

TRANSMITTED BY EMAIL

Date: 23 November 2021
Your ref: Exploration Right 12/3/252

TO: **HONOURABLE MINISTER OF MINERAL RESOURCES AND ENERGY**
Mr Gwede Mantashe

ATT: Ms Vuyelwa Siyeka Vuyelwa.Siyeka@dmr.gov.za

AND TO: **DIRECTOR GENERAL, DEPARTMENT OF MINERAL RESOURCES AND ENERGY**

ATT: Adv Thabo Mokoena thabo.mokoena@dmr.gov.za
mamabefu.modipa@dmr.gov.za

CC **The Petroleum Agency of South Africa**

ATT: Ms Sibongile Madi, (Manager, Licencing and Regulation) malie.sibongile@petroleumagency.co.za
plu@petroleumagency.co.za

CC: **Honourable Minister of Forestry, Fisheries and Environment**
BMbali@environment.gov.za
fshaik@environment.gov.za

Ms Barbara Creecy

FROM: Ricky Stone ricky@greencounsel.co.za

Total pages: 8 + Annexures A & B Our ref: B052-001

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Dear Minister and Director-General,

SUSPENSION OF EXERCISE BY SHELL AND IMPACT AFRICA OF RIGHT TO CONDUCT SEISMIC EXPLORATION IN TRANSKEI EXPLORATION AREA

Introduction

1. We act for the Kei Mouth Ski Boat Club ("KMSBC"), the Border Deep Sea Angling Association ("BDSAA") and Natural Justice (collectively "our clients").

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2. We have been instructed that Royal Dutch Shell PLC and/or its subsidiaries (“Shell”), as Operator of Exploration Right 12/3/252 (“Exploration Right”), held jointly by Shell and Impact Africa Limited and/or its subsidiaries (“Impact Africa”) intend to commence with 3D seismic surveys for the exploration of petroleum resources (“exploration activities”) in Licence Blocks 3327B, 3327D, 3427B, 3328 (A-C), 3228 C and D, 3229 (A-C), 3129D, and 3130 (A-C) (“Transkei Exploration Area”).
3. The *National Environmental Management: Integrated Coastal Management Act 24 of 2008* (“NEM:ICMA”) defines the areas in which Shell proposes undertaking these exploration activities as “coastal public property” which vests in the citizens of the Republic and which the State must hold in trust on behalf of the citizens of the Republic.¹ The State, in its capacity as the public trustee of all coastal public property, must –
 - 3.1. ensure that coastal public property is used, managed, protected, conserved and enhanced in the interests of the whole community; and
 - 3.2. take whatever reasonable legislative and other measures it considers necessary to conserve and protect coastal public property for the benefit of present and future generations.²
4. Shell has announced that it will commence the exploration activities imminently, which may occur as soon as 1 December 2021.
5. We are instructed that Shell and/or Impact Africa do not have an environmental authorisation in respect of the listed activities triggered by the exploration activities as required by the *National Environmental Management Act, 107 of 1998* (“NEMA”), and consequently commencing the exploration activities at this time would be unlawful.
6. The purpose of this letter is to request the Minister and/or the Director-General (“DG”) of the Department of Mineral Resources and Energy (“DMRE”) to exercise their statutory powers to prevent the commencement of the exploration activities unless and until –
 - 6.1. Shell and/or Impact Africa have obtained the necessary authorisations in terms of NEMA and the *Mineral and Petroleum Resource Development Act, 28 of 2002* (“MPRDA”); and
 - 6.2. any appeals, and/or reviews in respect of those authorisations have been finally determined.
7. We understand the material facts to be as follows.

The authorisation and renewal processes – 2013 to date

8. In early 2013, Impact Africa applied for the Exploration Right in terms of Section 79 of the MPRDA (“the Application”).
9. The Application was accompanied by *inter alia* an Environmental Management Programme (“EMPr”) which was submitted for approval in terms of (the then) Section 39 of the MPRDA.
10. Pursuant to the submission of the EMPr, the Petroleum Agency of South Africa (“PASA”) accepted the Application on 1 March 2013, and PASA and/or the DMRE caused a basic Public Participation

¹ *National Environmental Management: Integrated Coastal Management Act 24 of 2008*, subsection (1) of section 11 (Ownership of coastal public property), as read with section 7 (Composition of coastal public property), and the definition of “coastal waters” in section 1 (Definitions).

² NEM:ICMA, section 12. (State public trustee of coastal public property).

Process (“PPP”) to be conducted. Two of our clients (KMSBC and BDSAA) were registered as Interested and Affected Parties (“I&APs”) in the PPP and participated in that process with the benefit of legal representation.

11. PASA and/or the DMRE Minister (at the time) apparently issued Impact Africa with the Exploration Right on 20 May 2014³. We further understand that the Exploration Right is now in its second renewal for a period of two (2) years, effective August 2021.
12. We are instructed that in violation of our clients' constitutional right to fair administrative action, neither they, nor other registered and potential I&APs, were notified of –
 - 12.1. PASA and/or the DMRE's decision to grant the Exploration Right in 2014;
 - 12.2. Impact Africa's transfer and/or disposal of a 50% participatory interest in the Exploration Right to Shell and the DMRE Minister's consent to such transfer and/or disposal (as required by Section 11(1) and (2) of the MPDRA, read with section 82(1)(d)) (“**Annex A**”); or
 - 12.3. any of Impact Africa and/or Shell's renewal applications (including the mandated EMPr environmental compliance audits) pertaining to the Exploration Right as submitted in terms of Section 81 of the MPRDA.

Notification of commencement of exploration activities

13. Our clients only recently discovered, through a notification issued on behalf of Shell (as Operator) by SLR Consulting (South Africa) (Pty) Ltd (“SLR”), that the exploration activities are scheduled to commence on or about 1 December 2021. (“**Annex B**”).
14. We are instructed to place on record that this is the **first time**, since registering as I&AP's and participating in the PPP during 2013, that I&APs (including our clients KMSBC and BDSAA) received any form of notification of Impact Africa and/or Shell's intentions to act in terms of the Exploration Right and undertake the exploration activities within the Transkei Exploration Area.

Requirement for an environmental authorisation under NEMA

15. The Exploration Right was granted and the EMPr was approved under the MPRDA prior to 8 December 2014. At that time, exploring for oil and gas was not a "listed activity" for the purposes of the Environmental Impact Assessment Regulations made under NEMA ("EIA Regulations") and consequently could be lawfully undertaken without an environmental authorisation under NEMA (provided that the exploration did not involve any other listed activities).
16. On 8 December 2014, the so-called “one environmental system” was introduced which made the DMRE responsible for issuing Environmental Authorisations under NEMA for all mining and related activities, including for the undertaking of seismic surveys as part of exploration activities.

³ EMPr Environmental Compliance Audit, 14 May 2020, Executive Summary, Page 1.

17. The introduction of the “one environmental system” required amendments to both the MPRDA and NEMA.
 - 17.1. NEMA was amended by the *National Environment Management Amendment Act, 62 of 2008*, (“NEMAA”), which commenced on 9 May 2009, except that section 14(2), provided that any provision relating to prospecting, mining, exploration and production and related activities came into operation when the “one environmental system” came into effect.
 - 17.2. In terms of the transitional provisions of NEMAA, an EMPr that was approved in terms of the MPRDA before the coming into effect of the “one environmental system” must be regarded as having been approved in terms of NEMA. The effect of this is that an EMPr approved under the MPRDA prior to 8 December 2014 must be regarded as an EMPr approved in terms of NEMA.⁴ It does not mean that such an EMPr has the status of an environmental authorisation under NEMA. (Indeed "environmental authorisation" is defined in both the MPRDA and NEMA in a manner that excludes EMPrs.)
18. It is now necessary to undertake a Full Scoping and Environmental Impact Assessment (“S&EIA”) and obtain an environmental authorisation before commencing with seismic surveys, because –
 - 18.1. activities requiring an exploration right, “including the operation of that activity”, are Listed Activities for the purposes of the EIA Regulations (Listing Notice 2, Listed Activity 18); and
 - 18.2. section 5A of the MPRDA (which commenced on 8 December 2014), states that “*no person may explore for and produce any petroleum or commence with any work incidental thereto on any area without an environmental authorisation*”.
19. Furthermore, since the proposed exploration activities are "coastal activities" for the purposes of NEM:ICMA, the competent authority responsible for deciding whether or not to grant an environmental authorisation, must take into account the factors specified in section 63 (Environmental authorisations for coastal activities) of NEM:ICMA.
20. Other legislation which regulates and protects the oceans would also need to be considered, such as the *National Environmental Management: Protected Areas Act, 57 of 2003*, (“NEM:PAA”); the *Regulations in terms of section 97 of the National Environmental Management: Biodiversity Act, 10 of 2004*, (“*Marine TOPS Regulations*”); and the *Marine Spatial Planning Act, 16 of 2018*, (“MSPA”).

Impact of proposed exploration activities

21. The proposed exploration activities will cause significant noise pollution, environmental degradation and harm to marine species, which constitute "adverse effects" for the purposes of NEM:ICMA.
22. The ocean is an acoustic world. Sound travels far more efficiently underwater than through the air. Whales, dolphins, and other marine species depend on sound to find mates, forage, avoid predators, navigate, and communicate – in short, for virtually every vital life function. Ocean species are acutely sensitive to acoustic disturbance, which can disrupt or prevent these vital activities.

⁴ Section 24N (Environmental management programme) of NEMA deals with the content and approval of EMPrs.

23. Seismic surveys for oil and gas blast the water column with dozens of high-volume airguns to detect oil and gas reserves beneath the ocean floor, generating some of the loudest sounds that humans produce in the ocean that disrupt acoustic habitats across a wide geographic scale.⁵ Airguns are fired as often as every ten seconds, twenty-four hours a day, for months at a time. Each blast can produce effective sound levels in excess of 260 decibels that are powerful enough to be heard underwater for hundreds⁶ or even thousands⁷, of kilometres.
24. The predominant seismic airgun frequencies overlap with the frequencies of greatest sensitivity for many fishes and invertebrates,⁸ while all of the airgun frequencies interfere with marine mammal communication.⁹ Noise from these blasts can disturb, injure, or even kill animals across the entire marine ecosystem, from the smallest zooplankton to the largest whales.¹⁰ For example, airguns have even been shown to disrupt use of reefs by fish¹¹ and kill off zooplankton, critical for sustaining the larger food web.¹² They also have been shown to disrupt whale migrations and feeding.
25. The mitigation measures proposed in the EMPr fail to address all of the harms described here. Moreover, it is not just the airguns that induce harm: the multibeam echosounders that would be used in the surveys also alter marine mammal behaviour, with research showing beaked and short-finned pilot whales changing their communication and behaviour in the presence of

⁵ Lorien Pichegru et al., *Avoidance of seismic survey activities by penguins*, 7 *Sci Rep* 16305 (2017), <http://www.nature.com/articles/s41598-017-16569-x> (last visited Nov 18, 2021).

⁶ B.J. Estabrook et al., *Widespread spatial and temporal extent of anthropogenic noise across the northeastern Gulf of Mexico shelf ecosystem*, *Endangered Species Research*, 30:267-382, (2016); M. Guerra et al., 2016. *High-resolution analysis of seismic air gun impulses and their reverberant field as contributors to an acoustic environment*. In A.M. Popper and A. Hawkins, eds. *The Effects of Noise on Aquatic Life II*, at 371-379. New York, N.Y.: Springer.

⁷ S.L. Nieuwkirk et al. 2012. *Sounds from Airguns and fin whales recorded in the mid-Atlantic Ocean*. 1999-2009. *Journal of the Acoustical Society of America*, 131: 1102-1112.

⁸ Arthur N. Popper et al., *Acoustic detection and communication by decapod crustaceans*, 187 *J Comp Physiol A* 83–89 (2001), <https://link.springer.com/article/10.1007/s003590100184> (last visited Nov 18, 2021). Arthur N. Popper et al., *Anthropogenic Sound: Effects on the Behavior and Physiology of Fishes*, 37 *Marine Technology Society Journal* 35–40 (2003).

⁹ C. Gomez et al. *A systematic review on the behavioral responses of wild marine mammals to noise: The disparity between science and policy*. *Canadian Journal of Zoology* 94: 801-819, (2016); S. Cerchio et al. *Seismic surveys negatively affect humpback whale singing activity off Northern Angola*. *PLoS ONE* 9(3): e86464 (2014).

¹⁰ P. J. O. Miller et al., *Using at-sea experiments to study the effects of airguns on the foraging behavior of sperm whales in the Gulf of Mexico*, 56 *Deep Sea Research Part I: Oceanographic Research Papers* 1168–1181 (2009), <https://www.sciencedirect.com/science/article/pii/S0967063709000508> (last visited Nov 18, 2021); W. John Richardson, Gary W. Miller & Charles R. Greene, *Displacement of migrating bowhead whales by sounds from seismic surveys in shallow waters of the Beaufort Sea*, 106 *The Journal of the Acoustical Society of America* 2281–2281 (1999), <https://asa.scitation.org/doi/10.1121/1.427801> (last visited Nov 18, 2021); Stacy L. DeRuiter et al., *First direct measurements of behavioural responses by Cuvier's beaked whales to mid-frequency active sonar*, 9 *Biology Letters* 20130223 (2013), <https://royalsocietypublishing.org/doi/10.1098/rsbl.2013.0223> (last visited Nov 18, 2021).

¹¹ Avery B. Paxton et al., *Seismic survey noise disrupted fish use of a temperate reef*, 78 *Marine Policy* 68–73 (2017), <https://linkinghub.elsevier.com/retrieve/pii/S0308597X16307382> (last visited Nov 18, 2021).

¹² Robert D. McCauley et al., *Widely used marine seismic survey air gun operations negatively impact zooplankton*, 1 *Nat Ecol Evol* 1–8 (2017), <https://www.nature.com/articles/s41559-017-0195> (last visited Nov 18, 2021).

echosounders,¹³ while melon-headed whales were driven to mass strandings and death by multibeam echosounders.¹⁴

26. The exploration activities are scheduled at a time when marine ecosystems are under greater stress than when the surveys were initially proposed in 2013. There is unprecedented seismic surveying activity in the territorial waters of South Africa, increasing the potential cumulative impacts. Climate change has raised ocean temperatures and increased ocean acidity, with a variety of knock-on effects, including changing forage opportunities.¹⁵ New Marine Protected Areas (“MPAs”), including the Amathole Offshore Marine Protected Area, were recently created in recognition of both the value of these coastlines and offshore areas, and the threat that anthropogenic activities pose to them.¹⁶ Endangered humpback dolphins, vulnerable Bryde’s whales, and beaked whales, right whales, and humpback whales traverse these waters along with thousands of other species, known and unknown. Penguins in the area, whose numbers have fallen by 70% in the last decade, have already been shown to change behaviour as a result of seismic surveys.¹⁷ Entire reef ecosystems will be put at risk as a result of these surveys. All of the harms resulting from the seismic surveys will therefore undermine the goals of the MPAs.

Failure to consider relevant considerations

27. It is apparent that in deciding to grant the Exploration Right, approve the EMPr, and grant the extensions to the Exploration Right, the decision-maker failed to consider relevant considerations, including -
- 27.1. the duties of the State as public trustee of coastal public property, and under section 24 of the Constitution;
 - 27.2. a final environmental impact assessment report prepared in accordance with the EIA Regulations;
 - 27.3. the factors referred to in section 63 of NEM:ICMA;
 - 27.4. the provisions of NEM: PAA, the Marine TOPS Regulations, and the MSPA; and
 - 27.5. relevant information that had emerged since the EMPr was prepared.

¹³ Danielle Cholewiak et al., *Beaked whales demonstrate a marked acoustic response to the use of shipboard echosounders*, 4 Royal Society Open Science 170940, <https://royalsocietypublishing.org/doi/10.1098/rsos.170940> (last visited Nov 18, 2021); Nicola Quick et al. *Effects of a scientific echo sounder on the behavior of short-finned pilot whales* (*Globicephala macrorhynchus*), (2016) *Can. J. Fish. Aquat. Sci.* **74**, 716–726.

¹⁴ Brandon Southall et al. *Final report of the Independent Scientific Review Panel investigating potential contributing factors to a 2008 mass stranding of melon-headed whales* (*Peponocephala electra*) in Antsohihy, Madagascar.

¹⁵ O. Hoegh-Guldberg et al., *The Ocean. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, (2014) V.R. Barros et al. (eds.)). Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 1655-1731.

¹⁶ Department of Environmental Affairs, *National Environmental Management: Protected Areas Act 2003 (Act No. 57 of 2003): Notice declaring the Amathole Offshore Marine Protected Area in terms of Section 22A*, (2019).

¹⁷ Lorien Pichegru et al., *Avoidance of seismic survey activities by penguins*, 7 *Sci Rep* 16305 (2017), <http://www.nature.com/articles/s41598-017-16569-x> (last visited Nov 18, 2021).

28. The EMPr which was prepared and submitted to PASA for the purposes of informing the Minister's decision about whether or not to grant the Exploration Right to Impact Africa under the MPRDA, did **not** include a single reference to the ICMA or NEM: PAA. The EMPr was wholly inadequate to enable the decision-maker to ensure that the State fulfils its duties as public trustee of coastal public property, and under Section 24 of the Constitution.
29. Therefore, and to the extent that the MPRDA purports to enable exploration activities within coastal public property without considering whether permitting those activities is consistent with section 24 of the Constitution and the State's duties as a trustee, the provisions of the MPRDA are inconsistent with the Constitution.
30. An assessment that is over eight (8) years old does not accurately reflect the current local context and the rapidly evolving stresses on marine ecosystems. It is also important to consider the rapidly evolving scientific understanding of the harms to marine ecosystems from these blasts, which has increased substantially since 2013 when the EMPr was submitted.

Right of appeal

31. Our clients' rights and/or legitimate expectations are materially and adversely affected by the decisions to grant and extend the Exploration Right, and they are aggrieved by the decisions. They are further concerned about the significant and imminent environmental harm that will result from the commencement of exploration activities, including 3D seismic survey activities. Consequently, our clients intend to submit an appeal in terms of section 96 of the MPRDA against the decisions to grant and renew the Exploration Right.
32. We request that the Minister and/or the DG of the DMRE, as a matter of urgency -
 - 32.1. provide us with copies of the Exploration Right, each renewal application (including any supporting information), and each renewal decision and the reasons for it; and
 - 32.2. confirm that the 30-day appeal period in terms of Section 96(1) of the MPRDA shall commence on the day that you provide us with the information referred to in paragraph 32.1.

Conclusion

33. We therefore request the Minister and/or the DG -
 - 33.1. to suspend the administrative decision to renew the Exploration Right in terms of section 96(2)(a) of the MPRDA pending the finalisation of the appeal process;
 - 33.2. to direct Impact Africa and Shell that they may not commence the exploration activities in the absence of an environmental authorisation granted in accordance with section 28 of NEMA which authorises them to undertake the relevant listed activities (e.g. activity 18 on Listing Notice 2); and
 - 33.3. to direct Impact Africa and Shell to ensure that the EIA process investigates and evaluates the impact of seismic surveying on the coastal environment in light of new information which has emerged since the submission of the EMPr in 2013, the requirements of section 63 of NEM:ICMA, and the provisions of NEM:PPA, the Marine TOPS Regulations, and the MSPA.

34. Unless we receive written confirmation by noon on **Friday 26 November 2021** that you have taken the measures referred to in paragraph 33, our instructions are to apply to court for appropriate relief on an urgent basis without any further notice to you.

35. All of our clients' rights are reserved.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ricky Stone', written in a cursive style.

CULLINAN & ASSOCIATES INC.

per: Ricky Stone