

To: **The Appeal Authority**
Department of Forestry, Fisheries & Environment
Environmental House
473 Steve Biko
Arcadia
Pretoria
0083

By Email: Appeals@dffe.gov.za
bsedibana@dffe.gov.za

Cc: coegaksa@tripol4.com

21 April 2023

Dear Appeal Authority

Re. Urgent Condonation Application ito s47C of NEMA: Project ref. 14/12/16/3/3/2/2005 & Appeal (ref. LSA 207022) in respect of the Application for Authorisation submitted by Karpowership SA (Pty) Limited for the proposed gas to power via powership project at the port of Coega and for Condonation for the late filing of the appeal

We write to you on behalf of the Green Connection NPC, a registered interested & affected party (I&AP), and refer to the [corrected] notification of the abovementioned application by Tripol4 Sustainable Solutions (the environmental assessment practitioner (EAP)) dated 17 April 2023, as well as the s47C application by Pinsent Masons on behalf of Karpowership SA (Pty) Limited (KPS) dated 7 April 2023.

We note that the application seeks condonation in terms of s47C of NEMA to:

- (a) Condone the late submission of the Appellant's Appeal outside of the time period provided for in the Appeal Regulations (in terms of which the Appeal was due on or before 28 March 2023); and
- (b) Condone the time period and Public Participation Period required for the submission of the Generic Environmental Management Programme (EMPR).

We note further that this 'urgent' condonation application was submitted to DFFE on 7 April 2023, but that I&APs were only notified thereof on 14 April 2023. As consequence, the Green Connection (and other I&APs) have been afforded only seven days to consider whether or not to oppose the application, as well as to prepare and submit any opposing papers. The basis for affording I&APs a seven-day period within which to comment on the application is not stated. Given that the condonation application indicates that one of the reasons for the delay is that the appeal issues relate to a complex project and require time to address, it is submitted that the 7-day commenting period afforded to I&APs on the same complex project is unreasonable and procedurally unfair.

KPS seeks condonation in respect of its appeal which is indicated as also having been submitted on 7 April 2023, some ten days after the appeal deadline. By way of contrast, in December 2022 I&AP's (including the Green Connection) requested an extension of only two days within which to submit comments on the three KPS EIA applications. Notwithstanding the complexity of commenting on three KPS EIA applications simultaneously, this request was denied by Triplo4 / KPS.

In addition, and notwithstanding various references made in the condonation application to an appeal having been submitted and the averment made that the appeal has 'good prospects of success', the appeal submission (as well as any supporting documents relied upon therein) has not been made available to I&APs (a request for same was emailed to the EAP on 19 April 2023, but to date no response has been received). On the face of it, the failure to submit a copy of the appeal to I&APs is a violation of the National Appeal Regulations.¹ The failure to provide a copy to I&APs also frustrates the ability of the Green Connection to make meaningful and informed comment on the condonation application, including on the prospects of success of the appeal and any prejudice that I&APs may suffer if the condonation application is granted. I&APs have also not been furnished with the Transnet letters to DFFE (which were referred to in the DFFE record of refusal), nor has the Directive from the Minister of Transport (referred to in paragraph 4.1.2 of the condonation application) been made available. Without having access to the appeal (and any supporting documents), the Green Connection is also unable to make sense of the submissions made on behalf of KPS in, for example, paragraphs 4.5.2 and 4.5.3.

We note further that the condonation application also seeks 'in accordance with the relief sought in the appeal' that the Minister condones the 30-day public participation period for the Generic EMPr and the subsequent submission thereof by no later than 30 May 2023. According to DFFE's 7 March 2023 record of refusal relating to KPS's application for authorisation in respect of the Port of Coega, one of its findings was that the Generic EMPr is a legislative requirement, should have been included in the draft and final EIAR's, and that the EIA process was compromised by KPS's failure to comply with this legislative requirement. Without having access to the appeal and the relief sought therein, the Green Connection is again unable to make informed and meaningful comment on this aspect of the condonation application. To the extent that KPS may be seeking to 'cure' the defect highlighted in DFFE's record of refusal, this part of the condonation application appears to pre-empt any future appeal decision on this aspect.

Noting that the condonation application indicates that the Appeal Authority informed KPS that it could only submit the condonation application when the appeal was submitted (paragraph 2.4), and noting further that the Appeal Guidelines (2017) indicate that the adjudication of a request for condonation will, as far as reasonably possible, be communicated together with the appeal decision, the Green Connection submits that:

- Notification of the appeal and condonation application (and the provision of a copy of the appeal submission and any supporting documents) should have been given simultaneously (especially given that the condonation application refers to and relies on the appeal

¹ Regulation 4(1) of the National Appeal Regulations (GNR.993 of 8 December 2014) 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:

- (a) the date that the notification of the decision for an application for an environmental authorisation or a waste management licence was sent to the registered interested and affected parties by the applicant; or
- (b) the date that the notification of the decision was sent to the applicant by the competent authority, issuing authority or licensing authority, in the case of decisions other than those referred to in paragraph (a).

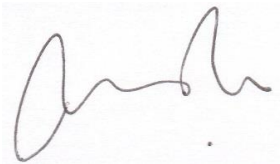
submissions, and given that the opportunity to make informed and meaningful comment on the condonation application cannot be made in the absence of a copy of the appeal submission being provided); and

- I&APs should have been afforded the same time period to comment on the condonation application and to submit a responding statement (i.e. 20 days from receipt of a copy of the appeal submission).

In light of the above, the Green Connection respectfully requests the Minister and/or the Appeal Authority to instruct KPS to afford the Green Connection and other I&APs a 20-day opportunity to comment on the condonation application (calculated from the date when I&APs are provided with a copy of the appeal submission and any supporting documents).

Notwithstanding the above, the Green Connection fully reserves its right to apply for an extension of the prescribed 20-day period for submitting a responding statement to the appeal should the circumstances warrant.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Adrian Pole', is written over a light grey rectangular background.

Adrian Leonard Pole