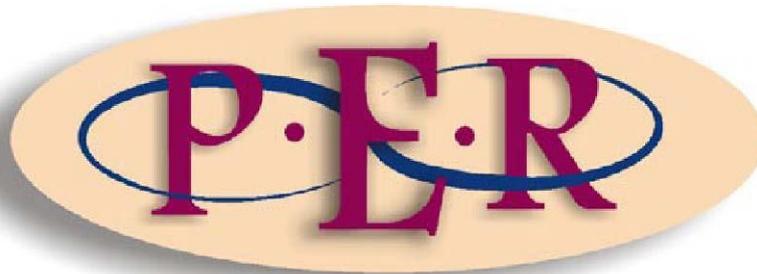


Author: M Young

**ACHIEVING EQUITY IN THE FISHING INDUSTRY: THE FATE OF
INFORMAL FISHERS IN THE CONTEXT OF THE *POLICY FOR
THE SMALL-SCALE FISHERIES SECTOR IN SOUTH AFRICA***

ISSN 1727-3781



2013 VOLUME 16 No 5

<http://dx.doi.org/10.4314/pelj.v16i5.6>

**ACHIEVING EQUITY IN THE FISHING INDUSTRY: THE FATE OF INFORMAL
FISHERS IN THE CONTEXT OF THE *POLICY FOR THE SMALL-SCALE
FISHERIES SECTOR IN SOUTH AFRICA***

M Young*

1 Introduction

The *Marine Living Resources Act* 18 of 1998 (hereafter the MLRA) governs fisheries management in South Africa. Embedded in this Act are a number of objectives which guide decision-making under the MLRA. Among these objectives is the need to ensure resource sustainability as well as the need to "restructure the fishing industry to address historical imbalances and achieve equity within all branches of the fishing industry".¹ The latter objective has been described as one of the "foundational" objectives of the MLRA.² It recognises that during the apartheid era the fishing industry represented a microcosm of the South African society and economy - fishing rights were principally held by white-owned entities to the exclusion of other demographic groups.³ In the result, a group referred to in this contribution as "informal fishers" was systematically denied formal access to marine living resources.

Since the implementation of the MLRA significant progress has been made in transforming the composition of the commercial fisheries sector, primarily through

* Michaela Young. LLB (Stellenbosch), LLM (UCT). Lecturer, Institute of Marine and Environmental Law, Department of Public Law, Faculty of Law, University of Cape Town. E-mail: micha.lau@uct.ac.za.

¹ Section 2(j) of the *Marine Living Resources Act* 18 of 1998 (MLRA).

² *Langklip See Produkte v Minister of Environmental Affairs and Tourism* 1999 4 SA 734 (C); *New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries* 2012 ZASCA 30; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC). It stems, at least in part, from the Reconstruction and Development Programme (RDP), which states that "*the primary objective of fisheries policy is the upliftment of impoverished coastal communities through improved access to marine resources*".

³ Witbooi 2002 *Int J Mar Coast Law* 431-440; Branch 2002a *S Afr J Mar Sci* 455; Harris 2002b *S Afr J Mar Sci* 503; Gen N 434 in GG 36413 of 25 April 2013 1-2; Hauck and Sowman *Waves of Change* 41.

employment or BEE practices.⁴ However, despite the clear objective of the MLRA to achieve equity in the fishing industry, and despite the formal recognition afforded to the subsistence fisheries sector in terms of the MLRA, informal fishers as a group have continued to be marginalised and excluded from the fishing rights allocation process established in terms of the MLRA.⁵ With the promulgation of the long-awaited *Policy for the Small-Scale Fisheries Sector in South Africa* (the Small-Scale Policy) which has been in the making for approximately five years, the *status quo* is set to change.⁶ The Policy "aims to provide redress and recognition" to those who have previously been overlooked by establishing a fisheries management regime for what the Policy describes as the "small-scale fisheries sector".⁷ Steps towards the implementation of the Small-Scale Policy have been initiated by the Department of Agriculture, Fisheries and Forestry in the form of the *Marine Living Resources Amendment Bill* (the Bill) which, according to a notice published on 12 September 2013, is due to be tabled in parliament shortly.⁸

The objective of this contribution is to review the scope of application of the Small-Scale Policy and the proposed co-management regime from a legal perspective.⁹ The ultimate objective is to assess the potential of the proposed scheme to succeed in achieving the foundational objective of the MLRA by creating opportunities for formal access to marine living resources for those who have been marginalised and overlooked in the rights allocation process to date. The analysis of the management

⁴ Sowman 2011 *Afr J Marine Sci* 298.

⁵ The fisheries management regime established by the MLRA is based on the allocation of fishing rights. No person may undertake commercial, recreational or subsistence fishing activities unless a fishing right and a permit have been granted to that person in terms of ss 18(1) and 13(1) of the MLRA, respectively. Applications are submitted on invitation. The number of permits granted is in part a function of the Minister's determination in any given year of the total quantity of marine resources that may be harvested (known as the "total allowable catch") in each of the three sectors and the "total applied effort". For an exposition of the fisheries management regime see resources that may be harvested (known as the "total allowable catch") in each of the three sectors and the "total applied effort". For an exposition of the fisheries management regime, see Diemont "Marine Living Resources".

⁶ Gen N 474 in GG 35455 of 20 June 2012 (*Policy for the Small-Scale Fisheries Sector in South Africa* (the Small-Scale Policy)).

⁷ The Small-Scale Policy 1.

⁸ Gen N 942 in GG 36847 of 12 September 2013. The *Marine Living Resources Amendment Bill* [B30-2013] was preceded by a draft Bill published for public comment in Gen N 434 in GG 36413 of 25 April 2013. A correction to this Notice, which shortens the commenting period, was published on 13 May 2013 in Gen N 472 in GG 36459 of 13 May 2013.

⁹ With regard to the meaning of co-management, see para 3.2 below.

regime will take place against the backdrop of factors identified in relevant literature as critical to building a successful co-management regime. While this review focuses primarily on the provisions of the Small-Scale Policy, it cannot take place in a vacuum. Rather, it must take place against the backdrop of the country's vision for its future economic development as provided by the *National Development Plan* (NDP).¹⁰ In the author's view the NDP provides a useful overarching guide to government's likely policy choices in achieving the ultimate goals of the eradication of poverty and sustainable development. In addition, the analysis must remain rooted in the context of environmental realities, such as the significant resource constraints in the fisheries arena, which fundamentally limit the opportunities for achieving the MLRA's equity objective.¹¹ This contribution therefore also touches briefly on the alignment of the Small-Scale Policy with South Africa's development imperatives and environmental realities, which will have a fundamental influence on the likelihood of the successful implementation of the Policy.

2 The concept of "informal fishers" and the Small-Scale Policy

2.1 Conceptual boundaries: subsistence fishers; small-scale commercial fishers; commercial fishers and "informal fishers"

It is generally accepted that the various sectors of the fishing industry require different governance structures and management regimes due to their unique needs and characteristics.¹² In South Africa this recognition finds expression in the

¹⁰ The National Development Plan (NDP) is available at National Planning Commission 2012 www.npconline.co.za. The NDP states that it provides "a broad strategic framework to guide key choices and actions" (The NDP 26). The NDP was prepared by the National Planning Commission, whose mandate is to take a critical view of South Africa and to provide a vision of the kind of society South Africa seeks to build over the next 20 years, the ultimate objective being to provide recommendations on how to make this vision a reality.

¹¹ A particular challenge in this regard is the fact that globally, and SA is no exception, many of the coastal fisheries resources which are the primary resources relied upon by traditional fishers are over-exploited, fully exploited or have collapsed. Branch 2002a *S Afr J Mar Sci* 456, 460; Sowman 2011 *Afr J Marine Sci* 298. For information regarding the status of South Africa's fisheries resources, see DAFF *Status of the South African Marine Fisheries Resources*.

¹² Sowman 2011 *Afr J Marine Sci* 298; Harris 2002a *S Afr J Mar Sci* 407 confirm the view that in particular, the subsistence sector requires a unique management approach. On the history of the enactment of the MLRA and the recognition of the subsistence sector, see Glazewski *Environmental Law* 405-407.

distinction between three broad fishing sectors regulated in terms of the MLRA: (1) the commercial sector; (2) the subsistence sector, which was formally recognised for the first time in the MLRA;¹³ and (3) the recreational sector.¹⁴

The term "subsistence fisher" is defined as follows in the MLRA:¹⁵

A natural person who regularly catches fish for personal consumption or for the consumption of his or her dependants, including one who engages from time to time in the local sale or barter of excess catch, but does not include a person who engages on a substantial scale in the sale of fish on a commercial basis.

In ordinary parlance the concept of "subsistence" conjures up images of activities focused on satisfying the bare minimum of existential needs through food production or other forms of food procurement.¹⁶ In line with this common understanding, the definition of the term in the MLRA emphasises the element of consumptive use as the defining characteristic of subsistence fishing.¹⁷

What is also evident from the above definition is that subsistence fishers are generally contrasted with those aiming to produce a tradable surplus (ie commercial enterprises).¹⁸ This is a necessary distinction, as it is widely accepted that subsistence fishers and large-scale industrial operations should not compete within the same sector for access rights.¹⁹ However, subsistence fishing also potentially includes economic activities at a level exceeding the occasional sale or barter but which are nevertheless aimed primarily at satisfying subsistence needs. In practice, there is no distinction between the poor fisher who catches fish to meet the family's most basic nutritional needs and the poor fisher who catches fish mainly for sale so

¹³ Branch 2002b *S Afr J Mar Sci* 475.

¹⁴ For a discussion of the various categories of marine resource activities regulated by the MLRA, see Diemont "Marine Living Resources".

¹⁵ Section 1 of the MLRA.

¹⁶ Schumann and Macinko 2007 *Marine Policy* 707.

¹⁷ For a discussion of the concept of "subsistence" generally and in the fisheries context, see Schumann and Macinko 2007 *Marine Policy* 706-718.

¹⁸ Schumann and Macinko 2007 *Marine Policy* 707.

¹⁹ Sowman 2011 *Afr J Marine Sci* 297.

as to generate income from which to meet basic (ie subsistence) needs.²⁰ Yet the definition of "subsistence" in the MLRA propagates this artificial distinction.

If one accepts that subsistence activities may in theory include commercial activities, then the conceptual boundary between the subsistence fishing sector and the commercial fishing sector becomes a fluid one. In other words, fishing activities are not readily capable of being pigeon-holed into neat categories of "subsistence" on the one hand and "commercial" on the other.

This is so not only because the subsistence category potentially includes poor members of society undertaking fishing activities primarily to generate income but also because some of those fishers who are engaged in fishing primarily for income-generation purposes may rise to the level of a small-scale business operation. These fishers find themselves somewhere between the subsistence and commercial ends of the scale. This so-called small-scale commercial sector may be distinguished from the industrial commercial sector based on the following characteristics: (1) its labour-intensive (as opposed to capital-intensive) harvesting methods; (2) its use of low-technology gear; and (3) its focus on near-shore fisheries.²¹ Due to these unique characteristics, small-scale enterprises should also, like their subsistence counterparts, be regulated in a nuanced manner which takes account of the differences between the small-scale fisher and the large-scale commercial operator in the rights allocation process.²²

The above analysis therefore yields three potential groupings which must be accommodated in an equitable and effective fisheries management regime: (1) the subsistence fisher who may fish for consumption or for sale but whose poverty levels

²⁰ Schumann and Macinko 2007 *Marine Policy* 710-711.

²¹ Sowman 2006 *Marine Policy* 61.

²² Sowman 2011 *Afr J Marine Sci* 302; Branch 2002b *S Afr J Mar Sci* 477, 485. The Subsistence Fisheries Task Group (SFTG) was appointed subsequent to the promulgation of the MLRA with the mandate to investigate the subsistence sector with a view to providing recommendations regarding the management of the sector. It recommended that the MLRA should be amended with a view to establishing essentially the three categories of fisheries described in this contribution and that these sectors should be regulated in a nuanced manner. See Harris 2002b *S Afr J Mar Sci* 505-506 for a detailed exposition of the SFTG's recommendations.

are such that the fishing activities are directed at satisfying the bare minimum of existential needs; (2) the small-scale fisher who has risen from the level of subsistence to operating a commercial enterprise albeit on a much smaller and less sophisticated scale than industrial operations (referred to in this paper as artisanal fishers);²³ and (3) large-scale industrial fishing operations (referred to as the commercial sector). The term "informal fisher" is used inclusively in this contribution and refers to the fishers within categories (1) and (2).

Before venturing into a brief analysis of the fate of informal fishers to date, it is appropriate to provide further clarity on the choice of labels or descriptions relied on in this contribution for the above three groupings. The term "informal fishers" is relied upon to group together the subsistence fishers and micro-entrepreneurs. The reason for this is that both the subsistence fishers and the micro-entrepreneurs have been overlooked in the fishing rights allocation process to date.²⁴ It is this group of fishers that is the primary focus of this contribution and it is therefore useful to devise a description of this group for present purposes. Collectively, subsistence fishers and micro-entrepreneurial fishers are also often referred to as "small-scale fishers" in the relevant literature. The use of this description for the group has been deliberately avoided. The reason for this is to avoid any confusion with the terminology of the Small-Scale Policy, as the term utilised in the Small-Scale Policy is not necessarily synonymous with the group which has been overlooked and marginalised. The same reasoning applies to the choice of terminology utilised in this contribution to refer to those operating small fishing enterprises. The choice of descriptions in this contribution is therefore primarily based on a desire for clarity and avoiding confusion with the terminology of the Small-Scale Policy.

²³ These fishers could also be described as "small-scale commercial fishers", which would be a more neutral description. However, this description has been avoided to prevent any confusion with the terminology employed by the Small-Scale Policy.

²⁴ See in this regard the analysis presented in the following paragraph of this contribution.

2.2 Realities in the South Africa context: the need for the Small-Scale Policy

Whatever approach is adopted in defining and managing the various possible fishing sectors in fisheries management legislation, the approach must be context-specific and respond to the realities within which the regulatory regime is to apply. The fisheries management regime established in terms of the MLRA to date has failed on several fronts to respond to South African realities. As a result, a significant proportion of informal fishers has continued to be excluded from legally recognised access to marine living resources since the promulgation of the MLRA.

In analysing the fate of informal fishers and the need for the Small-Scale Policy it is useful to bear in mind some of the defining characteristics of the subsistence sector. At the time of enactment of the MLRA little was known about this sector. This fact prompted the appointment of the Subsistence Fisheries Task Group (SFTG), which was mandated to investigate and survey *inter alia* the number of fishers within this sector, the marine living resources of relevance and the nature of subsistence fishing activities.²⁵ The SFTG's investigations revealed the following information relevant to this contribution: the sector includes a continuum of activities ranging from the purely consumptive use of harvested marine living resources to those primarily involved in harvesting for commercial reasons;²⁶ at the time of the survey it was estimated that there were approximately 30 000 fishers in 147 fishing communities, although more recent estimates suggest that the number of fishers may be much higher;²⁷ lastly, the research revealed that although some of the species of relevance to the subsistence sector are not of commercial interest, several species relied upon by subsistence fishers overlap with those relied upon by the commercial and recreational fisheries sectors.²⁸

²⁵ Harris 2002b *S Afr J Mar Sci* 503.

²⁶ Clark 2002 *S Afr J Mar Sci* 433-434; Sowman 2011 *Afr J Marine Sci* 302; Branch 2002a *S Afr J Mar Sci* 455.

²⁷ Branch 2002a *S Afr J Mar Sci* 440; Sowman 2011 *Afr J Marine Sci* 302.

²⁸ Harris 2002b *S Afr J Mar Sci* 506.

Against the backdrop of the findings of the SFTG, it is submitted that the MLRA has fallen short in two respects. Firstly, the MLRA fails to recognise that the subsistence end of the continuum in South Africa includes both those who fish for personal consumption and those that sell their catch in the ordinary course and in excess of the occasional sale or barter.²⁹ The MLRA therefore has not captured all of those fishers who rely on fishing activities directly, or indirectly through the sale of fish, to meet their most basic nutritional needs. Secondly, to date no management regime to cater for the subsistence sector as recognised in terms of the MLRA has been implemented. In other words, even those fishers that qualify as subsistence fishers in terms of the MLRA have been consistently overlooked in the fishing rights allocation process since the promulgation of the MLRA.³⁰

Although not expressly recognised as a category of fishers in terms of the MLRA, artisanal fishers have fared somewhat better than their subsistence counterparts. Some of these fishers have been accommodated through the allocation of fishing rights in terms of the commercial fishing rights allocation process since 2001.³¹ This group has, however, also experienced significant challenges, including the complexity of and administrative challenges associated with the rights application process and the small overall quotas allocated to this sector. As a result of these challenges many artisanal fishers were unable to compete for fishing rights successfully and those that were successful often received unsustainable quotas rendering small-scale businesses economically unviable.³² The management regime

²⁹ Clark 2002 *S Afr J Mar Sci* 433-434. The fact that the "subsistence" sector in South Africa includes a continuum of activities ranging from consumption to those undertaking micro enterprises for profit was confirmed by a survey in 2000 undertaken as part of research undertaken by the Subsistence Fisheries Task Group (the SFTG).

³⁰ With the exception of the 1999/2000 fishing season, in which a number of subsistence permits were granted in respect of a select number of marine species, no other subsistence rights have been allocated and the sector has functioned only by way of exemptions granted in terms of s 81 of the MLRA. Witbooi 2002 *Int J Mar Coast Law* 436; Diemont "Marine Living Resources" 15-30 - 15-33; Gen N 1582 in GG 20303 of 16 July 1999.

³¹ The first call for applications for limited commercial rights was made in terms of Gen N 1771 in GG 22517 of 27 July 2001. This move was prompted by a recommendation of the SFTG. For a concise discussion of the SFTG's recommendations see Harris 2002b *S Afr J Mar Sci* 503-523.

³² Sowman 2011 *Afr J Marine Sci* 302; Sowman 2006 *Marine Policy* 60-61, 67, 69; Isaacs 2006 *Marine Policy* 56. Isaacs highlights that the practice of awarding economically unviable allocations coupled with the lack of capacity to harvest, market and sell their catches, rendered many of those who had achieved limited commercial rights holders of mere paper quotas. Also see the Small-Scale Policy 3.

established in terms of the MLRA has therefore also not resulted in the optimal and effective management of the artisanal sector in such a way as to promote formal access to marine living resources by previously marginalised informal fishers.³³

The remainder of this contribution seeks to determine if the Small-Scale Policy is capable of addressing the gaps in and lack of implementation of the MLRA insofar as informal fishers are concerned. Put differently, will the Small-Scale Policy foster the realisation of the MLRA's foundational objective by providing informal fishers with an opportunity to gain formal and legally recognised access to marine living resources?

3 Review of the Small-Scale Policy

The Small-Scale Policy introduces a fundamental shift in government's approach to the management of informal fishers by providing a mechanism for the allocation of fishing rights to "small-scale" fishing communities.³⁴ The ultimate objective of the Policy is to establish a regime which ensures equitable access to marine living resources for these communities.³⁵ The Policy is based on the following core elements and principles: a community-based approach to the allocation of fishing rights; a co-management approach; a multi-species approach in awarding fishing rights; and the preservation of the integrity of ecosystems and resource sustainability.³⁶

³³ In the case of *West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism* 2010 ZASCA 114, the Minister of Environmental Affairs and Tourism acknowledged that "the short, medium, and long-term fishing rights allocation processes with which his department's Marine and Coastal development (*sic.*) Branch (MCM) have been involved over the past decade had focused primarily on the interests of medium and large sized commercial entities."

³⁴ The Small-Scale Policy 1, 10, 15, 17.

³⁵ The Small-Scale Policy 10.

³⁶ The Small-Scale Policy 10, 14-15.

3.1 *Scope of application*

3.1.1 *The meaning of the term "small-scale"*

As suggested by its name, the Small-Scale Policy seeks to apply to the small-scale fisheries sector. If one takes into account the manner in which that term is utilised in relevant literature, the overwhelming impression is that the Policy applies to all informal fishers.³⁷ This impression is also supported by an explanatory document on the Small-Scale Policy (the Summary Document) issued by the Department of Agriculture, Forestry and Fisheries.³⁸ The Summary Document identifies the small scale sector as the fisheries sector which is not currently recognised in terms of the MLRA - in other words, the artisanal sector as described above - and states that the Small-Scale Policy applies to this currently unrecognised sector.³⁹ The Summary Document further emphasises that the small-scale sector is concerned with relieving poverty and ensuring food security. Viewed holistically, the Summary Document read with the Small-Scale Policy suggests that the approach is to collapse the subsistence and artisanal fisheries sectors under the Policy.⁴⁰

The impression that the Small-Scale Policy applies holistically to all informal fishers as described in this contribution is, however, on the face of it, not borne out by a closer examination of the definitions in the Policy of the terms "Small-Scale fishing", "Small-Scale fishers" and "Small-Scale fisheries sector".⁴¹

³⁷ The term is generally used in an inclusive manner to denote not only purely subsistence activities but also activities that move into the realm of commercial activities in the form of micro enterprises. Sowman 2011 *Afr J Marine Sci* 298; Berkes, Colding and Folke *Managing Small-Scale Fisheries* 7.

³⁸ DAFF Date Unknown www.nda.agric.za (the Summary Document).

³⁹ The Summary Document 1.

⁴⁰ The Summary Document 1.

⁴¹ The Small-Scale Policy 6-7. The terms are defined as follows in the Policy: "Small-Scale fishing" means "the use of marine living resources on a full-time, part-time and seasonal basis in order to ensure food and livelihood security. ..."; "Small-Scale fishers" means "persons that fish to meet food and basic livelihood needs, or are directly involved harvesting /processing or marketing of fish, traditionally operate on or near shore fishing grounds, predominantly employ traditional low technology or passive fishing gear, usually undertake single day fishing trips, and are engaged in the sale or barter or are involved in commercial activity."; and "Small-Scale fisheries sector" means "that sector of fishers who employ traditional and/or passive fishing gear and engage in a range of labour intensive harvesting, processing and distribution technologies to harvest marine living resources on a full-time, part-time or seasonal basis in order to ensure food security."

Although the definitions of the above terms include references to some of the characteristics of the small-scale commercial sector,⁴² such as the use of low technology gear and a focus on near-shore operations, the emphasis of the Small-Scale Policy appears to fall on the most vulnerable and food insecure households rather than on those fishers who operate closer to the commercial end of the scale.⁴³ This interpretation is further supported by the numerous references in the Policy to the role of small-scale fisheries in maintaining livelihoods, ensuring food security and creating a safety net for unemployed or underemployed members of society.⁴⁴ Despite its name therefore, on a plain reading of the Small-Scale Policy, it seems to emphasise activities that contribute to a level of production that secures a standard of living at or slightly above the level at which basic livelihood needs are being met (ie the subsistence level).

As such, the Small-Scale Policy would be more appropriately described as applying to the subsistence sector, although the Policy does adopt a more inclusive approach than that mandated by the definition of the subsistence sector currently reflected in the MLRA. This more inclusive approach is reflected in the expanded notion of the subsistence sector in terms of the Policy. The Policy recognises that semi-commercial activities do fall within the realm of the "small-scale" sector as defined in terms of the Policy.⁴⁵ In other words, the Small-Scale Policy casts its net widely enough to

⁴² For a concise summary of the characteristics of the three broad categories of fisheries (ie commercial, small-scale and subsistence) identified above, see Berkes, Colding and Folke *Managing Small-Scale Fisheries* 7.

⁴³ The three definitions relating to the small-scale sector emphasise the fact that the fishing-related activities are undertaken to ensure food security in the following manner: (1) the definition of "Small-Scale fishers" states that those fishers are "persons that fish to meet food and basic livelihood needs"; (2) the definition of "Small-Scale fishing" states that this activity entails the use of marine living resources to "ensure food and livelihood security"; and (3) the definition of the term "Small-Scale fisheries sector" refers to the sector in which fishing activities are undertaken to "ensure food security". It should also be noted that the above definitions are closely aligned with the definition proposed by the SFTG for the term "subsistence". Sowman 2006 *Marine Policy* 66.

⁴⁴ The Policy 4-5. The following quotes on p 5 of the Policy are illustrative of the Policy's stance in this regard: "... the role of Small-Scale fisheries as a livelihood support and coping mechanism for the poor is crucial ... "; "Small-Scale fisheries should also provide a critical safety net for vulnerable Small-Scale fisher households (even those which were not previously poor) when they face a sudden decline in their income".

⁴⁵ The proposed amendments in the MLRA Bill include a proposal to replace the references of "subsistence" in the Act with the terms "small-scale". Curiously, and despite the fact that it is proposed that the term subsistence be deleted wherever it occurs in the operational provisions of

include those who fish in order to generate income but whose poverty levels are nevertheless such as to locate them closer to the subsistence end of the continuum than the commercial end.

This recognition is confirmed by the definition of the term "small-scale fishers", which is that this group includes fishers that are "engaged in the sale or barter or are involved in commercial activity".⁴⁶ It is also confirmed by the criteria for identifying those who qualify as small-scale fishers.⁴⁷ Small-scale fishers include those who "subsist from their catch or are engaged in the sale or barter or involved in *semi-commercial activity*."⁴⁸

The expansion of the scope of the subsistence sector in terms of the Policy to include commercial activities is to be regarded as a positive development as it accords with the situation on the ground in South Africa.⁴⁹ Notwithstanding the inclusion of a level of commercial activity within the scope of application of the Small-Scale Policy, however, the manner in which the various terms relating to the "small-scale" sector are defined in the Small-Scale Policy implies that there is a cut-off point beyond which artisanal fishers will not be covered by the Policy. This cut-off, although not clearly defined through objective criteria, seems to be located at the point where commercial activities are no longer directed primarily at meeting livelihood needs but rather are more appropriately described as profit-generating enterprises. In the author's view the Policy ought to have provided a more explicit treatment of its scope of application. In particular, the cut-off point between those commercial activities falling within the scope of the Policy and those that go beyond it should have been treated expressly. The lack of such explicit treatment potentially perpetuates uncertainty as to the class of fishers covered by the Policy.

the MLRA, the MLRA Bill does not propose the deletion of the definition of the term "subsistence" in s 1 of the MLRA. This appears to be an oversight.

⁴⁶ The Policy 7. Author's emphasis.

⁴⁷ The Policy 38-39.

⁴⁸ The Policy 38-39.

⁴⁹ Clark 2002 *S Afr J Mar Sci* 433-434. Perhaps it was this more inclusive and expansive approach to defining the subsistence sector which prompted the drafters of the Policy to name it the Small-Scale Policy rather than the subsistence fisheries policy.

3.1.2 The limiting effect of the community-based approach

Even if the intended scope of application of the Policy is to embrace all informal fishers (as this group is described in this contribution) - which would mean that the above assessment of the Small-Scale Policy's wording does not accord with government's intention regarding the Policy's scope of application - the community-based approach advocated by the Policy is likely to exclude a significant proportion of artisanal fishers. Put differently, even if this is not the intention of the Policy, it is likely to exclude a significant proportion of those fishers who operate closer to the commercial end of the spectrum.

The Small-Scale Policy envisages that:⁵⁰

Small Scale fishing rights be granted to a community-based legal entity in a particular area where Small Scale fishers have traditionally operated. No rights will be awarded to individuals ...

The rights allocation scheme is further based on the idea that the community-based legal entity to which the rights are allocated is made up of individuals who meet the criteria of small-scale fishers set out in the Small-Scale Policy and who make up a small-scale fishing community.⁵¹ The rights allocation scheme proposed in terms of the Small-Scale Policy therefore adds two important filters to the Policy's scope of application. In order to benefit from the provisions of the Policy, a fisher must be a member of a fishing community and the fisher must qualify as a small-scale fisher in terms of the criteria established by the Policy.

The term "Small-Scale fishing community" is defined as follows in the Policy:⁵²

... an established socio-cultural group of persons who are, or historically have been, fishermen and -women, including ancillary workers and their families; have shared aspirations and historical interests or rights in the harvesting, catching or processing of marine living resources; have a history of shared Small-Scale fishing

⁵⁰ The Small-Scale Policy 33.

⁵¹ The Small Scale Policy 35.

⁵² The Small Scale Policy 7.

activity but, because of forced removals, are not necessarily tied to particular waters or geographic area (*sic.*); and were or still are operating near or in the seashore or coastal waters where they previously enjoyed access to marine living resources, or continue to exercise their rights in a communal manner in terms of an agreement, custom, or law, and who regard themselves as a community.

The definition of the term "community" which is also provided in the Policy emphasises that in order to qualify as a community, the group of persons must share common interests and regard themselves as a community.⁵³ Based on these definitions the following distinguishing characteristics may be extracted: (1) the community represents a group of fishers who view themselves as a community through a shared vision and common aspirations; (2) the group has historic ties to the harvesting of marine living resources or, expressed differently, fishing forms part of the community's tradition; and (3) the fishing activities historically have been exercised in a communal fashion.

The criteria set out in the Policy for identifying small scale fishers eligible to become members of the community-based legal entity are grounded on similar considerations. The community members must *inter alia* be able to demonstrate their "direct historical involvement in traditional fishing operations", they must be "South African citizens (male or female) from the Small-Scale fishing community" and they must have a high level of dependence on their fishing activities with no permanent other employment.⁵⁴

The scope of application of the Small-Scale Policy is therefore restricted to those fishers who can demonstrate historical ties to fishing activities in the exercise of their tradition. In addition, participation in the rights allocation process envisaged by the Policy is possible only through the vehicle of the community-based legal entity, and in turn, the existence of a fishing community, the members of which have a shared tradition and vision relating to the exploitation of marine living resources.

⁵³ The Small Scale Policy 7.

⁵⁴ The Small-Scale Policy 38-39.

The "community" requirement is likely to function as an exclusionary requirement, as the entire rights allocation scheme is premised on the declaration of a fishing community, coupled with the establishment of a legal entity through which the community will reap the benefits of the fishing operations. Simply put, if there is no community, there can be no allocation of fishing rights. This exclusion is likely to play out in two ways. Firstly, the community filter potentially excludes artisanal fishers who operate closer to the commercial end of the continuum as those fishers are essentially micro-entrepreneurs that operate commercial enterprises which are ill-suited to a community-based approach.⁵⁵ The exclusion of this class of fishers can be justified, insofar as the intention of the Policy is to focus primarily on the subsistence sector, and so long as those falling outside the scope of the Policy are adequately catered for elsewhere. Secondly, fishers living in metropolitan or peri-urban areas who display a high level of dependence on fishing activities as a means of survival are unlikely to be in a position to participate in the rights allocation process under the Small-Scale Policy. The reason for this is that the size of the urban centres within which they live and the heterogeneous nature of those settlements militate against the identification of a "community" with shared aspirations and traditional ties with fishing activities.⁵⁶

In addition to the exclusionary effects discussed above, the community and eligibility criteria are also potentially associated with the exclusion of some *bona fide* fishing communities. A survey of fishing communities undertaken as part of the SFTG investigations into the subsistence sector revealed that the patterns of community fishing activities vary widely along the South African coast.⁵⁷ Several rural coastal

⁵⁵ In this regard see also the discussion in para 3.2.2 below. The possibility that artisanal fishers may nevertheless be able to participate in the rights allocation process under the Small-Scale Policy is recognised. This is possible, however, only insofar as such fishers are able to form a "community" within the meaning of the Policy. While this is not entirely impossible, research suggests that a community-based, co-management approach becomes significantly more challenging when a diverse group of individuals, each with their own best interest (as opposed to the community's interest) at heart, must be accommodated. Commercial enterprises are inherently ill-suited to a community-based approach as each business seeks to maximise its own profits and benefits. It is therefore doubtful that there will be very many cases in which artisanal fishers are able to effectively form a "community" for the purpose of participating in the rights allocation process under the Policy.

⁵⁶ Branch 2002a *S Afr J Mar Sci* 455.

⁵⁷ Branch 2002a *S Afr J Mar Sci* 475-487.

communities which essentially live a subsistence lifestyle - and therefore ought to be covered by the Small-Scale Policy - are involved in fishing activities but only as a component of those communities' livelihood activities.⁵⁸ In other words, the members of these communities do not "derive the major part of their livelihood from Small-Scale fishing operations" as required in terms of the Policy's eligibility criteria.⁵⁹ Similarly, the "traditional link" filter could operate in a restrictive manner, excluding those who fish to ensure food security on the basis that they lack a traditional link with fishing activities. While this requirement may assist in identifying *bona fide* small scale fishers, it may also be criticised as being unduly restrictive and discriminatory against those who genuinely rely on the sea to support their most basic nutritional needs.⁶⁰

At this stage it is unclear how rigidly the requirements of the Small-Scale Policy regarding the identification of fishing communities and small scale fishers will be applied in the rights allocation process. At least insofar as the requirements are applied in an inflexible manner which does not take account of the unique circumstances of each community and/or the individuals who are involved in fishing activities, the Small-Scale Policy could continue to marginalise some of those who are most in need of access to marine living resources and the reform heralded by the Small-Scale Policy.

3.1.2 The fate of artisanal fishers excluded from the scope of the Small-Scale Policy

The fact that the Small-Scale Policy appears to focus on (albeit an expanded notion of) the subsistence sector rather than the informal sector as a whole is not in and of itself problematic. In fact, according to the SFTG recommendations, artisanal fishers (referred to as small-scale commercial fishers by the SFTG) are best managed as a

⁵⁸ Branch 2002a *S Afr J Mar Sci* 455-456.

⁵⁹ The Small-Scale Policy 38.

⁶⁰ Clark 2002 *S Afr J Mar Sci* 434. The potentially exclusionary effect of this requirement is ameliorated, however, by the fact that the Policy allows some flexibility in applying the traditional link requirement. It does so by allowing for exemption from this requirement with a view to affording young adults an opportunity to "enter the Small-Scale sector". The Small-Scale Policy 38.

sub-category of the commercial sector.⁶¹ In order to prevent the failures of the past commercial rights allocation process in relation to artisanal fishers, an approach which envisages that artisanal fishers falling outside the scope of the Small-Scale Policy will continue to be accommodated in the commercial sector implies that a sufficiently nuanced rights allocation approach should be adopted. This approach should cater for the artisanal/small-scale commercial sector by recognising the characteristics which distinguish this sector from commercial enterprises that naturally hold a competitive advantage in competing for rights in the commercial sector.

Although this contribution is focused on reviewing the Small-Scale Policy, it is worth noting that the fishing rights allocation process envisaged in terms of the *Draft Revised General Policy on the Allocation and Management of Fishing Rights* (the Draft General Commercial Policy) read with the *Draft revised sector specific fisheries policies on the allocation and management of fishing rights* does not indicate an intention to establish a particularly nuanced approach to allocating fishing rights to artisanal fishers who are unable to participate in the rights allocation scheme proposed in terms of the Small-Scale Policy.⁶² This approach is likely to perpetuate the challenges historically experienced by artisanal fishers in the commercial rights allocation process, with adverse implications for the attainment of equity within the fishing industry.

⁶¹ Harris 2002b *S Afr J Mar Sci* 505-506.

⁶² Gen N 396 in GG 36383 of 17 April 2013 (Draft General Commercial Policy). Gen N 473 in GG 36460 of 14 May 2013. Draft sector-specific policies have been published for comment for the following fishing sectors: Kwazulu-Natal trawl, squid, tuna pole, shark demersal, oysters, white mussels, traditional linefish, and hake handline. It must be borne in mind that the references in the Draft General Commercial Policy to "small-scale fisheries" refers to the term as defined in terms of the Small-Scale Policy and not the term as generally understood in the sense as described in para 2.1 above.

3.2 The community-centred, co-management approach

3.2.1 Principal features of the proposed management regime and critical success factors

The management approach adopted in terms of the Small-Scale Policy is described in the Policy as a community-focused, co-management approach.⁶³ The approach is community-focused insofar as the Small-Scale Policy envisages that both the fishing rights allocation process and the harvesting of marine living resources will be dealt with in a community-centred manner.

In other words, fishing rights will be held by the community on behalf of the community members via the legal entity to be established by the community.⁶⁴ The Policy states that the nature and composition of the legal entity must be decided upon by the community.⁶⁵ This choice, according to the Policy, will depend on the type of entity that will best suit the needs of the community.⁶⁶ The legal entity represents the members of the fishing community and its members decide who of their number are entitled to undertake fishing activities based on the eligibility criteria in the Policy.⁶⁷ The community's fishing rights, once awarded, are to be exercised in specially demarcated community areas, which in some instances may provide exclusive access to the community.⁶⁸ Within this area, the community will be

⁶³ The Small-Scale Policy 17.

⁶⁴ The Small-Scale Policy 16-17, 23.

⁶⁵ The Small-Scale Policy 32.

⁶⁶ The Small-Scale Policy 32. It should be noted that the Small-Scale Policy contains little guidance regarding the nature and form of the legal entity apart from the fact that the community is to choose the vehicle best suited to its circumstances and a reference in the section of the Policy dealing with definition to the entity's being one with "perpetual succession". See the Small-Scale Policy iv.

⁶⁷ The list of members entitled to fish is subject to verification by the Department and/or an independent third party. The Small-Scale Policy 31-32, 39-43. The process for the registration of fishing communities, the selection of members of the legal entity and the acquisition of fishing rights are areas of the Small Scale Policy which merit further investigation and comment. An analysis of these aspects of the Policy, however, is beyond the scope of this contribution, which focuses on the scope of application of the Policy and the proposed management regime.

⁶⁸ The Small-Scale Policy 28-30. The adoption of an area-based regime is grounded on the recommendations of the SFTG. Harris 2002b *S Afr J Mar Sci* 508-509. It should be noted that ss 23 and 24 of the *National Environmental Management: Integrated Coastal Management Act* 39

entitled to fish for a variety of species.⁶⁹ The decision as to which species a particular community will be entitled to harvest and the quantity that may be harvested will be informed by the Total Allowable Catch (TAC), and Total Applied Effort (TAE) for the relevant species, the location of the area within which the community will exercise its rights, as well as socio-economic factors and historic use.⁷⁰ In addition, the basket of species will be determined by "the extent to which a particular resource is already being exploited in terms of the long-term rights allocation process".⁷¹

The co-management approach advocated by the Small-Scale Policy represents a move away from the conventional top-down fisheries management approach, in which governance is considered the task of the state alone.⁷² Instead, co-management embraces the idea that:⁷³

Government and a Small Scale fishing community share the responsibility and authority for the management of a marine resource by that community.

Co-management has gained increasing support in literature as an alternative to top-down management as it moves management towards a more people-centred approach. It achieves this by allowing the affected community to be actively involved in the management of fishing activities together with government.⁷⁴ In accordance with the co-management approach, the Small Scale Policy states that the community and the state will have a shared responsibility for the management of the fishery.⁷⁵ The Policy envisages, for example, that the community will become involved in the monitoring of stocks through catch-recording and the monitoring of access to the community fishing area.⁷⁶

of 2004 makes provision for the declaration of special management areas which could be relied upon to implement the scheme proposed by the Small-Scale Policy.

⁶⁹ The Small-Scale Policy 36-37.

⁷⁰ The Small-Scale Policy 36-37. For definitions of the terms TAC and TAE, see s 1 of the MLRA.

⁷¹ The Small-Scale Policy 37.

⁷² Sowman 2011 *Afr J Marine Sci* 301.

⁷³ The Small-Scale Policy iv.

⁷⁴ Schell *Small-Scale Fisheries in South Africa* 146 and the sources quoted there; Hauck and Sowman *Waves of Change* 2-3, 13-36.

⁷⁵ The Small-Scale Policy 23.

⁷⁶ The Small-Scale Policy 24.

The management of the fishery is envisaged to take place through a co-management committee, which is formed by the legal entity and representatives of all three spheres of government.⁷⁷ A co-management agreement will "govern the relationship between Government and the Small-Scale fishing community" and clarify the roles and responsibilities of all stakeholders.⁷⁸ Furthermore, a management plan will "guide and facilitate the implementation and management of activities at the local level".⁷⁹

The move towards a co-management approach is generally to be viewed as a positive development as many commentators and international organisations, such as the FAO, support a management structure and approach that involves the resource users.⁸⁰ In other words, the co-management approach moves the governance regime closer to the people-centred approach, which commentators now generally regard as a more appropriate governance form for informal fisheries.⁸¹

This kind of approach was also recommended by the SFTG on the basis of research which revealed that the informal fishers themselves largely felt alienated and excluded from the management process. According to this research, informal fishers expressed a clear interest in being directly involved in decision-making.⁸² There is therefore evidence to support the fact that a co-management and community-centred approach will find the necessary buy-in from fishing communities.

However, co-management is no panacea. Although it is often promoted as a solution to the classical problems of top-down management systems, which are seen to alienate the resource user, experiences with this kind of management regime are mixed. Often co-management performs no better than traditional governance

⁷⁷ The Small-Scale Policy 32.

⁷⁸ The Small-Scale Policy 30.

⁷⁹ The Small-Scale Policy 29.

⁸⁰ See in general: Sowman 2011 *Afr J Marine Sci* 297-311; Berkes, Colding and Folke *Managing Small-Scale Fisheries*; FAO *International Guidelines*; Sowman 2011 *Afr J Marine Sci* 300; Hauck and Sowman *Waves of Change* 2-3, 13-36.

⁸¹ On the benefits of a co-management approach, see Hauck and Sowman *Waves of Change* 23-24.

⁸² Harris 2002b *S Afr J Mar Sci* 509.

systems.⁸³ Effective co-management depends on a number of factors including at least the following: the community should be highly homogenous in kinship and must share common aspirations and traditions which enable management of the group as a collective; the community must be capacitated and empowered through education and training in order to partake in the management regime in a meaningful manner and to implement those management functions that are devolved to the community as well as to build alternative livelihoods; there must be institutional viability and continuity; there must be clear and credible rules regarding resource access and use; there must be an enabling legal framework; and there must be security of the community's access rights.⁸⁴

3.2.2 The community and communal rights holding

The community-oriented approach to allocating fishing rights and resource management is inherently limited because it presupposes the existence of a community. In other words, the approach presupposes the existence of a group of resource users who are bound together by a common purpose and shared views and aspirations. It is this common purpose or shared vision which facilitates the joint management of fishing and related management activities. The issue raised here touches on the same concerns as those expressed above, namely that by its very nature the Small-Scale Policy is likely to exclude those fishers from its scope of application that do not form part of a readily identifiable, homogenous community that is able to organise itself into a cohesive unit for the purpose of resource management.⁸⁵

⁸³ Isaacs 2012 *Environmental Sustainability* 338; Hersoug 2011 *Maritime Studies* 31.

⁸⁴ Berkes, Colding and Folke *Managing Small-Scale Fisheries* 213-215; Hauzer, Dearden and Murray 2013 *Marine Policy* 346-354; Charles "Human Rights and Fishery Rights" 68, 70; Branch and Clark 2006 *Marine Policy* 12; Hersoug 2011 *Maritime Studies* 31.

⁸⁵ In the context of a series of case studies, Hauck and Sowman point out that the requirement of the existence of a relatively homogenous community in the South African context is a "relevant" factor in determining the likely success of a co-management project rather than a "key" factor. However, the case study cited in the commentators' work in which a diverse group of individuals participated in a co-management project certainly illustrates that co-management becomes significantly more challenging in circumstances where diverse and conflicting aspirations and views have to be accommodated. Ultimately, co-management will be possible, it is submitted, only insofar as the divergent views which may exist among resource users can be channelled into a coherent, collective vision for resource management. Hauck and Hector "Towards Abalone

The same concern arises regarding the award of communal rights. As Sowman points out, individual rights may be unworkable where fishers undertake their harvesting activities in a collective, community-oriented manner.⁸⁶ Equally, however, collective rights are unworkable where fishers currently do not exercise their fishing activities in a communal manner. As discussed in the previous paragraph, South Africa's informal sector also includes fishers who do not, or who no longer form part of a tight-knit community which undertakes fishing activities as part of its tradition. Implementing a communal rights-holding approach in such circumstances would be a task riddled with significant challenges, insofar as it is possible at all.

The question is not whether a community-oriented management and rights allocation regime is appropriate at all. Clearly, this kind of approach caters for a significant proportion of those who have been marginalised in the past and therefore has its place in fisheries management viewed holistically. Rather, the question is whether the approach proposed by the Policy is sufficiently nuanced and flexible to cater for all those who have been overlooked in the fishing rights allocation process to date. On this score, the Policy seems to fail. Given the diversity within the informal sector, there can, in the author's submission, be no "one size fits all" solution.

3.2.3 The devolution of management functions, community participation and credible rules

Co-management requires the allocation of management rights to the resource users, who are the real day-to-day managers of the resource.⁸⁷ Fishers therefore should be actively involved in the protection, conservation and rehabilitation of marine living resources.⁸⁸ This in turn implies that certain management functions must be devolved to the resource users.

and Rock Lobster Co-management" 247-268; Sowman, Hauck and Branch "Lessons Learned" 320-328.

⁸⁶ Sowman 2006 *Marine Policy* 70.

⁸⁷ Charles "Human Rights and Fishery Rights" 67.

⁸⁸ Berkes, Colding and Folke *Managing Small-Scale Fisheries* 198-199.

Although the Small-Scale Policy states clearly that the intention is to involve communities in fisheries management, it does not clarify how far decision-making and management powers will be devolved to the community level. What is clear is that the community will be involved in the management of the community area through "community-based monitoring and catch-recording" and compliance monitoring and enforcement.⁸⁹ Beyond that, however, the Policy provides little to no guidance on the level of input that communities will have into crucial issues, such as the determination of the basket of species to be made available to the community; the demarcation of the community fishing area; the quantities that may be fished; or the gear that may be used.⁹⁰ Although the Small-Scale Policy appears to advocate some involvement and consultation regarding the above issues, it seems that ultimately government will retain control, and the final say, over such critical aspects as the determination of the basket of species and quantities that may be fished by a community.⁹¹

The lack of detail in the Policy regarding the level of consultation on and participation in the above decisions raises an issue which is of critical importance for the successful implementation of a co-management approach, namely that of credibility. The effectiveness of the regime will depend *inter alia* on the credibility of the rules that govern the fishing activities from the perspective of the fishing community.⁹² This is particularly important as the Small-Scale Policy proposes to involve fishing communities in compliance and enforcement within the fishing area. Insofar as the determination of the species and the quantity that may be fished lacks legitimacy in the eyes of the community, the community itself is unlikely to abide by the rules and may simply continue to harvest species falling outside the basket awarded to that community and/or to harvest resources in excess of the quantity

⁸⁹ The Small-Scale Policy 29.

⁹⁰ There are several statements regarding community participation scattered throughout the Policy. None of these statements, however, provides sufficiently detailed guidance on how the participatory system is envisaged to function and in how far the community will be able to influence decision-making on the part of government. The Small-Scale Policy 23, 28, 29.

⁹¹ The Small-Scale Policy 32.

⁹² Hauck and Hector "Towards Abalone and Rock Lobster Co-management" 248.

awarded.⁹³ As it stands therefore, the Small-Scale Policy fails to address in sufficient detail a primary issue that must be dealt with in order to ensure the successful implementation of the Policy.

3.2.4 Institutional structures and capacity-building

The literature on co-management generally indicates that strong governing institutions are required in order to make a success of this management approach.⁹⁴ This has two implications: (1) communities must be capacitated and empowered to participate effectively in the management regime; and (2) there must be an element of continuity of role-players both on the community's side and on the part of the government authorities involved in the co-management process.

Both elements present particular challenges in the South African context. The loss of human capacity and institutional memory that the Department of Agriculture, Forestry and Fisheries has experienced over the past years could present an obstacle to the establishment of competent governing institutions.⁹⁵ Sowman⁹⁶ points out that:

High levels of staff turnover within any department result in lack of continuity in terms of data collection, analysis and management decisions, inefficiencies in terms of project implementation, lengthy planning processes, and confusion regarding appropriate government contact points for communities themselves.

Similarly, the lack of individual capacity at the resource-user level is likely to be a problematic aspect of the Policy unless it is addressed effectively through ongoing

⁹³ This is precisely the situation that has historically prevailed in relation to fisheries such as abalone. Informal fishers who were not awarded fishing rights simply continued to harvest abalone. Raemaekers 2011 *Ocean and Coastal Management* 433-445. A similar legitimacy problem has been experienced in the context of the declaration of Marine Protected Areas coupled with the restriction or prohibition of fishing activities by local communities. The failure to consider the needs of these communities has led many simply to ignore the imposed regulations. Sowman 2011 *Environmental Management* 573-583.

⁹⁴ Berkes, Colding and Folke *Managing Small-Scale Fisheries* 214. The need for community training is also emphasised by the authors. Berkes, Colding and Folke *Managing Small-Scale Fisheries* 108.

⁹⁵ Sowman 2011 *Afr J Marine Sci* 307.

⁹⁶ Sowman 2011 *Afr J Marine Sci* 307.

education and capacity-building.⁹⁷ The need for training and capacity-building at the local user level is recognised by the Small-Scale Policy, which accordingly makes provision for building "the capacity of the fishers through education, training and skills development in all aspects of the fishery."⁹⁸ Specifically, the Policy recognises that training on the following aspects will be crucial: the form of the legal entity and establishment of the legal entity; the preparation and implementation of management plans; monitoring and catch-recording; and the functioning of the co-management committee.⁹⁹

While the acknowledgment of the need for training and capacity-building is a positive aspect as it provides the basis for dealing with this issue effectively, the Policy provides no guidance on how government intends to roll out an effective training scheme. The Policy merely states that it envisages that provincial and local government as well as NGOs will play an important role in capacity-building.¹⁰⁰ In addition, previous case studies on fisheries co-management in South Africa indicate that training needs may be much wider than those expressly recognised in the Small-Scale Policy. For example, these needs are also likely to include basic numeracy and literacy skills.¹⁰¹

Given the myriad of demands on provincial and local government and the capacity constraints experienced by these spheres of government in fulfilling current mandates, it is difficult to conceive of the source of the additional human and financial capital that will be required to build an effective training programme. Insofar as this aspect is not addressed, the successful implementation of the Small-Scale Policy is at risk.

⁹⁷ Sowman 2011 *Afr J Marine Sci* 307. The education levels of members of fishing communities have been shown to be relatively low. A survey of 448 households in 2002 established that almost two-thirds had either no schooling or only some primary schooling, with virtually none having any form of tertiary education. Branch 2002a *S Afr J Mar Sci* 445.

⁹⁸ The Small-Scale Policy 15.

⁹⁹ The Small-Scale Policy 24-25.

¹⁰⁰ The Small-Scale Policy 25.

¹⁰¹ Sowman, Hauck and Branch "Lessons Learned" 248.

3.2.5 Legislative basis for the implementation of the Small-Scale Policy

There are three issues which require consideration as far as the requirement for an enabling legal framework governing the implementation of a co-management, communal approach is concerned.

Firstly, the fisheries sector which the Policy seeks to govern is not defined in the MLRA. As outlined in paragraph 2.1 above, the definition of the term "subsistence" does not permit the undertaking of commercial activities in excess of the occasional sale or barter. In the interest of legal certainty and to ensure the alignment of the Small-Scale Policy with the governing legislation, the definition of the term "subsistence" should therefore be amended or replaced with a definition that caters for the undertaking of semi-commercial activities. The Bill addresses this issue by proposing the replacement of the definition of the term "subsistence" with the term "small-scale". The latter term is defined in the Bill along the lines set out in the Policy, and hence recognises that such fishers may be involved in commercial activities.¹⁰²

The two remaining issues to be considered relate to the implementation of the co-management approach, coupled with the establishment of the co-management institutions. As it stands, the MLRA does not make provision for the implementation of a co-management approach, nor does it permit the delegation of powers and assignment of duties to the provincial sphere of government.

With regard to the former, as alluded to above, the Small-Scale Policy similarly does not provide a detailed framework for the implementation of a co-management approach. It provides only the broad brush-strokes of the chosen management regime. It seems that government's intention is to establish the detailed enabling framework by way of regulations promulgated under the MLRA.¹⁰³ The Bill

¹⁰² Section 1(a) of the Bill read with s 1(e) which proposes the deletion of the definition of the term "subsistence fisher".

¹⁰³ This approach appears to be confirmed by a statement in the Small-Scale Policy to the effect that "the draft policy is not a strategy, implementation plan or procedural guideline ... The

specifically confers the power to make regulations regarding *inter alia* the process and procedures relating to the allocation of fishing rights and the management of the rights of access.¹⁰⁴ The co-management approach advocated by the Small-Scale Policy may therefore be legitimately catered for in terms of regulations. However, other than conferring this power to regulate, the Bill contains no provisions which expressly authorise the implementation of a co-management regime. This is regrettable given the industry's past propensity to litigate, particularly where a decision may adversely affect fishing rights allocations to the commercial sector.¹⁰⁵ In the author's view it would be preferable to cater for co-management in the enabling legislation itself rather than to leave this issue for future regulation.

The remaining issue relating to the lack of a provision empowering the delegation of functions to the provincial sphere originally appeared to have been identified by the legislature. The issue was addressed in the Bill published for public comment in April 2013, which included a provision to cater for the delegation of functions to the provincial sphere.¹⁰⁶ It is curious that this proposed amendment has been removed from the Bill to be presented in the National Assembly.

As matters stand, in order to establish the necessary enabling legal framework, amendment of the MLRA and/or the promulgation of regulations is required. Although the Bill caters for some of the necessary amendments, others will ostensibly have to be catered for by way of regulations; and yet others appear not to have been addressed. The gaps in the legal framework create a potential for legal challenge of the proposed small-scale fisheries regime. At the very least, the gaps in the framework, together with the gaps in the Policy itself (such as the failure to describe in detail the participation by communities in the implementation of the

operational details will be determined and may be spelt out in regulations ..." The Small-Scale Policy 18, fn 14.

¹⁰⁴ Section 5 of the Bill.

¹⁰⁵ Section 1(a) of the Bill read with s 1(e), which propose the insertion of the definition of "small-scale fisher" and the deletion of the definition of "subsistence fisher", respectively.

¹⁰⁶ Section 79 of the MLRA. In terms of this provision, powers may be delegated to the Director-General or an officer of the department or to an authority in the local sphere. The Bill as published in April 2013 proposed the insertion of ss 78A-F into the MLRA in order to provide for the delegation of powers to the provincial sphere of government.

regime) imply that a substantial amount of time may pass still before the Policy is capable of implementation - time that impoverished fishing communities can ill afford.

3.2.6 Access or ownership rights

Commentators generally emphasise that in order for co-management arrangements to function effectively, it is crucial that the affected communities are granted rights to the resource and that these rights are secure.¹⁰⁷ If past fishing rights allocation processes are anything to go by, then the securing of access rights is probably going to be the most contested issue in implementing the Small-Scale Policy.¹⁰⁸

The issue of fishing rights allocations is related primarily to the ecological status of marine living resources. A great number of these stocks, including those most relevant to the informal sector, are fully exploited or overexploited or have even collapsed.¹⁰⁹ This hampers the opportunities to increase access to resources by the small-scale sector (as characterised by the Small-Scale Policy) by simply increasing the number of quotas issued to fishers.¹¹⁰ This issue therefore takes the debate squarely into the consideration of one of the other cornerstones of the MLRA - which

¹⁰⁷ Berkes, Colding and Folke *Managing Small-Scale Fisheries* 214.

¹⁰⁸ The relevant literature and the law reports provide ample evidence to support a characterisation of the fishing rights allocation processes in the past as possibly the most contested issue in fisheries governance in South Africa. Sowman 2011 *Afr J Marine Sci* 305-306. The fishing rights allocation process has historically led to a series of court challenges including the following cases: *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC); *Langklip See Produkte v Minister of Environmental Affairs and Tourism* 1999 4 SA 734 (C); *West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism* 2010 ZASCA 114. For a discussion of relevant case law, also see Diemont "Marine Living Resources" 15-1 - 15-43; Witbooi 2006 *Marine Policy* 33-35.

¹⁰⁹ Isaacs 2006 *Marine Policy* 54; Sowman 2011 *Afr J Marine Sci* 298; Branch and Clark 2006 *Marine Policy* 5; Branch 2002a *S Afr J Mar Sci* 456, 460; Harris 2002b *S Afr J Mar Sci* 506. For information regarding the status of South Africa's fish resources, see DAFF *Status of the South African Marine Fisheries Resources*.

¹¹⁰ Isaacs 2006 *Marine Policy* 54; Sowman 2011 *Afr J Marine Sci* 306. In connection with the status of fish resources also see DAFF *Status of the South African Marine Fisheries Resources*.

is also reaffirmed in the Small-Scale Policy - namely the need to ensure resource sustainability.¹¹¹ This issue is discussed in further detail in the following paragraph.

3.3 Compatibility of the Small-Scale Policy with the country's vision for its future economic development and the objective of resource sustainability

The Small-Scale Policy recognises the need to marry equity objectives with the protection of marine ecosystems by calling for sustainable patterns of consumption.¹¹² However, as alluded to above, several species of fish that are important to the informal sector, such as west coast rock lobster, abalone, and several linefish species are either depleted or are already optimally exploited.¹¹³ This implies that limited opportunities exist, if any, to increase the number of fishing rights in those fisheries sectors.

This in turn implies that, with the exception of the resources tapped by some fisheries, such as seaweed, which provide opportunities for expanding exploitation efforts, the small-scale sector can be accommodated only through the re-allocation of fishing rights.¹¹⁴ In other words, fishing quotas awarded to the commercial and recreational sectors will have to be decreased to cater for small-scale fishing communities. This dilemma goes to the heart of the importance of transformation in relation to the MLRA's other objectives, including the objectives of ensuring the sustainable use of marine living resources and promoting economic growth. There are no simple answers to this quandary and ultimately the responsibility for

¹¹¹ Sections 2(a) and (f) of the MLRA; the Small-Scale Policy 12. The need to ensure resource sustainability is also inherent in the factors to be considered in awarding fishing rights in terms of the Small-Scale Policy. See in this regard para 3.2.1 above.

¹¹² The Small-Scale Policy 4, 7, 18. The objective of the Small-Scale Policy is *inter alia* to "provide a dispensation that will contribute to efforts to eradicate poverty, ensure food security and promote equity without endangering the ecological sustainability of marine living resources". The Small-Scale Policy 12.

¹¹³ DAFF *Status of the South African Marine Fisheries Resources*.

¹¹⁴ Branch 2002a *S Afr J Mar Sci* 456.

balancing the various, at times conflicting objectives of the MLRA rests with the Minister of Agriculture, Fisheries and Forestry.¹¹⁵

In the past, that discretion was exercised in a manner which favoured the objective of achieving economic growth. Transformation ranked secondary to the perceived need on the part of government to maintain economic stability, to encourage macro-economic growth and to securing investor confidence in the fishing industry, coupled with the imperative of maintaining resource sustainability.¹¹⁶ It remains to be seen if government has the necessary appetite for implementing the Small-Scale Policy and thus for altering its historic stance on the equity/economic growth debate.

The fact that a Policy has finally been published more than a decade after the promulgation of the MLRA, hot on the heels by a Bill which furthers the implementation of the Policy, provides an indication of government's commitment to transforming the fishing industry with a view to achieving equity. In addition, the Small-Scale Policy itself indicates government's intention to provide access to marine living resources to those previously marginalised by stating that notwithstanding the fact that the implementation of the Policy is:¹¹⁷

Perhaps less attractive from a purely economic point of view (no significant surplus rent is generated by the activities) the role of Small-Scale Fisheries as a livelihood support and coping mechanism is crucial from a social point of view.

Equally, however, there are statements in the Small-Scale Policy which call that very commitment into question. For example, the Small-Scale Policy states that the decision regarding the basket of species to be harvested and the quantities that may be taken are determined primarily in relation to the quantity available given the TAC, the TAE, and the extent of existing exploitation.¹¹⁸

¹¹⁵ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 (CC) 508G-509H.

¹¹⁶ Sowman 2011 *Afr J Marine Sci* 303; Sowman 2006 *Marine Policy* 69.

¹¹⁷ The Small-Scale Policy 5.

¹¹⁸ The Small-Scale Policy 37.

Government's commitment to implementing the Small-Scale Policy may also be tested against the *National Development Plan* (the NDP), which seeks to provide a blueprint for South Africa's future economic development.¹¹⁹ The ultimate goal of the NDP is to eradicate poverty and reduce inequality by 2030. It seeks to achieve this in a variety of ways, including the creation of economic opportunities for rural communities.¹²⁰ Importantly, the NDP regards the fisheries sector as a sector for the expansion of employment and recognises that those who have historically been involved in fishing but who have frequently been ignored must be accommodated.¹²¹ In the same breath, however, the NDP expresses concern about the fact that the trend in awarding fishing licences has been to favour allocating many rights of small value rather than fewer rights of substantial value. According to the NDP this approach increases the number of participants, but also decreases the average gain per participant. This in turn undermines economic viability, which the NDP views as being of primary importance. Accordingly, the NDP states that:¹²²

Small-scale fisheries cannot be regarded as a way to boost employment. Capital-intensive industrial fisheries offer better salaries and better conditions of employment than small-scale low-capital fisheries. Reducing the rights allocated to industrial fisheries to award them small-scale operations simply cuts jobs.

The above statement places the NDP directly at odds with the steps that would, on the face of it, need to be taken to implement the Small-Scale Policy. Insofar as the NDP is an indicator of government's political will to implement the Small-Scale Policy, the prospects of success are diminished considerably.

4 Conclusion

The task of achieving transformation of and ultimately equity in the fishing industry is a task of no small measure. Achieving this objective requires government to find a balance between sustainability imperatives, economic objectives and social

¹¹⁹ The NDP is available at National Planning Commission 2012 www.npconline.co.za. The NDP states that it provides "a broad strategic framework to guide key choices and actions." The NDP 26.

¹²⁰ The NDP 218.

¹²¹ The NDP 229.

¹²² The NDP 229.

imperatives. It is further complicated by the diverse nature of South Africa's informal fisheries sector, which implies that there can be no "one size fits all" solution to addressing the continued inequities in the allocation of fishing rights.

The community-oriented, co-management approach adopted by the Small-Scale Policy, while appropriate for a significant portion of informal fishers, also has inherent limits which will potentially result in the continued exclusion of a proportion of informal fishers who operate closer to the commercial end of the spectrum and/or who do not form part of a "small scale fishing community". The Policy is silent on how those falling outside its scope will be accommodated. Ostensibly, those fishers will continue to fall under the commercial rights allocation process. While this approach is not necessarily flawed, the special circumstances and characteristics of small-scale commercial operators must be accorded due weight in the allocation of fishing rights within this sector.

Notwithstanding the criticism of the Small-Scale Policy's scope of application, the paradigm shift in government's approach to the management of informal fisheries introduced by the Policy must be welcomed as a positive development. The Policy creates the room for addressing the needs of fishing communities in a manner which accords the resource users a more active role in the management of fisheries. In doing so, the Policy follows trends elsewhere in the world.

Ultimately the contribution of the Policy towards achieving the MLRA's foundational objective depends on the political will and the resources devoted by government towards implementing the Policy. The Policy review in this contribution indicates that there are a number of gaps and issues which require further clarification and conceptualisation before the Policy is capable of successful implementation. The fact that government has finally produced a policy framework to address the inequalities in the fishing rights allocation process to date results in cautious optimism that government will also follow through on the implementation of the Small-Scale Policy. If, however, the NDP truly represents a blueprint of government's vision, the Small-

Scale Policy appears doomed to fail, as the promotion of economic growth will continue to take centre stage.

Bibliography

Berkes, Colding and Folke *Managing Small-Scale Fisheries*

Berkes F, Colding J and Folke C *Managing Small-Scale Fisheries: Alternative Directions and Methods* (International Development Research Centre Ottawa 2001)

Branch 2002a *S Afr J Mar Sci*

Branch G *et al* "Case studies on the socio-economic characteristics and lifestyles of subsistence and informal fishers in South Africa" 2002 *S Afr J Mar Sci* 439-462

Branch 2002b *S Afr J Mar Sci*

Branch G *et al* "Defining fishers in the South African context: subsistence, artisanal and small-scale commercial sectors" 2002 *S Afr J Mar Sci* 475-487

Branch and Clark 2006 *Marine Policy*

Branch G and Clark B "Fish stocks and their management: The changing face of fisheries in South Africa" 2006 *Marine Policy* 3-17

Charles "Human Rights and Fishery Rights"

Charles A "Human Rights and Fishery Rights in Small-Scale Fisheries Management" in Pomeroy R and Andrew N (eds) *Small-Scale Fisheries Management: Frameworks and Approaches for the Developing World* (CABI Wallingford 2011) 59-74

Clark 2002 *S Afr J Mar Sci*

Clark B *et al* "Identification of subsistence fishers, fishing areas, resource use and activities along the South African coast" 2002 *S Afr J Mar Sci* 425-437

DAFF *Status of the South African Marine Fisheries Resources*

Department of Agriculture, Forestry and Fisheries *Status of the South African Marine Fisheries Resources* (DAFF Pretoria 2012)

Diemont "Marine Living Resources"

Diemont M "Marine Living Resources" in Glazewski J and Du Toit L (eds) *Environmental Law in South Africa* (LexisNexis Cape Town 2013) chapter 15

FAO *International Guidelines*

Food and Agricultural Organisation *International Guidelines for Securing Sustainable Small-Scale Fisheries* (FAO Rome 2012)

Glazewski *Environmental Law*

Glazewski J *Environmental Law in South Africa* 2nd ed (LexisNexis Durban 2005)

Harris 2002a *S Afr J Mar Sci*

Harris J *et al* "The process of developing a management system for subsistence fisheries in South Africa: recognising and formalising a marginalised fishing sector in South Africa" 2002 *S Afr J Mar Sci* 405-424

Harris 2002b *S Afr J Mar Sci*

Harris J *et al* "Recommendations for the management of subsistence fisheries in South Africa" 2002 *S Afr J Mar Sci* 503-523

Hauck and Hector "Towards Abalone and Rock Lobster Co-management"

Hauck M and Hector R "Towards Abalone and Rock Lobster Co-management in the Hangklip-Kleinmond Area" Hauck M and Sowman M (eds) *Waves of Change: Coastal and Fisheries Co-management in South Africa* (University of Cape Town Press Cape Town 2003) 247-268

Hauck and Sowman *Waves of Change*

Hauck M and Sowman M (eds) *Waves of Change: Coastal and Fisheries Co-management in South Africa* (University of Cape Town Press Cape Town 2003)

Hauzer, Dearden and Murray 2013 *Marine Policy*

Hauzer M, Dearden P and Murray G "The effectiveness of community-based governance of small-scale fisheries, Ngazidja Island, Comores" 2013 *Marine Policy* 346-354

Hersoug 2011 *Maritime Studies*

Hersoug B "Fishing rights to the right people? Management options in crowded small-scale fisheries" 2011 *Maritime Studies* 15-39

Isaacs 2006 *Marine Policy*

Isaacs M "Small-scale fisheries reform: Expectations, hopes and dreams of 'a better life for all'" 2006 *Marine Policy* 30-42

Isaacs 2012 *Environmental Sustainability*

Isaacs M "Recent progress in understanding small-scale fisheries in South Africa" 2012 *Environmental Sustainability* 338-343

Raemaekers 2011 *Ocean and Coastal Management*

Raemaekers S *et al* "Review of the causes of the rise of the illegal South African abalone fishery and consequent closure of the rights-based fishery" 2011 *Ocean and Coastal Management* 433-445

Schell *Small-Scale Fisheries in South Africa*

Schell N *Small-Scale Fisheries in South Africa: Stakeholders' understanding and perceptions of co-management* (MPhil-thesis UCT 2011)

Schumann and Macinko 2007 *Marine Policy*

Schumann S and Macinko S "Subsistence in coastal fisheries policy: What's in a word?" 2007 *Marine Policy* 706-718

Sowman 2006 *Marine Policy*

Sowman M "Subsistence and small-scale fisheries in South Africa: a ten year review" 2006 *Marine Policy* 60-73

Sowman 2011 *Afr J Marine Sci*

Sowman M "New perspectives in small-scale fisheries management: challenges and prospects for implementation in South Africa" 2011 *Afr J Marine Sci* 297-311

Sowman 2011 *Environmental Management*

Sowman M *et al* "Marine Protected Area management in South Africa: New policies, old paradigms" 2011 *Environmental Management* 573-583

Sowman, Hauck and Branch "Lessons Learned"

Sowman M, Hauck M and Branch G "Lessons Learned from Nine Coastal and Fisheries Co-management Case Studies" Hauck M and Sowman M (eds) *Waves of Change: Coastal and Fisheries Co-management in South Africa* (University of Cape Town Press Cape Town 2003) 320-328

Witbooi 2006 *Marine Policy*

Witbooi E "Law and fisheries reform: Legislative and policy developments in South African fisheries over the decade 1994-2004" 2006 *Marine Policy* 30-42

Witbooi 2002 *Int J Mar Coast Law*

Witbooi E "Subsistence fishing in South Africa: implementation of the Marine Living Resources Act" 2002 *Int J Mar Coast Law* 431-440

Register of case law

Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism 2004 4 SA 490 (CC)

Langklip See Produkte v Minister of Environmental Affairs and Tourism 1999 4 SA 734 (C)

New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries 2012 ZASCA 30

West Coast Rock Lobster Association v Minister of Environmental Affairs and Tourism 2010 ZASCA 114

Register of legislation

Marine Living Resources Act 18 of 1998

National Environmental Management: Integrated Coastal Management Act 39 of 2004

Register of government publications

Gen N 1582 in GG 20303 of 16 July 1999

Gen N 1771 in GG 22517 of 27 July 2001

Gen N 474 in GG 35455 of 20 June 2012

Gen N 396 in GG 36383 of 17 April 2013

Gen N 434 in GG 36413 of 25 April 2013

Gen N 472 in GG 36459 of 13 May 2013

Gen N 473 in GG 36460 of 14 May 2013

Gen N 942 in GG 36847 of 12 September 2013

Register of internet sources

DAFF Date Unknown www.nda.agric.za

Department of Agriculture, Forestry and Fisheries Date Unknown First Draft - Plain Language Summary of Small-Scale Fishing Policy www.nda.agric.za/doaDev/fisheries/02_news_notices/Plain_Language_Summary.pdf [date of use 8 Jul 2013]

National Planning Commission 2012 www.npconline.co.za

National Planning Commission 2012 National Development Plan www.npconline.co.za/pebble.asp?relid=25 [date of use 5 Jun 2013]

List of abbreviations

Afr J Marine Sci	African Journal of Marine Science
DAFF	Department of Agriculture, Forestry and Fisheries
FAO	Food and Agricultural Organisation of the United Nations
Int J Mar Coast Law	International Journal of Marine and Coastal Law
MLRA	Marine Living Resources Act
NDP	National Development Plan
RDP	Reconstruction and Development Programme
S Afr J Mar Sci	South African Journal of Marine Science
SFTG	Subsistence Fisheries Task Group
TAC	Total Allowable Catch
TAE	Total Applied Effort