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14 May 2005

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM
ATTENTION: THE DEPUTY DIRECTOR GENERAL
THE RIGHTS VERIFICATION UNIT
11 LANSDOWNE ROAD
CLAREMONT
SQUID POLICY COMMENTS

FAX NO: (021) 670 1782

Dear Sir

RE: COMMENTS ON THE DRAFT GENERAL POLICY ON THE ALLOCATION AND MANAGEMENT OF LONG TERM COMMERCIAL FISHING RIGHTS / THE POLICY FOR THE ALLOCATION AND MANAGEMENT OF COMMERCIAL FISHING RIGHTS IN THE SQUID FISHERY: 2005

1 MANDATE

We hereby confirm that we have been instructed by the South African Squid Management Industrial Association ("SASMIA") to submit comments on its behalf in respect of the Draft General Policy on the Allocation And Management Of Long Term Commercial Fishing Rights: 2005 ("the draft General Policy") read together with the Draft Policy For The Allocation And Management Of Commercial Fishing Rights In The Squid Fishery: 2005 ("the Sector Policy"). In this regard, we annex hereto marked "A" our letter of appointment which reflects such mandate.

2. INTRODUCTION

2.1. SASMIA is an industrial body duly recognised as such in terms of Section 8 of the Marine Living Resources Act, No 1998 ("the MLRA").

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- 2.2. SASMIA currently represents a majority of those parties who have an interest in the South African Squid industry, which includes most importantly, 93% of rights holders in such industry.
- 2.3. The aforementioned draft policies were published on or about 1 March 2005 and called for comment by 4 April 2005. SASMIA submits that the time period required for comment does not provide sufficient time to workshop and discuss all the issues that arise therefrom at industry level. Accordingly, in the submissions, SASMIA has dealt with those issues which its members have indicated are the most important to the industry and/or require clarity or further detail from the Department. Therefore, the failure of SASMIA to deal with each specific issue raised in the policies should not be deemed to mean that SASMIA is in agreement with the Department's draft policy in respect of the particular issue in question.
- 2.4. SASMIA would like to record that the allocation of long term fishing rights and the draft policies which will form the basis of such allocations, constitutes in its view, the most significant event to be implemented and regulated by the MLRA. The principal advisory forum for the Minister established in terms of the MLRA is the Consultative Advisory Forum ("CAF"). Accordingly, SASMIA registers its concern that despite this significant event in the history of the fishing industry in South Africa the Minister has not consulted the CAF and the CAF has not advised the Minister in respect of the draft policies and rights allocation process. In this regard, we specifically refer to the obligations on the Minister and the CAF referred to in Sections 6, 7, 8 15(1) and (2), Section 21(3) and Section 24 of the MLRA. The Act envisages the CAF as broadly representative and multi-disciplinary and allows for the CAF to advise the Minister and the Minister to consult the CAF on a variety of issues including the broad ranging objectives and principals set out in Section 2 of the MLRA. The aforesaid draft policies must be lead by the principals and the objectives in Section 2 of the MLRA and accordingly, it is SASMIA's view that the Minister should be consulting the CAF in relation to the draft policies, the issues arising therefrom and the allocation process as whole in the various sectors. The purpose of this process would be to allow for the Minister to receive balanced and wide ranging advice which does not only emanate from the Department and the various consultants and advisors employed by the Department but also emanates from an independent, representative and multi-disciplinary body which has been specifically created by statute to advise the Minister.
- 2.5. The Department has stated that the policies will inform the decision maker when allocating rights for the long term and as such, it is submitted by SASMIA that the views and comments of SASMIA should be fully considered by the Department, SASMIA being the only recognised industrial body representing rights holders in the sector.

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- 2.6. Furthermore, the proper consideration of SASMIA's submissions would be in line with the following provisions of the MLRA:

"Objectives and Principals

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."

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

- 2.7. It is also SASMIA's view that both the General and Sector Specific Policy should have a substantial degree of consistency with the previous medium term rights allocation policy so as not to prejudice those rights holders who have shaped and paced their progress based on such previous policy and its criteria. Accordingly, as will become evident, SASMIA submits that there are certain important policy shifts contained in the draft policies which are inconsistent with the policy applied in the medium term rights allocation process.

- 2.8. In these submissions, SASMIA intends dealing with the following issues relating to the sector policy (and in certain cases which also relate to the General Policy):

- 2.8.1. The profile of the fishery;
- 2.8.2. Transformation profile of the fishery after the medium term rights allocation process;
- 2.8.3. Certain overarching fishery objectives;
- 2.8.4. The duration of the rights;
- 2.8.5. New entrants;
- 2.8.6. The following exclusionary criteria:
 - 2.8.6.1. the form of the Applicant;
 - 2.8.6.2. compliance.

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- 2.8.7. The following comparative balancing criteria:
 - 2.8.7.1. *transformation;*
 - 2.8.7.2. *Investment in the fishery;*
 - 2.8.7.3. *reliance on Squid;*
 - 2.8.7.4. *local economic development;*
 - 2.8.7.5. *compliance.*
 - 2.8.8. Empowerment of Squid fishers;
 - 2.8.9. Effort allocations;
 - 2.8.10. Suitable vessels;
 - 2.8.11. Consolidation of participants;
 - 2.8.12. Vessels and fishing effort;
 - 2.8.13. Monopolisation;
 - 2.8.14. Observer programme;
 - 2.8.15. Permit conditions.
- 2.9. As regards other issues arising out of the General Policy, due to time constraints, SASMIA intends dealing with the following specific issues in point form:
- 2.9.1. Use of Departmental database / accessibility of data relied upon;
 - 2.9.2. Access to information / other Applicants' applications and annexures;
 - 2.9.3. Design of criteria and weighting;

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- 2.9.4. Non-discretion of decision maker in respect of exclusionary criteria;
- 2.9.5. Considering information concerning a holding Company or subsidiary Company;
- 2.9.6. The determination of executive management;
- 2.9.7. Disallowing of rights holders to re-enter the commercial fishery where fishing rights have been alienated;
- 2.9.8. Pre-registration of vessels;
- 2.9.9. Excess quantum left after appeals and increases in the TAE;
- 2.9.10. Transfer of commercial fishing rights.

3. **SECTOR SPECIFIC ISSUES**

3.1. **Profile of the Fishery**¹

- 3.1.1. As regards the profile of the fishery set out in the policy, SASMIA would like to elaborate on and correct certain issues referred to.
- 3.1.2. The Department has stated that *"in 1989, the jig fishery registered its highest catch of 9 800 tons"*. In fact, in the 2003 / 2004 season the Squid sector recorded its highest catch of approximately 12 000 tons confirming the healthy state of the resource.
- 3.1.3. As regards the average price of Squid in 2004 being quoted as R30,00 per kilogram, it must be recorded that the current Squid price is now only at approximately R20,00 to R23,00 per kilogram and at present, there is a backlog in the market in that there is a surplus of catch held in cold storage.
- 3.1.4. The Department has also assumed that *"since 1988, the fishery has been closed once a year for four weeks in an attempt to counter the effects of 'creeping effort'"*. This statement is not in fact correct, as the fishery was never closed to counter the

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effects of “creeping effort”. SASMIA does not know what the Department’s definition of “creeping effort” is nor how it has been quantified (if at all). In fact, the closed season mentioned by the Department was initiated voluntarily by the industry in order to allow the Squid stock a period during which it could reproduce without interruptions. Furthermore, the duration of subsequent closed seasons was decided on a year by year basis, subject to the recommendations of Squid scientists who base their recommendations on biomass surveys.

- 3.1.5. As regards the Department’s statement that increases in vessel efficiency and catch technology have “lead to increases in fishing efficiency”, this is a very general assumption which has not in fact been researched or quantified.
- 3.1.6. Finally, as regards the profile of the fishery, due to the fact that the Sector Specific Policy will be paramount in informing the Department in the rights allocation process and in particular, how it will allocate rights in a particular sector, SASMIA is duty bound to inform the Department of the following further background to the fishery particularly relating to effort and transformation.
- 3.1.7. SASMIA records that in 1998 there was a redistribution of Squid rights where 30% of all existing rights were withheld with 10% thereof going towards a reduction of effort and the other 20% being redistributed to historically disadvantaged persons. In addition, in 1999 up to a further 10% of effort was sacrificed by certain of the larger companies in the sector so as to further promote transformation. Accordingly, even long before the medium term allocation of rights, there was a pooling of effort for the benefit of transformation. Furthermore, many of those rights holders who contributed towards this pool are still in the industry today and in some manner should be credited with this 20% effort contribution towards transformation.
- 3.1.8. Following from this and what may have been ignored by the Department is that at the commencement of the Squid industry, there was a significant number of historically disadvantaged operators who then later alienated their rights allocations.
- 3.1.9. In summary therefore, it is submitted that there has already been an ebb and flow of transformation in the Squid sector. Such transformation needs to be taken into account in the current Squid Sector Policy and in particular, regarding the weighting

¹ Page 4 and 5 of the Sector Policy



of transformation under the balancing criteria used to score Applicants. We deal further with transformation later in these submissions.

3.2. Transformation of the Squid Sector after Medium Term Rights Allocation²

- 3.2.1. The Department states that “allocation records show that 33% of rights holders are majority owned by blacks; 61% of workers are black; almost all right holders are small and medium sized enterprises”.
- 3.2.2. Later in the draft Sector Policy under the heading “Transformation” the Department again quotes 33% of rights holders in this fishery are black owned and 32% are black managed.
- 3.2.3. SASMIA submits that the transformation profile quoted by the Department in the policy as referred to above may reflect the position as at the date of application in September 2001 but in fact does not reflect the true transformation profile of the Squid sector to date. SASMIA further records that during 2004 an Economic and Sectoral Study (“ESS”) was conducted in the Squid sector which all medium term rights holders had to complete and submit to the Department. SASMIA has been able to establish from its members that should the Department take into account the transformation profile of the Squid sector based on this latest ESS data, it would show a significant difference to the transformation profile as stated by the Department in the draft sector policy. In short, SASMIA submits that the Squid sector is far more transformed than the percentages set out in the draft Sector Policy.
- 3.2.4. Part of the information taken into account by the Department during the medium term rights allocation was an economic and sectoral database in the Squid fishery which amongst other things set out the ownership and employment profile of the industry. Accordingly, in this long term rights allocation process and in determining the weighting to be applied to transformation (which would also effect the new entrant policy), it is only fair, reasonable and rational for the Department to again take into account the latest ESS data which was compiled during the 2004 survey. This should of course be a better measure of transformation throughout the medium term rights period.

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3.2.5. SASMIA urgently requires access to a copy of the 2004 ESS data.

3.3. Certain of the Overarching Fishery Objectives³

- 3.3.1. As stated in the previous paragraph regarding transformation profile, it is submitted by SASMIA that the current transformation profile relied upon by the Department is inaccurate and accordingly, the overarching objective of “substantially increasing the transformation profile of” the Squid fishery is based on inaccurate and outdated information.
- 3.3.2. As regards the integration of the so called “restricted rights”, SASMIA cautions that this can only be carried out in such a way as to avoid any further increase in effort in the Squid fishery. A suggestion by SASMIA (subject to proper research) would be to compare the average annual landings per “restricted man” to average annual landings per “unrestricted man” and thereafter calculate how many restricted men it would take to equal the effort of one “unrestricted man”. These are SASMIA’s initial thoughts on this particular topic and prior to any particular integration approach being adopted by the Department, SASMIA submits that it should be properly consulted regarding this issue and workshops should be held where various suggestions can be tabled and discussed.
- 3.3.3. As regards the “encouragement of further investment in vessels” SASMIA is of the view that such investment in new vessels should only be in respect of the upgrading of existing vessels and not to allow new entrants or increased effort in the sector. Investment in infrastructure and other areas of the Squid sector will be commented on later. In addition, SASMIA’s view does not necessarily mean that current restricted rights holders be given preference. Catch returns and levies paid must be carefully analysed to assess performance.
- 3.3.4. As regards the Department’s preference for the allocation of rights to Applicants who predominantly “rely on Squid” for their income, comments thereon will be submitted later herein. (Paragraph 3.7.7 below)

² Page 5 of the Sector Policy

³ Page 6 of the Sector Policy



- 3.3.5. As regards “affirming Applicants from the Eastern Cape”, this must not be to the exclusion of those established rights holders in other areas such as Cape Town/Hout Bay who were also pioneers in the industry.

3.4. The Duration of the long term Squid Fishing Rights⁴

- 3.4.1. The Department has proposed allocating commercial rights in the Squid sector for only a period of 8 years which period has apparently been based on the transformation profile of the fishery and the “substantial fluctuations in resource abundance”.
- 3.4.2. SASMIA again reiterates that this policy stipulation by the Department is incorrect and is based on outdated information. Accordingly, should the aforementioned 2004 ESS data indicate an increase in the transformation profile of the Squid sector (as SASMIA submits), the Department should determine that the duration of the long term rights in the Squid sector be extended in proportion to such increase in the transformation profile.
- 3.4.3. As regards the alleged “substantial fluctuation” in the resource, SASMIA submits that the formal industry has been in existence for the past 21 years since 1984 and has shown itself to be sustainable at present levels of exploitation during this period. In essence the industry has adapted to the fluctuations in the resource accepting this as a natural consequence of this particular fishery. However, this fluctuation should not be of sufficient significance to justify limiting the duration of the right. Rather than limiting the duration of the right, SASMIA points out that there are sufficient alternative management tools to control the sustainability of the sector and further, it is submitted that the longer the duration of the right, the greater the vested interest of the rights holder in sustainable utilisation thereof.
- 3.4.4. Furthermore, with vessels ranging in cost between R3 Million and R6 Million, together with the erratic catch patterns of Squid, an eight year allocation makes it extremely difficult to raise capital from banks and investors.

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3.5. New Entrants⁵

As regards new entrants, the Department has stated that “new entrant Applicants will be considered and maybe preferred over existing right holders if the inclusion will assist in the transformation of the Squid fishery”. Again, SASMIA submits that this policy regarding new entrants has been based on inaccurate and outdated information by the Department regarding the current transformation profile in the Squid sector. Accordingly, this aspect of the policy needs to be amended by the Department having properly ascertained the true transformation profile of the Squid sector with particular reference to the ESS data referred to above. In fact, in most of the other Sector Policies and also in the General Policy, the Department’s policy is that new entrants will only be permitted to replace unsuccessful right holder Applicants. Due to the fact that in respect of the Squid sector, the Department has shifted its policy from the draft General Policy regarding new entrants, it is further testimony to the fact that the Department must be certain as to its facts regarding the transformation profile of the Squid sector.

3.6. Certain of the Exclusionary Criteria:

Form of Applicant⁶

3.6.1. SASMIA has identified that not all current rights holders in the Squid fishery are Close Corporations or Companies. The Department has stated that Applications from natural persons (i.e. individuals or sole proprietors) and trusts will not be considered. It is submitted with respect that this policy is contrary to the provisions of the MLRA in that Section 18(4) allows for a South African person to hold rights with the definition of South African person in terms of Section 1 of the MLRA including both South African citizens (i.e. individuals or sole proprietors) and trusts. Furthermore, this provision of the draft policy is inconsistent with the previous policy of the Department in the medium term rights allocation process where trusts and individuals were in fact allocated rights. Accordingly, it is submitted that it would not be legitimate for the Department to fail to consider natural persons and trusts in the allocation process.

⁴ Page 6 of the Sector Policy

⁵ Page 6 of the Sector Policy

⁶ Page 7 of the Sector Policy



Compliance⁷

3.6.2. Whilst SASMIA commends the Department on its compliance efforts, it must be noted that in the medium term rights allocation process the current policy proposed in respect of compliance and convictions was not applied. Although SASMIA does not currently have any knowledge of any of its members who would be directly affected by this provision, it is submitted that this policy should be applied with caution by the Department so as not to cause any injustices to shareholders of Applicants particularly where a director or a fellow shareholder may have a conviction of which other shareholders and directors were not aware (criminal records are not made public).

3.7. Certain of the Balancing Criteria:

Transformation⁸

3.7.1. As stated previously, SASMIA once again reiterates that the transformation profile quoted by the Department is inaccurate and based on outdated information and needs to be reviewed based on more up to date information and in particular, the ESS data submitted in 2004.

3.7.2. In general and with particular reference to the policy stipulations of the Department regarding transformation set out in the General Policy, it is SASMIA's view that based on the importance of transformation as a criteria in the entire allocation process, the criteria need to be more clearly stipulated together with the relevant weighting ascribed to the various elements of transformation. It is SASMIA's view that since the medium term rights allocation, the Broad Based Black Economic Empowerment Act of 2003 ("the BEE Act") has been introduced and must be taken into account as far as is reasonably possible by the Department in determining the qualification criteria in respect of transformation. Although there is no particular transformation charter for the fishing industry it is submitted that the codes of good practice issued in terms of the Act together with any balanced score card developed in terms thereof should be utilised by the Department in the rights allocation process. To the contrary, in the General Policy (Page 40) the Department has

⁷ Page 7 of the Sector Policy

⁸ Page 8 of the Sector Policy



argued against using the BEE Act and the balanced score card in this allocation process.

- 3.7.3. It is submitted that this policy stipulation by the Department may be in contravention of the BEE Act.

Investment in the Fishery⁹

- 3.7.4. In this respect, as well as crediting investments in suitable vessels, the Department intends crediting investments in processing and marketing infrastructure. With respect, SASMIA is of the view that particularly with regarding to marketing, the industry already has too many people in competition with each other attempting to marketing Squid to the very same customers. As such, for each of the rights holders to embark upon their own exporting initiatives will create chaos in the market and will serve no benefit to the Squid sector.

- 3.7.5. As regards processing, it is recorded that the processing of Squid mostly takes place on board the vessel where the fish is in fact washed, graded, sorted by size, blast frozen, glazed, packaged (bagged), and stored. The only on-shore processing comprises of separating the blocks by size, boxing, storing and thereafter transporting for export. The export market requires whole and uncleaned Squid and if the fish was processed any further in South Africa this could reduce the value of the product by up to 60%.

- 3.7.6. Accordingly, as regards points scored for processing and marketing infrastructure, SASMIA requests that the Department takes into account the above submissions particularly with regard to the weighting of such point scoring compared to other criteria.

Reliance on Squid¹⁰

- 3.7.7. Although many of the rights holders in the Squid sector rely on Squid fishing for more than 50% of their gross annual income, there are a number of rights holders who are also involved in other sectors which is in line with the Draft General Policy

⁹ Page 8 of the Sector Policy

¹⁰ Page 9 of the Sector Policy



of the Department regarding multi-sector involvement. Accordingly, SASMIA cannot support the policy stipulations which prejudices certain rights holders who have legitimate involvement outside of the Squid sector and in various sectors which would have also necessitated a certain level of investment. Again this was not part of the policy of the medium term rights allocations and the application of this current policy stipulation may lead to irrational, unfair and unreasonable results.

- 3.7.8. Furthermore, the penalisation of Applicants who have shareholders who derive income from outside the fishing industry may result in a disinvestment in the industry and such policy needs to be carefully considered before being applied.

Local Economic Development ¹¹

- 3.7.9. The Department would like to positively score those Applicants that elect to land their catches at small harbours along the Cape South Coast and in the Eastern Cape Province. With respect, SASMIA submits that this is more suited to the handline sectors and is not practical in the context of the Squid industry. The product of the Squid rights holders is export quality Squid which is sea frozen within 3 to 4 hours of being caught. This frozen product must be landed at an established port with a suitable cold storage and infrastructure. Port Elizabeth, Port St. Francis and East London are the only ports within the range of the resource that fulfill these practical criteria. Furthermore, Port St. Francis can only handle a limited number of vessels. Accordingly, the application of this policy stipulation by the Department is with respect not sustainable.

- 3.7.10. SASMIA is of the general view that it would be unreasonable to penalise rights holders who off load catch at the most convenient port for them.

Compliance ¹²

- 3.7.11. SASMIA cannot support the policy stipulation that "rights holders, including their directors or controlling shareholders, who are currently being investigated for breaches of the MLRA, whether criminal or administrative, will not be allocated a Squid fishing right until the conclusion of the investigation ". From a criminal law

¹¹ Page 10 of the Sector Policy

¹² Page 10 and 11 of the Sector Policy



perspective, it is submitted that this policy stipulation is in breach of an Applicant's constitutional rights to a fair trial in terms of Section 25 of the Constitution and in particular, the right of an accused to be presumed innocent until proven otherwise.

3.7.12. As regards any administrative procedures instituted under the MLRA with particular reference to Section 28 thereof, it is submitted that again, until such procedure is finalised the person involved should be presumed innocent failing which it is submitted that such person's right to fair administrative justice will also have been breached, which right is again also contained in the Constitution. Section 7 of the Constitution confirms that the fundamental rights set out in chapter 3 of the Constitution "shall bind all legislative and executive organs of State at all levels of Government".

3.7.13. From a practical point of view, it is SASMIA's submission that if there is ultimately a conviction under the MLRA then Section 28 of the MLRA specifically allows for a procedure to revoke, reduce or cancel the right allocated. Therefore, should a particular investigation or criminal matter or administrative procedure against a particular rights holder not have been completed at the time when rights are allocated, this should not prohibit an allocation to the particular Applicant concerned as there is a procedure specifically in place to allow for the future revocation, cancellation or reduction of such rights.

3.8. Empowerment of Squid Fishers ¹³

3.8.1. The Department has stated its intention to develop a Squid crew list on which crew members will have to register and thereafter successful Applicants will have to select their crew members from such list.

3.8.2. SASMIA records that the Squid industry has been extremely proactive as regards labour issues in the industry and has engaged the Department of Labour, SAMSA and the South African Revenue Services with regard to labour issues. It is submitted that it is only the Squid industry and the Deep-sea Trawl industry who have engaged Government Department's regarding labour issues as aforesaid. Furthermore, the Department has not provided any detail as to how the Squid crew list will be regulated.

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- 3.8.3. SASMIA submits that this is an issue which definitely requires close consultation with the industry as it already appears that the Department has ignored the efforts of the sector in dealing with the labour issue. In this regard, we attach hereto marked "B" and "C", letters from SAMSA and the Department of Labour respectively confirming the industry's commitment to labour and Safety matters.

3.9. Effort Allocations

- 3.9.1. The policy stipulations by the Department as regards effort are one of the greatest concerns of SASMIA.
- 3.9.2. By way of background, SASMIA submits that a fair determination of the minimum viable effort for various lengths of vessels was made in 2001 prior to the allocation of the medium term rights. This determination was done by a committee comprising of respected and experienced industry persons and a senior scientist from the Department. However, during the medium term rights allocations unfortunately the Department deviated from these recommendations which resulted in much ambiguity, inconsistency and confusion. As a consequence, identical vessels have different effort allocated to them.
- 3.9.3. Fortunately, the confusion has since settled down during the medium term period and it is SASMIA's recommendation that the status quo be maintained i.e that the length categories continue to be utilised as a guide for future allocations and that vessels currently in this sector continue to operate at the lower manning levels brought about by the vessel length categorization. In addition, where vessels have elected and have been permitted to operate at manning levels less than those determined by the vessel length category, SASMIA agrees that those vessels must continue to be manned at those same levels in order to maintain stability. Therefore, in summary, vessels currently in the Squid industry are not certified at their maximum manning levels but rather at their minimum viable effort.
- 3.9.4. The Department's proposal is to effectively allocate effort to vessels based on their certification at maximum manning levels. As a result, it is submitted that this will increase the effort in the Squid sector by between 15 and 20% which may result in a reduction of the current number of vessels in the sector which in turn will result in a loss

¹³ Page 11 of the Sector Policy



To:

THE DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM
THE DEPUTY DIRECTOR GENERAL

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of jobs. In order to maintain stability, SASMIA again recommends that the status quo must be maintained. This approach is also in line with the precautionary approach adopted by the Department as regards the management of the resource. This is particularly relevant in the Squid sector which the Department has stated is “currently optimally exploited”.

- 3.9.5. If SASMIA understands the Department’s proposal correctly, then all that Applicants need to do is have their Safety Certificates amended to reflect the legal maximum crew component in respect of their particular vessel. This can be done legally and without losing any fishing time and as a result, the effort in the sector as stated previously, will increase by 15 to 20% by merely amending vessel Safety Certificates. As stated previously, SASMIA is of the view that this increased effort will destabilize the industry.
- 3.9.6. As regards the Department’s intention to reserve a pool “of approximately 30 vessels for allocation to Applicants that are transformed or have invested in Squid vessels”, SASMIA submits that it is not viable or practical in a TAE sector such as the Squid sector that a proportion of the TAE can be allocated in terms of quantum criteria. For instance, with “man” as the unit of effort and a specific number of “men” permitted on any given vessel, the question arises which 30 vessels will be reserved for the pool. SASMIA requires further detail from the Department on this issue.
- 3.9.7. This was not a policy which was applied during the medium term rights allocation and in SASMIA’s view may lead to multiple vessel owners in the sector who have in theory invested the most being prejudiced.
- 3.9.8. The Department’s proposal lacks sufficient detail and in any event, in SASMIA’s view would be very difficult to apply fairly without resulting in unreasonable and irrational allocations. There is also an ambiguity in the wording of the Department in that it firstly states that:
- 3.9.8.1. The pool of vessels will be allocated to Applicants that are transformed **or** who have invested in Squid vessels.
- 3.9.8.2. Secondly, the Department states that the pool will be allocated to those Applicants that have scored the highest on transformation criteria **and** who

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requested more than one vessel. These two statements contradict each other.

3.9.8.3. SASMIA proposes that rather than have a transformation pool, each of the Applicants should be scored on their own merits based on the Department's criteria with respect to transformation and therefore existing rights holders will be balanced against each other based on such criteria regardless of the number of vessels nominated by an Applicant. This way will eliminate the potential prejudice to multiple vessel owners.

3.10. Suitability of Vessels

3.10.1. The Department refers to the minimum SAMSA certified length of approximately 8 metres. SASMIA draws the Department's attention to the fact that there is a difference between registered length and overall length and furthermore, not all vessels are registered in terms of the Merchant Shipping Act. Most of the vessels who are under 25 tons are licensed in terms of Section 68 of the Merchant Shipping Act and accordingly, are not registered vessels. Therefore the length referred to in the Section 68 License (which incorporates the Safety Certificate) is calculated differently to the lengths reflected on the Safety Certificate and Registration Certificate of a registered vessel. Despite the confusion during the medium term rights allocation relating to allocations by vessel length, the situation in the industry has now stabilized and SASMIA requests that the status quo be maintained with regard to effort allocation per vessel based on length. However, having said this, it is important for SASMIA that the Department is aware of the different definitions of length which are applied by SAMSA depending on the vessel category.

3.10.2. Furthermore, regarding the suitability of vessels, SASMIA strongly recommends that a suitable vessel should be a vessel capable of producing export quality Squid of at least the average industry standard and as such, should be HACCP certified for Squid.

3.11. Consolidation of Participants

3.11.1. The Department has stated that it intends facilitating the consolidation of rights holders under certain circumstances. In addition, in the General Policy reference is made to the fact that Applicants must be Close Corporations or registered Companies in order

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to apply. The Department has indicated that should an individual currently hold fishing rights and thereafter form a CC or Company, it will recognise such Company or CC as the previous existing rights holder if the majority shareholder therein is such individual.

3.11.2. Furthermore, the Department refers to the "majority shareholder" in the Company or CC having to be such individual. SASMIA requires clarity as to the definition of a majority shareholder. Does it mean that such shareholder owns 51% or more of the shares in the entity or does it mean that the shareholder owns the most shares in the entity compared to each of the other individual shareholders. For instance, such individual might have 40% shares in the Company with all the other shareholders having only 10% each. Depending on the definition, an individual rights holder may be limited in the level of transformation it can score on.

3.11.3. SASMIA submits that this has great cost implications for such Applicants particularly with regard to Income Tax and Capital Gains Tax due to the fact that the vessel must now be transferred into the new entity. The costs of this transfer in turn could severely prejudice the level of transformation which an Applicant can sustain in its shareholding. It would have been ideal had the Department consulted with SASMIA regarding this issue in order that the Department together with SASMIA could have approached the South African Revenue Services for some form of tax relief in these situations. There are also other costs involved such as accounting fees, legal fees and other admin costs.

3.12. Vessels and Fishing Effort¹⁴

3.12.1. The Department has stated that there are presently 163 Squid vessels in the fishery but according to SASMIA records obtained from the Department as at 21 February 2005 there are 138 vessels in the fishery. Although the Department has referred to the TAE possibly being revised down, SASMIA requires that the Department also acknowledge that there is also the possibility that the TAE could be revised upwards should the scientific evidence support this. It would be difficult to see how a TAE could be revised down i.e. which vessels will be removed? Regarding the curtailing of effort in the fishery by reducing the use of lights and closing areas to fishing and lengthening the closed season, SASMIA requires the Department to consult with it prior to introducing any of such limitations.

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3.12.2. SASMIA submits that initial TAE levels need to be carefully calculated through close consultation with industry and working groups.

3.13. Monopolisation¹⁵

The Department has not provided sufficient detail as to what it regards as monopolisation and a definition thereof is required. Furthermore, it is SASMIA's view that it is not strictly within the Department's mandate to police monopolisation. There are fairly sophisticated competition laws in South Africa which apply to this area of industry.

3.14. Observer Program¹⁶

SASMIA requests that the Department stipulate whether the manning limitations on Squid vessels will be revised in order to accommodate observers.

3.15. Permit Conditions¹⁷

3.15.1. As regards permit conditions, SASMIA is concerned that the Department may be utilising permit conditions for purposes other than the reason why they are required. It is SASMIA's view that permit conditions should be limited in general to determine sustainable conservation, management and compliance measures but not to regulate overarching objectives of the Act e.g. transformation.

3.15.2. Furthermore, SASMIA requests that they be properly consulted with regard to permit conditions and in this regard, requests the Department to workshop any permit conditions at the Squid working group and at the proposed Squid management working group so as to follow the established consultation procedure. This will be in line with the objectives of the Act that there be a broad and accountable participation in the decision making process.

¹⁴ Page 14 of the Sector Policy

¹⁵ Page 14 of the Sector Policy

¹⁶ Page 15 of the Sector Policy



4. **GENERAL POLICY ISSUES**

4.1. **Use of Departmental Database / Accessibility of Data Relied Upon**¹⁸

SASMIA is not confident that the data on the Department's database is updated with particular reference to the ESS survey referred to above. SASMIA has not been granted access to such survey and accordingly again requests access thereto.

4.2. **Access to Information / other Applicants' Applications and Annexures**¹⁹

The Department does not intend releasing other Applicants' applications unless ordered to do so by a Court. SASMIA is of the view that legally this would prohibit any meaningful challenge on appeal or in review proceedings as a challenging Applicant would not be able to access whether it has been balanced correctly against another Applicant if it does not know what information has been submitted by that other Applicant. The Promotion of Access to Information Act also is too time consuming to obtain the necessary information in time for the lodging of appeals.

4.3. **Design of Criteria and Weighting**²⁰

4.3.1. Again, SASMIA is concerned that the database is to be used for the development of criteria and weighting particularly where it is SASMIA's view that the Department's database in respect of the Squid sector is outdated as referred to above. SASMIA is of the view that the weighting ascribed to the various criteria needs to be made known to the rights Applicants prior to the lodgement of applications.

4.3.2. In a point scoring allocation process, the weighting ascribed to the various criteria is of paramount importance and without the sector and/or General Policy referring in detail to such weighting and the points ascribed to the criteria, it is very difficult for industry to comment on the various criteria.

4.3.3. For example, it would be important for SASMIA to know what percentage of the total point scoring transformation would count and what percentage investment in a vessel

¹⁷ Page 15 of the Sector Policy

¹⁸ Page 17 of the General Policy

¹⁹ Page 18 of the General Policy



would count. If for instance, the Department indicated it was only going to give 1% of the scoring towards investment in a vessel then clearly this policy would require comment from SASMIA to inform the Department of the importance of an investment in a vessel in the Squid sector. Unfortunately, due to the fact that the Department has not made known the weighting and point scoring, SASMIA is unable to give informed comment thereon. In summary therefore, the Department is not properly consulting the industry and the public at large on its policies as an essential part of the policies (weighting and scoring) has not been made public. SASMIA must record with regret that the proposed consultation process in respect of the policies is severely flawed.

4.4. Non-discretion of Decision Maker in respect of Exclusionary Criteria²¹

Regarding the exclusionary criteria, SASMIA is concerned that the Department's policy is that the decision maker will not be afforded the discretion to condone non-compliance with such exclusionary criteria. By doing so, the Department is unreasonably limiting the Minister's powers of exemption in terms of Section 81 of the Act.

4.5. Considering information concerning a Holding Company or Subsidiary Company²²

In the medium term rights allocation the Department did take into account the data pertaining to holding Companies particularly where its subsidiaries were the rights holding Companies. This shift in policy may cause prejudice to certain rights holders unreasonably.

4.6. The Determination of Executive Management²³

The Department's proposed policy to regard the top 1.7% of salary earners in an entity as constituting its executive management is arbitrary and in SASMIA's view could in many cases result in irrational and unreasonable results by a mere blind application thereof.

²⁰ Page 26 of the General Policy

²¹ Page 37 of the General Policy

²² Page 41 of the General Policy

²³ Page 42 of the General Policy



4.7. Disallowing of Rights Holders to Re-enter Commercial Fishery where fishing rights have been Alienated²⁴

The Department has stipulated that rights holders who have sold or in any way alienated a fishing right will not be allowed to re-enter the commercial fishery under a different guise. Furthermore, the Department has stated that this applies to shareholders or members who have sold more than 10% of an enterprise. SASMIA requires clarity on this point in particular, there may be circumstances where an existing member or shareholder of an entity has sold 10% or more in such entity for the purposes of transformation and retains a shareholding in such entity. SASMIA recommends to the Department that rigid adherence to this principal may in fact cause prejudice to genuine operators within the fishery who have elected to restructure their enterprise and/or to transform.

4.8. Pre-registration of Vessels²⁵

4.8.1. The Department has requested as essential that vessels are pre-registered with the Department. SASMIA requires clarity as to what pre-registration means. Does it mean that the vessels must already be in the particular sector or merely registered administratively on the Department's database? This is of vital importance to SASMIA and its members when nominating the vessels in their applications.

4.8.2. As regards vessels to be nominated, SASMIA submits that the Department should not consider vessels which have been in the past de-listed from the Squid Sector and have not thereafter been properly readmitted to the sector via the Fisheries Effort and Vessel Change Advisory Committee

4.9. Excess Quantum left after appeals and Increases in the TAC

It is submitted by SASMIA that if there is excess TAC after appeals or increases in the TAC from time to time, such excess should be made available firstly to existing rights holders who have been successful with their Section 18 rights applications or their appeals. If the Department intends allocating such excess in any other way, it must be through a valid Section 18 rights application process.

²⁴ Page 45 of the General Policy

²⁵ Page 51 of the General Policy



4.10. Transfer of Commercial Fishing Rights

The Department has in the past indicated that it was developing a detailed policy regarding Section 21 transfers of fishing rights. To date, such policy has not been published. Whilst SASMIA appreciates the window periods proposed by the Department, there may be times which fall outside of the window periods where a rights holder will need to transfer a fishing right and accordingly, SASMIA would advise against the Department limiting itself as regards approving Section 21 transfers. SASMIA is further of the view that Section 21 of the MLRA does not extend to the sale of interest or shares within Close Corporations or Companies which hold fishing rights. To extend Section 21 to these instances would lead to absurd and irrational circumstances and would probably in the long term devalue shareholding in fishing entities. The Department's proposed policy in this regard is not in line with the provisions of Section 21 of the Act.

5. CONCLUSION

- 5.1. In conclusion therefore, SASMIA accordingly requests that the Department carefully consider the submissions set out herein and with particular reference to:
- 5.1.1. The verifying of data and information on which the Department intends relying on when determining criteria and weighting in respect to transformation; and
 - 5.1.2. The allocation of effort to successful rights holders and in particular, the non-suitability of the transformation pool of vessels as proposed; and
 - 5.1.3. The changing of the effort allocation system per vessel and in particular, the non-suitability of utilizing the SAMSA certified maximum crew per vessel.
- 5.2. SASMIA is proud to state that the South African Squid industry is one of the few loligo inshore fisheries worldwide that has survived longer than 10 years. The mere fact that the industry has survived for the past 20 years is adequate proof that the safety measures and TAE levels set in consultation with the scientists have been successful. The fragile balance of optimum exploitation and the precautionary approach has been fine tuned over the last two decades and any deviation in effort allocation and boat manning levels could upset this balance.

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- 5.3. Finally, SASMIA invites the Department to contact it directly or via ourselves if there are any issues or comments raised which require further detail or clarity.
- 5.4. We thank you for your consideration.

Kind regards

Peter Edwards

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