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COMMENTS ON THE MARINE BIODIVERSITY SECTOR PLAN PUBLISHED IN GOVERNMENT GAZETTE 48187 ON 10 MARCH 2023

1 INTRODUCTION

The Biodiversity Law Centre appreciates this opportunity to submit comments on the draft Marine Biodiversity Sector Plan (“the Biodiversity Sector Plan”) and on the Department of Forestry, Fisheries, and the Environment’s (“DFFE”) marine spatial planning process.

Ensuring that the marine spatial planning process includes rigorous protections for South Africa’s marine biodiversity is critical. Currently, our planet is in a biodiversity crisis, with an

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estimated one million species threatened with extinction.¹ The current rate of extinction is tens to thousands of times higher than historical levels and is accelerating.² In the marine realm, almost a third of reef-forming corals, sharks and shark relatives and over a third of marine mammals are currently threatened with extinction.³ The rapid loss of global biodiversity has serious implications for the future of human society. “Humanity needs the life support” that species and the ecosystems they create provide, including a stable climate, flows of fresh water, agriculture pest control, disease vector control, crop pollination, protection against natural hazards such as flooding and drought, and many other services.⁴ The health of humanity is thus inextricably linked to healthy ecosystems and thriving biodiversity.

South Africa’s oceans are rich in biodiversity, providing habitat for over 13,000 species, with 26% to 33% of those species estimated to be endemic.⁵ Recognizing the importance of this biodiversity and the need to protect it, South Africa, along with many other nations, signed the Convention on Biological Diversity,⁶ which commits nations to conserving and sustainably using biodiversity.⁷ Most recently, in December 2022, South Africa was one of 196 nations that signed the Kunming-Montreal Global Biodiversity Framework where nations agreed to halt the decline of nature and protect 30 percent of the planet’s lands and seas by 2030 (referred to as 30 by 30).⁸ Including rigorous protections for biodiversity within this marine spatial planning process is essential to ensure that South Africa meets these international commitments and protects its invaluable marine species and ecosystems.

In light of this, we appreciate that the Biodiversity Sector Plan recognises the necessity of safeguarding environmental opportunities for future generations through the maintenance of

¹ Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, Global Assessment Report on Biodiversity and Ecosystem Services: Summary for Policymakers (2019) at 24, <https://doi.org/10.5281/zenodo.3553458>.

² *Id.*

³ *Id.*

⁴ Gerardo Ceballos et al., Vertebrates on the brink as indicators of biological annihilation and the sixth mass extinction, 117:24 PNAS 13596 (2020), <https://www.pnas.org/doi/full/10.1073/pnas.1922686117>.

⁵ Kerry J Sink et al. (eds), South African National Biodiversity Assessment 2018 Technical Report Volume 4: Marine Realm at 20. South African National Biodiversity Institute, Pretoria, South Africa (2019), <http://hdl.handle.net/20.500.12143/6372>.

⁶ Convention on Biological Diversity, *List of Parties*, <https://www.cbd.int/information/parties.shtml>.

⁷ Convention on Biological Diversity, *Introduction*, <https://www.cbd.int/intro/>.

⁸ Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity, Decision 15/4, Kunming-Montreal Global Biodiversity Framework (2022), <https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf> [hereinafter *Kunming-Montreal Global Biodiversity Framework*].

an adequate, representative sample of marine biodiversity within biodiversity management zones, which includes Marine Protected Areas (“MPAs”) and Critical Biodiversity Areas (“CBAs”).⁹ However, there are several aspects of the Biodiversity Sector Plan that undermine this overarching objective:

- Firstly, the Biodiversity Sector Plan does not take into account concrete international obligations and domestic goals regarding biodiversity protection. The fulfilment of international obligations is explicitly contemplated by the Marine Spatial Planning Act, 2018 (the MSP Act), which lists one of the objects of the Act as to “give effect to South Africa's international obligations in South African waters.” Furthermore, Section 5 lists principles and criteria for marine spatial planning and includes in 5(1)(l) “South Africa's international obligations and cross-border cooperation” as a principle that should be applied and considered to the marine spatial planning and with “regard to the precautionary approach”. As stated above, South Africa recently signed the Kunming-Montreal Global Biodiversity Framework, where signatories agreed to protect 30% of the world’s marine and terrestrial area by 2030. Likewise, in its National Biodiversity Strategy and Action Plan, South Africa delineated a goal to protect nearly 20% of its EEZ by 2028. The Biodiversity Sector Plan does not acknowledge either of these specific commitments or explain how South Africa intends to achieve them through the marine spatial planning process.
- Secondly, the Plan does not adopt a risk averse and cautious approach to marine biodiversity conservation, as required by section 5(1)(l) of the MSP Act , as well as section 2(4)(a)(vii) of the National Environmental Management Act, 1998 (“NEMA”) (which applies to all organs of state whose actions may significantly affect the environment). Instead of promoting conservation within CBAs by prohibiting activities which could negatively impact these areas and undermine their management objectives, the Plan compromises conservation and allows between these objectives and activities that are already occurring within CBAs. Because of this, the Plan’s sea-use guidelines are too permissive to truly protect biodiversity within these areas

⁹ Department of Forestry, Fisheries & the Environment, Draft Marine Biodiversity Sector Plan (2023) at 9, https://www.dffe.gov.za/sites/default/files/docs/inputforMSPsectorplan_biodiversity.pdf [hereinafter *Biodiversity Sector Plan*].

identified as biodiversity priorities or to meet the commitments to protect biodiversity described above.

- Thirdly, the Plan fails to adequately acknowledge the important role of indigenous peoples and local communities in biodiversity conservation. There is no acknowledgement in the Plan of community livelihoods, or culture, or relationship as stewards of marine biodiversity. This is an omission which is also inconsistent with the Global Biodiversity Framework

The Plan also has significant implications for other plans that depend on thriving species and ecosystems, such as the Coastal and Marine Tourism Plan and the Wild Fisheries Sector Plan. In fact, the language regarding 30 by 30 should potentially be present in all Sector Plans, as this target must be front and centre of government's mind while it navigates the marine spatial planning process and determines what may happen where in the ocean.

Problematically, the Biodiversity Sector Plan seems to be the only sector plan that accommodates other sectors' needs and desires at this initial stage in the planning process. As the Plan makes clear, the Biodiversity Sector Plan is not the integrated Marine Area Plan. It is a sector plan that "mak[es] the case" for biodiversity protection and serves as the Biodiversity Sector's "spatial priority proposal which will then need to be further discussed and negotiated across sectors as part of the Marine Area Plan."¹⁰ In other words, the Biodiversity Sector Plan should be making the case for biodiversity protection without consideration of other sector influences; compromise will occur at the next stage of the planning process.

However, the Biodiversity Sector Plan already represents a compromise. The Biodiversity Sector Plan is based on the National Coastal and Marine Biodiversity Plan Version 1.2 developed by the South African National Biodiversity Institute and Nelson Mandela University. That process explicitly took other sectors into account: The National Coastal and Marine Biodiversity Sector Plan contains "[t]he most comprehensive collection of coastal and marine data compiled to date for the country ... This included data for 976 biodiversity features and design elements, **and data to minimize conflict with 19 sectors (petroleum, mining, 15 different fisheries, aquaculture and transport), and guide avoidance of cumulative impacts from 31 pressures on marine biodiversity.**"¹¹ Thus, the Biodiversity Sector Plan

¹⁰ *Id.* at 1.

¹¹ Linda Harris et al, *National Coastal and Marine Spatial Biodiversity Plan V1.2* (November 8, 2022), <https://storymaps.arcgis.com/stories/f0cc3b29d54143fa9842bf2aaf3eab30>.

has already incorporated the needs of other sectors and compromised for those needs, even before the process of creating an integrated plan. This is in contrast to the development of the other sector plans in the marine spatial planning process, which do not incorporate the needs of other sectors and concentrate on their own needs. As a result, the marine spatial planning process is already deprioritizing biodiversity protection in comparison to other sectors. In the context of developing Marine Area Plans, and to be consistent with other Sector Plan delineation prioritisation approaches, we recommend that the original biodiversity feature and process layers be included in the Marine Biodiversity Sector Plan before trade-offs are negotiated for the Marine Area Plans (in other words, the biodiversity features and process layers before the requirements of other sectors were accommodated).

Below, we explain these problems in more depth and suggest ways to strengthen and improve the Biodiversity Sector Plan and the marine spatial planning process.

2 THE BIODIVERSITY SECTOR PLAN MUST EXPLICITLY ACKNOWLEDGE INTERNATIONAL AND DOMESTIC GOALS FOR BIODIVERSITY PROTECTION AND EXPLAIN HOW THE MARINE SPATIAL PLANNING PROCESS CAN ACHIEVE THEM

As stated above, South Africa recently signed the Kunming-Montreal Global Biodiversity Framework, which commits nations to ensuring “that by 2030 at least 30 per cent of terrestrial, inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures...”¹² The Framework also commits nations to “ensure that all areas are under participatory integrated biodiversity inclusive spatial planning and/or effective management processes addressing land and sea use change, to bring the loss of areas of high biodiversity importance, including ecosystems of high ecological integrity, close to zero by 2030, while respecting the rights of indigenous peoples and local communities.”¹³

Even prior to signing the Kunming-Montreal Global Biodiversity Framework, South Africa delineated concrete goals to protect marine biodiversity. As required by Article 6 of the Convention on Biological Diversity, South Africa developed a National Biodiversity Strategy

¹² Kunming-Montreal Global Biodiversity Framework, Section H.30.1, Target 3.

¹³ *Id.*, Section H.31.1, Target 1.

and Action Plan for the 2015-2025 period. In this Strategy and Action Plan, South Africa identified a goal of placing 210,000 km² of South Africa mainland marine extent and 93,300 km² of offshore area within the Prince Edwards Island EEZ in “formally recognized protected areas” by 2028.¹⁴ Together, this area represents almost 20% of South Africa’s EEZ. The Strategy and Action Plan defines protected areas as “areas of land or sea that are formally declared through the Protected Areas Act (No. 57 of 2003) and are managed mainly for biodiversity conservation.”¹⁵ Currently, only 5.4% of the marine ecosystem area is under protection as MPAs.¹⁶

The marine spatial planning process is exactly the kind of regulatory and policy mechanism that can help South Africa achieve these international and domestic commitments to protect marine biodiversity. The Biodiversity Sector Plan states that the Plan is guided by “a range of national policies, relevant legislation and respective regulations, and international obligations.”¹⁷ Likewise, one of the Plan’s objectives is to “support MPA expansion in line with national targets and international obligations.”¹⁸ Importantly, this includes “retaining potential areas for future MPA expansion through marine area plans, to ensure it is possible to comply with international agreements and meet national targets for marine protection set out in the National Protected Area Expansion Strategy.”¹⁹ However, beyond these vague references, the Plan fails to acknowledge concrete commitments (such the global commitment of 30 by 30 or the national goal of protecting 20% of the EEZ) and fails to explain how this marine spatial planning process aims to achieve them.

Ensuring that South Africa meet these international obligations and national commitments should be a common goal across sector plans. This is because, as the Biodiversity Sector Plan plainly recognizes, marine and coastal biodiversity is an essential foundation for the South African economy and provides multiple services and benefits for South Africans and because “development cannot subsist upon a deteriorating environmental baseline.”²⁰ Indeed,

¹⁴ Department of Environmental Affairs, South Africa’s 2nd National Biodiversity Strategy and Action Plan 2015-2026 (2015) at 29, <https://www.cbd.int/doc/world/za/za-nbsap-v2-en.pdf>.

¹⁵ *Id.* at 27.

¹⁶ https://www.dffe.gov.za/mediarelease/20marineprotectedareas_declared.

¹⁷ Biodiversity Sector Plan at 6.

¹⁸ *Id.* at 7.

¹⁹ *Id.*

²⁰ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others*, CCT 67/06 [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); [2007] (6) SA 4 (CC); (07 June 2007), para 44.

many other marine sectors and every coastal community depends on biodiversity and functional ecosystems for a multitude of goods and services, including the provisioning of food and raw materials, genetic resources, water, recreation and tourism, transportation, scientific and educational opportunities, flood control, storm protection, pollution control, breeding and nursery habitats, shoreline stabilization and erosion control, carbon sequestration, and cultural and religious experiences.²¹ Because of this dependence, *all* sector plans should take into account South Africa's biodiversity commitments and be revised to incorporate these obligations and targets into the planning process. We recommend that each sector identify 30% of the EEZ where destructive activities should be prohibited to protect biodiversity.²² This would help ensure South Africa meets its international commitments.

3 THE BIODIVERSITY SECTOR PLAN ALLOWS ACTIVITIES WITHIN BIODIVERSITY PRIORITY AREAS THAT UNDERMINE THE PLAN'S OBJECTIVE TO PROTECT BIODIVERSITY AND FAIL TO MEET SOUTH AFRICA'S INTERNATIONAL AND DOMESTIC COMMITMENTS TO PROTECT BIODIVERSITY

The Biodiversity Sector Plan contains a number of inconsistencies and ambiguities that undermine the Plan's ability to achieve its stated management goals for biodiversity priority areas. In particular, the Plan permits activities that are destructive to biodiversity within areas that are supposed to protect or restore biodiversity. Further, the Plan allows activities within CBAs and Ecological Support Areas ("ESAs") that do not align with management objectives of these areas. In addition, the Biodiversity Sector Plan should clarify that any sea-use activity not explicitly listed in the guidelines is prohibited until a regulatory process determines it is compatible within a particular biodiversity priority area. Finally, the Plan should clarify how the identification and designation of MPAs will be incorporated into the marine spatial planning process.

The Biodiversity Sector Plan identifies multiple types of biodiversity priority area designations or zones, including: Marine Protected Areas (MPAs); Critical Biodiversity Areas (CBAs); and Ecological Support Areas (ESAs). Each of these designations have specific management objectives that are necessary "to secure and ... restore marine biodiversity" so that marine

²¹ Edward B. Barbier, *Marine Ecosystem Services*, 21:11 CURRENT BIOLOGY R507 (2017), <https://www.sciencedirect.com/science/article/pii/S0960982217302890>.

²² Here, destructive activities refer to Type 3, Type 4, and Type 5 activities as defined in the Biodiversity Sector Plan and discussed further below.

ecosystems can continue to provide “ecosystem services ...for the benefit of current and future generations.”²³

The Biodiversity Sector Plan states that MPAs and CBAs comprise a “strict biodiversity conservation zone” where “biodiversity features will be maintained in a natural or near-natural state, or as near to this state as possible, through strict place-based protection measures with associated regulation of human activities.”²⁴

ESAs, in contrast, are part of the “biodiversity impact management zone,” where “negative impacts of human activities on key biodiversity features are managed and localised to maintain the features in at least an ecologically functional state and/or to allow the area to improve in ecological condition.”²⁵

To achieve the biodiversity management goals of MPAs, CBAs, and ESAs, the Biodiversity Sector Plan specifies certain activities that are not compatible within these areas. Specifically, the Biodiversity Sector Plan divides various ocean-based activities into five different activity types.

- Type 1 Activities have “no or minimal impact” and are “consistent with maintaining natural or near-natural state.”
- Type 2 Activities “result in moderate impacts in localise[d] areas, with no or minimal impacts in the surrounding area.”
- Type 3 Activities “result in moderate impacts over broad areas.”
- Type 4 Activities “result in severe or very severe impacts in localised areas, with moderate or minimal impacts in the surrounding area.”
- Type 5 Activities “result in severe or very severe impacts over broad areas.”²⁶

3.1 THE BIODIVERSITY SECTOR PLAN PERMITS ACTIVITIES WITHIN CBAs THAT DO NOT ALIGN WITH THE PLAN’S STATED MANAGEMENT GOALS FOR CBAs.

²³ Biodiversity Sector Plan at 7.

²⁴ Biodiversity Sector Plan at 12.

²⁵ Biodiversity Sector Plan at 12.

²⁶ Biodiversity Sector Plan at 11.

The Biodiversity Sector Plan states that Type 4 and Type 5 activities are not compatible with the management objectives of CBAs and should therefore be prohibited within these areas.²⁷

We agree that Type 4 and Type 5 activities must be prohibited in all CBAs.

Currently, the Biodiversity Sector Plan divides CBAs into two different types: CBAs Natural and CBAs Restore. The management objective for CBAs Natural is to “keep the area in a natural or near-natural state.”²⁸ The management objective for CBAs Restore is to “improve ecosystem condition and if possible, to restore to natural or near-natural state.”²⁹ The Biodiversity Sector Plan contemplates that Type 3 activities should be prohibited in CBAs Natural but are permissible in CBAs Restore with restrictions.

We agree that Type 3 activities must be prohibited in CBAs Natural but disagree that Type 3 activities are permissible in CBAs Restore.

The management goal for CBAs Restore is more ambitious than the management goal for CBAs Natural. The goal in CBAs Restore is not only to prevent further deterioration of biodiversity but to *improve* the ecological condition of the area. The Biodiversity Sector Plan does not explain how it is possible to achieve this more ambitious management goal while allowing various types of destructive activities within those areas.

Various Type 3 activities are currently permitted in CBA Restore areas, albeit only as consent uses, including:

- Commercial linefishing, midwater trawling and small pelagic fishing;
- Prospecting;
- Petroleum exploration;
- Pipelines and undersea cables; and
- Wastewater disposal.

To be consistent with its stated management goal, therefore, the Biodiversity Sector Plan must ensure that CBAs Restore also prohibit Type 3 activities. This would be consistent with the risk averse and cautious approach required by both the MSP Act and NEMA.

²⁷ Biodiversity Sector Plan at 11.

²⁸ *Id.* at 11

²⁹ *Id.*

The Biodiversity Sector Plan is also inconsistent insofar as it states that Type 3 activities are not permitted in CBA Natural areas³⁰, but then lists certain Type 3 activities, including prospecting (non-destructive) and petroleum exploration (non-invasive), as being permitted in both CBA Natural and CBA Restore areas. It begs the question, why allow such activities in CBAs when the further stages thereof (mining and petroleum production) are prohibited in both CBA Natural and CBA Restore? The Biodiversity Sector Plan is inconsistent in this regard. **No Type 3 activities should be permitted in either CBA Natural or CBA Restore areas.**

In addition, while we agree that Type 4 and Type 5 activities should be prohibited within all CBAs, the Biodiversity Sector Plan's sea-use guidelines authorize multiple activities that constitute Type 4 or Type 5 activities within CBAs, including:

- Commercial fishing activities such as demersal hake longlining and demersal hake trawling (allowed in CBAs Restore only);
- Commercial aquaculture (allowed in CBAs Restore only);
- Renewable energy installations (allowed in CBAs Restore only, however it is difficult to comment on this activity in the absence of a Renewable Energy Sector Plan, which should be developed as part of the MSP process)
- Petroleum exploration;
- Mining prospecting;
- Defence activities (military training and missile testing);
- Ammunition dumping;
- Shipping lanes;
- Anchorage areas.³¹

All these activities result in severe impacts over broad or localised areas and are thus by definition either Type 4 or Type 5 activities. They must therefore be prohibited within CBAs per the terms of the Biodiversity Sector Plan. Again, this would be consistent with the risk averse and cautious approach required by both the MSP Act and NEMA. In addition, the wide breadth and extended duration of these destructive activities allows for chronic and overlapping impacts without consideration of their cumulative nature. If these activities are allowed within CBAs, CBAs will no longer be able to achieve their management goal of

³⁰ Id.

³¹ Id. at 15-16.

maintaining these areas in a natural or near natural state (or restoring them to such a state). Moreover, because these activities have severe impacts on biodiversity, designating CBAs that allow activities resulting in significant harm to biodiversity will not help South Africa achieve its commitments under the Global Biodiversity Framework or the National Biodiversity Strategy and Action Plan.

3.1.1 The Biodiversity Sector Plan Should Not Compromise with Commercial Sectors by Downgrading Consent Categories within CBAs Prior to the Negotiation Process

The Biodiversity Sector Plan states that certain activities, such as demersal hake longlining, demersal hake trawling, sea-based aquaculture, and petroleum exploration have “significant spatial overlap with some areas that are proposed for inclusion in the Strict Biodiversity Conservation Zone. Therefore, the consent category was reduced from N [not compatible] to RC [restricted compatibility].”³² We do not agree that the consent category should be downgraded from N to RC for these activities within CBAs simply to accommodate the priorities of other sectors.

First, the Biodiversity Sector Plan is an initial document:

[The] Biodiversity Sector Plan is ... not the integrated Marine Area Plan. Rather, it is a critical input for the next step of developing integrated cross-sectoral Marine Area Plans. As such, the Biodiversity Sector Plan serves as the sectors’ spatial priority proposal that will then need to be further discussed and negotiated across sectors as part of the Marine Area Plan development.³³

Because it is a proposal for biodiversity protection, which will then be watered down in the next phase of negotiation as other sectors make the case of their respective industries, this initial Biodiversity Plan should not represent compromise with other sectors. Compromise should occur in the next phase, as sectors negotiate. If the Biodiversity Sector Plan starts out from a compromised position, then biodiversity protection will only be whittled away further as negotiations proceed. And indeed, no other sector plan starts from this place of compromise. For example, the Offshore Oil and Gas Sector Plan states that “Offshore oil and gas exploration activities **are permitted to take place everywhere**, unless the spatial regulations of other sector’s zones (in Marine Sector Plans and eventually the Marine Area Plans) list the

³² Id.

³³ Id. at 1.

activity as consent use or prohibited use.”³⁴ This posture makes offshore oil and gas production the default and puts the burden on other sectors to carve out space for other uses; it therefore implicitly prioritizes offshore oil and gas development above other sector uses. In fact, no other sector plan explicitly makes accommodations for biodiversity protection. Yet the Biodiversity Sector Plan makes accommodations for nearly all commercial activities, including commercial fishing, aquaculture, military activities, renewable energy infrastructure, and petroleum development.³⁵ Intentionally or not, this lopsided compromise deprioritizes biodiversity protection in the marine spatial planning process from the very beginning.

Second, just because destructive activities are already occurring in areas that are proposed for CBAs, does not mean the guidelines should downgrade the consent category for these activities. Rather, the Biodiversity Sector Plan should be clear that these activities are still not compatible within CBAs and should be generally prohibited. In particular, authorization to initiate or expand such activities should be prohibited. To the extent destructive activities are already occurring within these areas, then exceptions could be made on a case-by-case basis, requiring robust mitigation for continued operation and plans to phase out the destructive activity over time, where possible. If this is not possible, additional CBAs may need to be identified.

3.1.2 The Biodiversity Sector Plan Should Not Allow Activities Harmful to Biodiversity Within CBAs Simply Because Other Activities Harm Biodiversity Even More

The Biodiversity Sector Plan reduces the consent category from N to RC for certain military activities because “[a]lthough some military activities may have a severe impact to biodiversity on an ad hoc basis, it is acknowledged that the military provide de facto benefits to biodiversity by limit the activities of more impactful sectors.”³⁶ Similarly, the Biodiversity Sector Plan reduces the consent category of renewable energy installations because “this infrastructure would place limits on other, more impactful sectors that would provide de facto benefits to biodiversity.”³⁷ We disagree that the Biodiversity Plan should allow activities harmful to

³⁴ Department of Forestry, Fisheries & the Environment, Draft Offshore Oil and Gas Sector Plan (2023), footnote 2,

https://www.dffe.gov.za/sites/default/files/docs/inputforMSPsectorplan_offshoreoilgas.pdf

³⁵ Biodiversity Sector Plan at 15-17.

³⁶ Biodiversity Sector Plan at 17.

³⁷ *Id.*

biodiversity merely because other activities may cause even greater harm. This is inconsistent with the risk averse and cautious approach mandated by the MSP Act and NEMA.

Instead, we urge DFFE to simply apply the framework already delineated in the Biodiversity Sector Plan. Namely, if the activity constitutes a Type 3, Type 4 or Type 5 activity, then it must be prohibited within CBAs. Moreover, the Biodiversity Sector Plan's effort to compromise with the renewable energy sector—a sector that is notably absent from the entire planning process—exemplifies the Biodiversity Sector Plan's problem of anticipatory and one-sided compromise. It is not the Biodiversity Sector Plan's job to make space for renewable energy in this initial stage. If anything, the renewable energy sector should have its own voice fully represented in an Offshore Energy Sector plan that includes offshore oil and gas *and* every other source of offshore energy (wind, sea-wave, etc.). That sector can then advocate for itself in the negotiation process.

3.1.3 If Production of a Resource is Not Compatible within a CBA per the Sea-Use Guidelines, Exploration of that Resource Must Be Likewise Prohibited.

The Biodiversity Sector Plan prohibits mining production and petroleum production in CBAs.³⁸ We agree that these activities should be prohibited within CBAs. However, the Biodiversity Sector Plan *permits* mining prospecting and petroleum exploration within CBAs.³⁹ From a practical perspective, allowing petroleum exploration and mining prospecting when mining and petroleum production is expressly prohibited does not make sense. If production is prohibited, then exploration is a wasted activity and should be likewise prohibited. Otherwise, the implication is that production may be acceptable if resources are discovered, which again undermines the biodiversity protection goals of designating CBAs.

3.2 THE BIODIVERSITY SECTOR PLAN PERMITS ACTIVITIES WITHIN ESAS THAT DO NOT ALIGN WITH THE PLAN'S STATED MANAGEMENT OBJECTIVE FOR ESAS.

It is our understanding that ESAs serve as 5 km buffers around all existing MPAs.⁴⁰ In addition, the Biodiversity Sector Plan states that the management goal for ESAs is to keep these areas in at least an ecologically functional state. Any activities within an ESA “must not undermine

³⁸ *Id.* at 16-17.

³⁹ *Id.*

⁴⁰ Harris et al., National Coastal & Marine Spatial Biodiversity Plan Version 1.2 Technical Report (2022) at ii, https://cmr.mandela.ac.za/cmr/media/Store/documents/EBSA/CBA%20Map%20v1/NCMSBPV1.2_Technical-report.pdf.

any adjacent MPAs or CBAs.”⁴¹ However, the Biodiversity Sector Plan allows Type 4 and 5 activities with ESAs. Since Type 5 activities “result in severe impacts over broad areas”⁴² it is not clear how ESAs can serve as functional buffers. If activities have severe impacts over broad areas, presumably such activities that occur within buffer zones would have impacts that leached over into CBAs. **Type 5 activities should therefore be prohibited within ESAs.**

Likewise, because these buffers extend only 5 km, **Type 4 activities should also be prohibited within ESAs.** Type 4 activities result in severe impacts over localised areas.⁴³ However, “localised” is not defined and could conceivably mean an impact that extends over several square kilometres. As such, severe impact within ESAs from Type 4 activities could have effects within adjacent MPAs and should therefore be prohibited.

3.3 THE MARINE BIODIVERSITY PLAN SHOULD SPECIFY THAT ACTIVITIES NOT LISTED IN THE SEA-USE GUIDELINES ARE PROHIBITED WITHIN MPAs, CBAs, AND ESAs UNTIL A REGULATORY PROCESS DEEMS THEM COMPATIBLE WITH AN AREA’S MANAGEMENT GOAL

The Biodiversity Sector Plan’s sea-use guidelines do not and cannot contain every ocean-based activity that currently occurs or that may occur in the future. As such, the Biodiversity Sector Plan should specify that any activity not specifically listed in the guidelines is prohibited until a regulatory process determines whether the activity is Type 1, Type 2, Type 3, Type 4, or Type 5. Then the activity should be allowed or prohibited depending on whether it falls into a class of activities that is prohibited or authorized within the area type.

4 THE BIODIVERSITY SECTOR PLAN AND THE ENTIRE MARINE SPATIAL PLANNING PROCESS MUST INCLUDE THE PERSPECTIVES OF INDIGENOUS PEOPLE, SMALL-SCALE FISHERS, AND OTHERS WHO DEPEND ON BIODIVERSITY FOR LIVELIHOOD, CULTURE, AND SUBSISTENCE.

The Biodiversity Sector Plan’s objective states that the prioritisation of biodiversity areas to meet conservation targets should avoid socio-economic costs of biodiversity conservation.⁴⁴ This is an important inclusion that should be more explicit, as conservation should not come at the cost of livelihoods or cultural practices of indigenous people and local communities

⁴¹ Biodiversity Sector Plan at 8.

⁴² *Id.* at 11.

⁴³ *Id.*

⁴⁴ *Id.* at 8.

("IPLC") who depend on marine biodiversity. For example, the declaration of MPAs must be done in a manner that respects and protects the rights of IPLC.

In general, both the Biodiversity Sector Plan and the entire marine spatial planning process is silent on the rights of IPLC. These rights should be expressly recognised in all sector plans. In addition, there is no sector plan which deals with intangible cultural heritage and biodiversity stewardship by IPLC. The sector development guidelines and objectives in the Marine and Underwater Cultural Heritage Sector Plan only relate to tangible heritage resources, and not traditional ways of life. Likewise, the Wild Fisheries Sector Plan omits the voices of small-scale fishers, who also do not have their own sector plan. Before moving on to the next phase of the marine spatial planning process, it is essential that these omissions are rectified and that these communities either have chance to create their own sector plans or fully represent their voices in existing sector plans.

The absence of consideration for IPLC in the Biodiversity Sector Plan stands in stark contrast to the significant compromises and carve outs made for various commercial sectors, as described above. This is contrary to the commitments South Africa made under the Kunming-Montreal Global Biodiversity Framework, which explicitly mandates that nations protect 30 percent of earth's land and seas by 2030 "while respecting the rights of indigenous peoples and local communities."⁴⁵ The importance of this aspect, as well as the issue of customary/traditional rights, has come to light in relation to several high-profile court cases.⁴⁶

5 CONCLUSION

We appreciate that DFFE includes biodiversity protection as a key element in the marine spatial planning process. However, we urge the Department to ensure that this process helps South Africa meet its international commitments with regards to biodiversity protection, especially the recent commitment to protect 30 by 30. This commitment must be a central focus of the entire marine spatial planning process, and not restricted only to the Biodiversity

⁴⁵ Kunming Montreal Global Biodiversity Framework, Section H.31.1, Target 1.

⁴⁶ *Gongqose & others v Minister of Agriculture, Forestry & Fisheries and others; Gongqose & others v State & others* (1340/16 & 287/17) [2018] ZASCA 87 (01 June 2018); *Sustaining the Wild Coast NPC and Others v Minister of Mineral Resources and Energy and Others* (3491/2021) [2022] ZAECMKHC 55; (1 September 2022); *Christian John Adams & Others v Minister of Mineral Resources and Energy & Others* (March 2022); *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829 (22 November 2018).

Sector Plan. In addition, the Biodiversity Sector Plan's sea-use guidelines must be strengthened. Currently, the Plan allows activities that are harmful to biodiversity within biodiversity priority areas. This means that the sea-use guidelines as they stand now will not actually ensure that South Africa protects 20% of its EEZ by 2028 and thus fails to align the targets delineated in both the National Strategy and Action Plan and the 30 by 30 commitment. Finally, both the entire marine spatial planning process and the Biodiversity Sector Plan fail to adequately consider and include the rights and needs of IPLC. This is an egregious oversight that must be rectified before proceeding to the next stage of the planning process.

Yours faithfully,



BIODIVERSITY LAW CENTRE NPC

***Per* Kate Handley**