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CONTENTS • INHOUD

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GOVERNMENT NOTICE

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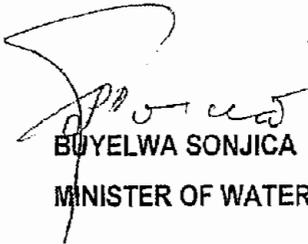
Government Notice

789 Marine Living Resources Act (18/1998): Publication of the Policy for the Transfer of Commercial Fishing Rights 3 32449

GOVERNMENT NOTICE

DEPARTMENT OF ENVIRONMENTAL AFFAIRS**No. 789****31 July 2009****MARINE LIVING RESOURCES ACT, 1998 (ACT NO. 18 OF 1998)****PUBLICATION OF THE POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS**

I, Buyelwa Patience Sonjica, the Minister of Water and Environmental Affairs, hereby publish the Policy for the Transfer of Commercial Fishing Rights in South Africa, as set out in the Schedule hereto, for general information.



BUYELWA SONJICA

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

SCHEDULE**POLICY FOR THE TRANSFER OF COMMERCIAL FISHING
RIGHTS**

Note: This policy is applicable only to the transfer of commercial fishing rights. It does not deal with the transfer of subsistence fishing rights, fish processing establishments, mariculture (marine aquaculture) rights or other non-consumptive rights or permits, such as boat-based whale watching and white shark cage diving.

This policy is also available at www.deat.gov.za or www.environment.gov.za

TABLE OF CONTENTS

Glossary of Terms

1. Introduction
2. Transformation in the Fishing Industry
3. Purpose and Objectives of this Policy
4. General Principles
5. Principles applicable to Companies and Close Corporations
6. Sale of Shares/Members Interest in Companies and Close Corporations
7. Conversion from a Close Corporation to a Company and *vice-versa*
8. Principles applicable to Individuals
9. No Moratorium
10. Duration of Right
11. Management and Administration of the Transferred Right
12. Fees

GLOSSARY OF TERMS

TERM	DESCRIPTION
MTRH	Medium-Term Right Holder.
NE	New Entrant applicant.
Cluster A	hake deep sea trawl, hake inshore trawl, small pelagics, Patagonian toothfish, KZN prawn trawl, south coast rock lobster and horse mackerel.
Cluster B	hake longline, west coast rock lobster (offshore), squid, seaweed, tuna pole and demersal shark.
Cluster C	handline hake, west coast rock lobster (nearshore).
Cluster D	netfish, KZN beach-seine, oysters and mussels.
Large Pelagics Longline Sector	tuna and swordfish longline fishing sector.

1. INTRODUCTION

- 1.1 This *Policy on the Transfer of Commercial Fishing Rights* is issued by the Minister of Water and Environmental Affairs ("the Minister").
- 1.2 The policy is applicable only to the transfer of commercial fishing rights. It does not deal with the transfer of subsistence fishing rights, fish processing establishments, mariculture (marine aquaculture) rights or other non-consumptive rights or permits, such as boat-based whale watching and white shark cage diving.
- 1.3 A right of access as contemplated in the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (hereinafter referred to as the "MLRA") is not a property right and should be understood as statutory permission to harvest a marine resource for a specified period of time. Accordingly, cancellation or revocation does not constitute the expropriation of a property right within the meaning of section 25 of the Constitution or the Expropriation Act, 1975 (Act No. 63 of 1975). This is clear from section 18(6) of the MLRA, which provides

that a fishing right is valid for the period determined by the Minister (or his delegate) whereafter it automatically reverts back to the State and may be re-allocated (to the previous right holder or another entity) in terms of the applicable provisions of the MLRA. A fishing right is granted to a specific person or entity and, in terms of section 21 of the MLRA, the right may not be transferred without the approval of the Minister or his delegate. Therefore, any transfer of the fishing right to a third party requires approval.

- 1.4 The transfer of fishing rights is dealt with in terms of section 21(2) of the MLRA, which provides that fishing rights may be transferred, if an application therefore has been made to the Minister, and is subject to the approval and conditions that the Minister (or his/her delegate) may determine. This policy sets out the principles that will govern the transfer of fishing rights.
- 1.5 The *General Policy on the Allocation and Management of Long-Term Commercial Fishing Rights: 2005* ("the General Policy") states that consolidation of fishing rights in the fishing industry is necessary and that the Minister will look favourably on consolidation as long as transformation is not undermined in the process. The General Policy States that:

"Consolidation is also necessary to rationalise the industry, to improve compliance and to reduce the administrative burdens and costs to the Department and Right Holders. This means reducing the number of entities, particularly those that share the same or similar shareholders and executive management team and physical address in a particular industry".

The consolidation of Right Holders is driven by the commercial realities of operating in a competitive sector that is subject to the vagaries of the market and the economic trends in the fishery. These factors include the price of fuel, decreasing catch rates and the fluctuating exchange rate.

- 1.6 It is expected that some Right Holders will apply for the transfer of rights in order to consolidate with other Right Holders in order to increase their efficiency. There are a number of other reasons why Right Holders may apply for a transfer. Reasons could for

example be where Right Holders are placed in or facing sequestration or liquidation, to restructure corporate entities, scaling down of non-core activities, and in the case of individuals, physical incapacity or death, or simply a desire to exit the fishing industry.

- 1.7 This policy sets out the principles for the transfer of fishing rights in the period following the allocation of long-term rights.

2. TRANSFORMATION IN THE FISHING INDUSTRY

- 2.1 The Department has endeavoured to improve the level of transformation in the fishing industry. This it sought to do under the medium-term rights allocation process in 2001 and more particularly, in the long-term rights allocation process of 2006.
- 2.2 Transformation was a key criterion in the allocation of fishing rights in the 2001 medium-term rights allocation process. The policy guidelines that framed the 2001 rights allocation process stated that fishing rights could not be transferred for the first two years of the duration of the right. This was to ensure that the transformation levels of Right Holders were not diminished. A number of applications for transfers of rights have been submitted towards the end of the four-year medium-term rights allocation process as Right Holders began to prepare for the long-term rights allocations process. These applications were submitted largely because Right Holders realised that they had failed to transform or to implement the strategies contained in the 2001 rights applications, and felt that this may prejudice their chances of being granted a long-term fishing right.
- 2.3 The commercial fisheries have transformed significantly since 1994 through two processes. Firstly, Right Holders that are corporate entities (close corporations and companies) transformed by transferring shares to historically disadvantaged individuals, thereby increasing the black ownership of the entity. Secondly, fishing rights were allocated to new entrants that were largely transformed.
- 2.4 The Department must be satisfied that the application for a transfer of a right is not a way in which untransformed applicants gain access to fishing rights, thus undermining the

objectives and policies of the MLRA and the long-term rights allocation process. This policy seeks therefore to guard against dilution of transformation in the industry.

2.5 Subsequent to the long-term rights allocation process of 2005-6, the Codes of Good Practice on Black Economic Empowerment was published (Government Gazette GN 112 of 9 February 2007) under the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) ("the B-BBEE Act") came into effect on the date of its publication.

2.6 Section 10 of the B-BBEE Act states the following:

Every organ of state and public entity must take into account and, as far as is reasonably possible, apply any relevant code of good practice issued in terms of this Act in-

- (a) determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law;*
- (b) developing and implementing a preferential procurement policy;*
- (c) determining qualification criteria for the sale of state-owned enterprises; and*
- (d) developing criteria for entering into partnerships with the private sector."*

2.7 The Department is clearly an organ of state,¹ and there can be no doubt that the allocation of fishing rights is a "concession or other authorisation" in terms of the MLRA.

2.8 As stated in the General Policy on the Allocation of Long-term Fishing Rights:

"The [B-BBEE] Act and the draft codes were considered in the development of this policy and the fishery specific policies. However, owing to the nature of the rights allocation process, the Minister of Environmental Affairs and Tourism has thus far not encouraged the adoption of charters for fishing sectors and has not adopted the weighting and benchmarks set in the draft codes relating to ownership and management. When allocating fishing rights, the delegated authority is called upon to compare applicants with each other, rather than against an external benchmark. Transformation is an extremely

¹ "organ of state" is defined to mean (my underlining):

- (a) a national or provincial department as defined in the Public Finance Management Act, 1999 (Act 1 of 1999);
- (b) a municipality as contemplated in the Constitution;
- (c) Parliament;
- (d) a provincial legislature; and
- (e) a constitutional institution listed in Schedule 1 to the Public Finance Management Act, 1999 (Act 1 of 1999).

important consideration in this comparative balancing process. The process is competitive and no "benchmark" can be set in advance. In a sector that is not sufficiently transformed, applicants with higher transformation scores than others will always stand a better chance of being allocated a right or a larger proportion of the available TAC or TAE. The policy is that within such a competitive comparative process, the adoption of charters or benchmarks is not always the appropriate vehicle to further transformation."

- 2.9 For the purposes of a transfer of a commercial fishing right the level of transformation will be assessed on the basis of ownership and management control.
- 2.10 The Department will also employ the Broad-Based Black Economic Empowerment Act's Codes of Good Practice. Applicants would be required to submit a Broad-Based Black Economic Empowerment verification certificate or provide the Department with their BEE contributor level as well as a detailed substantiation thereof. Applicants are reminded that a qualifying micro-enterprise (turnover less than R 5 million per annum) is deemed to be a Level 4 contributor unless the enterprise chooses to submit information that indicates that it is higher level contributor. Applicants wishing to claim the deemed Level 4 contributor status should submit a letter from their auditors or accounting officers demonstrating that their turnover is less than R 5 million in the last financial year.

3. PURPOSE AND OBJECTIVES OF THIS POLICY

This policy sets out the framework and principles for the transfer of commercial fishing rights in the period following the allocation of long-term rights. The transfer of commercial fishing rights may also facilitate broadening of economic opportunities and participation in the fishing industry.

4. GENERAL PRINCIPLES

- 4.1 There are two broad principles that will be considered in the assessment of applications for the transfer of fishing rights. First, whether the transfer will lead to a consolidation of Right Holders and effort in the sector. Second, the degree to which the transformation of the transferee and the black ownership of the total allowable catch (TAC) and total allowable

effort (TAE) will change should the transfer be approved. Consideration should also be given to policy regarding multi-sector involvement and monopolies.

4.2 Multi-sector involvement

In general, it is not a policy objective to preclude or discourage the holding of rights in more than one fishery. This is subject to two exceptions. Firstly, Right Holders in the Cluster A and B fisheries (including their controlling shareholders or members and members of their executive management teams) will not be allowed to hold commercial rights in the Cluster C and D fisheries, which are fisheries reserved for small and medium enterprises and individual fishers reliant on those fish stocks for their livelihood. Right Holders in Clusters C and D who intend to obtain shares or interests in Cluster A and B, may be permitted to transfer their Cluster C and D rights to other natural persons. Secondly, Right Holders will not be permitted to hold rights in more than one Cluster C or D fishery, except that: Right Holders may hold any combination of the following rights: white mussel, west coast rock lobster (near shore) and netfish (Gill and Treknet and Beach-Seine); A KZN Beach-Seine right may also be held with an oyster right.

4.3 Monopolies

While the Department encourages the consolidation of Right Holders in the fishing industry, the Department is opposed to monopolies which may operate to the detriment of smaller Right Holders in any fishing sector. The Department is concerned, in particular, that the smaller Right Holders in the fishing industry are not able to fully realise the value of their allocations due to their size. The Department will not determine a maximum threshold of the TAC that any one Right Holder may hold or control but will monitor whether any large Right Holders act in a manner contrary to fair competition practices.

In approving the transfer of rights, the Delegated Authority will also have regard for the General and Sector specific policies.

5. PRINCIPLES APPLICABLE TO COMPANIES AND CLOSE CORPORATIONS

5.1 An application for a transfer of a commercial fishing right to a current Right Holder in the same sector of the fishing industry as the transferor, will be favourably considered if:

- the transferee is at least as transformed as the transferor;
- has access to a suitable fishing vessel that is already in the fishing sector;
- has invested in the fishing industry;
- the transferee, its controlling shareholders or members have not been convicted of an offence under the MLRA, the Prevention of Corruption Act, 1992 (Act No. 94 of 1992), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) or any offence involving dishonesty.
- has a valid tax clearance certificate;
- is not in arrears with any levies, licence fees or other payments, catch returns or other documentation required by the Department in terms of the applicable permit conditions.

5.2 Where the transferor can demonstrate that it has made serious efforts, but has been unable to secure a Right Holder, including but not limited to economic reasons, in the same sector that is at least as transformed as the transferor, and wants to transfer the fishing right, then consideration will be given to the following, in the order of ranking set out below:

5.2.1 A Right Holder in the same sector, although not as transformed as the transferor;

5.2.2 A Right Holder in another sector, which operates in clusters A, B and large pelagic longline, handline hake and KZN beach-seine fishing sectors that is at least as transformed as the transferor;

- 5.2.3 A Right Holder in another sector which operates in clusters A, B and large pelagic longline, handline hake and KZN beach-seine fishing sectors that is less transformed than the transferor;
- 5.2.4 (a) An unsuccessful medium-term Right Holder applicant in the same sector in the long-term rights allocation process which is at least as transformed as the transferor;
- (b) An unsuccessful medium-term Right Holder applicant in the same sector in the long-term rights allocation process which is less transformed than the transferor;
- (c) An unsuccessful medium-term Right Holder applicant in another sector in the long-term rights allocation process which is at least as transformed as the transferor;
- (d) An unsuccessful medium-term Right Holder applicant in another sector in the long-term rights allocation process which is less transformed than the transferor
- (e) An unsuccessful new entrant applicant in the same sector in the long-term rights allocation process which is at least as transformed as the transferor;
- (f) An unsuccessful new entrant applicant in that sector in the long-term rights allocation process which is less transformed than the transferor;
- (g) An unsuccessful new entrant applicant in another sector in the long-term rights allocation process which is at least as transformed as the transferor;
or
- (h) An unsuccessful new entrant applicant in another sector in the long-term rights allocation process which is less transformed than the transferor.

- 5.2.5 in exceptional circumstances, an individual / entity from outside the fishing industry. A full motivation must be provided for this transfer. In such circumstances, the transferee should be at least as transformed as the transferor of the fishing right. This will be assessed with regard to the ownership of shares and management in the transferee as well as having regard to the sector specific criteria as detailed in the relevant fishery policy.
- 5.3 If, in the opinion of the Minister, a transfer would not be in the interest of the proper management of the fishing industry as it may for example lead to an undue concentration of rights in the hands of one or more companies, resulting in the monopoly in the sector, the transfer may be refused.
- 6. SALE OF SHARES/MEMBERS INTEREST IN COMPANIES AND CLOSE CORPORATIONS**
- 6.1 The alienation of shares/member's interest in right holding entities for purposes of the MLRA may require a transfer of a right.
- 6.2 Approval for transfer of a right is not required if the sale of shares shares/member's interest does not result in change and control of the company or close corporation and the company/close corporation remains at least as transformed as at allocation of the long-term right. The Right Holder (except in the case of a public company) will still be required to complete a form informing the Department so that the change in shareholding/member's interest can be recorded.
- 6.3 If the sale of shares/members interest results in change of control of the company/close corporation or results in the company/close corporation not being as transformed as at date of allocation of the long-term right an application for transfer of the right is required and the following will be considered:
- The change in shareholding/members interest relating to race and gender in the right holding entity;

- The number (percentage) of shares/member's interest to be sold;
- Whether the entity or person acquiring the shares/member's interest is an existing Right Holder in the fishing industry and if so, in which sector;
- The investment of the transferee entity or person acquiring the shares/member's interest in the fishing industry;
- The fishing performance of the entity or person acquiring the shares/member's interest;
- Whether the proposed transfer of shares/member's interest will lead to a consolidation of either Right Holders, or of effort;
- there is evidence that the transferee will be a 'paper quota' and not become directly involved in the catching or processing of the fish caught

7. CONVERSION FROM A CLOSE CORPORATION TO A COMPANY OR VICE-VERSA

- 7.1 Where there is a straight conversion from a close corporation to a company, or vice versa (no change in shareholding/member's interest), the Right Holder is required to inform the Department of such change and supply all relevant documentation in that regard.
- 7.2 In circumstances where there will also be a change in shareholding, then the application will be considered in terms of the section 6.2 and 6.3 above applicable to a change in shareholding/member's interest.

8. PRINCIPLES APPLICABLE TO INDIVIDUALS

- 8.1 There are two instances where an individual may transfer a right:
- 8.1.1 to a close corporation where the individual holds 50% or more of a member's interest in that close corporation in the hake handline sector only; or
 - 8.1.2 to another individual in the following fisheries; west coast rock lobster (nearshore), oyster, white mussel, traditional linefish, KZN beach-seine, netfish, abalone (divers). In this case a right may only be transferred to the spouse/partner or

dependent (in the same household or family) in circumstances where the Right Holder is deceased or has become physically unable to utilise the right. In exceptional circumstances, consideration will be given to transferring the right to a person not in the same household or family, but in the same community, provided such person has proven historical involvement in fishing and is at least as transformed as the transferor.

8.2 Subject to 8.1.2 the individual transferee must demonstrate that:

- 8.2.1 he / she will personally utilise the fishing right by being onboard the nominated vessel, or personally harvesting the resource;
- 8.2.2 he /she is dependent on fishing as a major source of income;
- 8.2.3 the transferee is a South African person as defined in Section 1 of the MLRA;
- 8.2.4 the transferee has not been convicted of an offence under the MLRA, having regard to the severity of the offence, the Prevention of Corruption Act, 1992 (Act No. 94 of 1992), the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004), the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) or any offence involving dishonesty;
- 8.2.5 the transferee is not in arrears with any levies, licence fees or other payments, catch returns or other documentation required by the Department in terms of the applicable permit conditions;
- 8.2.6 has access to a suitable fishing vessel that is already in the fishing sector; and
- 8.2.7 has a valid tax clearance certificate.

9. NO MORATORIUM

An application for the transfer of a commercial fishing right can be submitted at any time during the duration of the right.

10. DURATION OF RIGHT

The transfer of a fishing right is valid only for the remainder of the original period for which the right was granted under the long-term rights allocation process.

11. MANAGEMENT AND ADMINISTRATION OF THE TRANSFERRED RIGHT

The transferred right will be subject to the fisheries management and administration provisions as described in each of the commercial fishing sector policies. The obligations of the Right Holder will be in terms of provisions of the MLRA, Regulations and permit conditions.

12. FEES

Fees payable for the transfer of a fishing right was amended in consultation with the Minister of Finance and was published in the Government Gazette GN 397 of 30 April 2009.