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Attention: Mr. Gcobani Popose
By e-mail: Mspbill@environment.gov.za

23 May 2016

Dear Dr. Mayekiso

WRITTEN COMMENTS ON THE DRAFT MARINE SPATIAL PLANNING BILL, 2016 (GNR. 39847, NOTICE NO. 347)

1. The Centre for Environmental Rights (CER) is a non-profit environmental rights law clinic that helps communities defend their Constitutional right to a healthy environment.
2. In this document, the CER submits its written comments on the Draft Marine Spatial Planning Bill, 2016 that was published for comment in GG 39847 of 24 March 2016 under GN R 347 (Draft Bill).
3. The CER acknowledges the importance of a legal instrument for guiding marine spatial planning in South Africa and applauds the Department of Environmental Affairs for developing and publishing the Draft Bill. However, the CER has a number of concerns related to the Draft Bill. Our comments focus on the structure and broad content of the Draft Bill. Although we make reference to specific clauses of the Draft Bill in our comments, we do not make comments on specific provisions.

An ecosystem based approach to marine spatial planning:

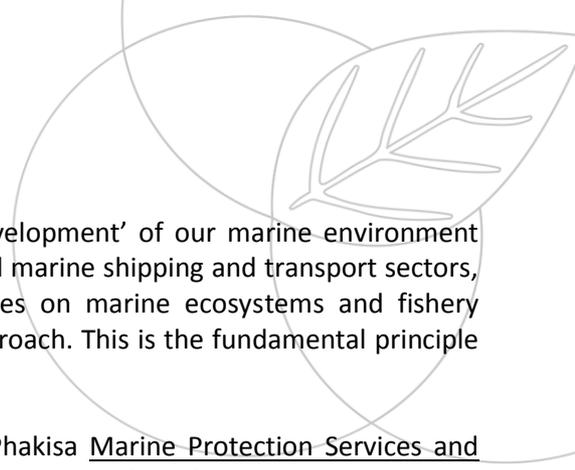
4. The *basis and foundation* of marine spatial planning is the adoption of an ecosystem-based approach to spatial planning and management; in order to ensure continued ecosystem functioning and ecosystem service provision. This underpins sustainable ocean economic development. An ecosystem based approach is a key international standard and criteria for 'best practice' in marine spatial planning.¹
5. The Draft Bill currently only pays lip service to the adoption of an ecosystem-based approach to marine spatial planning in a number of provisions; including identifying the 'need to balance economic, ecological, and social objectives'² and the goal to 'achieve ecological, economic, and social objectives'.³ This is insufficient.

¹ http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp

² Preamble

³ Clause 5(d)

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6. In light of Operation Phakisa, which aims to unlock the ‘industrial development’ of our marine environment through the rapid development of offshore oil and gas; aquaculture; and marine shipping and transport sectors, alongside increased mineral extraction activities and existing pressures on marine ecosystems and fishery resources, marine spatial planning *must* follow an ecosystem-based approach. This is the fundamental principle that differentiates marine spatial planning from ocean zoning.
 7. Furthermore, marine spatial planning is embedded in the Operation Phakisa Marine Protection Services and Governance⁴ focus area and is accordingly intended to be framed in an ‘ecosystem-based’ context.

Principles for marine spatial planning:

8. Related to the above, the Draft Bill currently does not include a set of principles that should guide marine spatial planning processes, including the development of a Marine Spatial Planning Framework and Marine Spatial Plans.
9. The Draft Bill should provide legal guidance and direction on principles that should inform marine spatial planning processes and decision-making, in order to provide a standard in which to review these processes and decision-making. Marine spatial planning principles and characteristics adopted in other jurisdictions include:
 - 9.1. An ecosystem-based approach
 - 9.2. Considerations of socio-economic resilience
 - 9.3. Adoption of the precautionary principle
 - 9.4. Open and adaptive management
 - 9.5. Integrated and strategic
 - 9.6. Spatial efficiency
 - 9.7. Equality
 - 9.8. Sustainability
10. A set of principles, an example of which is set out above, should be legally entrenched in the Draft Bill in order to properly guide marine spatial planning in South Africa. They should be binding on all organs of state and all decisions relating to the zoning of South Africa’s marine environment. Examples of binding principles are found in section 2 of the National Environmental Management Act, 1998 and Chapter 2 of the Spatial Planning and Land Use Management Act, 2013.

Existing rights:

11. Although the Draft Bill makes provision for restricting organs of state from issuing any future ‘permit, permission licence or other authorisation that is contrary to the marine spatial plan’ it does not specify the legal position of existing permits, permission, licences or other authorisations that are ‘contrary to the marine spatial plan or contrary to the object of the Draft Bill of ensuring the ecological integrity of the marine environment.’ As up to 98% of our exclusive economic zone has *already* been leased for offshore oil and gas exploration; over 10% for seabed mining; large concession areas provided for marine mining; fishing rights granted and significant commitments made for expanding marine sectors such as aquaculture and shipping, the ability of marine spatial planning to balance interests and at the same time ensure ongoing ecosystem functioning is severely hampered.
12. In order for marine spatial planning to be meaningful, it must provide for lawful withdrawal, repeal, expropriation and deprivation of existing rights that are not compatible with the overall vision and objectives of marine spatial planning.

⁴ Initiative 10

Marine spatial management tools in other legislation:

13. Several existing legislative instruments provide powers or make provision for spatial management tools in the marine environment, vested in different government departments. These include coastal protection zones and coastal protected areas⁵; marine protected areas⁶; small scale community fishing areas⁷; aquaculture development zones⁸; fisheries management areas and priority fishing areas⁹; no-go-areas for mining and petroleum activities¹⁰.
14. Many of the powers to establish these spatial management tools are best placed with the relevant departments with existing authority and mandate. The Draft Bill is silent on whether these powers will remain in the relevant departments or how these will align with the Draft Bill.

Stakeholder engagement and public participation:

15. In other jurisdictions where marine spatial planning has followed a robust process; it was undertaken with broad stakeholder engagement and wide public participation. The Draft Bill does not make provision for open, accountable and collaborative institutional structures and has no guidance on public participation in developing or the amendment of the Marine Spatial Planning Framework and Marine Spatial Plans.
16. The CER asserts that comprehensive public participation processes and broad stakeholder engagement is a prerequisite for effective marine spatial planning. Accordingly, the Draft Bill has to include a thorough public participation clause or enabling provision.

Extension of continental shelf:

17. The Preamble of the Draft Bill currently states: *'WHEREAS South Africa's exclusive economic zone consists of a total of 1 540 000 square kilometres of ocean, and South Africa has lodged a claim for an extended continental shelf for an additional 1 870 000 square kilometres'*.
18. The extension of the continental shelf is decided by the Commission on the Limits of the Continental Shelf and is in no way comparable to an exclusive economic zone. The United Nations Convention on the Law of the Sea (UNCLOS) confers coastal states with a broad range of sovereign rights and duties in relation to their exclusive economic zones. Such rights and duties relate to utilisation of living resources, fisheries management, species management, compliance and enforcement, exploitation of non-living resources, marine scientific research, the protection and preservation of the marine environment and any other activities for economic exploitation and exploration, such as the production of energy from the water, currents and winds¹¹. This includes the seabed, subsoil and water column.
19. On the other hand, Article 76 – 85 (Part VI of UNCLOS) outlines the rights and duties of 'coastal State over the continental shelf' which relate primarily for the purpose of exploring and exploiting natural resources. These natural resources consist of mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species (immobile).
20. In other words, the powers vested in South Africa under the extension of the Continental Shelf only relate to exploitation of specific resources. Accordingly, marine spatial planning will not be able to limit potential conflicts and balance priorities, such as conflicts between marine protection and marine mining as Continental Shelf

⁵ ICMA, 2008

⁶ NEM:PAA, 2014

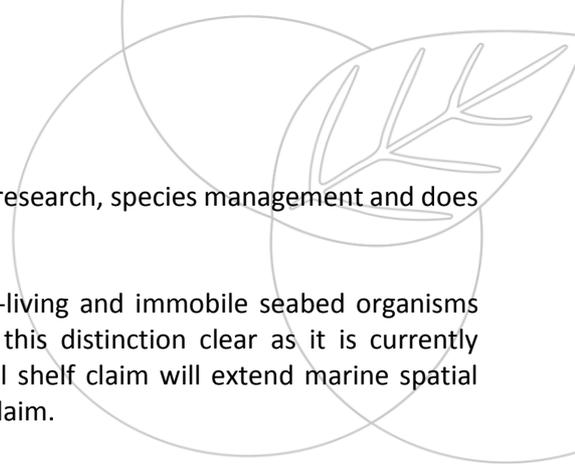
⁷ SSF Policy, 2014

⁸ Draft Aquaculture Bill, 2016

⁹ MLRA, 1998

¹⁰ NEMA, 1998

¹¹ Article 55 – Article 75



extensions do not provide for fisheries management, marine protection, research, species management and does not include the water column.

21. This is worrying in general as it provides broad powers to exploit non-living and immobile seabed organisms without parallel safeguards. In particular, the Draft Bill should make this distinction clear as it is currently ambiguous and creates an impression that the grant of the continental shelf claim will extend marine spatial planning to the proposed 1.8 million square kilometre continental shelf claim.

Alignment with other legislation:

22. In general, the Draft Bill should refer to and better align with existing ocean governance legislation including: National Environmental Management: Protected Areas Act, 2014; Marine Living Resources Act, 1998; Draft Aquaculture Bill, National Environmental Management Act, 1998; Small Scale Fisheries Policy for South Africa, 2014; Mineral and Petroleum Resources Development Act, Marine Pollution (Prevention of Pollution from Ships) Act, 1986; National Environmental Management: Integrated Coastal Management Act, 2008 and the South African Maritime Safety Authority Act, 1998.

Alignment with international and regional agreements:

23. As with the above, the Draft Bill should refer to and better align with existing international and regional commitments that provide for cooperative ocean governance and set out spatial planning tools and commitments. These include UNCLOS, the Benguela Current Commission and Convention on Biological Diversity.

Status of permit, permission, licence or other authorisation that is contrary to the marine spatial plan:

24. Clause 11 (Compliance with the marine spatial plan) currently reads:

“An organ of state may not issue any permit, permission, licence or other authorisation that is contrary to the marine spatial plan or any final decision of the Directors General Technical Committee, the Ocean Economy Ministerial Committee or the Executive Issue Resolution Committee.”

25. However, the Draft Bill should explicitly outline the legal status of any permit, permission, licence or other authorisation that is contrary to the marine spatial plan. It is unclear whether such a permit, permission licence or other authorisation would be null and void or open to review or appeal. This should be properly set out in the Draft Bill.

Institutional structures:

26. The Draft Bill currently establishes and sets out the functions of two institutional structures; Directors-General Technical Committee and Ocean Economy Ministerial Management Committee. These are both high-level and political decision-making committee.
27. It is submitted that the Draft Bill should make provision for the establishment of a technical committee to provide technical support to decision-makers. The existing National Marine Spatial Planning Working Group already plays a critical role in providing technical support and should be formalised in the Draft Bill.
28. Additionally, effective marine spatial planning requires broad engagement from multiple sectors and stakeholders. The CER thus recommends the Draft Bill should make provision for a Marine Spatial Planning Forum or suitably open institutional structure comprised of stakeholders from government departments, community groups, the private sector, conservation management agencies, not-for-profit organisations, academia, the broader marine scientist community and other relevant stakeholders.

29. We further recommend that the Draft Bill makes provision for an independent appeal authority that would consider appeals lodged against decisions relating to marine spatial planning.

Specific Environmental Management Act (SEMA) for the Oceans:

30. It is noted that the first drafts of the National Environmental Management: Ocean Bill (NEM: Oceans Bill) were conceptualised by the Department of Environmental Affairs in which broad environmental management provisions were proposed. Such legislation is critical for ocean governance and should be urgently developed and properly aligned with the Draft Bill. A NEM: Oceans Bill would provide valuable guidance in environmental management including conditions for permitting, licensing and authorisation within the marine spatial framework and plans. Accordingly, it should be developed parallel to the Draft Bill.

Suitable access to information provision:

31. As marine spatial planning requires broad engagement and considerable information and knowledge management, sharing and collaboration, the Draft Bill should play further attention to information needs and corresponding provision for access to information.

Recommendations:

32. In light of the above submissions, the CER recommends that:

- 31.1 The Draft Bill outlines an appropriate set of principles to guide marine spatial planning, including an explicit ecosystem-based approach.
- 31.2 The Draft Bill provides for withdrawal, repeal, expropriation and deprivation of existing rights in appropriate circumstances where such rights are completely incompatible with the overall vision and objectives of marine spatial planning.
- 31.3 The Draft Bill reiterates and affirms the powers to establish spatial management tools that are currently entrenched in other legislation, such as marine protected areas and fisheries management areas.
- 31.4 The Draft Bill includes a suitable public participation clause or enabling provision that provides for comprehensive public participation processes and broad stakeholder engagement in marine spatial planning processes.
- 31.5 The Draft Bill should make a clear distinction between an exclusive economic zone and continental shelf claim to prevent ambiguity.
- 31.6 The Draft Bill should refer to and better align with existing ocean governance legislation.
- 31.7 The Draft Bill should refer to and better align with existing international and regional commitments in conventions, agreements and treaties.
- 31.8 The Draft Bill should explicitly outline the legal status of any permit, permission, licence or other authorisation that is contrary to the marine spatial plan.
- 31.9 The Draft Bill should formalise the National Marine Spatial Planning Working Group.
- 31.10 the Draft Bill should formalise a Marine Spatial Planning Forum or suitably open institutional structure to enable broad engagement in decision-making related to marine spatial planning.

31.11 A National Environmental Management: Oceans Bill should be urgently developed parallel to the Draft Bill.

31.12 The Draft Bill should include a more comprehensive access to information provision.

We thank you for the opportunity to submit comments on the Draft Marine Spatial Planning Bill.

Yours sincerely

CENTRE FOR ENVIRONMENTAL RIGHTS

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

per:

Catherine Horsfield

Attorney

Programme Head: Mining

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