



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

**Reference: LSA231112**

**APPEAL DECISION**

**APPEALS AGAINST THE DECISION OF THE CHIEF-DIRECTOR: INTERGRATED ENVIRONMENTAL AUTHORISATIONS TO GRANT CONDONATION FOR THE SUBMISSION OF AN ENVIRONMENTAL IMPACT ASSESSMENT REPORT IN RESPECT OF THE ENVIRONMENTAL AUTHORISATION FOR THE PROPOSED GAS TO POWER VIA POWERSHIP PROJECT AND ASSOCIATED INFRASTRUCTURE AT THE PORT OF RICHARDSBAY IN KWAZULU-NATAL PROVINCE**

South Durban Environmental Alliance

First Appellant

Groundwork

Second Appellant

The Green Connection

Third Appellant

Natural Justice

Fourth Appellant

Centre for Environmental Rights

Fifth Appellant

Karpowership (Pty)Ltd

Applicant

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

Competent Authority

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**Appeal:** Five appeals were lodged against the decision of the Chief Director: Integrated Environmental Authorisations (competent authority (CA)) of the Department of Forestry, Fisheries and the Environment (the Department), dated 3 May 2023, to grant condonation to Karpowership (Pty) Ltd (the applicant) to submit a revised Environmental Impact Assessment report (EIAr) in respect of the proposed Gas to Power via Powership Project at the Port of Richards Bay, Umhlatuze Local Municipality, Kwazulu- Natal.

**BACKGROUND**

1. While the history and background to the genesis of the Karpowership projects are not an issue in this appeal, I deem it necessary to briefly refer to it for contextual purposes.
2. On 7 July 2020, the Minister of Mineral Resources and Energy (DMRE) issued a section 34 determination (the Determination) under the Electricity Regulation Act, 2006 (Electricity Regulation Act) for the procurement of 2000 MW of energy from a range of technologies, including Liquefied Natural Gas (LNG), which was gazetted in Government Gazette 43547 on 24 July 2020.
3. Pursuant thereto, on 23 August 2020, the DMRE issued a Request for Qualification and Proposals (RFP) for New Generation Capacity under the Risk Mitigation Independent Power Producer Procurement Program (RMIPPPP / RMI4P), the objective of which is to alleviate the immediate and future power generation capacity deficit in South Africa. The RMIPPPP forms part of the Energy Strategic Integrated Project No. 20.
4. The RFP invited bidders to submit proposals for the construction, financing, operation and maintenance of new power generation projects. The RFP succeeded in attracting project proposals featuring a variety of technology combinations including solar PV, wind, liquefied natural gas and battery storage.
5. On 5 October 2020, the applicant lodged an application for an environmental authorisation (EA) with the CA in respect of the proposed gas to power via powership programme, within the jurisdiction of the Umhlatuze Local Municipality, Kwazulu-Natal Province.
6. On 6 November 2020 the Strategic Integrated Project (SIP) Steering Committee confirmed that all projects classified with Preferred Bidder status will be regarded as SIP projects to be expedited in terms of

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Schedule 2 (Section 17(2)) of the Infrastructure Development Act (Act No. 23 of 2014) (Infrastructure Development Act).

7. On 18 March 2021, the applicant was appointed the Preferred Bidder for the project and for two other projects making up 1200MW of the allocated 2000MW required. The three projects proposed by the applicant, at the Ports of Ngqura (Coega SEZ) in the Nelson Mandela Bay Metropolitan Municipality, Eastern Cape Province, Saldanha Bay and Richards Bay, include various activities listed in the Environmental Impact Assessment (EIA) Regulations<sup>1</sup> per the National Environmental Management Act 107 of 1998 (NEMA), which requires Environmental Authorisation (EA) prior to commencement of the three Projects.
8. As per the announcement of the Honourable Mr. Gwede Mantashe, Minister of DMRE, on 18 March 2021, the three projects in which the applicant is involved, received the Preferred Bidder status within the RMIPPPP. Accordingly, the three projects are classified as SIP projects and are to be managed within the requirements set out in the Infrastructure Development Act.
9. The applicant applied for an EA for the proposed project in Richards Bay and lodged a final EIA and EMPr with the CA on 26 April 2021. That application was refused by the CA on 23 June 2021 due to certain gaps in information in the EIAR being identified, and procedural defects in the Public Participation Process (PPP) conducted. The decision was taken in terms of Regulation 4(2) of the 2014 Environmental Impact Assessment Regulations, 2014 ( 2014 EIA Regulation) as amended, and the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA), as amended.
10. On 13 July 2021, the applicant lodged an appeal in respect of that decision in terms of section 43 of NEMA. After due consideration of the appeal and owing to identified gaps in information and defects in the PPP, on 1 August 2022, I (as the appeal authority) remitted the matter in terms of section 46(3) of NEMA to the CA. This was so that the gaps in information and procedural defects that led to the rejection of the EA application could be addressed and a reconsideration and re adjudication of the EA application could be undertaken, provided that the appellant (applicant) and the CA adhered to the time frames prescribed by the 2014 EIA Regulations in respect of the EIA process.

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<sup>1</sup> Listing Notice 2 of 2014 (as amended).

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11. On 12 April 2023, I, in terms of sections 42(1), (2) and (2B) of NEMA, delegated my powers, functions, and duties, vested in me in terms of section 47C of NEMA, to the Director-General of the Department. Such delegation included the power to sub delegate the powers and duties mentioned, to a specific official or to the holder of a specific post in the Department, in respect of applications for environmental authorization for identified activities.
12. The Director-General in turn, on 28 April 2023, sub-delegated those powers and duties relating to section 47C of NEMA to the Chief Director: Integrated Environmental Authorisations of the Department (CA).
13. The procedure for the submission of appeals as contemplated in section 43(1) of NEMA is clearly outlined in Regulation 4(1) of the National Appeal Regulations, 2014, as amended (2014 Appeal Regulations) which 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:*

*(a) from the date that the notification of the decision for an application for an environmental authorization or a waste management licence was sent to the registered interested and affected parties by the applicant".*

14. Regulation 4(1) prescribes the period within which the appellant is required to submit an appeal to the appeal administrator. Such an appeal ought to be submitted in accordance with provisions of Regulation 4(2) of the 2014 Appeal Regulations.

**Section 47C Application**

15. On 14 December 2022, the applicant, addressed a letter to me in which they, in terms of section 47C of NEMA, requested an extension of *"certain time periods set out in regulations 21 and 23 of the EIA regulations."*
16. As part of the motivation for their request, the applicant set out the sequence of events that occurred since the submission of their application for an environmental authorisation as follows:

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- 16.1 On 5 October 2020, the applicant applied for an EA to the Department whereafter, the scoping and environmental impact reporting process commenced.
- 16.2 The Scoping Report was lodged on 18 November 2020 and accepted on 6 January 2021. The final EIA report and EMPr were lodged on 26 April 2021.
- 16.3. A Record of Refusal (RoR) was issued in respect of that application on 23 June 2021, which refused the application.
- 16.4. The applicant, thereafter, lodged an appeal to me against that refusal on or about 13 July 2021. I issued my appeal decision on 1 August 2022 which the applicant received on 5 August 2022.
- 16.5 In my appeal decision, I remitted the application to the CA for the applicant to remedy certain identified gaps in information and procedural defects. My appeal decision to remit the application to the CA was an "appropriate order" in terms of section 43(6) of NEMA for the various gaps in information and procedural defects in the PPP that led to the rejection of the EA application to be addressed during the reconsideration and re-adjudication of the EA application, provided the time frames prescribed by the 2014 EIA regulations in respect of the EIA process are adhered to by the appellant (applicant) and the CA.
- 16.6 The applicant circulated an amended draft EIA report on 9 November 2022.
17. The applicant, after realising that they would not be able to meet the required deadline of 13 January 2023 for the submission of their final EIA report in terms of regulations 21(2)(d) and 23(1) of the 2014 EIA Regulations, requested an extension of the time period and condonation in terms of section 47C of NEMA, based on the following:
- 17.1 On 7 December 2022, Anchor Energy (Anchor) addressed correspondence to the Director General of the Department in which they raised their concern at not being directly notified of the EIA process and were therefore unable to participate in the 2022 EIA process.

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- 17.2 The applicant became aware of this on 12 December 2022, and immediately provided Anchor with access to the full draft EIA report and subsequently the full audiovisual recording of the virtual public participation meeting, including all specialists' presentations. Anchor indicated they were not available for a focus meeting and would require the full 30 days for commenting on the draft EIA report.
- 17.3 Subsequent thereto, the applicant ascertained that a further 15 (fifteen) I&APs had not been given notice of the process due to a technical error that occurred in the migration of one sector of the data base of the I&APs from the first round of the application to a consolidated and expanded database for the current process.
18. In that request the applicant sought:
- 18.1 An extension of the 2-year period referred to in regulation 21(2)(d) from 7 January 2023 to 13 February 2023, to provide the affected I&APs with a full 30-day commenting period, taking into account the Christmas exclusion, and time to address resulting comments into the final EIAR, and
- 18.2 An extension of the 106 days period in Regulation 23(1) from 13 January 2023 to 13 February 2023 .
19. On 6th January 2023, the applicant submitted an EIAR without the comments from the 15 "omitted /affected" I&APs.
20. On 24 February 2023, the applicant through the EAP again submitted a request in terms of section 47C of NEMA for an extension and condonation for the late submission of the EIAR.
21. In that request, the EAP set out the reasons and circumstances which necessitated the request for the condonation and extension of time. Those reasons were similar to those the applicant set out in its request dated 14 December 2022, in that they reiterated that they became aware that certain 15 I&AP's were not provided with an opportunity to comment on the amended final EIAR and specialist reports due to an error in the "carrying over" of previous registered I&AP from the initial database of 170 contacts to a new database that had expanded to over 700 contacts.

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22. The applicant submitted their request in terms of section 47C of NEMA and sought certain preferred relief as follows: (Option 1) for the condonation and extension of the time periods allowed for the completion of the EIA as provided for in Regulation 22(2)(d) (2 years from approval of the Scoping Report) and Regulation 23(1) (106 days to complete the EIA) of the EIA Regulations; alternatively (option 2) should I decide that a further, third round is required and necessary for the omitted I&APs in Richards Bay whereby all registered I&APs will again be consulted.
23. The applicant alleged, inter alia, that as they had not received a response to their request for an extension or condonation from the Department by early January 2023, they decided as a matter of caution to submit the final EIAR without all the comments and responses of the "omitted" I&APs and intended to supplement it once that process was completed. This, they contend, necessitated the request for the extension and that some I&APs expressed their need to have 30 days to comment thereon.
24. In the applicant's motivation, the applicant sets out certain criteria which they alleged they complied with in respect of their application, these are the following:
  - 24.1 That the applicant had "good cause" for the grant of the request as the error in not "carrying over" the 15 I&APs from the previous database was a *bona fide* one and they took steps immediately to rectify it.
  - 24.2 That there was a lack of prejudice on the part of I&APs to the grant of the request as they would be provided with the requisite 30 days period to comment on the revised EIAR.
  - 24.3 That their EIA application had prospects of success, that all gaps in knowledge and impacts and all defects in the PPP identified in my appeal decision of August 2022 had been comprehensively addressed.
  - 24.4 That the progression of the EIA process and therefore the granting of the extension and condonation request is of vital importance to addressing the energy crisis in South Africa.
25. The CA on 3 May 2023, granted the applicant's request for an extension of the time period and condoned the late submission of the EIAR in terms of section 47C of NEMA and condoned the late submission of the EIAR. The condonation period was to be for a period of 60 days from the date of the decision.

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26. In granting the request, the applicant was requested to conduct a PPP for a minimum period of 30 days ensuring that all registered I&APs were provided with an additional opportunity to comment on the revised EIAr. A consolidated EIAr, addressing all comments received had to ("must") thereafter be submitted to the CA for decision making. A Comments and Responses Report of all comments, issues and or concerns raised had to be provided together with the EIAr.
27. The applicant was furthermore advised to ensure that registered I&APs were informed of the decision regarding the applicant's request for condonation in time in terms of section 47C of NEMA.

**APPEAL**

28. On 23 May 2023, five non-governmental organizations, namely, South Durban Community Environmental Alliance, Groundwork, the Green Connection, Natural Justice, and Center for Environmental Rights (CER) lodged a combined appeal to me against the decision of the CA to grant the applicant the extension and condonation.
29. The appeal was received in compliance with the National Appeal Regulations, 2014 (2014 Appeals Regulations)
30. The applicant submitted their response to the grounds of appeal on 21 June 2023
31. The CA submitted their comments to the grounds of appeal on 29 June 2023
32. The grounds of appeal and evaluation thereof are dealt with hereunder.

***First Ground of Appeal: The condonation process was procedurally unfair.***

33. The appellants submit as follows:
  - 33.1 Section 3 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") requires administrative action which materially and adversely affect the rights or legitimate expectations of any person must be



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procedurally fair. In order to give effect to the right to procedurally fair administrative action, the administrator is required to, *inter alia*:

- (a) give adequate notice of the nature and purpose of the administrative action;
- (b) a reasonable opportunity to make representations;
- (c) a clear statement of the administrative action;
- (d) adequate notice of the right of review or internal appeal.

33.2 There are no reasonable and justifiable circumstances to depart from the requirement to provide I&APs with an opportunity to comment on the condonation application.

33.3 Section 2 of NEMA calls for the participation of all I&APs in environmental governance to be promoted and promotes the rights of I&APs to comment on and make representations throughout the EIA process.

33.4 In respect of applications for condonation and extensions in the appeal process, the Department's Appeal Guideline states as follows:

*"12.1 In terms of section 47C of NEMA, the Minister or the MEC has the legal authority to grant an extension or condonation for the submission of an appeal or responding statement which is out of time.*

*12.2 Applications in terms of Section 47C of NEMA must be in writing, and must afford the other party/parties an opportunity to comment on the request."*

33.5 There is no reason why an application for condonation or extension in terms of the same section 47C of NEMA, albeit in respect of a different component of the EIA process, should not also afford I&APs with an opportunity to comment on the request.

33.5 The application for condonation for the late filing of EIAr was not made available to I&APs. Consequently, they did not have an opportunity to consider the application and the reasons for the request nor make any representations thereon. Therefore, the I&APs were unable to meaningfully participate in the process leading up to and the decision and that the CA was therefore not placed in a position to consider the other side.

**Applicant's response**

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34 The applicant responded that:

34.1 The appellants seem to have misunderstood section 47C of the NEMA, which states that *“The Minister or an MEC may extend or condone a failure by a person to comply with, a period in terms of this Act or a specific environmental management Act, except a period which binds the Minister or MEC.”*

34.2 There is neither an obligation to obtain I&AP's consent for a condonation application, nor to make I&APs aware of such application. It is the Minister (or the Minister's delegated authority) who holds this power. Only if there are valid grounds for the condonation to be granted, then, in this case the EIA proceeds and the I&APs rights are to participate in the EIA. The I&AP is not the Minister, nor holds the decision-making powers of the Minister.

34.3 The appellants' constitutional rights and PAJA rights may be exercised in the EIA process, and this is being done as they are participating in the EIA.

34.4 Alternatively, if the appellants have not misunderstood section 47C of NEMA, then the appellants are misusing this appeal process to try and make new law (i.e., to extend the requirements of section 47C to include a PPP (which it does not) and or / to manipulate and abuse the NEMA and the 2014 EIA Regulations by lodging a frivolous and vexatious appeal simply to delay and derail the applicant's EIA process.

34.5 The appellants have either intentionally or negligently conflated the EIA process with an appeal process. The Appellants quote the Appeal Guidelines, but the EIA process is not an appeal, and this was a section 47C of NEMA Condonation Application to extend the EIA timelines.

34.6 There is no prejudice to the appellants if the process proceeds. The CA took note of the considerable prejudice to the applicant if the Condonation Decision was not granted.

**CA's comments**

35 The CA comments that, in their opinion, the request made in terms of section 47C for an extension and condonation for the late submission EIAr is outside the scope of the EIA process.

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**EVALUATION**

- 36 Section 47C of NEMA provides that the Minister or an MEC may extend or condone a failure by a person to comply with a time period in terms of the Act (NEMA) or a Specific Environmental Management Act (SEMA), except a period which binds the Minister or MEC. It is apparent that the section confers a wide discretion to the Minister or MEC to grant such extension and condonation.
- 37 The appellant's reliance on the Guideline on the Administration of Appeals (Guideline) and their submission that the requirements in terms of paragraphs 12.1 and 12.2 thereof should be extended to applications such as the present one, is misplaced. Paragraph 12.1 of the Guideline contemplates and refers specifically to applications in terms of section 47C of NEMA for an extension or condonation "*for the submission of an appeal for responding statement which is out of time*". The Guideline, in paragraphs 12.1 and 12.2 refers specifically to appeals and the responding statements to such appeals and not to extensions and condonation of time periods for the late submissions of an EIA or an EMP in respect of NEMA or a SEMA. Therefore, I find that paragraphs 12.1 and 12.2 of the guidelines are not applicable in the present instance.
- 38 Section 47C of NEMA, although wide, does not prescribe such requirements as contended for by the appellants. This section does not place an obligation on an applicant seeking an extension of time and condonation for the late submission of its EIA to make such application available to I&APs for comment prior to the submission of such request by an applicant as suggested by the appellants.
- 39 Section 2 of NEMA, while recognizing that the participation of I&APs in environmental governance should be promoted, does so in relation to whether an environmental authorization for a project should be granted, it does not extend to an application for condonation for an extension of time and condonation for the late submission of an EIA in terms of section 47C of NEMA as suggested by the appellants.
- 40 In granting the application for the extension and condonation, the CA instructed the applicant to inform the I&APs of the outcome of the application, which they did in their letter of 3 May 2023 wherein they informed the I&APs of the "salient contents" of the decision.

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41 Having regard to the above and having considered the grounds of appeal, I determine that this first ground of the appellants' appeal is without merit and is hereby dismissed.

***Second Ground of Appeal: the CA was functus officio.***

42 The appellants state as follows:

42.1. According to the 2014 EIA Regulations, specific timeframes apply in relation to the EIA process and the subsequent appeal.

42.2. In June 2021, the CA refused to issue an EA to the applicant based on the first Environmental Impact Assessment (EIA), and the applicant subsequently lodged an appeal against this refusal decision. In my appeal decision, on 1 August 2022, I remitted the EA application to the CA due to, amongst others, that insufficient information had been provided to reach a decision. This gave the EAP another opportunity to remedy the defects, and to resubmit its revised EIA for reconsideration but "*provided that the timeframes prescribed within the 2014 EIA regulations... are adhered to by the appellant and the CA [Competent authority]*". Upon request by the appellant (CER) for clarification on the timelines, the Department, on 7 October 2022, responded that "*the Environmental Impact Assessment reports for the abovementioned projects in accordance with Regulation 23(1)(a) of the EIA Regulations, 2014 as amended must be submitted on or before 13 January 2023.*" Despite this, the EIA was not submitted timeously, and the application was subsequently withdrawn.

42.3. Subsequent to this process, the EIAR was revised, and made available for public comment in November / December 2022.

42.4 As is apparent from the letter from the CA to the EAP, dated 7 March 2023, the EAP wrote to the Department on or about 2 March 2023 to withdraw the EIAR dated 6 January 2023. The CA concluded "*Please note that the application for Environmental Authorisation... is now deemed withdrawn and the application is closed on the Departments side*'.

42.5 At this point, the application should have lapsed, and accordingly, the EA should have been refused, as the applicant had not met the requisite timeframes given to it by the Department.

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42.6 The Department being aware of their ‘...request to the Minister in terms of s47C of [NEMA]... Minister’s decision on the above request will determine the way forward on this application’.

42.7 Regulation 45 of the 2014 EIA Regulations provides as follows:

**“Failure to comply with requirements for consideration of applications.**

*An application in terms of these Regulations lapses, and a competent authority will deem the application as having lapsed, if the applicant fails to meet any of the timeframes prescribed in terms of these Regulations, unless extension has been granted in terms of Regulation 3(7).”*

42.8 Regulation 3(7) of the EIA Regulations in turn provides:

**“Timeframes**

*In the event where the scope of work must be expanded based on the outcome of an assessment done in accordance with these Regulations, which outcome could not be anticipated prior to the undertaking of the assessment, or in the event where exceptional circumstances can be demonstrated, the competent authority may, prior to the lapsing of the relevant prescribed timeframe, in writing, extend the relevant prescribed timeframe and agree with the applicant on the length of such extension.”*

42.9 Based on the Department’s own communication of 7 October 2022, the deadline to submit the EIA was 13 January 2023. The subsequent communication that “...the application for EA is now deemed withdrawn and the application is closed on the Departments side”, and that there does not appear to have been any application in terms of regulation 3(7) made by the applicant, the application for environmental authorisation at Richards Bay lapsed on or about January 2023.

42.10 The CA took both the relevant decisions. On 7 March 2023, the CA confirmed that the application was closed. In terms of this letter and the relevant provisions of the EIA Regulations, the application lapsed at that point. The CA was accordingly *functus officio* and was not competent to consider or grant any condonation request when he chose to revive the application by granting the condonation on 3 May 2023.

42.11 The applicant, under these circumstances is obliged to submit a new application for environmental authorisation, and the continuance of the current application is unlawful.

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**Applicant's response**

43 The applicant responded that:

43.1 The appellants seem to have misunderstood the powers that are granted to the Minister (or the Minister's delegated authority) in terms of section 47C of NEMA.

43.2 The appellants also err on their understanding of the facts. The EIA was submitted timeously before 13 January 2013.

43.4 The EIA was withdrawn for administrative reasons. Sixty (60) days was granted to conclude the EIA process in the Condonation Decision.

43.5 The PPP process exceeded the minimum legislated period of 30 days- 33 days that was given for comment, during November/December 2022, on the draft EIA report.

43.6 The purpose of section 47C of NEMA is to allow for the application to be processed. The applicant was advised by the Department that the final EIA report submitted in January 2023 had to be withdrawn in order for the Department to process the S47C application. The specific process was followed as advised.

43.7 Regulation 3(7) of the 2104 EIA Regulations does not apply as the project's Scope of Work did not change and there were no exceptional circumstances.

43.8 The appellant's version is denied, and it is submitted that the Section 47C Condonation Decision is a legal and valid manner for the EIA process to continue.

**CA's Comments**

44 The CA comments as follows:

44.1 The applicant, through their EAP, had initially requested an extension of time or condonation in terms of section 47C of NEMA to the Minister in December 2022. In response to that request, the applicant was

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advised by the CA that the application could not be considered since they had submitted the EIAR on 9 January 2023 (it was, I am advised, actually submitted on 6 January 2023 but captured by the Department on 9 January 2023). The submission of the EIAR was therefore within the prescribed timeframe and not out of time as stated by the appellants.

- 44.2 Subsequently, the EAP withdrew the application and a new request in terms of section 47C of the NEMA to extend the timeframe of Regulation 23(1)(a) of the 2014 EIA Regulations was submitted to the Minister for consideration. It should be noted that the Minister delegated this responsibility to the Director-General who in turn sub-delegated this provision to the CA, hence the decision was made by the CA and not the Minister.
- 44.3 In terms of regulation 3(8) of the 2014 EIA Regulations, any PPP must be conducted for a period of at least 30 days. The EAP complied with this provision.
- 44.4 As indicated above, the only way for the applicant to submit the section 47C of NEMA request was for them to withdraw the EIAR that they had submitted to the CA on 09 January 2023. The CA was not in a position to consider the section 47C request while the CA has possession of the EIAR.
- 44.5 Based on the above, the CA stated that the applicant was not obliged to submit a new application for an environmental authorisation and that the continuance of the current application is lawful, while the granting of the condonation request is standing.

**EVALUATION**

- 45 During June 2021, the CA refused to grant an EA to the applicant. The reasons given were the lack of information in respect of certain expert studies and procedural defects in the public participation process. On appeal to me (in terms of section 43 of NEMA), against that decision of the CA. I was unable to make an informed decision due to, inter alia, gaps in the information provided and certain procedural defects in the PPP.
- 46 In terms of section 43(6) of NEMA, I may, after considering an appeal, confirm, set aside, or vary the decision, provision, condonation, or directive or make any other appropriate decision. I, therefore, deemed that an appropriate order was to remit the application to the CA for reconsideration once the procedural

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and information gaps have been rectified. I further directed that the resubmission and reconsideration had to take place in compliance within the time frames prescribed in regulation 23 by both the CA and the applicant.

- 47 I accept as correct that the applicants EIA was submitted timeously and not as alleged by the appellants that it was out of time. I also accept as correct that the applicant withdrew their EIA based on information received from the department, namely that the department would not be able to consider its request in terms of section 47C of NEMA while the Department was in receipt of an EIA, and which would have to be withdrawn for the section 47C request to be considered.
- 48 The CA's acknowledgement in its letter of 7 March 2023 of the withdrawal of the EIA and its statement therein that the application is now closed on the Department's side does not, as contended for by the appellants, mean that the application had lapsed. This is so, particularly because the first section 47C request was made on 14 December 2022, prior to the lodging of the EIA on 6 January 2023. The applicant made a second request in terms of section 47C of NEMA on 24 February 2023 in the circumstances I described above, prior to the withdrawal of the EIAr.
- 49 I have taken note of the CA's the comments in its letter of 7 March 2023. By virtue of my position as the Minister responsible for the Department and as the appeal authority over decisions taken by official within the Department, I am aware that the words "lapsed" when used by the Department has a specific and technical meaning as contemplated in Regulation 45 of the 2014 EIA Regulations. My understanding is that when the CA used the words "closed on the Department's side" it means no more than that there is nothing further on the online system for the Department to do until the matter is progressed further. In the context of that letter, it is apparent that the matter would once again receive attention after the outcome of the section 47C of NEMA request. My understanding is supported by the statement in the said letter that "Ministers decision on the above request will determine the way forward on this application." If the Department had deemed that the application for an EA had lapsed, it would have been recorded as such and there would have been no reason for the statement concerning the Minister's decision determining the way forward. The reference to the Minister in this instance should be seen in the light of the delegation in that regard to the CA as I described earlier.
- 50 I also took note of the position of the Department that they were not able to consider the section 47C of NEMA request while the CA had possession of the EIAr.



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- 51 The appellants' averments based on the provisions of Regulation 45 of the 2014 EIA Regulations, to the effect that an application will be deemed to have lapsed if an applicant fails to meet any of the timeframes prescribed in terms of the regulations unless an extension has been granted in terms of regulation 3(7) of these Regulations, is not sustainable in the present case because:
- 51.1. As already stated, the applicant lodged the EIAr and EMPr timeously, and requested an extension and condonation in terms of section 47C of NEMA initially as early as 14 December 2022 but withdrew the EIA and EMPr same on the guidance of the department so that the request for condonation and extension of the time period could be processed.
- 51.2. Regulation 3(7) of the 2014 EIA Regulations did not preclude the appellant from seeking condonation or an extension of the time periods in terms of section 47C of NEMA for the late submission of the EIAr and EMPr and to conduct a PPP to cater for the omitted I&APs comments.
- 51.3. The initial refusal by the CA to grant the applicant an EA due to identified gaps in information and procedural defects in the PPP is distinct and different to the CA granting the application for an extension of the time and condonation for the late submission of the EIA. I therefore determined that the CA was not *functus officio* in granting the request in terms of section 47C of NEMA.
52. I find therefore, that the application had not lapsed, and the applicant was not required to commence the EIA process afresh.
53. I am advised, which advice I accept, that section 10(1) of the Interpretation Act 33 of 1957 (as amended), enables administrators to exercise their powers from time to time as the occasion requires, and to do so in different circumstances or as permitted by statute (or by implied authorization). The administrator may revisit or revoke their existing decisions whenever it is required and unless the contrary intention appears in the legislation. There is no such contrary intention that appears in the legislation. Generally, the *functus officio* doctrine applies only to final decisions. I am further advised that an administrator would not be *functus officio* if, for example, the plans which it previously refused to approve later qualified for reconsideration in terms of the legislation.
54. The CA was therefore not *functus officio* in considering and granting the applicant's application.

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55. Having considered the above, I determined that this second ground of appeal is without merit and is accordingly dismissed.

***Third Ground of Appeal: Condonation and further amendment of the EIA Report amounts to an abuse of the EIA process***

56. The appellants submit as follows:

56.1 The EAP has not provided any reasons to I&APs regarding why the EIA for Richards Bay required the amendments which were undertaken, or why it required these amendments after the "Final" EIA was already submitted to the CA.

56.2 The amendments that were subsequently made to the EIA are substantial and affect almost every specialist report. The EAP has not sought to provide any summary of the amendments.

56.3 The 2014 EIA Regulations makes specific provision for circumstances where reasonably unforeseen circumstances arise which necessitate the amendment of EIA.

56.4 Regulation 23(1)(b) of the 2014 EIA Regulations allows an EIA to be amended where significant changes have been made, or significant new information has been added to the documents, and provides for a further commenting period; and

56.5 Regulation 3(7) of the 2014 EIA Regulations, empowers the CA to extend the timeframe for submission of the report, prior to its lapsing, in the event where the scope of work must be expanded based on the outcome of an assessment done which outcome could not have been anticipated prior to the undertaking of the assessment, or in the event where exceptional circumstances can be demonstrated.

56.6 These mechanisms provide certainty and fairness in the EIA process, avoid abuse of the EIA process by applicants and EAPs, and avoid wasting of time and resources of I&APs. Each time documents are provided for comment, it requires significant time and resources for I&APs to consider them, understand them, understand any changes, engage with experts or other professionals should they wish to do so, and prepare representations. The burden on I&APs is immense each time a report is amended.

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- 56.7 Notably, the EAP refused to grant the appellants a further two days for the submission of their comments on the EIA Report on 12 December 2022. However, it seeks endless opportunities to amend the EIAr.
- 56.8 The EAP was obliged to utilise these mechanisms to seek additional time to make the amendments it has since made. If it did not, due to its own incompetence or any other reason, then it was required to submit a new application for EA.
- 56.9 If the information contained in the final EIAr was insufficient or inadequate for the CA to decide on the application, then it was obliged to refuse the application in terms of regulation 24(1)(b).
- 56.10 It is not known at this stage why the EAP did not seek to request an extension of time in terms of either regulation 23(1) or regulation 3(7) of the 2014 EIA Regulations. The EAP has not provided reasons why it did not previously know that it needed to make significant changes and has not indicated that significant new information became available after the previous EIAr was submitted to the CA. It should have known before it submitted the previous EIA Report if the scope of work was to be expanded based on the outcome of the assessments previously undertaken. Clearly, it could also not demonstrate exceptional circumstances prior to the submission of the previous report.
- 56.11 There is no reason why the amendments that have been made could not have been foreseen prior to the lapsing of the relevant timeframes. This is particularly since, according to the EA Refusal, it appears that during the first EIA process, CA gave specific instructions to provide outstanding documents during the EIA, and the applicant appears to have ignored these instructions. Moreover, the list of missing information and documents were also outlined in the EA Refusal by the CA.
- 56.12 Furthermore, in her appeal decision, the Minister specifically directed the applicant to resubmit its revised EIAr within the prescribed timeframes. The current application process is consequently continuing in violation of the EIA Regulations and the Minister's appeal decision.

**The Applicant's response**

57. The applicant responds as follows:
- 57.1 The appellants provide misleading information in this ground of appeal. The changes to the EIA are not "substantial" and do not "affect nearly every specialist report." Changes to the EIA have been highlighted for I&AP's in both the EIA as well as the Specialist Reports.

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- 57.2. The changes included changes to better defining the listed activities, the inclusion of the Generic EMP's and progressing offset arrangements with the Ezemvelo Kwa-Zulu Natal Wildlife.
- 57.3. In the final EIA dated January 2023, blue text was used to indicate any changes made from the draft EIA to the final EIA. In the revised draft EIA dated May 2023, the following clarification note was included *"Clarification notes upon completion of the PPP in December 2022, any added text to the 2022 final EIA report was marked in blue text. The 2022 final EIA report was used as the basis of this revised draft EIA report, and any further additions are marked in underlined blue text. This will assist the readers in identifying the changes made to the report since the previous draft EIA report that was made available for public review and comments in November-December 2022."*
- 57.4. Any changes made in the May 2023 draft EIA based on updated studies were marked in underlined blue.
- 57.5. The section 47C of NEMA Condonation Application was the correct manner to proceed and Condonation was duly received.
- 57.6. This is misleading information that has been provided by the appellants. The changes to the EIA were highlighted and were not significant.
- 57.7. If comments are received between the draft EIA report and then final EIA report, then changes are required. In addition to repeatedly highlighting the changes made in 2023, Appendix 7.6 also indicated where the Record of Refusal and matters raised by the Honourable Minister in the Appeal Decision were addressed.
- 57.8. This is consistent with the appellants' modus operandi to continually extend timelines in order to delay and derail the project. This vexatious, frivolous and invalid appeal is a further example.
- 57.9. The appellants are incorrect. The Regulations do not apply for the reasons explained above. The appellants simply seek the EIA to begin afresh so that they may again seek to derail the project.

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57.10 The appellant's version of events is denied, as indicated above the final EIA was submitted within the timeframes and the section 47C of NEMA Condonation Decision is a valid manner to submit the additional information, provided the EIA PPP requirements are complied with.

57.11 Appendix 7.6 indicated where the Record of Refusal and matters raised by the Honourable Minister in the Appeal Decision were addressed.

**The CA's comments.**

58. The CA commented that:

58.1. On 03 May 2023, they (the CA) granted the applicant's request for condonation of a failure to comply with a period in terms of section 47C of the National Environmental Management Act, 1998 (Act No. 107 of 1998) (NEMA) and condone the late submission of the EIA to the CA for decision-making, subject to:

58.1.1. The applicant conducting a PPP for a minimum period of 30 days, ensuring all registered interested and affected parties are provided an additional opportunity to comment on the revised EIA.

58.1.2. A consolidated EIA, addressing all comments received, must thereafter be submitted to the CA for decision-making.

58.1.3. A comments and response report with detailed responses to all comments, issues and/or concerns raised must be provided together with the EIA.

58.2 Any amendments made to the EIA other than those required above, were done outside the requirements of the section 47C decision to grant condonation.

**EVALUATION**

59. Regulation 23(1)(b) of the 2014 EIA Regulations contemplates circumstances where prior to the submission of an EIA and EMP, as contemplated in regulation 23(1)(a), an applicant becomes aware that significant changes have been made or significant new information has been added to the EIA and

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EMPr which changes or information was not contained in the reports consulted on during the initial PPP and that the revised EIAr or EMPr would be subjected to another PPP of at least 30 days.

60. In the applicant's section 47C of NEMA request, they explained the circumstances after my appeal decision to remit the application to the CA, that led to them becoming aware of defects in its EIAr in that 15 I&APs had previously not been "*individually informed of the 2022 EIA process by e-mail and associated PPP in the current phase*" due to a human or technical error.
61. They further explained that despite submitting the "*Extension and Condonation request to the Minister's office on 14 December 2022, no decision was received thereon by early January.*" They therefore submitted the deficient FEIAr "in its current form without the comments from the "omitted" I&APs. The applicant states that the dilemma it faced, was to submit a revised final EIAr after the cut-off date of 6 January 2023, without any certainty that condonation would be granted in which event the EIA would lapse and the applicant would be left without "an active application" or submit the one that it did on 6 January 2023.
62. The applicant was entitled to request an extension of the time contemplated in Regulation 23(1)(b) of the 2014 EIA Regulations or request an extension of the time and condonation for the late submission of their EIAr or EMPr as contemplated in section 47C of NEMA.
63. I have already dealt with the application of Regulation 3(7) of the 2014 EIA Regulations. In any event, it appears that the CA considered the applicant's reasons for the section 47C of NEMA-application and considered the request to be reasonable and justifiable in the circumstances. I confirm that the reasons furnished by the applicant in its motivations for their requests in terms of section 47C of NEMA are reasonable under the circumstances set out therein. The requirement to demonstrate "*exceptional circumstances*" as contended for by the appellants, is not a requirement of section 47C of NEMA.
64. As regards the appellants' assertions concerning the provisions of Regulation 24(1)(b) of the 2014 EIA Regulations, I noted that the applicant withdrew the EIAr on the advice of the Department so that their request in terms of section 47C of NEMA could be considered. Such withdrawal occurred prior to the applicant's application for an EA being assessed and decided upon. It was, therefore, not open to the Department to refuse the application for an EA in terms of Regulation 24(1) at that stage.

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65. Having regard to, and having considered the above, I determine that this third ground of appeal is without merit and is hereby dismissed.

**DECISION**

66. In reaching my decision on this appeal, I have taken the following, among other, into account:

- 66.1. The applicant's application for condonation in terms of section 47C of NEMA and the documents referred to therein;
- 66.2. The decision of the CA in response to the application for a condonation and extension request to submit a generic EIAR dated 3 May 2023;
- 66.3. The appeal lodged by the appellants;
- 66.4. The applicant's responding statement submitted on 21 June 2023;
- 66.5. Comments by the CA submitted on 29 June 2023;
- 66.6. Relevant provisions of NEMA, 2014 EIA Regulations and National Appeals Regulations, 2014;
- 66.7. The applicant's section 47C request dated 14 December 2022;
- 66.8. The applicant's section 47C request dated 24 February 2023;
- 66.9. Correspondence from the Department addressed to the applicant dated 6 February 2023, and
- 66.10. Correspondence from the Department addressed to the applicant dated 7 March 2023.

67. In terms of section 43(6) of NEMA, I have the authority, after considering the appeal, to confirm, set aside or vary the decision, provision, condition or directive or to make any other appropriate decision.

68. Having considered the above, I determine that the grounds of appeal relied upon by the appellants are without merit. It is therefore my decision that the decision of the CA of 3 May 2023 to grant the applicant's request in terms of section 47C of NEMA is hereby upheld, and the appellants' appeal is dismissed.

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

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70. Should the Appellants be dissatisfied with any aspect of my decision, they are at liberty to approach a competent court of law to have this decision judicially reviewed. The judicial review proceedings ought to be instituted within 180 days of notification hereof, in accordance with the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).



**MS B D CREECY, MP**

**MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT**

**DATE:** 22/7/2023