

Centre for Environmental Rights oral submissions on the:
MARINE SPATIAL PLANNING BILL [B9 -2017]

**PORTFOLIO COMMITTEE ON ENVIRONMENTAL AFFAIRS PUBLIC
HEARINGS ON THE MARINE SPATIAL PLANNING BILL (B9-2017)**

V454, 4th Floor, Old Assembly Building

Parliament, Cape Town

Friday 01 September 2017



Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa



Marine Spatial Planning Bill, 2017

EXISTING RIGHTS

- The 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 EEZ has *already* been leased for offshore petroleum; 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
- An approach to existing rights may include:
 - Proper regulatory system for existing rights including, MSP considered in EIAs, EMPs, and spatially sensitive guidelines, tools, regulation for specific activities
 - 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.
 - Strategic lapsing of rights



Marine Spatial Planning Bill, 2017

MARINE SPATIAL TOOLS IN OTHER LEGISLATION

- 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 zone, coastal protected area (ICMA, 2008), marine protected areas (NEM:PAA, 2014); aquaculture development zones (Draft Aquaculture Bill, 2016); fisheries management areas (MLRA, 1998); no-go-areas (NEMA, 1998); and Small scale Community Fishing Areas (SSF Policy, 2014) and no-go-areas for mining and petroleum activities (MPRDA, 2002)
- 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.



Marine Spatial Planning Bill, 2017

ALIGNMENT WITH LEGISLATION AND INTERNATIONAL LAW

Alignment with other Legislation:

The Bill should refer to and better align with existing ocean-related 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:

The 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 Convention and Convention on Biological Diversity.

The importance of aligning the MSP Bill with other legislation and international and regional agreements is important for effective implementation



Marine Spatial Planning Bill, 2017

COMPLIANCE WITH THE MARINE SPATIAL PLAN

- Clause 11 of the Draft MSP Bill, 2016 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.”*
- 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 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. The credibility of the entire MSP system depends on marine spatial plans having binding status both in relation to organs of state and individuals.



Marine Spatial Planning Bill, 2017
ESTABLISHMENT OF AN INDEPENDENT APPEAL AUTHORITY

- Recommend 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 provisions establishing and regulating the functioning of the Water Tribunal in the National Water Act, 1998 (NWA) is a good model for provisions dealing with the establishment and functioning of an independent appeal authority.



Marine Spatial Planning Bill, 2017 STAKEHOLDER FORUM AND CONSULTATION

- In other jurisdictions with successful marine spatial planning processes, marine spatial planning is undertaken with broad stakeholder engagement and wide public consultation. The CER thus asserts that the consultation provision in the MSP Bill should be strengthened.
- MSP Bill currently places onus of consultation on National Working Group. This is a technical structure and is thus not suited to undertaking consultation and stakeholder engagement.
- 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.
- 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.



Marine Spatial Planning Bill, 2017 STAKEHOLDER FORUM AND CONSULTATION

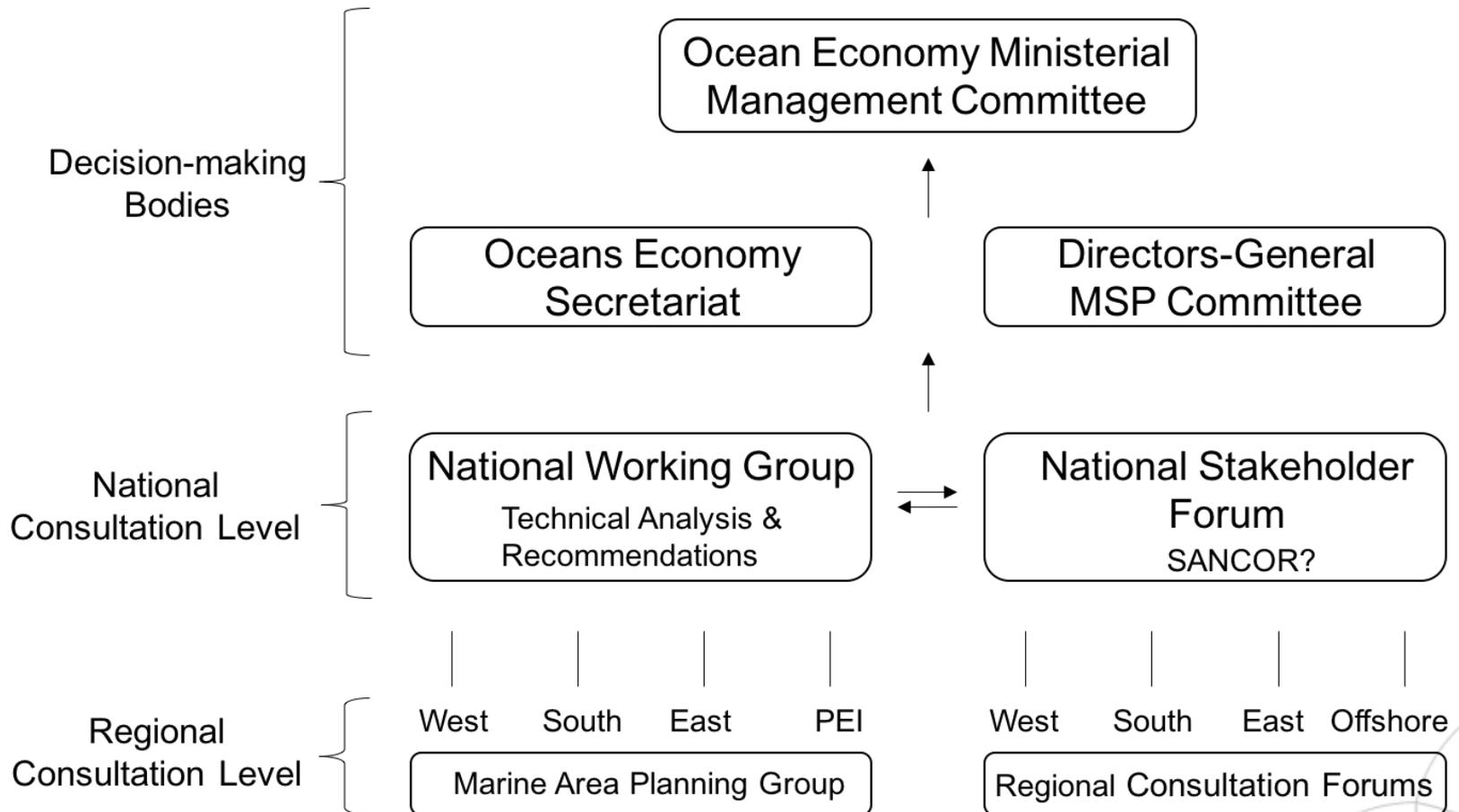
“An MSP Stakeholder Forum should be developed based on users and relevant authorities identified, with representatives from each group participating in the MSP Stakeholder Forum. This forum would be made up of regional forums, from the four regions identified by the MSP Framework, with co-chairs sitting 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.”

Excerpt from a Workshop Report on the Role of Civil Society in MSP



Marine Spatial Planning Bill, 2017

PROPOSED STRUCTURE FOR AN MSP STAKEHOLDER FORUM



Marine Spatial Planning Bill, 2017 STAKEHOLDER FORUM AND CONSULTATION

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 and Municipal Coastal Committees. The CER thus recommends the inclusion and provision for such institutional structures. The NEM:ICMA committee provisions provide an example of an enabling provision for MSP Committees.



Marine Spatial Planning Bill, 2017

MODEL PROVISION FOR MARINE SPATIAL PLANNING COMMITTEES

- *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.*
- *The MSP Committees must -*
 - *promote integrated ocean management and the co-ordinated and effective implementation of this Act and the marine area plans;*
 - *advise the Directors-General Committee and Ministerial Committee, on matters concerning marine spatial planning in relation to specific planning region*
 - *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*



Marine Spatial Planning Bill, 2017
MODEL PROVISION FOR MARINE SPATIAL PLANNING COMMITTEES (2)

- *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.*
- *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*
- *When appointing persons, ensure that the MSP Committee includes—*
 - *persons with expertise in fields relevant to marine spatial planning and integrated ocean management;*
 - *one or more members representing community based and non-government organisations; and*
 - *one or more members representing scientific or marine research institutes.*



Marine Spatial Planning Bill, 2017

SPECIFIC ENVIRONMENTAL MANAGEMENT ACT (SEMA) FOR THE OCEANS

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 MSP. 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.



Marine Spatial Planning Bill, 2017 **ACCESS TO INFORMATION**

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



Marine Spatial Planning Bill, 2017

PUBLICATION OF MARINE AREA PLANS

- 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.
- the interest of fairness and clarity, and in the spirit of participative, accountable and transparent public administration, 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.



Marine Spatial Planning Bill, 2017
MODEL PROVISION FOR PUBLICATION OF MARINE AREA PLANS

- *Before approving the marine spatial framework and marine area plans in terms of section 12, the Minister must –*
 - *give notice of the proposed marine spatial planning framework and the marine area plans in the Gazette and the media*
 - *publish on an appropriate electronic platform for those parts of the marine area plans which cannot be published by notice in the Gazette,*
 - *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*
 - *consider all representations received in respect of the proposed marine spatial planning framework and marine area plans*



Marine Spatial Planning Bill, 2017

SUMMARY OF RECOMMENDATIONS

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.
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.
3. The MSP Bill should refer to and better align with existing ocean governance legislation , international and regional commitments in conventions, agreements and treaties
4. 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.



Marine Spatial Planning Bill, 2017

SUMMARY OF RECOMMENDATIONS (2)

- 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
- The MSP Bill should formalise and include an enabling provision for an independent appeal authority
- A National Environmental Management: Oceans Bill should be urgently developed to complement and support the MSP Bill
- The MSP Bill should include a more comprehensive access to information provision
- The MSP Bill includes a 60 day commenting period for the development of marine area plans



Thank you for the opportunity to make oral representations on the Marine Spatial Planning Bill



Centre *for* Environmental Rights
Advancing Environmental Rights in South Africa

