



# Centre for Environmental Rights

Advancing Environmental Rights in South Africa

Honourable Mr Mohlopi Philemon Mapulane  
Chairperson  
Portfolio Committee of Environmental Affairs  
National Assembly  
Parliament of the Republic of South Africa  
Cape Town

Attention: Ms T Madubela  
By e-mail: [tmadubela@parliament.gov.za](mailto:tmadubela@parliament.gov.za)

19 June 2017

Dear Honourable Mapulane

## WRITTEN COMMENTS ON THE MARINE SPATIAL PLANNING BILL [B9 -2017].

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 Centre for Environmental Rights submits its written comments on the Marine Spatial Planning Bill [B9 -2017] (MSP Bill) in response to the call for comments opened on 29 May 2017 by the Portfolio Committee on Environmental Affairs.
3. The CER submitted written comments on the Draft Marine Spatial Planning Bill, 2016 (Draft MSP Bill) published for comment in GG 39847 of 24 March 2016 under GN R 347 and the Draft Marine Spatial Planning Framework, 2016 (Draft MSP Framework) published for comment in the GG 40219 of 19 August 2016 under GN R 936. As we will refer to our comments on the Draft MSP Bill and Draft MSP Framework throughout this document, we attach a copy of our comments, marked "**Annexure A**" and "**Annexure B**" respectively, for ease of reference.
4. Furthermore, in March 2017 CER co-hosted a two-day workshop on MSP in partnership with the International Ocean Institute - Africa (IOI-SA), the Nelson Mandela Metropolitan University (NMMU) and WWF-South Africa. The objective of the workshop was to explore the supportive role that civil society can play in implementing the MSP Bill and Framework. We attach a report that outlines the outcomes of the workshop (Workshop Report), marked "**Annexure C**", and refer to it in our comments.
5. The CER acknowledges the importance of a legal instrument for guiding marine spatial planning in South Africa and applauds the Department of Environmental Affairs and the Portfolio Committee on Environmental Affairs for developing the MSP Bill. The CER welcomes the incorporation of several important provisions in the MSP Bill that were absent in the Draft MSP Bill. However, the CER still has a number of concerns related to the MSP Bill. Our concerns relate to important issues that are not addressed in the Bill and issues relating to specific clauses of the MSP Bill.

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## Existing rights

6. The MSP Bill does not specify the legal position of existing permits, permission, licences or other authorisations that are contrary to the objectives of marine area plans or contrary to the principles of the MSP Bill. 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.
7. In order for marine spatial planning to be meaningful, it must legally provide for withdrawal, repealing, expropriation and deprivation of existing rights that are not compatible with the overall vision and objectives of marine spatial planning. We thus recommend inclusion of such an enabling provision.

## Marine spatial management tools in other legislation

8. In our comments on the Draft MSP Bill, we pointed out that several existing legislative instruments provide powers or make provision for spatial management tools in the marine environment, and that those powers are vested in different organs of state. Those functions and powers include the following:
  - 8.1. The management of the coastal zone, including the declaration and management of coastal protected areas by the Minister of Environmental Affairs or his or her delegates in terms of the National Environmental Management: Integrated Coastal Management Act, 2008 (NEM:ICMA).
  - 8.2. The declaration and management of marine protected areas by the Minister of Environmental Affairs or his or her delegates in terms of the National Environmental Management: Protected Areas Act, 2003.
  - 8.3. Fisheries management, including the declaration and management of priority fishing areas and the registration and management of small-scale fishers and the declaration and management of priority fishing areas, by the Minister of Agriculture, Forestry and Fisheries or his or her delegates in terms of the Marine Living Resources Act, 1998 (MLRA) and the Regulations Relating to Small-Scale Fishing, 2016 published in terms of the MLRA.
  - 8.4. The declaration and management of aquaculture development zones by the Minister of Agriculture, Forestry and Fisheries or his or her delegates in terms of the Draft Aquaculture Bill, 2016.
  - 8.5. The management of areas under prospecting rights, mining rights, mining permits, exploration rights, productions, co-operation permits and reconnaissance permits by the Minister of Mineral Resources or his or her delegates in terms of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA).
  - 8.6. The declaration and enforcement of no-go-areas for mining and petroleum activities by the Minister of Mineral Resources or his or her delegates in terms of the MPRDA and no-go areas for specified listed activities by the Minister of Environmental Affairs in terms of the National Environmental Management Act, 1998.
  - 8.7. Many of the powers to establish these spatial management tools are best placed with the relevant departments with existing authority and mandate. The MSP Bill is silent on whether these powers will remain in the relevant departments or how these will align with the MSP Bill.
9. The importance of clarifying and rationalising existing authority and mandates remains important for effective implementation of the MSP Bill.

## Alignment with other legislation

10. In our comments on the Draft MSP Bill, we submitted the following:

*“In general, the MSP 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.”<sup>1</sup>*

11. The importance of aligning the MSP Bill with other legislation remains important for effective implementation of the MSP Bill.

## Alignment with international and regional agreements

12. In our comments on the Draft MSP Bill, we submitted the following:

*“... the MSP Bill should refer to and better align with existing international and regional commitments that provide for cooperative ocean governance (or integrated ocean management) and set out spatial planning tools and commitments. These include UNCLOS, the Benguela Current Convention and Convention on Biological Diversity.”<sup>2</sup>*

13. The importance of aligning the MSP Bill with international and regional agreements remains important for effective implementation of the MSP Bill.

## Compliance with the marine spatial plan

14. Clause 11 of the Draft MSP Bill, entitled “Compliance with the marine spatial plan”, read as follows:

*“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.”*

15. CER submits that this was a critical provision that has since been removed from the MSP Bill. This provision sought to bind organs of state to marine spatial plans and the decisions of MSP institutional structures, ensure coordination between departments and sectors and provided guidance and certainty on ‘the status of permit, permission, licence or other authorisation’ issued contrary to the marine spatial plans. The CER thus submits that this provision should be re-incorporated into the MSP Bill.

16. Furthermore, this clause should explicitly outline the legal status of any permit, permission, licence or other authorisation that is contrary to the marine spatial plan. This would ensure clarity on 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 MSP Bill.

17. We submit that the credibility of the entire MSP system depends on marine spatial plans having binding status both in relation to organs of state and individuals.

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<sup>1</sup> Paragraph 22 on page 4

<sup>2</sup> Paragraph 23 on page 4

## Institutional structures and the establishment of an independent appeal authority

18. CER welcomes the inclusion of the National Working Group on Marine Spatial Planning.
19. However, the CER recommends that the MSP Bill makes provision for an independent appeal authority that would consider appeals lodged against decisions relating to marine spatial planning both by persons directly affected by such decisions and interested and affected parties. The importance of internal or administrative appeals was highlighted by the Constitutional Court in the matter of *Koyabe and others v Minister for Home Affairs and others*.<sup>3</sup> In that matter, the Constitutional Court found that appeal mechanisms provide for immediate and cost-effective relief<sup>4</sup> and that issues to be decided on may sometimes require specialised knowledge which may be of a technical and/or practical nature.<sup>5</sup>
20. We submit that the provisions establishing and regulating the functioning of the Water Tribunal in the National Water Act, 1998 (NWA)<sup>6</sup> is a good model for provisions dealing with the establishment and functioning of an independent appeal authority. The relevant provisions of the NWA include the following aspects:
  - 20.1. The establishment of a tribunal that consists of members that are independent, committed to the objects of the MSP Bill and have the requisite expertise and experience to decide on issues that may arise (we propose that the members of a tribunal established in terms of the MSP Bill have expertise in marine spatial planning).
  - 20.2. The operation of the Tribunal, including the funding for such a tribunal.
  - 20.3. The jurisdiction of the Tribunal.
  - 20.4. The suspension of decisions pending the outcome of an appeal.
  - 20.5. Timeframes for appeals and a provision authorising the Minister of Environmental Affairs to publish a set of rules regulating the procedure followed in a tribunal.

## Stakeholder forum and consultation

21. The CER welcomes the inclusion of a dedicated clause and enabling provision on **Consultation** in the MSP Bill (Clause 8).
22. However, in other jurisdictions with successful marine spatial planning processes, marine spatial planning is undertaken with broad stakeholder engagement and wide public consultation. Comprehensive consultation and broad stakeholder engagement is a prerequisite for effective marine spatial planning. The CER thus asserts that the consultation provision in the MSP Bill should be strengthened.
23. Notably, the MSP Bill currently places the onus of consultation on the National Working Group on Marine Spatial Planning. This is a technical structure and is thus not suited to undertaking consultation and stakeholder engagement.

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<sup>3</sup> [2009] ZACC 23

<sup>4</sup> Ibid at paragraph 34

<sup>5</sup> Ibid at paragraph 37

<sup>6</sup> See Chapter 15 of the NWA

24. A key outcome and recommendation of the MSP Workshop on Civil Society was the need for an institutional structure to facilitate open, accountable and collaborative stakeholder engagement and consultation. We refer to Section 4.1 of the Workshop Report, in the following excerpt:

*“An MSP Stakeholder Forum should be developed based on users and relevant authorities identified, with representatives from each group participating in the MSP Stakeholder Forum. This forum would be made up of regional forums, from the four regions identified by the MSP Framework, with co-chairs sitting on the national forum. The representation and structure of this national forum would need to be well thought out. The Ministerial group and the Directors-General group are the decision-making groups, but it is likely that decisions will be based on the technical analysis and recommendation from the National Working Group level. A proposal is that the MSP Stakeholder Forum be established alongside formal MSP institutional structures proposed by the MSP Bill i.e. the National Working Group on MSP and Marine Area Planning Group. In brief, institutional structures for consultation and stakeholder engagement should be established alongside technical committees (NMSPWG and MAPG) (see Figure 1). A further suggestion is that the regions be divided into west, south, east and offshore regions which may help with organisation.”<sup>7</sup>*

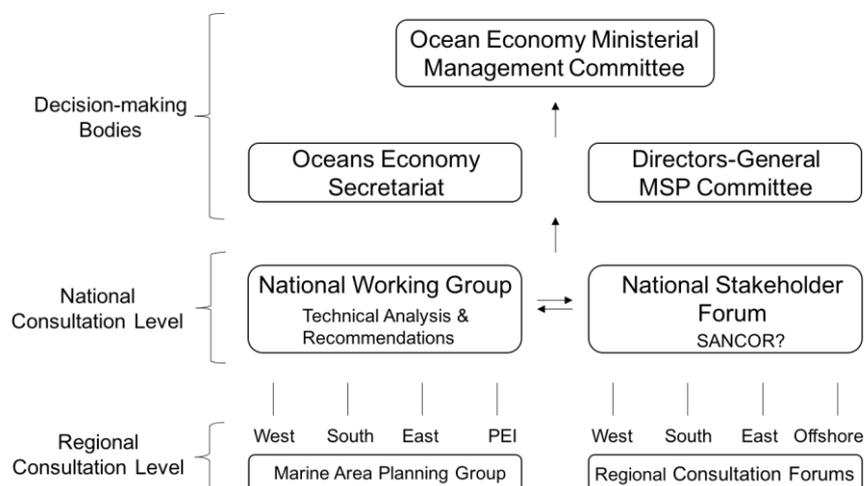


Figure: Diagram of the proposed structure of MSP Stakeholder Forum<sup>8</sup>

25. The CER thus recommends the establishment of a Marine Spatial Planning Stakeholder 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.

26. Notably, marine spatial planning is comparable to Integrated Coastal Management in relation to need for broad engagement from multiple sectors and stakeholders. It is for this reason that the NEM: ICMA established Provincial Coastal Committees<sup>9</sup> and Municipal Coastal Committees<sup>10</sup>. The CER thus recommends the inclusion and provision for such institutional structures. An example of an enabling provision for MSP Committees, modelled on the NEM:ICMA committee provisions, is as follows:

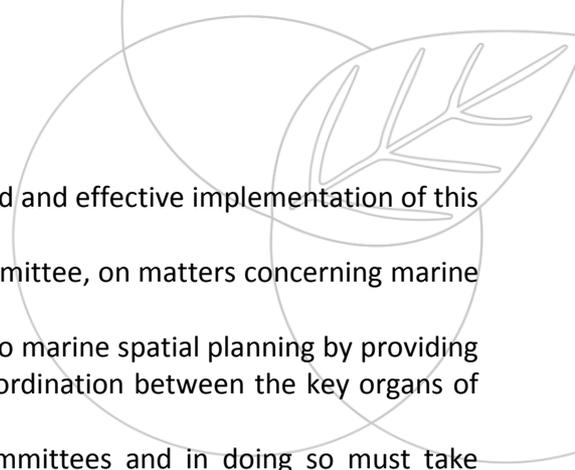
1. The Minister must within 12 months of the commencement of this Act establish Marine Spatial Planning Committees that coincide with the four marine area planning regions.
2. The MSP Committees must -

<sup>7</sup> Annexure C, at pages 14-15

<sup>8</sup> Annexure C, at page 15

<sup>9</sup> Section 39

<sup>10</sup> Section 42

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- 2.1. promote integrated ocean management and the co-ordinated and effective implementation of this Act and the marine area plans;
  - 2.2. advise the Directors-General Committee and Ministerial Committee, on matters concerning marine spatial planning in relation to specific planning region
  - 2.3. promote a co-ordinated, inclusive and integrated approach to marine spatial planning by providing a forum for, and promoting, dialogue, co-operation and co-ordination between the key organs of state and
3. The Minister must determine the composition of the MSP Committees and in doing so must take account of the desirability of ensuring the representation of organs of state and community groups or bodies which have a material and direct interest in the conservation and management of the marine environment or the use of marine resources.
  4. The Minister must appoint persons to the MSP Committees who by virtue of the office that they hold or their expertise are able to assist the Committees in fulfilling its functions; and
  5. When appointing persons, ensure that the MSP Committee includes—
    - 5.1. persons with expertise in fields relevant to marine spatial planning and integrated ocean management;
    - 5.2. one or more members representing community based and non-government organisations; and
    - 5.3. one or more members representing scientific or marine research institutes.
27. CER submits that MSP Committees alongside a Stakeholder Forum on Marine Spatial Planning would facilitate robust consultation and engagement and support an MSP process that is participatory, open, transparent and inclusive.

### **Specific Environmental Management Act (SEMA) for the Ocean**

28. In our comments on the Draft MSP Bill, we submitted the following:

*“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 alongside a legal framework for MSP. 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. Environmental management legislation is critical for ocean governance and for supporting MSP and should be urgently developed and properly aligned with the MSP Bill.”<sup>11</sup>*

29. We reiterate that a NEM: Oceans Act is critical for sustainable marine spatial planning, balancing and mitigating user impacts and ensuring the MSP principles outlined in the MSP Bill are achieved.

### **Suitable access to information provision:**

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

31. During the MSP Workshop, civil society stakeholders raised the need for an MSP information portal or platform. This will enable information-sharing, knowledge exchange and will create awareness regarding the MSP process. An excerpt from the Workshop Report states:

*“A digital meeting place for potential collaborators in the form of an information-sharing platform, or a knowledge portal (such as the Oceans and Coastal Information Management System (OCIMS)) would allow*

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<sup>11</sup> Paragraph 30, page 5

*for opportunities for collaboration. Metadata would support this as it would indicate the availability and accessibility of data.”<sup>12</sup>*

32. The MSP Bill could include a provision for an information portal.

#### **Decision-making framework and decision support tools:**

33. The MSP Bill provides a limited decision-framework for MSP, including a framework for trade-offs and balancing user interest. Apart from Clause 5 (Principles and criteria for marine spatial planning), there is limited guidance for decision-making.

34. The importance of developing a decision-framework and thereafter identifying decision-support tools is raised in the Workshop Report. In the Workshop Report, it is recorded that decision-support tools (DeSTs) are used to evaluate trade-offs between ecological, social and economic objectives. There are many DeSTs that have already been developed that may support MSP. However, the decision framework should firstly be defined, in order to determine the outcomes that the tools need to achieve. There has previously been work in this area, specifically surrounding the development of operational frameworks for decision making in conservation, however these operational frameworks (or policy processes) can be applied to various situations. Once the operational framework has been agreed upon, the question can be asked: “what DeSTs are available to support the MSP process and which tools are appropriate?” A review of available decision-support tools should be conducted to determine which tools are most appropriate in supporting the MSP process in South Africa. There is an opportunity for academia (in particular) to pilot tools.

#### **Publication of marine area plans**

35. Clause 12 states that once approved by the Ministerial Committee, the Minister must publish the marine area plans by notice in the Gazette. This clause currently does not include provision for the public to submit written representations on marine area plans and for the Minister to consider such representations. This is concerning, particularly due to the scale of the planning areas. The Spatial Planning and Land Use Management Act, 2013, for instance, provides for a 60 day commenting period for the development of any national, regional, provincial and municipal spatial development frameworks.

36. Furthermore, a fair procedure preceding the publication of marine area plans may well be a legal imperative regardless of the failure of the MSP Bill to make explicit provision therefor. As the publication of marine area plans in terms of the MSP Bill has the potential to impact on the rights of the public and individuals, the publication of marine area plans may well constitute administrative action, as contemplated in the Promotion of Administrative Justice Act, 2000 (PAJA). In terms of sections 3 and 4 of PAJA, a fair procedure must be followed prior to taking administrative action. Therefore, the failure to conduct a public participation process prior to the publication of marine area plans, may render such publication vulnerable to administrative review.

37. Even if decisions to publish marine area plans are found not be administrative action, there is still the possibility that such decisions are vulnerable to review on the principle of legality due to a lack of public participation.<sup>13</sup>

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<sup>12</sup> Annexure C, at page 18

<sup>13</sup> See, for instance, the matter of *Albutt v Centre for the Study of Violence and Reconciliation and others* [2010] ZACC 4

38. In the interest of fairness and clarity, and in the spirit of participative, accountable and transparent public administration,<sup>14</sup> we therefore propose that the MSP Bill makes explicit provision for a general notice and comment procedure prior to the publication of marine area plans.

39. We therefore recommended the insertion of a clause following Clause 12 in more or less the following terms:

Before approving the marine spatial framework and marine area plans in terms of section 12, the Minister must –

- (a) give notice of the proposed marine spatial planning framework and the marine area plans in the Gazette and the media
- (b) publish on an appropriate electronic platform for those parts of the marine area plans which cannot be published by notice in the Gazette,
- (c) invite the public to submit written representations in respect of the proposed marine spatial planning framework and marine areas plans to the Minister within 60 days after the publication of the notice referred to in paragraph (a); and
- (d) consider all representations received in respect of the proposed marine spatial planning framework and marine area plans

#### **Recommendations:**

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

- 40.1. The MSP 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.
- 40.2. The MSP 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.
- 40.3. The MSP Bill should refer to and better align with existing ocean governance legislation
- 40.4. The MSP Bill should refer to and better align with existing international and regional commitments in conventions, agreements and treaties
- 40.5. The MSP Bill should re-incorporate Clause 11 (Compliance with the marine spatial plan) from the Draft Bill and should explicitly outline the legal status of any permit, permission, licence or other authorisation that is contrary to the marine spatial plan.
- 40.6. The MSP Bill should formalise and include an enabling provision for a Stakeholder Forum on Marine Spatial Planning and Marine Spatial Planning Committees or suitably open institutional structure to enable broad consultation, public participation and stakeholder engagement in decision-making related to marine spatial planning
- 40.7. The MSP Bill should formalise and include an enabling provision for an independent appeal authority
- 40.8. A National Environmental Management: Oceans Bill should be urgently developed to complement and support the MSP Bill
- 40.9. The MSP Bill should include a more comprehensive access to information provision

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<sup>14</sup> Section 195(1) of the Constitution of the republic of South Africa, 1996

40.10. The MSP Bill provides a more robust decision-framework to guide MSP decision-making

40.11. The MSP Bill includes a 60 day commenting period for the development of marine area plans

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

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**



per:

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