



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

Reference: **LSA 231067**

**APPEAL DECISION**

**APPEALS AGAINST THE DECISION OF THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES, DATED 17 APRIL 2023, TO GRANT AUTHORISATION IN TERMS OF SECTION 24 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998, AS AMENDED, READ WITH REGULATION 23 OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGULATIONS, 2014, AS AMENDED, FOR THE PROPOSED OFFSHORE DRILLING OF EXPLORATION WELLS IN BLOCK 5/6/7 OFF THE SOUTH-WEST COAST OF SOUTH AFRICA**

TotalEnergies EP South Africa Block 567 (Pty) Ltd	Applicant
Patrick Bond	First Appellant
Danne Joubert	Second Appellant
Anglia Joubert	Third Appellant
Oceans Not Oil	Fourth Appellant
South Durban Community Environmental Alliance	Fifth Appellant
Rescue Vleesbai Action Group	Sixth Appellant
Jacqueline Sunde	Seventh Appellant
Lisa Cloete	Eighth Appellant
Wildlife Animal Protection Forum SA	Ninth Appellant

**APPEALS AGAINST THE DECISION OF THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES, DATED 1 APRIL 2023, TO GRANT AUTHORISATION IN TERMS OF SECTION 24 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998, AS AMENDED, READ WITH REGULATION 23 OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGULATIONS, 2014, AS AMENDED, FOR THE PROPOSED OFFSHORE DRILLING OF EXPLORATION WELLS IN BLOCK 5/6/7 OFF THE SOUTH-WEST COAST OF SOUTH AFRICA**

Michelle Rivarola	Tenth Appellant
EMS Foundation SA & Climate Justice Charter Movement	Eleventh Appellant
Hermanus Business Chamber	Twelfth Appellant
Marine Dynamics Conservation Trust	Thirteenth Appellant
The Green Connection and Natural Justice	Fourteenth Appellant
Department of Environmental Affairs and Development Planning	Fifteenth Appellant
West Coast Indigenous Council	Sixteenth Appellant
West Coast Guriqua Council	Seventeenth Appellant
Aukotowa Fishing Cooperative	Eighteenth Appellant
Department of Mineral Resources	Competent Authority

**Appeal:** This is an appeal lodged against the decision of the Director General: Mineral Resources of the Department of Mineral Resources and Energy, (the DMRE/competent authority (CA)), to grant an Environmental Authorisation (EA) to TotalEnergies EP South Africa Block 567 (Pty) Ltd (the applicant), in respect of listed activities pertaining to the proposed offshore drilling of exploration wells in Block 5/6/7 off the South West Coast of South Africa.

## **1. BACKGROUND**

- 1.1 TotalEnergies EP South Africa (the applicant) has since 2012 held an exploration right issued in terms of Section 79 of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") over Block 5/6/7 (the Block) off the southwest coast of South Africa, which allows for the undertaking of various exploration activities within the Block.
- 1.2 The applicant has since then undertaken 2D and 3D seismic surveys in the Block. Based on an analysis of data acquired from such surveys, the applicant proposes to drill up to five exploration wells.

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- 1.3 On 20 May 2022, the applicant lodged an application for an EA with the DMRE, for Listed Activity 18 for the proposed exploration well drilling in Block 5/6/7 off the southwest coast of South Africa. This application was lodged in terms of the Environmental Impact Assessment Regulations, 2014 (2014 EIA Regulations), published under the National Environmental Management Act, 1998 (Act No. 107 of 1998), as amended (NEMA).
- 1.4 The applicant commissioned SLR Consulting (South Africa) (Pty) Ltd, as an independent environmental assessment practitioner (EAP), to undertake a Scoping and Environmental Impact Assessment (EIA) process for the EA application.
- 1.5 On 15 December 2022, the EAP submitted an Environmental and Social Impact Assessment (ESIA) report, prepared in respect of the EA application to the DMRE, for consideration and decision-making purposes.
- 1.6 On 17 April 2023, the DMRE issued an EA to the applicant under reference number: TEEPSA 12/3/224.
- 1.7 The area of interest is 10 000km<sup>2</sup> in extent and is located offshore roughly between Cape Town and Cape Agulhas, approximately 60km from the coast at its closest point and 170km at its furthest, in water depths between 700m and 3200m (“the area of interest”).
- 1.8 The duration of the Project is estimated to be approximately 10 months divided into phases as follows- *“The mobilisation phase of the Project is estimated to be 45 days. Drilling of the exploration well(s) will take up to three months, while drilling of the appraisal well(s) will take up to four months. Well plugging and abandonment will take up to 15 days, while the demobilisation phase will take up to 10 days to complete.”*

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**Appeals**

- 1.9 The Directorate: Appeals and Legal Review (Appeals Directorate) in the Department of Forestry, Fisheries and the Environment (the Department) received the following appeals in opposition to the grant of the EA to the applicant:
- 1.9.1 On 25 April 2023, from Patrick Bond (*first appellant*);
  - 1.9.2 On 26 April 2023, from Danne Joubert (*second appellant*);
  - 1.9.3 On 26 April 2023, from Angila Joubert (*third appellant*);
  - 1.9.4 On 3 May 2023, from Oceans not Oil (*fourth appellant*);
  - 1.9.5 On 5 May 2023, from South Durban Community Environmental Alliance (SDCEA) (*fifth appellant*);
  - 1.9.6 On 6 May 2023, from Rescue Vleesbaai Action Group (REVAG) (*sixth appellant*);
  - 1.9.7 On 8 May 2023, from Dr Jacqueline Sunde (*seventh appellant*);
  - 1.9.8 On 8 May 2023, from Lisa Cloete (*eight appellant*);
  - 1.9.9 On 9 May 2023, from Wildlife Animal Protection Forum South Africa (WAPFSA) (*ninth appellant*);
  - 1.9.10 On 9 May 2023, from Michele Rivarola (*tenth appellant*);
  - 1.9.11 On 10 May 2023, from Cullinan and Associates on behalf of the EMS Foundation (South Africa) and the Climate Justice Charter Movement (*eleventh appellant*);
  - 1.9.12 On 10 May 2023, from Hermanus Business Chamber (*twelfth appellant*);
  - 1.9.13 On 10 May 2023, from Marine Dynamics Conservation Trust (*thirteenth appellant*);
  - 1.9.14 On 12 May 2023, from Connection and Natural Justice (*fourteenth appellant*);
  - 1.9.15 On 12 May 2023, from Department of Environmental Affairs and Development Planning (DEADP) (*fifteenth appellant*);
  - 1.9.16 On 12 May 2023, from West Coast Indigenous Council (WCIC) (*sixteenth appellant*);
  - 1.9.17 On 12 May 2023, from West Coast Guriqua Council (*seventeenth appellant*); and
  - 1.9.18 On 10 May 2023, from Aukotowa Fishing Cooperative (*eighteenth appellant*).

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- 1.10 The above appeals were lodged in terms of section 43(1) of NEMA, read together with regulation 4 of the National Appeal Regulations, 2014 (2014 Appeal Regulations).
- 1.11 The Appeals Directorate also received appeals from the following appellants, however these were not within the prescribed time frames and/or not in the correct prescribed template and could therefore not be considered.
- 1.11.1 Gerrit Visser;
  - 1.11.2 Chester du Toit;
  - 1.11.3 Bev Caldwell;
  - 1.11.4 Jonathan Cloete;
  - 1.11.5 Jonathan van der Westhuizen;
  - 1.11.6 Julie on behalf of OBO Plettenberg Bay Community Environmental Forum;
  - 1.11.7 Elaine Mills; and
  - 1.11.8 Hermanus Ratepayers Association
- 1.12 On 11 May 2023, the Appeals Directorate received a request for extension of the time period for the submission of responding statements in respect of the appeals from the applicant.
- 1.13 On 17 and 29 May 2023, the Director of the Appeals Directorate granted the request and accordingly extended the timeframe for the responding statement to 6 June 2023.
- 1.14 On 06 June 2023, the applicant submitted their responding statement to the appeals.
- 1.15 On 15 June 2023, the DMRE submitted their response to the appeals, together with a request for condonation for the late submission thereof.

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1.16 On 11 September 2023, the Director of the Appeals Directorate condoned the late filing of the responding statement.

1.17 The appeals are premised on the following grounds:

1.17.1 Climate Change and Air Emissions;

1.17.2 Marine Ecology, Noise and Spills;

1.17.3 Cultural Heritage;

1.17.4 Need and Desirability;

1.17.5 Strategic Environmental Assessment (SEA);

1.17.6 Socio-economic, Tourism and Fisheries;

1.17.7 Insufficient Public Participation Process;

1.17.8 Inadequacy of the ESIA Report;

1.17.9 Alternatives;

1.17.10 Inadequate Reasons for Decision; and

1.17.11 PASA Acted Outside of its Mandate.

1.18 This is an appeal in the wide sense. I have therefore approached this appeal by re-assessing and re-determining the merits of the application.

1.19 Before I deal with each of the grounds of appeal, I wish to stress that I was guided in this appeal by the principles set out in section 2 of the National Environmental Management Act No. 107 of 1998 ("NEMA"). Those principles apply alongside all of the other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of persons disadvantaged by unfair discrimination. My decision has therefore been guided after a careful consideration of all of the principles set out in section 2 of NEMA, including section 2(2) which provides that "environmental management must place people and their needs at the forefront of its concern and serve

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their physical, psychological, developmental, cultural and social interests equitably”; also section 2(3) which provides that “development must be socially, environmentally and economically sustainable”. Moreover, when I considered the issue of sustainable development, I did so with section 2(3) in mind and I considered the proper application of the factors articulated in section 2(4)(a) to (r).

1.20 I am also guided by the judgement in *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) at para 80, Murphy J explained that:

“NEMA, like all legislation, must be interpreted purposively and in a manner that is consistent with the Constitution, paying due regard to the text and context of the legislation. Section 2 of NEMA sets out binding directive principles that must inform all decisions taken under the Act, including decisions on environmental authorisations. The directive principles serve as guidelines (by reference) to which any organ of state must exercise any function when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. They guide the interpretation, administration and implementation of NEMA and any other law concerned with the protection or management of the environment. Competent authorities must take into account the directive principles when considering applications for environmental authorisation. The directive principles promote sustainable development and the mitigating principle that environmental damage must be avoided, minimised and remedied. The environmental impact assessment process is a key means of promoting sustainable development, by ensuring that the need for development is sufficiently balanced with full consideration of the environmental impacts of a project with potential environmental impacts. The directive principles caution decision-makers to adopt a risk-averse and a careful approach, especially in the face of incomplete information.”

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1.21 With this in mind, I now deal with the grounds of appeal submitted by each of the appellants and where I deem it appropriate, I address those grounds of appeal that are overlapping in nature under a single ground of appeal.

## **2. GROUNDS OF APPEAL, RESPONSES AND COMMENTS**

### ***First Ground of Appeal: Climate Change and Air Emissions***

#### Failure to Calculate Climate Implications through Gas Life-Cycle Analysis

2.1. The first, second, fourth, fifth, seventh, eighth, ninth, tenth, twelfth, thirteenth, fourteenth, and seventeenth appellants submit as follows:

2.1.1. The first, fourth, fifth and fourteenth appellant note that the applicant failed to provide a full economic costing of the GHG emissions for the full life cycle of the project (not just seismic blasting but drilling, processing and refining, transport and combustion, production and methane leakage). The fourth appellant also notes that the environmental and social impacts are only measured during the exploration activities, whereas the need and desirability section of the ESIA extends effects into the future beyond the project. The applicant's exploration is ultimately to extract and process methane gas for consumption. The first, fourth, seventh, eighth, ninth, tenth and fourteenth appellant, relying on recent judgment, *Sustaining the Wild Coast and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk) at par 123 ("Makhanda judgment"), assert that the court mandated a full analysis of the impacts of gas and oil exploration, extraction, processing, transport, combustion, and disposal: "the processes are discrete stages in a single process that culminates in the production and combustion of oil and gas, and the emission of greenhouse gases that will exacerbate the climate crisis...". The Mkhanda judgment court further held that the blasting and exploration stage was one part of a whole-project process that cannot be "salami-sliced to the polluter's advantage."



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- 2.1.2. They say that the report by the EAP is incomplete and “in contempt of” the Makhanda judgment *if the full implications of not just exploration but the rest of the discrete stages are not considered as a whole.*
- 2.1.3. The first and thirteenth appellants note that the proposed exploration does not align to South Africa’s commitment to a “just” transition in achieving net-zero emission and a climate resilient society. The fourth appellant asserts that the ESIA report’s claim that natural gas is needed for peaking is outdated. It references Brown *et al*<sup>1</sup> for the assertion that the feasibility and economic viability of a 100% renewable electricity system for South Africa, meeting the “energy needs of all citizens at all times” is “cost-competitive with fossil-fuel-based systems, even before externalities such as global warming, water usage and environmental pollution are taken into account.” The National Business Initiative (NBI) published a study showing that the electricity sector likely needs just 17 petajoules (PJ) of gas a year until 2035, and South Africa already imports 180 PJ a year from Mozambique, repudiating any demand for further exploration.
- 2.1.4. The fourteenth appellants allege that the approved exploration activities flaunt the principles of the UN Global Biodiversity Framework adopted in Montreal in 2023, as well as the Paris Climate Agreement to which South Africa is a signatory.
- 2.1.5. The fourth appellant avers that studies show further development of gas infrastructure is incompatible with the Intergovernmental Panel on Climate Change (IPCC) target of keeping global increases in temperature below 2°C. Whether gas can achieve substantial climate benefits in the transition from coal-based electricity is contentious. That perception of gas climate compatibility was derived from the fact that gas burns cleaner than coal,

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<sup>1</sup> Brown, T. W., Bischof-Niemz, T., Blok, K., Breyer, C., Lund, H., & Mathiesen, B. V. (2018). Response to ‘Burden of proof: A comprehensive review of the feasibility of 100% renewable-electricity systems’. *Renewable and sustainable energy reviews*, 92, 834-847

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generating roughly half of the carbon emissions. However, that calculation ignores the enormous volumes of methane emitted into the atmosphere up and down the supply chain at drilling sites, compressor stations, pipelines, and liquefaction facilities. That calculation also ignores the energy used to transport it. The appellant concludes that cumulative emissions of nitrogen oxides, carbon monoxide and volatile organic compounds from new fossil gas plants in South Africa will add to the existing emissions and health impacts from the coal sector.

- 2.1.6. The first and fifth appellants assert that there are no estimates of how much gas is potentially available in the Block. Its market value and the environmental costs of likely externalities are not provided. In addition to a missing Social Cost of Carbon estimate, natural capital accounting and NEMA's commitment to the polluter pays principle are not referenced and a full cost accounting should be undertaken in the SEIA.
- 2.1.7 The first appellant avers that President Cyril Ramaphosa, on 11 October 2021, identified the danger to the economy of further fossil fuel development, wherein he referred to the "Carbon Border Adjustment Mechanism" (CBAM) that will be imposed by Western importers of South African goods. Others in the private sector such as Alexander Forbes have made similar utterances, stating S.A. must cut carbon emissions to protect its economy against carbon taxes.
- 2.1.8. This, the first appellant contends will be amplified if a coal-to-methane gas transition occurs, as methane is a more destructive GHG than CO<sub>2</sub>. Nevertheless, the likelihood of CBAM climate sanctions against methane gas is inevitable and will affect future South African exports. He submits that the social cost of carbon is the appropriate polluter-pays metric to judge the full costs of the proposed exploration followed by exploitation and combustion.

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- 2.1.9. The second appellant raises the concern of the releases of toxic pollution that may occur and that the exploration activities at the platform, transportation via tankers and refining the oil on land can release volatile organic compounds, greenhouse gases and other air pollutants.
- 2.1.10. The fifth appellant avers that climate change implications have not been considered.
- 2.1.11. The ninth appellant states the National Climate Change Response White Paper recommends renewable energy and not fossil fuels (including gas) and notes that there is a failure to address South Africa's dependency on fossil fuels, which is responsible for about 50% of Africa's GHG emissions. As one of the top 20 global GHG emitters, South Africa needs to make substantial emission cuts. The applicant's project will contribute to further emissions which could exacerbate climate change affecting life on both land and in the ocean.
- 2.1.12. The twelfth appellant avers that there are climate-related financial risks to exploration activity, including transition risk (the problem of stranded assets), negative impacts on trade and competitiveness, and the risks of climate change.
- 2.1.13. The seventeenth appellant states that the project is likely to adversely affect food availability and affordability and result in loss of property due to sea-level rise, along with the direct impacts of catastrophic weather events and the associated deterioration in physical and mental health and well-being. South Africa's commitments need improvement to be consistent with the Paris Agreement's 1.5°C temperature limit. Approving more oil and gas projects, including offshore exploration and production, will push South Africa further away from achieving its international climate commitments.

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Not fit and proper

2.1.14. The first appellant further avers that the applicant is not fit and proper to carry out fossil fuel extraction, having regard to the accompanying corruption and resource conflicts in other parts of Africa for example, Mozambique and Angola. He states that given the applicant's record it will be hard to imagine that they would be serious candidates if there was "a genuine opportunity to bid for the extraction of South Africa's natural resources."

**APPLICANT'S RESPONSE**

2.2. In their comments to this ground of appeal, the applicant responds as follows:

2.2.1. For the applicant to undertake exploration activities, it required an exploration right in terms of section 79 and 80 of the MPRDA and an EA under NEMA read with the 2014 EIA Regulation for activity 18 of listing notice 2. Whereas to undertake production activities it requires an EA in respect of activity 20 of the 2014 EIA Regulations, and a production right in terms of section 83 of the MPRDA.

2.2.2. The applicant's EA was granted for the exploration of oil and gas only. The applicant avers the aim of the exploration is to identify if hydrocarbon resources exist in the area of interest and if so whether a commercial development could be contemplated. Should it be the case, the applicant would first need to appraise the discovery and assess the feasibility of such a development before deciding to declare a commercial discovery and apply for a production right and submit a Field Development Plan.

2.2.3. Given the large uncertainties at the stage of exploration regarding the type of hydrocarbons, the size of the discovery, the quality of the reservoirs, the spatial extension of the area to be developed, the way to develop and economically produce the targeted discovery in a success case cannot be assessed in advance. The possible future

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production activities that may or may not arise vary hugely in scope, location, extent, and duration and cannot be reasonably defined until the proposed exploration project has been completed. It is not reasonable to undertake an assessment of the environmental impacts of an undefined project.

- 2.2.4. Should the results of the proposed exploration well drilling campaign prove promising, and the applicant decides to proceed to the production phase, a separate EA application and ESIA process will be undertaken to assess the potential impacts associated with possible production (i.e. extraction) activities. If the exploration reveals that there is no economically viable reserve, the project ends, and no production activities will occur. To attempt to assess the impacts associated with production at this stage will be unreliable and speculative.
- 2.2.5. The applicant contends the Makhanda judgement is erroneous and conflates exploration activities and production activities, which are separate and independent processes. The applicant avers there are two stages to the oil/natural gas life cycle: (i) exploration which can include seismic surveys (not "blasting") and/or exploratory drilling and (ii) production which includes extraction, and which leads to processing, transporting and combustion of that gas. The applicant states further that the Makhanda judgement is currently under appeal.
- 2.2.6. The applicant referred to the Climate Change and Air Emissions Impact Assessment dated October 2022, the European Bank for Reconstruction and Development ("EBRD") classifications for such projects, the 2017 National GHG Annual Inventory for South Africa, and concludes that given that the impact is of international extent, but is of short duration and low magnitude, the significance of the exploration activities on GHG emissions is low pre-mitigation and very low when mitigation measures are implemented. The significance of this, it says, is not addressed or disputed in the appellant's appeal.

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- 2.2.7. The impact of exploration activities on natural capital is considered and assessed in detail throughout the ESIA report and mitigation measures proposed for the impacts that exploration may have on the environment, including GHG emissions. The significance of such impacts, once the mitigation measures are implemented, are assessed to be negligible, low and very low in most instances. In particular, the impacts of CO<sub>2</sub>-equivalent emissions arising from the exploration are assessed in sections 9.1.1.1 and 9.1.1.2 of the ESIA report where it is shown that the contribution to GHG emissions of the exploration will be minimal.
- 2.2.8. Chapter 5 of the final ESIA report (need and desirability) considers the strategic context of the project within broader societal needs and the public interest and summarises (a chronology) of national and international policies. The applicant avers that national and international policy documents on just transition recognise the need for natural gas in the energy mix in the pathway to net-zero emissions by 2050. These national and international strategic agreements, laws, policies and plans, as well as the findings in the ESIA report, were considered by the Competent Authority in granting the EA.
- 2.2.9. South Africa's extensive policies holistically consider the most appropriate pathway to achieve sustainable development and achieving economic development in a manner that has a sustainable impact on environmental resources. In response to the fourth appellants contention in relation to the "Just Transition and Climate Pathways Study" (NBI, 2021) report, the applicant submits that the NBI's report addresses the potential gas demand in South Africa. However, in "The role of gas in South Africa's path to net-zero" report published in February 2021. The first key finding of this report is that gas can, if affordably supplied, play a key role as a transition fuel to replace more emissions-intensive fossil fuels like coal and diesel, and provide flexible capacity to enable a rapid scale-up of renewables, until alternative energy storage solutions and greener fuels become affordable.

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- 2.2.10. The appellant's attempt to discredit the role of gas in the pump storage example is misplaced as electricity is needed to pump the water to generate hydropower and there are no renewable energy resources available to pump the water uphill. The appellant says that pump storage only accounts for 9% of the energy requirements.
- 2.2.11. Contrary to the appellant's argument, the Bloomberg article does not "debunk" the use of natural gas as a transitional fuel. In fact, the article makes no mention of the use of natural gases as a transitional fuel; and does not deal with the policy considerations regarding the use of fossil fuels in achieving net zero targets. The applicant further highlights that the Bloomberg article is merely a media article and not a scientific journal which has been subjected to empirical investigations and peer review.
- 2.2.12. The possibility of a Carbon Border Adjustment Mechanism is not a requirement when considering and assessing an EA for the exploration activities.
- 2.2.13. The applicant asserts that the first appellant's suggestion that the applicant or its employees are involved in corruption is speculative, misleading and defamatory and deny such suggestions. The applicant has a zero-tolerance policy towards corruption and bribery which is reflected in their robust anti-corruption program and undertaking to promote the Sustainable Development Goals and as further detailed in Chapter 5 of its Universal Registration Document 2022.
- 2.2.14. The applicant contends the first appellant's allegations are without merit.
- 2.2.15. In relation to the second appellant's contentions the applicant submits that the appellant has not made any specific objection to the findings in the ESIA report or proposed mitigation measures. The emissions to air and water have been considered and assessed in the ESIA report and appropriate mitigation measures are included in the EMPR.

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2.2.16. The applicant contends that further development of gas infrastructure is not incongruent with the Intergovernmental Panel on Climate Change (IPCC) report (“the IPCC Report”). The IPCC recognises that there is an on-going role for fossil fuel (particularly oil and gas) and to a lesser extent coal in meeting electricity needs.

2.2.17. The 2019 World energy outlook special report (The Role of Gas in Today's Energy Transitions – Analysis - IEA) examines the role of fuel switching, primarily from coal to natural gas, to reduce emissions of carbon dioxide and air pollutants. The report also compares emissions from coal and gas. While there is a wide variation across different sources of coal and gas, an estimated 98% of gas consumed today has a lower lifecycle emissions intensity than coal when used for power or heat. This analysis takes into account both CO<sub>2</sub> and methane emissions and shows that, on average, coal-to-gas switching reduces emissions by 50% when producing electricity and by 33% when providing heat.

2.2.18. The fourth appellant’s statement that Brown *et al* “have shown the feasibility and economic viability of a 100% renewable electricity system in South Africa” is patently wrong. The Brown *et al* article makes no reference to South African projects and the feasibility and viability of implementing a 100% renewable solution in South Africa. The article was prepared in response to another article prepared by Heard<sup>2</sup> which considers renewable energy projects *inter alia* in Australia, New Zealand, Denmark, Japan, Ireland, Portugal and Germany, all of which experiences very different socio-economic and energy mix position to South Africa.

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<sup>2</sup> Heard, Brook, Wigley and Bradshaw ‘Burden of Proof: a comprehensive review of the feasibility of 100% renewable-electricity systems’ *Renewable and Sustainable Energy Reviews* Vol 76, September 2017, pages 1122 – 1133.



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2.2.19. With regard to the contentions of the ninth appellant, the applicant submits that as set out at paragraph 5.2.6 of the ESIA report, the White Paper "indicates that a mitigation option with the biggest potential includes a shift to lower-carbon electricity generation options". While renewable energy is recommended therein, natural gas is not excluded from this "lower carbon" solution. Furthermore, exploration is not in conflict with the country's energy goals.

2.2.20. The GHG emissions from the Project will not materially contribute towards climate change impacts and are summarised in the ESIA report<sup>3</sup>. The CCIA indicated that the total CO<sub>2</sub>-emissions from a single drilling and well testing campaign is approximately 0.06 Mt tonnes and therefore for a maximum of five wells with tests, the total GHG emission for the Project would be 0.3 Mt.

2.2.21. Although the Project's combined GHG emissions of approximately 0.3 Mt for all five wells is above the threshold set by the European Bank for Reconstruction (EBRD), these emissions would not occur in a single year. It is more likely that as only one or two wells will be drilled in a year and that the annual GHG emission total would be less than the 0.1 Mt CO<sub>2</sub> emissions threshold of EBRD and therefore considered to have a low intensity.

2.2.22. Furthermore, based on the published 2017 National GHG Annual Inventory for South Africa, the total CO<sub>2</sub> emissions from the Project, assuming five successful appraisal wells with tests, would contribute approximately 0.07% to the 2017 South African "energy" sector total of 0.41 Gt and represent a contribution of 0.06% to the National GHG inventory total of 0.51 Gt.

2.2.23. Given that the impact is of international extent, but of short duration the magnitude is low, with the implementation of the mitigation measures, the intensity and magnitude of the

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<sup>3</sup> at pages 309 – 311.

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GHG impact reduces to very low, with the residual impact reducing to very low significance.

**CA'S RESPONSE**

2.3. In its comments to this ground of appeal, the Competent Authority responds as follows:

2.3.1. Section 3.2 of the Climate Change and Air Emissions Impact Assessment Report indicates that the climate change impact over the Project lifetime was assessed and is within the scope of the proposed project. Both greenhouse gas emissions (climate change) and non-greenhouse gas emissions (air quality) that will be generated from emissions sources associated with the Project were considered. The impacts of the calculated emissions were assessed in terms of climate change and air quality. In terms of the Project's impact on climate change and GHG emissions, the assessment outcome indicates that the impact is of low significance and very low significance after the implementation of mitigation measures.

2.3.2. The applicant lodged an application to undertake exploration drilling to establish the extent and economic viability of gas reserves and/or oil in Block 5/6/7. The scope of the proposed work is to drill up to five wells to collect information regarding the extent, type of petroleum and economic feasibility of extracting the *potential* petroleum resources. It is not known if petroleum will be found during drilling. Therefore, at this stage the estimated potential petroleum is not known and cannot be provided. NEMA only requires applicants to assess the impacts of activities for which an EA is applied for. Phases or activities that are outside the scope of this project do not require a life cycle analysis. Should the results be positive, the impact of production activities on climate change will be assessed within the scope of that proposed project.

2.3.3. The Competent Authority is therefore satisfied with this assessment.

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- 2.3.4. The Integrated Resources Plan 2019 (IRP) notes that there is a requirement to pursue a diversified energy mix with respect to electricity production, which reduces the country's reliance on a few primary energy sources. The IRP notes that natural gas is considered a transition fuel, globally, that can provide the flexibility required to complement renewable energy sources.
- 2.3.5. In respect of the polluter pay principle the Competent Authority notes that plans and commitments to minimize and manage negative impacts of the authorised activities are described in the final EIA Report.
- 2.3.6. The Competent Authority takes note of the allegations against the applicant and notes that South African legislation does not provide for refusal of the environmental authorisations and exploration right applications based on the applicant's activities in other countries.
- 2.3.7. With regard to the averments made by the second appellant the Competent Authority confirms that emissions to air and water have been considered and assessed in the ESIA report and appropriate mitigation measures are included in the EMPR.
- 2.3.8. Greenhouse gas emissions (climate change) and non-greenhouse gas emissions (air quality) that would be generated from emissions sources associated with the Project were quantified. The impact of the emissions was therefore assessed in terms of climate change and air quality, the assessment outcome indicates that the impact is of low significance (before mitigation) and very low significance after the implementation of mitigation measures. The project will only contribute a maximum of 0.07% towards the 2017 South African energy sector and 0.06% towards the South African National GHG Inventory.
- 2.3.9. The IRP recognises the need for South Africa to employ a diversified energy mix to meet the country's electricity requirements. Natural gas is considered to meet this objective, to provide the flexibility required to complement renewable energy sources as a lower carbon

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option compared to coal. The IRP recognises the role of natural gas as a source to produce electricity and direct thermal energy. It acknowledges the role of gas to contribute towards maintaining base-load electricity and peak-load electricity.

- 2.3.10. The Competent Authority pointed out that IRP notes that the current use of natural gas in South Africa exceeds production and that demand is met by Mozambique. The need for South Africa's own natural resources is important for energy security and to transition the country towards a lower carbon economy. It concludes that the development of an oil and gas industry in South Africa does not contradict its renewable energy goals but complements renewable energy sources and that they are not mutually exclusive.

**EVALUATION (Reasons for Decision)**

- 2.4. In evaluating this ground of appeal and responses thereto, I note that an exploration right was granted to the applicant under section 79 of the MPRDA to undertake exploration activities. Section 1 of the MPRDA defines an exploration right as “the re-processing of existing seismic data, acquisition and processing of new seismic data or any other related activity to define a trap to be tested by drilling, logging and testing, including extended well testing, or a well with the intention of locating a discovery.”
- 2.5. Exploration concerns the identification of a resource, while production is concerned with the extraction of the discovered oil and gas.
- 2.6. I have perused the ESIA report and note that section 3.2 of the Climate Change and Air Emissions Impact Assessment Report (CCIA) indicates that the climate change impact for the project was assessed. I further concur that the CCIA falls within the scope of the proposed Project. In this regard I find that there is no legal requirement to conduct a full life cycle impact assessment for GHG beyond the exploration activities.

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- 2.7. 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.
- 2.8. I am aware of reliance by a number of the appellants on the case of the *Sustaining the Wilde Coast and Others v Minister of Mineral Resources and Energy and Others* 2022 (6) SA 589 (ECMk), referred to as the Makhanda Judgment, for the proposition that activities associated with the exploration for oil/gas and the activities associated with the extraction, production, transportation and consumption thereof are part and parcel of the same activity and therefore the applicant should have identified and assessed all the potential life cycle risks and mitigation measures in regard thereto. I respectfully disagree. 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 authorization, namely listed activity 18. It need not assess the potential impact and mitigation measures in respect of an activity for which it has not yet sought an authorization, even though it may one day seek to do so, namely listed activity 20.
- 2.9. Of course, if the applicant discovers gas resources whilst exploring, and in sufficient quantities to persuade it that extraction of that gas, and production, 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. Not before then.

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- 2.10. The Makhanda Judgment is currently being taken on appeal. I understand from the advice I received from the legal officials in the Department that rule 18(1) of the Uniform Rules of Court automatically suspends the operation of the order pending the finalisation of the appeal. It is therefore incorrect, and unfair, to assert, as some of the appellant's do, that the Competent Authority's decision is "in contempt" of that order. It is not.
- 2.11. The allegation that the applicant is not "fit and proper" to undertake the activity is entirely unsubstantiated with evidence. I agree with the Competent Authority that he could not permissibly take this into account when making his decision. Nor can I. I am obliged to confine myself to the relevant issues underpinning the granting of an EA as laid out in the legislative and regulatory instruments. I am of the view that I cannot take suspicion and speculation into account. They are not relevant, nor has the first appellant laid a proper basis, rooted in the legislative and regulatory instruments, for why he contends that these issues should be taken into account. The Competent Authority was also not entitled to anticipate future/ potential non-compliance by the applicant and pre-emptively refuse EA on that basis. Again, nor can I. An applicant is legally bound to comply with the conditions as set out in the EA. Non-compliance with any condition(s) of the EA or approved EMPR is an offence in terms of section 49 A(c) of NEMA.
- 2.12. Therefore, I determine this ground of appeal is without merit and is dismissed.

***Second Ground of Appeal: Marine Ecology, Noise and Spills***

Marine Ecology and Avifauna

- 2.13. The second, third, fourth, fifth, ninth, twelfth, thirteenth, and fourteenth appellants submit inter alia as follows:

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- 2.13.1. The second, third, twelfth and thirteenth appellants submit that oil and gas exploration and development causes disruption of migratory pathways, degradation of important animal habitats and ecosystems, soil fertility and animal communication such as echolocation, which can be devastating to the animals and humans who depend on these ecosystems.
- 2.13.2. The fourth appellant refers to the specific conditions in the EA and note their concern that the area of interest has the highest concentration of cetaceans in the greater area. They state that it is unclear how it will be ensured that the mitigation measures are increased during migration periods, given that the drilling activities are anticipated to occur for possibly more than 24 months, or how best international practices will be improved or modified, given that they are already in play.
- 2.13.3. The ninth and thirteenth appellants contend that the appellant asserts that the project will have considerable predicted impacts on marine wildlife, habitats, and ecosystems in one of the most pristine marine environments in South Africa and globally and that the project area overlaps with the Atlantic Southeast 19 IBA which provides essential habitats for bird species.
- 2.13.4. The fourteenth appellants submit that the risk of unacceptable, significant impacts on the marine environment, that cannot be effectively mitigated are too high to justify the decision to grant the EA for the proposed exploratory drilling.

Underwater Noise

- 2.14. The third, fourth, twelfth, thirteenth and fourteenth appellants submit as follows:
- 2.14.1. The third appellant suggest that load noises introduced into the ocean from human activity negatively impacts the sensory range of marine animals.

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- 2.14.2. The twelfth and thirteenth appellant avers that blasting noise, vibration and debris interferes with essential whale and dolphin behaviours, such as communication, feeding and breeding, and can also displace fish, reduce catch rates of some commercially important species, and expose marine animals to predators. That blasting is not only used during seismic surveys but may also be used in other aspects of the oil exploration process, such as the construction of drilling rigs, access roads and pipelines. This should have been assessed. It is important to consider whether the vertical seismic profiling (VSP) to be undertaken as part of the exploration process could potentially interfere with marine life.
- 2.14.3. The fourth appellant notes that while the ESIA report acknowledges that noise generated by vessels, well-drilling operations and the VSP, falls within the hearing range of most fish, mammals and reptiles and would be audible and detrimental to them for considerable distance before reducing to below threshold levels and that this is ignored due to paltry mitigation measures. The cost to fisheries and tourism is downplayed.
- 2.14.4. The fourteenth appellant alleges that the proposed seismic survey presents unacceptable risks of significant harm to the marine environment, which cannot be adequately mitigated through the mitigation measures proposed in the ESIA report and EA.
- 2.14.5. The fourth appellant further notes cumulative noise impacts were not considered.
- 2.14.6. The fourteenth appellant states that water being a dense medium, sound travels faster and further underwater. Marine species depend on sound for essential biological functions, including feeding, breeding, travelling, and socializing. Noise from drilling exploratory wells includes vessel noise, drilling noise, and VSP blasts, and can cause significant temporary and permanent harm across taxa, including physiological, loss of hearing, death, or other injury, and behavioural, cessation of feeding, changes in spawning or breeding, changes in movement patterns, and masking of communication.



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- 2.14.7. They allege the ESIA report does not fully identify and assess the risk posed to marine species and ecosystems and does not effectively mitigate the risks from the proposed activity, as its approach is flawed.
- 2.14.8. They aver that the ESIA' report's conclusion that VSP acoustic impacts will be low is flawed, because it fails to analyse the increase in ambient noise from the repetitive blasting of the airgun array, which can be significant and extend for kilometres. VSP is expected to occur in sessions for up to 9 hours with as many as 250 blasts at 20 second intervals. Sounds emanating from a seismic airgun array do not behave as individual and finite sound source in situ but reflect off the ocean surface and seafloor as they travel, leading to a continuous increase in the sound level through reverberation. Studies have found seismic surveys causing elevated ambient noise levels by more than 25 dB (approximately a 4-fold increase in noise levels) across distances of 40 km and that seismic blasts are detectable at distances greater than 500-700 km.
- 2.14.9. The conclusion in the Marine Ecology Assessment (MEA) that pelagic species react to blasting by moving away from a sound source, does not analyse the short and long-term impacts of this displacement from an ideal or preferred habitat on the individuals, populations, and ecosystems. While the study acknowledges that penguins are known to forage as far as 60 km offshore, it fails to analyse the African Penguins' full range and how displacement may impact their feeding behaviour or other predator-prey interactions. If the species are moved from these areas, it may cause severe and potentially irreversible consequence. The Block forms part of several "blue corridors" / "whale superhighways" for species like the humpback and the southern whale. The project area also covers sea turtle migratory corridors for both critically endangered leatherback and endangered loggerhead sea turtles. In addition, the CBAs where drilling may occur, include sperm whale winter and summer distributions, spawning areas, migration routes, and core usage areas for protected species.

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2.14.10. They contend the conclusion in the MEA that VSP affects plankton only near the zone of impact because the sound will be “highly localised and transient” dismisses the McCauley study that indicates a decrease of over 50% of plankton and all krill larvae within a 1km radius from airgun blasts. The ESIA report dismisses this study as “not comparable” to the VSP operations at hand, because it claimed that the “volumes and the energy released during VSP operations are significantly smaller than that generated by conventional seismic surveys.” The McCauley study however, used less pervasive technology than that expected from VSP operations.

2.14.11. The fourteenth appellants contends that the ESIA report’s conclusion that drilling and vessel acoustic impacts will be Very Low is flawed, as the Marine Ecology Assessment does not take into account all relevant information. The conclusion that “there is no evidence of significant behavioural changes that may impact the wider ecosystem,” is based on an almost 15-year-old EIA prepared for offshore drilling in the Falkland Islands, without further discussing the marine ecosystem there and how it differs from that off the Southwest Coast of Africa.

2.14.12. The fourteenth appellant avers that the ESIA report relies on Passive Acoustic Monitoring (PAM) to mitigate harm from VSP blasting, which the applicant makes no commitment to execute.

2.14.13. The fourteenth appellants states that the precautionary principle is required to be employed when assessing threats of harm to marine and bird life caused by seismic surveys. While the MEA uses outdated data and, at times, recognizes the scientific uncertainty, it does not apply the precautionary principle.

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Oil Spill / Well Integrity / Well Abandonment/ Water Quality

2.15. Third, fourth, fifth, sixth, ninth, twelfth, thirteenth and fourteenth appellants submit as follows:

2.15.1 The third and fourth appellant avers that well failure is a common occurrence, and it is therefore imperative that there is a clear understanding of barrier regulations, standards and implementation which is adequate and proactive. In the EA, under the authorised activities, it is stated that 'demobilisation entails leaving a well-head fitted with an over-trawlable abandonment cap if it is deemed safe to do so.' The appellant however raises concerns indicating that this statement is not clear on what "safe" entails. The fourth appellant submits that even though the ESIA notes the impact of an unlikely oil spill is of very high significance on marine and coastal environments this fact is glossed over by the Competent Authority and shows a lack of a duty of care despite the applicant's poor reputation in oil and gas production. An assessment of the receiving onshore environment of oil and mitigation is missing.

2.15.2. The fourth appellant refers to condition 5.5.4 of the EA, which states that "*If the operations are planned to cover the Austral Winter period, the oil spill response plan must be enhanced to cover risks associated with shoreline oiling from blow-out*", and notes that this is the only acknowledgment of the potential for a blow-out. They question the need for enhancing the response plan, if it is already in line with best practice and state that changes in weather conditions should already have been incorporated into the planned activities.

2.15.3. The fifth and thirteenth appellants aver that oil spills and/or pipeline rupture in the Agulhas Current will have devastating local ecological damages, which has not been considered.

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- 2.15.4. The fourth appellant avers that alternatives to well-plugging were not considered. The risk of an oil spill that would have huge ecological, social, economic and cultural impacts is acknowledged in the ESIA report. The modelling undertaken as part of the OSM and the marine ecology and fisheries reports indicates that it is likely that a well blowout could result in oil reaching the South African coastline depending on wind and currents and may even reach as far as Namibia and have significant impacts. The overall sensitivity of marine ecology/environment to a large oil spill is considered very high and calls for a precautionary approach.
- 2.15.5. The sixth appellant avers that a well blow-out event would cause an environmental, economic and social disaster from Lamberts Bay to Knysna, with Cape Town and False Bay at its centre. In the ESIA report, the probability of the impacts of a blow-out are deemed to be unlikely, which it defines as equal or less than 5%. The extreme current and wave conditions of the Southern Cape coast will mean that the probability of such a disaster may well approach this upper limit of a 1 in 20 occurrence.
- 2.15.6. The ninth appellant submits that spills would severely impact the ecology, economy and the livelihoods of the area. No provision appears to be made for the long-term monitoring of well plugs and other structures that will be abandoned at the end of the project. Alien invasive marine species, viruses and bacteria will potentially be introduced into the area due to international vessels and equipment being used and ballast water discharge.
- 2.15.7. The twelfth appellant avers that the impact of water pollution from operational discharges and spills and leaks during exploration or production on the health and reproduction of marine organisms should have been considered.
- 2.15.8. The fourteenth appellant refers to the report by WildTrust, which they assert concludes that the exploration activities “pose a serious risk and threat” to marine biodiversity and livelihoods of coastal communities that has not been fully articulated, rated and evaluated,

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nor are effective mitigation measures in place for either a major blow-out, or minor and operational spills. The WildTrust report rates the probability of a major spill as medium rather than low.

2.15.9. The WildTrust report refers to a different, independent oil spill model for South African waters which presents results for a hypothetical 15-day blowout spill of light crude oil in the same location and notes that a number of species identified in the ESIA report which may be severely impacted by large, unplanned, minor and operational spills, include a number of species which are under severe threat of extinction and are protected due to their vulnerability and therefore the EA should be set aside.

2.15.10. The fourteenth appellant states the risk of a catastrophic oil spill is highest at the exploratory drilling stage and despite reassurances from regulators and companies, happen all too often e.g. the 2010 Deepwater Horizon incident which was an exploratory well 1,500 metres deep, resulted in an oil spill that had devastating impacts on ocean ecosystems, the livelihoods of coastal communities, the tourism industry and caused the massive killing of marine mammals, fish, and birds.

2.15.11. The fourteenth appellant alleges that such disasters are not anomalous as at least 711 offshore blowouts and/or well releases have occurred world-wide since 1955. They contend that in many ways, the Block 5/6/7 drilling presents an even greater risk than the Deepwater Horizon event because drilling in deep waters increases the risk of accidents and spills due to higher bottom water pressure and higher pressure within the oil and gas pockets. The Block 5/6/7 plan is to drill up to five wells between 700 and 3,200 m, extending past the deep drilling range and into the "ultra-deep" range (below 2,400 m depth). Drilling at increasing depths equates to colder temperatures, higher pressures, and more difficult working conditions that necessitate the use of specialised remote controlled vehicles capable of withstanding high water pressures and currents.

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2.15.12. The fourteenth appellant further alleges the applicant's Oil Spill Modelling (OSM) fails to consider the increased risk of accidents and spills with ultra-deep drilling and relies on a model based on the blow-out contingency plan for Block 11B/12B, where the maximum water depth of 1,800 m is half that of the maximum water depth of Block 5/6/7 (3,200 m). There was no accounting for the probable difficulties in capping presented by the extreme depths of the proposed exploratory drilling in Block 5/6/7. In ultra-deep and deep drilling, blowout capping is increasingly technically challenging and expensive and involves many technical steps each of which prolongs the time before a well can be contained, with disastrous impacts to marine and coastal ecosystems and communities.

2.15.13. The fourteenth appellant avers that sub-seafloor blowout and leak scenarios were not assessed in the OSM. They say that it took 87 days to seal the well in the Deepwater Horizon incident where the pipe fracture occurred in the water column. Given the challenges of ultra-deep drilling, the assumption of a 20-day capping timeframe in the OSM is likely an underestimate. These gaps are a fatal flaw in the OSM and the Project's environmental assessment. It says that without this information, the Competent Authority could not make a reasonable decision about the Project's risk level and safety.

2.15.14. The fourteenth appellant contends that as the blowout contingency plan (BOCP) has not yet been studied for Block 5/6/7, before the applicant prepares an assessment of the bathymetry, sediment, and geology of the Block, it is impossible to adequately assess the technical equipment and contingencies needed to quickly cap a blowout. Because of these unknowns, the OSM should have used a capping time longer than 20 days to properly assess the impacts of a spill.

2.15.15. The fourteenth appellant states that the ESIA report and OSM fails to adequately consider the year-round high winds and swell on blow-out or spill response timing. Block 5/6/7 is located within a highly turbulent and unpredictable meteorological and oceanographic system, aptly called the Cape Cauldron and is a major global hotspot of eddy kinetic

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energy. They assert the Block routinely experiences seas rough enough to make deck operations dangerous and could lengthen blowout or spill response time.

2.15.16. The fourteenth appellant avers that the ESIA report fails to consider that the Block is in a hotspot of climate change-induced oceanic intensification, which amplifies the risk of offshore drilling accidents and spills and in the Cape Cauldron/Agulhas Retroflexion area of the Block. Storms increase the risks of offshore blowouts and spills as in the case of Hurricane Ivan, which destroyed seven drilling platforms and damaged 12 large pipelines and six other platforms.

2.15.17. The fourteenth appellant contends that whilst the impacts associated with a blow-out are identified as being of high significance, the ESIA report (and the EA) fail to provide for adequate mitigation of impacts. The WildTrust report finds that “the minimum time to shoreline oiling is estimated to be 0.6 days, which would make mitigation measures impossible to implement.”

2.15.18. The fourteenth appellant contends that the ESIA report and the mitigation measures proposed depend on plans, including the OSCP and the BOCP, which have not been made available to I&APs. These plans should have formed part of the ESIA report, as the information contained in these reports is crucial to understand the adequacy of mitigation measures, and the likely impacts on the marine environment, including the MPAs, CBAs and EBSAs, and on coastal communities.

2.15.19. They state that the ESIA report also fails to adequately assess the impacts from operational and minor spills.

2.15.20. The fourth, ninth, tenth and fourteen appellants raise the concern that a precautionary approach should have been followed but was not, and that an EA should therefore not have been granted. There are references again to the Makhanda Judgment to support the

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claim that the harm cannot be ruled out nor that it is not capable of restoration, and that these are adequate grounds for the applications to have been refused. The appellant asserts financial compensation cannot reverse irreversible environmental damage. There is reference again to the Deep Water Horizon disaster in the Gulf of Mexico to show that well exploration and exploitation disasters can never be adequately rectified as the plugged well head may still leak oil ten years on.

**APPLICANT'S RESPONSE**

2.16. In their comments to this ground of appeal, the applicant responds as follows:

Marine Ecology and Avifauna

- 2.16.1. The ground of appeal by the second and third appellant is unclear, as the impact of the Project on migratory pathways, important animal habitats and oil spills are thoroughly considered and assessed in the ESIA report and appropriate mitigation measures are included in the Environmental Management Plan to minimise these impacts.
- 2.16.2. The appellants have not objected to or refuted the findings or mitigation measures in the ESIA report, and it is assumed the appellant merely objects to the Project in principle and "in principle" objections should be dismissed.
- 2.16.3. The most significant residual impact of normal operations relates to the potential of smother and toxic effect on localised sensitive or potentially vulnerable hardgrounds. However, the avoidance of localised sensitive or potentially vulnerable hardgrounds will reduce the significance of smothering and toxic effects on these benthic communities to medium significance.



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- 2.16.4. In response to the fourth appellant, the applicant confirms that it is required to comply with both the EA and the recommendations in the ESIA report and specifications in the EMP. They indicate that it is likely that only one to two wells will be drilled in a year in the area, and not five back-to-back wells. Thus, the timeframes have been reported per well and the impacts will not be a cumulative 24-months in duration as stated by the appellant. The applicant further asserts that the impact on whale migration is considered in the ESIA report and that whales may experience disturbance within 2.2 km from the drilling unit and will easily be able to avoid the area since the drilling unit is stationary. It is therefore unlikely that whale migration will be affected.
- 2.16.5. In response to the ninth appellant's contentions, the applicant submits that the ground of appeal paraphrases and summarises the potential environmental impacts already considered and assessed in the ESIA report, for which suitable mitigation measures are proposed. Furthermore, the appellant does not suggest that the assessments of the impacts therein are incomplete or inaccurate, nor that the mitigation measures proposed are inadequate.
- 2.16.6. In response to the twelfth appellant's contentions, the applicant points out that the only infrastructure that will be constructed are the exploration wells and there will be no pipelines or platforms. The drilling would be undertaken in the offshore marine environment (60 km from the coastline at its nearest point) where the Southeast Atlantic Unclassified Slope Substratum and Upper-, Mid- and Lower Slope ecosystem types have been rated as of 'Least Concern'. Identified CBA1 and CBA2 areas occur within 5.4% of the area of interest. The wells will be specifically sited to avoid sensitive hardgrounds following a pre-drilling ROV survey. As a result, the overall sensitivity of receptors to the presence of well drilling infrastructure, the small percentage of habitats potentially affected, despite the presence of CBAs, is considered low.

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- 2.16.7. The applicant contends that the thirteenth appellant has not suggested that the assessment of the environmental impacts in the ESIA report are incomplete or inaccurate, or that the mitigation measures proposed therein are inadequate. The impact on marine species includes endangered species such as the southern right whales, humpback whales, sperm whales, and various baleen and toothed whales is considered and assessed in the ESIA report in sections 7.5.7; 9.1.2; 9.1.4.1; 9.2.3; 10.1; 10.4.3.1 and the proposed mitigation measures are set out at the end of each section.
- 2.16.8. The impact on marine birds including endangered species such as Atlantic yellow-nosed albatross, Indian yellow-nosed albatross, and the Tristan albatross are considered and assessed in the ESIA in sections 9.1.2.1; 9.1.4.1; 9.1.5; 9.2.5; 10.3; 10.4.3.1 and the proposed mitigation measures are set out at the end of each section.
- 2.16.9. The presence and impacts of the Atlantic Southeast 19 IBA is considered and assessed in the ESIA report in section 7.5.4 and the proposed mitigation measures on IBAs in sections 9.1.4 and 9.1.5 of the ESIA report.
- 2.16.10. The impact on marine wildlife was assessed in chapters 9 and 10 of the ESIA report. The impact on EBSAs, MPAs, CBAs, sediment & benthic fauna was considered and assessed in the ESIA report.
- 2.16.11. The impact on marine fauna and sea birds due to operational lighting and light from flaring was assessed in detail in the ESIA report under section 9.1.5 (vessels) and section 9.2.5.2 (well test). The residual risk in both cases is of very low significance.

Underwater Noise

- 2.16.12. Regarding the impact of major noise sources associated with the proposed drilling on relevant marine fauna species of concern, a specialist Underwater Noise Modelling Study

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was prepared as part of the EIA and considered the worst-case scenario. This information was used by the other specialists (e.g. marine ecology, fisheries and social/economic) to assess the significance of the potential noise impacts by combining the acoustic zones of impact with ecological and social information of the affected area.

2.16.13. The applicant asserts that the exploration project does not entail any “blasting” activities. It points out that the VSP authorised by the EA differs materially from the traditional stand-alone seismic surveys.

2.16.14. The applicant disputes the fourteenth appellant’s assertion that the seismic survey presents an unacceptable risk of significant harm to the main environment which cannot be adequately mitigated through the mitigation measures proposed, on the basis that it is devoid of any reasons or evidence contradicting the expert submissions in the ESIA report. It contends that because the applicant is not conducting a seismic survey but rather a VSP indicates that the appellants have not applied their minds to the contents of the ESIA report.

2.16.15. The specialist assessments considered the zones of impact in relation to various sensitivities (e.g. key feeding and spawning areas, MPAs, key fishing areas, etc.) and the Underwater Noise Modelling Study takes the current ambient noise levels into account, which is 10 dB higher than the lowest level and are considered in the cumulative noise impact models.

2.16.16. The applicant contends that underwater noise reverberation is unique to the source location and season as it arises from scattering within the water column of the ocean and the ocean surface/ bottom. To assess this problem, a parabolic equation modelling algorithm RAMGeo was used to solve the range-dependent acoustic problems with fluid seabed geo-acoustics properties generated using VSP acoustic sources.

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2.16.17. Since noise levels vary with depth, there will be areas in the water column in the identified zone of impact that are exposed to lower noise levels than others, with moderate to high impacts in the near-field, and lower in the far-field.

2.16.18. The applicant avers that VSP is a standard method that may be used during well logging and can generate noise that could exceed ambient noise levels. The volumes and the energy released into the marine environment are significantly smaller than that generated for conventional seismic surveys and is expected to take up to a maximum of nine hours (around 250 pulses) per well to complete. Depending on the location of the source and receiver, some airgun signals can be detected hundreds of kilometres across the ocean.

2.16.19. The applicant dismisses the claim that no long-term impacts were assessed as the VSP process is a mere 8-9 hrs operation. The ESIA report also considered the “whale superhighways” in the ecology impact report.

2.16.20. Whereas the Perry 2005 citation (Falklands) may be 15 years old, more recent studies (including references as recent as 2022) were considered in the assessment which have not indicated that ecosystem wide impacts would be expected from the proposed project. Drilling operations will continue for a short period only and no long-term noise effects on biota are expected.

2.16.21. The applicant asserts that subsequent to the McCauley study (2017), Richardson *et al* 2017<sup>4</sup> (extrapolated the experiment and used an airgun system of 3,200 cubic inches and found substantial impact at distances outside the seismic survey area. The study concluded that “zooplankton populations recovered quickly after seismic exposure due to their fast growth rates, and also due to the dispersal and mixing of zooplankton from both

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<sup>4</sup> Richardson, A.J., Matear, R.J. and Lenton, A., 2017 Potential impacts on zooplankton of seismic surveys. Australia: CSIRO)

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inside and outside of the impacted region.” The study also stated that future studies need to be designed and optimized, to test the McCauley findings.

2.16.22. The applicant says that ESIA reports, by their very nature, predict potential impacts of a project. While baseline acquisition often involves primary data collection, impact assessment typically involves the inference of potential impacts using one or several desktop methods; it does not typically involve experimentation during the ESIA process. The quality of information on which the assessment is based informs the confidence of the assessment (significance rating) which include and which were analysed are:

- Understanding of the project type;
- Understanding of the receiving environment and baseline;
- Number of impact receptors;
- Monitoring data for previously implemented projects;
- Scientific studies;
- Similar projects in the same area, or relevance of other data; and
- Unpredictable external influences.

2.16.23. The applicant submits that based on the above analysis, the confidence in the assessment of potential project impacts is medium to high.

2.16.24. The applicant points out that impacts on whale migration is considered in the ESIA and that no permanent displacement of species or their prey is likely due to the short duration of noise of drilling and VSP operations with noise levels returning to ambient after drilling is complete. While whales may experience minor disturbance within 2.2 km from the drilling unit, since the unit is stationary whales will easily be able to avoid the area and thus, whale migration will unlikely be affected and no displacement is expected. Considering the project's short duration of 4 months for drilling, 9 hours for VSP, the highly localised effects

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of drilling and associated noise, it is not considered critical that drilling be undertaken outside any migration periods.

2.16.25. Furthermore, as penguins are far-ranging species, they will easily avoid the noise and move elsewhere to feed. The impacts of displacement are thus expected to be negligible, particularly considering the distance offshore. Although African Penguins have also been recorded as far as 60 km offshore, the area of interest for drilling lies on the western extent of penguin foraging areas. There is no direct overlap of the area of interest with general distribution areas (as per Figure 7-31 in the ESIA report).

2.16.26. The applicant notes that section 2(4)(vii) in NEMA states that sustainable development requires “that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”. It says that an ESIA report, by its nature, predicts the potential impacts of a project based on existing experience and that impacts can never be predicted with certainty. As such, the risk-averse and cautious approach required in terms of section 2(4)(vii) NEMA implies that the EAP and specialists must critically interrogate the available data and determine whether it allows for an assessment of impacts with sufficient confidence. This, says the applicant, was done.

2.16.27. The area of interest for drilling is located in a main marine traffic route that passes around Southern Africa, and as such, most of the impacts related to routine noise emissions are not unique to the project vessels.

2.16.28. The applicant confirms that PAM will be used if safe to do so. Where, for example, due to the risk of the cable being caught up and tangled in the thrusters, it is considered too dangerous (in consultation with independent PAM and Marine Mammal Observers (MMO)) the risk will be assessed as stated in the ESIA report.

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2.16.29. No issues were raised about the Underwater Noise Modelling Study (methodology and input parameters) during the ESIA consultation periods by any I&As. Not even the fourth appellant.

Oil Spill / Well Integrity / Well Abandonment/ Water Quality

2.16.30. The applicant avers that the ESIA report is robust and provides sufficient information for informed decision-making on the proposed Project as it takes account of the significance of potential impacts including those related to an unlikely oil spill event, and a detailed oil spill modelling was conducted.

2.16.31. Section 10.4.3.1 in the ESIA report deals specifically with the impact of oil spills on marine ecology and the environment. In response to the fourth appellant's concerns regarding the potential for a blow-out during the Austral winter period, the applicant avers that a specific OSCP will be developed, suited to the specific season of operation.

2.16.32. In response to the fourteenth appellant's contention that the OSCP and the BOCP was not made available to I&As, the applicant asserts that a draft OSCP was published on the EAP's website for comment in support of the ESIA report which contained a detailed section on onshore response strategies for oil spills including beach type assessment and evaluation and detailed response strategy for each type of environment. The applicant contends that the impacts of an oil spill is considered in detail at pages 445 – 476 of the ESIA report and that the OSCP and the BOCP are not required to assess those impacts under the ESIA. The applicant says that the OSCP is a detailed oil spill response strategy and contingency plan dealing with a specific well and operations for that well. It sets out the processes/methodology to be followed in respect of a blowout, the requirements of which are well-specific and can only be determined once the micro-siting of the well is finalised. The BOCP document is therefore developed prior to drilling, as it must be tailored and specifically developed for a specific well.

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2.16.33. The applicant is aware of well integrity risks, and therefore places stringent processes and verification means to ensure that once a well is drilled to its intended depth and after data acquisition, the well abandonment process is constructed in accordance with industry standards, and that barriers installed to prevent flow to underground reservoirs or to the surface are tested. Their Well Integrity Management rules builds on the highest standards available such as the ISO 16530-1 standard, Norsok standard D-010 and the UK Oil & Gas guidelines. It also says that the statistics from publicly available literature (IOGP 434-02) shows that for wells that have been properly abandoned there are no reports of blowouts.

2.16.34. The applicant asserts that well failure is not a common issue and that the Vignes Report is taken out of context as it assesses barrier integrity related to production issues rather than exploration and further clearly states that plug and abandoned wells was not considered.

2.16.35. The applicant reiterates that the "safety" relates to other users of the sea (i.e. fishing gear) and not to the safety of the well head. The well head (whether left in situ or removed) has no bearing on the integrity of the well plugging which is done downhole in the well itself at various depths and levels. The "safety" relates to whether the well will be capped and left in situ or removed. The over-trawlable structure that is placed over the well head if left in situ is therefore to protect fishing gear from getting damaged and not to protect the well head. International industry standard is to leave the well on the sea floor for deep offshore wells (water depth of 800 m plus) as it has no impact on fishing activities at these depths and greater.

2.16.36. The potential of these events occurring due to a well blowout, however, is considered very low in the ESIA report. In a South Africa context, 358 wells have been drilled in the offshore environment to date and no well blowouts have been recorded. The probability is lowered further as the applicant has valuable experience and is well-aware of the local conditions and requirements to operate in these conditions, having successfully drilled two



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wells off the South Coast (in 2019 and 2020) where the strong Agulhas current is considered more extreme than those in the Block.

2.16.37. The impacts of an oil spill are considered and assessed in detail on all sectors (see section 10.4.3.2 of the ESIA report) and coastal and nearshore users, including small-scale and recreational fishing (see section 10.4.3.3 of the ESIA report). The applicant submits this ground of appeal must be dismissed.

2.16.38. The ESIA report confirmed that an oil spill would affect water quality. The intensity of the impact depends on whether the spill occurs in offshore water where encounters with pelagic seabirds, turtles and marine mammals would be low due to their extensive distribution ranges or closer to shore where encounters with sensitive receptors will be higher. The ESIA report points out that as the dominant winds and current blow/flow in a north-westerly direction, any oil slick would be transported away from the coast with only a small oil spill remaining on the surface for up to 5 days with a negligible probability of reaching sensitive coastal habitats.

2.16.39. The ESIA report, however, recognizes that if a spill occurred *en route* to the drill site, it may extend into the coastal MPAs and reach the shores affecting intertidal and shallow tidal benthos and sensitive coastal bird species. Notwithstanding this, the ESIA report indicates that the residual impacts on marine fauna and commercial fishing is of low significance. Although the probability of an oil spill is low, there are several mitigation measures and best practices the applicant would implement further reducing the risk of any oil spill.

2.16.40. Regarding the fifth appellant's averments concerning pipeline rupture in the Agulhas current, the applicant reiterates that the project concerns exploration only, and that there are no pipelines in the exploration phase.

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2.16.41. The applicant reiterates that the occurrence of a well blowout is extremely unlikely and refers to the 358 wells that have been drilled in the offshore environment to date without any well blowouts being recorded to date. Global data maintained by the Lloyds Register indicates that the frequency of a blowout from normal exploration wells is in the order of 0.000143 per well drilled. The applicant asserts that while the probability range for “unlikely” in the ESIA report is 0 – 5%, the above figures indicate that the probability is significantly closer to 0%.

2.16.42. The applicant disagrees with the findings and conclusions of the WildTrust report, referenced by the fourteenth appellant, for the following reasons:

2.16.42.1 It classifies the probability of a major oil spill as medium as rather than low despite that 358 wells have been drilled along the South African coastline which have been drilled in a “challenging environment” without any well blowouts.

2.16.42.2 The oil spill modelling referred to in the WildTrust report as justification for the high impacts that a (surface) blowout spill will have on the coastline, is unreliable as the authors have not given any details of the terms of reference upon which that modelling was based, the methodology followed, nor assumptions relied on. The report was also not attached to the appeal.

2.16.42.3 The weather conditions for the model referred to by the appellant is not known.

2.16.43. It is therefore not possible to determine if the WildTrust report can accurately be compared with the findings in the oil spill modelling report in the ESIA Report. This notwithstanding, the applicant asserts that while the ESIA report acknowledges that the impact of a (surface) blowout spill is high to very high, the risk of such incident arising is low.

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2.16.44. The applicant states that the various operational discharges during mobilisation, operation and demobilisation of the project are set out in detail in section 9.1.2; 9.2.2 and accidental spills/discharges in section 10.3 of the ESIA report along with the impact that these discharges will have on water quality and marine fauna. The taxa most vulnerable to routine operational discharges are pelagic seabirds, turtles, and large migratory pelagic fish and marine mammals. Some of the species potentially occurring in the drill area, are considered regionally or globally “Critically Endangered”, “Endangered”, “Vulnerable” or “Near Threatened”. However, the vessels used for the project will comply with MARPOL 73/78, regulating the nature and extent of discharges and thereby ensure that such discharges will not have a material impact on marine fauna, habitats, and ecosystems. The overall sensitivity of receptors to operational discharges is therefore considered medium.

2.16.45. Compliance with MARPOL 73/78 will result in discharges having a minimal effect on seawater quality given the low total discharge and taking into account dilution by the surface water. Furthermore, the area of interest is far removed from sensitive receptors (>60 km) and the dominant wind and current direction will ensure that any discharges are rapidly dispersed north-westwards, away from the coast.

2.16.46. The applicant points out that the ESIA report on pg. 314 notes that operational waste discharges would primarily take place at the drill site(s) and along the main traffic route taken by the support vessels between the drill sites and Cape Town or Saldanha Bay which is an area that already experiences increased vessel operational discharges.

2.16.47. The area of interest for drilling is located 60 km offshore at its nearest point and far removed from coastal MPAs and sensitive coastal receptors. There is no overlap of the area of interest with offshore MPAs or EBSAs. The closest MPA (Brown’s Bank Corals – western section) is located approximately 12 km east of the area of interest, whereas the Brown’s Bank EBSA is located 4 km east at its closest point. Discharges could directly affect migratory pelagic species transiting through the drill area. Vessel discharges on

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route to the onshore supply base in Cape Town or Saldanha Bay could result in discharges closer to shore.

2.16.48. In addition, the applicant contends that the fourteenth appellant did not take into consideration the mitigation measures proposed in the HES Report; the fact that 358 wells have been drilled in the same “challenging environment” without a single well blowout; the applicant’s local and global track record of drilling wells in such “challenging environments” including drilling operation in the North Sea harsh environment conditions; the global offshore well blowout database since 1980 maintained by Lloyds Register and SINTEF, which indicates the frequency of a blowout from normal exploration wells to be in the order of 0.000143 per well drilled, and that once these elements are taken into consideration, the HES Report’s conclusion that the likelihood of a well blowout, as being low, must be the preferred conclusion.

2.16.49. Since the Deepwater Horizon (“DWH”) incident, the current state of knowledge, available technology and approach to well blowout responses by the drilling industry have advanced. As a result, the duration of the DWH event is not considered as a benchmark of a reasonable response period. The applicant points out that TotalEnergies was a founding participant in a global consortium - OSRL Subsea Well Intervention Service (SWIS); capping stacks were developed and strategically placed around the globe for quick intervention and that no such equipment existed at the time of the DWH incident. The applicant also subscribes to Wild Well Control’s Well Contained Capping Services.

2.16.50. Subsea capping and containment equipment managed by OSRL is installed at Saldanha and it is, therefore, well-placed for a rapid response to an unplanned event in Block 5/6/7.

2.16.51. As a result of the world’s learning from the DWH incident, the oil and gas industry has reviewed guiding documents and a training and an emergency drill program was developed to foster a blowout prevention culture. A real time support centre with constant

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monitoring of sensitive operations was created and software solutions implemented for visualizing well barriers and predicting well control events.

2.16.52. The appellant acknowledges that pressure in wells increases according to drilling depth.

However, what is relevant for consideration is the pressure gradient encountered rather than well depth. This information is used to calculate the fluid type and mix to ensure that the formation is drilled with a fluid that has adequate density to balance the highest pressures to be encountered. They further assert that the well architecture is designed for the necessary working pressure limitations defined per API standards. This includes the required mitigation measures, quality controls and quality checks when the equipment is purchased and conducting the necessary commissioning function pressure tests during installation before the well construction can advance to the next well section.

2.16.53. The applicant points out that although the area of assessment (drilling area) is up to 3,200 m, the average water depth that they will be drilling in is between 2,000 m and 2,500 m. Furthermore, the applicant successfully completed drilling two wells in South African waters at Brulpadda and Luiperd in 2019 and 2020 respectively without adverse impacts. They are familiar with well drilling in these conditions, and what is required in order to do so. It is currently drilling wells in Namibia at depths between 3,000 m and 3,200 m.

2.16.54. Regarding the study referred to by the appellants, the applicant asserts that it specifically relates to a fixed long-term platform production operation whereby the events occur over the lifetime of the platform operational period (20-30 years). They disagree that this study is comparable to a subsea exploration drilling campaign of a few months, as the premises are not the same. In addition, there are mechanisms to shut-in the well, the Blowout Preventer (BOP) which is designed to operate at significant pressure. Specialised equipment designed and built for the conditions at the drilling location (including rig, vessels, ROV) will be used.

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- 2.16.55. They aver that while the OSCP for Block 11B/12B was used as a baseline for Block 5/6/7, it was adjusted to cater for the well depths at Block 5/6/7 and that the water depth is not the only criteria that requires consideration for response and capping strategies. Other factors such as location, equipment specifications, metocean conditions etc are considered and which were included in the adjustment. A detailed capping study is conducted as part of the well preparations, before drilling operations.
- 2.16.56. They also point out the Oil Spill Report was based on the assumption that capping would be achieved at both sites within 20 days and not 13 days in respect of Release Point 1. This notwithstanding, further assessment of capping capability in South Africa and for the drilling location in the Block with support from regional affiliates and vessels, the applicant can cap the well in 13 days. They therefore contend that the 20 days used for the OSM is a reasonable and realistic assumption for the installation of a capping stack in the unlikely event of a blowout.
- 2.16.57. One of the enhanced response strategies is the pre-installation of an additional well control shut in device (in addition to the BOP) called a Mudline Closure Device (MCD) which is designed as an additional blowout stopper for the proposed drilling operations. It provides an additional barrier that can be activated to close in the well.
- 2.16.58. An underground or sub-surface blowout consists of an “underground flow only or with limited surface flow where minor flow occurred and typically the BOP has been activated. This means that the oil spill is contained in the well, and the major risk of uncontrolled release of oil (blowout) into the environment is stopped or prevented, while well control processes are initiated to start well intervention procedures. The modelling done for Block 5/6/7 considers the worst-case scenario of a surface blowout and an uncontrolled flow of oil into the environment for 20 days. Therefore, the conclusion in the ESIA report considers oil spills into the environment, no matter the type of blowout and assesses the “worst case impacts”

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2.16.59. Year-round winds and swells were considered. It is evident from Appendix 2 to the Oil Spill Report that metocean results for 5 years for all four seasons were used in developing the spill model. The results of the modelling are based on data from a combination of satellite sensors, which is the closest method to on-site measurement. Save for stating that the area of interest is based in a highly turbulent and unpredictable meteorological and oceanographic system, the appellants have not dispute the metocean results in Appendix 2. The metocean data provided by HES in the Oil Spill Report is therefore unchallenged.

2.16.60. The applicant states the ocean current modelling has catered for the Agulhas retroflection area which was purchased from SAT-OCEAN who developed innovative and exclusive technologies combining in-situ data, satellite sea surface temperature, wind and altimetric data, allowing it to generate 3D ocean currents and winds anywhere in the world.

2.16.61. The equipment used for this environment is purpose built to operate in harsh environments and conditions (including in the North Sea which is classified as harsh to ultra-harsh environment).

2.16.62. The ESIA report recommends that drilling operations during the periods when the likelihood of shoreline oiling from a (major) oil spill is highest (namely during the Austral winter) should be avoided where possible, but should exploration wells be drilled in this period, response needs to be enhanced. This includes the development of a well-specific response strategy and plans (OSCP and BOCP) aligned with the National OSCP, TotalEnergies' requirements and international industry best practice for each well location that identifies the resources and response required to minimise the risk and impact of shoreline and offshore oiling.

2.16.63. Furthermore, as the Project is of a temporary nature (exploration drilling) and expected to be completed over a short period of time, physical risks of climate change and changes in

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meteorological parameters are not expected to have a significant impact on the project itself or onshore communities.

**CA'S RESPONSE**

2.17 In their comments to this ground of appeal, the Competent Authority responds as follows:

Marine Ecology and Avifauna

2.17.1. The drilling operations will commence outside migration and breeding periods of marine species of concern and mitigation measures will be implemented during operations. No potential degradation to marine habitat was identified but temporary habitat loss is expected during operations.

2.17.2. The significance of impact of cetaceans is very low and this is due to the cetaceans' extensive distribution and that the numbers expected to be encountered is expected to be low because cetaceans are a highly mobile species and are known to move away from the sound source before trauma occurs. It is also documented in literature that the temporary impact on the species is fully reversible.

2.17.3. Potential environmental impacts associated with production activities can only be assessed once exploration activities have yielded a clear understanding of the project details and how these aspects would interact with receptors.

Underwater Noise

2.17.4. The activities authorised by the EA is for the drilling of wells. Noise generated from production activities are therefore not relevant to the assessment. No seismic survey activities were authorised for the EA. In terms of loud sounds introduced into the ocean by



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the authorised activities, an underwater noise impact assessment was conducted to assess the impact of underwater noise on various marine fauna such as marine mammals, fish (including fish eggs and larvae) and sea turtles. The assessment indicates that the major noise sources (excluding from the helicopters which will transport staff, the residual impact significance of which is low) are generated by VSP, the drilling unit and support vessels. In terms of the vessel and drilling noise, impact significance on marine fauna was found to be of very low significance with and without mitigation. In terms of the impact of noise generated by VSP, the noise impact significance on marine fauna was found to be low significance with and without mitigation. The literature reveals that marine species avoid areas close to active noise sources but return to the area a few days after the noise stops.

2.17.5. The identification and assessment of impacts of the project with the mitigation measures fulfils the precautionary principle because the assessment identifies impacts that need to be prevented and minimised. Furthermore, mitigation management instruments such as plans specific to an identified impact will be developed and implemented during the operations. These efforts meet the NEMA requirements and the precautionary principle. The 500 m mitigation zone around the noise source is to prevent impacts on marine species. However, as indicated in the ground of appeal, the 20 km buffer zone is around the core foraging areas which are regarded as sensitive and are excluded as no operations will be undertaken in such areas. A minimum of two marine mammal observers (MMOs) will be onboard during the VSP operations. The drilling unit will be fitted with PAM technology. Marine species will be monitored visually and acoustically.

Oil Spill / Well Integrity / Well Abandonment

2.17.6. Potential impacts of oil spill of various magnitudes were assessed and simulated in the Oil Spill Modelling exercise. Plans and commitments to minimise and manage negative impacts of the authorised activities were described in the final ESIA report. An OSCP and a

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BOCP will be developed and submitted for approval before commencement of the activities, to be implemented during drilling. In addition, an Oil Spill Drift Modelling report will be in place to manage the unlikely event of an oil spill (the report was peer reviewed by an independent reviewer). Therefore, no significant impacts are anticipated on the ecosystem.

- 2.17.7 Well integrity is very important and will therefore be tested during the demobilisation phase. The well heads will be removed, and the casing cut to a certain depth below the surface. Where, based on the risk assessment, well heads are left in place they will be fitted with an over-trawlable cap. The risk assessment will assess if it is safe for other sea-users to leave the over-trawlable cap. There is no alternative to plugging and while there are various materials that could be used, cement is the most recommended and used in oil and gas wells.
- 2.17.8. In response to the sixth appellant's contentions, the Competent Authority clarified that it is the probability of the blow-out occurrence that is deemed unlikely, not that of its impacts. The probability of an oil spill reaching the shoreline is less than 5% should a blow-out occur. The assessment indicates the residual impact ranges between very high to high (with mitigation). Although the impact is high to very high, the probability of it occurring is low. Should such an event occur, a number of mitigation measures will be implemented to minimise the severity. Therefore, a blow-out will not result in a catastrophic event and the activity proposed will not have significant negative impacts on the receiving environment. It is noted that in South Africa, 358 wells have been drilled offshore with no incidents of a blow-out. It is also important to consider the time (+/- 60 days) it would take to cause a significant impact (as stated in the reports). It should be borne in mind that the longest time it would take to complete capping to stop the release of oil from the well is 20 days. This means that it would be done before any significant impact will be caused.

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2.17.9. The EA is in respect of exploration activities only, i.e. to confirm the presence or absence of oil/gas and to collect information such as the extent, type of petroleum and feasibility of extracting the resources (if they are found). No production activities are authorised by the EA and an assessment of the impacts associated with production activities was not required. The reason for this has already been provided in the discussion (above) on the distinction between listed activity 18 versus 20 in Listing Notice 2.

2.17.10. Regarding water pollution, the impact of various discharges associated with the authorised activities were assessed for operational discharges (galley waste, sewage etc.), discharge of ballast water from the drilling rig and vessels, and discharges from drilling fluid, cuttings, and cement. The potential impact on the marine environment and biodiversity is of low significance with and without mitigation measures. For hardground substrates, the potential impact is considered high and considered medium with the implementation of mitigation measures.

2.17.11. 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.

2.17.12. The Competent Authority notes that the applicant has the skillset and experience required for deepwater drilling and has successfully drilled wells in the South African deepwater area. It states that according to the Blowout and Well Control Handbook (second edition), 2017, deepwater wells are 80% less likely to have a blowout than wells in shallower areas. Despite the low likelihood of a blowout occurrence, the Competent Authority accepted that the applicant has put plans in place to manage impacts should the incident occur.

2.17.13. The Competent Authority averred that the DWH well was operated under a flag of convenience and had less consideration of safety measures as shown by various incident analysis reports published after the incident. Safety measures in oil and gas operating rigs

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and drill ships has since improved. The Competent Authority reiterated that the modelling report did not indicate that it would take 13 or 20 days to mobilize the capping stack from Saldanha to the drilling area, rather it indicated that the capping time would take a maximum of 13 to 20 days.

2.17.14. There are two blowout contingency plans for Blocks 11B/12B and the Venus well in Namibia. They were developed under the same conditions as block 5/6/7. Therefore, the required technical equipment needed for a blowout is known. The Oil Spill Drift Modelling simulated scenarios for all seasons experienced in the area of interest. Consideration of the various seasons in itself includes all metocean conditions in the area of interest.

2.17.15. The OSCP and BOC plans are internal operating documents, which will be prepared and approved by the South African Maritime Safety Authority (SAMSA) after being sent for comments to PASA and the Department of Forestry Fisheries and the Environment.

**EVALUATION (Reasons for Decision)**

Marine Ecology and Avifauna

2.18. In evaluating the grounds of appeal in relation to concern raised on relating to impact on marine and marine environment I considered the Marine Ecology report. I note that the highest sensitivities to the proposed drilling activities are as follows:

- Brown's bank and Cape Canyon deepwater reefs that support potentially vulnerable, long-lived benthic invertebrate species;
- Numerous vulnerable and endangered pelagic shark species.
- Loggerhead and leatherback turtles that migrate through the area;
- Sperm whales, which occur in the area year-round;

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- Humpback and fin whales, which migrate through the area between May and December; and
- The Brown's Bank MPA and EBSA

2.19. I further note that the overall impact of marine ecosystems and fauna was considered to be of medium to low impact. The impacts of an unplanned oil spill (which of itself is considered to be highly unlikely) has been rated of high significance. In this regard, I am however satisfied that the OSCP and BOCP that will be but in place will adequately mitigate the severity of the impact.

2.20. My decision is also informed by the fact that the limited scope and short duration of the Project. Again, for reasons that I have already traversed, the duration of the Project is limited to exploration (prospecting) and not extraction (production).

2.21. In light of the aforementioned I find that this ground of appeal has no merit and is accordingly dismissed.

Underwater Noise

2.22. In evaluating the concern raised in relation to noise, I considered the Noise Impact Assessment study. In this regard I note that the following impact were assessed:

- Impacts from VSP seismic pulses; and
- Impact of drilling operations.

2.23. I accept that underwater noise and light generated from the Project activities can impact on the behaviour, communication, feeding, and breeding of marine mammals, fish and birds including endangered species. However, having regard to the ESIA report, it is apparent

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that these impacts as well as those on the migratory pathways have been considered and assessed and adequate mitigation measures in respect thereof have been proposed. I note that the proposed wells, pursuant to an ROV survey, will be positioned to avoid sensitive areas and that there will be a 500 m mitigation zone around the noise source and a 20 km buffer zone around core foraging areas in which no operations may be undertaken. I am satisfied that the potential noise and light impacts of the Project on the marine ecology and avifauna and the proposed mitigation measures have been identified and assessed and that the impacts are considered to be of very low significance.

- 2.24. The implementation of the mitigation measures for VSP and the residual impact on marine fauna will remain low due to the sensitivity of the receptors.
- 2.25. I am therefore satisfied that the impacts of noise and light have been adequately assessed and mitigated to ensure low impacts on the receiving environment. As such this ground of appeal is dismissed.

Oil Spill / Well Integrity / Well Abandonment

- 2.26. The occurrence of a blow-out is very unlikely, with a probability of equal or less than 5%. The probability of oil reaching the Namibian offshore and shoreline is less than 5% and 30% respectively. Various mitigation measures for unplanned events, such as blow-out are described in the ESIA report. The mitigation measures include blow-out and oil spill contingency plans, an emergency response plan, a shipboard oil pollution emergency plan, the availability of capping stacks etc. All of these will be implemented if there is a spill or blow-out. I am satisfied that these contingent plans, properly implemented, will prevent or reduce the impacts of an oil spill or blow-out on the receiving environment. I am also satisfied, after careful consideration, that the recommended mitigation measures satisfy the requirements of the precautionary approach.

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- 2.27. It is my considered view, after reviewing the literature made available to me in the appeal, that the potential impacts on the receiving environment and on marine and coastal receptors have been identified, considered and addressed. I have taken note of the fact that some 358 wells have been drilled off the South African coast without any well blow outs. Additionally, I have taken note of the applicant's track record in working in similar environments. I further note the impacts, mitigation measures, contingency plans and responses that will be implemented if such an event occurs. There are important differences between this proposed Project and the Deep Water Horizon project and, indeed, the other oil spill incidents cited by the appellants. They are not comparable to the proposed exploration. Significantly, technology and industry knowledge to deal with such events has advanced since then. I am satisfied that the implementation of the MARPOL standards will result in discharges from the project having a minimal effect on sea water quality given the low total discharges which will also be diluted by sea water. The remoteness of the area of interest and its distance away from sensitive receptors is also relevant, as is the fact that the dominant wind and ocean current direction will disperse any discharge away from the coast.
- 2.28. I have further noted, and I accept the adequacy of, the measures to deal with underwater noise and discharges from the operations.
- 2.29. A wealth of information has been placed before me by the various parties. Some of it is technical. It is also important. I have reviewed the literature furnished to me. Whilst I accept that my decision in this appeal requires that an equilibrium be struck between a range of competing interests and considerations, I am satisfied that, after careful consideration, there is not enough in the appeal to persuade me to refuse the applicant an EA on the grounds raised by the appellants under this head. The appellants' concerns are adequately dealt with and accommodated. In light of the above, I find that this ground of appeal has no merit and is accordingly dismissed.

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***Third Ground of Appeal: Cultural Heritage***

2.30. The fourth, fifth, seventh, fourteenth, sixteenth, seventeenth, and eighteenth appellants submit the following:

2.30.1 The fourth appellant contends that the lack of environmental benefits and paltry local social/community benefits of the project need to be weighed against its considerable pollution risk to the marine environment, fisheries, local communities and to intangible heritage, spiritual and cultural practices.

2.30.2 The appellant refers to condition 5.5.3 of the EA which states that the applicant must undertake a pre-drilling survey at each well site to confirm the presence or absence of any environmentally sensitive features and that, in the event that the survey identifies the presence of archaeological sites or ship wrecks, the holder must notify the South African Heritage Resource Agency (SAHRA) and the Petroleum Agency South Africa (PASA) of the discovery. The appellants aver that the condition is effectively useless as there is no instruction to stop drilling or move the site in such an event, and that there is no definition of an environmentally sensitive feature in the EA.

2.30.3 The fifth, seventh, and fourteenth appellant submits that there was a failure to adequately assess, understand and describe the receiving environment, in particular, failure to adequately assess the cultural impacts of the project on fisheries and fisher communities in the Cultural Heritage Impact Assessment Report (CHIA). The CHIA report presented is a partial and inadequate assessment of the cultural basis of the receiving environment for this project from a fisheries perspective. Although the report includes a comprehensive assessment of the cultural impact on the Khoisan people, not all fishers identify as Khoisan and this is insufficient to cover the fisheries cultural heritage component. The CHIA report fails to appreciate the broader fishery cultural heritage and focuses narrowly on the



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ancestral and ritual practices and the relationship that the Khoisan people have with the sea.

- 2.30.4 The Report (Boswell 2022) says that the CHIA report uses anthropological research methods, including fieldwork, to define the receptors, their sensitivity to specific impacts existing, cumulative observable impacts in the sites. The report does not explain how the fisher culture is regarded as a “receptor” or how the impacts on fishers’ ability to access marine resources as the material basis of their culture. This say, some of the appellants, is not adequately addressed in the report. Considering that this project had already identified key fisheries that the activity will impact, for eg. demersal trawl and tuna-pole, it is surprising that the cultural heritage of fisheries was not investigated in any depth nor cites any literature on the cultural identities, knowledge systems, values, and customary practices of the fishers or fisheries sectors.
- 2.30.5 The fifth appellant, specifically, avers that the ocean and marine resources are inextricably woven into the cultural identity of fisher people and fisher communities. This interdependency has also been recognized by the Convention on Biological Diversity in a series of decisions from the Conference of Parties, the Special Rapporteur on Human Rights and the Environment amongst others. The CHIA report fails to engage with the importance of the ocean for fishers’ cultural identity.
- 2.30.6 The fifth appellant submits that the systems of fishers’ local ecological knowledge of the ocean and marine environment biodiversity management and protection are not addressed in the report. If the fishers’ access to fish and to the marine environment is at risk, threatened or impacted by a planned or unplanned event, such will impact their knowledge system which is part of their culture. The cultural and customary practices of specific fisher communities that have become expressions of their culture are not referenced.

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- 2.30.7 The report touches on the ocean's value from a tourism and recreational perspective but does not address the fisheries-related cultural ecosystem values that are relied upon by other sectors. Important fisher cultural sites recognised by the South African Heritage Association as heritage sites because of their value, such as Kassies Baai, are not mentioned in the report and should be part of the baseline so that if there are any impacts, they can be properly assessed.
- 2.30.8 The seventh appellant submits the CHIA report identifies numerous impacts but does not speak to the Northern Belt Coast and it can be assumed then that "there will be impacts" such as those mentioned by the CHIA report in all the other areas.
- 2.30.9 The author of the report shows little understanding of the importance of the Western Cape towns for both the commercial and the small-scale fisheries sector. The report does not make any attempt to link the impact assessment to the exosystemic interactions with culture for each of the identified communities. This is a fatal flaw in this heritage assessment. It is clear that this rating of high to very high is arbitrary and not based on a systematic, real assessment of uses and users and sites of significance.
- 2.30.10 The coast and area around the Langebaan Lagoon is famous for the finding of Eve's footprint but this is not mentioned in the report, nor are the many other important sites up the West Coast between Langebaan and Doringbaai, such as the particularly important archaeological site at Elands Bay. It is not clear why fisher practices were not detailed in the section of the report identifying and describing the baseline environment and receptors. Nor does the report go on and assess the impact of the activities on this intangible heritage. This is a fatal flaw of the report as the report is not clear where this intangible cultural heritage was identified and assessed.
- 2.30.11 The seventh appellant submits that in section 7.2.5, the report outlines the methodology used for assessing sensitivity of receptors. The report states that receptors are differentially affected by seasonal factors, but this is not explained. It is unclear how the

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expert took this into consideration in the rating of the impact. It is not clear if the report is suggesting that all fisher intangible cultural heritage would fall under “natural heritage receptor” and if the sensitivity to all would then be high. It is not clear why the category of natural receptor will not be impacted by the seasons given that fishers’ cultural practices and customs are also linked to certain species that are seasonal. The report lacks clarity and consistency and is factually incorrect. The fisher community depend on marine resources for their livelihoods, food security and cultural identities, not only for their “subsistence”.

2.30.12 The CHIA report’s final assessment and findings are non-sensical from the perspective of its assessment that “public participation efforts can reduce the intensity of impact”.

2.30.13 The CHIA report fails to adequately understand the nature of fisheries in South Africa and the cultural heritage - both tangible and intangible - applicable to fishers. It fails to adequately describe the baseline environment, identify receptors, assess potential impacts and rate these impacts. Section 7.2.7 outlines the CHIA Identification of Mitigation Measures but fails to include a mitigation measure to address fishers’ cultural identity and the impacts on their customary practices and systems. The report misunderstands the relational ontology underpinning fishers and indigenous coastal peoples’ relationship with the ocean. It erroneously assumes that a ritual will pacify them and their ancestors and fails to understand the role that the ancestors play in the living customary law of many indigenous people and fishers’ belief in the inter-connectedness of the ocean ecosystems and their place in it. These communities are saying no to oil and gas based on centuries old wisdom and connectedness to the ways of their ancestors and the ways of the ocean.

2.30.14 The sixteenth appellant says that the indigenous people, descendants of the Khoi and San, are the majority of inhabitants of the area and have resided along the West Coast for centuries, with fishing activities deeply entrenched in their culture. The risk of fish moving

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away from the shores will have a major impact on their economic and cultural activities and they seek guarantees that the Project will not negatively impact thereon.

2.30.15 The seventeenth appellant objects to the granting exploration rights, as they allege their heritage and culture was not considered and is not being respected. Oil and gas production in the oceans can disrupt the cultural way of life and livelihoods of local people who have a connection to the sea. It can lead to the destruction of cultural and spiritual resources, both built and natural, which are key to the sense of self, identity, and dignity. An example of this is significant loss to customary and recreational fishing through changes to fish populations and migratory zones.

2.30.16 The eighteenth appellant is concerned that the oil and gas, if found, will not only harm them economically but will also have a harmful impact on their spiritual and cultural connection to the ocean.

**APPLICANT'S RESPONSE**

2.31. In their comments to this ground of appeal, the applicant responds as follows:

2.31.1 In response to the fourth appellant, the applicant avers that the impact on intangible cultural heritage, although it could be mitigated for some people, remains of medium significance for those who are categorically opposed to oil and gas exploration. The majority of potential impacts can be adequately mitigated with the implementation of the proposed mitigation measures (as included in the ESMP), which are in line with current industry good practice and specialist understanding of the local environment. They contend that on the basis of these findings, there is no reason why the project should not proceed.

2.31.2 The applicant asserts that the requirement for a pre-drilling survey, with ROV footage to be reviewed by a specialist/expert to identify any potential sensitivities, is not useless as

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alleged by the fourth appellant. The ESMP specifies that a chance find procedure must be developed and implemented. If any historic shipwreck objects are found during the pre-drilling seafloor survey or after drilling commencement, which could potentially be impacted by the activity, work in the directly affected area should stop (if identified after drilling commencement) until the SAHRA has been notified and the operator has complied with any additional mitigation as specified by the SAHRA. Furthermore, the ESIA report (Section 9.2.2.1.1) does provide additional detail on “environmentally sensitive features.”

2.31.3 The applicant states that the CHIA researchers attempted to engage with the seventh appellant (Dr Sunde) and other academics in reaching the various fisher groups to obtain their views but did not receive this assistance. In a request for assistance (10 March 2022) the seventh appellant noted that such communities would have to be engaged by the academics before the CHIA team could speak to them. It is clear that the CHIA specialist made an effort to obtain as much input as possible and that he tried to collaborate with the appellants at the onset of the CHIA process. The report provides a comprehensive assessment of various stakeholders’ cultural heritage with respect to the use and enjoyment of the oceans, including fisher people perspectives, which must be read with the Fisheries Report which jointly provides a cohesive assessment of the impacts of the Project on custom, culture and practices of the SSF.

2.31.4 In relation to the seventh appellants’ appeal, the applicant submitted that the impact of the Project on fisheries (including SSF) was considered and assessed at pages 89 to 129 of the Fisheries Report. The Cultural Heritage Report must be reviewed in accordance with the findings in the Fisheries Report in so far as it relates to impacts on SSF. The appellant has misread the Cultural Heritage Report. It does not state that no fishing occurs during the winter months, it merely states that the conditions are different (i.e. the SSF would need to travel further away from the coast to catch snoek). Further, the appellant also does not appreciate that the CHIA relates to various stakeholders and, as a result, the mitigation measures may not be appropriate for all receptors in all instances. The applicant submits

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that the impacts of the planned activity on all affected and mentioned sectors including fishers are assessed in the report that related to the activities undertaken by the diverse communities and sectors along the coast or the area of interest. There was no preferred sector or preferred individual that was given more attention or focus. The criteria used for impact rating is described in section 7.6. It considered various components such as the sensitivity of the receptor, the magnitude, intensity, duration, extent and significance of the impact. It is therefore not based on the numbers of users as the ground of appeal suggests. If there are no identified potential impacts on a certain feature, area or activity, then such was not included in the report.

2.31.5 In relation to the sixteenth appellant's averments, the ESIA report notes that any impact on the integrity of the coastal and marine ecosystem could impact various aspects that make up peoples' intangible cultural heritage, including ancestry and/or spirituality, livelihoods and sense of place for indigenous groups, specifically (First Peoples and Nguni). Furthermore, the CHIA was undertaken to investigate and assess the cultural and spiritual beliefs of South Africa's coastal fisher communities and indigenous peoples within the Project's indirect area of influence.

**CA'S RESPONSE**

2.32. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.32.1. The study was not based on fishers only, but all stakeholders who might have a cultural or heritage connection to the ocean and coast and area of interest. The CHIA report assessed the impacts on the Khoisan people as well as on other affected fishers or those allocated along the Project area. It acknowledged impacts on their cultural and heritage values which were assessed. Section 7 of the CHIA report elaborates on intangible cultural and heritage aspects that were identified and assessed. These include spiritual and/or ancestral rituals, leisure, tourism etc. The location of the authorised activity is further offshore from the area

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where such cultural and heritage practices take place; the only potential impact would be water pollution due to an oil spill.

- 2.32.2. The undertaking of interviews was also dependent of the availability and willingness of the interviewee. The fishers' cultural identity is described in section 4 of the CHIA report as well as in section 7 and impacts of the planned activity on this are assessed. The assessment did not focus on the relationship between fishers and snoek only, but on the benefits that are derived from the coast and the sea. This is described or referred to as sea or marine life where communities use the sea for subsistence purposes. It is identified as one important heritage component.
- 2.32.3. The need to consider all existing indigenous knowledge systems is emphasised in section 2 of the report. However, the description of all indigenous knowledge system was out of the scope for the assessment. As the main objective of the interviews and this assessment was to understand the dynamics of the coastal communities in relation to their cultural and heritage linkages to the sea. Impacts of normal and unplanned events are assessed in sections 7.2 and 7.3 of the CHIA report.
- 2.32.4. The Competent Authority recognised the CHIA report, assessed the impacts of the Project against several identified receptors, namely ancestry and/or spirituality, archaeology and/or tangible heritage, sense of place, livelihoods, natural heritage, and health, and indicated that the impact of project activities under normal operation on cultural heritage (intangible cultural heritage, including small scale fishers) was found to be of medium significance and a residual impact is of low significance where communities accept the mitigation measures. The impact of an oil spill on cultural heritage was of very high significance, with a residual impact of high significance. The Competent Authority was satisfied that the identified potential impacts were either avoided, minimised, or managed through recommended mitigation measures as set out in section 9 of the ESIA report.

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**EVALUATION (Reasons for Decision)**

- 2.33. I note the reference to condition 5.5.3 of the EA which states that the applicant must undertake a pre-drilling survey at each well site to confirm the presence or absence of any environmentally sensitive features and that, in the event that the survey identifies the presence of archaeological sites or shipwrecks, the holder must notify the South African Heritage Resource Agency (SAHRA) and the Petroleum Agency South Africa (PASA) of the discovery. I also note the criticism of this condition, essentially that a discovery of an environmentally sensitive feature – such as an archaeological site or a shipwreck - does not require the applicant to stop its activity at the site. I agree with the criticism. In the circumstances, I have amended condition 5.5.3 to provide for the possibility that the pre-drilling survey may reveal an archaeological site or shipwreck and that, if it does, the applicant must not only notify SAHRA and PASA of the discovery, but that it must also stop its activity in the area until those two agencies have had an opportunity to consider the impact of the discovery and issue a directive, within their powers, on what they deem is the most appropriate course of action to be taken in the circumstances. This is subject to a caveat that if SAHRA and PASA are inclined to issue a directive upon being notified of a discovery, whatever that directive may be, they must do so within 7 days of being notified of the discovery.
- 2.34. Having considered the above, I am satisfied that the potential impacts on potential environmental receptors including small scale fishers and indigenous persons' intangible cultural heritage, spiritual practices and socio-economic connection with the sea, have been adequately assessed and mitigated to minimise such impacts on the receiving environment. This ground of appeal is accordingly partially upheld to the extent that I have amended condition 5.5.3. The balance of the appeal, on this ground, is dismissed.



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***Fourth Ground of Appeal: Need and Desirability***

2.35. The third, fourth, sixth, seventh, ninth, eleventh, twelfth, thirteenth, fourteenth and eighteenth appellants submit the following:

2.35.1. The third and fourth appellant aver that there is no “need’ for this Project in terms of the broader public interest nor in terms of the well-being of future generations. Due to South Africa’s sensitivity to climate impacts, which the ESIA report has not adequately acknowledged, there is a no need to pursue the Project, the choice of alternative energy cannot be another hydrocarbon option.

2.35.2. The sixth appellant avers that there is no over-arching systematic, marine spatial plan and assessment framework for the region. The draft Marine Spatial Planning Sector Plans were gazetted on 10 March 2023; but to date a Marine Spatial Plan for the region, within which the proposed project is located, has yet to be developed in accordance with the Marine Spatial Planning (“MSP”) Act of 2019 which came into effect on 1 April 2022. The granting of an EA for oil and gas exploration in this context is illegal as it is not only contrary to the MSP Act but also to the National Development Plan (“NDP”) which proposes that EAs be conducted to plan for sustainable use of the ocean environment. The necessary planning processes prescribed by the MSP Act are not yet in place to enable a decision of this nature.

2.35.3. The seventh appellant submits that the ESIA report fails to adequately assess the need and desirability of the Project in the context of the climate emergency and available scientific evidence on the social and ecological cost of this fossil fuel prospecting. It does not adequately describe the need or desirability for a project of this nature or its potential climate change impacts nor provide an assessment of the full carbon and social costs. It also fails to take cognizance of the Makhanda Judgment which requires, in relation to climate change and impacts, a comprehensive assessment of the need and desirability of

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such a Project at each stage in the process (which this appellant says is linked). In this instance, the Project will push up the country's GHG emissions in contravention of numerous international commitments.

2.35.4. The seventh appellant submits that the President announced the implementation of section 6 of the National Energy Act ("the NEA") with effect from 1 April 2024. The NEA requires the Minister of Mineral Resources and Energy to develop an Integrated Energy Plan (IEP) with public input, to consider all the variables and includes issues such as climate change and international carbon commitments and requires the Minister to balance competing economic, environmental, political and social interests. Until such time that this IEP has been developed, an EA for any new oil and gas prospecting lacks a legislative and policy framework and will be premature in the context of the current global and national climate crisis as well as South Africa's energy crisis. There should be a moratorium on new fossil fuel prospecting pending the development of this IEP.

2.35.5. The ninth appellant submits that fossil gas expansion is inconsistent with the Paris Agreement goals and UN Framework Convention which requires South Africa to take steps towards limiting global warming to below 1 degree above pre-industrial levels. The ESIA report failed to show the need to invest in new infrastructure for production, refining, exporting and transport of fossil fuel. This will contribute to fossil fuel dependence and make the transition to a low carbon economy and energy difficult.

2.35.6. The project only offers about 170 local jobs while small scale fishing rights comprise a total of 2,031 fishers. The far-reaching effect of the project cannot be known with complete certainty and could affect their livelihoods, sense of place, cultural and spiritual connection to the sea. The appellant contends that need and desirability relates to the interests and needs of the broader public which requires a consideration of the strategic context of the development seen alongside the broader societal needs and public interest.

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2.35.7. The ESIA report failed to provide a detailed costing of the potential adverse effects including GHG emissions. Activities and mitigation procedures are difficult to independently monitor and enforce. Therefore, a precautionary approach must be applied and preferred in decision-making and when there is uncertainty, the activity should not be authorised.

2.35.8. The eleventh appellant raised numerous issues concerning the “need and desirability” of the Project. Section 3 of the Reasons for Decision (“RoD”) reflects an absence of any consideration of the comments raised by the appellant (and other I&AP’s). It says that the reasons for the appellant’s view was not interrogated. The Competent Authority was bound to consider the provisions of section 24O of NEMA and State policy in respect of energy needs, including the mix of gas that may or may not be required as part of the Just Transition to a decarbonised future. Furthermore, the Competent Authority ought to have considered the extent to which there is a need to explore for deposits of oil and gas, given the climate crises, South Africa’s obligations to reduce its emissions of greenhouse gasses, and that exploration activities are ecologically harmful.

2.35.9. The appellant contends that the applicant’s distinction between the “exploration phase” and the “production phase” is artificial.

2.35.10. The twelfth and thirteenth appellants refer to the Wait et al (2015) study on the economic potential of the oil and gas industry in South Africa and note that investment in the industry will not deliver significant tax revenue for the fiscus. In the long term, the production of oil, petroleum and gas will result in a decrease in the GDP of 0.12% raising concerns about the economic viability of investing in that industry. They state that analysts and economists warn of a long-term substantial decline in demand for fossil fuels, just as there is an excess in supply.

2.35.11. The fourteenth appellant contends that the Competent Authority must consider the factors in section 24O of NEMA, including the need and desirability of the project, including the

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Guideline on Need and Desirability ("the Guideline"). The assessment of "need and desirability" must consider how the activity "may affect the geographical, physical, biological, social, economic, and cultural aspects of the environment" and the potential impacts of the Project throughout its life cycle (rather than only the need and desirability of the exploration drilling the wells).

2.35.12. They contend the description of need and desirability in the ESIA report is deficient as it fails to consider the lifecycle impacts associated with oil and gas exploitation as per the requirements of section 2(4)(e) of NEMA, including the impacts of production; the climate change implications; all relevant instruments and policies i.e. the UN Framework Convention on Climate Change ("UNFCCC"), the Paris Agreement, Western Cape Climate Response Strategy ("WCCRS"), and the West Coast District Municipality's Amended IDP 2022-2027); to adequately consider alternatives, including the no development option; the potential impacts on food security; and it assumes that gas is a transition fuel to assist South Africa to achieve its climate commitments.

2.35.13. The fourteenth appellant submits that even if the Project results in commercial exploitation, it would not necessarily have any impact on South Africa's energy security, as any oil and gas extracted would not belong to South Africa, but would invariably belong to the companies that extract it for profit. While the ESIA report refers to various government policies in support of gas as a transitional fuel (for further offshore oil and gas exploration), it states that the use of fossil fuels is not aligned with other national and international agreements, laws, policies and plans, which identify the need to reduce the reliance on fossil fuels and for the global community, including South Africa, to reduce its GHG emissions to meet international law obligations and commitments.

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2.35.14. They aver that the Vital Ambition Report<sup>5</sup> by Meridian Economics in collaboration with the Council for Scientific and Industrial Research (“CSIR”) Energy Centre (“the Vital Ambition Report”) concludes that gas to power is only justified in the South African energy mix, in so far as it is required for low-utilisation flexible capacity (peaker plants) for balancing the system during peak power demand. The report confirms that no investments in gas infrastructure for energy production and generation is needed now or in the near future.

2.35.15. The fourteenth appellant asserts that while natural gas combustion is less carbon-intensive than coal, fugitive emissions arising from the production, transport, storage and use of natural gas have a much greater climate impact than CO<sub>2</sub>. They refer to the study of Dr Robert Howarth and say that over a 20-year period, methane emissions, which make up 70-90% of natural gas emissions, are projected to be 82.5 times as impactful as those of CO<sub>2</sub>. They state that the desirability of using gas as a ‘transitional’ fuel is questionable having regard to volatile international gas prices, as well as the potential risk of Carbon Border Taxes being introduced in the future putting South Africa’s economy at greater risk. This, it says, diminishes the need and desirability for promoting new gas development projects.

2.35.16. Notwithstanding the DMRE’s policy of accelerating exploration of local resources, and in the short-term pursuing gas import options, the appellants submit that the Competent Authority is not bound thereby and that he must independently apply his mind to the need and desirability of the Project from a NEMA perspective. It contends that rigid adherence to policy in administrative decision-making fetters the decision-maker’s discretion, in violation of just administrative action, in support of which they cite *Earthlife Johannesburg and Another v. Minister of Energy and Others* (supra).

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<sup>5</sup> By Meridian Economics in collaboration with the Council for Scientific and Industrial Research (“CSIR”) Energy Centre (“Vital Ambition Report”)

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2.35.17. The eighteenth appellant asserts that it is not clear how developing the Block for oil and gas is helping South Africa's energy crisis and the achievement of its climate change goals. They say that the cost to the environment of further fossil fuel development is of concern. Although the DMRE sees oil and gas development as a solution for loadshedding, there is no plan as to who will purchase the oil/gas and if it will even stay domestically. There is no information on how the need for oil and gas meets domestic demand, and whether Eskom is going to purchase it. They say that oil and gas will not resolve the energy crisis. They believe that a moratorium on fossil fuel prospecting is appropriate due to the Integrated Energy Plan ("IEP") and the fact that it is not actually aligned with the JET IP

**APPLICANT'S RESPONSE**

2.36. In its comments to this ground of appeal, the applicant responds as follows:

2.36.1. It refers to the ESIA report which considered the policies that govern *inter alia* the development of South Africa's oil and gas resources and exploitation of gas resources (i.e. the White Paper on the Energy Policy of South Africa; the IRP 2019; Operation Phakisa; Draft Integrated Energy Plan; South African Gas Masterplan, economic development New Growth Plan; NDP 2030; South African Economic Reconstruction and Recovery Plan ("SAERPA"), Just Transition Plan, the Paris Agreement; South African NDC; and the Just Transition Plan, among others. In doing so, it avers that the proposed Project is in line with these policies and instruments. It further asserts that the principle of sustainable development which underpins a need and desirability assessment, recognises that development of the oil/gas sector can assist in ensuring energy security in South Africa, fulfil economic and employment objectives and, simultaneously, move the economy into a lower-carbon environment.

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2.36.2. The applicant asserts that when combusted, methane emits significantly less GHG than other fossil fuels. The 2019 World Energy Outlook Special Report<sup>6</sup> examines the role of fuel switching, primarily from coal to natural gas, to reduce emissions of carbon dioxide and air pollutants. The report concludes that an estimated 98% of gas consumed today has a lower lifecycle emissions intensity than coal when used for power or heat generation. The analysis takes into account both CO<sub>2</sub> and methane emissions and shows that, on average, coal-to-gas switching reduces emissions by 50% when producing electricity and by 33% when providing heat. This is the main reason why natural gas can be considered a key fuel for the energy transition.

2.36.3. In response to the seventh appellant's contentions, the applicant says that the MSP Act does not impose a moratorium on the grant of permits and licences to undertake activities in the marine spatial planning region pending the finalisation of the framework and/or these plans. It was, therefore, not unlawful for the Competent Authority to grant the EA.

2.36.4. The MAPs do not dispense with other regulatory requirements. Before any activities requiring a permit or licence can commence, the applicant will need to comply with the relevant application process, such as an ESIA, for the administrator to consider whether or not to grant authorisation. The MAPs and sectoral plans are an additional tool that administrators will need to consider.

2.36.5. In relation to the oil and gas sector plan, the appellant failed to highlight that the Marine Spatial Planning Sector Plans which include a Marine Offshore Oil and Gas Sector Plan ("the Draft MS Plan") confirms that "finding and mapping concentrations of offshore oil and gas resources that would merit commercial production is... a key priority for the South African government." To give effect to the government's Operation Phakisa (which sought to drill 30 exploration wells within 10 years of its inception), requires a "stable, certain and

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<sup>6</sup> The Role of Gas in Today's Energy Transitions – Analysis – IEA.

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predictable regulatory environment in order to attract both domestic and foreign capital-intensive investments.”

- 2.36.6. The Draft MS Plan recognises that securing the future of the upstream oil and gas sector will confirm it as an indispensable part of South Africa’s IRP and address energy challenges and secure low carbon emissions through gas resources. To preserve the environment while efficiently maximising hydrocarbon recovery, exploration and production activities have to be undertaken as per the prescribed regulatory framework.
- 2.36.7. The Marine Offshore Oil and Gas Sector Plan proposes guidelines for decision-makers. The applicant submits that the current ESIA report fulfils the requirements of and is aligned with the Draft MS Plan. One of the key recommendations in the ESIA report is that the applicant should develop a well-specific response strategy and plans (including OSCP and BOCP) which must be approved by SAMSA, PASA and DFFE. The primary objective of the OSCP is to identify all possible spill scenarios, level of response requirements and set in motion the necessary actions to stop any discharge of oil and to minimise its effects. The OSCP thus provides a comprehensive response to all oil and chemical pollution emergencies in the marine environment.
- 2.36.8. In terms of the Draft MS Plan offshore oil and gas exploration activities are permitted to take place unless the spatial regulations of other sector zones (in MS Plans and eventually the MAPs) list the activity as consent use or prohibited use. This, therefore, contemplates that offshore exploration can occur prior to the MAPs being finalised.
- 2.36.9. In light of the detailed ESIA report and the fact that there is no legal requirement that the MS Plans and MAPs be finalised before environmental authorisation can be granted, the applicant contends the appellant’s ground of appeal must be dismissed.



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2.36.10. In relation to the National Development Plan, the framework provides that the MSP is closely aligned with the NDP which identifies priorities relevant to the marine environment. The current NDP 2030 includes the development of strategies to increase offshore oil and gas. The New Growth Path sits alongside the NDP and is a framework for South Africa's economic policy, essentially to drive the country's job creation strategy including employment opportunities in offshore oil and gas and the identification of realistic and sustainable options for the diversification of the economy.

2.36.11. Under the existing legislative regime (NEMA and the EIA Regulations) applicants are required to conduct an EIA to obtain an EA to undertake exploration activities. As part of these assessments, applicants must assess relevant policies and laws and cumulative impacts of their proposed activities. When the Oil and Gas Sector Plans and the West Coast Marine Plan are finalised, they will be considered as part of the EIA process.

2.36.12. Section 6 of the National Energy Act ("the NEA") is not yet effective. As a result, it is not enforceable. It does not prohibit or prevent persons from applying for and obtaining exploration rights and EAs under existing legislation, namely the MPRDA and the NEMA.

2.36.13. The applicant asserts that the appellant's reliance on Prof Mark New's report fails to recognise that the report refers to reserves of all fossil fuel types including coal, in the calculations of proven reserves exceeding what can be used. South Africa has limited proved reserves of oil and natural gas and uses its large coal deposits to meet most of its energy needs, particularly in the electricity sector, with renewable energy playing an increasing role. By 2030 (as per the IRP 2019), it aims for energy supply to be dominated by renewables (PV, wind, CSP, hydro and storage) which constitutes 46% of the primary energy supply, followed by coal with 43%, gas and diesel with 8.1%, and nuclear with 2.4%. Although the capacity allocations in the IRP 2019 see a significant increase in renewables and a decrease in hydrocarbons (coal, oil and gas), the IRP 2019 acknowledges that gas-to-power technologies are required to provide the flexibility

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required to complement renewable energy in the "just transition" to a net-zero and climate resilient society. There is, therefore, a role for natural gas fired power generation at least as a transitional fuel.

2.36.14. In terms of oil, the trend of South African oil refinery closures will continue. In terms of gas, Mossel Bay Gas-to-Liquid (GTL) plant could close unless a domestic gas supply is identified. Due to refinery closures, the demand for oil refined products is likely to be met by increased imports. This exposes South Africa to price risks due to the international energy market and high levels of energy supply risk exacerbating poverty and inequality.

2.36.15. The No-Go alternative may prevent South Africa from identifying domestic gas that could offer an energy supply that could be competitively priced, produce relatively low carbon dispatchable power (lower carbon emissions than coal, oil or oil-fired generation) without the inherent weather risk of solar or wind generation (in the absence of utility scale batteries) and reduce South Africa's exposure to the highly volatile international oil and gas markets (fluctuating price). Further to this, using a domestic resource would have a lower carbon footprint than importing from abroad and should not be seen to be in conflict with reaching carbon neutrality by 2050.

2.36.16. The applicant avers that the twelfth and thirteenth appellants' use of the Wait study is selective without considering its limitations, which was considered by the Davis Tax Committee in their report on Oil and Gas to the Minister of Finance in Sept 2016 (page 22 of the report) in conjunction with the Econometrix Study and Standard Bank report. The Wait study uses old 1998 statistics, which creates reliability issues in terms of the outcomes of the economic modelling. The applicant asserts that oil and gas activities have a higher multiplier effect on job creation (demonstrated in the Econometrix and Standard Bank Studies) than GDP growth. The applicant refers to page 22 of the Davis Tax Committee Report which states that even if attracting investment in the oil and gas sector does not yield significant tax revenue for the fiscus (and contribute substantially toward

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GDP as a percentage), the multiplier effect of such an investment provides the platform for job creation.

2.36.17. In their response to the fourteenth appellant, the applicant contends that the project has an insignificant contribution to GHG emissions and that granting authorisation for this project will not contribute materially to GHG emissions. The applicant further asserts that the fourteenth appellant's interpretation of section 2(4)(e) of NEMA is incorrect and contends that what is required is that a person takes responsibility for the environmental health and safety consequences of a project or activity through its life-cycle.

2.36.18. The applicant contends that it is inappropriate to undertake a need and desirability assessment for production activities in an application for an EA to undertake exploration and that no timeline has not been set for commercial exploitation because the nature and extent of the reserve is unknown.

2.36.19. The applicant asserts that the agreements, laws, policies and plans merely "identify the need to reduce" and not eliminate fossil fuels and that natural gas combustion is less carbon-intensive than South Africa's current energy supply which is predominantly coal based and it therefore considered a transition fuel.

2.36.20. The applicant contends that the IDPs of most of the affected municipalities support oil and gas/diverse energy mixes and in particular the City of Cape Town's IDP contemplates natural gas in the energy mix. They assert the West Coast District Municipality's IDP recognises that "the single most important development that will take place in the Saldanha Bay municipal area over the next 10 to 20 years is the establishment of the Saldanha Bay Industrial Development Zone (SBIDZ) as the primary oil, gas and Marine Repair engineering and logistics services complex in Africa, servicing the needs of the upstream Oil Exploration Industry and production services companies operating in the oil and gas

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fields... The SBIDZ will create opportunities for economic growth and employment for the people of Saldanha Bay.”

2.36.21. The applicant says that the issue of fugitive emissions associated with the production, transportation, storage and use of natural gas does not arise as the Project is only for exploration activities and as a result production, transportation, storage and use of natural gas will not occur. Therefore, Carbon Border Taxes are not relevant to the Project.

2.36.22. The applicant states that given the current energy crisis in South Africa, the need to transition from coal-based energy and Government’s objectives to grow the economy, reduce poverty, unemployment and inequality, there is a need for an alternative (non-coal) reliable baseload power which can dispatch power quickly, during peak demand. This reliable alternative will assist South Africa fulfil its international climate change obligations to decommission coal power stations. Exploration is needed to determine if there is a feasibly and viable gas resource.

2.36.23. The applicant contends that natural gas exploration is desirable for various reasons. First, it deepens and expands the knowledge base of available resources in South Africa’s EEZ which would enable strategic decision-making about South Africa’s future energy mix. Second, knowledge of oil/gas resources is important to understand South Africa’s reliance and/or independence for a non-coal-based energy resource. Third, if viable resources are identified, strategic decisions can be made around project development and associated economic development thereof.

2.36.24. The applicant asserts that Dr Howarth’s gas life cycle impact paper acknowledges that “gas emits less carbon dioxide at combustion per unit energy than coal.” With regard to upstream GHG (methane) emissions from leaks and venting, Dr Howarth does not indicate whether any consideration was given to the industry’s “enhanced efforts” to reduce gas lifecycle emissions and methane leaks nor that the lifecycle emissions intensity of gas and

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coal is subject to a high degree of uncertainty. Methane has a global warming potential 28 times higher than CO<sub>2</sub> over 100 years and 80 times over 20 years.<sup>7</sup> However, when combusted, methane emits significantly less greenhouse gases than other fossil fuels and half of coal combustion emissions and is the main reason why gas is considered a fuel source for the energy transition.

2.36.25. The applicant says that, contrary to the Vital Ambition Report's conclusion that no new gas infrastructure is required, the Just Transition Plan suggests otherwise. They contend that the Vital Ambition Report in any event recognises gas has a role to play in South Africa's energy mix.

2.36.26. In relation to the eighteenth appellant's averments, the applicant asserts that the appellant's references to the Marine Spatial Plan, Integrated Energy Plan, Integrated Resource Plan, and the PCC's JET IP are broad and lack specificity, accordingly, the applicant is unable to respond to these allegations, and there is no evidence to support them.

## **CA'S RESPONSE**

2.37. In its comments to this ground of appeal, the Competent Authority responds as follows:

2.37.1. The Competent Authority is not responsible for the development of MSPs. There is no provision in NEMA that prohibits the undertaking of oil and gas projects in areas where there is no MSP. It is the Competent Authority's view that the requirements of section 24 of the Constitution were met during the EIA process undertaken for the EA.

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<sup>7</sup>Source: GIEC 6th Assessment Report.

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2.37.2. Marine Spatial Planning is still in the development phase and Marine Sector Plans were published for public comment on 10 March 2023. Thus, the MSP cannot be taken into consideration at this stage.

2.37.3. The need and desirability section of the ESIA report considers the impacts of climate change and motivates action prescribed in various policies and strategies applicable to ensure carbon emissions reduction. The applicant commissioned the Climate Change and Air Emissions Impact Assessment in order to understand the impacts of the project on climate change, including discussing the vulnerability of communities in the immediate vicinity of the Project to climate change and proposing management and mitigation strategies. Ultimately the Competent Authority was satisfied with the assessment.

2.37.4. The Competent Authority reiterated that the EA is in respect of an exploration right granted in terms of section 79 of the MPRDA to explore and collect information regarding the extent, type of petroleum and economic feasibility of extracting the potential resources. It is uncertain if petroleum will be encountered during the exploration drilling and therefore, a discussion regarding the economic viability of the oil and gas industry in South Africa is premature.

2.37.5. NEMA only requires applications for an EA to identify and assess impacts of the activities applied for. Only the impacts of the authorised exploration activities were assessed during the EIA process. Should the EA holder decide to progress to the production phase, a production right application must be lodged in terms of the MPRDA and an EIA process undertaken will need to be undertaken for it.

2.37.6. Chapter 5 of the ESIA report discussed the need and desirability and covers the context of the oil and gas industry, applicable policies and planning frameworks (local, national, and international) and broadly covers societal needs and the public interest. The project is in alignment with government policies such as the IRP (2019) which recognises the need for South Africa to employ a diversified energy mix to meet the country's electricity

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requirements. Natural gas is considered to meet this objective, to provide the flexibility required to complement renewable energy sources and as a lower carbon option compared to coal.

2.37.7 Furthermore, the Integrated Energy Plan (IEP) recognises natural gas as a required source to produce electricity and direct thermal energy. It acknowledges its role in contributing to maintaining base-load electricity and peak-load electricity. It is also recognised to transition South Africa towards a lower carbon economy. Importantly, the IEP notes that the current use of natural gas in South Africa exceeds production and that the majority of this country's gas demands/needs are met by Mozambique. The need for South Africa's own natural resources is important for future energy security and to transition the country towards a lower carbon economy. The Competent Authority contend that these two aspects support the need and desirability of the proposed Project.

2.37.8. The implementation date of section 6 of the National Energy Act ("the NEA") is in 2024. The EA in question was granted in 2023. It is the Competent Authority's view that the announcement and the effective date of the IEP will not apply retrospectively.

2.37.9. The Competent Authority is satisfied that the need and desirability analysis as prescribed in the Guideline on Need and Desirability in terms of the EIA Regulations (Notice 819 of 2014) is met. Alternatives are discussed in the ESIA report. It meets the applicable legislative requirements. The location of the drilling area is selected based on known data indicating the possible presence of hydrocarbon reserves and therefore the chosen area for further exploration i.e. drilling.

2.37.10. In their response to the fourteenth appellant, the Competent Authority states that the Need and Desirability Guideline requires consideration of national policies, strategies and strategic concerns such as climate change, food security and sustainability of natural resources and ecosystems. These were considered. The IRP (2019), which provides a

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path to meet electricity needs over a 20-year planning horizon and identifies the preferred electricity generation technologies to meet projected electricity demand, was also considered. It provides a mechanism for Government to diversify the country's electricity generation mix and promote the use of renewable energy and other low-carbon technologies. The plan also aims to balance several objectives, namely: to ensure security of supply; to minimise cost of electricity; minimise negative environmental impact (emissions), and to minimise water usage. The IRP (2019) noted that natural gas is considered a transition fuel globally and recognised that exploration to assess the magnitude of local recoverable shale and coastal gas are being pursued and must be accelerated. The proposed project could support this requirement through the exploration.

2.37.11. The Competent Authority avers that project alternatives were assessed in section 7.3 of the ESIA report and that these include the no-go alternative. The assessment of the no-go alternative did not identify any positive impacts of this option, other than the fact that there will be no change to the region and the country. This is because no activity will take place and therefore there will no information acquired about South African petroleum reserves. The negative impacts of undertaking the Project were also identified and mitigation measures were recommended to manage such impacts. The Competent Authority submitted that the positive impacts of undertaking the project outweigh the negative impacts, and therefore the decision was made to grant the applicant authorisation.

**EVALUATION (Reasons for Decision)**

2.38. In considering the grounds of appeal I have noted that Chapter 5 of the ESIA report discussed the needs and desirability of the Project which covers the context of the oil and gas industry, applicable policies and planning frameworks (local, national, and international) and broadly societal needs and public interest. I note, too, that the project is in alignment with government policies and plans such as the IRP (2019) which recognises the need for South Africa to employ a diversified energy mix to meet the country's



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electricity requirements. I have furthermore considered the Guideline on Need and desirability as well as the No- Go alternative.

- 2.39. 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 Planning Sector Plans which includes a Marine Offshore Oil and Gas Sector Plan ("the Draft MS Plan"). The IRP and IEP recognise natural gas as a required source to produce electricity and direct thermal energy. It acknowledges its role to contribute 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.
- 2.40. As stated above, the Project is in respect of exploration only, not production, and therefore the issue of a cross border carbon taxes does not arise.
- 2.41. I furthermore find that there is no legal requirement that the MSPs and MAPs should be finalised before environmental authorisation can be granted and that a moratorium on exploration operates until such time as these instruments are in place.
- 2.42. I am cognisant of the fact that section 6 of the NEA has not yet come into effect. I therefore determine this ground of appeal has no merit, and it is accordingly dismissed.

***Fifth Ground of Appeal: Strategic Environmental Assessment (SEA)***

- 2.43. The sixth, twelfth, and fifteenth appellants submit as follows:

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- 2.43.1. The sixth appellant avers that section 24 of the Constitution, which mandates government to secure the right to a healthy environment and protect the marine environment, is balanced with the need for sustainable social and economic development. The Competent Authority is unable to do this without a Strategic Environmental Assessment (“SEA”) to guide decision-making on authorisations such as this. Oil and gas prospecting cannot be authorised in this area until all the available science and information has been assessed and priorities for this region agreed upon.
- 2.43.2. The twelfth appellant contends that EIAs should take place at a broader level (i.e. regional or national) in the form of an SEA to consider the potential impact on the region as a whole. Such a study would be prudent in the case of the Overstrand and its surrounds.
- 2.43.3. The fifteenth appellant asserts the activities are being approved without a SEA, which is needed to coherently plan/co-ordinate these activities and to manage the cumulative impacts. “Piece-meal decisions”, it says, do not ensure that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner, while promoting justifiable social and economic development” as per the objectives set out in section 2(h) of the MPRDA.

**APPLICANT RESPONSE**

- 2.44. In its comments on this ground of appeal, the applicant responds as follows:
- 2.44.1. In terms of the EIA Regulations, an ESIA process is identified in terms of which an applicant must consider, investigate, assess and report the potential consequences of the proposed drilling exploration project. It is not a requirement under the NEMA or the EIA Regulations that an SEA must be conducted before individual exploratory drilling environmental authorisation applications can be considered and assessed. There is precedent for this conclusion, a recent appeal decision by the Minister in respect of the

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proposed exploratory drilling by Eni South Africa B.V. and Sasol South Africa Limited, the Minister confirmed that “the lack of an SEA cannot be used as a legally valid ground of appeal”. The Minister stated that:

“The EIA process is not considered inadequate in the absence of and/or if not preceded by a SEA process... the Minister, or a MEC with the concurrence of the Minister, may make regulations for laying down the procedure to be followed for preparation, evaluation, adoption and review of prescribed environmental management instruments, including (ii) strategic environmental assessments... A decision has not yet been made regarding the need for SEA of the oil and gas Sector in South Africa... It must however be noted that even if an SEA for offshore oil and gas exploration and development can be commissioned, project level assessment of environmental impacts would still be required (unless some of the provision for exclusion from obtaining an EA are adopted). The SEA would most likely not inform stakeholders and decision-makers about the “full dimensions of individual projects.”

2.44.2. There is no SEA. One could not therefore have been considered. Neither NEMA nor the EIA Regulations 2014 require one. There is no basis to claim that a decision cannot be made until such an SEA or any other environmental management instrument has been adopted. The lack of a SEA cannot be used as a legally valid ground of appeal.

**CA'S RESPONSE**

2.45. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.45.1. The Competent Authority states that there is no requirement that a SEA be in place before an EA application may be considered for approval. NEMA does not prohibit the undertaking of oil and gas projects in areas where there is no MSP or SEA. The Competent Authority is not responsible for the development of SEAs, however it

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acknowledges the need and is considering it. It is the Competent Authority's view that the requirements of section 24 of the Constitution were met during the EIA process undertaken for the EA.

**EVALUATION (Reasons for Decision)**

- 2.46. I do not believe that the absence of an SEA or MSP is an impediment to the granting of an EA. Neither NEMA nor the EIA Regulations prohibit the undertaking of oil and gas projects in areas where there is no SEA or MSP.
- 2.47. I find that this ground of appeal is without merit and is accordingly dismissed.

***Sixth Ground of Appeal: Socio-economic, Tourism and Fisheries***

- 2.48. The fourth, sixth, ninth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth appellants submit the following:
- 2.48.1. The fourth and twelfth appellants assert that the proposed exploration and production is unlikely to create long-term jobs for South Africans due to automation of functions, health and safety due to inadequate government regulation, and job security/mass layoff due to market instability; it could, however, negatively affect fishing activities. Furthermore, according to the Scoping Report, southern right whales may be affected by the exploration activities while passing through the Block enroute to their coastal breeding grounds. This could affect tourism along the Whale Coast, which relies on the presence of these whales to generate revenue for the region.
- 2.48.2. The fourth appellant further asserts that the exploration activities will be undertaken for an extended period of time (24 months) and that, from the scoping report, the impact on the various fisheries ranges from no impact to substantial impact. Despite this, fisheries

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appear to have had little to no say in the decision. There is no evidence of the fisheries sector being consulted. The pelagic longline and demersal trawl are expected to be most impacted by the drilling and post-drilling phase.

2.48.3. The sixth and twelfth appellants aver that the approval of the application for an EA ignores the fact that this exploration/production Project carries an untenable risk of a major environmental, economic and social disaster. The environmental and economic future of the Western Cape must be weighed against the relatively limited benefit ( $\pm$  20 years) of local gas availability, which is unlikely to have a major beneficial effect on the economy of the province and will only materialise a number of years from now. It seems inconceivable that the potential benefit of extracting natural gas can in any way be worth risking this unlikely, but possible, scenario which could lead to catastrophic long-term effects for the environment, economy and the livelihoods of millions of people. The implementation of this project, they say, cannot be allowed to proceed.

2.48.4. The ESIA report fails to adopt an ecosystems-based approach to the assessment of the impacts of the proposed activity. Instead, it restricts itself to a narrow focus on “fisheries” and “species” rather than understanding the linkages and inter-dependencies between the two. The ocean ecosystem and fishers cultural, social and economic identities in relation to this ecosystem are not limited to the fishers’ spatial location in the actual area of impact. A precautionary approach should be adopted in this instance.

2.48.5. The seventh appellant notes that the Fisheries Impact Assessment report indicates that there are several possible direct and secondary impacts of hydrocarbon spills on fisheries, including displacement of species from normal feeding and protective areas, clogging of gills of fish species which will lead to fish mortality, exclusion of fisheries from areas that may be polluted or closed to fishing due to contamination. The issue is not adequately addressed in the report which does not acknowledge that the line fish sector will be impacted by the activity. In the absence of adequate evidence of the impact of such an

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activity on marine fauna, and in the context of the NEMA principles coupled with the level of risk of a major oil spill, a precautionary approach should be adopted and this activity should not go ahead.

2.48.6. The ninth appellant submits that this project will offer only about 170 local jobs. Sixty-eight communities have registered for small-scale fishing rights, comprising a total of 2,031 fishers, and while they are thought to be on the shore of the area of interest, the far-reaching effects of the proposed drilling cannot be known with complete certainty. This could, in turn, affect their livelihoods. The coast relies on tourism as an important economic activity and the direct and indirect impacts of a drilling project along this coastline will have detrimental effects on tourism in the area. Hermanus is considered the most well-known area in the country for whale watching and whale-related activities.

2.48.7 The twelfth appellant contends that the Overstrand/Walker Bay area has a thriving abalone aquaculture industry and exports to markets around the world. The industry employs over 800 people and generates substantial revenue for the local economy. It contends that the abalone industry is an important employer, part of the economy and community of the Overstrand/Walker Bay area. Many people and businesses in the region rely on it. Abalone producers depend on unpolluted seawater for production because abalone are highly sensitive to changes in water quality. Potential pollution during drilling as well as plumes resulting from oil spills could interfere with abalone cultivation. Contaminants such as chemicals, heavy metals, and pollutants can accumulate in an abalone's tissue, making them unfit for human consumption. Poor water quality can stress the abalone, making them more susceptible to disease and parasites and any negative impact on the abalone industry will have an adverse knock-on effect on jobs in the area. The EIA failed to address the concerns raised by the abalone industry with respect to impact on water quality and kelp beds, the latter being a major food source for abalone.

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2.48.8. The twelfth appellant states that Walker Bay is a pristine reserve with an abundance of coastal and marine life. It is known as one of the best areas in South Africa for land-based whale watching, drawing thousands of tourists. Tourism is a growth industry in Overstrand and the largest employer in the area with overseas tourists constituting in excess of 20% of all visitors (generating much needed foreign revenue). The proposed activities, if it leads to extraction, will have a negative impact on the tourism industry.

2.48.9. Each year, hundreds of Southern Right Whales gather from June to December in the sheltered bay to breed and calve. Other whale species found in the area include Humpback Whales, Bryde's Whales, and occasionally the Blue Whale. While only 5% of visitors to Hermanus cited whale watching as the reason for their visit, the twelfth appellant contends that it is important to note that whales form a crucial part of the Hermanus area's brand identity as the whale capital of South Africa. The continued presence of whales must be ensured by preventing activity that is proven to disturb their breeding grounds and migration patterns.

2.48.10. The twelfth appellant argues that it is important not only to consider potential economic gains but also to analyse losses from, for example, increased public health and infrastructure costs, increased pollution and the impact on the marine economy. In support of this, it cites certain overseas studies which show the negative environmental consequences that the oil and gas industry can cause. It can cause a reduction of local government revenue because the oil and gas industry can reduce local taxes and income from other economic sectors such as tourism, forestry and fisheries. In addition, substantial local costs must sometimes be borne by local communities addressing issues such as water pollution caused by the industry.

2.48.11. The twelfth appellant avers that South Africa's high unemployment will probably result in an influx of unemployed people into oil and gas rich locations and likely increase the size of informal settlements, putting pressure on housing and accommodation stocks, lowering

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property values as is suggested by studies from the United States, Britain and Canada. Furthermore, the health of communities living close to oil and gas extraction sites are affected by impacts such as the contamination of air and water and their health will be affected by gas flaring and the long-term impact of climate change. They state the health impacts to include chronic and recurrent respiratory diseases, abnormal haematological indices, increased susceptibility to blood dyscrasias, dermatological diseases, malignancies, nausea, dizziness, fatigue, genotoxicity, alteration in hormonal status, and psychological disorders, among others.

2.48.12. The thirteenth appellant avers that the proposed exploratory area borders or overlaps with areas that local South African fishermen depend on for their livelihoods, such as the deepwater hake grounds on the continental slope. Disturbances caused by the drilling process could drive the hake away from their usual habitat, leading to the displacement of this important commercial species. The impact on the deepwater hake fishing industry could be catastrophic, with a loss of income for local fishermen and businesses, and the potential for long-term damage to the sustainability of the industry.

2.48.13. The fourteenth appellant submits that the socio-economic impacts of a major oil spill were not adequately assessed, particularly the potential socio-economic impacts on small-scale fishers and communities who depend on the sea for their livelihoods. The EAP concluded that there was no need to broaden the scope of the socio-economic impact assessment as the economic impacts are likely to be “so broad it would have little direct value in informing the impact assessment process or developing mitigation measures and decision-making” and that “[t]he impact of an unlikely oil spill is assessed to be of very high significance and any additional information will not change the assessment.”

2.48.14. The fifteenth appellant states that the potential impacts that could arise from a well blowout could impact the marine ecology/environment, commercial fishing, coastal near shore users and intangible cultural heritage. While they acknowledge that the ESIA report



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indicates that statistically the chance of a well blowout is significantly low, the risk is that if it does occur, the impact on the receptors would be significant in terms of the environmental and financial costs to recover from such event. While the applicant's commitment to secure all forms of financial insurance and assurances to the PASA prior to drilling for possible compensation requirements in the event of an unplanned pollution event is acknowledged, the adequacy and extent thereof, to timeously support the affected receptors and the extent of what the financial risk modelling would consider, is unclear.

2.48.15. The sixteenth appellant states that the community that they represent are mostly fishermen and women. They are concerned that their primary source of food and income will be threatened by the Project, as drilling in the ocean will have a negative impact on the migration patterns of fish resulting in a reduction in catches.

2.48.16. The seventeenth appellant avers that the project has no intended benefits for their fishing communities but only the potential for long-life harm to the environment and their living resources.

2.48.17. The sixteenth appellant asserts that their community is skilled at fishing and are fish workers. They will not have an income if the impacts of the project cause a loss of their livelihoods. Furthermore, no offers of compensation have been made to the community, should catches be reduced due to the project. As the inhabitants of the West Coast have the right to benefit from economic activity in the area, they demand consultations to discuss and negotiate compensation and benefits should any drilling take place.

2.48.18. The seventeenth appellant similarly states that no "considerable compensation measures" or arrangements have been adopted vis-à-vis the fishing communities in terms of any harm. It was not considered that harm to the ocean could be irreparable. The Project could result in their "living" culture and heritage disappearing. It claims that a connection with the ocean, spiritually and for health purposes, and therefore their culture, could face extinction.

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2.48.19. The eighteenth appellant contends that the area is important for the snoek run, and they say that drilling will interfere with the snoek and their spawning grounds. Snoek are a migratory species and their migration patterns are changing due to climate change. They wish to see a plan in place on how the applicant and the DFFE may assist communities that depend on the ocean for their livelihoods if there are adverse impacts on fish. The needs of the local communities were not taken into account. It is a top-down approach and there is no clear evidence of what benefits there will be for local communities nor what will happen if there is a negative impact on the marine environment. It alleges that the consultation process was a box-ticking exercise and lacks truth and scientific evidence of the impact of these proposed developments.

2.48.20. The eighteenth appellant says that it is unclear what the community benefits will be if the Block will be used to produce oil/gas. They allege that the applicant said that they would direct funds to community developments, but that there is no plan as to how that will work, what the amount will be, and how the applicant plans to ensure education, energy access, social upliftment and inequality. It questions why communities should believe that they will receive any benefits from a large, multinational corporation. They point out there is a lack of economic and job opportunities to the local communities along the West Coast, and oil and gas companies are not focused on changing this, much less the systemic economic issues in South Africa. The appellant says that it is unclear what the applicant's contingency plan is and how people who utilise the sea for a living, such as small-scale fishers, will be compensated. They do not trust large oil and gas companies to do the right thing because they have a track record of environmental abuse and a lack of compensation for accidents.

#### **APPLICANT'S RESPONSE**

2.49. In its comments on this ground of appeal, the applicant responds as follows:

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- 2.49.1. The applicant avers that the impacts of the project on tourism are set out in the Socio-economic Report (Appendix 13) to the ESIA report. The impact on tourism, recreation, recreational fishing, and commercial shipping is considered to be of regional extent, short term duration and low intensity for local tourism and medium intensity for commercial shipping.
- 2.49.2. The applicant reiterates that whales can avoid the area and that the activities are unlikely to affect whale migration.
- 2.49.3. In response to the fourth appellant, the applicant avers that stakeholders from the large pelagic longline and demersal trawl sectors are registered on the I&AP database and were notified of the EA application, all ESIA documents were released for comment, and the details of all public meetings. It should also be noted that the Oceana Group attended the online public meeting held on 7 November 2022.
- 2.49.4. The sixth appellant assumes that the applicant will be producing oil/gas, whereas the Project only relates to exploration activities and not to production. As a result, the socio-economic benefits/impacts of local gas production have not been considered in the ESIA report. Those impacts will certainly be considered in an EA application for production activities if, based on the results of the exploration, the applicant deems it is feasible to do so. The applicant denies the project carries an “untenable risk of major environmental, economic and social disaster”. The ESIA report considered all the environmental, economic and social risks required under NEMA, the EIA Regulations, NEMA: Integrated Coastal Management Act (Act No. 24 of 2008) and other legislation.
- 2.49.5. The overall findings in the ESIA report, on the basis of the nature, duration (mostly short-term) and extent (mainly localised), the majority of residual impacts related to normal

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operations range from negligible to low significance with the implementation of the recommended mitigation measures.

2.49.6. The applicant asserts that section 7.6 of the ESIA report and section 3.5 of the Marine Ecology Impact Assessment present an ecological network model and considers the potential ecosystem-wide effects of the proposed exploration drilling. The ESIA report presents a simplified network diagram indicating the interaction between the key nearshore and offshore ecosystem components off the South-West and West Coasts, and their links to fisheries. The Marine Ecology Impact Assessment, reports on marine biodiversity in the broader project area and identifies potential impacts on fisheries due to obvious linkages. Downstream effects on the cultural, social and economic identities of the various fishing sectors are assessed in the other specialist studies.

2.49.7. Species such as snoek have extensive offshore spawning grounds extending from the western edge of the Agulhas Bank along most of the South African West Coast. Their nomadic and generally random longshore movements make them less vulnerable to the potential impacts of the proposed drilling, certainly less than resident, long lived species (e.g. rock lobsters). Female snoek spawn serially in June to October moving inshore to feed on anchovies and sardines between spawning events, therefore, there is no single inshore or offshore migration of snoek. A localised and short-term drilling campaign is, therefore, highly unlikely to have measurable effects on their spawning success which displays substantial spatial and temporal variability.

2.49.8. The impacts of an oil spill are considered and assessed in detail on all sectors and costal and nearshore users, including small-scale and recreational fishing.

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2.49.9. The applicant asserts that abalone was extensively considered and assessed in the ESIA report<sup>8</sup> as well as in the context of marine protected areas<sup>9</sup>. The drilling operations will occur at least 60 km offshore. The cuttings, drilling fluid and cement will be localised around the well and will not reach the shore. In any event, the dominant current direction is away from the shoreline and any discharges will rapidly disperse in a north-west direction away from the coastline. Abalone will only be affected in the event of a surface well blowout. This is, however, considered to be of a very low likelihood.

2.49.10. Normal operational discharges close to shore from vessels could have an impact on sensitive coastal environments and species listed globally as “endangered” or “critically endangered”. This was considered and assessed in the ESIA report which found that compliance with MARPOL 73/78 will ensure reduced discharges and reduced impacts on marine fauna due to these discharges. The EISA report notes that compliance with MARPOL 73/78 means intermittent operational discharges with minimal effect on seawater quality.

2.49.11. The applicant states that the impacts of normal operations on tourism and employment are considered and assessed at paragraph 9.2.6.2. of the ESIA report. It notes that the entire South-West Coast supports extensive domestic and international tourism-based accommodation, facilities, and activities. Much of the coastline supports popular tourism and recreational beaches, while the nearshore and offshore marine environment supports extensive recreational use (including swimming, surfing, snorkelling, and diving, onshore and nearshore recreational fishing, spearfishing, boat charters, whale watching, shark-cage diving, etc.). The applicant contends that given the remoteness of the exploration activities (greater than 60 km from the coast at its closest point) the drilling unit’s day-to-

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<sup>8</sup> at pages 271 – 271, pages 277 – 278 (mariculture), and 280 – 282 (small scale fishers)

<sup>9</sup> at pages 208 – 212

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day operations will likely have negligible interactions with any nearshore tourism, recreational or recreational fishing activities.

2.49.12. The applicant asserts that any potential interactions between the exploration vessels and nearshore and offshore vessels, would only arise as the Project's vessels transit between the Block and the logistics base (in either Cape Town or Saldanha Bay) resulting in a negligible increase in the number of commercial vessels entering either of the ports. Assuming the Project and other vessels follow the laws of the sea and standard harbour and safety controls, the impact on local tourism, recreation and recreational fishing, is considered to be of regional extent, short-term duration, and low intensity.

2.49.13. The applicant says that the twelfth appellant's allegation that South Africa's high unemployment will "probably" result in an influx of unemployed persons looking for employment in respect of the project is speculative and, in any event, without merit given the short duration of the intended operations.

2.49.14. The applicant reiterates that the job-opportunities from the project related to exploration activities are short-term in nature while the demand for local services will be largely limited to logistics, supply base, helicopters, refuelling, catering, goods, accommodation, waste management and other well drilling activities (e.g. logging, cementing and testing) provided onshore in Cape Town or Saldanha Bay. The specialised nature of the drilling is such that skills are not available locally and are sourced from international contractors.

2.49.15. In response to the twelfth appellant, the applicant contends that the project will not have any impact on human health because it will be conducted more than 60 km from the coast. Any emissions generated by the Project will have dispersed before reaching any communities. They contend the appellant's allegations and grounds do not have merit.

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2.49.16. In its response to the thirteenth appellant, the applicant asserts that the Fisheries Report considers the impact of VSP and drilling discharges on fish species including hake. The noise impacts are summarised at paragraph 9.2.3.2.2 of the ESIA report which indicates that physical damage to fish caused from VSP sources occurs only in the immediate vicinity of the airguns within distances of less than a few meters as confirmed by the Underwater Noise Modelling Study which predicts that fish will need to be close to the VSP sound source (within 30 m) to suffer physiological injury. However, as most pelagic species likely to be encountered within the area of interest are highly mobile, they will be expected to move away from the sound source before any trauma can occur. As the major spawning areas of key commercial species (e.g. hake, anchovy and sardine) all lie inshore of the area of interest, fish eggs and larvae (which drifts in the current and cannot move out of the way) will not be affected by the highly localised VSP operations, although there is minor overlap with egg and larval drift of these species in the inshore portion of the area of interest only. A decline in zooplankton abundance due to VSP operations will be negligible.

2.49.17. Behavioural responses to impulsive sounds are varied and any changes in spawning, migration and feeding behaviour of fish in response to VSP could affect fisheries. It is estimated that fish may experience behavioural disturbance up to 5 km from the drilling unit, however the residual impact is assessed to be of very low (demersal trawl, demersal longline and large pelagic longline) to low (tuna pole) significance. This impact will only be expected for a short duration of up to nine hours per well.

2.49.18. Since the proposed drilling will be undertaken more than 60 km offshore and the sediment plume is distributed away from key fishing areas in the continental shelf edge and spawning areas, the fishing sectors that could be affected by drilling discharges are those that operate within or adjacent to the area of interest, namely demersal trawl, demersal longline, large pelagic long-line and tuna pole. No other sectors, including the small-scale fisheries (SSF), will be impacted by the drill discharges.

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2.49.19. In their response to the fourteenth appellant, the applicant reiterates that while the probability of a major spill happening is extremely small (probability of 0.000143 per well), the impact will be very significant on the marine and coastal environment should it happen. Oil spill modelling results show that the coast between southern Namibia on the West Coast and Gqeberha the South-East Coast may be at risk, depending on the metocean conditions at the time of drilling (season dependant).

2.49.20. The applicant confirms as pointed out in the ESIA report, that the presence of a large oil slick will impact commercial and small-scale fishing operations, and that there would be a reduced recreational, small-scale, and commercial fishing in the impacted area, including near-shore and offshore fishing. Effects on fishing operations will also be likely to include area closures and the 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 (including major fish spawning and nursery areas), the intensity of the impact on most commercial fisheries would be high. There would also be a reduction in income for secondary and tertiary sectors that support commercial fishing, as well as a reduction in income and livelihoods impacts on those dependent on small-scale fisheries. In the highly unlikely event of a large oil spill, (assuming the worst-case scenario of coastal oiling), the residual impact on marine and coastal ecology and nearshore users, including SSF, will be of very high significance. The residual impact on offshore fishing will be of high significance. However, measures to avoid an oil spill and mitigate the effects thereof are in place should this happen.

2.49.21. The applicant reiterates that it will be challenging and of little assistance in the impact assessment process or development of mitigation measures and decision-making to attempt to assess the economic impacts of unplanned events (such as a well blowout) due to the many variables, assumptions and uncertainties that will be involved. The outputs of such an assessment are likely to be so broad as to be of little direct value. Therefore, the SEIA considered the broad socio-economic impacts related to an unlikely large oil spill.



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They contend the level of information provided in the assessment thereof is adequate to inform the assessment and decision-making. As the impact of an unlikely oil spill is assessed to be of very high significance, any additional information will not change the rating.

2.49.22. The ESIA report<sup>10</sup> furthermore recommends the establishment of a grievance mechanism for stakeholders to register specific grievances related to operations, to ensure that they are informed about the process, that resources are mobilised to manage the resolution of grievances according to the grievance management procedure, and that responses are implemented in terms of IPIECA-IOGP guidelines for the economic assessment and compensation for marine oil releases.

2.49.23. The applicant asserts that in the unlikely event of oil spill/ blowout, a process to determine the economic effects and related compensation will be initiated in accordance with applicable laws (including sections 28 and 30 of NEMA which outlines the requirements for Duty of Care, Remediation of Environmental Damage and Control of Emergency Incidents) and involves inter alia government, the applicant's insurers, and organisations responsible for the incident and industry organisations.

2.49.24. An economic assessment in terms of the IPIECA-IOGP and the International Oil Pollution Compensation Fund (IOPC) guidelines will be conducted to determine who should be compensated. The applicant will ensure that damages and compensation to third parties is included in insurance cover for the financial consequences of any unplanned event.

2.49.25. The claims for loss could include loss or damage to property, grazing lands, livestock, fishing nets, livelihood etc, resulting from the discharge of oil from an offshore installation and/or damage or loss caused by methods used to clean up polluted areas during a spill.

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<sup>10</sup> Chapter 11: EMPr

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According to the exploration right, the applicable laws, rules and regulations in the international petroleum industry, the applicant will procure and maintain an insurance policy that reasonably covers the costs of regaining control of a well and the costs of pollution clean-up; third party liability for damage, injury and death; and damage to the drilling equipment whilst in transit or intermediate storage.

2.49.26. In relation to the eighteenth appellant's contention regarding the impact on snoek fishing, the applicant states that the SSF is defined in the Small-Scale Fishing Regulations as being "near-shore", meaning "the region of sea (including seabed) within close proximity to the shoreline." These communities are thus unlikely to operate beyond a range of 20 km from the coastline, well in shore of the area of interest. There is no overlap with the traditional line fish (which also target snoek and tuna) and small pelagic purse-seine (which targets sardine and anchovy) fishing grounds. Snoek are targeted by SSF during the snoek seasonal migration (between April and June), when they shoal nearshore and are, therefore, available by handline. Snoek move offshore into deeper waters to spawn in July and August (and are not available to line fishers during these times, as the fish are beyond the range of surface line fishers).

2.49.27. Since the major spawning areas of key commercial species (e.g. hake, anchovy and sardine) all lie inshore of the area of interest, they will not be affected by the highly localised VSP operations, although there is minor overlap with egg and larval drift of these species in the inshore portion of the area of interest only. Thus, declines in zooplankton abundance as a result of VSP operations are likely to be negligible.

2.49.28. The eighteenth appellant presumes that the applicant will be producing oil/gas but the Project only relates to exploration and not production. Therefore, the socio-economic benefits/impacts of local gas availability and production have not been considered in the ESIA report. The applicant asserts that no promises were made regarding jobs and income. The possible opportunities for jobs and income were considered and assessed in

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the ESIA report at paragraph 9.3.1. (page 404 - 406) where it was stated that, due to the relatively short-term duration (approximately 6 months per well) of the project there are limited long-term opportunities.

2.49.29. The possibilities of job creation were specifically included in the Non-Technical Summary attached as Appendix 5.4 to the ESIA report which states that the impact related to jobs and business opportunities is assessed as being positive, but negligible. They assert that the limited nature and extent of employment opportunities was communicated to all interested and affected parties.

2.49.30. In terms of community and local economy benefits, due to the nature and duration of exploration activities, these will not be significant.<sup>11</sup> It is important to note that the early exploration activities also benefit the country through data collection, thereby improving the knowledge on the availability of our reserves.

### **CA'S RESPONSE**

2.50. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.50.1. The exploration activities will have negligible impact on the local sense of place and coastal tourism, given the remote location of the area of interest and limited use of the harbour. In addition, exploration activities benefit the country through data collection and improve knowledge on the availability of our reserves. The benefits should not be looked at in terms of direct and immediate benefits that could be derived during the production operation, should the project progress to that phase, but should consider the benefit it would have in terms of the produced resources being an input to the sustainable energy resources that would help in achieving the goal of using cleaner energy resources.

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<sup>11</sup> section 8.5 pages 72-75 of the Socio-Economic Impact Assessment Report.

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- 2.50.2. The project was advertised on various platforms around the coastal towns affected. Public participation meetings were also held in these towns with I&APs, inclusive of fisheries. Comments received from fishing communities were responded to in the comments and response report. These includes comments from Bigai fishing community in Knysna, Abagold Limited, Korana Fishing, etc.
- 2.50.3. The SEIA Report adopted a systematic approach to identifying the environmental and socio-economic impacts associated with the project. The Competent Authority is satisfied that all potential impacts were identified and that the impacts are either avoided, minimised or managed through implementation of the recommended mitigation measures.
- 2.50.4. The Fisheries Impact Assessment (appendix 12 of the ESIA report) indicates that there is no overlap between the area of interest and the small-scale fisheries. Therefore, the project has no impact on them. This is based on the distance between the area of interest and the small-scale fisheries harbours and vessel clarification (which dictates the distances a vessel may move from the coast).
- 2.50.5. The Competent Authority says that as regards the deepwater hake fishing grounds, the ESIA report (figure 7.57 on page 247) shows that the area of interest is largely offshore of the fishing grounds but covers 364 km<sup>2</sup> of trawling area at the outer depth range, which is an overlap of 0.64%. Furthermore, data related to the area of interest for 2017-2019 indicates an average of 60 trawls per year which yields 0.16% and 0.27% overall effort and catch respectively. In addition, with the 500 m exclusion, the overall affected effort and catch figures are 0.02% and 0.03% respectively. The study indicates a seasonal trend in fishing efforts for demersal trawling, with the December and April to August showing the greatest fishing efforts.

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- 2.50.6. The socio-economic impacts of unplanned events, such as a blowout are assessed in section 7.3 of the ESIA report which includes impacts on small scale fisheries and coastal communities. The development and implementation of management plans such as the oil spill and blowout contingency plans forms part of the recommended mitigation measures.
- 2.50.7. The Fisheries Impact Assessment considered the impacts of the project on the fishing industry, and the temporary 500 m safety zone around the drilling unit. The study indicates that the demersal trawling industry as a receptor is adaptable and is therefore rated low sensitivity. The magnitude is considered very low. Hence the impact on the demersal trawling industry is regarded as negligible.
- 2.50.8. The Competent Authority reiterated its comments concerning the subsea infrastructure (permanent exclusion around wellheads on the seafloor) and asserted that the demersal trawling industry prefers to avoid abandoned wellheads to avoid fishing gear damage (despite over-trawlable caps), hence the impact on the demersal trawling industry being medium and the residual impact significance being zero. The mitigation measures are to avoid drilling within the demersal trawling ring fenced area or to remove wellheads and ensure that abandoned wellheads and buoy locations are surveyed and accurately chartered with the South African Navy Hydrographer (SANHO).
- 2.50.9. The Competent Authority contends that the significance to the demersal trawling industry of drill cuttings is low to very low and negligible both before and after the implementation of mitigation.
- 2.50.10. Concerning underwater noise from drilling, the Competent Authority refers to the Underwater Noise Impact Assessment, which acknowledged that although noise generated by the Project may impact on fish and catch rates and/or fishing efforts and may impact livelihoods in the fishing industry, the significance of the demersal trawling industry to vessel and drilling noise is medium to very low both before and after mitigation. The

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significance of underwater noise during VSP to demersal trawling is very low after mitigation.

2.50.11. The Competent Authority refers to the potential impact of the exploration activities on water quality and marine fauna, and concludes that these impacts were assessed, with adequate mitigation measures provided.

2.50.12. The Competent Authority says that due to the nature and short duration of exploration activities, there will not be significant job creation. Local benefits are limited to matters such as food and accommodation services.

2.50.13. Because EA is in respect of an exploration right only and not a production right, the socio-economic and health impact assessment of oil and gas production falls outside the scope of this application.

2.50.14. In the unlikely event of a major oil spill, the process to determine the economic effects and compensation will be initiated. The Petroleum Industry Environmental Conservation Association ("PIECA") - International Association of Oil and Gas Producers ("IOGP") (what the applicant refers to as the IECA-IOGP Good Practice Guide Series) provides guidelines for the economic assessment and compensation for marine oil releases (2015) which, together with applicable legislation, will be used for guidance and compliance. The process will include stakeholders such as Government, industry role players, and insurers. The applicant and its insurers will be liable for clean-up, income loss etc and third-party insurance.

2.50.15. The ESIA report states that the applicant will secure insurance that includes compensation for third parties. The provision for compensation in the unlikely event of an oil spill will be in place before the commencement of the authorised activities, the proof of which will also be submitted to the regulator.

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2.50.16. The Competent Authority avers further that section 3 of the MPRDA provides that minerals and petroleum resources are the common heritage of all South Africans and that the State is the custodian of them for the benefit of all South Africans. Thus, the State (through the Minister of Mineral Resources and Energy) may grant permits and licences if the required EIAs are conducted and indicate that no detrimental harm will occur.

2.50.17. In relation to the eighteenth appellant's averments, the Competent Authority states that the ESIA report assessed the socio-economic impacts of the proposed exploration activity. Should the operator discover a viable resource, it will be required to lodge an application for a production right in terms of the MPRDA. Such an application will trigger the need for an EA for the activities involved in the production of oil and gas. The EA and associated EIA will at that stage address issues of the local and national economic impacts of production, as well as a Social and Labour Plan.

**EVALUATION (Reasons for Decision)**

2.51. Having considered the grounds of appeal and the response thereto by the applicant and the Competent Authority, I am of the view that the potential impacts and mitigation measures in respect of the project and environmental receptors have been adequately identified, considered and addressed. I note that the Project, being of short duration and of limited scope, is not expected to provide many job opportunities. I am satisfied, however, that the socio-economic impacts and mitigation measure on inter alia, tourism, marine fauna, small scale and commercial fishing have been considered and addressed moreover as the project is located approximately 60 km from the coastline at its nearest point. No human health impacts are expected as any emissions generated will have dispersed before reaching any communities. I note, too, the applicant's financial arrangement, plans and grievance procedure to be implemented to compensate affected persons in the event of an oil spill and well blow out.

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- 2.52. Many of the comments made by the appellants were made on the assumption that the impacts associated with production had to be considered, not just those associated with exploration. For reasons that I have already advanced, which reasons were acknowledged by the applicant and Competent Authority, that is not the correct way of approaching this matter. In this appeal, I have only considered the impacts of exploration which are far less significant and far less invasive than they will be if extraction and production takes place. As has been a recurring theme in this appeal, this is not the time to consider the possible impacts of a Project that is not yet planned.
- 2.53. That being said, I am concerned about the plight of small-scale fishers and the communities that they belong to. I appreciate that for some of them, this Project presents a cause of concern and anxiety. For example, the seventeenth appellant raises the potential for long-life harm to the environment and the living resources that their livelihoods depend on. The sixteenth appellant raises the fact that their community will not have an income if something, however remote the risk may be, goes wrong and there is harm to the environment and the fish stocks that they rely on. Whilst I accept that the applicant may be liable to compensate them if this happens, the promise of compensation does not always remove fears and anxiety. Sometimes it is a fear of the unknown, possibly arising from matters not fully understood. For these communities, the well-being of the sea, fish stocks and the environment is crucial to their own physical and emotional wellbeing. As the seventeenth appellant says, oil and gas projects “could” result in their culture and heritage disappearing. Their connection with the sea is strong. Whilst I am satisfied that communities were consulted and that their concerns were taken into account, I nevertheless take the view that the applicant needs to do more, on an ongoing basis, to allay fears and anxiety. This can be done if the communities have an open channel of communication with the applicant. Thus, if they have concerns that arise from, for example, things that they may see or hear about that worry them or cause them anxiety, they should be able to raise these with the applicant and the applicant should spend time investigating



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the source of the fears and anxiety to allay them or otherwise address them. For that reason, I am including a new condition as paragraph 5.5.8 of the EA, requiring the applicant to appoint a liaison officer who must be available to the affected communities. The communities must have access to the liaison officer who, in turn, must keep them informed of the activities at regular intervals and be available to answer any questions that they may have. This will go a long way to allaying fears and anxiety. This is separate from the grievance procedure.

- 2.54. Save for including the new condition creating a liaison officer, I find that the grounds of appeal have no merit and are accordingly dismissed.

***Seventh Ground of Appeal: Insufficient Public Participation Process***

- 2.55. The eighth, eleventh, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth appellants submit as follows:

2.55.1. The eighth appellant submits that the appellant alleges there was no due diligence regarding the Public Participation Process ("PPP") as there was "interference" at the level of promising jobs and income instead of laying out an objective case for communities to make educated decisions. There is a failure to take in the entire scope of environmental impact, and its wider implications concerning social, economic and spiritual environments. The country has committed to green energy, whereas this energy is not green and will impact on climate change, and a wider impact on communities in all areas.

2.55.2. The eleventh appellant submits that section 1 (Information Considered in Making the Decision) of the RoD contains a single reference to the comments submitted during the PPP merely stating that "[t]he results of the Public Participation Process submitted with the ESIA, which highlighted issues, objections, concerns, and comments raised by various I&APs and responses by the EAP"

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2.55.3. The Competent Authority did not elaborate on what the highlighted issues entailed, what the content of the objections, concerns, and comments were, whether they contained any substance, and if they did, how they were dealt with when deciding the application and stipulating specific conditions which would form part of the EA. The decision-maker makes another “tick-box” reference to the PPP, simply stating at paragraph 3.6 that “[t]he Public Participation Process (PPP) complied with chapter 6 of the EIA Regulations, 2014 and related guidelines.” The decision-maker then goes on to list what the PPP included. In essence, that the PPP continues to be a mere tick-box exercise undertaken by applicants.

2.55.4. The Competent Authority's failure to give adequate consideration to the public comments is even more egregious when understood against the backdrop of the totality of issues, comments, objections, and concerns which were submitted by I&AP's. The lack of social licence to operate (“SLO”) can result in reputational damage, stakeholder resistance, legal and regulatory challenges, and financial risks. These are relevant considerations which the decision-maker was bound to consider when deciding to grant an EA. They assert the SLO is relevant to offshore oil and gas projects because these types of projects involve significant environmental risks and impacts.

2.55.5. The fourteenth appellant says that their substantive written submissions, comments and objections during the EIA process to the EAP were not meaningfully dealt with or resolved in the ESIA and related reports. They also say that the PPP failed to achieve meaningful consultation as coastal communities and the general public were overwhelmed by the number of offshore oil and gas related applications running parallel processes which may impact the South-West and West Coast of South Africa and quote, for example, in May, I&APs had to respond to no less than four offshore oil and gas EIA processes, without taking into account legislative PPP for the Upstream Petroleum Resources Development Bill and the draft Marine Spatial Plans during a similar period. They assert that multiple public meetings and submission dates had similar time periods. They contend that fishers

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are out at sea daily or for extended periods of time and, do not have the time or resources to attend multiple public meetings, engage with voluminous technical information and provide comments and appeals. Therefore, primarily civil society organisations were able to respond to some of these processes (though they are also time and capacity constrained given the number of applications), and as a result, are prejudiced by the “onslaught of applications.”

2.55.6. The fourteenth appellant alleges that the impacts and benefits of the project were not presented in an objective manner at public meetings and consultations and “corporate social responsibility” should not be confused with positive impacts of a project, with promises of sponsorships, office spaces and other deals to “buying consent and support” for the project. They allege that the people employed by the applicant as “Community Liaison Officers” assisted to bring people to public meetings, and those paid to distribute pamphlets and who expressed their views, failed to disclose their employment status and consequent conflict of interest to members of the public they engaged with.

2.55.7 The appellants allege that at the public meeting in Hout Bay on 8 November 2022, various community representatives commented in support of the project, with at least one or two having been paid by the applicant to distribute pamphlets, whose conflict of interests were not disclosed. Furthermore, at the same meeting, the EAP’s representative provided a summary of the findings of the ESIA report, which was clearly skewed in favour of the development. The librarian at the Gansbaai Library, Ms Edna van der Linde, confirmed that the library did not receive a copy of the ESIA report for this project. It therefore asserts that the EIA was procedurally unfair.

2.55.8. The fourteenth and fifteenth appellants note that the OSCP and BOCP were not made available for comment during the EIA process, with only an outline of a framework OSCP having been included as “additional information” on the basis that the EAP argued that there was no specific requirement to include the BOSP and OSCP in the EIA document

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because they will be site-specific and are internal documents. The appellants note that these plans are to be developed after the EA decision and will therefore be concluded after the PPP phase, without input from the various affected receptors. They contend that these plans are crucial for I&APs to comment on in the EIA process.

2.55.9. They note further that condition 5.5.2 of the EA requires the applicant to submit a number of plans, including the BOCP and the OSCP, presumably to the Competent Authority but that there is no requirement for these plans to be made available to I&APs, for any commenting process. The lack of making such plans available for comment, they submit, is procedurally unfair, and consequently, the decision to authorise the exploration is unlawful.

2.55.10. The fourteenth appellants assert that South Africa is a signatory to the Benguela Current Convention and The Convention for Co-operation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region which sets out the intention to promote a co-ordinated regional approach to the long-term conservation, protection, rehabilitation, enhancement and sustainable use of the Benguela Current Large Marine Ecosystem in order to provide economic, environmental and social benefits. There is an obligation on State parties to avoid transferring, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

2.55.11. While the ESIA report briefly mentions the Benguela Current Convention, it does not consider the obligations that arise from it and it does not mention the Abidjan Convention at all. The claim made by the appellants is that the activity has potential significant adverse transboundary environmental impacts and Namibia, at least, should have been consulted and the Abidjan Convention secretariat, together with the Benguela Current Commission or other relevant treaty bodies.

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2.55.12. The sixteenth appellant alleges that neither they, nor the community of Lambert's Bay were part of the PPP as they were not aware of the consultation. They question where the advertisements of the PPP were placed.

2.55.13. The seventeenth appellants contend that no consideration was given to their concerns raised during the PPP, and with little to no mitigation factors that they can depend on because, if the environment is harmed, their livelihoods will suffer as well as their future generations. They assert that they "feel" that they did not have a say in this development.

2.55.14. The eighteenth appellant alleges that the consultations did not provide adequate information on risks of drilling to the marine environment, impact on fisheries and spiritual/cultural heritage. They state that at the consultations they were told that the Block is an area without "critically endangered" and "endangered" species. They also say that the information and science that was presented on the impact of drilling was confusing and that they do not trust that there will be no impact on the fish stocks that they depend on, even if the Block lies outside their fishing zone. Just because a species is not labelled as "endangered" does not mean that there could not be a negative impact on it.

**APPLICANT'S RESPONSE**

2.56. In its comments on this ground of appeal, the applicant responds as follows:

2.56.1. The applicant avers that no promises were made regarding jobs and income. The possible job opportunities and income was considered and assessed in the ESIA report at paragraph 9.3.1. and in the detailed SEIA report (Appendix 13) which indicated that: Due to the relatively short-term duration (approximately 6 months per well) of the project there are limited opportunities for long-term opportunities; it states further that there are "only likely to be restricted benefits to local SMME's outside of incidental expenditure"; the majority of

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the workforce will comprise highly specialised skilled staff that will come in with the drilling unit, about 180 to 200 people working on rotation.

- 2.56.2. The result of the PPP submitted with the ESIA report highlighted issues, objections, concerns, and comments raised by various I&APs. However, the Competent Authority indicated at paragraph 3.6(i) of the RoD that the PPP addressed "comments and issues raised by I&APs in the ESIA report". It is clear, it says, that the Competent Authority was satisfied that the reasons provided by the EAP were satisfactory in answering and addressing the issues raised by the appellants.
- 2.56.3. The applicant contends the Competent Authority met the requirements for the adequacy of reasons as set out in the case of *Minister of Environmental Affairs and Tourism v Phambili Fishers (Pty) Ltd*. First at paragraph 1.1 of Appendix 1 (Reasons for Decision) to the EA the Competent Authority set out the primary laws regulating the consideration and assessment of the ESIA report and the granting of the EA.
- 2.56.4. The reasons for the decision must also be understood within the context of the EIA process. The ESIA report comprises: a main report of 582 pages; 10 expert reports of 1407 pages; details of the public participation process of 748 pages (including the comments and responses table which is 430 pages itself); additional annexures totalling 53 pages. This is in addition to any internal memoranda and recommendations from within the DMRE to the Competent Authority on the ESIA report. With all this information, the Competent Authority was required to make a decision on the application within 107 days.
- 2.56.5. With the limited time within which the Competent Authority was required to decide the application and the fact that the ESIA report alone amounts to almost 3,000 pages and the comments and responses table comprising 430 pages, it would be unreasonable to expect the Competent Authority to provide reasons to the scale and detail that the appellants are requesting. If the Competent Authority was required to provide such a level

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of detail, the EIA process would need to have been extended significantly which would have further delayed the process (which had already taken the better part of a year to complete).

2.56.6. The applicant rejects the appellant's statement that only 1% of I&APs support the project as misleading and, disingenuous. First, the appellants as regular participants in EIA processes, are aware that most parties that submit comments in a PPP do so because they are opposed to the proposed project. Second, the 1% represents only those people who chose to submit comments in support of the project. When considering the widely publicised notification of the PPP which is expected to have reached all the coastal provinces within the area of influence as well as targeted regions informing them of the project and PPP, there were 1,523 registered I&APs but comments were only received from 89 of them. From this, it can be assumed that the public informed of the Project either support it, are indifferent to it, or oppose it but not to the extent that they felt inclined to formally oppose it.

2.56.7 Based on the similar methodology of the appellants, only 5.8% of registered I&APs objected to the project and only 1.2% of registered I&APs decided to lodge an appeal against the grant of the EA. On this basis the opposition to the project is a very small subset of the public and not an "overwhelming majority" of I&APs as suggested by the appellants.

2.56.8. The applicant avers the fourteenth appellant's comments on the ESIA report and EMPr were dealt with and incorporated at pages 125 – 247 of Appendix 5.8 to the ESIA report with detailed responses to each of the issues raised.

2.56.9. The applicant asserts that the fact that various PPP were running parallel does not detract from the fact that the PPP exceeded the requirements under the 2014 EIA Regulations and afforded all I&AP's an opportunity to participate.

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2.56.10. The applicant rejected the accusation made that it effectively “bought” consent and support for the project. The community and social upliftment programme referred to was in response to a question relating to the applicant’s corporate and social responsibility and is not something being developed as part of the project.

2.56.11. The applicant avers that they employ site liaison officers on a fulltime basis in the West Coast District, City of Cape Town and Overberg District as part of their long-term strategy for community engagement outside the ESIA process. Their purpose, during the ESIA is to help notify community members of the public meetings and comment periods. Where community members expressed an interest in attending public meetings but lacked the means to do so, they were supported with transportation. Transport was provided on request to communities in St Helena Bay, Saldanha Bay, Mitchells Plain, Hout Bay, Kleinmond and Hermanus.

2.56.12. The applicant employed only one Site Liaison Officer (SLO) in the region based in Houtbay for the above purposes. The SLO requested community members to assist in spreading the message on their WhatsApp groups to inform family and friends of the meetings, as not all community members have access to radio and newspaper. Others taking on the role to inform fellow community members of happenings in their community do so out of interest for the community and sharing of information and are not paid by the applicant. The SLO works closely with ward counsellors and structures to give them updates on the applicant’s projects and public meetings in the spirit of meaningful consultation and engagement.

2.56.13. The applicant says that it has a copy of proof of delivery of the Non-Technical Summary to the Gansbaai library and that it is available to be produced should this be necessary.

2.56.14. The applicant contended that the appellants provided no evidence that a biased summary of the ESIA report in favour of development was presented and such allegation is the



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appellant's subjective view but that there is no merit to the claim that the PPP was procedurally unfair.

2.56.15. The applicant denies the suggestion of secrecy concerning the OSCP and BOCP and reiterates that because the plans are unique and specific to each operation and contractor, they cannot be developed in detail at this stage. The ESMP provided commitments on the approach to and the key components of the plans. The structure of the applicant's OSCP is provided in the ESIA report and a generic example of the OSCP was provided to the appellants during the PPP and was made available on the EAP's website together with all the other project documents. The applicant points out that no comments were received on the draft OSCP during the PPP. Only once the precise location of the wells has been determined, well architecture completed, rig/vessels contracted and the logistics base location finalised, can the OSCP and the BOCP be finalised and submitted for approval in accordance with the relevant legislation including that required by SAMSA, PASA and the DFFE.

2.56.16. The applicant says that there are no legal requirements for OSCP's and BOCP's to be made available for consultation with all I&APS and that such documents contain "TotalEnergies know-how and competitive advantage strategies." The various receptors had opportunity to comment on the draft OSCP during the consultation process. To the extent that receptors should be involved or notified of their role in the OSCP while such final plans are being developed, all necessary measures will be taken to ensure that their inputs are received.

2.56.17. The applicant contends that there is no obligation under either of the Conventions referred to by the fourteenth appellant to notify the Namibian Government of an application for an EA for a project, which has a low risk of a well blowout, that could possibly impact Namibia.

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2.56.18. The applicant says that the Benguela Current Convention applies to all human activities, to the extent that these activities or operations of aircraft or ships result in or are likely to result in adverse impacts, whereas the likelihood of a blowout occurring is very low and is even less likely to affect Namibian territories. They reject the contention that there is an obligation on the Namibian government to inform of every possible event (irrespective of the remoteness thereof) that may cause pollution to Namibian territorial water.

2.56.19. The applicant asserts that if a well blowout is to occur, there may, at that stage, and depending on the oil spill modelling, be an obligation to notify Namibia of the potential risk. There is no obligation under the Convention itself to notify other member States. They allege the obligation on South Africa under the Convention is to "take all possible steps to prevent, abate and minimise pollution and take the necessary measures to protect the marine ecosystem against any adverse impacts". They say that this obligation is met by requiring the applicant to conduct an ESIA for an EA. In addition there are other regulatory requirements such as obtaining approval for the OSCP before drilling commences, and that South African authorities can issue directives in terms of legislation to take measures to prevent pollution or environmental degradation.

2.56.20. In relation to the seventeenth appellant's averments, the applicant refers to the findings of the Cultural Heritage Impact Assessment, in which it is apparent the specialists specifically consulted with the West Coast Gouriqua Council, and considered the Biocultural Community Protocol ("BCP") of the Guriqua Peoples, in particular, theirs and coastal peoples' cultural connections with the sea and nature.

2.56.21. In relation to the eighteenth appellant's allegation, the applicant states that the ESIA report considers all of the environmental, economic and social risks required under NEMA, the EIA Regulations, the NEMICMA and other environmental legislation in respect of the Project. The consultation process was supported by sufficient information on the risks of drilling to the marine environment, impact on fisheries, and spiritual/cultural heritage. The

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greatest risk of drill cuttings discharge on marine communities is that of smothering. Thus, the marine fauna most at risk are relatively immobile or sedentary benthic species, rather than highly mobile pelagic species that would be expected to flee and move away from the area with increased water turbidity. The allegation by the eighteenth appellant that “just because an oil and gas block does not directly overlap with fishing or spawning grounds does not mean that fish will not be harmed by this” is not supported by any evidence.

**CA’S RESPONSE**

2.57. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.57.1. The ESIA process complied with NEMA and the 2014 EIA Regulations (as amended) for PPP. Additionally, the PPP Guidelines in terms of the EIA Regulations (DEA 2017) was used to steer the PPP. The applicant was alerted to false promises of jobs that were being circulated and ensured that this was raised with attendees at all public participation meetings. The applicant clarified to I&APs that they were not responsible for such false promises and ensured that the potential economic opportunities to South Africa and to I&APs was unpacked in the public participation meetings.

2.57.2. As part of the EIA public participation meetings were also held with I&APs conducted by the EAP during June 2022 and November 2022 and a total of four focus group meetings during the scoping phase was held with small-scale fishers, commercial fishers, Afri-Forum, PASA and West Coast Guriqua Council during June and July 2022. Ad hoc discussions were also held with various stakeholders during the scoping phase, all of which are detailed in Table 4.6 page 53-54 of the ESIA report.

2.57.3. The CA further points out that:

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- At the request of various stakeholders an extension to the comment period was granted to afford meaningful comment to the draft scoping report.
- All information was shared with I&APs for the review. In addition, further information was provided to I&APs in response to requests (uploaded to the SLR and data free websites by 22 June 2022).
- An extension of the commenting period was approved to afford I&APs to meaningfully engage the Scoping Report.
- A workshop was held during the impact assessment phase with Small-Scale Fishers and fisher representatives of South African coastal communities on 28 August 2022. The objective of the workshop was to foster meaningful engagements with various stakeholders. The learnings from this workshop were integrated into the impact assessment engagements. All comments/issue raised by I&APs were responded to refer to Comments and Responses Report, Appendix 5.8.

2.57.4. The Competent Authority thus considered the comments/concerns/issues raised by I&APs and the responses by the EAP and is satisfied that each was addressed. The Competent Authority was satisfied that a comprehensive PPP was conducted in compliance with the Chapter 6 of the 2014 EIA Regulations and sections 2(4)(f) and (o) of NEMA.

2.57.5. The Competent Authority stated that the analysis referred to by the appellants infers that the I&APs who voiced their opinions against the oil and gas industry is a representative sample of the said population. There is no legal requirement that all I&APs must be in support of an exploration right for petroleum resources before an EA can be considered.

2.57.6. It is evident from appendix 5.8, that the EAP complied with the 2014 EIA Regulations and accommodated focussed group meetings where the need and desire was identified. As indicated by the heritage specialist, there will be some I&APs who are simply opposed in principle and the meeting of the minds will be difficult. Some mitigation measures

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recommended by the Cultural Heritage Impact Assessment were to ensure open, consistent and regular consultation with stakeholders who are affected by the Project's operations together with a grievance mechanism. These are incorporated into the EMPr and must occur before commencing activities. The implementation of EA conditions and EMPr recommendations are monitored independently and by the Department.

2.57.7 In terms of Free, Prior and Informed Consent, the UN Declaration defines indigenous peoples' ownership rights to culture, ceremonial expression, identity, language, employment, health, education, etc. It supports their full participation in matters which concern them and their right to remain distinct. It also includes their right to peruse their own visions of socio-economic development. The EMPr obligates the applicant to regularly and consistently engage with indigenous groupings and leadership which give effect to the UN Declaration on the Rights of Indigenous Peoples. Refer to the EMPr, page 513. This recommendation also applies to other stakeholders.

2.57.8. In addition, section 3 of the MPRDA clearly states that minerals and petroleum resources are the common heritage of all South Africans and that the State is the custodian of the minerals and petroleum resources for the benefit of all South Africans. Thus, the State may through the Minister of Mineral Resources and Energy, grant various permits and licences provided the required EIAs are conducted.

2.57.9. The CA contends that all submissions from I&APs were recorded and responded to in the comments and response report in Appendix 5.8 of the ESIA.

2.57.10. The public participation period for the scoping phase started from 20 May to 20 June 2022 and was extended for further two weeks until 4 July 2022. The draft ESIA report was made available for public comments for 44 days, which was two more weeks longer than the 30-day comment period prescribed. The Competent Authority pointed out that at the time

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there were only two oil and gas projects running, therefore, I&APs were afforded a reasonable time to submit their comments.

2.57.11. The Competent Authority asserted that it was not in a position to respond to the allegations of people being paid or employed by the applicant to distribute pamphlets. However, it confirmed that the PPP was conducted by an independent EAP, whose final report was submitted to the Department

2.57.12. The Competent Authority stated that the OSCP and BOCP are internal operating documents which will be prepared and sent for approval by SAMSA, after being sent for comments to PASA and the DFFE. There is no additional requirement for the plans to be published for public review and comments. However, a generic OSCP was uploaded on the EAP's website and the data free website for the review by I&AP. The Oil Spill Drift Modelling report provides recommendations that will be incorporated in these plans. In addition, each OSCP and BOCP is developed separately from the ESIA process and is a project specific plan. The plan considers factors such as metocean conditions and well locations. The OSCP will consider several modelling studies, guidelines, plans, applicable legislation, and applicable international conventions. Training and periodic drills will be conducted with the objective of testing the adequacy of the OSCP. Furthermore, the applicant has contracted response companies to provide capping stacks if the blow-out preventer fails. They say that SAMSA is responsible for the overall co-ordination of the prevention and combating of an oil spill incident.

2.57.13. The Competent Authority reiterated that it is important to note that the occurrence of a blow-out is very unlikely, with a probability of equal or less than 5%. Furthermore, the oil dispersion scenario from the Oil Spill Drift Modelling Report indicates that the significant oil or impact will only be seen after 60 days. Capping would have been done within 20 days, and the release of oil would by then have been stopped and the anticipated impact reduced.

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2.57.14. The Competent Authority accepted that the probability of oil reaching the Namibian offshore and shoreline is less than 5% and 30% respectively. Should the oil spill incident occur, mitigation measures included in the BOCP, OSCP, Emergency Response Plan, Shipboard Oil Pollution Emergency Plan will be implemented.

2.57 15. They assert the application for EA is within South African boundaries and was processed in terms of applicable legislation. Legislative instruments that govern offshore activities will be adhered to during the operation and in an unlikely event of an oil spill.

2.57 16. The Competent Authority noted that newspaper advertisements were placed in 14 local and 4 regional newspapers in English, Afrikaans and IsiXhosa (30 adverts in total). This included publication in the local newspaper "Ons Kontrei" on 15 April 2022 and 28 October 2022 which covers Lamberts Bay in Afrikaans during the scoping phase and impact assessment phase respectively during the ESIA process.

2.57 17. Furthermore, site notices in English, Afrikaans and IsiXhosa were placed at 71 locations in 28 coastal towns/cities between Port Nolloth and Jeffrey's Bay. The site notices targeted locations likely to come to the attention of small-scale and recreational fishing and coastal tourism. Site notices were placed in Lamberts Bay as per the ESIA report.

2.57 18. In addition, radio announcements were aired to notify coastal users of the proposed project, the ESIA process and the I&AP registration process. Notices were aired repeatedly on 10 radio stations in English, Afrikaans and IsiXhosa. During the scoping phase I&AP radio announcements were made on Radio Namakwaland on the 27-29 April 2022. It was broadcasted three times in English and three times in Afrikaans. During the impact assessment phase, radio announcements were made between 26 October and 4 November 2022 (6 in English and 6 in Afrikaans).

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2.57.19. Physical copies of non-technical summaries of the project and comment forms were placed at various locations. These included Lambert's Bay Public Library, 44 Church Street, Lamberts Bay. These were accompanied by a notification letter and invitation letter, refer to Appendix 5.3.

2.57.20. The EAP conducted several public meetings (during June 2022 and November 2022) and a total of four focus group meetings were held during the scoping phase with the small-scale fishers, commercial fishers, Afri-Forum, PASA and West Coast Guriqua Council during June and July 2022. During the impact assessment phase, a Focus Group Meeting was also held with the Traditional and Indigenous Leaders on 31 October 2022. Ad hoc discussions were also held with various stakeholders during the scoping phase, these are detailed in Table 4.6 page 53-54 of the ESIA report.

2.57.21. Thus, the community of Lamberts Bay were notified of the project and the Competent Authority is satisfied that the public participation process was conducted in compliance with Chapter 6 of the 2014 EIA Regulations.

2.57.22. In relation to the seventeenth and eighteenth appellant's averments, the Competent Authority states that one of the objectives of PPP is to gather local knowledge and receive input/concerns/grievances from I&APs with the aim of conducting a comprehensive environmental study. Another objective is to allow for any technical misunderstandings to be cleared. As an I&AP, the eighteenth appellant should have raised any confusion or inadequacy that they identified during the PPP. The EAP conducted several public meetings (during June 2022 and November 2022).

2.57.23. In addition, four focus group meetings were held during the scoping phase, one of which was with the West Coast Guriqua Council on the 26 July 2022. The record indicates that 60 participants attended the Focus Group Meeting. The appellant was therefore consulted. Appendix 5.7 of the ESIA report contains the minutes of the meeting held on 26 July 2022



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between the applicant and the West Coast Guiniqua Council and indicates the issues raised during the Focus Group Meeting. The Competent Authority was satisfied that the concerns raised by the seventeenth appellant were responded to and where applicable the impacts raised were assessed.

2.57.24. Two of the Focus Group Meetings were held with the small-scale fishers on 6 June and 11 July 2022. The record indicates that 71 people were invited but only 13 attended, which relates to an 18.3% attendance rate during the scoping phase. In addition, a workshop during the impact assessment phase was also held for small-scale fishers on 28 August 2022. The learnings from this workshop were integrated into the impact assessment engagements. Comments received from fishing communities were responded to in the comments and response report.

**EVALUATION (Reasons for Decision)**

2.58. In relation to the contention that there was not adequate consultation, I deem it appropriate to highlight that regulation 3(8) of the 2014 EIA Regulations affords registered I&APs a 30-day period to make written comments/representations in respect of all reports and/or plans relevant to the aforesaid application. Regulation 41(6) of the 2014 EIA Regulations further stipulates that the person conducting the PPP must ensure that all potential or registered I&APs are provided with a reasonable opportunity to comment on the application or proposed application. These provisions are written in peremptory terms.

2.59. The purposes of the public participation provision, among others, is to afford I&APs the opportunity to express their views on matters affecting them. This principle was reiterated by the Constitutional Court in the case of *Fuel Retailers Association of SA (Pty) Ltd v Director General, Environmental Management Mpumalanga and Others* Case CCT 67/06 (2007) ZACC 13.

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2.60. I have taken note of pages 43 to 64 of the ESIA report as well as the allegations and responses made in this appeal. In the first instance, I wish to make the point that this is an appeal in the wide sense, meaning that shortcomings in the PPP can and usefully are rectified on appeal. However, I am of the view that a thorough PPP was followed at the various stages of the process.

### **THE SCOPING PHASE**

- Newspaper Advertisements

Newspaper advertisements announcing the proposed project and pre-application I&AP registration period were placed in four regional and 14 local newspapers in English, Afrikaans and isiXhosa (30 adverts in total). The advertisements provided notification of the proposed project and ESIA process and invited I&APs to register on the project database. A list of the regional and local newspapers appears on page 46 and 47 of the final ESIA.

- Site Notices

Site notices were placed at 71 locations in 28 coastal towns between port Nolloth on the West Coast and Jeffreys Bay on the South-Eastern coast. The site notices were placed in English, Afrikaans and isiXhosa. A list of the locations where such notices were placed appears on page 48 of the final ESIA report. The advertisement was placed in accordance with regulation 41(2) (c) of the 2014 EIA Regulations.

- Radio Announcements

Radio announcements were aired to notify coastal users, including vulnerable and disadvantaged communities, of the proposed project, ESIA process and I&AP registration. The notices were aired multiple times per day on 10 stations in English, Afrikaans and isiXhosa over a period of a few days. A list of the radio stations, airing dates and

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languages appears on pages 48 and 49 of the final ESIA report.

- Cell phone number for SMS and WhatsApp

To facilitate registration and engagement, a cell phone number was provided in all notifications (notification letter, site notices and radio announcements) so that SLR could be contacted via SMS or WhatsApp messaging.

- Locations where the draft Scoping Report and Non-Technical summary were made available for review.

These locations are listed at page 50 of the final ESIA report.

- Draft scoping report notification letter

All I&AP's registered on the project database were notified of the application, EIA process and draft Scoping Report for a comment and review period, by means of notification letters in English, Afrikaans and isiXhosa.

- Non-technical summary.

The non-technical summary of the draft Scoping Report in the three languages mentioned above was prepared and distributed with the notification letters. It was furthermore available for downloading and distribution electronically via e-mail and WhatsApp and in hardcopy on request as well as in audio format on the SLR website. Copies of the non-technical summary were also made available for collection at various public locations.

- Community Mobilisation

Copies of the non-technical summary and Comment Form were handed out or placed on the locations listed on pages 51 and 52 of the final ESIA report between 30 May and 3 June 2022.

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- Data Free Website

The draft Scoping Report and non-technical summary were placed on a data free website free of charge to the user.

- Public Focus Group meetings and ad hoc meetings

A list and details of the public, ad hoc and focus group meetings held appears on page 53 of the final ESIA report.

- Extension of comment period on draft scoping report

The comment period on the draft Scoping Report which initially extended from 20 May to 20 June 2022 was further extended to 4th July 2022 at the request of several I&AP's.

A summary of the key issues raised during the PPP appears on pages 56 and 57 of the final ESIA report.

## **IMPACT ASSESSMENT PHASE**

- Workshop with small scale fishery on "meaningful consultation at the grassroots level"

SLR held a workshop on 23 August 2022 organized by the South African United Fishing Front. The target audience was small-scale fishes and fisher representatives from a wide range of coastal communities across South Africa.

- Draft ESIA Report

This was distributed for review and comment from 24 October to 7 December 2022 to afford I&APs an opportunity to provide comment on the findings of the impact assessment, proposed mitigation and ESMP. Copies of the full report and non-technical summary available on the SLR website, data free website and various locations.

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The locations where the draft ESIA report and non-technical summary were made available, appears on page 58 of the final ESIA report.

- Advertising

Newspaper advertisements announcing the release of the draft ESIA report for review and comment as well as the public meetings were placed in 4 regional and 15 local newspapers in English, Afrikaans and isiXhosa (29 adverts in total) The advertisements were placed in accordance the 2014 EIA Regulations. A list of regional and local newspaper publications and the dates of publication appear on page 59 and 60 of the final ESIA report.

- Radio Announcements

Radio announcements were aired to notify the public of the release of the draft ESIA report for review and comment as well as the public meetings. These were aired multiple times per day on 10 different radio stations in the three languages mentioned above over a period of a few days. A list of the radio stations, airing dates and languages appears on page 61 of the final ESIA report.

- Notification of draft ESIA report comment period and meetings

I&AP's registered on the project database were notified on 24 October 2022 of the draft ESIA report comment and review period by means of a notification letter in English, Afrikaans and isiXhosa. In addition, SMS or WhatsApp messages were sent to those without e-mail addresses. To facilitate the comment process, Comment Forms in these languages were attached to the letters. The notification letter also indicated that a non-technical summary was available for review and invited stakeholders to attend public meetings.

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Notification of the online Focus Group Meeting held on 31 October 2022 was provided to selected traditional and indigenous leaders on 27 October 2022. Reminders were sent to stakeholders on 31 October 2022 prior to the meeting. The link to the online public meeting was also emailed on 7 November 2022 to stakeholders who registered to attend the online meeting.

- Non-technical summary

A non-technical summary in the three languages was made available as a document and in audio format. The non-technical summary was made available at various locations for collection as well as for download from the SLR and data free websites and made available at all face-to-face public meetings in the three languages.

- Cell Phone Calls, SMS and WhatsApp

A cell phone number was provided in all notifications, advertisements, radio announcements and communication sent to I&APs informing them that the EAP could be contacted via SMS or WhatsApp messaging.

- Data free website

The draft ESIA report and non-technical summary was placed on a data free website for I&AP's to access and download without incurring any data costs.

- Community Mobilisation

The applicant appointed site liaison officers in the areas for the purposes of mobilizing the community as set out on page 62 of the final ESIA report. Where requested, communities were supported with transportation to attend public meetings.

- Public and Focus Group Meetings

Nine public meetings and one focus group meeting were held in the project's direct area of

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influence. There were posters for the face-to-face meetings in the three languages summarising the proposed project and key ESIA findings. Details of the public and focus group meetings appear on page 63 of the final ESIA report.

- Additional information provided

All information requested during this scoping phase remained available for download from the SLR and data free websites. In addition, a copy of the applicant's generic Oils Spill Contingency Plan (OSCP) was uploaded to the EAPs website and data free website for review.

- I&AP Comment and Responses

Issues raised by I&APs and responses appear in the meeting minute and the Comments and Responses Report.

2.61. In summary, there is nothing before me to suggest that the applicant did not conduct an adequate PPP or that the appellants were denied an opportunity to participate in the application process. Moreover, those people with grievances made them in their appeal submissions which were responded to and I considered those.

2.62. I am accordingly satisfied that the PPP carried out in respect of the proposed project met and complied with the requirements for PPP, as outlined in the 2014 EIA Regulations.

2.63. There was no need for the applicant to have consulted with the Namibian Government.

2.64. This ground of appeal relating to the PPP is dismissed.

***Eighth Ground of Appeal: Inadequacy of the ESIA Report***

2.65. The twelfth, thirteenth, and fourteenth appellants submit as follows:

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- 2.65.1. The twelfth and thirteenth appellants assert that there is insufficient data concerning the exploration off the Overstrand coast to accurately predict the negative impacts caused by exploration and later operations and that there could be unintended risks to the marine environment. They further contend that the study conducted is inadequate, based on desktop research and contained inaccuracies with respect to species in the area.
- 2.65.2. The fourteenth appellant contends that the final ESIA report was fatally flawed and therefore cannot serve as a lawful basis for granting an EA and should be set aside. Having regard to the gap in knowledge and understanding of the likely impacts and costs to the environment and people, the Competent Authority should have applied the precautionary principle described in section 2(4)(a)(vii) of NEMA and refused the EA.
- 2.65.3. The fourteenth appellant avers that there is a major need for a full assessment of the cumulative impacts of the various existing and proposed activities, before making a decision to authorise reconnaissance, exploration or production activities. By way of example, they allege that the cumulative impacts of noise, operational spills and other disturbances in the ocean will likely have major impacts for cetaceans, and the costs of repeated disruptions may accumulate over a long journey (such as migration) and thus collectively have a major impact on the energy stores of the whales, with an unknown cost, are not identified in the ESIA report.
- 2.65.4. The appellants note that while the ESIA refers to the possibility of potential impacts on Namibian territorial waters and indirect areas of influence on coastal and nearshore region located landward of Block 5/6/7 between southern Namibia on the West Coast and Gqeberha on the South-East Coast, depending on the metocean conditions, the ESIA report does not contain a detailed assessment of any impacts on Namibian waters, or its coast and coastal communities. This, they contend, raises concerns because of the significance associated with the EBSAs between South Africa and Namibia; and that the



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Benguela Current flows in a generally northerly direction which “is coastal upwelling with high nutrient supply to surface waters leading to high biological production and fish stocks.” They submit that due to South Africa’s international law obligations, the EIA process should have included an assessment of transboundary impacts and the failure to do so renders the assessment deficient.

**APPLICANT’S RESPONSE**

2.66. In its comments on this ground of appeal, the applicant responds as follows:

2.66.1. The applicant asserts the appellant does not provide any indication where the ESIA report could be enhanced or further developed, save for stating, without any evidence, that there “could be unintended risks to the marine environment”. They contend this ground of appeal must be dismissed, as it is vague and without substance.

2.66.2. Regarding the alleged inaccuracies of the species located in the area, the appellant has not highlighted any specific species that was apparently incorrectly referenced in the Marine Ecology Report. All the species that may exist in the various locations is supported by numerous investigations and studies that are cited in the Marine Ecology Report prepared by SLR (December 2022). See pages 35 to 107 of the ESIA report.

2.66.3. The applicant denies the fourteenth appellant’s allegation that the ESIA report is fatally flawed or that the EA should be set aside. The applicant submits that the impacts of the Project have been fully identified, assessed and mitigated. It asserts that it is unnecessary for the Competent Authority to invoke the precautionary principle in this instance as the Project impacts are known and rated as being of negligible to very low significance.

2.66.4. The applicant reiterates that the assessment of transboundary impacts vis-a-vis Namibia are not required as part of the ESIA process.

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**CA'S RESPONSE**

2.67. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.67.1. The Marine Ecology Report adopted a strong precautionary approach and any information gaps identified in the "assumptions and limitations" section of the report did not affect the integrity of the ecological impact assessment.

2.67.2. Potential environmental impacts associated with production activities can only be assessed once exploration activities have yielded a clear understanding of the Project and how the various aspects interact with receptors.

2.67.3. The Competent Authority points out that all activities will be executed in accordance with international industry good practices, the best available techniques and the cumulative impacts on the past and current activities within the area of interest were considered and assessed. Although cumulative impacts on future activities cannot always be assessed due to unknown information about those activities, the assessment and analysis of cumulative impacts was undertaken in relation to impacts that could be meaningfully assessed and analysed.

2.67.4. The Competent Authority reiterates that the application for EA is within South African boundaries and was processed in terms of the applicable legislation, regulations and policies. Legislative instruments that govern offshore activities will be adhered to during the operation and in an unlikely event of an oil spill.

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**EVALUATION (Reasons for Decision)**

- 2.68. The ground of appeal is in the form of a general statement without stating in what respect the data concerning the exploration off the Overstrand coast is insufficient and what the unintended risks to the marine environment are and what the alleged inaccuracies with respect to species in the area are. I have had regard to the Marine Ecology Report and note that the species identified therein at the various locations is supported by investigations and studies in the report.
- 2.69. I have had regard to the SEIA and I am satisfied that the impacts of the exploration of oil/gas have been fully identified, assessed and mitigated. In this regard a precautionary approach has been adopted.
- 2.70. I have noted the indications in the ESIA report of the possibility of potential impacts on Namibian territorial waters in the event of an oil spill, however I determine that there was no requirement for the applicant to conduct a “detailed assessment” of any impacts on Namibian waters, or its coast and coastal communities. I find that this does not render the process deficient.
- 2.71. Having considered the above, I determine that this ground of appeal has no merit and is accordingly dismissed.

***Ninth Ground of Appeal: Alternatives***

- 2.72. The twelfth appellant submits as follows:
- 2.72.1. The twelfth appellant contends that the EIA should thoroughly have explored alternatives, including economic alternatives, concerning what renewable energy projects could be implemented at the same/similar cost (including the costs associated with potential

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catastrophic events). Alternatives such as a Blue or Oceans Economy, the sustainable exploitation of the oceans and an Ecosystem-Based Management viewpoint should have been considered as opposed to oil exploration activities.

**APPLICANT'S RESPONSE**

2.73. In its comments to this ground of appeal, the applicant responds as follows:

2.73.1 Project alternatives were considered on pages 127 to 130 of the ESIA report and that, as the EA is in respect of an exploration right, it is not relevant to consider alternative energy generating options. Furthermore, it is not yet known if, and what type of gas, heavy oil, condensate, etc will be discovered (that is the purpose of exploration). Due to the distance from shore, water depth and high marine traffic in the drilling location, offshore renewable options would potentially not be viable at the proposed location.

**CA'S RESPONSE**

2.74. In its comments on this ground of appeal, the Competent Authority responds as follows:

2.74.1. The application is in respect of an exploration right under section 79 of the MPRDA 28 of 2002. The project is intended to determine the extent, type, and economic feasibility of the potential petroleum resources, not to produce energy i.e. to use gas to generate electricity.

2.74.2. Project alternatives, with respect to technology, design, no-go, timing/scheduling, and site location within the scope of the Project as per the requirements of the 2014 EIA Regulations were assessed during the EIA process (section 6.6. on pages 127 to 130 of the ESIA report).

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**EVALUATION (Reasons for Decision)**

- 2.75. I have considered the ground of appeal. Having regard to the fact that EA granted to the applicant is specifically only in respect of drilling exploratory wells in the area of interest. I am satisfied that the applicant was not required to consider alternatives regarding alternative energy sources or technologies. The applicant was also not required to consider relevant alternative energy generating options. Neither was the Competent Authority and nor am I in this appeal.
- 2.76. I determine that this ground of appeal has no merit and is accordingly dismissed.

***Tenth Ground of Appeal: Inadequate Reasons for Decision***

- 2.77. The eleventh and fourteenth appellants submit as follows:
- 2.77.1. Although the decision-maker was bound by the principles contained in the ICMA, the RoD does not contain a single reference to the ICMA because the ICMA and particularly section 63 thereof was not considered when assessing the need and desirability of the project within the coastal zone and on coastal public property. The Competent Authority ought to have considered the factors in section 63 of ICMA read with sections 12 and 21, and whether the project “would be contrary to the interests of the whole community.” They contend this requires an eco-centric consideration of the impacts of the project in an area that must be afforded a high standard of protection given the natural functioning of the dynamic coastal processes.
- 2.77.2. The eleventh appellant asserts that the draft ESIA report ignored the fact that the area where drilling is intended enjoys a special legal status by virtue of the many Marine Protected Areas and Critical Biodiversity Areas situated within close proximity (and in some cases, overlapping) the Area of Interest. This, they say, necessitates that decisions

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affecting it be taken in a manner that complies with the requirements of the ICMA as a whole (and not only the considerations contained in section 63). Based on a plain reading of the RoD, the decision-maker failed to consider the ICMA at all and “the decision-maker committed a material error of law”. Additionally, they say, the decision to grant an EA was not taken in the interests of the whole community as defined in the ICMA.

2.77.3. They fourteenth appellant asserts that direct and indirect impacts can overlap as impacts that occur in the localised project can affect species that are distributed more broadly across the seascape or that also use habitat outside of the impacted areas. Therefore, the Competent Authority needed to consider the connectivity of marine ecological processes, particularly where the issues are regulated by the legal obligation. It says that the Competent Authority ignored the importance of the National Environmental Management: Biodiversity Act Act No. 10 of 2004, the National Environmental Management: Protected Areas Act Act No. 57 of 2003 and relevant provisions of ICMA in terms of protecting and conserving the identified Critical Biodiversity Areas (“CBAs”), Ecologically or Biologically Significant Marine Areas (“EBSAs”) and Marine Protected Areas (“MPAs”) within the survey area and that the extent of potential negative impacts on these areas should have been considered.

2.77.4. Furthermore, the ESIA report provides no independent assessment of drilling in the CBA 1 (an irreplaceable or near-irreplaceable site required to meet biodiversity targets with limited, options to meet targets elsewhere) and CBA 2 (a site where there may be alternative areas for biodiversity targets to be met at a higher cost or requiring allocation of additional area to achieve the targets), nor mitigation measures directed to protect the unique properties of the CBAs in the Area of Interest.

2.77.5. Given the limited biological and ecological data available on the community structure and endemism of South African marine fauna off the edge of the continental shelf, the extent

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of, type and severity of impacts to the marine fauna are uncertain and a precautionary approach should have been adopted.

2.77.6. The appellants submit that the Competent Authority focused inappropriately on the direct “footprint” impacts of the Project and ignored the wider indirect and cumulative impacts associated with the areas of significance and failed to consider the higher protection afforded to the environment in the impacted areas.

2.77.7 The eleventh and fourteenth appellants allege that the Competent Authority's decision, reasons and conclusion in support thereof, as described in Appendix 1 of the EA, are generic, standard-form, and unsubstantiated and are almost verbatim the same reasons provided by the Competent Authority in other oil and gas related applications, such as those in the EA for Searcher Geodata UK Limited and TGS Geophysical Company UK Limited. From the reasons provided, it is impossible to conclude that the Competent Authority took all relevant considerations and information into account, including the submissions made by the appellants and other I&APs and the needed and desirability of the Project. They assert therefore, that the Competent Authority's decision was neither reasonable nor rational.

## **APPLICANT'S RESPONSE**

2.78. In its comments on this ground of appeal, the applicant responds as follows:

2.78.1. The applicant says that the reasons for the decision to grant the EA must be read in conjunction with the conditions in the EA, in particular the specific conditions included at pages 14 to 15 of the EA and Appendix 1 must be read within the context of the documents referred to in that appendix. It submits that in providing his reasons, the Competent Authority is not required to provide a detailed analysis of each of the comments raised and the reasons why each of them was dismissed and/or why each of the

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comments was suitably addressed in the ESIA report. That would be overly burdensome particularly since the comments and responses table exceeds 450 pages in length.

- 2.78.2. The applicant denies that the requirements of section 63 not considered and assessed in the ESIA report. In granting the EA, the Competent Authority considered and assessed the ESIA report. It contends that the fact that the Competent Authority does not expressly mention section 63 does not render his decision fatally flawed. The applicant avers the ESIA report as a whole, sets out the collective impacts on human (cultural heritage, socio-economic, fishing impacts etc.) and non-human (noise impacts, marine ecology assessments).
- 2.78.3. The applicant says that the granting of the EA is reasonable and rational. It also points out that in their appeal, the appellants have not challenged any of the EAPs responses to their comments/issues to demonstrate that the responses are unreasonable or irrational.
- 2.78.4. The applicant disputes the fourteenth appellant's allegations that marine protected and sensitive areas were not considered in detail in the ESIA report. It points out that they are addressed at pages 208 to 225, and the impact on these areas are considered and assessed at pages 332 to 402 of the ESIA report in respect of the normal operations of the project and at pages 438 – 442 and pages 455 – 474 in respect of unplanned discharges of oil into the environment.
- 2.78.5. As CBAs and EBSAs are identified as sensitive areas. The applicant points out that to mitigate the impact on such areas, the ESIA report records that the applicant is committed to undertake pre-drilling site surveys (with ROV) to ensure there is sufficient information on seabed habitats, including mapping of sensitive and potentially vulnerable habitats within 1,000 m of a proposed well. If sensitive and potentially vulnerable habitats are detected, on expert review of the ROV footage, it will adjust the well position accordingly or implement



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appropriate technologies, operational procedures and monitoring surveys to reduce the risks of, and assess the potential damage to, vulnerable seabed habitats and communities.

2.78.6. The applicant asserts that section 7.6 of the ESIA report and section 3.5 of the Marine Ecology Impact Assessment deals in some detail with potential ecosystem-wide effects of the proposed drilling and that Figure 7-50 of the ESIA report shows a simplified network diagram of the interaction between the key nearshore and offshore ecosystem components off the South-West and West Coasts and their links to fisheries. Downstream effects on the cultural, social and economic identities of the various fishing sectors were assessed in other specialist studies (including fisheries, socio-economic and cultural heritage).

#### **CA'S RESPONSE**

2.79. In its comments to this ground of appeal, the Competent Authority responds as follows:

2.79.1. The Competent Authority says that the requirements of section 63 were as a fact considered and that a comprehensive PPP was conducted. It acknowledged that exploration Block 5/6/7 overlaps with Brown's Bank Coral and Southeast Atlantic Seamounts MAPs and CBAs and refers to Figure 7.46 on page 217 of the ESIA report. However, the area of interest (where proposed drilling will occur) does not overlap with any MPAs and the Competent Authority refers to Figure 7.45 of the ESIA report. The Competent Authority also states that as the Project involves a coastal activity and is located within coastal waters. The likelihood of the Project causing pollution or any other impact to the coastal environment was considered and assessed during the EIA process. Furthermore, various other applicable instruments relating to the protection of coastal waters such as MARPOL will be adhered to during operations. Various plans will be developed and implemented during operation to manage all potential negative impacts to the coastal environment.

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- 2.79.2. The Competent Authority asserts the impact assessment process and decision-making considered all relevant and applicable SEMAs. NEM:BA and NEM:PAA requirements and that the impacts on sensitive environmental features such as MPAs, CBAs and EBSAs were assessed in the ESIA report.
- 2.79.3. The area of interest overlaps with CBA 1 and CBA 2 (both natural and restore). In terms of spatial coverage, approximately 5.4 % of the area of interest is covered by CBA 1 and CBA 2, refer to Figure 7.45 on page 209 of the ESIA report. Invasive and non-invasive (e.g. seismic survey, drilling, etc.) exploration activities are classified as “restricted compatibility” with the CBAs, meaning that they are acceptable under certain or additional rules (the rules are a work in progress). Notwithstanding, drilling is allowed within the CBAs subject to the implementation of the recommended mitigation measures. It is important to note, that the CBA map and the Sea-User Guide contained in the National Coastal and Marine Spatial Biodiversity Plan, 2022 version 1.2 is currently a recommendation.
- 2.79.4. A socio-economic impact assessment was conducted during the ESIA process and the residual impacts were found to range from negligible significance to low significance. The impacts that the project aspects could have on the environment were systematically identified and assessed. The significance of residual impacts for normal operations ranged from no impact to medium and for unplanned events from negligible to very high.
- 2.79.5. Although the residual impact significance of a major spill (unplanned event) remains very high due the magnitude, it is important to put the probability of such an unlikely event into perspective in order to have a balanced perspective of the risk. Offshore South Africa, 358 wells were drilled with no incidents of a well blow-out to date. The Competent Authority is therefore satisfied that the stipulated requirements of section 63 were duly considered during the review process.

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2.79.6. In response to the fourteenth appellant, the Competent Authority asserts that the reasons for the decision on the EA are based on NEMA and the 2014 EIA Regulations as well as a consideration of applicable guidelines, policies and strategies. Hence, the reasons for the decision will be the same in various EAs. The same broad issues were considered.

**EVALUATION (Reasons for Decision)**

2.80. Having considered the grounds of appeal and responses thereto, I determine that the grant of the EA read together with the general and specific conditions and the identification of the potential impacts and mitigation measure of the project, the authorisation was rational and reasonable and that the provisions of the ICMA and section 63 were considered. In any event, I have considered in the appeal and I am of the view that the authorisation is rational and reasonable.

2.81. I therefore find that the ground of appeal is without merit and is accordingly dismissed.

***Eleventh Ground of Appeal: PASA Acted Outside of its Mandate***

2.82. The fourteenth appellant submits as follows:

2.82.1. On 18 June 2004, the then Minister of Minerals and Energy designated PASA to perform the functions set out in Chapter 6 of the MPRDA in terms of section 70 of the MPRDA and not in terms of NEMA. Section 71 of the MPRDA sets out the functions of PASA as the designated agency, which includes that the designated agency must “review and make recommendations to the Minister regarding the acceptance of environmental reports and the conditions of the environmental authorisations and amendments thereto.” PASA has a very limited role relating to environmental matters.

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2.82.2. It asserts that according to the 2014 EIA Regulations, Listing Notice 2, the Minister responsible for Mineral Resources is identified as the Competent Authority where the listed activity is related to exploration of a petroleum resource. Section 42B of NEMA provides that the Minister responsible for Mineral Resources may in writing delegate a function entrusted to him/her in terms of the Act to the Director-General for the Department of Minerals and Energy or any officer in the Department of Minerals and Energy. They say that section 42B of NEMA does not empower the Minister responsible for Mineral Resources to delegate a function to State-owned agencies or companies such as PASA. Section 42B of NEMA also does not include a power to sub-delegate.

2.82.3. The appellant contends that while PASA may receive applications under the MPRDA for reconnaissance permits, technical co-operation permits, exploration rights and production rights, however it may not evaluate such applications and make recommendations to the Minister. It says that PASA is not empowered to hold pre-application meetings with applicants nor to agree to an ESIA process. PASA, it says, may not make recommendations on whether or not to grant EA.

2.82.4. PASA's statutory functions under the MPRDA include promoting onshore and offshore exploration for and production of petroleum as well as to review and make recommendations to the Minister on the acceptance of environmental reports and the conditions of the EA. It therefore cannot be an objective role-player.

2.82.5. The appellant alleges that PASA has performed various functions outside of its mandate, in the following respects:

2.82.5.1 Holding a pre-application meeting held on 19 May 2021 to inform them of the applicant's proposed Project and application for an EA, as well as to obtain agreement on the ESIA process.

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2.82.5.2 Compiling an Application Form for an EA and the DFFE National Screening Tool;  
and

2.82.5.3 Accepting the final ESIA report for consideration and review, and thereafter making a recommendation to the DMRE on whether or not to grant the environmental authorisation.

2.82.6. The appellants assert that PASA is not empowered under the MPRDA to perform the functions of the Competent Authority. Furthermore, PASA has performed certain functions in relation to the EIA process that are outside the scope of section 71 of the MPRDA and should have been performed by the DMRE Minister or a person to whom the Minister had validly delegated the power in accordance with section 42B of NEMA. Consequently, the decision is *ultra vires* and should be set aside.

**APPLICANT'S RESPONSE**

2.83. In its comments on this ground of appeal, the applicant responds as follows:

2.83.1. It disputes the allegation that PASA is not objective and that PASA acted *ultra vires* as alleged.

2.83.2. The applicant asserts that PASA has particular knowledge and experience with regard to oil and gas resources which the DMRE does not have. The DMRE therefore has to rely on PASA as to whether the content of the environmental reports should be accepted by the DMRE or not. There is nothing in terms of its mandate preventing PASA from doing this. It alleges that the functions performed by PASA were administrative and did not prejudice the fairness of the ESIA process.

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**CA'S RESPONSE**

2.84. In its comments to this ground of appeal, the Competent Authority responds as follows:

2.84.1. The Competent Authority asserts that the relevant authority referred to under section 30 of NEMA with respect to the upstream oil and gas industry is the DMRE and that PASA is a designated agency acting on behalf of the Minister of the DMRE to perform functions prescribed under 71 of the MPRDA. One of the overarching duties of PASA is to ensure that oil and gas resources are developed sustainably by monitoring environmental performance of the industry and reporting to the Minister.

**EVALUATION (Reasons for Decision)**

2.85. In regard to the role of PASA did not act ultra vires.

2.86. The decisions were not taken by PASA but by the Competent Authority.

2.87. None of the actions taken by PASA referred to by the applicant constitute material decisions in the EIA process. They are not administrative action.

2.88. Moreover:

2.88.1. Whether or not PASA performed functions during the EIA process that it was not empowered to do is irrelevant because any lack of authority to perform such functions was ultimately addressed by the Competent Authority when he made his decision. Accordingly, even if PASA did perform some functions that it was not authorised to, the actual decision to grant an EA to the applicant was taken by the Competent Authority, being the DG.

**APPEALS AGAINST THE DECISION OF THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES, DATED 1 APRIL 2023, TO GRANT AUTHORISATION IN TERMS OF SECTION 24 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998, AS AMENDED, READ WITH REGULATION 23 OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGULATIONS, 2014, AS AMENDED, FOR THE PROPOSED OFFSHORE DRILLING OF EXPLORATION WELLS IN BLOCK 5/6/7 OFF THE SOUTH-WEST COAST OF SOUTH AFRICA**

2.88.2. I am the Appellate Authority and this is an appeal in the wide sense. Ultimately, in this appeal, the final decision, which is administrative action, is mine to take and I have taken it. I have the power under section 43 of NEMA to decide whether, on the basis of the appellant's grounds of appeal, the original decision-maker's decision ought to be confirmed, set aside or varied.

2.89. For all the above reasons, I submit that this ground of review has no merit and is accordingly dismissed.

### **3. DECISION**

3.1. In reaching my decision on these appeals, I have taken the following information into consideration:

3.1.1. The EA dated 17 April 2023;

3.1.2. The appeals submitted by the eighteen appellants during the period of 25 April 2023 to 12 May 2023;

3.1.3. Responding statements submitted by the applicant on 06 June 2023;

3.1.4. Comments submitted by the CA on 15 June 2023; and

3.1.5. The information contained in the project file TEEPSEA 12/3/224 with specific reference to the final ESIA report, together with relevant specialist studies annexed thereto.

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

3.3. Having carefully considered the appeals and responses to them, together with all other relevant information, I have decided as follows:

**APPEALS AGAINST THE DECISION OF THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES, DATED 1 APRIL 2023, TO GRANT AUTHORISATION IN TERMS OF SECTION 24 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998, AS AMENDED, READ WITH REGULATION 23 OF THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) REGULATIONS, 2014, AS AMENDED, FOR THE PROPOSED OFFSHORE DRILLING OF EXPLORATION WELLS IN BLOCK 5/6/7 OFF THE SOUTH-WEST COAST OF SOUTH AFRICA**

- 3.3.1. The applicant's environmental authorisation is confirmed with the same conditions of authorisation as appeared in section 5 of Appendix 1 of the Director-General's Reasons for Decision dated 17 April 2023, however, I have amended the special condition in paragraph 5.5.3 of the EA as discussed above and I have included a new condition, also discussed above, as paragraph 5.5.8 of the EA, requiring the applicant to employ a liaison officer to address any questions and concerns that small-scale fishers and their communities may have and to keep them apprised throughout the process.
- 3.4. In arriving at my decision, it should be noted that I have not responded to each and every statement set out in the appeals and/or responses thereto. I have, however, considered all of them. 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.
- 3.5. Should any party be dissatisfied with my decision, it may apply to a competent court to have my decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof in accordance with the provisions of sections 6 and 7 of the Promotion of Administrative Justice Act No.3 of 2000.



**MS B D CREECY, MP**

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

**DATE: 24/9/2023**