IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 5676/2024

In the matter between

THE GREEN CONNECTION NPC	First Applicant
NATURAL JUSTICE	Second Applicant

and

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	First Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Second Respondent
DIRECTOR GENERAL: MINERAL RESOURCES AND ENERGY	Third Respondent
TOTAL ENERGIES EP SOUTH AFRICA BLOCK 567 (PTY) LTD	Fourth Respondent

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APPLICANTS' SUPPLEMENTARY FOUNDING AFFIDAVIT

I, the undersigned

ELIZABETH JANE MCDAID

do hereby make oath and say as follows:

1. I am an executive director of the first applicant and currently serve as its strategic lead. I deposed to the founding affidavit in these proceedings on behalf of the first applicant and I am likewise authorised to depose to this affidavit.

2. A confirmatory affidavit in the name of Natural Justice and deposed to by Delme Cupido confirming Natural Justice's authority will be filed together with this affidavit.

3. The facts in this affidavit are within my personal knowledge and belief, or appear from documents under my control, except where the context indicates otherwise, and are to the best of my knowledge both true and correct. Where I make legal submissions, I do so on the basis of advice from the applicants' legal representatives.

4. This affidavit is intended to supplement the founding affidavit in these proceedings with reference to the rule 53 records. The second and third respondent filed their record of decision on 02 September 2024 and the first respondent filed its record on 13 August 2024. In this affidavit, I will make general reference to **"the rule 53 record"** unless it is necessary to distinguish between the records of the two decision-makers.

5. The parties have agreed to a timetable for the further conduct of this matter. This supplementary founding affidavit is filed in compliance with that timetable.

6. I will use the same abbreviations in this affidavit as I used in the founding affidavit

7. This affidavit supplements the founding affidavit in the following respects:

   7.1 First, the record of the first respondent reveals that the appeals response reports (**"ARRs"**) submitted by the competent authority in terms of regulation 5 of the National Appeal Regulations under NEMA (**"the Appeal Regulations"**) were prepared and signed by officials in the employ of the Petroleum Agency of South Africa (**"PASA"**). I am advised that this amounts to material non-compliance with the Appeal Regulations and gives rise to a further ground of review in respect of the Minister's decision.

   7.2 Second, the rule 53 record is telling in what is not contained in the record and in fact reveals a notably scant decision-making process (relative to the risks and impacts involved in the project proposal). The applicants rely on the absence of particular deliberations and inquiries to found further grounds of review and elaborate on others.

   7.3 Third, the rule 53 record reveals that neither the DG nor the Minister took any steps at all to establish whether the measures that the fourth respondent ("**Total**") says will be included and substantiated in a future "oil spill contingency plan" are feasible. in what follows I make several observations in connection with this issue to augment the fifth ground of review in the founding affidavit.

APPEAL REPONSE REPORTS PREPARED BY THE PETROLEUM AGENCY OF SOUTH AFRICA

8. Regulation 5 of the National Appeal Regulations under NEMA[1] provides that the competent authority, as well as any other interested and affected party, may submit a responding statement on any appeal lodged in terms of section 43 of NEMA. The competent authority for present purposes is the third respondent ("the DG") referred to in Regulation 5 as the decision-maker.

9. Regulation 5 provides:

> "The applicant, the decision-maker, interested and affected parties and organs of state must submit their responding statement, if any, to the appeal authority and the appellant within 20 days from the date of receipt of the appeal submission."

10. It appears from the first respondent's records that PASA submitted an ARR responding to each of the 18 appeals lodged against the DG's decision. The ARRs submitted by PASA purported to be, and were treated as, the responding statement of the "competent authority". This is clear from the following documents:

    10.1 An email addressed to PASA's Sinazo Mnyaka on 16 May 2023, enclosing the ARR submitted by Total and advising that "the competent authority" may apply for condonation of the late filing of their responding

[1] GNR 993 of 8 December 2014.

statement, which at that stage had not been submitted and was out of time. A copy of this email is attached marked **"SFA1"**.

10.2 A copy of a decision by the Director: Appeals and Legal Review of the Department of Forestry, Fisheries and the Environment dated 15 September 2023, condoning the late filing of PASA's ARRs in terms of section 47C and 47CB of NEMA. In the decision, the applicant for condonation is referred to alternately as "PASA" and "DMRE". It is clear that the author regards these entities as interchangeable. A copy of the decision is attached marked **"SFA2"**.

10.3 The ARRs themselves are drafted in such a manner that it is clear that the author considers him or herself to be responding in the capacity of the authority responsible for the decision. By way of example, I attach as **"SFA3"** the ARR responding to the applicants' appeal.

11. The below are some instances in SFA3 where this is in evidence:

11.1 In response to an objection that the competent authority had not applied the precautionary principle in dealing with the marine ecology assessment in the Final EIR, it is stated:

> "The identification and assessment of impacts of the planned project together with the recommendation of impacts mitigation measures is regarded as fulfilment of the precautionary principle. This is because the assessment will determine impacts that need to be avoided, prevented and minimised."

11.2 In response to an objection that the "no-go" alternative had not been properly considered, it is stated:

> "The negative impacts of undertaking the project were also identified and mitigation measures were recommended to manage such impacts. However, it was also found that the positive impacts of undertaking the project outweigh the negative impacts. Hence the decision was made to grant the authorisation."

12. In responding to the appeals, PASA exercised a function that was within the exclusive province of the competent authority – i.e. justifying and explaining its decision.

13. The purpose of a responding statement by the competent authority is to ensure that the appeal authority is appraised of the competent authority's reasoning in taking the decision under appeal. Clearly PASA is not in a position to perform this role.

14. Moreover, PASA's functions and *raison d'etre* are manifestly incompatible with the assumption of what is supposed to be an impartial role in a process to determine whether exploration for oil and gas is justifiable from an environmental perspective. PASA serves as "the designated agency" contemplated in section 70 of the MPRDA. Its functions include *inter alia* *"promoting onshore and offshore exploration for and production of petroleum"*.[2] There are sound reasons why an organ whose institutional activities are centred

[2] MPRDA, section 71(a).

around promoting a particular industry should not act in the place of the first instance decision-maker in a process such as this.

15. I am advised that where an administrative decision is impugned on the basis of a procedural defect, the proper inquiry is whether the non-compliance had the effect of undermining the purpose of provision. This is not the same as asking whether compliance with the provisions would have led to a different result.

16. It is quite clear that the Minister's consideration of, and reliance upon, PASA's comments in support of the DG's decision, undermined the purpose of the National Appeal Regulations and, in particular, regulation 5.

17. In the premises, the Minister's consideration of the ARRs authored by PASA amounts to a material non-compliance with a procedural requirement and his decision consequently falls to be set aside in terms of section 6(2)(*b*) of NEMA.

18. Moreover, the Minister was provided with no information supporting the DG's decision because the only input received and considered was from PASA and not from the competent authority. This itself renders the decision on appeal fatally flawed for the failure to take into account relevant considerations. While Regulation 5 provides that a decision maker must submit its responding statement, if any, as part of the appeal process, it is difficult to see how the Minister could rationally take a decision on appeal without having insight into the reasons for the decision taken by the DG.

FAILURE TO CONSIDER OVERALL CONSEQUENCES OF THE ACTIVITY

19. The Final EIR did not assess the adverse environmental consequences of the extraction (i.e. production) of oil or gas on the project area. The scope of the assessment was limited to the immediate impact of the five exploration wells that comprise Total's proposed exploration work programme.

20. This narrow frame of assessment meant that a host of relevant impacts and issues were excluded from consideration in the Final EIR and, consequently, the DG and the Minister's decision-making process. These include: the incompatibility of the project (comprising both exploration and production) with relevant policy on climate change; the potential long-term impact of the project on the fishing sector; increased operational risks over the long term; and whether or not the project is necessary and desirable. In this regard, I refer to the expert affidavit of Prof Mark New filed together with this affidavit which make clear that the failure to consider climate change amounts to a failure to take relevant considerations into account.

21. This issue was raised in many of the appeals to the Minister, including that of the applicants. Paragraphs 132 and 133 of the applicants' appeal (annexure FA5) read:

> "A balanced and proper assessment of need and desirability requires considering both the positive and negative impacts of the full chain of oil and gas exploration and production. However, the ESIA fails to consider the negative impacts of long-term oil and gas production, and downstream activities, in fact deliberately avoiding dealing with these aspects in relation to need and desirability. It does not consider how the exploration or production

> activities will not accrue any real benefits to coastal communities, only risk. Instead, it portrays the ostensible benefits of production, midstream and downstream activities, shying away from considering the impacts associated with exploitation."

22. It is relevant to note that objections of this nature had been raised as early as July 2022, in comments on the draft scoping report prepared in terms of part 3 of the EIA Regulations. I attach two examples as **"SFA4.1"**and **"SFA4.2"**.

23. The Minister disposed of all such objections in the appeals process on the basis that the regulatory framework in terms of the MPRDA and NEMA draws a clear distinction between exploration and production and that the production phase impacts will be assessed at a future date. For example, at paragraph 2.7 to 2.9 of the appeal decision (annexure FA6) she states:

> "It is perhaps apt for me to point out at this stage that a number of appellants conflate the scope of the EA granted to the applicant (which is for the drilling of exploration wells in the area of interest) with activities of extraction for purposes of production and consumption. I deem it necessary to point out that to undertake exploration, an applicant requires an exploration right under the MPRDA and an environmental authorisation in terms of listed activity 18 in Listing Notice 2. Production activities require a production right and an environmental authorisation under listed activity 20 in Listing Notice 2. The Listing Notice 2 of the EIA Regulations requires a separate authorisation for these two activities which are regarded as distinct from each other.
>
> It is my view that the applicant is only required to assess the potential impact and mitigation measures in respect of the activity for which it has sought an authorisation, namely listed activity 18. It need not assess the potential impact and mitigation measures in respect of an activity for which it has not sought an authorisation, even though it may one day seek to do so, namely listed activity 20.

> Of course, if the applicant discovers gas resources while exploring, and in sufficient quantities to persuade it that extraction of that gas is a viable option, then, before it can extract and produce – which are activities that will trigger listed activity 20 – it will need to apply for an environmental authorisation to do so."

24. I am advised that this stance is incorrect in law and that it was impermissible for Total and the competent authority to completely disregard the impacts of the intended exploitation of oil and/or gas on the project area. Exploration and production are two parts of one project with a single goal and a predictable trajectory. Exploration is not an end in and of itself, its sole purpose is to enable the exploitation of gas or oil. Accordingly, the question whether a petroleum project is needed and desirable (the fundamental inquiry in terms of NEMA and the EIA Regulations) can only be answered by reference to the costs and benefits of the proposal across its full life cycle. This is a legal issue which will be addressed further in argument.

Relevant project impacts not assessed

25. Because the environmental assessment process was premised on the fiction that the project consists of nothing more than the drilling of five exploration wells, the Final EIR did not give any meaningful consideration to the biophysical impacts of production activities on the project area or the broader implications of enabling the extraction and combustion of significant quantities of fossil fuels.

GHG emissions

26. The GHG emissions that will result from the production phase are one of its major potential impacts.

27. As I explain at paragraphs 70 and 74 of the founding affidavit, the Government has made a binding commitment in terms of the Paris Agreement to ensure that GHG emissions peak between 2020 and 2025, within a range of 398 to 510 Mt CO_2e, and thereafter decline.

28. Parties to the Paris Agreement must update their NDCs (i.e. emissions reduction commitments) on a five-yearly basis and each successive NDC must be a "progression beyond" the earlier one (i.e. must entail a greater reduction of GHG emissions). This is in terms of article 4.3 of the Paris Agreement.

29. The objective of the process set up under the Paris Agreement is to achieve net zero annual GHG emissions by 2050 in order to stave off the run-away climate change that is projected if global warming exceeds 1.5°C above pre-industrial levels.

30. The following passage in the SA-LED document places this undertaking in context:

> "The latest National Greenhouse Gas Inventory Report (2015) shows that South Africa's total gross GHG emissions (excluding forestry and other land use) increased by 23% from 439 Mt CO2-eq in 2000 to 541 Mt CO2- eq in 2015 (DEA, 2019a). Forestry and land use are a CO2 sink and reduced gross emissions by 5% in 2015. South Africa's net GHG emissions are 512 Mt CO2-eq.

> <u>The Energy sector accounted for 79.5% of the total gross emissions for South Africa in 2015 (Figure 3),</u> with the percentage contribution of this sector to overall emissions growing by 25% between 2000 and 2015. Energy industries (which includes electricity generation and liquid fuels production from both crude oil and coal) were the main contributor, accounting for 60.4% of emissions from the energy sector and almost half of gross emissions. This was followed by transport, other sectors, and manufacturing industries and construction. Fugitive emissions from fuels contributed another 5% to overall emissions in 2015. Agriculture, Industrial Processes and Product Use and Waste contributed 9.0%, 7.7% and 3.6% to gross national GHG emissions in 2015 respectively." (my emphasis).

31. Of relevance is the fact that gas (if this is what is ultimately discovered on the project area) is particularly impactful from the perspective of GHG emissions due to fugitive emissions of methane. I refer in this regard to the expert affidavit of Mr. Mark New, filed together with this one. At paragraph 15 of Mr. New's affidavit it is stated:

> "Methane (from fugitive emissions and other sources such as agriculture) is a powerful GHG. Although it breaks down in the atmosphere faster than CO2, its warming impact is more than 80 times greater than that of CO2 when measured over a 20 year period, and 27.9 times greater when measured over a 100 year period."

32. If the Government does not make a concerted effort now to facilitate the attainment of its NDC commitment, it is going to be increasingly constrained in its future management of the economy and, in particular, the energy sector.

33. This goes to the fundamental inquiry that must be undertaken by the competent authority in determining whether petroleum development should proceed within the project area – do the benefits of the project proposal outweigh the socio-economic and environmental costs? If it does not, then there can be no justification for the environmental and social risks that arise from it.

34. It requires a full and systematic assessment by the environmental assessment practitioner ("EAP") and by the decision-makers. This would entail a projection of the GHG emissions that are likely to result from the production of oil or gas on the project area and a pertinent inquiry by the decision-makers as to whether the project proposal can still, notwithstanding the projected GHG emissions, be regarded as the best practicable environmental option for the affected environment and the finite "carbon space" that South Africa has available if it is to make a fair contribution to implementing the Paris Agreement.

35. Total says that such an exercise would not have been possible at this stage because the extent of the petroleum resource within the project area is not yet known, but this justification does not bear scrutiny.

36. The economics of offshore gas development are determined in the main by two considerations: (a) the capital costs of the development of the production facilities and transport facilities (pipelines etc.) and (b) the volumes of gas that can be produced. The capital costs increase as water depth increases, distance from the shore increases and ocean conditions become more severe. A production operation in deep water, far from shore would be commercially feasible only if there is a large proven reserve and annual production volume. In this regard, I refer to the expert evidence in the affidavit of Mr. Hilton Trollip, which will be filed simultaneously with this affidavit.

37. Mr. Trollip estimates that to be marginally economic, petroleum development within the project area would require a minimum gas resource of about 1000 to 1500 petajoules, produced over 10 to 15 years.

38. Instead of undertaking the exercise engaged by Mr. Trollip, the Final EIR conducts an unbalanced assessment which addresses gas exploration on the project area without reference to specific facts and details. This assessment (predictably) leads the EAP to the conclusion that exploration for gas would be desirable because it is promoted by the South African energy policy framework. In this regard it is stated in the summary of the need and desirability assessment in the executive summary of the Final EIR:

> "Notwithstanding the above, natural gas is included in the energy mix of the country to serve as a transition or bridge on the path to carbon-neutrality from 2050 onwards (as per the Paris Agreement) and provide the flexibility required to complement renewable energy sources (as per the IRP 2019)."

39. This is a key assumption underpinning the reasoning as regards the need and desirability of the project in the Final EIR. If it is analysed in the light of the quantity of the petroleum resource that would need to exist within the project area in order for production to proceed, it turns out to be completely incorrect.

40. The types of new generating capacity that is brought online by the responsible organs of State is determined by the energy minister in terms of section 34 of the Electricity Regulation Act. The integrated resource plan is a planning instrument provided for by the Electricity Regulation Act to guide such determinations and to direct how new generating capacity must be added to the electricity system. The current iteration of the integrated resource plan is the Integrated Resource Plan 2019 (**"the IRP 2019"**).

41. The IRP 2019, can be regarded as the principal policy instrument for energy planning in South Africa and the definitive statement of policy on what is "desirable" in terms of electricity generating capacity and associated fuels.

42. The structure and methodology of the IRP 2019 and the role for gas is addressed in the affidavit of Mr. Trollip. Mr. Trollip is an energy systems expert with some 40 years of experience spanning international, national and local economic, energy, and industrial systems, including emissions mitigation in so far as it relates to technology, techno economic, management, institutional, regulatory, policy and legal analysis, design, innovation, development and implementation in a wide variety of settings.

43. My submissions below are based on Mr. Trollip's evidence.

44. The IRP 2019, is a plan indicating the optimal combination of fuels/technologies to meet forecasted electricity demand for the next 10 years. It is the product of a model built to calculate the "least cost" mix of generation options, adjusted to account for technical and policy considerations and "real world" conditions that cannot be easily or transparently incorporated into the model. It is widely consulted upon and reflects input from Government, research institutions and civil society.

45. The IRP 2019, envisages the addition of a relatively significant amount of new generating capacity from gas and diesel (relative to historical usage) between now and 2020. It calls for the addition of 1000 megawatts (**"MW"**) in 2024 and 2000 megawatts in 2027. Taken with existing installed capacity, the total

installed capacity for gas and diesel in 2030, per the IRP 2019, will be 6380 MW. This translates to 8.1% of the total system capacity. The <u>actual energy contribution</u> of gas and diesel to the system (i.e. the electricity produced annually) is lower, at 1.3%. The difference between the proportion of system capacity attributed to gas and diesel and its actual energy contribution is a function of the "average load factor". The average load factor refers to how frequently the system makes use of the capacity in question. An average load factor of 12% has been allocated to gas and diesel.

46. Based on these conditions, Mr. Trollip has calculated that the new generating capacity envisaged by the IRP 2019, represents demand for gas of approximately 6 petajoules per annum from 2024 and thereafter 19 petajoules per annum from 2027.

47. Proceeding from these figures, it is clear that if a gas resource is developed within the project area, it will exceed by a very substantial margin the gas utilisation envisaged by the IRP 2019. In this regard, it is relevant to note that similar exploration projects are proposed across the entirety of South Africa's offshore territory. I attach hereto as **"SFA5"** a map maintained by PASA confirming this.

48. It should be noted that a draft update to the IRP was published in 2023 (**"the IRP 2023"**). This plan envisages the addition of between 4000 and 6200 megawatts of generating capacity for gas, which would obviously increase the total gas utilisation. This plan is however the subject of controversy, and the current Minister of Electricity and Energy announced in July 2024, that it would

be fundamentally revised to include an additional 7000 MW of renewable energy. I attach hereto as **"SFA6"** a news article reporting on the Minister's address.

49. As a general matter, whatever the nature of the resource discovered on the project area, if it is commercially produced, the opportunities for use in the South African energy market specifically will be increasingly limited in light of legislative and policy measures adopted to give effect to South Africa's international obligations regarding GHG emissions.

50. For example, section 6 of the National Energy Act, 34 of 2008 contemplates the publication of an "integrated energy plan" by the minister responsible for energy dealing with "supply, transformation, transport, storage of and demand for energy". This plan defines the broader context in which the IRP is developed and adopted and addresses energy supply in South Africa beyond the electricity sector. The integrated energy plan is required among other things to take account of South Africa's international commitments (section 6(2)(h)) and plans adopted in relation to GHG emissions (section 6(3)(a)). In terms of section 6(6), the integrated energy plan will serve as a guide for infrastructure investments. Section 6 was only recently brought into operation in April 2024.

51. A further impact of developing gas resources that might well be excess to requirements is that these developments may in the long term become what are referred to as "stranded assets".

52. Apart from South Africa's demand for gas, there is reason to believe that worldwide gas demand will go into decline over the next 25 years due to global efforts to achieve net zero carbon emissions by 2050. A recent report by the International Energy Agency entitled *Net Zero by 2050: A Roadmap for the Global Energy Sector* states that reaching net zero by 2050 "requires nothing short of a total transformation of the energy systems that underpin the economies of the world" (pg 3). A copy of this report is attached marked **"SFA7"**. Moreover, the developed world is in the process of adopting carbon border adjustment mechanisms (effectively tariffs) to induce trading partners to implement decreases in fossil fuel consumption. The European Union is in the final stages of enacting this measure. I attach hereto as **"SFA8"** a copy of a press report in this connection.

53. As a matter of scientific fact, the total proven oil and gas reserves globally exceed by some margin what it would be possible to combust while still implementing the global emissions reductions necessary to limit the increase of global average temperatures to no more than 1.5°C above pre-industrial levels. I will file together with this affidavit an affidavit by Professor Mark New substantiating this statement.

54. Total has recently conducted an environmental impact assessment in respect of production operations on Block 11B/12B, which is situated approximately 120 kilometres offshore of Mossel Bay. A summary of the project activities and components is set out in a document entitled *Draft Environmental and Social*

Impact Assessment Report – Non-technical Summary (**"the 11B/12B ESIA"**). A copy of this document is attached marked **"SFA9"**.

55. The ESIA report for this block is still to be finalised. TEEPSA was recently granted a further extension to submit its final EIA report until 19 May 2025.

56. As a matter of logic, one can extrapolate from the operation on Block 11B/12B and arrive at some approximation of the infrastructure and activities that would be implemented on the project area.

57. A description of the essential elements of the production activities is given on page 6 of the 11B/12B ESIA. It reads:

> "With reference to Figure 2-1, the development of Block 11B/12B will involve the following activities within the Project Development Area and the Project Pipeline Corridor:
>
> Drilling of five production wells, with the option of drilling a sixth well.
>
> The construction of subsea infrastructure to connect the wells.
>
> The installation of a pipeline, approximately 100 km long, to carry both gas and condensates from the wells to the existing F-A Platform.
>
> Gas and condensate will be processed at the F-A Platform.

58. As a matter of logic, it is possible to reason that the long-term operation of the activities described above would increase the magnitude of the impacts identified and assessed in the Final EIR.

59. Section 7.1 of the 11B/12B ESIA (on page 10), deals with the impacts of "normal operations". The following appears under this section:

> "Of these, the most significant negative impacts are:
>
> • The impact of drill cuttings discharges on the marine environment.
>
> • The potential impact of introducing alien invasive marine species due to discharges of ballast water from the drill rig and vessels.
>
> • Direct loss of benthic habitat where wells and subsea infrastructure are placed and along the production pipeline route, with a consequent reduction in fish catch and subsequent impact on livelihood of fishers.
>
> • The impact on squid fishery, small-scale fishers and large pelagic fishery as a result of maritime safety zones.
>
> • Impact on various aspects which make up people's intangible cultural heritage, which include ancestry / spirituality and sense of place.
>
> • The contribution of the Project to greenhouse gasses and climate.
>
> • The potential impact on health, safety and security resulting from Project workers spending leisure time in local communities and impacts on air quality as a result of emissions from support and supply vessels."

60. Section 7.2 (on page 11) deals with unplanned events. The following appears under this section:

> "Unplanned events or accidents that could have the greatest environmental impact is a major spill of hydrocarbons from a subsea well blowout, or a rupture of the production pipeline. The cause of a well blowout is due to failure of pressure control systems which causes the uncontrolled release of hydrocarbons from a well.
>
> Although the probability of a well blowout occurring is extremely low; a blowout or pipeline rupture has the potential to affect various marine ecological receptors,

including phytoplankton, zooplankton and microbes; benthic fauna; fish; seabirds; turtles and large marine mammals. If the spill were to reach the coastline the coastal environment as well as fishery and mariculture activities would be impacted.

In addition, these impacts would have knock-on effects on other receptors and aspects, including tourism, community livelihoods, human rights and intangible cultural heritage. However, the full impact of the unplanned event will depend on the duration of the spill and the ocean and weather conditions at the time of year that will determine the direction and size of the plume and whether the condensate or oil reaches the coastline.

Other unplanned events that would also have impacts include accidental spills during refuelling vessels at sea and vessel on-vessel collision."

61. On this basis, even without expert assessment, it is possible to conclude as a matter of logic that the effect of production activities on the project area would be to amplify (in terms of both geographical extent and duration) the major impacts associated with Total's exploration activities, specifically the risk of a well blow-out and impacts to the surrounding marine environment.

62. In the absence of a proper assessment of these impacts, it is impossible to understand what the consequences would be for affected stakeholders such as, for example, coastal communities who rely on the ocean for their livelihoods, the fishing industry, or on the marine protected areas coinciding with the project area (Brown's Bank and Southeast Atlantic Seamounts).

63. I note that the major environmental consequence of the exploration activities – the effects of a well-blowout – was deemed acceptable in the Final EIR principally on the basis that the chances of such an event were vanishingly

small. The effects of such a scenario were nonetheless acknowledged to be catastrophic.

64. What has not been considered is how the magnitude of this risk and associated impact will increase as a result of the expanded scope and duration of the project – i.e. additional wells and pipelines operated of a period of up to 30 years.

65. Over and above this, the risk is likely to increase with the changing climate over the lifespan of the project. This point as made and substantiated at paragraphs 53 to 58 of the applicants' appeal as follows:

> "53. As the surface ocean warms from anthropogenic climate change, increasingly turbulent and hurricane-prone metocean conditions are amplifying the risk of offshore drilling accidents and spills in the Gulf of Mexico. So too in the Cape Cauldron/Agulhas Retroflection area of the Block, metocean conditions are shifting and becoming more extreme and less predictable with rapidly ocean warming.
>
> 54. The Block is already situated in a turbulent and energetic metocean regime and at its baseline is a particularly dangerous place for ultra-deep and deep offshore drilling activities. But as climate change causes storms to become more intense and frequent, and waves to become stronger and higher (particularly in the Block), the risk of accidents and spills increases, as does the ability to cap them.
>
> 55. The sea surface temperature of the Agulhas Current system has increased significantly since the 1980's. With ocean warming, there has been a documented increase in eddy kinetic energy in the Southeast Atlantic associated with more eddies being formed from the turning of the Agulhas Current. This increase in eddy kinetic energy means less predictable metocean conditions and generally stronger systems in the exact location TEEPSA's proposed exploration zone within Block 5/6/7.
>
> 56. Ocean waves are becoming increasingly high and powerful with upper-ocean warming. The ESIA states that "[m]ost of the South-West Coast is classified as exposed, experiencing strong wave action."[38] However, the ESIA does not cite recent

data and analyses that indicate wave action and winds are increasingly strong in the South-West Coast as the surface ocean warms due to climate change. A recent analysis of global satellite data looked at trends in oceanic wind speed and significant wave height over the 33-year period from 1985 to 2018. This study identifies the Agulhas region as one of the places in the world's oceans that shows a statistically substantial increase in mean significant wave height.

57. Recent research shows that the transfer of energy from wind into sea-surface motion has increased globally (0.4% per year globally) across all ocean basins since 1948. But the SW coast of South Africa is a hotspot for wave energy increases – there, wave power annual increase is between 2-2.5 % per year, nearing the highest increase in the world oceans.

THE BLOW-OUT AND OIL SPILL CONTINGENCY PLAN

66. The fifth ground of review in the founding affidavit concerns *inter alia* the reliance the decision-makers placed upon a "blow-out contingency plan" and an "oil spill contingency plan" as material mitigation measures, notwithstanding that they had not yet been prepared.

67. The fact of the notional oil spill contingency plan informed the conclusions of the Oil Spill Modelling Report, which in turn informed the assessment of the potential impact of an oil spill with respect to both marine ecology and the impact on the fishing sector. For example, it is recorded on page 33 of the Final EIR:

> "A Marine Ecology Impact Assessment has been undertaken, which addresses potential impacts on all coastal and marine ecosystems and species. This includes the assessment of impacts of drill cuttings discharge and a large oil spill based on modelling results. Site sensitivity is confirmed in this specialist study."

68. A copy of the Oil Spill Modelling Report, which was Appendix 7 to the Final EIR is attached marked **"SFA10"**. It is recorded at page 41:

> "The spill response strategies (including associated operation start and end times) listed below were applied to the study scenarios. These assumptions are based on the Oil Spill Contingency Plan (OSCP) prepared for Block 11B/12B in 2020 and adjusted for the project area location. These assumptions have been validated by the affiliate (TEPSA) and TotalEnergies antipollution specialist. <u>Since no OSCP has been compiled for Block 5/6/7, these are only assumptions that may change when the OSCP is finalised."</u>

69. Notwithstanding the fundamental importance of the oil spill contingency in the assessment of impact, the DG and the Minister were satisfied to proceed without any firm information as to its contents.

70. One of the key aspects of the oil spill contingency plan is the deployment and installation of a capping stack. It is explained at page 126 of the Final EIR that:

> "The capping stack would only be deployed in a situation where the BOP has failed to serve its purpose and a blow-out has occurred. It is a piece of equipment that is placed over the blown-out well as a "cap." Its purpose is to stop or redirect the flow of hydrocarbons and to buy time for engineers to permanently seal the well. It weighs as much as 100 tonnes and requires co-ordinated logistical planning and execution in quickly transporting it to the emergency location."

71. According to the Final EIR (at page 125), Totalhas access to capping stacks with varying specifications in different parts of the world, including Saldanha, Aberdeen, West Africa and Singapore:

> TEEPSA has contract agreements with global response companies to use globally advanced capping stacks in the event of a well blow-out. One contract is held with Oil Spill Response Limited (OSRL), which has a capping stack based in Saldanha Bay and another with Wild Well Contain (WWC), which has a capping stack based in Aberdeen.

> TotalEnergies also has a capping stack (10 K27) in West Africa (Gulf of Guinea). Capping stacks are designed to shut-in an uncontrolled subsea well in the unlikely event of a blow-out. OSRL has a 10 K capping stack housed at its Saldanha Bay Base (see Figure 6-13), while WCC has 15 K capping stacks housed in the UK (Aberdeen) and Singapore. These are available for global mobilisation and transportation by sea and/or air in the event of an incident."

72. Without going into the logistics, the Final EIR concludes that it is "a reasonable and realistic assumption" that a capping stack could be installed within 20 days.

73. Notably, the Oil Spill Modelling Report (at page 42) assumes the availability of a capping stack in Namibia and makes no mention of Saldanha, Aberdeen, West Africa or Singapore.

74. Given the materiality of the oil spill contingency plan and the assumptions as to its efficacy by the decision-makers, one would have expected the competent authority and the Minister to take steps to resolve the uncertainties as to feasibility and logistics involved in mobilising and install a capping stack within 20 days. The rule 53 record reveals that no such steps were taken and that the Minister did not take the opportunity to refer these matters to an expert panel in terms of regulation 6 of the National Appeal Regulations.

75. I respectfully submit that this deficit reinforces the grounds of review dealt with in my founding affidavit, in particular that the decisions were not rationally connected to the information before the decision-makers and that they failed to take account of relevant considerations.

CONCLUSION

76. In the premises I submit that the applicants have made out a case for the review and setting aside of the decisions under review in terms of section 6 of PAJA.

ELIZABETH JANE MCDAID

I hereby certify that the deponent has declared that she knows and understands the contents of this Affidavit and that to the best of her knowledge and belief it is the truth, which Affidavit has been signed to and affirmed to before me at Claremont on this the 10 day of October 2024.

COMMISSIONER OF OATHS

SUID-AFRIKAANSE POLISIEDIENS
LOGISTIEK
2024 -10- 10
VEHICLE FLEET
CLAREMONT K.P. / C.P.
SOUTH AFRICAN POLICE SERVICE

"SFA1" 9151

Azalia Van Schalkwyk

From:	Fiona Grimett
Sent:	Tuesday, 16 May 2023 21:28
To:	'mnyakas@petroleumagencysa.com'
Cc:	'EAappeals@petroleumagencysa.com'; 'Pieter.Alberts@dmre.gov.za'; Mamikie Semenya; Heloise Van Schalkwyk
Subject:	Consolidated ARR | TotalEnergies EP South Africa Block 567 (Pty) Ltd | TEEPSA 12-3-224
Attachments:	Consolidated Appeals Response Report_TEEPSA Block 567.docx; List of appeals received.docx

Dear Sinazo,

Please see attached a consolidated Appeal Response Report (ARR), and the list of appeals, for the 17 Appeals lodged against the granting of an environmental authorisation to TotalEnergies EP South Africa Block 567 (Pty) Ltd (the applicant) for the Proposed Offshore Exploration Well Drilling in Block 5/6/7, South-West Coast, South Africa (DMRE REF: TEEPSA 12/3/224), as promised in my telephone conversation with Phumla (PASA).

Phumla, as per our discussion, please take note of the following, should the competent authority wish to apply for condonation for the late filing of their responding statement in terms of section 47C and 47CB (1) & (3) of NEMA (see extract of the relevant section provided below).

The responding statement may be submitted together with a request for condonation for the late filing thereof. There is no formal application form; the condonation application can be submitted in the form of a letter / email. The application must state:

1) the reasons for the late filing of the DMRE's responding statement; and
2) how many days it was late by.

Section 47C and 47CB (1) & (3) provides as follows:
Section 47C of NEMA provides 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 that binds the Minister or MEC".*

Section 47CB of NEMA deals with the extension or condonation of time periods applicable to appeals relating to prospecting, exploration, mining or production, provides as follows:
*"**(1)** The Minister may only in exceptional circumstances extend or condone a failure by a person to comply with a time period applicable to an appeal contemplated in section 43(1A), except for a time period which binds the Minister;*
(2)..........;
***(3)** When considering an extension or condonation the Minister must consider the following factors:*
(a) The degree of lateness;
(b) a detailed explanation of the reasons for lateness;
(c) whether and to what extent that person or the Minister responsible for mineral resources will suffer prejudice if the time period is extended or failure to comply with a time period is condoned; and
(d) a detailed explanation of the merits of the application for extension or condonation".

Regards,

Ms Fiona Grimett
Control Environmental Officer: Appeals and Legal Review
Department of Forestry, Fisheries and the Environment
Environment House

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DMRE Reference: TEEPSA 12/3/224

DECISION PERTAINING TO THE REQUEST FOR CONDONATION

REQUEST FOR CONDONATION FOR THE LATE FILING OF A RESPONDING STATEMENT IN RESPECT OF THE APPEAL LODGED AGAINST THE DECISION OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY TO ISSUE AN ENVIROMENTAL AUTHORISATION TO TOTALENERGIES EP SOUTH AFRICA BLOCK 567 (PTY) LTD FOR ACTIVITIES RELATED TO THE PROPOSED OFFSHORE EXPLORATION WELL DRILLING IN BLOCK 5/6/7 OFF THE SOUTH-WEST COAST OF SOUTH AFRICA

1. INTRODUCTION

1.1 This is a request for condonation for the late filing of a responding statement, submitted by the Chief Operating Officer of the Petroleum Agency South Africa (PASA), in respect of the appeals lodged by Patrick Bond, Danne Joubert, Angila Joubert, Oceans not Oil, the South Durban Community Environmental Alliance (SDCEA), Rescue Vleesbaai Action Group (REVAG), Dr Jacqueline Sunde, Lisa Cloete, the Wildlife Animal Protection Forum South Africa (WAPFSA), Michele Rivarola, the EMS Foundation (South Africa) and the Climate Justice Charter Movement, the Hermanus Business Chamber, the Marine Dynamics Conservation Trust, the Green Connection and Natural Justice, the Department of Environmental Affairs and Development Planning (DEA&DP), the West Coast Indigenous Council (WCIC), the West Coast Guriqua Council (WCGC) and Aukotowa Fisheries Primary Co-Operative Ltd (the appellants).

1.2 The above appeals were lodged against the decision of the Director General: Department of Mineral Resources and Energy (DMRE), to grant an Environmental Authorisation (EA) to the applicant on

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17 April 2023, for listed activities pertaining to the proposed offshore exploration well drilling in Block 5/6/7 off the South-West coast of South Africa.

2. BACKGROUND AND THE REQUEST FOR CONDONATION

2.1 On 17 April 2023, the DMRE (together with PASA) granted an EA to the applicant, for listed activities pertaining to the proposed offshore exploration well drilling in Block 5/6/7 at the abovementioned location. The EA was granted in terms of the Environmental Impact Assessment Regulations, 2014, as amended (2014 EIA Regulations), published under the National Environmental Management Act, 1998 (Act No. 107 of 1998), as amended (NEMA).

2.2 On 20 April 2023, registered interested and affected parties (I&APs) were notified of the EA decision, provided with a copy thereof and advised of the right to appeal, as required by regulation 4(2) of the 2014 EIA Regulations. This regulation provides that:

"*(2) The applicant must, in writing, within 14 days of the date of the decision on the application ensure that-*

(a) all registered interested and affected parties are provided with access to the decision and the reasons for such decision; and

(b) the attention of all registered interested and affected parties is drawn to the fact that an appeal may be lodged against the decision in terms of the National Appeal Regulations if such appeal is available in the circumstances of the decision."

2.3 During the period of 25 April 2023 to 12 May 2023, the Directorate: Appeals and Legal Review (Appeals Directorate) within the Department of Forestry, Fisheries and the Environment (the Department), received appeals from the abovementioned appellants. The appeals were lodged timeously in terms of section 43(1A) of NEMA, read together with regulation 4 of the National Appeal Regulations, 2014 (2014 Appeal Regulations).

2.4 Considering the provisions of regulation 5 of the 2014 Appeal Regulations, responding statements on the appeals were due during the period of 17 May 2023 to 5 June 2023. Regulation 5 provides that "*the applicant, the decision-maker, interested and affected parties and organ of state must submit their* *responding statement, if any, to the appeal authority and the appellant* ***within 20 days from the date of receipt of the appeal submission.***"

2.5 In addition, regulation 1(3) states that "*Where a prescribed timeframe is affected by one or more public holidays, the timeframe must be extended by the number of public holiday days falling within that timeframe.*"

2.6 On 15 June 2023, the Appeals Directorate received out-of-time responding statements on the appeals from the PASA, accompanied by a request for condonation of the late filing thereof.

2.7 In motivating their request, the PASA submits that they could not file the responses on time due to capacity challenges. For this reason, the PASA requests that the late filing of the responding statements be condoned.

2.8 On 29 June 2023, the applicant and the appellants were furnished with a copy of the condonation request for their responses thereto. On 03 July 2023, the applicant indicated that they do not object to the request.

2.9 On 30 June 2023 and 06 July 2023 respectively, the Hermanus Business Chamber and Cullinan and Associates (on behalf of the EMS Foundation (South Africa) and the Climate Justice Charter Movement) indicated that they do not object to the request.

2.10 On 29 June 2023, Mr Michele Rivarola objected to the request and on 04 July 2023, the DEA&DP and the Aukotowa Fisheries Primary Co-Operative Ltd objected to the request for condonation. The responses were received from the remaining appellants.

2.11 In his objection, Mr Michele Rivarola stated that the PASA's request for condonation ought to have been submitted before the response due date (not one week after the due date), and the appellants informed of such request within a day or two at most. He states that PASA and the Appeals Directorate are acting contrary to PAJA and that no number of condonations and extensions will make up for PASA's lack of competence in being able to adjudge objections or evaluate counter arguments to the EIA, on the basis of which PASA granted the exploration well drilling licence.

2.12 It is respectfully submitted that, as per sections 47C and 47CB of NEMA, an application for the condonation of a late responding statement is to be utilised where the responding party fails to file the responses to the appeal on time. An application for condonation is therefore submitted after the due date for responses and generally accompanies the responding statement(s), whereas an application for an extension of the timeframe to file responses to an appeal is to be submitted before the due date for responding statements. The DMRE's submission of the condonation application one week after the due date therefore falls within the parameters of a condonation application submitted in terms of section 47C and 47CB of NEMA. Moreover, the appellants were afforded an opportunity to submit their comments and objections to the condonation request, for consideration by the Appeals Directorate, irrespective of the date on when they received PASA's request. In addition, the "evaluation of the counter arguments to the EIA" relates to the merits of the appeal, which can be addressed in the appeal decision.

3. LEGISLATIVE FRAMEWORK GOVERNING THE REQUEST FOR CONDONATION

3.1 In terms of sections 47C and 47CB of NEMA, the Minister responsible for the Department has the legal authority, subject to explicit limits, to grant an extension or condonation for the submission of an appeal or responding statement which is out of time. The powers and duties enshrined in these sections have been delegated to the Director of the Appeals Directorate.

3.2 Section 47C of NEMA provides as follows:

"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 that binds the Minister or MEC".

3.3 Section 47CB of NEMA deals with the extension or condonation of time periods applicable to appeals relating to prospecting, exploration, mining or production. This section provides as follows:

(1) *"The Minister may only in exceptional circumstances extend or condone a failure by a person to comply with a time period applicable to an appeal contemplated in section 43(1A), except for a time period which binds the Minister.*

(2) ......

(3) When considering an extension or condonation the Minister must consider the following factors:

(a) The degree of lateness;

(b) a detailed explanation of the reasons for the lateness;

(c) whether and to what extent that person or the Minister responsible for mineral resources will suffer prejudice if the time period is extended or failure to comply with a time period is condoned; and

(d) a detailed explanation of the merits of the application for extension or condonation.

*(4) **The time period may only be condoned for a maximum period equal to the time period allowed for the action for which condonation is sought in terms of this Act**."*

4. DECISION

4.1 In arriving at my decision on the request for condonation of the late filing of the responding statements, it should be noted that I have not responded to each, and every statement set out by the parties in this matter, and where a particular statement is not directly addressed, the absence of any response thereto should not be interpreted to mean that I agree with or abide by the statement made.

4.2 Having duly considered the reasons advanced by the PASA in their condonation request, as well as responses thereto by the appellants and the applicant, I am of the view that it would not be in the interest of justice to refuse condonation in this matter. My reasons are as follows:

4.2.1 Mining and related appeals are generally complex, and it would therefore be in the interest of the Minister to receive suitable responses on the appeal prior to making a determination thereof. For this reason, I am reluctant to refuse condonation to file responses that might provide assistance on complex issues during the adjudication of the appeal, especially in circumstances where PASA is the only party to provide relevant responses in respect thereof.

4.2.2 Despite the appellants' objection to the request, they did not cite any prejudice that might be suffered as a result of condoning the late filing of the responding statement. However, DMRE may suffer prejudice if their responses on the appeal are not considered.

4.3 In light of the aforegoing, the PASA's request for condonation for the late filing of responding statement is granted. Having condoned the late filing of responding statement, the appeal administrator will proceed to make recommendations on the appeal within thirty (30) days from the date of signature hereof.

Heloise Van Schalkwyk

Director: Appeals and Legal Review

Date: 15 September 2023