

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**

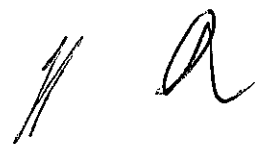
Fourth Respondent

REPLYING AFFIDAVIT

I, the undersigned

ELIZABETH JANE McDAID

do hereby make oath and say as follows:



1. I am the strategic lead and board member of The Green Connection. I deposed to the Applicants' founding affidavit, and supplementary 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 that Natural Justice supports and associates itself with the contents of this replying affidavit, will be filed together with this affidavit.
3. I have read the answering affidavits and confirmatory affidavits filed by the respondents and make this affidavit in reply thereto.
4. The facts set out below are true and correct and, unless the context indicates to the contrary, fall within my personal knowledge.
5. Where I make legal submissions, I do so on the advice of the Applicants' legal representatives, which advice I accept to be correct.

INTRODUCTION

6. This affidavit is in response to the answering affidavits filed by Total (the "**Total AA**") and the first and second respondents ("**the State AA**"). I note that a draft of the State AA was provided to the parties on 13 January 2025 and signed versions were only provided on 12 February 2025.



7. The body of this affidavit is composed of a response to the principal defences raised by the respondents in respect of each of the review grounds.
8. Thereafter, I provide an *ad seriatim* response to certain allegations made in the answering affidavits.
9. Total contends that the Applicants' affidavit is flawed on the grounds that it conflates considerations relevant to production operations with those relevant to exploration operations. This is incorrect as a matter of fact and law. Assessing the need and desirability of the proposed exploration activities, of necessity, requires some consideration of the production phase of the project.
10. To determine whether exploration for and extraction of gas within the project area (this being the appropriate scope of this assessment) is a desirable proposal, one must have regard *inter alia* to the foreseeable environmental costs and risks associated with the production phase.
11. To be clear, the contention is not that this entails the prediction and investigation of all production impacts, but rather an accounting for the fact of, and general nature of, these impacts.
12. This was not done because Total states that it is impossible to anticipate the form, nature and extent of a production operation. But this is not so. In fact, the Applicants refer to "*Draft Environmental and Social Impact Assessment Report – Non-technical Summary*" relating to Total's production operation on offshore Block 11B/12B in the Southern Cape as an example.



13. Total contends that the Applicants' allegations in connection with this document are (a) misplaced, because Total was not obliged to assess production impacts for the current proposed exploration activities; and (b) of limited relevance, because of the specificities of the production operation on Block 11B/12B, namely, the type of resource (gas and condensate), the specific development plan, the type of marine environment and metocean conditions, and the development scope.
14. The Applicants referred to the document in issue to illustrate that there are predictable characteristics of a production operation with respect to infrastructure and the manner in which it is conducted (SFA, para 56).
15. While there will undoubtedly be variation across different types and scales of operation, there are certain enduring constants – i.e. the establishment of infrastructure, the drilling of wells, the necessity of transporting the resource, and the fact that these are long-term operations. Total has not denied this contention.
16. Thus, the point is made in the founding affidavit that the predictable effect of a long-term production operation would be to amplify the magnitude of the impacts already identified in connection with the proposed exploration activities – such as drilling discharges, loss of benthic habitat, and risk of a well blow-out. Total has likewise not denied these allegations.



17. On this basis, it is contended that the effect of these impacts on stakeholders such as coastal communities and the fishing industry should have been considered for purposes of the need and desirability inquiry.
18. The Applicants accept that a production operation conducted within the project area would not take the precise form of the operation within Block 11B/12B. The contention is that the fact of this operation illustrates that Total is in a position to predict key aspects of a production operation, which go to environmental risks and costs, namely the drilling of wells, establishment of associated infrastructure and the maintenance of these operations over a long period of time.
19. It is therefore not correct to artificially separate production and exploration where considerations relevant to both phases must be taken into account.

I now turn to the review grounds and the respondents' answer to each of the grounds.

1ST REVIEW GROUND: SOCIO ECONOMIC IMPACTS

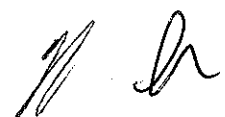
20. The crux of the Applicant's first review ground is as follows. The Final EIR identified the impact of a well blow-out on marine ecology as a potentially significant impact. Therefore, Total was required to assess the nature, significance, consequences, extent, and duration of that impact as well as the probability of it occurring. Total failed to meet this requirement because the Final EIR:



- 20.1. does not assess the effect of the impacts of a well blow out on local communities or fisheries; and
- 20.2. the only attempt at quantifying the consequences of these impacts is an assumption of a 10% drop in the value of fisheries for three years.

Total's response

- 21. Total's response to this is that:
 - 21.1. the 10% figure is not an assumption but rather an "indicator" to provide an idea of the magnitudes involved; and
 - 21.2. Prof Leiman's report indicates that the impacts would be far lower since the only major fisheries likely to experience serious impacts produce little output, most notably the West Coast rock lobster and the small pelagic fishery on the West Coast.
- 22. As I understand it, the reference to Prof Leiman's report is a reference to the SEI Report.
- 23. It appears that Total's attempt to show that the 10% figure is significantly higher than the likely impact is based on the following:
 - 23.1. The Oil Spill Modelling indicates that the main area of concern lies between Cape Agulhas and St Helena Bay (Total AA para. 57).



- 23.2. The most economically important fisheries in this area are the hake demersal trawl and longline vessel fisheries, but, it is alleged, these are not likely to be markedly impacted (Total AA para. 58.1).
- 23.3. The only fisheries likely to experience serious impacts are the West Coast rock lobster and the small pelagic fishery on the West Coast (Total AA para. 65).
24. There are a number of obvious flaws in this analysis:
- 24.1. The Fisheries Impact Assessment Report ("**The Fisheries Report**") notes that the impacts of an oil spill could result in the exclusion of fisheries from areas that may be polluted or closed due to contamination (Fisheries Report, Record p. 7347).
- 24.2. The Fisheries Report notes that the small pelagic purse-seine fishery, which Total accepts would be directly affected by an oil spill (Total AA para. 58.2), accounts for 22% of the total value of South Africa's offshore commercial fisheries and 59% of the total catch (Record p. 7242 to 7243).
- 24.3. In respect of the small pelagic purse-seine fishery the Fisheries Report also notes that:
- 24.3.1. This is the largest South African fishery by volume and the second most important in terms of economic value (Record p. 7287).



24.3.2. The wholesale catch value for this sector during 2017 was R 2.164 Billion (Record p. 7267).

24.3.3. The abundance and distribution of small pelagic fish fluctuates but fish are targeted primarily along the South and West Coasts of the Western Cape and the Eastern Cape coast (Record p. 7268).

24.4. The Fisheries Report also notes additional impacts which Total's response ignores, specifically:

24.4.1. A variety of pelagic species are reported to spawn off the Western, Southern and Eastern Agulhas Bank (Record p. 7349).

24.4.2. The inshore area of the Agulhas Bank serves as an important nursery for numerous linefish species (Record p. 7349).

24.4.3. The coastal bays and estuarine environments of the South Coast are critical nursery areas for many of the fish stocks on which various commercial fisheries are based. Any contamination of these areas would result in a mortality of ichthyoplankton and impact on the recruitment of species to the demersal trawl sectors, demersal longline, small pelagic purse-seine, midwater trawl, linefish and squid jig sectors (Record p. 7350).

24.4.4. The area of interest overlaps with the egg and larval drift and return migration of commercially important species (including snoek) and *"In the context of the detrimental effect on ichthyoplankton (spawn products) on recruitment to fisheries, all affected fishing sectors are considered to be vulnerable to unplanned and uncontrolled major events and are rated as HIGH sensitivity"* (Record p. 7350).

24.5. The Fisheries Report records that the West Coast rock lobster is a valuable resource of the South African West Coast and consequently and important income source for West Coast fisherman (Fisheries Report, Record p. 7286).

25. The Fisheries Report describes the impact assessment of oil spills as follows:

Large spills: The extent of the surface oiling could be regional to international. Large scale effects on fishing operations would also be likely to include area closures and exclusion of fisheries from areas that may be polluted or closed to fishing due to contamination of surface waters by oil or the chemicals used for cleaning oil spills. Based on the possible extent of surface oiling (and overlap with major fish spawning and nursery areas, and key fishing areas), the intensity of the impact on most commercial fisheries would be high. Based on the extent of surface oiling of a large scale blow-out, the operations of most commercial fisheries would be affected on a regional scale; viz, demersal trawl, midwater trawl, demersal longline, small pelagic purse-seine, large pelagic longline, tuna pole-line, traditional linefish, west coast rock lobster, south coast rock lobster and squid jig. In addition to these offshore fisheries, nearshore small-scale fishing (beach seine, gillnet, seaweed harvesting, white mussels, oysters, abalone, etc.) as well as aquaculture facilities could be affected by shoreline oil contamination. For crude oil the weathering processes over the short-term (hours to weeks) include evaporation, dispersion, dissolution, photo-oxidation, emulsification and spreading, whereas biodegradation and

sedimentation dominate the weathering processes over the medium- to long-term (weeks to years). Due to the scale (regional to international) extent and medium-term duration (due to impact on recruitment) of the impact, the magnitude of the impact on these sectors is expected to be VERY HIGH. In all cases impacts are partially reversible.

(Record p. 7354) (Emphasis added)

26. Accordingly, Total's contention that the only fisheries likely to experience major impacts currently produce very little output is unsustainable. Total accepts that the small pelagic purse-seine fishery will be directly affected. The Fisheries Report indicates that this accounts for: 22% of the wholesale value of South Africa's commercial fisheries; 59% of the total catch; and catch value of over R 2 billion.
27. Moreover, Total has failed to consider the impacts on small-scale fisheries ("SSFs"), despite acknowledging that "small output" fisheries may be affected. The Fisheries Report references SSFs, yet Total does not engage with the fact that even seemingly low-output fisheries play a crucial role in sustaining coastal communities and livelihoods. The economic vulnerability of SSFs means that any disruption could have devastating consequences for fishers and dependent communities.
28. As such, Total's contention that the 10% indicative amount is clearly higher than the likely impact, is clearly untenable.



29. In any event, given the significance of the fisheries and economic activity involved, an unsubstantiated indicative figure could never be an acceptable assessment of the impacts under investigation.

The State's response

30. The response by the state respondents in relation to the first ground of review is that Total has allocated financial resources to compensate the fisheries sector in the event of a blowout or oil spill (State AA para. 118).
31. That is not a response to the review ground raised by the Applicants. Moreover, it is indicative that the State failed to take relevant considerations into account in coming to its decisions.

2ND REVIEW GROUND: THE FAILURE TO CONSIDER THE ICMA FACTORS AND DISCHARGE THE STATE'S DUTY AS TRUSTEE OF COASTAL PROPERTY

32. The crux of the Applicants' second review ground is that the Final EIR, and the Decision under Review were required to take into account the factors specified by section 63 of the National Environmental Management: Integrated Coastal Management Act 24 of 2008 ("ICMA"). Specifically:

- 32.1. Whether coastal public property will be affected by the activity and, if so, the extent to which the proposed development or activity is consistent with the purpose of establishing and protecting these areas (section 63(1)(c)).



- 32.2. If the activity affects coastal public property, whether it is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations (section 63(1)(h)(i));
- 32.3. Whether the activity would be contrary to "*the interests of the whole community*" (section 63(1)(h)(vii)); and
- 32.4. the objects of ICMA (section 63(1)(k)).

("the ICMA Factors")

Total's response

The Final EIR

- 33. Total contends that the ICMA Factors were in fact considered by the Final EIR and, therefore, by the Director General and the Minister (Total AA para. 86).
- 34. Total provides a tabulated list of what it appears to contend are references to portions of the Final EIR which relate to the subject matter of the ICMA Factors, although it has not explained how any of these factors amount to a proper consideration of the ICMA Factors. This will be addressed further in argument.
- 35. However, even if these references have any relevance to the ICMA Factors, they do not amount to the requisite consideration of the factors.
- 36. In its response regarding the failure to consider the section 63(1)(c) factors, Total provides one such list of references which it describes as relating to



coastal public property and the coastal protection zone and summarizes certain of the findings made in the Final EIR (Total AA p. 36 to 38).

37. However, Total's response does not set out that the Final EIR assessed whether the Proposed Project was consistent with the purpose of establishing and protecting coastal public property. Accordingly, Total cannot establish that section 63(1)(c) of the ICMA was considered.
38. Similarly, in respect of section 63(1)(h)(i) of the ICMA, Total does not set out that the Final EIR assessed whether the Proposed Project was consistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations.
39. In respect of section 63(1)(k), Total contends that the Final EIR considered the objective to "*preserve, protect, extend and enhance the status of coastal public property as being held in trust by the State on behalf of all South Africans, including future generations*" because the Final EIR included "*various mitigations measures to ensure that impacts on coastal and public property will be minimised to the extent that they arise*" (Total AA p. 40). This contention is flawed in two respects:
 - 39.1. First, providing for mitigation measures does not amount to considering the objective at issue.
 - 39.2. Second, none of the mitigation measures referenced by Total give any indication that the Final EIR considered the objective at issue.

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40. In respect of section 63(1)(h)(vii), Total contends that the Final EIR assessed the interests of the whole community on the basis that it includes sections on: Need and Desirability; Cultural Heritage; Marine Ecology; and, Socio-Economic Impacts. However, Total overlooks that the "*interest of the whole community*" is a unique consideration created by the ICMA which is not present in other environmental legislation. This requires a specific and focussed consideration of what that objective means in the context of this particular project and its impacts on the whole community. Total is correct that it requires a holistic assessment – but that was simply not done in this case.
41. Accordingly, Total has not established that the Final EIR considered the ICMA Factors.

The DG's Decision

42. Total then contends that the DG's Decision considered the ICMA Factors because:
- 42.1. The Final EIR considered the ICMA Factors (Total AA paras 89 to 90).
- 42.2. PASA's response to the Applicant's appeal referred to the coastal environment, coastal waters and alleged that all specific environmental management acts had been considered (Total AA para. 90.2).
- 42.3. The reasons for the DG's Decision recorded that the no-go alternative was not preferred due to the positive impacts that might be derived from the Proposed Project (Total AA para. 91).

43. None of these contentions have any merit.

43.1. As set out above, the Final EIR did not consider the ICMA Factors.

43.2. PASA is not the Director General and, in any case, whatever it alleged in its response to the Applicant's appeal could not have been considered in the DG's Decision

43.3. That the DG's Decision gives a reason for why the no-go alternative was not considered does not establish that the ICMA Factors were considered.

The Appeal Decision

44. Total contends that the Appeal Decision considered the ICMA Factors because:

44.1. The Minister considered the Final EIR (Total AA para. 94).

44.2. The Minister referenced matters which "bear on" section 63 such are "Marine Ecology, Noise and Spills" (Total AA para. 95).

44.3. The Minister recorded that she was satisfied that the DG's Decision was rational and reasonable and that the ICMA Factors were taken into account (Total AA para. 96).

45. None of these contentions have any merit:

45.1. As set out above, the Final EIR did not consider the ICMA Factors.



45.2. The fact that the Minister mentions matters that relate to the marine environment does not equate to a proper consideration of the ICMA Factors.

45.3. The Minister's bald and unreasoned statement, in the Appeal Decision, that she was satisfied that the ICMA Factors were considered is not sufficient in law to establish that the Minister considered the ICMA Factors.

The state's response

46. The state respondents' response to the second ground of review is notable for two reasons. First, it is manifestly unsound. Second, it directly contradicts Total's response.

47. The state respondents contend that there is no merit to this ground of review because:

47.1. The areas of interest or drilling do not overlap with any marine protected area; (State AA para. 121.1).

47.2. The Final EIR reviewed the critical biodiversity areas and ecologically or biologically significant marine areas; (State AA para. 121.2).

47.3. The EA conditions mandate Total to conduct a pre-drilling survey to gather information on seabed habitats (State AA para. 121.3), and if sensitive habitats are detected this will be addressed (State AA para. 122).

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48. None of these contentions amount to an allegation that the Director General or the Minister in fact considered the ICMA Factors.
49. It is particularly notable that the State Respondents have not alleged that they took into account the ICMA Factors in the manner which Total contends – namely through the various passages of the Final EIR identified by Total. This directly contradicts Total's response.

3RD REVIEW GROUND: FAILURE TO CONSIDER CLIMATE CHANGE AS PART OF NEED AND DESIRABILITY

50. The Applicants' third review ground is based on the deficient and irrational approach to the assessment of "need and desirability", in that it failed to consider the greenhouse gasses which would be associated with extracting, transporting, storing and burning any gas discovered by the Proposed Project.
51. The evaluation of "need and desirability" is a key element of the decision-making process under section 24 of NEMA.¹ It poses the question: does the proposed activity represent the best use of the land or environmental resource in issue? To answer this question, one must identify the ultimate public purpose that the activity is intended to serve and consider whether it is desirable within the broader framework of considerations prescribed by NEMA, and applicable policy and planning instruments (this proposition will be addressed further in argument).

¹ EIA Regulations, regulation 18; appendix 3(2)(b).



52. It follows that, in the context of oil and gas exploration, the need and desirability assessment must consider the full lifecycle of the project, including the intended extraction of the resource.
53. The assessment in the Final EIR was not conducted in this manner. It did not extend beyond the exploration phase. The exploration activities were treated as an end in and of themselves and their purpose was characterised as being simply "*the generation of information on possible indigenous resources*" (Total's AA, para 110.2.1). This ignores the fact that that information has no relevance outside of the extraction and subsequent utilization of the resources.
54. Had the Final EIR and the Decision Makers evaluated the need and desirability of the project across its lifecycle (as they were required to do), they would have found it necessary to obtain rough calculations of the volume of gas that would be extracted in a production scenario.
55. Rough projections as to the minimum size of any production operation on the project area can be obtained with relative ease. This is because the economic feasibility of an oil or gas project is dictated by variables related to the capital costs of extracting and transporting the resource. As indicated by Mr Trollip's affidavit and the Supplementary Founding Affidavit, a minimum volume of oil or gas must exist for the project to be economically feasible.
56. Had they been done, the relevant calculations would have revealed that:



- 56.1. The minimum field size required to proceed with production on the block would have been in a range of approximately 1 to 1.5 trillion cubic feet, or 1000 to 1500 petajoules. This would have to be produced over a period of some 10 to 15 years to yield an adequate revenue stream, so this would equate to production of some 50 to 100 petajoules per annum.
- 56.2. The quantities of gas produced from the project area would far exceed what South Africa requires for domestic use according to the IRP 2019 (the principal electricity planning instrument), which is approximately 6 petajoules per annum from 2024 and thereafter 19 petajoules per annum from 2027.
57. Thus, domestic use of the gas produced on the project area would entail combustion of fossil fuels far in excess of what is currently envisaged by the IRP 2019 and would consequently have serious implications for South Africa's GHG emissions profile. I do not understand it to be in dispute that there is an imperative to transition South Africa's electricity system to a low emissions trajectory.
58. Accordingly, the flawed assessment of need and desirability resulted in the omission of relevant considerations and had a material effect on the content of the Final EIR and the reasoning of the Decision Makers. A full and rational assessment of need and desirability, rooted in facts and figures would have produced a diametrically opposite conclusion – i.e. that steps toward producing gas within the project area are neither necessary, nor desirable.



59. Given that both Total and the State decision makers have justified the truncated and artificial assessment of need and desirability on the basis of their uncertainty as to the volumes of gas in a production scenario, the Applicants' third review ground called for a detailed and thorough rebuttal by the respondents of Mr. Trollip's assertions that it is possible to make rough projections of production volumes.
60. No such response has been provided by the Respondents. The DG and the Minister did not deal with the issue at all, while Total has simply repeated the extremely general (and easily debunked) explanations offered throughout the appeal process regarding unknown variables such as "*the way to produce the targeted discovery in a success case*"
61. In response to Total's explanation in its answering affidavit, Mr. Trollip explains in a further affidavit, filed together with this one, that Total's explanations are contrived and are out of step with the reality of how exploration operations are planned and managed. According to Mr. Trollip's evidence, it is both possible and necessary to engage in detailed economic analysis at every stage of a petroleum project, from the initial desktop assessment of geology to the development of production facilities. Based on Mr. Trollip's evidence, it is simply not possible that Total is ignorant of the minimum volume of gas or oil that would need to be extractable from the project area in order for it to proceed with production.
62. I respectfully submit that the Court should reject the Respondents' contrary assertions as a justification for the wholesale failure to consider the relevant

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aspects of the production phase, including the desirability of the significant GHG emissions that they will necessarily entail.

4TH REVIEW GROUND: FAILURE TO ASSESS TRANS-BOUNDARY IMPACTS

63. Total's response to the fourth review ground is a legal one. In short it contends that there was no obligation to assess the impacts which the Proposed Project may have on:

63.1. Namibian waters;

63.2. the Namibian shoreline; or,

63.3. international waters.

64. The Applicants will respond to Total's contentions in detail in argument.

65. To avoid the confusion which Total has sought to create I record the following:

66. The Applicants do not seek to directly enforce South Africa's international legal obligations. Rather the Applicants contend that because NEMA does not expressly include or exclude the consideration of transboundary impacts of projects which take place in South Africa (and therefore are subject to NEMA) it is necessary to interpret NEMA to determine whether or not there is an obligation to assess those transboundary impacts.

67. The accepted approach to statutory interpretation, as codified by section 233 of the Constitution, requires the Court to prefer reasonable interpretations of legislation which are consistent with international law. The international legal



obligations set out in my founding affidavit clearly indicate that this Court must interpret NEMA to require the assessment of transboundary impacts.

68. This does not involve an extra-territorial exercise of jurisdiction. The Proposed Project is in South Africa and Total is subject to South Africa's jurisdiction. Total has not set out any factor (legal or otherwise) which prevented it from assessing the transboundary impacts (in whole or in part) of the Proposed Project.

69. Total seeks to create a dangerous lacuna in environmental law. If the country which has jurisdiction over a proposed project does not require the assessment of the transboundary impacts, there will be no effective way of ensuring those impacts are assessed.

The state's response

70. The state respondents contend that Total was not obliged to assess impact assessments on the Namibian shoreline or international waters. That contention is bad in law and will be addressed in legal argument.

5TH GROUND: THE BLOW OUT AND OIL SPILL CONTINGENCY PLANS

71. The crux of the Applicant's fifth review ground is that:

71.1. The Oil Spill Contingency Plan ("OSCP") and the Blow-Out Contingency Plan ("BOCP") were not available when the Final EIR was prepared and the Decision under Review were taken.



71.2. These documents (or their contents) ought to have formed part of the EMPR for the Proposed Project.

71.3. The EA does not cater for public participation in respect of the OSCP or the BOCP.

Total's response

72. Total's response comprises the following:

72.1. An allegation that the OSCP and BOCP cannot be prepared at this stage (Total AA para. 154).

72.2. It is rational that Total is required to submit these documents 60 days prior to the commencement of drilling (Total AA para. 157.2).

72.3. If tailored OSCPs and BOCPs were submitted as part of the Final EIR or EMPR based on assumed well positions Total would need to amend these documents once the pre-drilling activities were complete. Total contends this would be impractical and overly burdensome (Total AA para. 164).

72.4. Once Total has determined the well locations and architecture it will prepare the OSCP and BOCP and submit this for approval in accordance with the relevant legislation (Total AA para. 173).

73. I am advised and submit that Total's vague allegations of the burden and impracticality of preparing an OSCP and BOCP based on the assumed well

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locations cannot excuse its failure to prepare the documents for the Final EIR and EMPR.

74. In any event, Total has failed to put up any of the information needed to ventilate the validity of its contention. For example, it has not set out the time and cost it would take to prepare and then amend the OSCP and BOCP.
75. What is more, Total has failed to provide any defence to the procedural fairness aspect of this review ground. In fact, it appears from their response to the Applicant's internal appeal that Total does not intend to permit public participation in respect of the BOCP and OSCP. Paragraph (n) of page 9677 of the Record reads:

There are also currently no legal requirements for OSCPs and BOCPs to be made available for consultation with all I&APS. These documents contain TotalEnergies "know-how" and competitive advantage strategies as major O&G company. It is thus denied that the failure to make the Oil Spill Contingency Plan and the Blowout Contingency Plan available for public comment is procedurally unfair and this ground of appeal is without merit and stands to be dismissed.

76. To avoid any confusion, I point out that even if the existence of "know how" could justify not conducting a public participation process (which it cannot). Total has not set out any evidence to establish the existence, confidentiality, or proprietary nature of any such know-how.
77. The precise nature of the legal obligation to permit public participation will be argued in due course, but I point out that the content of the OSCP and the BOCP is clearly relevant to the Final EIR, the EMPR and the assessment of



the environmental impacts of the Proposed Project. Therefore, the process through which the assessment of those impacts was assessed and through which the EA was granted was required to include public participation in respect of the OSCP and the BOCP or, at least, their contents.

The State's response

78. The State Respondents contend that there is no merit in this review ground because:

78.1. The EA conditions mandate Total to subject the OSCP and BOCP to a public participation process before the commencement of drilling operations (State AA para. 135).

78.2. PASA, Total and the DG possess the unrestricted authority to amend the EA in terms of regulation 27 of the EIA Regulation read with section 71(i) of the MPRDA.

79. The State's response regarding an unfettered authority to amend is a legal argument which will be addressed in due course.

80. The State's contention regarding the requirement to conduct a public participation process has no merit for two reasons:

80.1. First, the EA does not include such a requirement. Presumably this is why the State Respondents' answering affidavit does not provide any reference to the alleged requirement.



80.2. Secondly, as set out above, Total does not intend conducting such a process.

6TH REVIEW GROUND: THE INVOLVEMENT OF PASA

81. In its supplementary founding affidavit, the Applicants introduced a further ground of review based on PASA's assumption of the role of the "competent authority" for purposes of the appeal to the Minister in terms of section 43 of NEMA.
82. This was not only unlawful but also resulted in irrelevant considerations being taken into account and relevant considerations being left out of account.
83. PASA's function in terms of section 71(a) of the MPRDA is to "*promote onshore and offshore exploration for and production of petroleum*". By its institutional nature, PASA is manifestly unsuited to defending what is meant to be an impartial decision regarding the environmental impacts of a petroleum exploration project.
84. The factual basis for this ground of review is set out in paragraphs 10.1 to 10.3 and 11 of the supplementary founding affidavit. Officials administering the appeals process referred to PASA interchangeably as "DMRE" and "the competent authority" and PASA's "appeal response report" is drafted in a manner that makes it clear that PASA considers that it has been called upon to justify the DG's Decision.

85. For their part, the Minister and the Director General do not pertinently respond to the allegation that PASA fulfilled the role of the competent authority during the appeals process and appear to have misconstrued the complaint as being that PASA *"should not have filed submissions in the internal appeal to the Minister of Environmental Affairs under section 43 of NEMA, instead, the DG or DMR, the decision maker, should have responded"* (Minister's AA, para 109). The Minister asserts that *"the Applicants have not established a case to demonstrate that PASA acted beyond its mandate throughout the internal appeal process"* (Minister's AA, para 111).
86. Total similarly contends that PASA did not submit its appeal response report in the capacity of competent authority but did so as an interested "organ of state" as contemplated and permitted by regulation 5 of the National Appeal Regulations (TEPSA AA, para 201).
87. It is simply not so that PASA was treated as any interested organ of state during the appeals process. This is indisputably the case on the face of the Minister's Decision, which presents PASA's responses in respect of each appeal ground under the heading **"CA's Response"**.
88. For example, at page 15 of PASA's appeal response report in respect of the Applicants' joint appeal ("SFA3" to the supplementary founding affidavit) it is recorded:

The Agency is not able to comment on the suggested rating of the likelihood of a blow-out occurrence, because the WildTrust report does not provide the methodology used to generate the rating. Therefore, it is not clear if it considered

all components considered in the Oil Spill Drift Report submitted with ESIA.

89. This is in response to material put up by the Applicants in a document titled "WildTrust Report" disputing the calculation in the Final EIR of the likelihood of a blowout.
90. The Minister's Decision, in dealing with the corresponding ground of appeal, records at paragraph 2.17.11 under the heading "CA's response", *"the Competent Authority states that it is unable to comment on the suggested rating of the likelihood of a blow-out occurrence in the WildTrust report because the appellants did not provide the methodology used to generate the rating"*.
91. This passage was lifted directly from PASA's appeal response report. In any event, given that it is common cause that the competent authority did not submit a responding statement, PASA is the only possible source of this observation.

AD SERIATIM RESPONSE

92. Much of both answering affidavits is argumentative in nature which, I am advised, will be dealt with in due course.
93. Accordingly, this affidavit is limited to responding to the factual averments in the answering affidavits which have not been addressed above but, nonetheless, warrant a direct response. Any averment made in answering affidavits which is not addressed should be taken as denied. Where the



substance of a particular allegation has been addressed in the body of this affidavit, this is not repeated in the *ad seriatim* response and I rely on what is said in the body of this affidavit.

Ad Total's answering affidavit

Ad paragraph 32.1

94. The content of this paragraph is denied. The Final EIR clearly treats the prospects of a well blow out, and the consequent oil spill, as a potential impact. This is assessed in section 10.4 of the Final EIR (Record p. 5159), which is part of section 10, which is headed "*Impact Assessment – Unplanned Events*" (Record p. 5145).

Ad paragraph 60 to 63

95. Even if it is appropriate to compare the effects of an oil spill to harmful natural phenomena such as red tide (which is denied), that cannot excuse a deficient assessment of the potential impacts of a proposed project.

Ad paragraphs 109 - 110 (and sub-paragraphs)

96. The Applicants admit these paragraphs to the extent that they correctly record the contents of the Final EIR.
97. That Total assessed some of the climate change impacts of Proposed Project does not excuse a failure to properly assess the need and desirability of the Proposed Project.

Ad paragraphs 117 (and sub-paragraphs); paragraph 119 (and sub-paragraphs)

98. Dr Burger's evidence regarding the global warming potential of methane gas and the phenomenon of fugitive emissions is dealt with in the affidavit of Professor Mark New, filed together with this one.
99. I do not understand it to be in dispute that combustion of gas produces GHG emissions and that it is incompatible with a low emissions trajectory over the long term. Ad paragraph 121
100. I submit, with due respect to Dr Burger's qualifications and expertise in the field of air quality, that he does not (based on a perusal of his curriculum vitae) possess any educational qualifications or expertise that would qualify him to provide expert evidence on matters related to energy policy or the design of the electricity system.

Ad paragraph 121.2 – 121.4

101. While there may be a role for gas as a "bridging technology" in the process of transitioning South Africa's electricity system away from fossil fuels, it does not follow that producing this gas domestically is necessary or desirable. I refer in this regard to Mr. Trollip's affidavit filed together with this affidavit.

Ad paragraphs 125.1; 125.2; 125.3

102. I deny that the deponent to Total's answering affidavit, Ms Jacinta Francisco, has the knowledge and expertise to dispute Mr Trollip's expert opinion.



103. In any event, a comprehensive response to Ms Francisco's allegations in this regard is set out in Mr. Trollip's affidavit. His evidence is to the following effect:

103.1. It is simply not correct that considerations relating to the cost and feasibility of production are postponed to a juncture after a discovery is made. To say so is false, illogical and at odds with widespread industry practice.

103.2. An exploration project is, from the outset, periodically assessed to calculate "expected monetary value" based on "net present value". These calculations are impossible without (a) cost elements, which can be estimated from known physical parameters; and (b) revenue elements - which depend on production volumes and scale.

103.3. This exercise is a fiscal necessity. Oil and gas exploration is an inherently risky business, and not all projects yield revenue, many will fail to reach production.

103.4. Practically, this means that economic analysis informs every phase of a petroleum project.

103.5. A project will proceed through distinct phases, each gathering increasingly detailed information, namely: initial assessment of general geology; seismic data gathering to assess geology and possible hydrocarbon reservoirs; exploration wells to discover actual physical presence of hydrocarbons; further wells for field appraisal

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and evaluation; and production facility development if warranted by the appraisals.

103.6. Each stage requires assessment of potential revenues and costs within achievable ranges.

103.7. The relationship between water depth, distance from shore, and capital costs is well-documented. These physical parameters directly determine minimum viable production volumes. This relationship is not speculative, rather it is a basic economic necessity.

103.8. More particularly, physical constraints of water depth and distance to shore directly determine minimum production costs, which in turn establish minimum required production volumes needed to amortize these costs. This is a fundamental economic relationship that (a) defines clear lower bounds for viable project scale; (b) can be determined within very usable accuracies before any exploration; (c) is essential for basic project viability assessment; and (d) forms a central constraint on possible development scenarios.

103.9. In the case of Block 5/6/7, the distance to shore and the water depths are determinative of viable minimum production volumes. The distance to shore determines the scale and cost of associated infrastructure requirements (a pipeline or export facility) and the depth influences development costs.



104. Mr. Trollip has served on the boards of upstream oil companies such as Mossgas, Soekor and PetroSA and has direct experience of how such decisions are made.

Ad paragraph 125.4

105. The Applicants acknowledge that the product could also be oil but point out that the Decision Makers accepted the "need and desirability" of the envisaged production operation on the basis of South Africa's theoretical need for gas.

Paragraph 2.39 of the appeal decision reads:

I am therefore satisfied that the criteria for the need and desirability for the Project has been demonstrated by the applicant, in particular that the Project accords with legislative requirements and government policies and plans, including the IRP (2019), the NDP and the draft Marine Spatial Sector Plans which includes a Marine Offshore Oil and Gas Sector Plan ("the draft MS Plan"). The IRP and IEP recognises natural gas as a required source to produce electricity and direct thermal energy. It acknowledges its role to contribute to maintaining base-load electricity and peak-load electricity and is also recognised as a way to transition South Africa towards a lower carbon economy providing the flexibility required to complement renewable energy sources and as a lower carbon option compared to coal.

Ad paragraphs 277 to 278

106. I deny that Total has established any basis to depart from the ordinary remedy in review applications which is that an unlawful decision must be reviewed and set aside. This will be addressed further in legal argument.

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Ad the State Respondents' answering affidavit

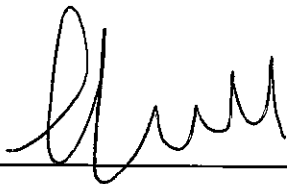
Ad paragraphs 61 – 67; 95 – 99; 124 to 127

107. That Total assessed some of the climate change impacts of Proposed Project does not excuse a failure to properly assess the need and desirability of the Proposed Project.

CONCLUSION

108. In the circumstances, the Applicants have established that the Decisions under Review stand to be reviewed and set aside in terms of section 6 of PAJA.
109. The Applicants request the costs of three counsel including the cost of senior counsel on scale C and two junior counsel on scale B.
110. The Applicants submit that as this application has been brought in the public interest to protect constitutional rights, even if it is unsuccessful no cost order should be made against the applicants.

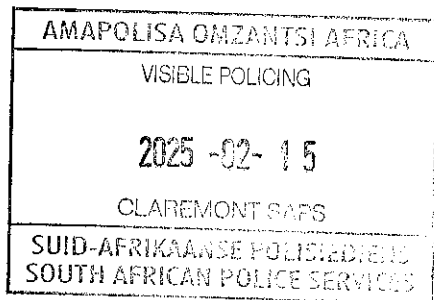
WHEREFORE the Applicants persist with the relief sought in their notice of motion.



ELIZABETH JANE McDAID



I hereby certify that the deponent has declared that he knows and understands the contents of this Affidavit and that to the best of his knowledge and belief it is the truth, which Affidavit has been signed to and affirmed to before me at CLAREMONT on this the 15 day of FEBRUARY 2025.



WILSON JULIAS
COMMISSIONER OF OATHS
SAPS
CLAREMONT
CAPTAIN

[Handwritten signature]