Dear Dr Mayekiso

WRITTEN COMMENTS ON THE DRAFT MARINE SPATIAL PLANNING FRAMEWORK, 2016

1. In this document, the Centre for Environmental Rights (CER) submits its written comments on the Draft Marine Spatial Planning Framework, 2016 that was published for comment in the Government Gazette 40219 of 19 August 2016 under GN R 936 (Draft MSP Framework).

2. The CER is a non-profit environmental rights law clinic that helps communities defend their Constitutional right to a healthy environment.

3. The CER welcomes the initiative taken by the Department of Environmental Affairs (DEA) to publish a framework for marine spatial planning for the South African exclusive economic zone (EEZ). Given the unprecedented interest in utilizing the EEZ for economic development, it is essential that a sound planning framework guides the development of the EEZ to ensure that critical components of the marine environment is protected. Furthermore, given the many competing uses of the EEZ, proper planning is key to avoiding conflict and to create regulatory certainty. However, the CER has some specific concerns about the Draft MSP Framework, which concerns we set out below.

4. On 23 May 2016, the CER submitted written comments on the Draft Marine Spatial Planning Bill, 2016 that was published for comment in Government Gazette 39847 of 24 March 2016 under Notice No. 347 (Draft MSP Bill). As we will refer to our comments throughout this document, we attach a copy of our comments for ease of reference.
Section 2.4: South Africa’s Marine Spatial Planning Principles (p3-4)

5. The inclusion of comprehensive Marine Spatial Planning Principles is welcomed. However, as we suggested in our comments on the Draft MSP Bill,1 those principles should be included in the Draft MSP Bill as well. Furthermore, the ecosystem-based principle should be first and foremost, with all other principles being subservient to this grounding principle.2

Section 2.7.2: Legislative context

6. This section fails to mention the Draft MSP Bill, which is intended to provide the legal framework for this Draft MSP Framework. This is a critical omission, as the Draft MSP Bill should be finalised and inform the Draft MSP Framework.

7. Furthermore, it is noted that the first drafts of the National Environmental Management: Ocean Bill (NEM: Oceans Bill) were conceptualised by the DEA 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 MSP Bill and the Draft MSP Framework. 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 MSP Bill and MSP Framework.

8. This section should also flesh out that existing legislative instruments that 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 areas3; marine protected areas4; small scale community fishing areas5; aquaculture development zones6; fisheries management areas and priority fishing areas7; no-go-areas for mining and petroleum activities8.

Section 2.7.3: Policy context


Section 3: South Africa’s Ocean Territory

10. Paragraph 3.1 states:

South Africa has lodged further claims under the United Nations Convention on the Law of the Sea (“UNCLOS”) to extend its jurisdiction to certain parts of the continental shelf. If these claims are approved by the United Nations Commission on the Limits of the Outer Continental Shelf, they will double South Africa’s sea-bed rights. This ocean and sea-bed jurisdiction would far exceed South Africa’s 1 200 000 km² of

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1 Paragraphs 8-10 of the CER comments, p2
2 Paragraphs 4-7 of the CER comments, p1-2
3 ICMA, 2008
4 NEM:PAA, 2014
5 SSF Policy, 2014
6 Draft Aquaculture Bill, 2016
7 MLRA, 1998
8 NEMA, 1998
terrestrial jurisdiction. With the additional shelf claims, South Africa will potentially exercise spatial jurisdiction over a large Exclusive Economic Zone.

11. The extension of the continental shelf is decided by 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, enforcement and compliance, exploitation of non-living resource, marine scientific research, the protection and preservation of the marine environment and any other activities for the economic exploitation and exploration, such as the production of energy from the water, currents and winds. This includes the seabed, subsoil and water column.

12. 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).

13. In other words, the powers vested to 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 extensions do not provide for fisheries management, marine protection, research, species management and does not include the water column.

14. This is worrying in general as it provides broad powers to exploit non-living and immobile seabed organisms without parallel safeguards. The Draft MSP Framework 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.

Section 4: Human Uses in South Africa’s Ocean Territory

15. A fundamental objective of marine spatial planning is to understand spatial compatibilities or lack thereof between different marine uses. Section 4 of the Draft MSP Framework should thus focus on collating and outlining data and information on compatibilities and impacts of different uses on each other. The Draft MSP Framework should provide a tool and policy framework for decision-making, trade-offs and balancing interests. Without a proper analysis of compatibilities, this section will not support or provide guidance in marine spatial planning. There is a significant body of research that can support this section of the Draft MSP Framework, including:


9 Article 55 – Article 75


16. It is thus recommended that a systematic literature review, that considers impacts of different uses on each other, compatibilities and incompatibilities and trade-offs, should inform this section.

Section 4.1.2: Harvesting of Marine Living Resources

17. The final paragraph of this section relates to aquaculture. This has to be fleshed out far more extensively. The paragraph does not mention Operation Phakisa’s aquaculture initiatives and the Draft Aquaculture Bill, 2016 (Draft Aquaculture Bill). In particular, the Draft Aquaculture Bill proposes aquaculture development zones, which has a particular bearing on marine spatial planning.

18. This section should also properly align with the SSF Policy, particularly as it relates to proposed ‘small scale fishing community areas’.

Section 4.1.4: Marine Mining

19. Paragraph 2 states:

   Deposits of two minerals important for the production of fertiliser (potassium and glauconite) are widely found in South Africa’s Exclusive Economic Zone. Currently the costs of extraction remain prohibitive in the context of available terrestrial resources.

20. This section is misleading. Despite ‘prohibitive costs of extraction’, in 2012 and 2014 the Department of Mineral Resources granted three rights to prospect for marine phosphate to Green Flash Trading 251 (Pty) Ltd (GFT 251), Green Flash Trading 257 (Pty) Ltd (GFT 257) and Diamond Fields International Ltd (DFI Ltd) respectively, over a considerable portion of South Africa’s marine environment. Together, these prospecting areas total approximately 150 000 km2 or 10% of our exclusive economic zone. These areas coincide with several existing fishery footprints, critically endangered ecosystems and habitats earmarked for protection in offshore marine protected areas. This section should draw on recent research on the potential environmental and socio-economic impacts of marine phosphate mining - http://cer.org.za/safeguard-our-seabed/safeguard-our-seabed/scientific-and-legal-arguments-against-bulk-marine-sediment-mining

21. Furthermore, the section fails to outline the increasing number of prospecting rights for offshore heavy mineral sands. In 2004, Richards Bay Minerals was issued a five-year heavy metals prospecting right, in an area on the northern KZN coast, stretching between Richards Bay and Cape St Lucia. In 2012, Coastal Phosphate (Pty) Ltd applied for a prospecting right for marine phosphate and potash. The Background Information document indicates that the proposed prospecting area is located offshore from Cape St Francis and covers an area of 1043 km2. In 2012, Fast Pace Trade and Invest (Pty) Ltd was granted a prospecting right for heavy minerals and gemstones in a block centred around the mouth of the Tugela River, offshore and extending northeast of Darnal in KwaZulu-Natal, between 30-70 metres depth contour. Recently, Mineral Sands Resources (Pty) Ltd (MSR) applied to expand its coastal mineral sand mining operations (the Tormin Mine) further offshore. On 13 November 2015 DMR granted a prospecting right to ‘MSR’ for garnet, heavy minerals, leucoxene, monazite, rutile and zircon. This right expands the Tormin mine coastal operations further offshore by extending the current operations 10 500ha seawards.

10 Published for comment by the Department of Agriculture, Forestry and Fisheries in Government Gazette No. 39723 of 23 February 2016 under Notice No. 190
Section 4.1.5: Offshore Oil and Gas

22. This section should explicitly state the extent of petroleum activities and rights in our exclusive economic zone i.e. approximately 98% of South Africa’s exclusive economic zone is subject to a right or lease for offshore oil and gas exploration or production.

23. The section should also outline unconventional offshore oil and gas applications and activities. PetroSA, for instance, has recently applied for environmental authorisation to undertake hydraulic fracturing in the F-O Gas Field off Mossel Bay. In response, the Department of Environmental Affairs granted an amendment of its environment authorisation to include hydraulic fracturing in three F-O Gas Field development wells. Rhino Oil and Gas Exploration South Africa (Pty) Ltd recently applied for an exploration right for inshore oil and gas exploration. The inshore licence block is off the South-West Coast and stretches from Saldanha to Cape Agulhas.

24. This section should detail the impacts and risks associated with offshore oil and gas to the marine environment and the other marine uses that depend on a healthy marine environment.

25. This section should further align with proposals in Initiative E2 (Enhance environmental governance capacity of oil and gas regulator) of Operation Phakisa Oil and Gas focus area.

Marine mining

26. The Draft MSP Framework can potentially be used to mitigate risks associated with marine mining. In particular, the CER recommends that the Draft MSP Framework should:

26.1. Properly consider the impacts of bulk marine sediment mining coastal sand mining, offshore hydraulic fracturing and inshore oil and gas exploration on other marine. A purpose of marine spatial planning is to align marine uses and conflicts. However, seabed mining is entirely incompatible with fishing and conservation;

26.2. Provide for consideration of a network of no-go-areas where offshore prospecting, mining (minerals), exploration and production (oil and gas) are prohibited or restricted prior to mining rights being awarded. This could be integrated into marine spatial planning processes including marine area plans. This should be incorporated in the Draft MSP Framework

26.3. Provide for a process for undertaking Strategic Environmental Assessment related to marine mining, for activities such as bulk marine sediment mining, coastal sand mining, offshore hydraulic fracturing and inshore oil and gas exploration that addresses economic impact of these industries versus renewable industries

Section 4.1.7: Ocean Cultural and Social Use

27. This section should make reference to and more closely align the Draft MSP Framework with the Operation Phakisa coastal tourism lab and initiative objectives and priorities.

Biodiversity and ecosystem services

28. Section 4 should include biodiversity, ecosystem services and ecological infrastructure as a marine use. This is important, as it underpins the sustainable development of our marine environment. It should thus be considered an independent marine use, for the purposes of developing marine spatial plans and ocean zoning.
29. This section should further draw from the National Biodiversity Assessment 2011: Technical Report: Volume 4: Marine and Coastal Component.\textsuperscript{11}

Existing rights

30. The Draft MSP Framework does not specify the position or approach to existing permits, permission, licences or other authorisations that are contrary to the marine spatial plan or contrary to principle of ensuring the ecological integrity or ecosystem-based approach outlined in the Draft MSP Framework. 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.

31. In order for marine spatial planning to be meaningful, the Draft MSP Framework should set out a position for withdrawal, repealing, expropriation and deprivation of existing rights that are not compatible with the overall vision and objectives of marine spatial planning.

Section 5: Developing Marine Area Plans

32. This section is unclear as to the delineation of marine area plans. Clause (1)(c) of the Draft MSP Bill proposes development of marine area plans for the East Coast, South-East Coast, West Coast and Prince Edward Islands. It is unclear whether the Draft MSP Framework envisages the same.

33. Section 5.3 states:

‘Data and information will inform the identification of specific biogeographic marine areas for the purpose of planning. Information that will be called upon from each sector department for each plan are unlikely to relate only to the specific Marine Areas, and may cover larger areas, possibly at a national or supra-national scale; this is especially so when data relates to marine ecosystem processes or wide-ranging maritime activities.’

34. The CER supports this process, rather than the delineation of the four marine area plans in the Draft MSP Bill. The four regions are not based on ecological or bioregion consideration and do not align with management boundaries for the Departments of Mineral Resources, Environmental Affairs or Agriculture, Forestry and Fisheries.

35. It is accordingly recommended that a marine spatial plan which covers the entire exclusive economic zone be developed, which in turn informs marine area plans based on suitable criteria such as management boundaries, ecological factors and marine uses. If this approach is adopted, the Draft MSP Bill should be aligned and amended accordingly.

Section 5.4.1: Establishing an inter-departmental approach

36. The Draft MSP Bill proposes two institutional structures; Directors-General Technical Committee and Ocean Economy Ministerial Management Committee. These are both high-level and political decision-making committee. The CER supports the formalisation of the National Working Group as envisaged by Section 5.4.1, to provide technical support for decision-making.

37. However, it is recommended that the Draft MSP Bill be aligned and amended to support the formalisation of the National Working Group.

Section 5.4.2: Engaging with Stakeholders

38. This section states:

The preparation of any marine spatial plan involves the participation of representatives of groups and organisations that will be affected by the plan. This is because they can provide information and ideas, assist in discussion between marine interests and contribute to the implementation of the plan. It is important that participants are brought in at an early stage in plan preparation and that they continue to be involved throughout the MSP process. They may be involved through meetings and workshops, through being invited to respond to draft versions of a plan, and by other methods as appropriate. Stakeholders will be brought actively into the plan-making process, including, for example, representatives of key sectoral interests, non-governmental organisations, coastal authorities and community groups.

39. This is a welcome addition. However, it seems loosely defined and open to discretion on which stakeholders are ‘invited’ to participate. The CER thus recommends the Draft MSP Framework 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. The Draft MSP Framework could follow a similar approach to Municipal Coastal Committees provided for under s.42 of The National Environmental Management: Integrated Coastal Management Act, 2008 (NEM:ICMA).

Suitable access to information provision

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

Thank you for the opportunity to submit comments on the Draft MSP Bill. Please do not hesitate to contact us should you require any further information.

Yours sincerely

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