



Seismic surveys: what constitutes meaningful consultation?

Recently, there was debate about whether seismic surveys should take place off the Wild Coast in the Eastern Cape of South Africa, and an important form of communication, called consultation, was highlighted.

What is seismic exploration?

Seismic exploration or survey involves estimating shapes and physical properties of Earth's subsurface layers from the returns of sound waves that are transmitted through the Earth. Seismic surveys are used by the hydrocarbon (oil and gas) industry to locate and estimate the potential size of oil and gas deposits below the Earth's surface.

Marine seismic surveys use airgun arrays towed behind ships that produce high intensity, low-frequency impulsive sounds at regular intervals aimed at mapping the seafloor and underlying rock strata. The sea floor is mapped and any hydrocarbon reservoirs can be found.

Marine seismic surveys can be harmful to marine life. Recently, seismic surveys became a 'flashpoint' in South Africa. A debate began between the hydrocarbon sector,

government officials, affected communities, civil society organisations, environmentalists, and scientists.

In December 2021, the debate led to a court case challenge about marine seismic surveys off the coast of the Eastern Cape. This event highlighted the importance of meaningful consultation and holds important lessons for those intending to pursue such surveys in South African waters.

Background to the Eastern Cape seismic survey court challenge

In the first quarter of 2013, Impact Africa Ltd (acting on behalf of oil company, Shell) applied to the Petroleum Agency of South Africa (PASA) for an exploration right to survey oil and gas deposits off South Africa's Eastern Cape coast. The proposed survey area size was more than 6,000km, which equates to almost the entire Eastern Cape coastline.

The Mineral and Petroleum Resources Development Act 28 of 2002 requires applicants of prospecting rights to notify in writing and consult with the landowner or lawful occupier, and any other affected party, and to submit the result of the consultation to relevant officials within 30 days from the date of the notice.

To comply with this requirement, Impact Africa (referred to as the company 'Shell' here) placed advertisements in four Afrikaans and English newspapers to notify the public about the proposed project and the consultation process. Members of the public were invited to provide comments.

A draft Environmental Management Programme (EMP) was placed on the project website and people were given 30 days to comment. Notification was sent directly to all interested and affected persons. Then group meetings were held as part of the engagement process. All interested and affected persons on the stakeholder database were invited to these meetings.

A final EMP was produced in June 2013, which PASA approved on 9 September 2013 with a few conditions (not given here). The Deputy Director-General of the Department of Mineral Resources and Energy approved the EMP and granted the exploration right on 29 April 2014. Shell decided to begin the exploration seven years later, in late 2021, but then faced a court challenge to its planned seismic survey.

After the Makhanda High Court dismissed an urgent application by several parties to interdict (or ban) Shell from conducting its seismic survey, Shell commenced its survey in early December 2021.

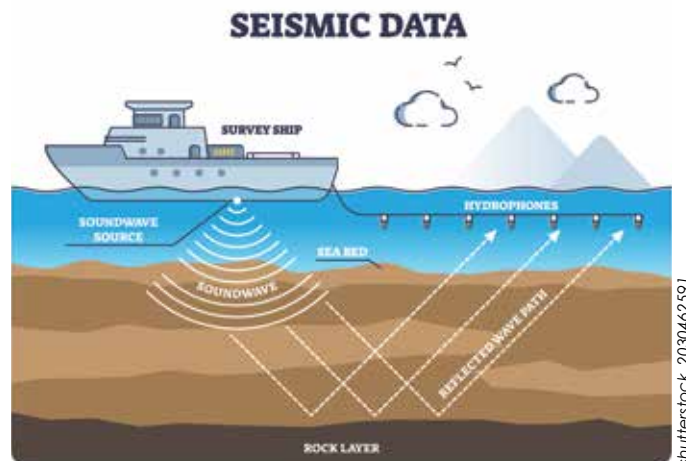
On 17 December 2021, several other parties (called 'the applicants' here) approached the Makhanda High Court again to interdict Shell from conducting the survey. The applicants argued that Shell had failed to meaningfully consult them about the survey.

Why did the applicants believe Shell's consultation process was flawed?

The applicants argued that the Afrikaans and English newspapers in which the notices of the seismic survey were published in 2013 were only accessible to literate persons with access to those newspapers. Moreover, notifications of Shell's seismic survey were not published in isiZulu or isiXhosa, the languages spoken by affected communities.

The applicants argued that Shell should have used radio and community newspapers, which would have facilitated communication with them in the language used in their respective communities.

The applicants also argued that group meetings were not held in the communities in question. Instead, Shell held consultation meetings in Port Elizabeth, East London and Port St Johns, all of which were far from the affected



communities. The applicants contended the location of those meetings excluded the communities from attending.

Moreover, the approach followed was inconsistent with the communities' custom of seeking consensus. The applicants argued that Shell deemed it adequate to speak only to the 'Kings' or 'monarchs' of communities and to assume that those monarchs spoke for their 'subjects' (their community members). The applicants argued this 'top-down' approach mirrored that taken during colonial and apartheid eras.

The applicants said that communities, such as the Amadiba, have strict rules about consultation that emphasise the importance of seeking consensus. Decision-making is part of their customary law and avoids the use of top-down decision-making. The applicants argued that meaningful consultation means providing communities with the necessary information on the proposed activities and affording them an opportunity to make informed representations. The monarchs cannot make representations on behalf of all of the community members.

The applicants also argued that the monarchs did not have authority over large communities who stood to be affected by the seismic survey. For instance, the monarchs who were consulted did not have authority over amaMpondo aseQaukeni. Thus, none of the monarchs engaged were empowered to speak on behalf of customary fishing communities anywhere along the Wild Coast.

While the EMP referred to a request for five additional meetings to be held with the monarchs, there was no suggestion that those meetings were held. The applicants argued that Shell did not follow through with the consultations proposed in its EMP. Before reviewing how the court evaluated Shell's consultation efforts, two important concepts need to be considered: public engagement and community consultation.

What is public engagement?

Public engagement is a process that provides people with trustworthy information on key policy issues, asks for their input, and integrates it into decision making

and social action. This type of engagement occurs with a wide diversity of stakeholders (for example, religious leaders, traditional leaders, community leaders, and local communities themselves).

Public engagement could also include engagement with civil society organisations (CSOs) who aim to further the interests of the communities they serve. CSOs include non-governmental organisations, community-based organisations, faith-based organisations, or networks.

CSOs are often well respected in some communities as being 'non-government' distinguishes them from governmental power structures. CSOs are also often better placed to access vulnerable, marginalised communities, such as traditional fishing communities, who may be largely invisible and inaccessible to a person from outside the community unfamiliar with local customs, traditions, or power structures.

How do we define a 'community' and what constitutes community engagement?

The term 'community' has been used to describe interactions among people on the basis of geographic localisation. However, people who live together in a community do not necessarily form a community since they may differ with respect to value systems and other cultural characteristics.

Some say that the defining feature of a community is the common identity shared by its members. A single individual may belong simultaneously to different religious, occupational or ethnic communities. Another individual

may live in a community with distinct values and aspirations that may inhabit a single geographic area.

Common culture and traditions, common knowledge and shared history, common economy / shared resources, a common communication network, and self-identification as being part of a community are all things that define community.

Given the complexity of the concept of 'community', it is not surprising that there is no universally accepted understanding of 'community engagement'.

Community engagement goes beyond community participation. It is the process of working collaboratively with relevant partners who share common goals and interests. This involves building authentic partnerships, including mutual respect and active, inclusive participation.

Those who seek to engage with communities must, by necessity, ask three important questions: *How* should I consult? *Where* should I consult? *Who* should I consult with? Community leaders (including monarchs, traditional leaders, religious leaders, and political representatives) may not necessarily represent all persons in their respective communities or even have their interests at heart.

How did the Makhanda High Court assess Shell's consultation efforts?

After documents were submitted to the court and reviewed, the Makhanda High Court held that affected communities could not be expected to participate in Shell's consultation process.



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To become interested and affected persons, community members had to have knowledge of the seismic survey and the contact details of Shell's consultants. The court noted its concerns that the advertisements were published in only English and Afrikaans, which were not the languages spoken by affected communities.

Moreover, Shell's draft EMP was published on the project website and notification was sent to registered interested and affected persons. The court noted that this meant that unless a person was already registered as an interested and affected persons, he or she would not know where to find the draft EMP or how to comment. There was little prospect of community members registering as interested and affected persons or otherwise discovering the relevant documents.

The court found that Shell did not provide an explanation of how its 'stakeholder analysis' was done or why it considered the previous studies that it relied upon were sufficient. The court found that the stakeholder analysis and the previous studies relied upon were insufficient because they did not identify the numerous small-scale and subsistence fishing communities along the coastline where the seismic survey was to be performed.

The court noted that the applicants are holders of customary fishing rights and, because the seismic survey could negatively impact upon those rights, the customary fishers of the Wild Coast had a right to consultation in respect of the seismic survey. Accordingly, the consultation process carried out by Shell was inadequate.

Shell argued that the customary practices and spiritual relationship that the applicant communities argued they have with the sea was not objectively verifiable. The court rejected this argument, saying that those practices and beliefs must be respected and where conduct offends those practices and beliefs and impacts negatively on the environment, the court has a duty to step in and protect those who are offended and the environment.

The court held that Shell was under a duty to meaningfully consult with the communities and individuals who would be impacted by its proposed seismic survey. Given all these shortcomings, the court concluded that Shell's consultation process was inadequate and flawed. Accordingly, the exploration right was unlawful and invalid. The court thus interdicted (banned) Shell from conducting its seismic survey, until Part B of the application – which will focus on whether Shell was required to obtain environmental authorisation to conduct the survey – happens later this year.



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Implications of the Makhanda judgement for holders of exploration rights

The Makhanda judgment holds important lessons for those wishing to exercise their exploration rights. Consultation is not a 'tick-box' exercise. Affected stakeholders must be engaged in the languages they speak and in communication mediums accessible to, and used by, them.

Consultations must be held in settings that are accessible to affected communities. Engagement with monarchs and traditional leaders should never be regarded as proxies for consultation with affected communities and individuals. Put differently, consultation should be bottom-up (i.e. occur at the grassroots level), not 'top-down'.

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Kamumva nje, kubenenkulumo mpikiswano mayelana nenhlolovo ngokuzamazama komhlaba ogwini lwasempumalanga koloni, eningizimu ne Africa, kuvelele izindlela ezibalulekile zokuxhumana, ezinjengokubonisana nokuxoxa nemiphakathi. Njengoba lezindlela zokuxoxa zingazange zihleleke kahle azikwazanga ukuba zenzeke.

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