



When Public Participation Goes Wrong !

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Why is PP in EIA so important?

- They are concerned with & seek to vindicate 2 Fundamental Rights in the Bill of Rights:
 - The Environmental Right (section 24)
 - The Right to Just Administrative Action (section 33)

Understanding Public Participation in EIA

PPP Basics

- Fixing a **notice board** to the site and any alternative site.
- Giving **written notices** to various parties.
- Placing an **advertisement** in a newspaper or Government Gazette.

Duties of the EAP

- Comply with the Act and EIA Regulations.
- Take into account the Public Participation Guideline 2017 (DFFE)

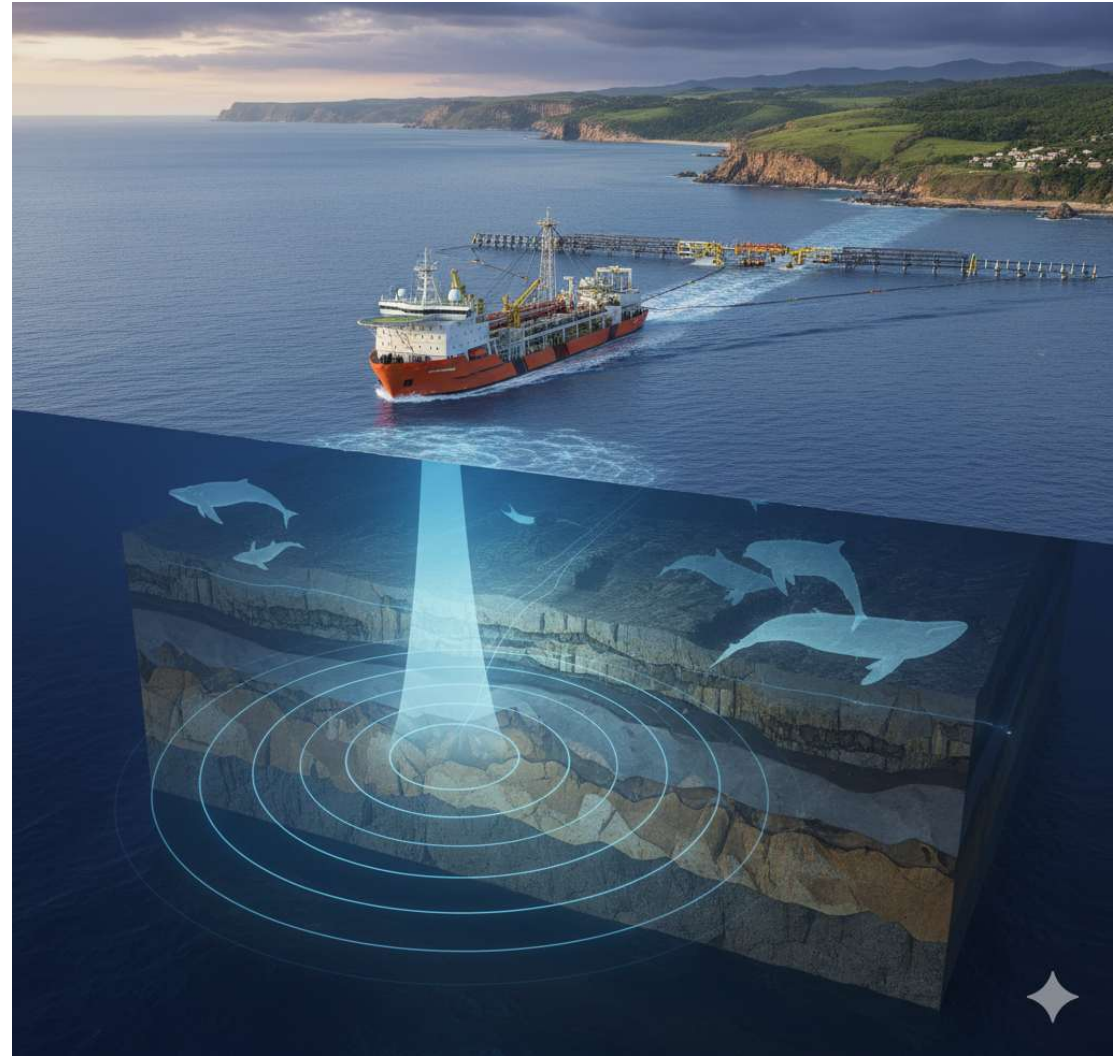
The Level of Public Participation

- the **scale of anticipated impacts** of the proposed project;
- the **sensitivity** of the affected environment and the degree of **controversy** of the project; and
- **characteristics** of the potentially affected parties.

Case Studies Highlighting Public Participation Failures

Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources and Energy & Others (2022)

MAKHANDA HIGH COURT
DECISION



Sustaining the Wild Coast NPC & Others v Minister of Mineral Resources & Energy & Others (2022)

- Landmark judgment of the High Court (Eastern Cape Division)
- Court set aside a multi-year exploration right granted to *Shell plc* and *Impact Africa*.

The court concluded...

- Consultation process undertaken was "woefully lacking" and procedurally unfair.
- Court reviewed and set aside:
 - the decision to grant the exploration right for the exploration of oil and gas in the Transkei and Algoa exploration areas.
 - the decision taken to grant a renewal of the exploration right.
 - the decision taken to grant a further renewal of the exploration right.

Meaningful Consultation

In the first place, meaningful consultations consist not in the **mere ticking of a checklist**, but in engaging in a **genuine, bona fide substantive two-way process** aimed at achieving, as far as possible, consensus, especially in relation to what the process entails and the import thereof.

The flaws...

- **Inadequate Identification of Affected Parties:**

- (I&APs) were identified based on previous similar studies rather than through a comprehensive public process.
- resulted in the coastal communities not being being consulted directly.

The flaws...

- **Inaccessibility of Information and Notices:**

- Adverts placed in English & Afrikaans medium newspapers – barely understood by affected rural communities
- Newspapers were out of reach of rural communities
- Project website providing online information – ineffective and inaccessible to rural communities like the aMadiba community.

The flaws...

- **Flawed Engagement with Traditional Structures**
 - Consultation meetings were only held with Monarchs and Traditional Leaders
 - No direct consultation with members of the affected communities.

South Durban
Community
Environmental Alliance
& Another v Minister:
DFFE & Others (2025)

SUPREME COURT OF
APPEAL DECISION



Eskom's 3000MW gas-to- power plant in Richards Bay

- Supreme Court of Appeal stopped the project in its tracks.
- The court **reviewed and set aside the Minister's decision** to uphold the authorization, finding that the administrative actions failed to comply with the National Environmental Management Act (NEMA).

The court concluded...

- There was inadequate public participation
- failure to properly consider:
 - climate change impacts,
 - cumulative impacts, and
 - the need and desirability of the gas plant
- The court ultimately upheld the appeal and set aside the authorization.

The flaws...

- Public participation process → fundamentally inadequate.
- EIR: most commonly spoken language (Richards Bay area) → isiZulu (79% of the population)
- Yet, public notices and reports were advertised in English and Afrikaans newspapers like 'The Mercury', 'Rapport', and the 'Sunday Times'.
- No advertisements were placed in local isiZulu newspapers,
- No information was broadcast on isiZulu radio stations, and
- No direct consultation was held with local communities or their leaders.

The court's findings...

- The court held that a "**meaningful opportunity to participate**" is a non-negotiable prerequisite for procedural fairness, and its absence vitiated the entire process.
- Flexibility in a public participation process is essential to achieving meaningful consultation.
- The person conducting the public participation is vested with discretion to ensure that the language used allows for meaningful participation.
- NEMA + EIA Regulations + Public Participation Guideline provide a comprehensive structure for adequately communicating with affected and interested parties

Impact of the SCA decision

- Serves as binding judicial authority on PP in EIA.
- SCA upheld the appeal and set aside the EA entirely.
- Eskom must start the entire process from scratch, by conducting a genuine and inclusive public participation process.
- Judgment sends a clear message about the consequences of failing to adhere to environmental law.
- Decision affirms the supremacy of NEMA & the non-negotiable right of communities to meaningful public participation in their own language

Conclusion

Our growing environmental jurisprudence confirms that:

Public Participation is not a box-ticking exercise

Simply complying with the procedural requirements is not enough.

EAPs must engage in Meaningful Consultation

Flexibility & practicality in the PPP is essential.

