

GENERAL NOTICE

NOTICE 1767 OF 2007

DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM

MARINE LIVING RESOURCES ACT, 1998 (Act No. 18 of 1998)

INVITATION TO COMMENT ON THE DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS, 2007

The Minister of Environmental Affairs and Tourism hereby publishes for comment the Draft Policy for the Transfer of Commercial Fishing Rights.

Interested and affected parties are invited to submit written comments on the Draft Policy for the Transfer of Commercial Fishing Rights in the manner provided for in this Notice.

Interested parties may submit written comments to the Department by 16h00 on Friday 1 February 2008 by mail, by hand, e-mail or telefax transmission. Please note that comments received after the closing date may be disregarded.

<u>By mail</u>	<u>By Hand</u>	<u>By Email</u>
Subject: Comments on Draft Policy for the Transfer of Commercial Fishing Rights Customer Services Centre, Private Bag X2, Roggebaai, 8012	Subject: Comments on Draft Policy for the Transfer of Commercial Fishing Rights Customer Services Centre, 2 nd Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town	<u>rightstransfer@deat.gov.za</u>
		<u>By FAX</u> 021 421 5151
		<u>Telephonic queries</u> 021 402 3263

The draft policy and application forms are also available on the Department's website www.deat.gov.za OR www.mcm-deat.gov.za The draft policy is also available in Afrikaans, Isixhosa and Isizulu on the Department's website.

IN THE CASE OF INCONSISTENCY BETWEEN THE ENGLISH, AFRIKAANS, ISIXHOSA AND ISIZULU TEXT, THE ENGLISH TEXT PREVAILS.



environment & tourism

Department
Environmental Affairs and Tourism
REPUBLIC OF SOUTH AFRICA

DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS: DECEMBER 2007

Note: This policy is applicable only to the transfer of commercial fishing rights (total allowable catch or total applied effort). It does not deal with the transfer of subsistence and small-scale commercial 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.mcm-deat.gov.za

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1. Introduction

- 1.1 This *Draft Policy on the Transfer of Commercial Fishing Rights* is issued by the Minister of Environmental Affairs and Tourism ("the Minister").
- 1.2 The policy is applicable only to the transfer of commercial fishing rights (total allowable catch or total applied effort). It does not deal with the transfer of subsistence and small-scale commercial 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 The transfer of fishing rights is dealt with in terms of section 21(2) of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) ("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. The policy sets out the conditions that will govern the transfer of fishing rights.
- 1.4 The position regarding the transfer of fishing rights following the allocation of medium-term fishing rights was set out in Government Notice 1771 of 27 July 2001. As set out in that Government Notice, applications for the transfer of fishing rights would generally not be favourably considered during the first two years from the date the allocation is made by the Minister or his delegate. The reason for this was to discourage "paper quotas". In addition, the following policy considerations had to be taken into account when considering whether to grant the transfer of a right:
- The extent to which "paper quota" holders are created or prolonged;
 - Transformation performance; and
 - The degree to which rational consolidation of and stability in the fishing industry will be achieved.
- 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 requirements 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 were 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.

3. **Purpose and Objectives of this Policy**

This policy sets out the criteria and requirements for the transfer of 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 Criteria**

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 black ownership 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.

5. Criteria – Companies and Close Corporations

5.1 An application for a transfer of a fishing right to a current Right Holder in the same sector of the fishing industry as the transferor, will be generally favourably considered if the transferee is at least as transformed as the transferor. This is because such a Right Holder has already been evaluated and measured in terms of the criteria for long-term rights and therefore has demonstrated that it:

- has access to a suitable fishing vessel that is already in the fishing sector;
- has invested in the fishing industry;
- has not been convicted of an offence under the Marine Living Resources Act, 1998 (Act No. 18 of 1998);
- 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;
- is sufficiently transformed.

5.2 Where the transferor can demonstrate that it has made serious efforts, but has been unable to secure a Right Holder in the same sector that is at least as transformed as the transferor, and wants to acquire 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, but in the same cluster of the fishing industry that is at least as transformed as the transferor;

5.2.3 a Right Holder in another sector but in the same cluster of the fishing industry;

- 5.2.4 an unsuccessful applicant in the long-term rights allocation process;
- 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.

6. Criteria – Listed Companies

In the case of listed companies, an application for a transfer of a right is required where shares are to be traded in a single tranche.

7. Criteria – Individuals

7.1 There are two instances where an individual may transfer a right:

7.1.1 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

7.1.2 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.

7.2 The individual transferee must:

- 7.2.1 demonstrate that he / she will personally utilise the fishing right by being onboard the catching vessel, or personally harvesting the resource;
- 7.2.2 be dependent on fishing as a major source of income; and
- 7.2.3 have proven historical involvement in fishing.

8. Transfer of Shares

- 8.1 The alienation of shares/member's interest in right holding entities is regarded as a change in ownership and therefore requires a transfer of a right. This is because the sale or alienation of shares/member's interest can result in the change of control of an entity with the result that the transformation objectives of the MLRA and the Department are undermined. For this reason right holding entities intending to sell or transfer shares/member's interest in the right holding entity, must submit an application form for the transfer of a right.
- 8.2 Approval of the Department is not required if 10% or less of the shares/member's interest are being transferred, unless this results in a change in control of the company or close corporation, i.e. the effect of such a transfer would be that there is a new controlling shareholder/member who holds at least 51 % of the shares/member's interest. However, if the latter does not occur, then the transferor Right Holder must still complete and submit the application form for a transfer so that the change in shareholding/member's interest can be recorded.
- 8.3 The following will be considered when an application is submitted for a transfer of more than 10% of the member's shares/interest:
 - The change in ownership of the total shareholding/member's interest (race and gender) in the right holding entity;
 - The number (percentage) of shares/member's interest to be transferred;

- 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 in the fishing industry;
- The fishing performance of the transferee;
- Whether the proposed transfer of shares/member's interest will lead to a consolidation of either Right Holders, or of effort;
- Whether the proposed transfer of shares will result in the change of controlling interest in the entity.

9. Conversion from a Close Corporation to a Company or *vice-versa*

9.1 A conversion from a close corporation to a company (or *vice versa*) is regarded as a change in ownership and therefore requires a transfer of rights in terms of section 21 (2) of the MLRA and accordingly the Right Holder must submit an application form for the transfer of a right.

9.2 The transfer will be approved where there is a straight conversion from a close corporation to a company, or vice a versa (no change in shareholding/member's interest).

9.3 In circumstances where there will also be a change in shareholding, then the application will be considered in terms of the section above applicable to a change in shareholding/member's interest.

10. Winding up, Liquidation or Sequestration

On the granting of a final order of liquidation of a juristic person, or sequestration of a natural person's estate, the fishing right shall revert to the State. No application for the transfer of the right will be granted.

11. Attachment of Fishing Right

11.1 In the execution of a warrant, the Sheriff of the Court may attach a fishing right or permit in an attempt to satisfy a judgment creditor. This is done by attaching the original grant of right or permit held by the Right Holder (or by the Department where the permit has been issued but has not been collected). The consequence of such an attachment is that the Right Holder will not be able to engage in fishing as it is a requirement that the original valid permit be on board the vessel. Where a right or permit has been attached, the Department will record the attachment on its records and ensure that no duplicate right or permit is issued.

11.2 A right that is to be sold in execution of an order of Court must be on the suspensive condition that the consent of the Minister is required before the transfer can be effected. An application for such a transfer of a right must be submitted to the Department for consideration and approval in terms of this policy.

12. Refusal of Transfer of Right

12.1 In general, a transfer will not be considered or approved in the following instances:

12.1.1 the transferee is not a South African person as defined in Section 1 of the MLRA;

12.1.2 the transferee has been convicted of an offence under the MLRA;

12.1.3 the transferee is in arrears to the Department of fees and levies;

12.1.4 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;

12.1.5 the effect of the transfer will be that it will not result in a consolidation of Right Holders or of effort;

12.1.6 if, in the opinion of the Minister, such a transfer would not be in the interest of the proper management of the fishing industry. This could arise in circumstances where the transfer may lead to an undue concentration of rights in the hands of one or more companies. In such cases the application for the transfer of a fishing right could be referred to the Competition Board for its recommendation; and

12.1.7 if, a duly completed application form for the transfer of a right has not been submitted together with the application.

13. No Moratorium

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

14. 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.

15. Fishing Right as Security

15.1 Consent from the Department is not required if the fishing right is to be used as collateral or otherwise encumbered as security for a loan or guarantee from a bank or other financial institution. The inherent risk in approving a loan or guarantee on the security of a fishing right will be determined by *inter alia* the following factors:

15.1.1 Whether the Department will permit the fishing right to be sold or transferred in terms of this policy;

15.1.2 That the fishing right can be revoked at any time. This can happen not only where the Right Holder has committed an offence under the MLRA, but also when the Right Holder has not effectively utilised the right;

15.1.3 The remaining period of validity of the fishing right;

15.1.4 Whether the Right Holder will be sequestrated or liquidated.

16. 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.

17. Fees

Fees payable for the transfer of a fishing right will be as published in the Government Gazette GN 878 of 2 September 2005 and as amended in consultation with the Minister of Finance from time to time.



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Department:
Environmental Affairs and Tourism
REPUBLIC OF SOUTH AFRICA

BRANCH MARINE AND COASTAL MANAGEMENT

COMMENT SHEET

DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS: *DECEMBER 2007*

My comments on the above-mentioned draft policy are:

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Date Received:

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