Nelson Mandela Metropolitan University

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18 June 2017

Ms T Madubela
Portfolio Committee on Environmental Affairs
tmadubela@parliament.gov.za
tel (021) 403 3713
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Dear Ms Madubela

Comments on the revised Marine Spatial Planning Bill of 2017

Thank you for the opportunity to comment on the revised Marine Spatial Planning Bill (hereafter referred to as "the Bill"). Please feel free to contact me if you require any clarification or additional materials regarding my comments below.

Given that the Bill sits under the Department of Environmental Affairs (DEA) and not in an independent "Oceans" Department, there is a concern that DEA will be compromised in trying to maintain environmental integrity in the decision-making process. To address this concern, I recommend <u>five</u> "checkpoints":

Checkpoint 1: The MSP Bill and Framework should clearly state the principle foundations of MSP as described by Qiu and Jones (2013):

is it an <u>Ecosystem-based MSP,</u> which considers that ecosystem conservation is the foundation for MSP, and that irreversible collapses in marine ecosystems would eventually lead to collapses in the economic sectors that depend on such marine ecosystems - see Douvere (2008); Maes (2008); Ehler and Douvere (2009); De Vivero and Mateos (2012); NGO (2012);

or

is it an <u>Integrated-Use MSP,</u> in which economic growth is seen as the foundation of MSP, and the collapse of the 'environmental pillar' does not necessarily lead to the collapse of related socio-economic structures).

1

—Oceans and causing environmental disaster. We believe the evironmental health is equally important as economic development.

Hope you find this to be in order.

Yours faithfully
Elcort Matlala
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Email: koboroelcort @gmail·com

Signature: _____ Date: 25 /05/ 2017

"South African waters" means the—(a) internal waters as referred to in section 3 of the Maritime Zones Act, 1994 (Act No. 15 of 1994), but excludes all freshwater bodies and estuaries as defined in section 1 of the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008);

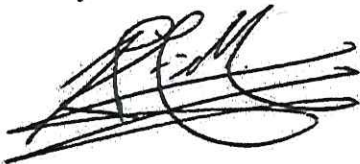*Stakeholder comment and appeal process*

I notice that the planning process allows for the input of marine sector plans by industry authority or sector bodies, and wish to comment that a parallel mechanism be afforded to public users so that a process is in place for stakeholder engagement at all levels in the planning process.

Furthermore a review period allowing comments on proposed marine area plans should be afforded to all stakeholders to consider equitable access to the ocean environment and resources.

Finally, I believe an appeal process requires consideration in the MSP framework practice.

I thank you for the opportunity to provide these brief comments.

Sincerely

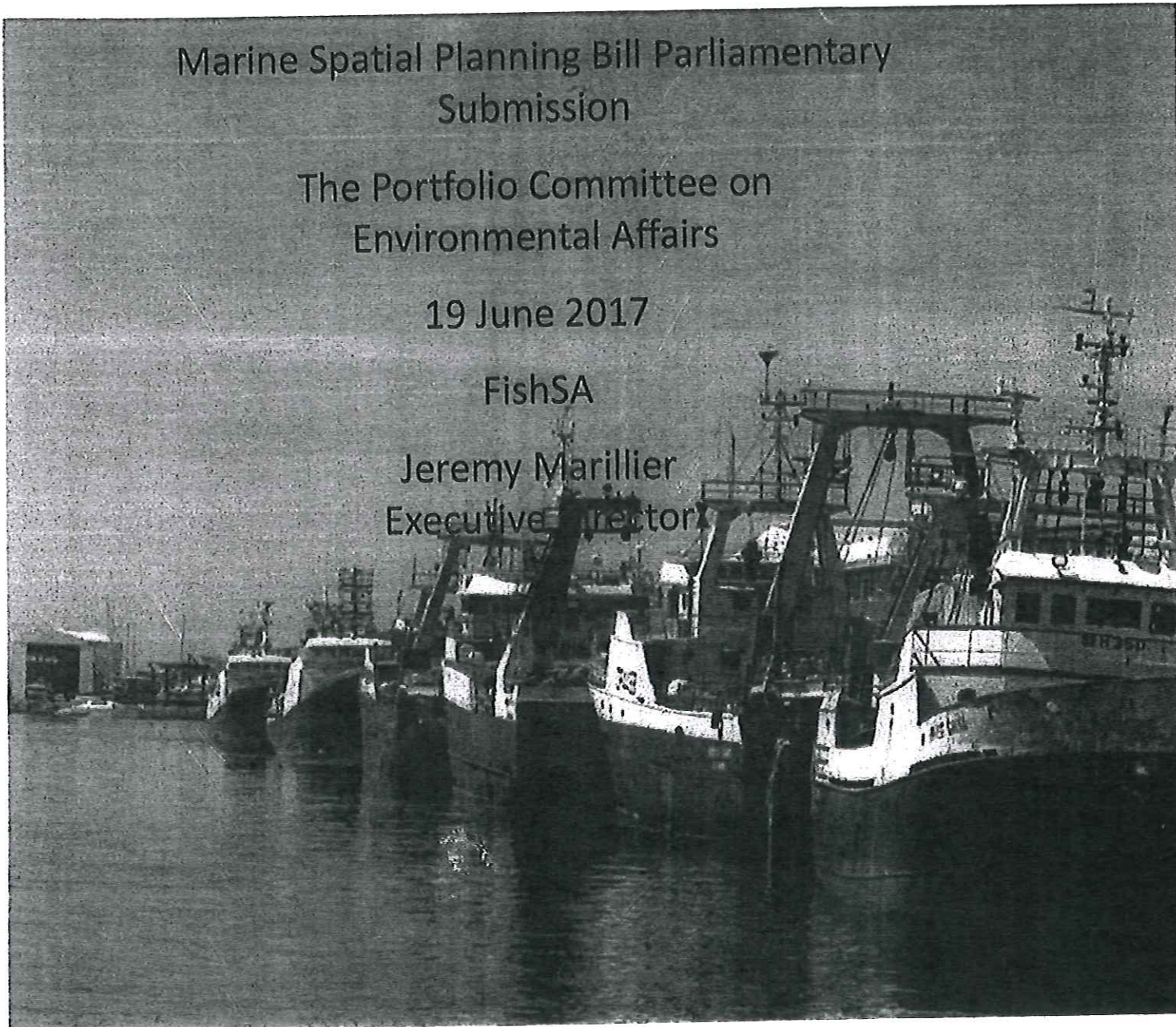Prof Ken Findlay, CPUT Research Chair: Oceans Economy, Cape Peninsula University of Technology

Marine Spatial Planning Bill Parliamentary
Submission

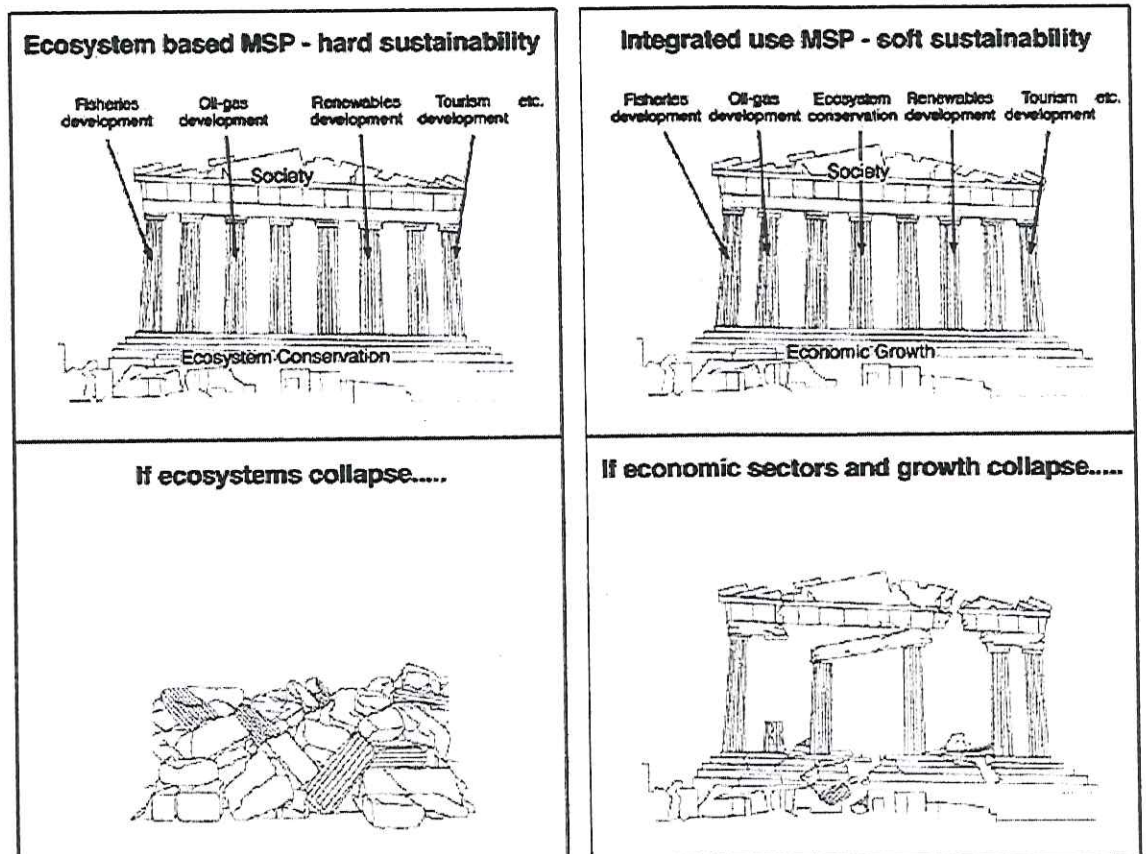The Portfolio Committee on
Environmental Affairs

19 June 2017

FishSA

Jeremy Marillier
Executive Director

The European Union analysis provided by Qiu and Jones (2013) provides this summary:

"This paper provides an overview of the emerging policy landscape for marine spatial planning in the European Union, which consists of four main categories of policy drivers: environmental legislation, legislation on marine renewable energy, fisheries regulations and the Integrated Maritime Policy. The weak links between these categories of policy drivers, underpinned by a lack of clarity regarding the vision for sustainability, pose major challenges for the emergence of ecosystem-based and integrated marine spatial planning in Europe. In addition, there is still uncertainty arising from on-going reform of the Common Fisheries Policy, and discussions on the need for a new marine spatial planning directive. This paper concludes with the view that better integration of environmental concerns into the Common Fisheries Policy is needed to strengthen the link between environmental legislation and fisheries regulations, and that the existing policy landscape, particularly the Marine Strategic Framework Directive, already provides a legal framework for ecosystem-based marine spatial planning. Such a framework is consistent with the recognition that ecosystem conservation underpins other pillars of sustainable development and provides the foundation for cross-sectoral marine planning and management."

| Ecosystem based MSP - hard sustainability	Integrated use MSP - soft sustainability
Fisheries development, Oil-gas development, Renewables development, Tourism development etc. — Society — Ecosystem Conservation	Fisheries development, Oil-gas development, Ecosystem conservation, Renewables development, Tourism development etc. — Society — Economic Growth
If ecosystems collapse.....	If economic sectors and growth collapse.....

Qiu and Jones (2013)

Given that the Bill sits in DEA, in order to comply with their mandate, I believe DEA needs to adopt the Ecosystem-Based MSP approach. The long-term impacts of short-term decisions that ignore environmental concerns are not in keeping with section 24 of our Constitution.

Checkpoint 2: The Bill appears to grant all decision-making powers to the Executive and there does not appear to be a proper democratic process for decision-making about ocean access, allowed uses or rights (including existing rights).


Draft the plans → Implement the plans **X**
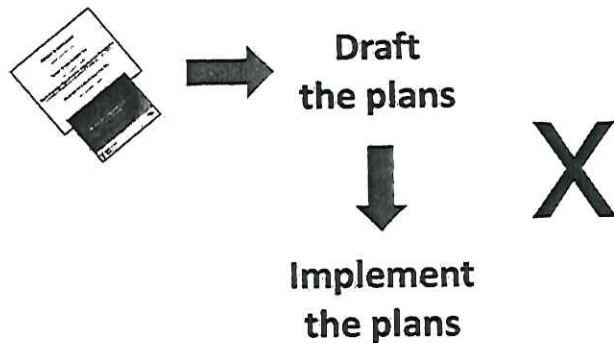
If one abandons all powers to the Executive then Parliament has no part in influencing decision-making. I would recommend that any Marine Area plans that are developed should be submitted to a Parliamentary review process BEFORE implementation.

Draft the plans → Implement the plans **√**

PARLIAMENT
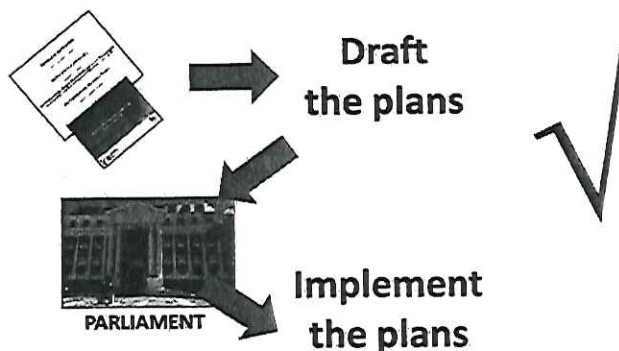
Checkpoint 3: A further risk posed by a very "top-down" approach to MSP is that of dissatisfied stakeholders. If stakeholders are not <u>meaningfully</u> consulted, and do not feel <u>ownership</u> of the plans, or have no <u>power</u> in the consultation process, one of the outcomes will be litigation, most likely using the PAJA. Thus, in order to facilitate a more "bottom up" approach to the MSP process, I recommend that the development of Marine Area Plans should include regional consultation forums (e.g. the Coastal Committees provided for under the National Environmental Management: Integrated Coastal Management Amendment Act, 2014) (see Figure below, taken from Reed and Lombard 2017, and Reed *et al.* 2017).

Another consequence of a top-down approach is the inequality of resource distribution to the poor. Local, poor stakeholders (e.g. subsistence fishers, or local marine tourism industries) need to have a powerful platform for engagement in negotiations about MSP, because large powerful marine stakeholders (e.g. mining, oil and gas, commercial fishing) can easily dominate any negotiations. The result is that the rich get richer, and the poor derive no benefits. Coastal Committees, as mentioned in the previous paragraph, would be best placed to engage with "smaller" stakeholders, and represent their needs. The Committees should be required to "sign off" on any Plans before they are passed on to a Provincial, and then National, MSP Committee, and then to a Parliamentary review process as described in Checkpoint 2.
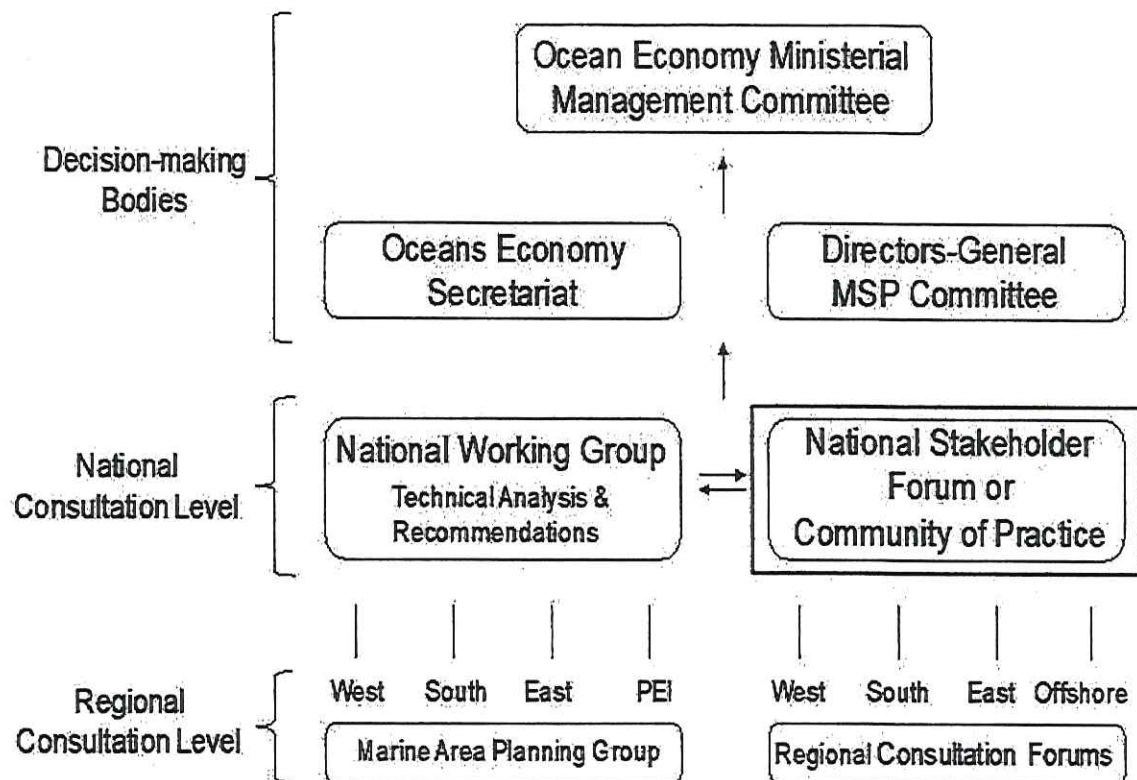
Checkpoint 4: A mechanism for civil society to engage with the drafting, and implementation, of Marine Area Plans needs to be created. I recommend that a National Stakeholder Forum be established (as per the diagram above, red box) to allow civil society to be formally represented in the MSP process (in addition to the Coastal Committees mentioned in Checkpoint 3). The formation of such a stakeholder group has already begun (see first workshop report: Reed *et al.* 2017) and engaging with this group will assist DEA greatly in their stakeholder negotiations.

Checkpoint 5: A mechanism for commenting on, and appealing, Marine Area Plans needs to created. A minimum of a 30-day comment period should be provided for in the legislation.

I hope that you will find these recommendations helpful.

Kind regards

Prof. Mandy Lombard

References

De Vivero J.L.S. and J.C.R. Mateos. 2012. The Spanish approach to marine spatial planning. Marine Strategy Framework Directives. EU Integrated Maritime Policy. *Marine Policy* 36:18–27.

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Reed J.R., S. Roux, A.T. Lombard, K. Findlay, A. Awad, J. Duncan and L. Celliers. 2017. Marine Spatial Planning Workshop Report and Outcomes: The Role of Civil Society in Supporting Marine Spatial Planning. 6-7 March 2017. (http://cer.org.za/wp-content/uploads/2016/08/MSP-Workshop-Report-Outcomes-The-Role-of-Civil-Society-in-Supporting-MSP.pdf)

The Role of Civil Society in Supporting Marine Spatial Planning

Authors: Ms Jodie Reed – PhD candidate in Marine Spatial Planning, Nelson Mandela University and Prof. Amanda Lombard – South African Research Chair: Marine Spatial Planning, Nelson Mandela University.

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Mr Saul Roux – Legal Campaigner, Centre for Environmental Rights;

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Dr Ken Findlay – CPUT Research Chair: Oceans Economy, Centre for Sustainable Oceans, Cape Peninsula University of Technology

Dr Louis Celliers – Principal Researcher, Coastal Systems, CSIR

Mr Adnan Awad – Director, IOI-Southern Africa

Mr John Duncan – Senior Manager, Marine Programme, WWF-SA

South Africa has jurisdiction over a large exclusive economic zone (EEZ) of approximately 1,5 million km^2 of ocean, and, if successful, the extended continental shelf claim will double South Africa's sea-bed rights (Figure 1). Management of ocean space has traditionally been carried out through sectoral approaches (i.e. fisheries, mining, oil and gas, environment), and in many cases this has led to conflict amongst sectors, or between sectors and the need to protect the marine environment. As the demand for ocean space and marine resources in South Africa increases, particularly as a result of planning initiatives such as Operation Phakisa: Oceans Economy (http://www.operationphakisa.gov.za/operations/oel/pages/default.aspx), a more integrated and coordinated approach to management is required to ensure that ecological, economic and social objectives are balanced. Marine spatial planning (MSP) has emerged in many countries to date as an effective process to achieve greater integration of marine resource management and policy.

In July-August 2014 in Durban, Operation Phakisa brought together teams from government, labour, business, academia and other sectors to work together in experimental laboratories (labs), to explore possibilities to "unlock the economic potential" of the country's oceans. These labs covered items 1-4 in Figure 2 (Box: Growing the Oceans Economy) and Cabinet designated the Department of Environmental Affairs (DEA) as the lead agency for the process. Since then, other Government Departments have "inherited" labs 1-3, but the DEA has retained the Marine Protection Services and Ocean Governance lab. This lab includes a number of initiatives, and MSP is one of these (Figure 2). In March 2017, the Marine Spatial Planning Bill was published for approval by Parliament (https://www.environment.gov.za/legislation/bills), and lists five "Objects of the Act". These address the need for a "*shared marine spatial planning system*" to "*promote economic opportunities*" facilitated by "*good ocean governance*" while understanding "*threats to the ocean*" and giving "*effect to international obligations*".

At first glance this would appear to be a legal instrument best suited to the Department of Economic Development, but it falls under the DEA, who's legal mandate is to: "*give effect to the right of citizens to an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of present and future generations. To this end, the department provides leadership in environmental management, conservation and protection towards sustainability for the benefit of South Africans and the global community*". So how will DEA balance the need to grow the oceans economy, while simultaneously delivering on their core mandate of environmental protection? Two possible solutions would be (1) an overarching Oceans Act that provides the framework for MSP legislation and conflict resolution, or (2) guiding principles within the MSP legislation that call for well-managed, participatory and effective ecosystem-based MSP (defined here as an adaptive management process that can integrate and balance the provision of ecosystem services without compromising their ecological integrity). The Integrated Coastal Management Act of South Africa (No. 28 of 2008) is an example of how another such integrated policy was implemented by DEA.

What, exactly, does ecosystem-based MSP entail? In 2009 the United Nations Educational, Scientific and Cultural Organization (UNESCO) published a 10-step approach to ecosystem-based MSP, authored by C. Ehler and F. Douvere (see msp.ioc-unesco.org/msp-guides/msp-step-by-step-approach/) (Figure 3). The main authors, Ehler and Douvere, were asked: "*Does MSP have to be ecosystem based? Must it be implemented in an ecosystem-based way to be effective even in cases where the main uses of a particular ocean area are purely industrial, such as shipping, oil drilling, or offshore wind farms.*" Their response was:

"*...we strongly advocate that marine spatial planning is an ecosystem-based approach. No matter what kinds of activities are carried out in a particular area, they are going to have an effect on the ecosystem services that are provided by that area. And no matter how small or large a marine area is, there are ecosystem services that it provides. It is particularly important that those natural services are considered and that an attempt is made to maintain and to sustain those services that are critical in terms of not only the ecosystem but also the economy of marine areas. To add one point to that, a very important first step in any marine spatial planning process is the identification of biologically and ecologically significant areas. That is the basis for spatial planning. When you decide to create a wind farm or an oil and gas development area, the cumulative impacts on these ecologically and biologically important areas are considered and very well documented in MSP processes.*" (see https://meam.openchannels.org/news/meam/examining-relationship-between-marine-spatial-planning-and-ebm-views-three-planners)

Although global good practice recommends an ecosystem-based MSP approach, during the Phakisa labs in 2014 it was noted that 'global good practice' (viewed primarily as 'first-world good practice') must be treated carefully in South Africa's national context, where there is an imperative to balance environmental considerations and transformational-developmental considerations (as required by the country's Constitution). Consequently, it was felt that South Africa should develop their own Oceans

Act, under which MSP legislation would fit. In fact, the DEA had already started this process (before Phakisa began), with the publication of the White Paper on National Environmental Management of the Ocean (NEMO) which could form the basis of a future Oceans Act (see https://www.environment.gov.za/sites/default/files/legislations/nemo_whitepaper_no37692_gn426.pdf) . NEMO has eight guiding principles for ocean governance, and one of these is the "*promotion of an ecosystem and earth system approach to ocean management*", while another is "*the identification of economic opportunities which contribute to the development needs of the poor and vulnerable within the population ensuring human dignity*". An overarching Oceans Act, with guiding principles such as these, would have provided a very useful framework in which MSP legislation could fit. Without the Act, we must now make sure that our MSP legislation addresses the need to balance ocean use, with ocean health.

So how do we as South African civil society (defined here as non-governmental organisations and individuals, including marginalised and previously disadvantaged segments of society) ensure that our own policies address this difficult balance? A key aspect of the solution can be found in step 4 of the UNESCO 10-step process: engaging stakeholders (Figure 3). Another UNESCO publication describes different interpretations of stakeholder engagement (Figure 4). The weakest form of stakeholder engagement is when an authority's decision is simply communicated to stakeholders, without any active engagement. At the other end of the spectrum, the strongest form of stakeholder engagement involves negotiation, where stakeholders and authorities have equal powers for decision-making. This is difficult to achieve, particularly when some stakeholders are far more powerful than others. Marine stakeholders tend to fall at both extremes of this spectrum, from marginalised coastal communities, to multinational corporates in mining and fishing.

Fortunately, South Africa's MSP Framework (2017) document (which accompanies the MSP Bill) recognises that a transparent MSP process, including the compilation and collection of appropriate spatial data and associated decision-support tools and extensive stakeholder engagement processes, is essential for ensuring effective governance of a sustainable ocean economy. As such, South Africa's goals for MSP include under "*Goal 4: Contributing to good ocean governance*", the requirement for "*relations to be built with non-state organisations and communities, that should be encouraged and enabled to contribute to planning processes as a means to enable effective ocean governance*" (MSP Framework, 2017) (Figure 5).

But how will these relations with "*non-state organisations and communities*" be developed in South Africa? In order to support a National MSP process being led by the DEA, four institutions (the Centre for Environmental Rights (CER), the International Ocean Institute-South Africa (IOI-SA), Nelson Mandela University (NMU) and WWF-South Africa) hosted a two-day workshop on MSP in Cape Town in March 2017. The objective of the workshop was to explore the supporting role of civil society in implementing the fledgling MSP legislation. The four hosting institutions were represented by Mr Saul Roux (CER), Mr Adnan Awad (IOI-SA), Prof. Amanda Lombard (NMU, and South African

Research Chair in Marine Spatial Planning), and Mr John Duncan (WWF-SA). Prof. Ken Findlay (CPUT, and Chair in Oceans Economy), Prof. Patrick Vrancken (NMU, and South African Research Chair in the Law of the Sea), Dr Steve Kirkman (DEA, Oceans and Coasts) and Dr Louis Celliers and Ms Nicolene Fourie (both from CSIR) were invited to give additional presentations. Formal presentations during the workshop included the following: the roles of different sectors and civil society in MSP; MSP in the Benguela Current Large Marine Ecosystem and the role of Ecologically and Biologically Significant Areas; MSP research programmes at the Cape Peninsula University of Technology (CPUT) and NMU; integrated coastal management and MSP; and legal and governance aspects of MSP.

In addition to these presentations, the workshop also included group discussions and participant feedback. Discussions focussed on issues that included: international best practice for MSP; a legal and governance framework for MSP in South Africa; identification of potential spatial layers; identification of research, knowledge and information gaps in relation to MSP; identification of knowledge products and MSP decision-support tools; opportunities for collaboration; resource requirements (including financial, research and institutional) for the integration of civil society into MSP in South Africa; and in particular, the advancement of their effective contribution to national stakeholder processes.

Participants were asked to provide input to a possible national MSP. Feedback from participants highlighted two fundamental requirements of a national MSP process. First, that the MSP process should be participatory and based on extensive, meaningful engagement with stakeholders, similar to that prescribed by the National Environmental Management Act of South Africa (No. 107 of 1998), and second, that the process should be ecosystem-based to prevent degradation and collapse of marine ecosystems and the services they provide.

In order to organise civil society stakeholders so that they can contribute to government stakeholder processes sensibly and effectively, the following suggestions were tabled:
1. Create opportunity for engagement between the DEA and civil society to strengthen the MSP policy process;
2. Constitute an institution of civil society to participate in the MSP policy process. This institution was proposed as an MSP stakeholder forum to be established alongside institutional structures established by the MSP Bill (*i.e.* the National MSP Working Group - NMSPWG) and the draft MSP Framework (*i.e.* the Marine Area Planning Group - MAPG). An alternative proposal is the development of a Community of Practice. The proposed institutions to implement MSP in South Africa are represented in Figure 6;
3. Establish an MSP information portal or platform to enable information-sharing and to create awareness of the MSP process;
4. There is a need to align coastal and marine research efforts with the data and information needs of the MSP process. To achieve this, clarification is required from the DEA regarding

the process that will be followed in the development of regional and national marine spatial plans. This will enable civil society to contribute better towards the milestones in this process;

5. There are many existing decision-support tools available to support the development of marine area plans. However, appropriate tools can be identified only once there is a clear understanding of the objectives of these plans.

In conclusion, it is important to remember that one of the cornerstones of effective MSP is continuous and effective engagement with civil society, a critical actor in ocean governance. It is also the responsibility of civil society to ensure that international MSP best practice and guidelines are considered in order to ensure that the MSP process is ecosystem-based, area-based, integrated, adaptive, strategic and participatory. In South Africa civil society holds much information and experience to support the MSP process. There is much research that can and should be used to inform MSP including research on the sustainable use of resources as well as trade-off analyses to measure the performance of various decision scenarios on different objectives.

For further information regarding the "Marine Spatial Planning Workshop: The Role of Civil Society in Supporting Marine Spatial Planning" discussed in this article, the Workshop Report is available online at http://cer.org.za/wp-content/uploads/2016/08/MSP-Workshop-Report-Outcomes-The-Role-of-Civil-Society-in-Supporting-MSP.pdf.
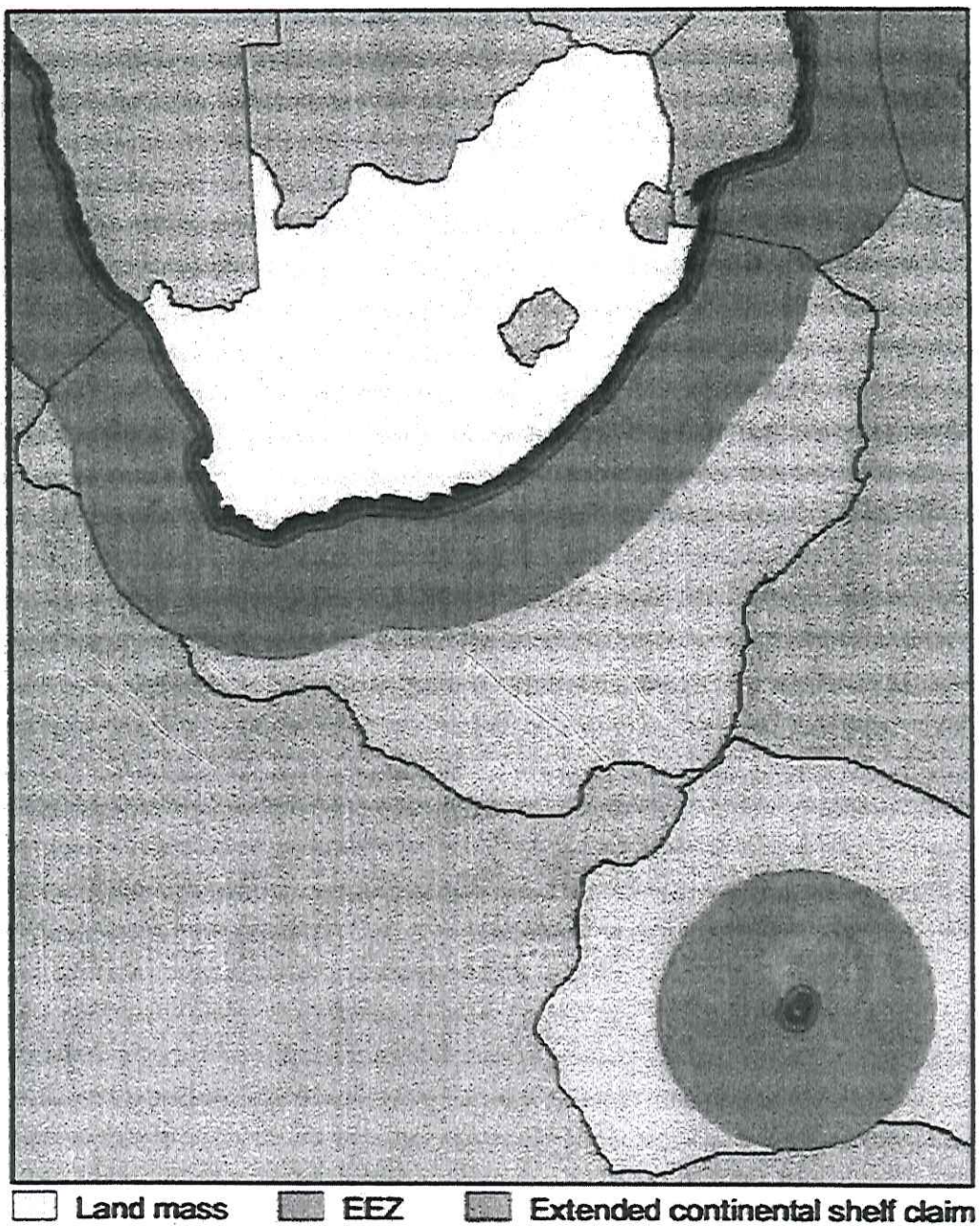
Figure 1. South Africa's extended continental shelf claim (green) submitted to the Commission on the Limits of the Continental Shelf in 2009 (for the mainland extended shelf continental claim see http://www.un.org/depts/los/clcs_new/submissions_files/zaf31_09/zaf2009executive_summary.pd f, and for the extended shelf claim surrounding the Prince Edward Islands see http://www.un.org/depts/los/clcs_new/submissions_files/frazaf34_09/frazaf2009exec_sum_resum e.pdf).

Growing the RSA Economy: Nine Point Plan

1. Revitalisation of the agriculture & agro-processing value chain (APAP)
2. More effective implementation of a higher impact IPAP
3. Advancing beneficiation (adding value to our mineral wealth)
4. Unlocking the potential of SMMEs, cooperatives, township & rural enterprises
5. Growing the Oceans Economy
6. Resolving the energy challenge
7. Managing work conflict
8. Scaling up private sector participation
9. Cross-cutters (ICT, Transport infrastructure, Science & Technology, Water)

Growing the Oceans Economy
OPERATION PHAKISA:

1. Marine Transport and Manufacturing
2. Offshore Oil and Gas exploration
3. Aquaculture
4. Marine Protection Services and Ocean Governance
5. Coastal Tourism

Marine Protection Services and Ocean Governance

Integrated Ocean Governance and Protection

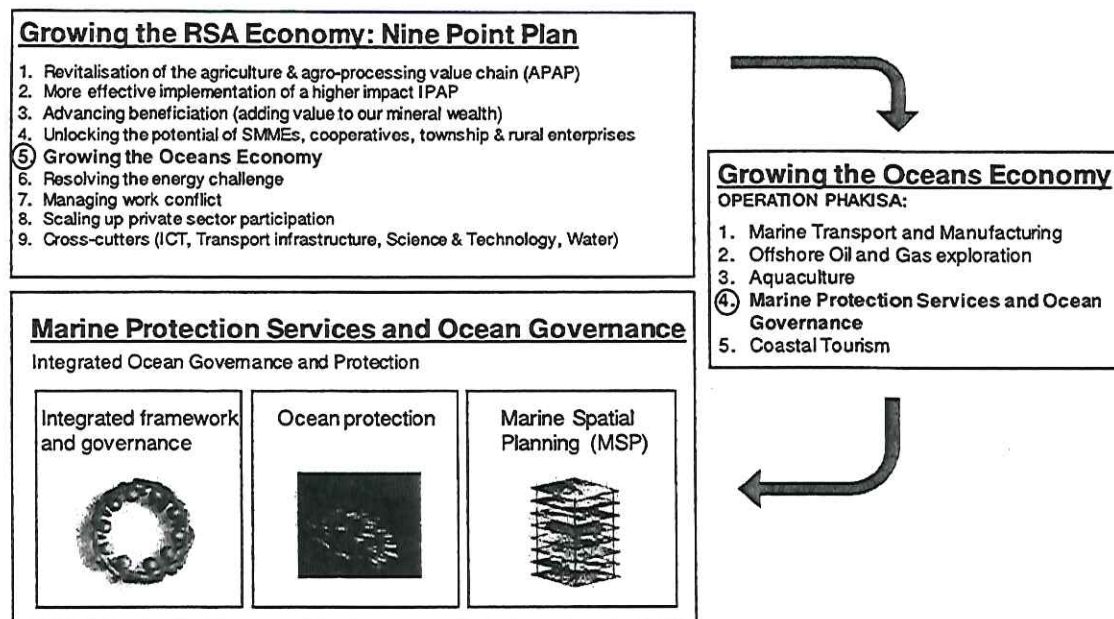| Integrated framework and governance	Ocean protection	Marine Spatial Planning (MSP)

Figure 2. The relationship between South Africa's Nine Point Plan to grow its economy; Operation Phakisa; and Marine Spatial Planning.

STEP 1. Establishing Authority

STEP 2. Obtaining Financial Support

STEP 3. Organizing the MSP Process

STEP 4. Engaging Stakeholders

STEP 5. Analyzing Existing Conditions

STEP 6. Analyzing Future Conditions

STEP 7. Developing the Plan

STEP 8. Implementing the Plan

STEP 9. Evaluating Performance

STEP 10. Adapting the Process

Figure 3. The ten-step good-practice approach to ecosystem-based marine spatial planning (from Ehler, C. and F. Douvere. 2009. Marine Spatial Planning: a step-by-step approach toward ecosystem-based management. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme. IOC Manual and Guides, Paris: UNESCO; msp.ioc-unesco.org/msp-guides/msp-step-by-step-approach/).

☐ **Communication:** Authorities responsible for MSP want to convey a message to a target audience and obtain approval for what their message asserts, suggests, and decides. Communication does not involve the stakeholders in any active way;

☐ **Dialogue:** A form of 'horizontal' interaction among stakeholders who are positioned as equals. There is no precise purpose other than to know and understand one another better. Dialogue is intended to create a sense of proximity and mutual understanding about the problems and solutions for a particular MSP area;

☐ **Information:** Authorities responsible for MSP want to keep a target audience informed about their intentions, decisions and attempts to provide a basis of understanding, but don't expect any particular reaction. Unlike communication, the information is intended to be objective and represents a way to empower stakeholders to react to decisions or take a position with full knowledge of the facts;

☐ **Concertation:** A form of 'horizontal' interaction among stakeholders that are positioned as equals. Unlike dialogue, the purpose is to develop a common position among a group of stakeholders that can be presented or defended before the authorities responsible for MSP. ("Concertation" is a French term referring to musicians playing an instrument with the purpose of creating a common outcome, e.g., a concert); and

☐ **Consultation:** Authorities responsible for MSP collect the opinions of stakeholders you have consulted with no guarantee that the opinions expressed will be taken into account;

☐ **Negotiation:** A form of 'horizontal' interaction in which both stakeholders and the authorities responsible for MSP have equal powers for decision-making.

Figure 4. Different ways of incorporating stakeholders in MSP (adapted from Bouamrane, M. (ed.). 2006. Biodiversity and stakeholders: concertation itineraries. Biosphere Reserves – Technical Notes 1. UNESCO, Paris; http://msp.ioc-unesco.org/msp-good-practices/engaging-stakeholders/).
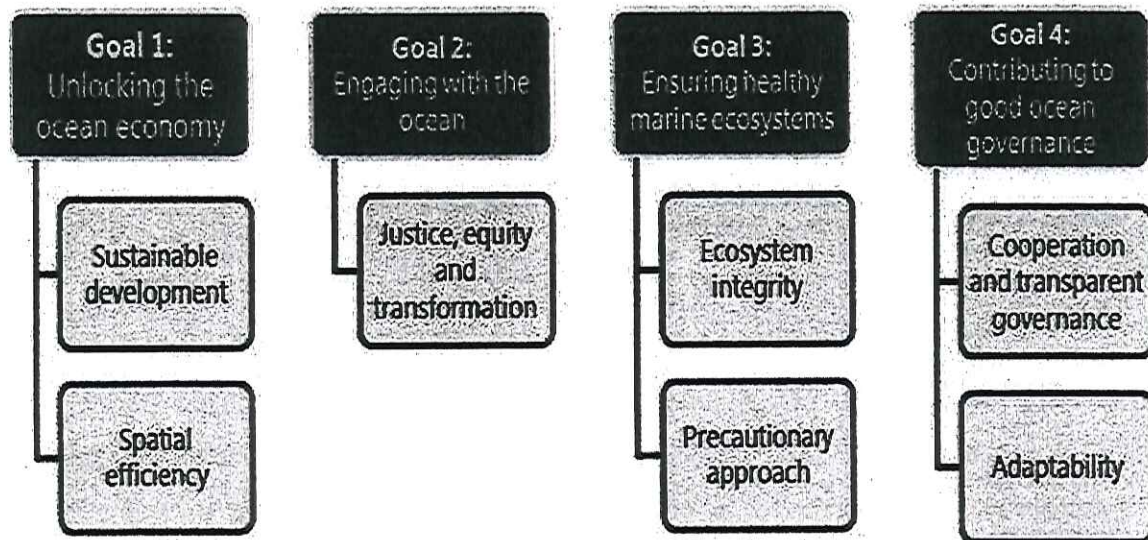
Figure 5. South Africa's Marine Spatial Planning Goals (adapted from the MSP Framework, 2017; http://www.gov.za/sites/www.gov.za/files/40860_gon451.pdf)