

Cape Town Office

3rd Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa
PO Box 5227 • Cape Town 8000 • South Africa
Tel: (021) 481 3000 • Fax: (021) 423 0935 • Website • www.lrc.org.za
PBO No. 930003292
NPO No. 023-004



The Minister of Agriculture, Forestry and Fisheries
Department of Agriculture, Forestry and Fisheries
Small-Scale Fisheries: Customer Services

Per email: ssfregs@daff.gov.za

and

Per fax: (021) 402 3622

**Submissions to the Minister of Agriculture, Forestry and Fisheries on the
Proposed Regulations Relating to Small-Scale Fishing**

28 May 2015

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance), EJ Broster
S Magardie (Director), A Andrews, S Kahanovitz, WR Kerfoot, C May, M Mudarikwa, HJ Smith
FB Mahomed (Acting Director), T Mbhense, A Turpin
S Sephton (Director), C McConnachie
N Fakir (Director), SP Mkhize, C van der Linde, MJ Power
J Brickhill (Head of CLU), M Bishop, G Bizos SC, T Ngcukaitobi, S Nindi, A Singh, M Wheeldon, W Wicomb

We write for the Masifundise Development Trust ('MDT'). We also make these submissions on our own behalf and on the basis of our representation of small scale fishing communities and customary fishing communities in the Northern and Western Cape, Eastern Cape and KwaZulu-Natal.

MDT have worked for the advancement of the small scale fishing sector for years and was instrumental in the Kenneth George litigation in the Equality Court which resulted in the development of the Small Scale Fisheries Policy ('SSFP'). They participated in the Task Team that negotiated the policy and was a representative of the community constituency during the policy negotiations at NEDLAC. They act as a secretariat for Coastal Links, the largest network of community-based organisations representing small scale fishing communities in South Africa.

The LRC has represented MDT in these endeavours and continues to do so.

INTRODUCTION

The Proposed Regulations Relating to Small-Scale Fishing ("the Regulations") to the Marine Living Resources Act ("the MLRA"), as amended in 2014 ("the Amendment Act") were gazetted on 6 March 2015 and interested persons have been invited to submit substantiated comments or representations.¹ The deadline was extended, by gazette, to 28 May 2015.

The Regulations follow from Section 5 of the Amendment Act to the MLRA (which substitutes section 19 of the principal Act) as the empowering provision. In particular, subsection (d) empowers the Minister to prescribe

- (i) *The process and procedure relating to the allocation and recognition or rights of access to small-scale fishers based within small-scale fishing communities;*
- (ii) *The procedures to be applied in the allocation of those rights;*
- (iii) *The management of the rights of access;*
- (iv) *The criteria and timetable for recognition of small-scale fishers and small-scale fishing communities; and*

(e) may prescribe any ancillary or incidental administrative or procedural matter that it is necessary to prescribe for the proper exercise and performance of the powers and duties referred to in the preceding paragraphs.

In addition, the SSFP explicitly provides that "the operational details [of the policy] will be determined and may be spelt out in regulations or operating procedures" (p 18, fn 14).

¹ *Government Gazette* No. 38536, No. R184, 6 March 2015

It is trite that the Minister should act within the scope of the empowering statutory provision and for the purposes envisaged by the legislation – also in drafting regulations.² Administrators, including Ministers, have no inherent power; they only have the power expressly provided by legislation.

Because the legislature often does not have the technical expertise related to specific areas, legislation often provides for broad discretionary powers with little constraint for administrators in drafting regulations. However, because these particular Regulations are empowered by a policy and legislative amendment process of negotiated rule-making, with a huge technical and other input from stakeholders across the spectrum, the particular empowering provisions of these Regulations include substantive principles that constrain the discretion of the Minister in what the Regulations should and should not provide.

As such, these Regulations needed to prescribe not only the process, procedures, management, criteria and timetable, but should have given effect to any substantive principles contained in the relevant section of the Act and the SSFP.

The empowering provision in the Amendment Act includes the following substantive principles:

1. The Minister's obligation to give effect to section 9(2) of the Constitution;³
2. The Minister's obligation to give effect to section 39(3) of the Constitution;⁴
3. The Minister and any organ of state shall have regard to the need to incorporate a community-based approach in the allocation of rights of access within the small-scale sector.

These principles, and others relating to the legal entity to be established, are echoed in the SSFP.

However, as we will point out in further detail below, the Minister acted outside his powers in drafting these Regulations in at least three key areas: the imperative of incorporating a community-based approach, the realization of section 39(3) and customary rights to the resources, and in the limited options for legal entities that the Regulations provide.

² This is a fundamental principle of administrative law. See Hoexter p 73-74.

³ (2) To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

⁴ (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

This is not permitted in our law.

There are many examples of case law in which a Minister exceeded his/her power in regulations by not keeping to the empowering provisions leading to the regulations being declared unlawful. Examples include *Minister of Correctional Services v Kwakwa*;⁵ *Minister of Home Affairs v Watchenuka*;⁶ *Affordable Medicines Trust v Minister of Health*;⁷ *Head of Department, Mpumalanga Department of Education v Hoerskool Ermelo*.⁸

These submissions will be structured as follows:

1. The history and status of the SSFP
2. The key principles, objectives and mechanisms of the SSFP and Amendment Act and the failure of the Regulations to give effect to them
3. Key Recommendations in amending the proposed Regulations
4. Clause by clause commentary

1. THE HISTORY AND STATUS OF THE CURRENT LEGAL FRAMEWORK: THE SSFP AND THE AMENDMENT TO THE MLRA

The development of the small scale fishing policy gazetted in June 2012 happened as a result of traditional artisanal fishing communities, with the help of the Masifundise Development Trust, launching a challenge of the MLRA in the Equality Court in 2005.⁹ The fishers alleged that the failure of Act to provide artisanal fishing communities effective access to the resource was in violation of a number of their rights contained in the Constitution, including the right to substantive equality and non-discrimination, the right to choose a trade or occupation freely, the right to access sufficient food and the right of every child to basic nutrition.

As a result, a Court Order was granted by agreement by the Equality Court stating as follows (own emphasis):

The [Minister] shall appoint an interim relief task [...] to prepare a process that will develop *a new legislative and policy framework to accommodate traditional fishers more effectively*. The framework will be developed taking into account the principles and objectives contained in section 2 of the [MLRA] and should take into account international and national legal obligation and policy directives *to accommodate the*

⁵ 2002 (4) SA 455 (SCA).

⁶ 2004 (4) SA 326 (SCA).

⁷⁷ 2006 (3) SA 305 (CC).

⁸ 2010 (2) SA 415 (CC).

⁹ See para 1.5(f) of the SSFP.

socio-economic rights of these fishers and to ensure equitable access to marine resources for those fishers.

In order to satisfy the Court Order, the Minister was bound to develop both a legislative and a policy framework to accommodate the socio-economic rights and the right to substantive equality of these fishers in line with international and national legal obligations.

After five years of an exceptional consultation process both in scope and in depth, the task team had developed a policy which was then further debated and refined at NEDLAC and finally gazette in June 2012. This process, which could properly be described as 'negotiated rulemaking', was in line with the Constitutional imperatives of participatory democracy captured in sections 19, 59 and 72. Negotiated rulemaking is designed to be a collaboration between decision-makers and interested parties where participants are directly involved in the drafting of the rules (or policy). This process is meant to limit the possibility of legal challenge because of the direct engagement in the drafting.

In any event, the drafting of the policy was the first step for the Minister to exercise his obligation in terms of the Court Order. While the fishing communities had waited a very long time for this first all-important step, they were elated when it finally happened.

The SSFP introduced a paradigm shift. The department recognized that "a new approach must address the existing need for transformation, the progressive realization of human rights within affected communities, developmental objectives and current economic realities, and the ecological sustainability of the resource, and contribute to community well-being and development".¹⁰

This did not only entail the recognition of rights to be held on a communal basis, but a move towards placing greater decision-making and governance responsibility in the hands of communities. This move follows best practice in virtually every other comparable jurisdiction in the world, from South-East Asia, Australasia, Canada to our Southern Africa neighbours.

The next step was to amend the MLRA so as to make legislative provision for these changes. The significant amendments to the MLRA, which was assented to in 2014, are discussed below.

2. KEY PRINCIPLES, OBJECTIVES AND MECHANISMS INTRODUCED BY THE SSFP AND THE MLRA AMENDMENT ACT

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In this section we address the particular principles established by the policy and the MLRA Amendment which must be reflected in the Regulations.

3.1 Communities as co-managers and co-custodians of the resource: the community-based approach

The SSFP envisioned not merely the recognition of a sector previously marginalized by the MLRA, but aimed to make communities the co-managers and co-custodians of their resources. It entrenched a community-based approach to the small scale fisheries sector, following the best practices in most comparative jurisdictions.

A community-based approach has several distinct but indivisible elements: it entails recognizing a communal right, as the policy and the MLRA now do, but that communal right operates effectively only if the local governance, decision-making and regulation and implementation of the community are promoted. **Merely granting a communal right is not adhering to a community-based approach.**

It is thus not surprising that the policy and the Amendment to the MLRA specifically ensure that a community-based approach is followed.

Section 5(3) of the Amendment Act - the empowering provision for the Minister to make these regulations – provides:

The Minister and any organ of state shall have regard to the need to incorporate a community-based approach in the allocation of rights of access within the small-scale fisheries sector.

The SSFP makes multiple statements of intent to implement and promote a community-based approach to the governance of the resource. Some of these include:

- *The Department recognizes that the ecosystems approach is central to the fisheries management system. **Small scale fisheries resources will be managed in terms of a community-based co-management approach...**(p4)*
- *The policy will establish an effective basis for determining which marine living resources are applicable to the Small Scale fisheries sector. This will include...**a co-management approach to managing the Small Scale fisheries sector** (p10).*
- *The policy must ... provide for... participatory management practices (p12).*
- *The principles, that are the fundamental premises that will apply to decision-making, management and regulation of marine living resources in the sector, include to adopt and approach of co-*

management empowerment...; develop accountable and transparent structures and mechanisms, promote effective participation in policy development, management and decision-making; incorporate a community-based rights approach to the allocation of the marine living resources (p14-15).

- The primary object of the policy is described as introducing a fundamental shift in the approach to the Small Scale fisheries sector, which *provides for community orientation in the management of the marine living resources harvested by these fishers*. The strategic policy objectives to obtain the primary objective include to co-manage Small Scale fisheries sector and applicable marine living resources in an integrated and holistic manner recognizing national management protocols while responding to local contexts.
- The objectives of the policy include to *introduce mechanisms and structures that promotes a community orientated co-management and community-based approach in the harvesting and management of marine living resources within the Small Scale Fisheries sector. **This is given effect in the right holding option**; the range of management instruments and tools; institutional arrangements; and capacity building and compliance monitoring (p18).*
- It includes an entire section on “community orientation and community-based approach’(p17-19) and co-management of fisheries (p23).

The proposed regulations, with respect, entirely misunderstand the meaning of a community-based approach. While it includes a section on co-management, this section provides for the establishment of committees at various levels who will help the Minister in deciding how to manage the resource and then to implement the management strategy. That does not accord with any definition of co-management. That is, at best, a very limited form of participatory management.

Thus, rather than providing the mechanisms whereby co-management, co-decision making and co-governance could be realized, the Regulations provide for a system whereby the Minister is expected to regulate the sector down to the most local details (with at best some inputs by co-management committees who are not communities).

This takes all responsibility out of the hands of the communities. The community, in the terms of the Regulations, is only allowed to engage in marketing of the fish through a series of co-operatives. While our clients submit that this proposed system is unworkable, it is - more importantly - entirely at odds with the SSFP and MLRA as amended. This is not permissible in South African law.

Recommendations:

- a) The regulations should include definitions of co-management and community-based resource governance that is consistent with the SSFP.
- b) The Minister should not have the primary responsibility for the identification of members of the small scale fishing community (and the inclusion of new members) and of the manner in which the right is exercised. The primary responsibility should be with communities.
- c) In turn, the regulations must provide for a community rightsholding entity that is able to realise the objectives of co-management and community-based resource governance expressed in the SSFP and the Amendment Act.
- d) The rightsholding entities must be consistent with the existing customary or other structures already present in communities where applicable.

3.2 The recognition of customary fishing rights

Section 5 of the MLRA Amendment Act and the SSFP both explicitly recognize customary fishing rights in line with the Constitution. Some communities in South Africa, notably in the Eastern Cape and KZN, are able to demonstrate that they have, as a community and since time immemorial, accessed a particular resource in terms of the customary system of governance of their community. Those communities may have customary rights to the resource recognized by the Constitution. These rights may be regulated in terms of the legal framework, but they must be recognized.

The recognition of these rights flow from the following:

- a) **The Constitution:** The Constitutional Court has confirmed that customary law is, under the Constitution, recognized as an independent source of law. The recognition is based on sections 30, 31, 39(2) and 39(3) of the Constitution, the latter recognising any rights conferred by customary law as long as these are consistent with the Bill of Rights.¹¹
- b) **The MLRA Amendment Act:** Section 5(1), replacing section 19 of the MLRA, binds the Minister to “achieve the objectives contemplated in

¹¹ In *Bhe*, Langa JP, as he then was, said: *Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.*

section 9(2) and 39(3) of the Constitution”. Section 39(3) provides that all rights arising from customary law must be recognized in as far as these are consistent with the Bill of Rights.

Furthermore, the Amendment specifically recognizes communities who “continue to exercise their rights in a communal manner in terms of an agreement, *custom* or law” in its definition of small-scale fishing communities (section 1).

c) The **SSFP**:

- In calling for a new approach to the ecological sustainability of the resource, the SSFP says: “Communities want their traditional and customary fishing practices recognized within the fisheries management system” (p11).
- The first principle recognizes the existence of any rights conferred in terms of customary law to the extent that these are consistent with the Bill of Rights; and
- The second principle recognizes rights guaranteed by custom and law to access to, and use of natural resources on a communal basis to the extent that these are consistent with the Bill of Rights.

The proposed regulations must thus enable the Minister to identify and appropriately recognize, protect and promote the rights of customary small-scale fishing communities. This is not a suggestion; it is a legal imperative. However, the proposed regulations do not even mention customary rights. We submit that this is a fundamental flaw that must be remedied in order for the Amendment to be enacted.

In this regard, it should be noted that President Zuma recently sent the Minerals and Petroleum Resources Development Amendment Act back to parliament following the failure of the National Assembly to properly interrogate the implications of the Act on the customary rights of communities. Pres Zuma understands that the Constitution no longer allows the legislature or the executive to simply ignore the customary rights of communities in making legislation or regulation.¹²

Recommendations:

- The Regulations should provide for a mechanism by which the Minister can investigate and recognize communities who have customary systems governing their access to the marine resource and the customary fishing rights that arise from it.

¹² Statement released by the Presidency, 23 January 2015.

- The Regulations should provide a mechanism by which communities who believe they have customary rights but that have not been recognized by the Minister can apply for such recognition.

3.3 Legal entities

The SSFP is explicit about why it proposed community-based legal entities and for what purpose. The “main purpose” of these entities, according to the SSFP, is to

serve as local management structure and formalize co-management and the community-based approach. These structures will have to ensure that all activities associated with the harvesting and management of marine living resources are coordinated and properly controlled. This includes compliance with the conditions of the fishing rights and ancillary fishing activities. These structures will play a key role in ensuring that the interest of the local fishing community and sustainability of the ecosystems and marine living resources they depend upon are not compromised. The community-based structures will further serve as a platform for Small Scale Fishers to express their aspirations, needs and the challenges that they face.

The legal entity envisioned by the Regulations are not designed to fulfil these purposes at all. The Regulations provide for two entities only, both forms of co-operatives (although the policy specifically provides that communities may choose from a range of entities). The entities provided for by the Regulations has as its objective

to provide for employment or services to its members and facilitate community development¹³ and to provide sectoral services such as processing and marketing to its members.¹⁴

Given that the drafters of the Regulations have, *mero motu* decided to fundamentally change the objectives of the SSFP and the Amendment Act, it is not surprising that the legal entities proposed are not designed to deal with the objectives of facilitating co-management and community-based governance.

However, it is not within the purview of the Minister to fundamentally change the policy (and legislative) objectives by way of regulations. It plainly exceeds the lawful authority of the Minister to do so. The fact that these Regulations follow a process of years of negotiated rulemaking with the express intent to adhere to a Court Order only amplifies the unlawfulness.

¹³ The definition of the primary co-operative.

¹⁴ The definition of the secondary co-operative.

Thus, given that the policy and legislative commitments to co-management and co-governance of the resource must stand, the Regulations leave us at a loss as to which entity will realise this vision.

Co-operatives are designed to operate as quasi-commercial entities. As such, they could potentially provide employment and sectoral services as provided for by the Regulations. They may have a role parallel to the legal entity required in terms of the Amendment Act read with the SSFP. But the Regulations do not provide for those required legal entities. As such, the Regulations plainly fail to fulfil its mandate of operationalizing the SSFP and the Amendment Act.

It cannot be argued that the primary and secondary co-operative proposed will also fulfil the list of key functions required in terms of the SSFP and the Amendment Act for the following reasons:

- **Co-operatives are simply not designed to deal with those issues.** They are economic enterprises¹⁵ that operate within an existing legislative framework emphasizing business plans, entrepreneurship and financial acumen. The objectives of co-operatives in terms of the Co-operatives Act are to create employment, generate income, facilitate broad-based black economic empowerment and eradicate poverty. As such they could fulfil the objectives envisioned by the Regulations, but **not** those of the SSFP and the Amendment Act.
- As commercial entities, co-operatives can go bankrupt or be deregistered in terms of s 73 of the Co-operatives Act when they fail to comply with the provisions of the Act or their own Constitutions. This is not an empty threat; co-operatives are routinely deregistered. Given that business acumen will not come naturally to many small scale fishing communities, and given that communities will not choose this entity in terms of the current Regulations, but be forced to set it up, compliance with the Act will be a particular challenge. **The communal fishing right cannot be held and managed by a commercial entity that can go bankrupt or be deregistered at any time. What happens to the right?** In this regard it should be noted that the Communal Property Association Act does not provide for the deregistration of CPAs precisely because they hold communal rights on behalf of communities. There is a reason why the land sector required a special purpose vehicle to hold a communal right on behalf of a community. A communal fishing right is no different.

¹⁵ As described by the Co-operatives Act.

- An important principle of co-operatives in terms of the Co-operatives Act is that membership is *voluntary*.¹⁶ This principle is key to ensuring accountability. The possibility of members leaving the entity if it does not operate democratically, for example, is a key check and balance of the entity. Because that check and balance is in place (in terms of the Act), other checks and balances are not required. But the Regulations provide for co-ops as the only possible entity for small scale fishing communities. Membership is thus **not** voluntary. If you wish to be a member of the community, you must be a member of the primary co-operative. That is contrary to the fundamental principles of the Co-operatives Act and will leave these entities extremely vulnerable to abuse and mismanagement.
- Furthermore, the membership of Co-operatives in terms of the applicable Act is based on two reciprocal factors: that the member is able to accept the responsibilities of membership (which means the responsibilities of a *financial enterprise*) and that the member can use the services offered by the Co-op. Forcing small scale fishing communities into forming co-operatives means that these factors cannot be considered: everyone must become a member (at least of the primary co-operative). But what does the Co-operative do with members who don't fulfil their financial responsibilities? They cannot exclude them from the co-operative, because that would mean they lose their access to the resource. **Small scale fishers cannot lose their access to the resource because they are unable to comply with the business requirements of membership to a co-operative: the very basis for the Equality Court Order that led to the SSFP and the Amendment Act was that business requirements unlawfully excluded small scale fishers. The Regulations bring us right back to that situation.** Alternatively, if the co-ops are forced to keep members even if they don't have the ability to fulfil their membership obligations, the co-ops, as financial enterprises, will suffer. The Co-operatives Act was designed to avoid just such a situation.

The expressed purpose of the co-management structures created by the Regulations is not to co-manage, but to think of methods of how the Minister can share management of the resource with the community. But the community has no legal entity representing it *as a community*. The co-ops are not communities, but groups of fishers who decide to form co-ops. There can be multiple co-operatives within one community. In any event, co-ops are not equipped to

¹⁶ The Act defines co-operatives as "Autonomous association of persons united voluntarily".

represent communities in the management of the resource. The co-management provision thus becomes meaningless.

Recommendations:

- a) While the Regulations may make provision for legal entities such as co-ops to perform certain marketing and related functions, the primary duty of the Minister is to create legal entities that can represent the small scale fishing community as community, hold the right in a risk-free manner, and govern the communal access to the resource. These are the entities that should be co-responsible for the management of the resource.

4. KEY RECOMMENDATIONS

On the basis of the foregoing, we recommend that the Regulations be amended as follows:

1. The rightsholding entity must:
 - a. Represent an entire Small-scale fishing community (as defined by the Amendment Act and the SSFP).
 - b. That entity can take various forms, whether a Trust or a Communal Property Association or another suitable form. The type of entity is less important than the entity's Constitution and the principles of decision making and accountability that it includes.
 - c. Whatever form the entity takes, it must accord with the following requirements:
 - i. The primary function of the entity is to hold the communal right on behalf of the community; and to manage access to the resource in terms of the right and in consultation with the relevant authority.
 - ii. The objectives of the entity are (consistent with the SSFP) to serve as local management structure; to formalize co-management and the community-based approach; to ensure that all activities associated with the harvesting and management of marine living resources are coordinated and properly controlled; to ensure compliance with the conditions of the fishing rights and ancillary fishing activities; to ensure that the interest of the local fishing community and sustainability of the

ecosystems and marine living resources they depend upon are not compromised; to serve as a platform for Small Scale Fishers to express their aspirations, needs and the challenges that they face.

- d. The Constitution of the entity must provide that:
 - i. The entity cannot be deregistered;
 - ii. The members individually and the community as community must be protected in the event of the entity collapsing because of non-compliance with the relevant legal framework or its own constitution;
 - iii. All decisions will be taken in a democratic and transparent manner as decided by the members;
 - iv. Decisions that may adversely affect the rights of all the members must be ratified by a majority vote;
 - v. The office bearers of the entity will report to the members regularly through meetings and quarterly financial reports;
 - vi. Dispute resolution mechanisms are incorporated.
2. It is recommended that the oversight mechanisms provided for in the Communal Property Associations Act for the Minister be incorporated into the Regulations and made applicable to the fisheries legal entities.
3. The current pro forma constitution is perhaps adequate for the co-operatives envisioned by the Regulations as enterprises, but is not adequate for the purposes of a rights-holding entity. The Constitution must, at a minimum, include the objectives and provisions listed above.

5. CLAUSE BY CLAUSE COMMENTARY

5.1 Clause 1

It is unclear why a definition for “community” is inserted in the regulations, while it is expressly stated that the definitions of the MLRA are incorporated. The MLRA Amendment provides a definition for small scale fishing communities. The term ‘community’ is nowhere in the regulations used other than referring to small scale fishing communities. It is therefore

of no use, but somewhat confusing, to insert a different definition for “community” when this word is never used in this sense in the regulations.

In any event, it is submitted that the Regulations exhibit some confusion as to what these “communities” will be. Given that the proposed entity structure of primary and secondary co-ops envision individual fishers creating these structures, there seem currently to be no space for communities qua communities.

Definitions to be inserted:

“Co-management”: consistent with the SSFP.

“Community based approach”: consistent with the SSFP and international precedent.

“Customary communities” are communities who live according to a system of customary law.

“Customary rights” refers to rights to fishing arising from the customary law systems of fishing communities as recognized in terms of section 39(3), 30 and 31 of the Constitution.

“Rightsholding entity”

The definitions of the “primary co-operative” and “secondary co-operative” must be subject to the inclusion of a rightsholding entity that is appropriate to represent a community and co-manage the right and the resource.

5.2 Purpose of regulations

The principal purpose of these regulations are to provide for the effective implementation of the SSFP in terms of the MLRA as amended.

It is suggested that the further purposes should include (consistent with the empowering provisions):

- a) ensure the implementation of a community-based approach to fisheries management in the small-scale sector
- b) ensure the protection and promotion of the customary fishing rights of customary communities

5.3 The Identification, verification, registration and recognition of small-scale fishers and small-scale fishing communities.

This provision provides for the Minister to identify, verify and register small-scale fishing communities and their members. This is inconsistent with the definition of 'Small-scale fishing communities' in the Amendment Act. That definition expressly includes the principle of self-determination by including the requirement that the community "must regard themselves as a small-scale fishing community".

The confusion is between the 'identification' and the verification and registration of the community. The former is primarily in the purview of the community (subject to the external dispute resolution), while verification and registration are the ministerial mechanisms for ensuring that the process is transparent and legitimate.

This distinction is recognized in our law. For example, the Traditional Leadership and Governance Framework Act distinguishes between the community function of identifying a leader for the community, whereas the Premier/President (where relevant) recognizes the chosen leader.

In any event, the rest of provision 3 only deals with verification and registration and not identification. In this regard, it is important to recognize that the Minister's role in verification and registration should not undermine the self-determination of the community. This principle is integral to the success of a community-based approach and is captured in the Amendment Act.

5.4 Co-operatives and the granting of fishing rights.

This provision provides for the Minister to determine any number of co-operatives to be established in an area, each having at least five members and each then receiving a communal right. This provision is inconsistent with the definition of the "Small-scale fishing community" in the Amendment Act.

What the policy and the Amendment Act envision is the recognition of communities as they exist today or as they existed historically. Such a community is a group with ties of commonality and cohesion that exclude others. In most instances small scale fishers can't choose to be part of this community or that. Rather, communities exist and are recognized through the Amendment Act, and it follows that the recognized members of the community are small scale fishers. The recognition of the community-based approach requires it.

The Regulations get this process the wrong way round: section 4(a), for example, requires that a community only gets a right "if every member is a small scale fisher".

What the Regulations envision is the artificial creation of communities by five or more individuals coming together to form an enterprise. That is not a community. It may well be that five individuals within a community decide to join forces for purposes of marketing, for example, and form a co-operative for that purpose. But such artificially created groups cannot substitute for the “small-scale fishing communities” defined in the Act and who have, as a community, the right to access the resource.

The system proposed by the Regulations is, in fact, nothing more as a version of the individualised permitting system that the Policy explicitly rejects. It is recommended that there should be one rights-holding entity (as described above) per community, with as many co-operatives as is preferred amongst the members. But these co-ops cannot hold the right. Section 4(5) should thus read:

No small-scale fishing rights shall be allocated to any natural person or to a juristic person other than a community legal entity that as required in terms of section 7 (with section 7 amended as per the Key Recommendations above).

Section 4(6) is inconsistent with the community-based approach required by the Act and the SSFP. The Minister cannot be the one to determine “how the fishing right is to be exercised”. That is a decision of the community, subject to the approval of the Minister or relevant authority.

Section 4(7): it is unclear whether the Minister have the authority to determine the time period for Small-scale fishing rights by way of regulation.

5.5 Additional members of primary small-scale fisheries co-operatives

It is assumed that this section deals not necessarily with the primary co-operatives, but with the rightsholding entity. We will comment bearing that assumption in mind.

The Minister cannot micro-manage the membership of Small-scale fishing communities, not only because it contradicts the definition of these communities in the Amendment Act (that emphasizes self-definition) but also because it contradicts the principles of a community based approach. What is more, our clients submit that the suggested system is so onerous as to be unworkable.

5.6 Secondary co-operatives

No comments.

5.7 Constitution of small-scale fisheries co-operatives and management plan

These requirements are acceptable if these co-operatives are not the rightsholding entities representing the communities in then way envisioned by the SSFP (and detailed above). The rightsholding entity, however, must comply with the Key Recommendations listed above.

5.8 Certain powers and duties relating to small-scale fisheries co-operatives

This amount of top-down regulation expected of the Minister in this provision is not realistic.

5.9 Multi-species approach

This provision is based on the flawed assumption that there will be several rightsholding entities (co-operatives) in the area of one community. The policy and the Amendment Act provides for one rightsholding entity per community representing the community. Access to the resource in terms of that right will be managed within the community, whether there are one or multiple co-operatives formed within the community. The Minister may ratify the governance plan, but the community based approach requires the primary decision-making in this regard to lie with the community subject to the sustainable use of the resource.

Subsection 9(l) makes little sense: it refers to “the number of licences and permits allocated”. A community rights is a single communal rights that will be governed within the limits of the applicable TAE and TAC.

5.10 Small scale fishing areas and zones

No comment.

5.11 Co-management structures

We have raised our extensive objections to this provision and its failure to give effect to the principle of co-management entrenched in the SSFP.

5.12 Conflict resolution mechanisms

While any co-operatives should have conflict resolution mechanisms, these provisions should also apply to the rightsholding entity.

The Minister may not, by way of regulation, exclude the right to an internal appeal provided for in terms of the MLRA.

5.13 Compliance

The provisions of this section must apply to the rightsholding entity rather than the co-operatives.

Yours sincerely

LEGAL RESOURCES CENTRE

PER:

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

WILMIEN WICOMB