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DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES
ATTENTION: THE DEPUTY DIRECTOR GENERAL
BRANCH: FISHERIES MANAGEMENT

Customer Services
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Att: Mr. Dennis Fredericks

By Email: mlracomments@daff.gov.za

Dear Sir

RE: COMMENTS ON THE DRAFT MARINE LIVING RESOURCES AMENDMENT BILL, 2013.

1. **INTRODUCTION**

1.1 The South African Hake Longline Association ("SAHLA") is an industrial body duly recognised as such in terms of Section 8 of the Marine Living Resources Act, No. 18 of 1998 ("the MLRA") representing right holders in the Hake Longline Fishery.

1.2 The draft Marine Living Resources Amendment Bill, 2013 and the invitation to comment thereon was published in Government Gazette no. 36413 under Notice 434 of 2013 on 25 April 2013. In terms of the aforesaid notice interested and affected parties were invited to submit written comments to the Department of Agriculture, Forestry and Fisheries ("DAFF") by no later than 10 June 2013.

1.3 The MLRA is the overarching legislation governing and regulating the activity of the members of SAHLA in the fishing industry in South Africa. Its contents are critical to the ongoing participation of its members in the fishing industry and as such, it is submitted by SAHLA that the views and comments of SAHLA should be fully considered by DAFF, SAHLA being the only recognised industrial body representing right holders in the Hake Longline sector.

1.4 Furthermore, the proper consideration of SAHLA's submissions would be in line with the following provisions of the MLRA appearing at section 2 and section 8 as recorded hereunder:

2 *"**Objectives and Principles***

2(h) the need to achieve to the extent practicable a broad and accountable participation in the decision making processes provided for in this Act."

and

"8(2) The Forum shall give consideration to information submitted to it by industrial bodies and interest groups recognised in terms of subsection 1."

2. NOTICE AND COMMENT PROCEDURE – REASONABLENESS

2.1 On 25 April 2013 DAFF gazetted the Draft Marine Living Resources Amendment Bill, 2013 ("the Bill"). The Bill invited interested and affected parties to comment by no later than 10 June 2013. A "Corrected Notice" was then published in the Government Gazette on 13 May 2013 altering the time frame for submission of comments to 24 May 2013.

2.2 A "Public Hearing on the Marine Living Resources Amendment Bill, 2013" was held in Cape Town on 20 May 2013. The public hearing was advertised only on 15 May 2013, which had the end result that many attendees had not seen the bill prior to this date as not

all parties had access to the Government Gazette. It needs to be understood that many attendees were therefore given only four days in which to comment.

2.3 The principle of participation by the public is one of the cornerstones of a functioning and representative democracy, a principle which has been accepted by the Constitutional Court.[1] Our Constitution's commitment to principles of accountability, responsiveness and openness evidences a constitutional democracy which is not only representative but also contains participatory elements[2]. It was accepted that the exact measures and steps required to facilitate the process of public involvement will vary from case to case.

2.4 One of the principles used to determine the extent of public involvement is reasonableness and in determining such a Court will have regard to factors such as the intensity of the impact of the legislation on the public.

2.5 We are of the opinion that DAFF has not acted reasonably or fairly in publishing the Bill, amending the date for submission of comments and in hosting inadequate "Public Hearings". It is submitted that DAFF's amended time of 29 days from publication of the Bill for comments is unreasonably short and persons attending the "Public Hearing" on 20 May 2013 (most of which do not have access to the Government Gazette) were effectively given four days to comment on the Bill, such which Bill had only been provided in one language. This is inherently unfair and prejudicial.

2.6 The decision to shorten the timeframe for comments was published in the Government Gazette on Monday 13 May 2013, a mere 11 days before the amended deadline. It is therefore submitted that the actions of DAFF in limiting the already established submission deadline is mala fides and highly prejudicial.

2.7 It is imperative to note that the MLRA has not been extensively amended since its publication in 1998, such which is indicative of the need for a reasonable period for interested and affected parties to make proper meaningful comments in respect of the draft. The process has been rushed and prejudicial.

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[1] *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11, *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (CCT 59/2004) [2005] ZACC 14, *Matatiele Municipality and Others v President of the Republic of South Africa and Others* (2) (CCT73/05A) [2006] ZACC 12.

[2] *Doctors for Life International v Speaker of the National Assembly and Others* (note 1) at paragraph 111.

2.8 In addition to the above, DAFF's attention is drawn to the specific rules of the National Assembly (NA) and the National Council of Provinces (NCOP) ("the Rules"). These rules require that a certain process be followed before a Bill is introduced into Parliament. Similarly, in respect of Bills introduced into the NCOP, the Rules contain an almost identically worded provision (Rule 186).

2.9 Prior to introducing the bill into Parliament, an explanatory summary or the draft Bill must be published in the Gazette with an invitation to submit comments to the Secretary of Parliament. Although, these rules do not prescribe a specific timeframe for the submission of comments, it is our submission that a reasonable timeframe is at least between 30-40 days.

2.10 Accordingly SAHLA hereby submits that its rights and the rights of its members in this regard are fully reserved and that its submission of comments should not be construed as a condonation or acceptance of the actions of DAFF.

3. INAPPROPRIATE LEGISLATIVE AMENDMENT PROCEDURE

3.1 We would like to place on record that DAFF's publication of the Draft Revised General Policy on the Allocation and Management of Fishing Rights: 2013 (the draft General Policy) was premature in light of the fact that the amendments to the MLRA had not yet been finalised. The draft General Policy, although issued in the context of MLRA, refers in large part to structures and concepts for which the MLRA makes no provision. DAFF's publication of the Bill cannot serve the needs of the draft General Policy, as it merely represents the intentions of the Executive, which intentions have not yet been scrutinised and vetted through the public comment and legislative process (i.e. the parliamentary stages and processes involved in making or changing a law). A draft General Policy cannot make reference to structures and concepts that, although perhaps envisaged by a Bill, have not yet been established by an Act. We therefore submit that the order of the entire process of legislative and policy review is materially and inexcusably incorrect.

3.2 We note that DAFF intends to introduce the Bill to the National Assembly (NA) as a section 75 Bill. The Constitution of the Republic of South Africa classifies a section 75 Bill

as an ordinary Bill that does not affect the provinces and can be introduced in the NA without the mandatory approval of the National Council of Provinces (NCOP). We wish to place on record that this bill should rather be classified as a section 76 Bill as it does in our opinion affect the provinces and it furthermore addresses issues which fall within the functional areas of concurrent National and Provincial legislative competence (Schedule 4 of the Constitution).

3.3 We submit that the entire legislative and policy review process should be re-embarked upon. Amendments to the MLRA should first be allowed to run their course through the correct legislative process, culminating in the publication of an amendment Act. Once the MLRA has been duly amended and the legislative framework for the kind of policy envisaged by the draft General Policy has been established, only then can the draft General Policy be formulated and published for public comment. The publication of the draft General Policy must be accompanied by the publication of individual fishery specific policies.

3.4 The long terms rights in various sectors expire on 31 December 2013 and it is evidently the intention of DAFF to begin with the 2014 reallocations shortly. The draft General Policy envisages an entirely new order. The small-scale fishery ambitions set out in the draft General Policy cannot be legally implemented until such time as a suitable MLRA framework exists. It is therefore our submission that the timeline for the 2014 allocation process is inoperative. We submit that the only way in which to resolve the present contradictions is to enact a rollover for the rights expiring in December 2013. This rollover will provide DAFF with the necessary time to ensure that its legislative housekeeping is in order prior to rights allocations.

3.5 Accordingly, whilst we hereby submit comments on the Bill, such comments should not be construed as a condonation or acceptance of the actions of DAFF. Our rights and the rights of our members in this regard are hereby fully reserved.

4. SPECIFIC COMMENTS ON SECTIONS OF THE BILL

4.1 AD AMENDMENT OF THE LONG TITLE OF ACT 18 OF 1998:

Our submission in respect of the proposed long title of the Act is that it appears to us to be superfluous and unnecessary as the current Long Title of Act 18 of 1998 provides an appropriate introduction to the framework which is covered by the contents of the Act.

4.2 **AD SECTION 3(a):**

4.2.1 See the comments set out below regarding the proposed powers to assign responsibility to the provinces as covered in the proposed amended Sections 78(A) to 78(F) of the Bill.

4.2.2 In this regard, we are of the opinion that this bill should be treated as a section 76 bill and not as a section 75 bill. Furthermore, we wish to point out that the reference to Schedule 4 (Part A) of the Constitution in the definition of "assignment" is evidence of the Bill's Section 76 status. We submit that the contents of this bill have an obvious impact on the Provinces and cannot therefore be treated as a Section 75 Bill.

4.3 **AD SECTION 3(b):**

We note that the definition of "community" as included in the draft bill is taken directly out of the Small-Scale Fisheries Policy. The definition, in our opinion, is meaningless as any group of people who declare themselves to be a community shall be considered as such. This is surely a wholly inadequate definition. It is our submission also that the MLRA is not the correct forum to address issues related solely to this group of rights holders and wish to note that the more appropriate place to deal with this would be the small scale fisheries policy.

4.4 **AD SECTION 3 – definition of "Department", "Director-General" and "Minister":**

4.4.1 We wish to note that the definition for "Department" in terms of the draft bill has not been amended to reflect the correct governmental Department which is the "Department of Agriculture, Forestry and Fisheries" and not the "Department of Environmental Affairs and Tourism" as stated in the draft bill. It is imperative that this oversight be rectified as there is no longer a Department of Environmental

Affairs and Tourism. This oversight must be rectified in order to provide certainty as to which Department exercises the relevant jurisdiction.

4.5 **AD SECTION 3(d):**

It is our submission that the definition of "ecological sustainability" is one which gives a completely new meaning to the concept of "ecology", such which is a commonly used term in scientific and environmental literature. It is our understanding that these two terms substantially conceptualize two different ideals which cannot in our opinion be amalgamated into one common ideal as per the wording of the draft bill. In our opinion, ecological sustainability would relate directly to matters of an ecological nature, however the inclusion of the social and economic factors negates against the use of the specific term "ecological" and require an alternative definition.

4.6 **AD SECTION 3(g):**

The tense in this sentence is incorrect. The definition should read: "fisheries management area" means a demarcated area declared in terms of section 15(1)."

4.7 **AD SECTION 3(h):**

It is noted that in terms of the draft bill, the definition of "fishing harbour" has been extended to include private slipways. This inclusion of private slipways would, on our understanding, entitle the Minister to charge and/or levy fees for the use of these slipways by private persons. This is in our opinion a gross violation of the right of private ownership. The contents of this paragraph will further allow fishery control officers to yield their powers on private land which is questionable. In summary, it is our contention that the Minister cannot unilaterally extend her jurisdiction to allow jurisdiction over areas in which it does not exist.

4.8 **AD SECTION 3(l):**

It is our submission firstly that all vessels be excluded from the definition of "fish processing establishment" including freezer vessels. We note that the intention of the amendment is to limit the definition of fish processing establishment but in our view this

intention has been poorly drafted and needs rewording. In addition, after the word "cleaning" should be inserted "gutting, heading..." and after the word "crates" should be inserted "and bins...". These additions would have the effect of clearly excluding hake longline vessels from the definition of "fish processing establishments".

4.9 **AD SECTION 3(l):**

It is our submission in this regard that any attempt to narrowly define and create an exhaustive list of "gear" is impractical in the circumstances given the wide range of "gear" available.

4.10 **AD SECTION 3(k):**

It is our submission that to include in the draft bill such a wide definition of "inland water" is not justifiable as such seeks to provide DAFF with extraordinary jurisdictional powers in terms of the draft bill.

4.11 **AD SECTION 3 – definition of "mariculture":**

We note that the definition of "mariculture" remains in the draft bill however it is not included in section 18 of the bill which relates specifically to fishing activities in respect of which a right shall be granted. As a result, if mariculture is not to be governed by the MLRA anymore, all reference to mariculture should then be removed.

4.12 **AD SECTION 3 – no definition for "non-consumptive":**

We note that the term "non - consumptive" features throughout the contents of the draft bill however this term has not been defined in the definitions section of the draft bill. Are non-consumptive activities restricted to 'commercial' non-consumptive activities or are 'recreational' non-consumptive activities included?.

4.13 **AD SECTION 3(o):**

We note that a "right holder" is defined as being a person who holds a commercial fishing right in terms of Section 18 of the Act. This section indicates two classes of rights holders, the first being small scale fishers and the second being commercial fishers. It is unclear as to why the small-scale fishers are not, in terms of the draft bill, regarded as right holders for the purposes of the proposed Act and the need for the definition of "right holder" where it expressly excludes all classes of fishing apart from commercial fishing?

4.14 **AD SECTION 3(p) definition of "small-scale fisher" and "small-scale fisheries":**

4.14.1 We note that the definition of "small scale fisheries" makes reference to a "policy". We further note that this definition is the exact definition taken out of the Small-Scale Fisheries Policy and surely should be amended for purposes of the Act. We are of the view that the definition's reference to terms such as "traditionally", "predominantly" and "usually" constitute vagueness and creates uncertainty. Definitions should fix a meaning in order to avoid vague terms and should furthermore set the parameters of a thing or concept.

4.14.2 Notwithstanding the above, we question whether it is suitable and appropriate to include this definition in the MLRA. It is our contention that it is more appropriately housed in the Small-Scale Fisheries Policy where they already exist.

4.14.3 It is further submitted that should the definitions of "small-scale fisher" and "small-scale fisheries" remain in the Bill, these definitions must be accompanied by a definition of "small-scale fishing and species" which will provide a clearer indication of the kind of right which small-scale fishers may be allocated. It must be clear what type of rights will be allocated to these small-scale fishers.

4.14.4 In any event we note the definition of "small scale fishers" which limits small scale fishing to traditional operations on or in near shore fishing grounds which employs low technology or possible fishing gear usually undertaken in single day fishing trips. As such, the hake longline sector is clearly not a small scale fishing sector.

4.15 **AD SECTION 3 – definition of "subsistence fisher":**

The draft bill appears to do away with the concept of "subsistence fisherman" and on reading of the bill, we understand that subsistence fisherman will no longer be allocated rights nor will they be considered as "rights holders". The question therefore is why the definition of "subsistence fisherman" remains when it is clearly redundant and no longer applicable in terms of the draft bill.

4.16 **AD SECTION 3(q):**

4.16.1 The term "South African person" has been extended to include a grouping of persons in an unincorporated form. The draft bill, however, provides no indication as to how these groups will be regulated or held accountable. We note that there is no formal record keeping required by the members of such unincorporated groups which creates queries as to how succession within these groups will be regulated.

4.16.2 Owing to the fact that natural persons as well as incorporated bodies can be easily identified and regulated by current legislation, we submit that only these then should be rights holders in terms of the Act to ensure the protection of the resource, the protection of the person to whom the right is given as well to ensure that the right is utilized in a sustainable manner.

4.16.3 If DAFF is insistent on its inclusion of these unincorporated groups then it is imperative that some sort of framework to regulate these groups be put in place. The other suggested approach is to disregard the concept of unincorporated groups altogether and focus on structures which firstly can be established in terms of the Act (such as trusts)and moreover ones which can be regulated effectively.

4.17 **AD SECTION 4 "insertion of Section 1A in Act 18 of 1998":**

Historically, the Minister has been referred to as the "custodian" of marine living resources on behalf of and for the benefit of all persons. However the draft bill now introduces the

concept of "public trusteeship" – it is our submission that there is no justification for the amendment of the historical concept of "custodian".

4.18 **AD SECTION 6 "Amendment of Section 2 of Act 18 of 1998":**

4.18.1 It is noted that the proposed amendment of Section 1A of the Act sets out the character of the "Public Trusteeship" of all marine living resources and further requires the Minister to undertake his or her duties for the benefit of all persons. In this regard, it is our view that the separation of the Principles and Objectives (Principles appearing in Section 2 with Objectives to appear in Section 2A) is in clear conflict with this very character and it is very concerning that the proposed amendment of Section 2 carries an unreasonably heavy weighting in favour of the recognition, protection and preferential treatment of an individual class of right holders. Both the Objectives and Principles are weighted in clear favour of the small-scale class of right holders at the unfair and prejudicial expense of the other categories of rights holders.

4.18.2 We note, with concern, that the proposed Principles set out in the Bill shows that all but one of the Principles have been copied from the Small-Scale Fisheries Policy save for the principle appearing under proposed Section 2(a) which recognizes, protects and supports small scale fisheries.

4.18.3 The proposed inclusion of Section 2A into the Act contains the proposed objectives of the Act. Once again, the proposed Objectives are extracted directly from the Small-Scale Fisheries Policy.

4.18.4 It is evident that the Principles and Objectives of the entire Act as proposed in the Bill shifts the focus of the Act to the small-scale fisheries sector. This is wholly unacceptable and violates the principles of equality amongst those already operating in the fishing industry.

4.18.5 The provisions contained in Sections 6 & 7 of the Bill are in our view wholly inappropriate for inclusion in the Act and are evidently aimed at favouring a specific class of citizens and only one sector which is inherently unfair. It is our submission that these should be deleted in their entirety.

4.18.6 It is submitted that the objectives and principles of the current MLRA are sufficient and seek to balance the interests of all interested parties. It is noted that section 2(j) of the MLRA does provide the Minister with the necessary powers to ensure the protection of small-scale fisheries.

4.18.7 With regard to the proposed Objectives and Principles of the MLRA, SAHLA records that in fact the fishing industry is arguably more transformed than any other commercial industry in South Africa.

4.19 **AD SECTION 9:**

The term "small-scale" is used but not defined.

4.20 **AD SECTION 11:**

4.20.1 It is our submission that more certainty should be afforded to the concept of "or may endanger" as included in section 16 of the Act. The concept of endangered stocks of fish or aquatic life should in our view be directly linked to appropriate scientific advice.

4.21 **AD SECTION 12 – Section 18 "Granting of Rights":**

4.21.1 We wish to point out that the term "small-scale fishing" is repeatedly used in this section, but remains undefined.

4.21.2 We are of the view that the details set out in Section 18(2) are unnecessary given that these are contained in the Small-Scale Fisheries Policy and furthermore the Minister is entitled to gazette these without the need for their inclusion in the Act. It is therefore submitted the Small-Scale Fisheries Policy is the appropriate forum for such provisions and not the Act.

4.21.3 Notably, we wish to point out that from the manner in which this section is drafted, it appears that the Minister is purporting to place the Small-Scale

Fisheries Policy above the Act itself. This effectively elevates the Small-Scale Fisheries Policy and gives it a wholly inappropriate status. The Policy must comply with the relevant Act as opposed to being above the Act.

4.21.4 The time period as contained in Section 18(2) requires the Minister to establish an implementation plan for small-scale fisheries within a period not exceeding three months after the commencement of the Act. It is our submission that this period of three months is unreasonable and it is impossible for the Minister to comply with this within the time stipulated.

4.21.5 It is also important to record that historically, allocations to community entities (as envisaged in the small scale policy) has not been a successful concept. The SACFC example is evidence of this where such entities are dominated by individuals who enrich themselves at the expense of the very community that the allocations are meant to benefit.

4.21.6 The proposed addition to Section 18(3) specifying that the environmental impact assessment report which the Minister may require an applicant to submit must be in terms of the National Environmental Management Act (NEMA) is queried. We presume that this addition is in respect of activities which have been identified as listed activities in terms of NEMA, and that the Minister does not intend on requiring applicants which are not engaged in listed activities to submit environmental impact assessment reports in terms of NEMA. Clarity in this regard is sought. In your assessment of our query, we draw your attention to Section 24A of NEMA which requires the Minister of Environmental Affairs to publish a notice and invite comments before identifying a listed activity. Any intention to apply the requirement to submit a NEMA environmental impact assessment report to non-listed activities would be wholly inappropriate.

4.21.7 At section 18(5) we note the need to permit new entrants from the historically disadvantaged sector. With regards to the hake sector as a whole, SAHLA's view is that such new entrants and even small scale fishers may be accommodated by utilizing that part of the hake TAC currently apportioned to hake handline. This is due to current hake handline rights being under-utilized.

4.21.8 The proposed amendment to Section 18(7)(a), particularly the section's reference to "a person" is incorrect in our view. The Minister cannot extend the validity of a right for "a person" as such a selective roll over would not only be unfair but also prejudice the management of the sector.

4.21.9 It is our submission that the powers contained in section 18(10) are unjustifiably wide in that the Minister has the discretionary right to reallocate a fishing right. It is in our opinion imperative that this power of the Minister is limited to some degree. Furthermore we feel that the Minister should be obliged to make the right available in a proportionate manner amongst the existing rights holders until the next reallocation process as the existing rights holders have clearly demonstrated their suitability in terms of the specified criteria.

4.21.10 It is SAHLA'S's submission that a right in terms of the MLRA is a real property right.

4.22 **AD SECTION 13:**

Section 19 makes a clear distinction between the small scale fishers and the commercial fishers when dealing with the transfer of a right. The former is dealt with in terms of section 19 whereas the latter in terms of section 21. These two sections essentially contain two distinct and separate processes for the transfer of small scale rights and commercial rights. This is both an inequitable and wholly unjustifiable distinction.
Section 19 also contains powers which are dealt with extensively in the Small-Scale Fisheries Policy. There is no need for inclusion of these detailed policy considerations in the Act.

4.23 **AD SECTION 16:**

In our view the addition of section 24A is unnecessary as performance measuring can be included as conditions subject to which fishing rights are granted.

4.24 **AD SECTION 18:**

4.24.1 The amendments to this section are of grave concern to us for the following reasons: The provision that states that a right holder's right can be revoked through the actions of an agent or employee should only be applicable if it can be proven that such agent or employee was acting on the instructions of the right holder. To impute the actions of an employee or agent acting without authority onto the unknowing rights holder is wholly unreasonable .

4.24.2 Sections 28(1)(b) and (c) are in contravention of a right holder's constitutional rights as there is in these provisions a presumption of guilt.

4.24.3 The proposed Section 28(1)(f) amendment places an extremely onerous burden on all persons who have been granted rights under the Act owing to the fact that any change in the composition or structure of the right holder after the right has been granted and where the change may have lowered the score given to the right holder in the allocation process must be provided to the Department and failure thereof may result in Section 28 proceedings. It is submitted with respect that this proposed section unreasonably limits the ability of right holders to conduct their normal day to day business operations. It is conceivable that a right holder may upgrade its vessel, thereby changing its investment score; may reduce its number of employees, thereby changing its employment score; may change its service providers, thereby changing its affirmative procurement score; may have shareholders who sell shares, thereby changing its gender equity or race equity scores; may have employees resign, thereby changing its employment equity score; may change its corporate social investment strategy, thereby changing its CSI score; all of which technically would result in a breach of Section 28 of the Act. It is therefore submitted that the broad obligation to report "any changes in the composition or structure" of a right holder is unjustifiably wide. If it was the intention of the drafters that the terms "composition" and "structure" should be interpreted to mean changes in black or gender shareholding, then it is submitted that such intention should be made explicitly clear. Should it have been the intention to limit the reporting to changes in black or gender shareholding, then it is further submitted that specific reference should be made to the percentage shareholding change that should be required to warrant a need to report such change.

4.24.4 It is our submission that the wording as contained in Section 28(1)(f) is too wide in that it purports to limit the day to day running of rights holders' businesses. The section furthermore appears to be rather illogical in that it is a ludicrous and wholly unreasonable addition of DAFF's powers to insist that right holders shall remain unchanged for the duration of the rights allocation period. Given the long duration of these rights, this is wholly unreasonable and unjustifiable.

4.24.5 Section 28(1)(h) is also vague and contains no indication of the criteria to which the Minister is referring to.

4.24.6 Section 28(1)(h) is also of great concern as its records that right holders may be subject to Section 28 proceedings where they fail to meet the criteria specified in a sector for a performance preview process held in terms of Section 24A of the Act (Section 24A is the proposed amendment inserting the provisions to hold the performance measuring process). It is our submission that this allows the Minister to arbitrarily set criteria for a performance preview process after rights have been allocated and to use such criteria to effectively remove specific classes of right holders or persons from the fishing industry due to their inability to comply with same. Any such criteria used in a performance measuring process cannot be more onerous than the criteria utilised in the right allocation process, which is the standard by which right holders were assessed and allocated rights. We therefore submit that the contents of the proposed Section 28(1)(h) are unreasonable.

4.24.7 It is our submission in respect of the above proposed amendments that they amount to an unreasonable exercise of the Minister's powers and furthermore may lead to infringements of the constitutional rights of right holders which effectively amounts to an abuse of power.

4.24.8 Section 28(5) contains a reference to (1A). The bill does not appear to contain a corresponding amendment to the Act with that reference. In addition to this, it is our submission that the powers afforded to the Minister in terms of this section are overly broad and have the potential to detrimentally affect rights which is unjustifiable.

4.25 **AD SECTION 29, "Amendment of Section 42 of the Act"**

The proposed section 42(5) contains an open ended list of management and conservation measures, however, these lists are not defined nor are they easily quantifiable at any given time. It is our submission therefore that right holders are prejudiced by having to comply with management and conservation measures which are essentially unknown to them. It would in our opinion be more effective if such measures were included in the permit conditions for each specific sector.

4.26 **AD SECTION 30. "Amendment of Section 43 of the Act"**

4.26.1 Section 43 of the Act deals with Marine Protected Areas which the Minister has purported to amend in terms of the draft bill. In accordance with the Proclamation of 2010 (referred to above), it is our understanding that the Department of Water and Environmental Affairs has been charged with the responsibility over these areas. On what basis, therefore, is the Minister of Agriculture, Forestry & Fisheries proposing to amend rules relating to areas which are not under her jurisdiction.

4.26.2 In addition to the above, section 43 now makes provision for the Minister to allow harvesting activity in marine protected areas. This would, in our opinion, undermine the reason why these areas were declared marine protected areas. Our submission is that there should therefore be no allowance for harvesting activity.

4.26.3 We wish to note that notwithstanding the need for the protection of designated marine protected areas, we are of the opinion that provision should be made for the Minister to de-proclaim a marine protected area should this become necessary.

4.26.4 In order for the Republic of South to comply with international treaties and conventions which require a state to proclaim a certain percentage of their waters as marine protected areas, the fisheries management areas (which are proclaimed in accordance with Section 15 of the Act) in our view should be taken into account in determining the total area allocated for marine protection.

4.27 **AD SECTION 36 "Amendment to Section 62 of the Act"**

4.27.1 The proposed insertion of section 62(2A)(a) contains no time period within which the investigation must be completed. Without this, the process is open to abuse in that the investigation could potentially be unfairly and prejudicially stalled by the investigating officer.

4.27.2 The proposed amendment of section 62(2A)(c) contains parameters which are unclear in light of the failure to define the term 'serious'.

4.28 **AD SECTION 40 AND 41 "Amendment of Section 78 of the Act and inclusion of Sections 78A to 78F"**

4.28.1 We are uncertain as to why and what the intention of the Minister is in assigning the administration of matters under the Act to provincial authorities. This is needed in order to make useful comments in this regard.

4.28.2 Sections Sections 78A to 78F clearly demonstrate the effect of this Bill on the Provinces. It furthermore shows the reason as to why the bill should classified as a Bill under Section 76 of the Constitution and not Section 75.

4.29 **AD SECTION 43 "Amendment of Section 80 of the Act"**

4.29.1 The purported removal of the appeal provisions is noted and instead of appealing to the Minister, parties must now appeal to the Marine Living Resources Review Board ("MLRRB").

4.29.2 It is our submission that the proposed Section 80(4)(b)(i) should not refer to "a retired judge" but rather to "a judge" as it is not correct to require a person to have 15 years legal experience as a retired judge. To require the person to have been retired for 15 prior to being able to chair the MLRRB is surely incorrect.

4.29.3 In section 80(5)(a) the word "degrees" should be corrected to read "degree".

4.29.4 The proposed amendment to Section 80B of the bill limits the right of a person to submit a review application to only those who have a direct interest in such a decision. Notably, section 80 of the Act, allowed any affected person to appeal to the Minister against a decision taken by any person acting under a power which was delegated. The proposed requirement of "direct interest" is therefore not objective enough and may be open to abuse. The concept of "affected person" is in our view more appropriate. Furthermore, the proposed Section 80B is restrictive in that the submission of a review in respect of decisions by "the Minister or his or her delegate, or the head of a department or his or her delegate." This raises concerns as to the scenario where the official may not be a direct delegate of either the Minister or a head of department. We submit therefore that the current wording of the section is more appropriate and need not be amended.

4.29.5 It is unclear whether the MLRRB is envisaged as an appeal or review board. Although the proposed section speaks of the decision of the MLRRB which is required to be communicated to the appellant. The proposed section also contains a provision which calls on the Chairperson of the MLRRB to make rules which govern the procedure of the MLRRB, such which includes the procedure for lodging and opposing an appeal. The name, however, appears to indicate a different intention. The MLRA has always provided for a right of appeal to the Minister and we are of the opinion that this right to appeal should remain and the MLRRB should be clearly envisaged as an appeal body.

4.29.6 There are similarities to be noted in respect of the MLRRB and the Water Tribunal, both of which have been established in terms of prevailing legislation. If the MLRRB is intended as a replica of the Water Tribunal, it should borne in mind that the Water Tribunal is clearly an appellant body and should therefore operate in the same manner.

4.29.7 It is noted that there is no time frame outlined as to the outcome of any matter which is referred to the MLRRB. We submit that a time frame will afford rights holders an opportunity to seek further recourse if necessary in an attempt to expedite an outstanding decision that has been lodged with the MLRRB.

4.29.8 It is noted that section 80D of the Bill contains a provision that appellants will have 21 days after receipt of the decision of the MLRRB to appeal to the High Court. It is our submission that this period is too short and a period of 30 days should be considered.

5. CONCLUSION

In conclusion therefore, SAHLA accordingly requests that DAFF carefully consider the submissions set out herein and SAHLA invites DAFF to contact it directly if there are any issues or comments raised which require further detail or clarity.

We thank you for your consideration.

Yours faithfully

P.P Sectfield

SOUTH AFRICAN HAKE LONGLINE ASSOCIATION