.

83.9.5 Section 5 (page 116 - 117): an additional legislation reference was added (Act 6 of 1981).

83.9.6 Section 6 (pages 124 – 131, 146) : in response to the comments on cumulative impacts, this section was expanded.

83.9.7 Section 7 (pages 148 – 150 and 154 – 159,): updated information and other minor changes were made to the I&AP database;

83.9.8 Section 8 (pages 160 – 173, 179 – 180, 184, 185, 187 – 189, 191 – 198, 204- 210, 212- 213, 215 – 220, 223- 228, 235 – 236, 256 – 258, 260 – 265, 268 – 274, 284- 292, 295 – 316, 318 and 319): additional information was included from various reports and amendments were made to paragraphs 8.3, 8.4, 8.5, 8.7, 8.8; and

83.9.9 Section 9 (page 331, 332- 333, 335- 340): this

indicated the power evacuation route alternatives.

83.10 It is the Appellant's view that these changes and additional information were of a nature and scale that *did not necessitate a further round of public participation consultation*.

83.11 The changes and additional information are a direct result of objection and comment from I&APs. This is in line with the iterative process discussed above in a Policy and Legislated setting.

83.12 Certain specialist studies *were peer reviewed and updated, pursuant to comments* received during the public participation process.

83.13 Accordingly, these reviews and updates were done solely for the purposes of addressing issues that arose from public comments. This does not amount to "significant changes and/or significant new information."

83.14 Nevertheless, the specialist studies that were peer reviewed and/updated are briefly highlighted below.

83.14.1 The Avifauna Report was amended to consider findings from the Report of the Powership Operation in a port in Ghana, concerns raised by I&AP's on the noise impacts to the Penguins and further assessment of the transmission line route indicating that the impact will be low after mitigation measures are implemented.

83.14.2 The Marine Ecology Assessment Report added a reference to a short-term study on underwater noise at a Powership Operation in a port in Ghana, and the study concluded, based on these records, that the effects of a similar operation on the surrounding marine ecology in Port of Ngqura would be unlikely. In addition, further clarity was included on cumulative impacts (based on existing operations and proposed projects).

83.14.3 The Estuarine and Coastal Assessment Report was updated to include the revisions to Project description and further assessment of the transmission line route indicating that the impact will

be low after mitigation measures are implemented.

83.14.4 The Air Quality Impact Assessment was updated to provide further clarity on cumulative impacts (based on existing operations and proposed projects), indicating that the contribution of the Karpowership Project to the existing ambient concentrations is very small and thus the cumulative effect of the Karpowership Project with existing sources is likely to be very low.

83.14.5 Impacts were further refined and assessed in the Estuarine and Coastal Assessment and the Marine Ecological Assessment, and no fatal flaws were identified. It was thus concluded that no significant new information had been included.

83.14.6 The Climate Change Impact Assessment was revised, and the Peer Review letter was attached to it in the Final EIAR. Adaptation and vulnerability aspects are considered under the downscaled climate analysis, which gives a detailed description

of anticipated conditions of key climatic parameters relevant to climate change adaptation, as well as the vulnerability assessment. The study was further refined to include information regarding the Paris Climate Agreement commitments and to provide clarity on the findings regarding Greenhouse Gases Emission Aspect, Vulnerability Aspect and the related mitigation measures. The report was also updated to reflect Scope 3 indirect emissions.

83.14.7 The Terrestrial and Ecology Assessment further assessed the transmission line route and indicated that the impact is the lowest to terrestrial habitats.

83.14.8 The Wetland Delineation and Functional Assessment contained a further assessment of the transmission line route, indicating that the impact would be low after mitigation measures are implemented.

83.15 In addition, when updating the Final EIAR, Triplo4 included all "new" information in blue text, such that it is easily

distinguishable from the information included in the Draft EIAR.

83.16 The updated information included in the Final EIAR is summarised in Annexure "**CA5** attached and highlights that no "significant new information" was included that was not in the Draft EIAR.

83.17 Furthermore, it must be noted that the new information included is not prejudicial to I&APs and, in fact, serves to clarify issues raised during the public participation process.

83.18 A summary of all the specialist findings from the Draft EIR to the Final EIR indicating the changes to impacts and ratings, is attached as Annexure "**CA6**".

84. **Failure to Comply with Public Participation Regulations**

84.1 The DFFE state in its third ground for refusal that:

> *"The Public Participation Process was not conducted in terms of Regulation 39, 40, 41, 42, 43 & 44 of the EIA Regulations, 2014, as amended as well as per the principles of NEMA as*

outlined in Chapter 2 of the Act."

84.2 This finding is broad and fails to stipulate any specific instances of alleged non-compliance on the part of Triplo4.

84.3 This statement is disputed in its entirety.

84.4 A Public Participation Plan was submitted to the DFFE and was approved during the pre-application meeting.

84.5 The Public Participation Plan was designed to ensure that reasonable opportunity was afforded to registered I&APs to participate in the EIA process. This was done by providing additional opportunities and extra means of communication, over and above the minimum requirements prescribed in Chapter 6 of the EIA Regulations, 2014, as amended. In addition, Triplo4 catered for I&APs who may not have had internet access and/or access to electronic media.

84.6 The lengths to which the EAP went to ensure a robust and reliable public participation process are detailed per each Regulation, as per Annexure "**CA7"** attached hereto, in which

compliance with each Regulation is demonstrated.

85. **Failure to Include All Relevant Listed Activities**

85.1 The DFFE's fourth ground for refusal reads as follows:

> *"The Competent Authority advised the EAP on a number of occasions, i.e. comments on the draft Scoping Report, acceptance of the Scoping Report and comments issued on the draft Environmental Impact Assessment Report that the EAP must ensure that all relevant listed and specified activities are applied for, are specific and can be linked to the development activity or infrastructure as described in the Project description, and that a final list of all applicable listed activities must be clearly identified and provided. However, the final EIAr and amended application form both contain listed activities where the EAP indicated uncertainty in terms of their applicability and requirement for environmental authorisation. As such, the objectives of the Environmental Impact Assessment Process as outlined in Appendix 3 of the EIA Regulations, 2014 as amended were not fulfilled and the Competent Authority was unable to make an informed decision on the on the potential of the listed or specified activities on the receiving environment."*

85.2 This finding is similarly denied and is without foundation.

85.3 The Appellant has reviewed the process undertaken by

Triplo4, and it is evident that Triplo4 attempted on numerous occasions to enlist the assistance of the DFFE in finalising the listed activities to be applied for.

85.4 The DFFE as the competent authority was, however, actively unwilling to assist and required that Triplo4 should make its own determination, even though this was a complex project and the DFFE's assistance, which is part of a statutory function, would have assisted the assessment process. Proof of correspondence with the DFFE in this regard is attached hereto as per Annexure "**CA8**".

85.5 The Appellant took independent legal advice and in accordance with that, adopted a cautious approach. That approach, with respect, is compliant with the provisions of **GN654** of **2010**, issued by the Department of Environmental Affairs in terms of the NEMA which contains sector guidelines for EIA regulations:

> *"If an Applicant is uncertain about whether the proposal falls within the ambit of the EIA Regulations, he or she should consult the relevant competent authority's guideline documents or approach the authority for advice. It is important to bear in*

> *mind that it is the responsibility of the person or Applicant to which a law applies to ensure compliance with that law. Therefore, if after consulting the competent authority the situation remains unclear, the Applicant should consider obtaining a legal opinion from an environmental legal expert. This information could then be provided to the competent authority with a view to obtaining finality on the matter. The competent authority, if uncertain could also elect to obtain a legal opinion. Whilst other government departments and municipalities may venture an opinion as to whether the EIA Regulations apply or not, their opinion cannot be taken as definitive, as they have no jurisdiction in terms of the EIA Regulations."*

85.6 Whilst it is accepted that the DFFE's advice, on the basis set out above, would not have been definitive, it was singularly unhelpful in that it refused to even engage with Triplo4.

85.7 Triplo4 requested clarity on several listed activities and whether these should be included in the Draft EIAR and the Final EIAR, including requesting clarity on the DFFE's interpretation of "*urban areas*", "*industrial complex*" and the phrase "*increase the development footprint of the port or harbour*", the interpretation of which would affect the listed activities to be applied for. No response was received from the DFFE.

85.8 The Appellant obtained a legal opinion from Webber Wentzel. This was as required by the RFP and dated 17 December 2020. At paragraph 2.3.4.3 of the opinion, it is stated that: "*Based on the information provided in relation to Port of Ngqura Project, we are of the opinion that all listed activities that will be triggered by the Port of Ngqura Project have been applied for.*"

85.9 Adopting a risk averse or prudent approach was the only reasonable approach and did not prejudice either the interests of the public of the adequacy of the assessment.

85.10 In the Appellant's submission there is no suggestion that it failed to apply for authorisation for a relevant listed activity or that it has failed to adequately assess a relevant listed activity. The only *"fault"*, if there is one, is that it might have applied for an authorisation that is strictly speaking unnecessary, but the regulations do not visit such an event with a threat of a refusal.

85.11 It is furthermore emphasised that the DFFE itself did not call for a legal opinion from the Appellant with regards to listed activities. Indeed, the conduct of the DFFE on this aspect has

been downright obstructive.

86. **Failure to Conduct Noise Modelling Study**

86.1 The fifth ground for refusal reads as follows:

> *"The Marine Ecology Specialist Study G2P Development, Port of Ngqura" dated April 2021 recommends that a noise modelling study should be undertaken to gain a more quantitative understanding of the noise produced from power ship operations in the Port of Ngqura and the cumulative impacts on the surrounding marine ecology. The same recommendation is made by the estuarine specialist. The recommended study should have been conducted as part of the EIA process to fully comprehend the impacts of the proposed development."*

86.2 There is no evidence that an alleged statement was made that the estuarine specialist echoed the opinion that the noise modelling should be conducted.

86.3 This ground of refusal flows directly from the objections raised by certain I&APs and has apparently not been properly evaluated by DFFE.

86.4 An assessment was indeed undertaken, using known data and the expert's specialist opinion. This study was included in the Draft EIAR and the Final EIAR.

86.5 A noise study of the actual powership operation in situ was not carried out because it had not been authorized and no Powership is yet docked in South African waters. Therefore, a comparative South African study was (and currently still is) impossible. It has been acknowledged that no underwater noise study was undertaken in the Port of Ngqura as no Powership is present, thus it is physically impossible to do so.

86.6 After it became apparent that noise was a cause for concern, additional studies were commissioned (including the noise study done by a team of Professors of Istanbul Technical University, and the study on the Powership in Ghana). No comparable noise exists in South Africa as there are no Powerships currently in the country. In industrial areas, the acceptable threshold for noise is 110dBa.

86.7 The results of the study conducted in April 2021 in Ghana of a similar Powership (24 Engines) by AB MECHENG in April

2021 found that in the immediate vicinity of the hull of the vessel, the underwater noise **did not appear to exceed 110dB** at frequencies in the 1/3 octave band scale. The Powership proposed for the Port of Ngqura has 21 Engines and would be similar or equivalent (or possibly slightly less due to the number of engines) in sound generation to that moored in Ghana, therefore the effects on the surrounding marine ecology are unlikely.

86.8 Thus, in the respectful view of the Appellant, there was an adequate assessment of likely noise impacts. Crucially, however, detailed mitigation provisions were provided in the Marine Ecology Report.

86.9 Firstly, it was recommended that a baseline study of the underwater noise climates in the Port of Saldanha should be initiated by way of a hydrophone network. Secondly, once in place, the operational noise of the Powership must be measured by the same means, and if the noise measurements in any sector of the marine environment exceeds the threshold for the marine ecology, noise dampening measures must be introduced.

86.10 Long-term monitoring (at least 12 months) of underwater noise should be developed and this information should be made available to the wider scientific community. These mitigation measures and ongoing monitoring commitments were included in the Final EIAR and will be strictly adhered to.

86.11 Guidance is sought in this regard, particularly on steps or action the EAP should have taken prior to submission of the Final EIAR.

86.12 It follows from the above that DFFE failed to appreciate the recommendations of the experts, namely that a post-operative study should be undertaken. Hence, its incorporation into the Enivornmental Management Programme Report ("**EMPR**"). There was, in the opinions of the experts, sufficient assurance from their assessments that the Project could be approved, subject to the conditions and mitigation measures.

86.13 If, in the view of the Minister, the level of assurance on the issue of underwater noise is insufficient, and a further modelling exercise should be carried then this could be incorporated as a condition of the ROD and EMPR with

annual audit oversight.

87. **Failure to Include SACNASP Peer Review in Final EIAR Submission and No clear recommendation from the estuarine specialist**

87.1 The sixth ground for refusal states that:

> *"The conclusion of the SACNASP Peer Review of the Estuarine Impact Report dated 23 April as included as Appendix I of the EIAr dated April 2021 for the Gas to Power Powership Project at the Port of Richards Bay within the uMhlathuze Local Municipality in the KwaZulu-Natal Province profect DFFE Reference: 14/12/16/3/3/2/2007 states "MER was requested by GroundTruth to review three draft specialist reports(dated February 2021) which focused on assessments of the environmental impacts of the Gas to Power developments proposed for the harbours of Richards Bay (Version 1 Draft Report), Coega (Version 1 Draft Report) and Saldanha Bay (Version 1 Draft Report) and stated that impacts identified is not a true reflection of the scale of the project in terms of influence. There are impacts that trigger regional and global scale impacts and the specialists recommends that these be reassessed. In addition, the peer review states that there is also no clear recommendation from the estuarine specialist. It must be noted that this peer review report has been omitted from the abovementioned application. This should have been reassessed and finalised by the EAP prior to submission of the report for decision making."*

87.2 There is no substance to this ground of refusal, and appears to have emanated from a misunderstanding of the nature of the involvement of Marine & Estuarine Research CC ("**MER**").

87.3 Coast Wise Consulting and GroundTruth, the consultants who completed the Coastal and Estuarine Impact Assessment Report, were not SACNASP accredited.

87.4 Consequently, the sole purpose of securing the MER confirmation was to provide SACNASP accreditation for the reports. This is a common and acceptable occurrence.

87.5 Such an expert reviews the relevant report and, if satisfied, confirms the findings of the consultants. It is not a peer review, since a SACNASP review is concerned primarily with the structure, methodology and analytical skill involved, not the assessment *per se*. This is evident from the MER letter confirming the findings of the assessment, attached hereto as Annexure "**CA9**".

87.6 For ease of reference, the concluding paragraph of Annexure "CA10" is instructive and reads as follows:

> *"The overall construction and content of the reports are good. The required background information to provide context to the assessment of impact has been included and is relevant. Based on the information provided in this background information we find that the conclusions reached in terms of the impacts and the proposed migratory measures are perfectly reasonable and sound."*

87.7 The MER letter was included in the application, when the specialist responded to the allegations in the MER letter.

88. **Failure to Conduct Underwater Noise Study**

88.1 The seventh ground for refusal reads as follows:

> *"Birdlife SA together with SANParks raised serious concerns regarding underwater noise that may have adverse effect on the African Penguin Sphensiscus demersus breeding on the nearby Jaheel and St Croix islands by increasing their foraging effort and consequently, negatively impacting their reproductive success. The Noise Impact Assessment recognises that it is "of critical importance that the current underwater soundscape of Algoa Bay be determined, and the potential noise impacts of the proposed Project by thoroughly assessed" and it recommends that a separate Underwater Noise Impact Assessment be undertaken. The failure to undertake the Underwater Noice Impact Assessment makes the Specialist hesitant to commit on whether or not the proposed mitigation measures reflected in the Marine*

Ecology, Avifauna and Noise studies will be sufficient to address potential impacts."

88.2 Undertaking such a noise study while no Powership is moored in the Port is objectively impossible and can only be done once the Powership is operational. This point has been made exhaustively since underwater noise was flagged as a potential issue.

88.3 As per the response to the fifth finding above, based on the mitigation measures in the Marine Ecology Report, a baseline study of the underwater noise climates in the Port of Ngqura will be initiated. This information will be combined with the likely Powership noise estimates presented above and the impacts of the total noise on the marine ecology will be reassessed. Long-term monitoring (at least 12 months) of underwater noise should be developed and this information should be made available to the wider scientific community. These mitigation measures and ongoing monitoring commitments were included in the Final EIAR and will be strictly adhered to.

88.4 Additionally, as per the Final EIAR, sound waves will be reflected/absorbed by structures such as the Eastern Breakwater that protects Jahleel and the other islands from sound waves produced in the Port of Ngqura. The end of the Eastern Breakwater is 2.3km from the preferred location of the Powerships and the harbour entrance faces south, towards the Port of Gqeberha.

88.5 This is away from the main feeding routes used by penguins from Jahleel and St Croix Islands that are generally in a southerly and south-easterly direction from the islands (Pichegru et al. 2017). Furthermore, interim comment was received from SANParks on 24 March 2021 stating that the development is indeed outside SANParks property, and that SANParks has no objection to the proposed Project.

88.6 It is thus submitted that this ground is without merit.

89. **Limitations to Specialist Studies**

89.1 The DFFE's eighth ground for refusal states as follows:

> *"Most of the specialists indicated limitations to their respective studies; amongst, others that they either had very limited time to apply their minds, or it does not apply to the standards of undertaking the assessments and that these studies were undertaken in the wrong season. These limitations were highlighted in the comments raised by various I&AP's as well as in the comments issued by the Chief Directorate: Integrated Environmental Authorities. The gaps and limitations identified in the respective assessments; raises concerns with regard to the adequacy of the assessment and the validity of the findings. The studies should have been updated and amended prior to submission for decision making."*

89.2 This ground of refusal is denied. It is true that, common to most assessments, the experts must produce their reports under the pressure of the mandated timelines contained in the Regulations, but none of the specialists indicated that as a result of those time constraints, their assessments could not be properly carried out.

89.3 Triplo4 have compiled a table with all specialist studies undertaken, including the dates of site visits and any limitations or gaps listed in such reports. This is attached hereto as Annexure "**CA10**", and clearly show that no significant gaps or limitations to the specialist studies were

identified.

89.4 As the Minister will note from a consideration of Annexure "**CA10**", there is no reason to conclude that the reports, and their subsequent findings and recommendations were unreliable or insufficient because of the factors stated by DFFE.

CONCLUSION AND RELIEF SOUGHT

90. The Minister will be aware that the Karpowership proposal has become highly controversial and is the subject of attacks at a multiplicity of levels, most of which are uninformed and needlessly adversarial.

91. The "site" assessment of marine noise is an impossibility on South African coastal waters, since there is no established precedent in South Africa and no Powership is yet permitted to moor, as elaborated on above. The legislation speaks of "reasonable" information and a "reasonable" and "adequate" public participation process. It does not speak of providing information on a negative situation. In other words, the legislature could not have intended for the Appellant to provide

information on an impossibility.

92. The need and desirability of the Project should have been considered, as the Project will provide critical energy needed in a country currently grappling with a power crisis. The provision of power will have significant economic benefit to businesses and households hampered by ongoing load shedding.

93. A possible alternative process **(RELIEF "B"),** as one of the requested forms of relief, will be considerably more advantageous to the Appellant than if the Record of Refusal is upheld and the Appellant is required to start the EIA process again. It will also comply with the principles in NEMA, in that the assessment, to the extent that it is deficient, is strengthened and a better-informed decision is thereby reached.

93.1 It is furthermore in the interests of the I&APs since the issues that they claim have been omitted or inadequately addressed will be considered and if necessary, fully addressed through annual audits.

93.2 Finally, and equally importantly, it will be in the public interest

because a decision will be reached that provides certainty on a complex project that is much needed to alleviate the Republic's energy crisis.

94. **RELIEF: Should the Honourable Minister be persuaded to decide on this basis, the Appellant respectfully proposes the following wording and basis for the decision:**

94.1 **RELIEF A.** That the Appeal is upheld, and the decision for the Gas to Power Powership Project at the COEGA SEZ in the Nelson Mandela Bay Metropolitan Municipality, Eastern Cape Province, project number 14/12/16/3/3/2/2005, handed down on 23 June 2021 (the decision) is set aside. Further, that the Project is authorised.

Alternatively,

94.2 **RELIEF B.** That the Appeal is upheld, and the decision is set aside. Further, that the DFFE incorporates any outstanding concerns raised by the decision maker on Appeal as specific conditions in the Record of Decision and the EMPR which conditions must be complied with when the Project is implemented, and form part of annual audits.

95. This appeal decision shall be transmitted to all registered I&APs via their nominated email addresses.

96. If the Honourable Minister wishes to engage in any mediation mechanism to address any further concerns, then the Appellant would welcome such approach.

97. In closing, it must be noted that certain organisations have taken the stance of adopting a vicious, adversarial, and aggressive approach to the Project, without even considering the potential benefits of the Project in a neutral, calm, and objective manner. The complaints are designed to cause maximum criticality of the delay in the overall RMIPPPP procurement timeline to Financial Close, all while the Republic is in the grips of an energy crisis.

98. It is hoped that the Minister will consider the overall socio-economic benefits to the broader Republic.