WESSA
PEOPLE CARING FOR THE EARTH

15 June 2021
Gqeberha

Attention: Appeals Authority
DFFE

Re. Responding statement on the Karpowership appeal (dated 07/04/2023) against the DFFE refusal to give environmental authorisation for their gas-to-power powership project in the Ngqura port.

The following comments in response to the Karpowership appeal are delivered jointly on behalf of the Wildlife and Environment Society of South Africa Algoa Bay Branch (WESSA ABB), Algoa Bay Ocean Stewards (ABOS), and the Green Connection. We do not respond to each, and every appeal ground raised by the Appellant, and this should not be construed as agreement with any appeal ground not specifically addressed

We wish to draw the appeal authority's attention to the Promotion of Access to Information Act (PAIA) and Promotion of Administrative Justice Act (PAJA) applications that WESSA ABB has made to the DFFE via the following correspondence:

1. A general query about details within the DFFE record of refusal (ROR) to the DFFE's Mr Agenbach on the 16 March 2023,
2. A subsequent PAJA application to Mr Sabelo Malaza of the DFFE on the 24 April 2023,
3. A further clarification and additional PAIA application to the DFFE on 26 April 2023,
4. Payment of the PAIA fee on the 04 May 2023
5. A follow-up query on the status of the PAJA and PAIA application on the 05 June 2023

As of the time of writing we have received no response to our PAIA and PAJA application and the subsequent query.

In brief the PAIA application seeks to view any correspondence between the Department of Forestry, Fisheries and Environment (DFFE), Transnet National Ports Authority (TNPA), the applicant (Karpowership), and the environmental assessment practitioner (EAP, namely Triplo4) that relates to the issue of the location/s of the Karpowerships (and FSRU unit) within the Ngqura port and its conflict with TNPA development plans for the self-same port. It is clear from the DFFE's ROR that substantial correspondence was entered into by the respective parties and that such was not divulged to interested and affected parties (I&APs) during the public participation process. As an I&AP we specifically raised the potential conflict with port development plans and were assured by the EAP and Karpowership officials that TNPA had been engaged with and that the submitted plans reflected the agreement between TNPA and Karpowership on the location of the vessels – in effect arguing that no such conflict existed.

At no point in the process were I&APs made aware of the possibility, and subsequently (alleged) agreement that the vessels would be moved under own (Karpowership) cost after five to seven years (see #56 and #57

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within the Karpowership appeal). We can find no reference in the final application (namely the Final EIAR submitted on the 06 January 2023) that the vessels will require relocation, we refer the appeal authority specifically to the following sections in the Final EIAR: #7.1 Layout alternatives (pg. ii); Figure 2-8 (pg. 52); #2.3 Project Locality; and Figure 3-4 (pg. 59).

Changing the vessel's berth five years into a 20-year contract, that impacts both future port development and the Karpowership (land-based) supporting infrastructure (gas pipelines, transmission lines, etc.), is in our view material to the environmental assessment and its exclusion is a fatal flaw.

The PAJA application we have submitted in turn seeks to understand the DFFE rationale in rejecting the environmental authorisation on what is effectively (only) technical grounds in their ROR. There are several areas of concern that fall under the ambit of sustainable development (economic, social, and environmental) that were raised in the public participation process and specifically via our own input. We would want to understand how those additional aspects did or did not influence the competent authority.

As such we reserve the right to supplement our comments on the Karpowership appeal upon receiving a response to our PAIA and PAJA applications.

However, given that the opportunity for commenting on the Karpowership appeal closes today, the 15 June 2023, and given that the existing documentation in the public domain already raises some key aspects, we believe it imperative to comment on that which is already available.

As a general point, like Moses commanding the wind to part the Red Sea, or Ali Baba crying "open sesame" to roll the stone back in front of the thieves' den, the Karpowership appeal and approach appears to deem the section 79(1) directive and the projects' SIP status as a similar type of divine or magic command that will clear its way into the Ngqura port. No matter how assertively the case is stated, we are of the view that under the South African Constitution and both NEMA and PAJA legislation, every application must be considered by its merits, its cumulative impact assessed on a sustainable development basis, and that while the project's status may afford it additional attention by government, the application and the subsequent appeal must both be reasonable and rational. It cannot overcome the laws of physics or reverse time, if there is no space for the vessels, willing it to be so will not change matters. Specifically, the Ngqura port is not an expansive development with unlimited space, and as such allocating space for three vessels on a permanent berthing basis for a 20-year period will have detrimental knock-on effects on other developments both within the port and the Coega SEZ. These must be assessed and weighed up before any (sustainable development) environmental authorisation can be granted to the Karpowership project.

Our specific comments duly follow.

1. **The Section 79(1) Directive (under the National Ports Act) issued by the Minister of Transport, MP Fikile Mbalula, on Sunday 26 February 2023**

1.1. Karpowership in their appeal (see Karpowership appeal # 58, # 64, # 66) refer to the Section 79(1) directive as material to their cause; in that it allegedly indicates the amicable agreement with TNPA; its existence renders DFFE's actions "ultra vires" with regards landowner consent; and that the directive requires TNPA to "take all necessary steps to give effect" to the directive, in effect to grant Karpowership access to the three ports mentioned, including the Ngqura port which is specific to our input. In response we wish to raise the following points:

1.1.1. The Sect 79(1) directive was issued on the 26 February 2023, considerable time after Karpowership's Final EIAR was submitted to the DFFE on the 06 January 2023. The directive did not form part of the environmental assessment and thus could not have informed either I&AP's or the DFFE's considerations of the Karpowership application.

1.1.2. The directive did not form part of the original environmental authorisation application by Karpowership, that was subsequently rejected by the DFFE on 23 June 2021, and upheld under appeal on the 01 August 2021. The appeal decision by DFFE Minister Creecy did however enable Karpowership to resubmit the applications after addressing "*gaps in the information and procedural defects*" (see https://www.gov.za/speeches/dffe-decision-karpowership-environmental-impact-assessment-applications-10-mar-2023-0000). If the section 79(1) directive is material to the Karpowership cause, why then on both occasions of submitting EA applications did it fail to secure and include the directive?

1.1.3. In June 2021, Daily Maverick ran an article (see https://www.dailymaverick.co.za/article/2021-06-02-business-urges-speedy-plan-b-for-sa-electricity-crisis-as-mbalula-drawn-into-turkish-power-ship-controversy/) that indicated that there existed substantive legal concerns about the appropriateness of any section 79(1) directive seeking to bring about a section 56 agreement, specifically that it was outside the powers of the Minister of Transport to do so (see the Bowman Gilfillan opinion here: https://www.scribd.com/document/510333324/Business-Unity-South-Africa#). At that time, the Department of Transport assured the public that relevant consultation would take place.

1.1.4. No evidence of such consultation has been provided by the department nor Karpowership in their appeal. It is only in a media release (see here https://www.gov.za/speeches/transport-sets-record-straight-karpowership's-access-three-ports-19-may-2023-0000) by the Department of Transport on the 19 May 2023 that a reference to consulting with TNPA is made, but it contains no indication of any other parties being consulted as part of the process. It is to be noted that the same media release incorrectly identifies Durban (and not Richards Bay) as a Karpowership site.

1.1.5. The directive itself attaches several conditions to its decision, two of which direct Karpowership to promote the training and employment of South African seafarers during the 20-year period, including a mechanism for obtaining "the practical element of sea time". A third condition that has relevance, and one that is specific to the Port of Ngqura, is that the direction is *"…subject to the use of the LNG facility [in the Ngqura port] which the Strategic Fuel Fund will build*". Given that the directive was issued post the public participation process, I&APs have not had sight of how port-bound vessels can offer sea-time experience and how Karpowership itself can fulfil this condition? While the training matter may be reasonably overcome through outsourcing to another maritime training institute and/or vessels, the third condition places a far greater constraint on the project. By making the project conditional on use of the LNG facility, the directive in effect negates the need for a FSRU component of the project and makes the project subject to the completion of the building of an LNG facility. No

such facility currently exists within the Ngqura port and TNPA have not indicated when such is expected to be operational. The exclusion of the FSRU vessel will have a material impact on the project as a whole, both with regards the infrastructure and the supply of gas to the Karpowership, and thus too the commercial basis of the off-take agreement with Eskom.

1.1.6. The current TNPA development plans (see https://www.transnet.net/Divisions/Documents/NPP%202019.pdf) for the Port of Ngqura indicate that the northern part of the harbour will be developed extensively, including a new channel and docks that will act to enable several new developments. One such development is the relocation of the "tank farm" from the PE port to the Ngqura port. It is clear that if the Karpowerships remain berthed for the 20-year period in their preferred location as per the most recent application submitted to the DFFE (and their stated intent under #67 in their appeal), then the northern component of the future development cannot take place. The cumulative impact of such a decision has not been considered by the environmental authorisation application and thus renders the application deficient.

1.1.7. In turn, the Coega SEZ will undoubtedly be materially impacted by the delay or non-development of the northern section of the Ngqura port. There is no clarity in the appeal on which project (SEZ vs. SIP vs. section 79(1)) the Appellant deems to carry greater weight or legal standing in the submissions made. Nor is it clear from the directive itself whether the Minister of Transport has duly considered the knock-on effect of granting Karpowership access in such a manner and its negative impact on the Nelson Mandela Bay and Eastern Cape economies that the Coega SEZ seeks to enable and service.

1.1.8. Assuming that the Karpowerships are indeed relocated to allow the northern development to take place, the impact of constructing the new port section, by example, the impact of silt from excavation works within the water column on the Karpowership's intakes has not been considered in the application. The impact on the routing of gas pipelines and transmission lines similarly has not been considered.

1.2. Thus, in our view, the section 79(1) directive is late; its legal applicability is doubtful; it materially alters several fundamental aspects of the proposed gas-to-power Karpowership project that were not considered as part of the environmental authorisation application; a LNG facility does not yet exist in the Ngqura port; it doesn't consider the cumulative effect on other developments within the port and Coega SEZ; it doesn't consider the impact of future port development on the project itself; and the applicant was given the specific opportunity to remedy its original application by the appeal decision in August 2021 which it failed to do. Given that the purpose of seeking an environmental authorisation is to weigh up the sustainable development potential of a project for its lifetime, and to provide such necessary information and assessment to the competent authority, the changes rendered by the section 79(1) directive, the subsequent lack of consultation of such with I&APs on its direct and cumulative impact, render the application fatally flawed.

2. The Strategic Integrated Project (SIP) status:

2.1. Having dealt with the deficiencies of the section 79(1) directive above, we turn our attention to the issue of the project's SIP status.

2.1.1. In #2 of its appeal the Appellant stresses the SIP's status and alleges it is "*considered vital for alleviating the country's current energy crisis*". While South Africa is indeed in crisis with regards current electricity supply, the solution to the crisis is contested, and there is not consensus that gas-to-power solutions that offer peaking power at high cost are "vital" in remedying the crisis. On the contrary, as the Presidential Climate Commission's (PCC) most recent report on "Stakeholder Perspectives on the PCC's Recommendations on Electricity

Planning in South Africa" (May 2023) indicates, there is "divergence around the use of gas" (pg. 11). There is already an existing gas-to-power plant within the Coega SEZ, namely Dedisa, that by our understanding is utilised minimally by Eskom due to its expense. If the Appellant's case for the "vital" nature of Karpowership was sound, the existing Dedisa plant would surely be used to a greater extent?

2.1.2. In #61 the Appellant in answer to the DFFE's pointing to the general cargo/liquid bulk berth's existing environmental authorisation (originally granted in November 2014 and subsequently renewed in November 2019), argues that "*due to the fact that SIP projects are of national importance, other projects are legally obliged to consider SIP projects when they are planned*" (pg. 24). The case made by the Appellant ignores two obvious realities: the first is that the cargo/liquid EA could not have considered the Karpowership project as it precedes it by several years. The second is that the Karpowership project is not the only SIP within the Coega SEZ, both Project Mthombo and the Hive Green Ammonia projects have SIP status and are to be serviced via developments within the port. The Final EIAR does not weigh up the impact of the Karpowership project on other SIPs under its consideration of cumulative impact. Nothing in the appeal explains why this SIP must have preference over others, or in fact how TNPA was expected to consider a project not yet conceived when it made its original plans.

3. The possibility of relocating Karpowerships after five to seven years.

3.1. The Appellant gives a clear indication in its appeal that it was aware that Karpowerships would be required to move after five to seven years to accommodate port expansion plans. In its appeal's #'s 55 to 57 it clearly indicates it was aware of TPNA's plans to construct the A100 berth which would be near the Karpowership location, and that "special attention" must be given to future port development.

3.2. According to the Appellant (see #57) a subsequent agreement was reached between itself and TPNA, that in the case of port development construction proceeding then "*Karpowership SA would need to relocate, at its own cost, the Powerships to an alternate location which would be agreed between Karpowerships SA and TNPA*". The Appellant's version is somewhat different to that given by the DFFE in its ROR, which states (as quoted by the Appellant on pg. 22) that "*the agreement further indicated that KPS will at its own cost relocate the vessels to an alternate location agreed to by TPNA and conduct the necessary EIA process for this location*". Two points arise from this "agreement": the first is that any environmental assessment must be for the entire (20-year) length of the project and thus all potential locations must be assessed in its application, not just the location where the project starts. The second point is that we can find no record of this agreement in the Final EIAR submitted on the 06 January 2023 (or in any preceding versions), either by direct mention or by attached copy to the application. It appears this material aspect has been excluded.

3.3. The details of the original Ngqura port expansion plan, specifically the A100 berth, are not contained in the Appellant's Final EIAR. Nor is the updated port development plan (in lieu of the alleged agreement between TNPA and Karpowership) included, assuming such has actually been concluded. As I&APs we are therefore unable to assess the potential impact such would have on the project. We assume too it places the competent authority in the same position.

3.4. At several points (see #62, 67, 68 and 84) the Appellant claims that "*amicable solutions are being reached*" about the short-, medium-, and long-term location of the vessels. The obvious point is that the statement is made in current tense not past tense, that the discussions are (still) currently underway. While these discussions may be viewed as "amicable" by the Appellant, there is in fact no final agreement in place, nor can any guarantee be given that a final agreement will be reached. Again, it appears the Appellant seeks to be "closing the stable door after the horse has bolted" and expecting that the CA/Appeal Authority simply assume in good faith that an agreement is possible/likely.

3.5. We note that the EAP and/or the public participation process (as per the 2014 amended EIA regulations, #13(1)(f) and 40(e)) is required to provide the CA and I&APs with any information

that is reasonably or potentially material to influencing the decision of whether to grant environmental authorisation.

3.6. In summary we believe the exclusion, whether intentional or not, of the relocation agreement with TPNA, the ongoing discussions, and the lack of clarity on the TPNA's subsequent port expansion plan, is material to the outcome of the environmental assessment, and as such is a fatal flaw in the application and a failure of the EAP and public participation process to fulfil their obligation to provide material information.

4. Expert capability:

4.1. We draw the appeal authority's attention to the most recent Daily Maverick (DM) article (see https://www.dailymaverick.co.za/article/2023-06-13-accreditation-of-karpowership-gas-explosion-risk-consultants-suspended-after-daily-maverick-probe/) in which it is stated that the necessary accreditation of the risk-consultants to the Final EIAR, namely Major Hazard Risk (MHR) Consultants has been withdrawn/suspended.

4.2. While the appeal regulations specify no new information can be considered by the appeal authority, the Appellant states in their appeal that the environmental assessment was "*extremely comprehensive*" (see #5), "*properly studied*" (see #8), and that the "*gaps have been addressed*" (see #16). This is clearly not the case, and we submit the above in evidence thereof and in response to the alleged thoroughness of the Applicant's Final EIAR.

4.3. In an earlier DM article it was pointed out that the gas explosion risk had been significantly re-assessed in the two versions of the environmental impact assessment submitted to the CA. See here https://www.dailymaverick.co.za/article/2023-01-11-karpowership-more-late-changes-to-gas-explosion-noise-studies/

4.4. Given the importance of understanding the explosion risk of gas vessels and operations, given the substantive changes between submitted versions, and now most recently the withdrawal of the expert's accreditation, the risk assessment cannot be assumed credible. Should the Appellant's plea be upheld, as a minimum the explosion-risk must be re-assessed by a competent expert and put to I&APs. But as we lay out below, at what point is an impact assessment deemed incompetent? We believe that threshold to have been exceeded and the case made by the Applicant in the Final EIAR fatally flawed.

5. Remedy/relief:

5.1. The Appellant's remedy/relief as per #93 is that the DFFE's EA refusal is to be set aside and referred back to the CA so that the Appellant can then embark on a public participation process (PPP) for the Generic EMPr.

5.2. Given the Appellant deems the DFFE to have erred in its assessment of the location conflict with port development plans, as in the SIP status is seen to resolve the conflict, and that "*amicable solutions are being reached*" between itself and the TNPA, the relief is simply that the DFFE correct its error.

5.3. In effect, including the repealed section 30(A) waiver by the DFFE, Karpowership have now had three opportunities to submit environmental authorisation applications, three "bites at the cherry" if you will. Specifically, the appeal decision by Minister Creecy gave Karpowership the opportunity to fill in the gaps of its first full application. And yet, it has excluded material aspects, added directives after the application has been submitted, and now wishes to embark on a further PPP to fill new gaps in its application. We consider this to be an abuse of the process, and that the opportunity to correct applications cannot be indefinite. As such, the gaps in the latest application are material and should be considered a fatal flaw.

For the reasons set out above, WESSA, ABOS, and the Green Connection submit that the appeal should be dismissed.

Yours truly,

Dr. Gary M Koekemoer
On behalf of WESSA ABB, ABOS, and the Green Connection
(Submitted electronically thus no signature)