

# Falling through the Net

**Small-scale fishing communities in South Africa have begun clamouring for the recognition of their human rights in the context of the promotion of marine protected areas**

In line with an increased international focus on marine protected areas (MPAs) as one of the means whereby the dual objectives of marine conservation and fisheries management can be achieved, South Africa has embarked on a national policy of expanding its MPAs. South Africa now has 24 MPAs of which 23 are on the coast and one, Prince Edward Islands, is an offshore MPA.

The 23 MPAs along the coast comprise a total of 23.17 per cent of the coastline. Seven of South Africa's MPAs do not permit any form of extractive use and are, therefore, considered 'no-take' MPAs. Extractive use throughout the MPA is permitted in nine MPAs whilst the remaining seven MPAs are zoned with both no-take and extractive-use zones. In total, approximately 9.26 per cent of the coastline is completely no-take.

In addition to these gazetted MPAs, the fisheries department has utilized marine spatial planning tools to develop a range of other spatial measures, including seasonal closures for specific species, trawl exclusion areas and experimental small pelagic exclusion areas.

South Africa has identified 18 areas referred to in terms of the decisions of the Convention on Biological Diversity (CBD) as 'ecologically and biologically significant areas' (EBSAs) that straddle both its exclusive economic zone (EEZ) and areas beyond national jurisdiction, and include several nearshore areas of relevance to small-scale fisheries governance.

The planning undertaken for these areas has included some socioeconomic data related to extractive use by key large commercial

industries in these areas; however, it has not included traditional knowledge or social and cultural information as urged by the decisions of the 11 Conference of the Parties (COP11) to the CBD in 2012.

There is a strong push from within the marine conservation sector to increase statutory no-take protection and a percentage-based objective has been included as an indicator in the Department of Environment's Strategic Objectives. In future, the performance of the senior state officials in the Directorate of Oceans and Coasts Biodiversity Conservation

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will be measured against the objective of ensuring an expansion of the MPA network.

Although South Africa is recognized as a global leader in systematic biodiversity planning and demonstrates compliance with the ecological planning components of the CBD Programme of Work on Protected Areas (CBD PoWPA), South Africa's marine and coastal biodiversity planning systems fall short on issues of governance, participation, equity and benefit-sharing when viewed from the perspective of small-scale fishing communities.

## **South African MPAs**

A recent study of MPAs in South Africa undertaken by the International

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Collective in Support of Fishworkers (ICSF) indicates that there is little coherence across legislative and policy spheres from the perspective of small-scale fisheries and, far from enjoying the benefits from these MPAs, small-scale fishing communities are falling through the net. More than one-third (approximately 56) small-scale fishing communities lie in, or adjacent to, an MPA. Small-scale fishing communities' rights are consistently marginalized and the negative impacts of MPAs on them are hidden.

In 1994, at the onset of democracy, South Africa inherited a complex apartheid-based protected area and natural resource governance legacy. Many Black coastal communities had been forcibly removed from their lands adjacent to the coast through a combination of racially-biased laws and conservation initiatives. National parks and protected areas were established on these lands and in most of these areas, access to their traditional fishing grounds and resources was denied or greatly restricted.

This situation was thus at odds with the new Constitution, introduced in 1996, which provides for the

same year. The MLRA aimed to introduce a new system of fisheries management, and promote equity and the sustainable use of marine resources. Section 43 of the MLRA made provision for the establishment of MPAs. Policy provision was made for the restitution of land, including coastal land; however, in a subsequent policy decision, it was agreed that where land claims were instituted on protected areas, legitimate claims would be recognized but communities would not be permitted to re-occupy this land. Instead, this land and any adjacent coastline would remain under conservation status and the state would enter into a co-management arrangement with the community concerned.

Small-scale fishing communities living in, or adjacent to, MPAs established during the apartheid era have thus experienced little change in their access to marine resources or their authority in MPAs, despite legal reforms. Even where they were claimants as part of adjacent terrestrial areas in terms of the Land Restitution Act of 1994, the MLRA consolidated and, in many areas, extended their exclusion and dispossession.

The ICSF research study highlights the fact that one of the key obstacles to small-scale fishing communities in relation to MPAs is the lack of policy coherence across different authorities responsible for implementing legislation and multiple overlapping authorities with responsibilities for MPAs. From 1998 until 2009, the Department of Environmental Affairs and Tourism (DEAT) was the authority responsible for both fisheries management and environmental management.

### **Designated authority**

However, in 2009, these functions were separated. From 2009 onwards, until May 2014, the rearranged Department of Environmental Affairs (DEA) was the designated authority for the management of MPAs. This responsibility was directly tied to the MLRA, however, which is the primary legislative tool used for allocating

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protection of biodiversity and the environmental rights of present and future generations, whilst simultaneously restoring the dignity and human rights of its citizens and ensuring redress for past injustices.

In the past two decades, the South African government has introduced a suite of legislative and policy reforms aimed at addressing this negative legacy. A number of environmental reforms were introduced, including the gazetting of a National Environmental Management Act in 1998, and a Marine Living Resources Act (MLRA) also in the

fishing rights which now fall under the Department of Agriculture, Forestry and Fisheries (DAFF).

In addition, the actual management of MPAs was contracted out by the DEA to four different conservation authorities, some of which included provincial and local authorities. These authorities draw their policy direction largely from environmental management and biodiversity protection policies, and they have little, if any, knowledge of the international and national fisheries policies that create obligations on them to accommodate the rights and needs of small-scale fishing communities specifically. There is no policy mechanism to promote and protect the rights of small-scale fishing communities explicitly across these various departments and sectors, in an integrated, holistic way.

In an attempt to promote a more coherent approach to the governance of MPAs, a set of legislative amendments to the MLRA and the National Environmental Management Protected Areas Act of 2004 were gazetted during 2014. These amendments effectively transfer the authority to plan and govern MPAs to the Minister of Environmental Affairs.

The authority to manage MPAs may then be contracted out to a suitable conservation authority. As a result of this shift, terrestrial and marine protected areas are now governed by the same legislation and within the same department. It is thus hoped that this will promote integration within the Department of Environment between its directorate responsible for coastal and biodiversity conservation and those responsible for promoting and overseeing compliance with the CBD PoWPA. It does, however, increase the need to ensure that there is coherence across biodiversity conservation and fisheries governance and implementation at international, national and local levels.

The ICSF research highlights that there is a subtle but significant gap between policy and actual practice. It appears that it is this gap that results in small-scale fishing



Net fishers at the Langebaan MPA. The 23 MPAs along the coast comprise a total of 23.17 per cent of South Africa's coastline

communities falling through the net. Notwithstanding the provisions made for restitution of property in the Constitution and the Land Restitution Act, which does not restrict property to that of land, coastal communities living in, or adjacent to, MPAs have not benefitted from the restitution processes, nor from the new fisheries policies with respect to getting access to marine resources. Neither have they been successful in securing recognition of their pre-existing customary rights through either the land or the fisheries legislation. Instead, irrespective of the content of the Settlement Agreements signed in terms of their land claims, a top-down, state-centric approach to MPAs has led to the gazettement of no-take MPAs without consultation with the local communities. Restrictive zonation within several MPAs has further marginalized many fishing communities, in some instances cutting off their access to the marine resources upon which they depended for basic food security. This has impacted the basis of their culture and their livelihoods.

### Relevant principles

Although the new Policy on Small-scale Fisheries gazetted in 2012 contains a number of principles of relevance to the recognition of small-scale fishers' rights, these have

not been implemented to date. Very few land claimant communities and small-scale fishing communities have been successful in securing full and effective participation in the governance of their protected areas and the associated natural resources in these areas. All MPAs are state-governed.

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The Policy on Small-scale Fisheries recognizes customary rights in so far as they are consistent with the Bill of Rights in the Constitution. However, despite this, neither the department responsible for fisheries nor the Department of Environmental Affairs has taken any steps to recognize communities' customary rights within MPAs.

The ICSF research conducted with the conservation authorities in South Africa provides evidence that these authorities have got policy in place that commits them to consulting stakeholders, to securing their participation in planning and management of protected areas, and commits to promoting equity and benefit sharing.

However, it would appear that these conservation authorities have taken few steps to ensure that within the larger community of stakeholders, the small-scale fishing communities' specific voices and needs are heard. The conservation authorities, in compliance with the legislation, must establish a Stakeholder Advisory Forum to enable stakeholders living or using the protected area to participate in its management.

Small-scale fishers must compete with a wide range of other resource users in these forums, ensuring that their voices are heard over those of the more powerful industrial fisheries and recreational fisheries lobby groups, mining and energy groups, powerful landowners, kite surfers, and sailing

boat owners, amongst others. There is little recognition of the need to recognize their preferential rights to marine resources in this context in accordance with the guidelines inherent in the FAO Code of Conduct for Responsible Fisheries or the recently adopted FAO Guidelines on Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Alleviation (SSF Guidelines). An added concern is that where there are Stakeholder Advisory Forums in place in MPAs, these tend to be conceptualized and treated as advisory forums only.

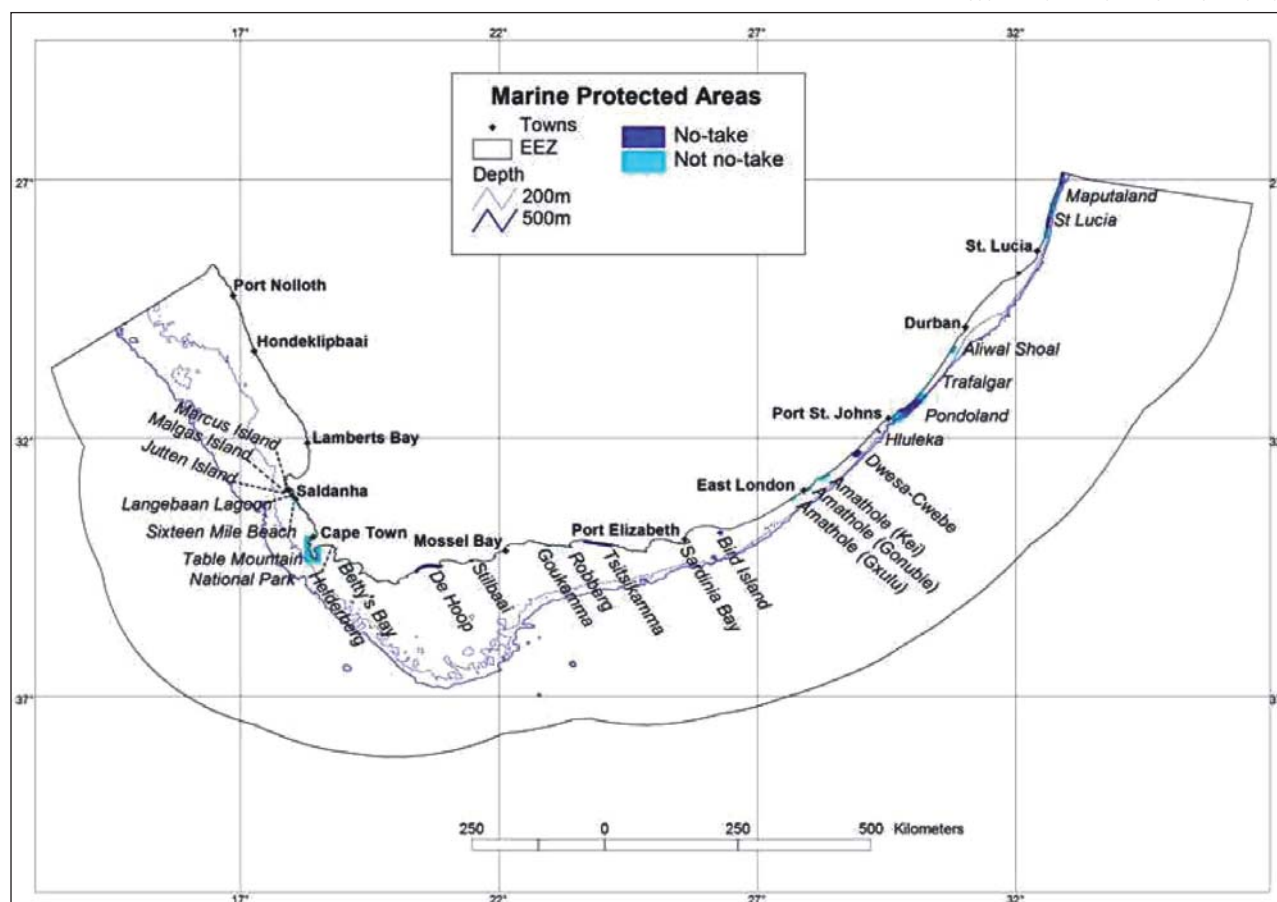
With the exception of two of the authorities who have tried to put fisheries co-management committees in place, there is little or no shared decisionmaking and co-management of resources. For those resource users who are, in fact, the owners of the coastal land and who have pre-existing customary rights to these resources, this is particularly undermining.

In addition, although some conservation authorities have embarked on strategies to promote ecotourism and benefit-sharing schemes, the benefits enjoyed by the local communities do not compensate fishing communities for their loss of access to marine resources, nor do they address the perceived loss of sense of place and culture that many communities have experienced.

Small-scale fishing communities across the South African coastline have begun advocating for the recognition of their human rights. Two of these small-scale fishing communities have launched legal action in the High Court demanding that their right to consultation and to the recognition of their customary rights must be recognized in the planning and governance of their MPAs (Gongqose and others vs the Minister of Fisheries and others; and Coastal Links Langebaan vs the Minister of Environmental Affairs and others).

**Guidelines**

In addition to the Constitution of South Africa, they have



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cited the Voluntary Guidelines on Tenure and the recently adopted FAO SSF Guidelines in their legal defence and in their plea that their rights are respected. These cases will be observed closely by the thousands of fishers living in, or adjacent to, other MPAs in South Africa in the hope that this legal action will secure the recognition of their rights. 3

#### For more



[www.icsf.net/en/monographs/article/EN/140-marine-protecte.html?limitstart=0](http://www.icsf.net/en/monographs/article/EN/140-marine-protecte.html?limitstart=0)

**Marine Protected Areas and Small-scale Fisheries in South Africa: Promoting Governance, Participation, Equity and Benefit Sharing**

[www.icsf.net/en/samudra/detail/EN/3742.html?detpag=mapart](http://www.icsf.net/en/samudra/detail/EN/3742.html?detpag=mapart)

**Living off the Land: Fishing Rights, SAMUDRA Report No. 62, July 2012**