
Comments by
LEGAL RESOURCES CENTRE (RF) (NPC)
&
KZN SUBSISTENCE FISHER FORUM
on the
Proposed Regulations Relating to
the Entry of Foreign Fishing Vessels
into South African Waters

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To: Honourable Minister of Forestry, Fisheries and Environment
Ms Barbara Dallas Creecy MP

We thank you for the invitation to submit comments on the proposed regulations.

The Legal Resources Centre (LRC) is a public interest law firm established in terms of s 14 of the Companies Act 2008 with registration number NPC 2022/410419/078. We have provided legal services in the public interest free

of charge since 1979 in cases that affect large sections of society generally, and the indigent in particular.

The LRC has worked with the KZN Subsistence Fisher Forum (KZNSFF) for a number of years in order to advance the rights and interests of subsistence fishers. The activities of this category of fisher is unregulated as you are aware. They are compelled to conform to laws that are applicable to recreational fishing. In this regard we record that our office and the KZNSFF are working with the Department (DFFE) to find a solution that will facilitate fishing by the membership of the KZNSFF – in furtherance of their socio-economic rights.

A subsistence fisher has the following characteristics:

- Being unemployed or earning a meagre income that needs to be supplemented.
- Inability to support himself/herself or his/her family on existing sources of income.
- Uses rod and reel; is shore-based; and does not use a boat.
- Consumes the catch or who trades the surplus in order to purchase necessities.

Besides promoting the rights and interests of this vulnerable class of persons, the KZNSFF takes an active role in monitoring legislation in this sector. In furtherance of that purpose these comments are respectfully offered by the LRC and the KZNSFF.

We comment generally and thereafter deal with specific issues raised by the proposed regulations.

GENERAL COMMENTS

- 1** KZNSFF and its members are deeply concerned about the irregular incursion of foreign fishing vessels into South African waters. They have over the years observed a decline in their catches. They blame this squarely on the blatant theft of our vital resources by these hordes that fish with impunity.
- 2** These foreign fishing fleets have been allowed unhindered to deplete our limited fishing stocks and destroy marine ecosystems. That has had direct impact on the livelihoods and food security of poor and vulnerable fishers and their families. With the South African economy performing poorly, these destitute persons depend on fishing to survive.
- 3** The intervention of the Minister is therefore timely and appreciated, but as set out below, requires far more stringent measures and allocation of further resources for purposes of enforcement.

SPECIFIC COMMENTS

Duplication and/or repetition of Laws

- 4** There is a danger that the proposed regulations attempt to regulate matters that are already dealt with in detail by the following statutes, thereby creating the potential for confusion, inconsistency, uncertainty, and conflict:
 - a. Maritime Zones Act 15 of 1994 (which includes the UN Convention on the Law of the Sea 1982 and which came into force on 16 November 1994.

- b. National Environmental Management Act 107 of 1998.
- c. National Environmental Management: Integrated Coastal Management Act 24 of 2008.
- d. Sea-Shore Act 21 of 1935 to the extent that it has not been repealed and to the extent that it has been assigned to the relevant provinces.
- e. National Environmental Management: Protected Areas Act 57 of 2003.
- f. Marine Traffic Act 2 of 1981.
- g. National Ports Act 12 of 2005.
- h. Marine Living Resources Act 18 of 1998.

Failure of Regulations to deal with Islands

- 5 Maritime zones are also applicable to the Prince Edwards Islands and the Marion Island in terms of the applicable legislation. This needs to be expressly stated in the regulations, in order to avoid uncertainty.

Vessel Automatic Identification System

- 6 Masters of vessels deliberately switch off the VAIS when engaged in illegal, unreported and unregulated fishing (IUU). This has been confirmed by recent research reported at –
<https://www.dailymaverick.co.za/article/2024-01-17-deep-learning-discovers-dark-vessels-on-seas-less-empty-than-we-thought/>
- 7 The first para of this report is illuminating: “*huge numbers of mainly fishing vessels have been “hiding” by turning off their compulsory automatic tracking systems.*”

- 8** That being the case it is submitted that –
- a. The switching-off of the VAIS should be criminalised with heavy penalties. The penalty should be akin to sabotage.
 - b. A presumption should be created whereby it is presumed that it was the intention of the master to engage in IUU by switching-off the VAIS.
- 9** The chair of the KZNSFF reports that the tracking system employed by the DFFE is capable of detecting only vessels exceeding 40m in length. Evidence at the disposal of the KZNSFF shows that most vessels engaging in IUU are smaller than 40m. It is respectfully submitted that the DFFE must invest in better tracking technology so that all the culprits may be apprehended.

Failure and/or Inadequate Enforcement in South African Waters

- 10** The State is the custodian and trustee of the coastal zone and must take reasonable measure to achieve the progressive realisation of the rights and interests of the people of South Africa.
- 11** KZNSFF has received numerous reports from off-shore fishers about foreign fishing vessels intruding into South African waters and engaging in theft and economic sabotage of our resources. These have been relayed to the powers that be but nothing effective has been done.
- 12** The KZNSFF strongly condemns this failure to act and protect our borders, seas and sovereignty by the State. We urge your office to take the sternest of actions against these vessels.

- 13** It is submitted that guarding, protecting and preserving our coast and its resources is a paramount duty of the State. If dedicated coastguard vessels are not available, then it is submitted that the SA Navy be deployed.
- 14** This function of the SA Navy is well within its mandate if one has regard to s 18(c) and (d) of the Defence Act 42 of 2002 which provide that “*In addition to the employment of the Defence Force by the President as contemplated in section 201(2) of the Constitution, the President or the Minister may authorise the employment of the Defence Force for service inside the Republic or outside the Republic in accordance with international law, in order to – (c) support any department of state, including support for purposes of socio-economic upliftment; and (d) effect national border control.*” (emphasis added)

Definition of Vessel

- 15** It is submitted that the definition of “vessel” should include not only foreign fishing vessels (ie boats and ships), but expanded to include all the types of craft as contemplated in the definition of vessel in the Marine Living Resources Act.

South African Waters

- 16** Reference is made to SA waters but the term is not defined. It is submitted that it should be defined to include the seashore, territorial waters, the exclusive economic zone and in relation to sedentary species the continental shelf as defined in the Maritime Zones Act 15 of 1994.

“Prevent, Deter and Eliminate IUU fishing”

- 17** Proposed reg 3(c) states the purpose of the regulations is to prevent, deter and eliminate IUU (ie illegal, unreported and unregulated) fishing. With respect, there is very little in the regulations that will achieve this purpose.

Domestication of the Agreement on Port State Measures

- 18** Proposed reg 3(d) states that the purpose of the regulations is to domesticate into South African law the *Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*. There is nothing in the regulations that attempts to domesticate the Agreement.
- 19** In any event it is respectfully submitted that international treaties and agreements cannot be domesticated by way of subordinate legislation (ie regulations).
- 20** The proposed regulations demonstrate an intention to make the agreement binding in South African law. This is to be commended insofar as the Agreement has not yet entered into force since 25 member countries have not yet ratified or approved the Agreement as contemplated in Are 29(1).
- 21** Be that as it may, s 231(2) of the Constitution provides that “*An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the*

National Council of Provinces unless it is an agreement referred to in subsection (3)."

- 22** Subsection 231(3) provides that *"An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession ..."*
- 23** On 16 February 2016 the Republic of South Africa deposited its instrument of accession with the Director-General of the Food and Agriculture Organisation. This accession was made in terms of Art 29 of the Agreement.
- 24** It will be seen from the terms of the Agreement that it is not of a technical, administrative or executive nature; moreover, it requires ratification or accession in terms of Art 29. It is therefore submitted that the procedure set out in s 231(2) is applicable, ie a resolution of Parliament is required. The Minister is respectfully urged to place the Agreement on the Table of Parliament so as to obtain the necessary resolution.

Proposed Penalties

- 25** The proposed regulations in reg 11 provide for imprisonment for a period not exceeding 2 years; and a fine not exceeding R2m; or to both. This, it is respectfully submitted constitutes a "watering down" of existing penalties contained in the Marine Living Resources Act.
- 26** The Act provides in s 51 for the seizure of vessels and their forfeiture (s 68). While s 58 provides for imprisonment for a period not exceeding 5 years. it is submitted that these penalties are

appropriate and must be incorporated into the final version of the regulations.

Conclusion

- 27** Subject to the above, our office and the KZNSFF repeat our desire to work with your office and the Department to respect, protect, promote and fulfil the rights of the most vulnerable in our society.

**LEGAL RESOURCES CENTRE
KZN SUBSISTENCE FISHER FORUM
19 February 2024**

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