

DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

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MARINE LIVING RESOURCES ACT, 1998
(ACT NO. 18 OF 1998)DRAFT POLICY ON THE ALLOCATION AND MANAGEMENT OF RIGHTS TO OPERATE FISH PROCESSING
ESTABLISHMENTS AND
THE DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS

I, Dr Dion Travers George, Minister of Forestry, Fisheries and the Environment hereby publish for comment the Draft Policy on Allocation and Management of Rights to Operate a Fish Processing Establishment and the Draft Policy on the Transfer of Commercial Fishing Rights (collectively the Draft Policies), as set out in the Schedule hereto.

The Draft Policies guide the Minister or Delegated Authority in the exercise of their powers to grant a right to operate a fish processing establishment in terms of section 18 of the Marine Living Resources Act, 1998 (MLRA) or to approve the transfer of a right in terms of section 21 of the MLRA. The Draft Policies have been reviewed to provide more clarity on certain issues and address implementation challenges.

The socio-economic impact assessment study for the Draft Policy on the Transfer of Commercial Fishing Rights and the exemption certificate for the Draft Policy on Allocation and Management of Rights to Operate a Fish Processing Establishment are available for download from the Department's website at <http://www.environment.gov.za/index.php/FisheriesManagementFRAP2020-21SEIAS> and may also be requested via email by sending an email to FRAPSEIAS_2020@dffe.gov.za

Any person who wishes to comment on the draft policies may submit written comments to the Department in the following manner:

By post: Department of Forestry, Fisheries and the Environment
Attention: Deputy Director: Fisheries Policy and Rights Administration
Private Bag X2, VLAEBERG
8018
By hand: 4th Floor Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town
By email: FRAPpolicycomments@environment.gov.za

Telephone queries – Mr Msimelelo Mdledle – 066 471 1473/ 084 304 0170

All written comments must be received by the Department within 30 calendar days of the publication of this notice in the *Government Gazette* or the publication of the related notice in the newspaper, whichever is the later date.

Comments received after this time may be disregarded.



DR DION TRAVERS GEORGE
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

SCHEDULE

1. DRAFT POLICY ON ALLOCATION AND MANAGEMENT OF RIGHTS TO OPERATE A FISH PROCESSING ESTABLISHMENT
2. THE DRAFT POLICY ON THE TRANSFER OF COMMERCIAL FISHING RIGHTS



DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING RIGHTS: 2024

**THIS DRAFT POLICY MUST BE READ WITH THE GENERAL POLICY ON THE ALLOCATION
OF COMMERCIAL FISHING RIGHTS: 2021 AND THE APPLICABLE FISHERY SPECIFIC
POLICIES (available at www.dffe.gov.za)**

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DEFINITIONS

“applicant” or **“transferor”** means a holder of a commercial fishing right issued in terms of section 18 of the Marine Living Resources Act that lodged an application for approval to transfer that commercial fishing right;

“family” means a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and goes beyond a particular physical residence;

“fronting” means a deliberate circumvention or attempted circumvention of the Broad-Based Black Economic Empowerment Act NO. 53 of 2003 as amended (B-BBEE Act and the Codes of Good practice under section 9(1) of the B-BBEE Act, issued by Notice 1019 in Government Gazette 36928 of 11 October 2013, and as amended by general notices published subsequently and the Government Gazette. It includes reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance or by any other person;

“Minister” means the minister responsible for fisheries;

“people with disabilities” means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment;

“person” includes a natural or juristic person;

“right holder” - means a person that has been granted a commercial fishing right;

“same community” means the same fishing zone or area within which the transferor and the transferee have proven historical involvement in fishing, to an extent that both the transferor and the transferee remain part of the same community;

“South African person” means—

- (a) a South African citizen according to the South African Citizenship Act, 1995 (Act No. 88 of 1995);

- (b) a company registered in terms of the Companies Act, 2008 (Act No. 71 of 2008) of which the majority of shareholders, as prescribed by the Minister, are South African persons;
- (c) a close corporation in terms of the Close Corporation Act, 1984 (Act No. 69 of 1984) of which the majority of members are South African persons; or
- (d) a Trust in which—
 - i. the majority of trustees having the controlling power at any given time are South African citizens; or
 - ii. a majority of the beneficial interests are held by South African citizens.

“transfer” includes the following:

- (a) the division or transfer of part of a right.
- (b) the transfer of a right and
- (c) the transfer of a shareholding or member’s interest in a right holder which results in a change in control within the right holder;

“transferee” means a person to whom a commercial fishing right is being transferred by the transferor.

ACRONYMS

MLRA	Marine Living Resources Act, 1998 (Act No. 18 of 1998)
TAC	Total Allowable Catch
TAE	Total Applied/Allowable Effort

INTRODUCTION

- 1.1 Section 21 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (MLRA) permits a commercial fishing right to be leased, divided or otherwise transferred with the approval of the Minister. For convenience, the relevant part of section 21 is quoted below:

“21. Commercial fishing. —

- (1) Subject to the provisions of the Act, a commercial fishing right may be leased, divided or otherwise transferred.*
- (2) An application to transfer a commercial fishing right or part thereof shall be submitted to the Minister in the manner that the Minister may determine, and subject to the provisions of this Act and any applicable regulation, the Minister may, in writing, approve the transfer of the right or part thereof....”*

- 1.2 In terms of section 79(1) of the MLRA, the Minister may, upon conditions that he or she deems fit, delegate any or all the powers conferred upon him or her in terms of the MLRA to the Director-General or an officer of the Department nominated by the Director-General. At the time of publication of this Policy, this delegation was granted to the Deputy Director-General: Fisheries Management (Delegated Authority).
- 1.3 This policy is intended to guide the application and approval process for the transfer of a commercial fishing right in terms of section 21 of the MLRA. It sets out the principles, objectives, criteria and management processes that will govern the transfer of commercial fishing rights.
- 1.4 This Policy is issued by the Minister and is called the Policy for the Transfer of Commercial Fishing Rights: 2024 (Transfer Policy).
- 1.5 The Transfer Policy repeals and replaces the Policy for the Transfer of Commercial Fishing Rights: 2009.
- 1.6 The Transfer Policy must be read in conjunction with the MLRA, the regulations published in terms of the MLRA; the General Policy on the Allocation of Commercial Fishing Rights: 2021 (General Policy) and relevant Sector Specific Policies.

1.7 The Transfer Policy must, as far possible, be interpreted in a manner which is consistent with the MLRA and all other relevant regulations and policies. In the event of a discrepancy between this Policy and the MLRA or regulations published thereunder, the legislation takes precedence.

1.8 The provisions of the Transfer Policy will take precedence in the event of any conflict between the provisions of the General Policy and sector specific policies insofar as they relate to the transfer of a commercial fishing right.

2. EFFECTIVE DATE

2.1 This policy will be effective from the date it is published by the Minister in the Government Gazette for final implementation.

3. MONITORING AND EVALUATION OF THE POLICY

3.1 In order to ensure the effectiveness of the Transfer Policy to address: (a) the social and economic needs of the fishing industry, (b) affected fishers, and (c) the ecological sustainability of the implicated resources, the Department will monitor and evaluate the impact of the Transfer Policy by instituting a number of formal performance measuring exercises for the duration of the allocated period in the various fishing sectors where fishing rights have been allocated. It is envisaged that the Department may institute several performance measuring exercises as and when required.

4. PURPOSE

The main purpose of the Transfer Policy is to:

4.1 Outline the manner in which an application for transfer of a commercial fishing right should be submitted and evaluated in order to provide guidance, ensure consistency in the process, as well as compliance with the legal framework; and

4.2 outline the principles that seek to prevent, amongst other things, the:

4.2.1 dilution of transformation in the fishing industry,

4.2.2 the undue concentration of rights (i.e. monopoly) into the hands of one entity; and

4.2.3 fronting.

5. OBJECTIVES

The objectives of this policy are to:

- 5.1 guide the decision-making process in respect of applications received with a view to give effect to the principles enshrined in section 2 of the MLRA;
- 5.2 outline restrictions on the transfer of commercial fishing rights;
- 5.3 ensure that the transfer of commercial fishing rights, where possible, facilitates broadening of economic opportunities and participation in the fishing industry to enable inclusive economic growth;
- 5.4 maintain or improve the transformation profile of the fishing sectors attained through the rights allocation process and/or through transfer of commercial fishing rights;
- 5.5 promote transformation, economic development and poverty alleviation in South Africa.

6. APPLICATION, SCOPE AND PRINCIPLES OF THE POLICY

- 6.1 This policy is only applicable to the transfer of commercial fishing rights or parts thereof.
- 6.2 This policy is also applicable to applications for the transfer of shares and members' interests in a company or close corporation respectively that result in change in control of that entity or result in the right holder entity being less transformed. This policy is not applicable to a change in minority shareholding or members' interests; to applications for a conversion from a close corporation to a company or a name change.
- 6.3 This policy does not deal with the transfer of exemptions. Exemptions are not transferable.
- 6.4 This Policy is not applicable to the transfer of Small-Scale fishing rights, mariculture (marine aquaculture) rights or fish processing establishments rights.

7. GENERAL PRINCIPLES

- 7.1 No applicant shall be favoured or prejudiced in considering his or her or its application for the transfer of a commercial fishing right.
- 7.2 All applications will be considered on the basis of their own merit and will be subject to the requirements and procedure set out in this Transfer Policy read with the relevant legislation and application form.
- 7.3 The Department may subject an application for a transfer of a commercial fishing right to the same criteria that were used during the assessment and evaluation of applications for the allocation of commercial fishing rights in the particular fishing sector to which the transfer relates.
- 7.4 The Department may subject the Applicant, Transferee and / or the information submitted in an application for the transfer to forensic verification prior to making a recommendation on the application to the Minister or Delegated Authority. Where required, the Applicant/Transferor will be obliged to participate or cooperate with such verification process, failing which the application may be rejected.
- 7.5 No application for transfer will be considered unless all the requirements for the transfer as set out in section 10 of this Policy have been met. Any request for deviation from the requirements listed in this Transfer Policy must be included and motivated in the application.
- 7.6 The Department will not process and decide on a transfer application while there are pending fisheries related legal proceedings involving either the Applicant/Transferor or Transferee as the outcome of these proceedings may have an impact on the proposed transfer (e.g. in terms of MLRA, the Criminal Procedure Act and Prevention of Organised Crime Act).
- 7.7 To ensure healthy competitive behaviour in the fishing industry and that commercial fishing rights are not concentrated in the hands of one or more entities resulting in monopoly in the particular fishing sector, the Department will require the following transactions to be subjected to evaluation by Competition Commission as an additional requirement and a favourable report should be obtained:

- 7.7.1 Applications arising out of an amalgamation, merger and acquisition; where the Right Holder holds the highest allocation in the fishing sector and seeks to acquire an additional allocation through a section 21 process;
- 7.7.2 the right holding entity intends to acquire majority shares in other right holding entities either in a single or multiple transactions; and
- 7.7.3 where the decision-maker deems it necessary to subject an application for evaluation by Competition Commission.
- 7.8 In the case of individual applicants, family members in the same household may not be granted more than one right in the West Coast Rock Lobster (Nearshore), Traditional Linefish, Netfish and KZN Beach Seine fishing sectors so as to broaden access to these resources.
- 7.9 Applicants are required to disclose their relationship with other right holders in the West Coast Rock Lobster (Nearshore), Traditional Linefish, Netfish and KZN Beach Seine fisheries as well as in other commercial fisheries.
- 7.10 If more than one family member of the same household applies for a transfer of a right, the Department may determine who the preferred right holder will be with due regard to the objectives and criteria set out in this policy.
- 7.11 In the case of individuals, a right may only be transferred to the spouse/ partner, dependent or a person in the same community and/or fishing zone. In exceptional circumstances, consideration will be given to transferring the right to a person not in the same community and/or fishing zone, provided such person has proven historical involvement in the fishing industry and would have scored the same or higher on transformation criteria as the right holder.

8. CONDITIONS OF TRANSFERS

- 8.1 Subject to any alternative specified period contained in a specific policy, a right transfer is not permitted within the first three (3) years of being granted and/or within the last two (2) years before the right expires, save for in exceptional circumstances where the transfer will not

undermine the rights allocation process, and the objectives of the MLRA and the sector specific fisheries policies. Consideration will be given to the following instances:

- 8.1.1 an application for the transfer from a Right Holder company or close corporation which is has been placed in liquidation or business rescue;
 - 8.1.2 an application arising from the execution of a court order;
 - 8.1.3 an application motivated by corporate restructuring and/ or scaling down of non-core activities;
 - 8.1.4 in a case of an individual Right Holder- death, sequestration or incapacitation.
- 8.2 A transfer application must in addition to all the other criteria detailed below, also demonstrate that it does not pose a paper quota holder or fronting risk.

9. TRANSFER PROCEDURE

- 9.1 The transfer application forms will be made available by the Department.
- 9.2 Both the Applicant/Transferor and the Transferee will be required to jointly complete the application form and submit in a manner determined by the Department.
- 9.3 The Department will consider a transfer application only if all lodgement requirements have been met. These include the following:
- 9.3.1 The correct application form has properly been completed;
 - 9.3.2 the application has been submitted in the manner determined by the Department;
 - 9.3.3 both the Applicant/Transferor and Transferee (or their authorised representatives) have signed the application form;
 - 9.3.4 where an Applicant/Transferor and/or Transferee is represented a signed and dated letter of authorisation must be attached to the application. This letter must not be older than three (3) months;

9.3.5 all supporting documents must be certified by a Commissioner of Oaths and the certification date must be no more than three (3) months prior to the date of submission of the application;

9.3.6 the application fee has been paid and proof of payment of the application fee is attached to the application form.

10. CRITERIA APPLICABLE TO TRANSFER OF COMMERCIAL FISHING RIGHT

10.1 When evaluating an application for a transfer between entities, the Department will consider the following:

10.1.1 Whether the Applicant/Transferor and Transferee were authorised to submit the application. For example, where the Applicant/Transferor and Transferee is a corporate entity or is otherwise represented, the application must be accompanied by proof of authorisation to make such application;

10.1.2 where a legal entity is involved that entity must be properly registered in accordance with the relevant legislation;

10.1.3 the Transferee must be a South African person as defined in section 1 of the MLRA which definition is repeated in this Transfer Policy for convenience;

10.1.4 whether the transfer will maintain or improve the transformation profile (colour, race, gender, disability and age, etc) of the affected fishing sector, and/ or the degree to which the percentage of TAC and/or TAE is held by historically disadvantaged persons;

10.1.5 whether the transfer will result in economic transformation, development and secure employment. As far as possible the transfer must seek to retain employees of the transferred right holder on terms and conditions not less favourable to the employees than those on which they were employed by the Applicant/Transferor for the duration of the right;

- 10.1.6 the transfer will result in broadening of access to a fishing sector(s) and the inclusion of historically disadvantaged persons within entities;
- 10.1.7 whether the transfer will result in a consolidation of rights;
- 10.1.8 whether the transfer will result in a consolidation of rights which will result in a monopoly and/or oligopoly of the fishing industry/sector by certain persons;
- 10.1.9 compliance by the Transferor and/or Transferee with all the tax obligations;
- 10.1.10 the compliance history of the Transferor and Transferee including:
 - 10.1.10.1 whether the Applicant/Transferor or Transferee or any of its members, shareholders or directors have been convicted of contravention of the MLRA, regulations, or conditions of a right or permit in the preceding ten years;
 - 10.1.10.2 whether the Applicant/Transferor or Transferee have had assets forfeited to the State in respect of a violation of a provision of the MLRA or regulations, including a condition of its right or permit, in the preceding ten years;
 - 10.1.10.3 whether the Applicant/Transferor or Transferee have had a fishing right or permit cancelled or revoked during the preceding ten years;
 - 10.1.10.4 whether the Applicant/Transferor and/or Transferee (where applicable) is in arrears with any levies, licence fees or other payments;
 - 10.1.10.5 whether the Applicant/Transferor or Transferee (where applicable) have outstanding catch returns or other documentation required by the Department in terms of the applicable permit conditions, MLRA or regulations;
 - 10.1.10.6 the likelihood that the Applicant/Transferor or Transferee is a paper quota holder or a front;

10.2 When evaluating an application between individuals, the Department will consider the following:

10.2.1 whether the Transferee is a South African person as defined in section 1 of the MLRA;

10.2.2 whether the proposed transfer of the commercial fishing right will maintain or improve the transformation profile (colour, race, gender, disability and age, etc) of the fishing sector, and/or the degree to which the percentage of TAC and/or TAE held by historically disadvantaged persons will change and/or give effect to the objectives of the MLRA;

10.2.3 the Transferee will be required to demonstrate that he or she will be personally involved in the fishery. The Transferee will be required to actively participate in the harvesting of the resource and/or the business operations. Where the Transferee is incapable of participating due to a permanent physical disability, such Transferee will be exempted from this requirement. Consideration will be given to females who may not personally be involved in the harvesting of the resource by being physical on board of the nominated vessel but who are dependant on the fishery for their livelihood;

10.2.4 Applicant/Transferor and Transferee are in good standing with their Tax obligations;

10.2.5 whether the Applicant/Transferor and Transferee has not been convicted of contravention of the MLRA, or Regulations, or permit conditions during the duration of commercial fishing right that is being transferred in the preceding ten years;

10.2.6 whether the Applicant/Transferor and Transferee has not had an asset forfeited to the State for a violation of a provision of the MLRA, the regulations or a term or condition of its permit or right in the preceding ten years;

10.2.7 whether the Applicant/Transferor and Transferee has not had a fishing right or permit cancelled or revoked during the duration of the current and/ or previous fishing rights periods;

- 10.2.8 whether the Applicant/Transferor and Transferee is not in arrears with any levies, licence fees or other payments and does not have outstanding catch returns or other documentation required by the Department in terms of the applicable permit conditions or the Department's legal framework;
- 10.2.9 whether the Applicant/Transferor and Transferee (where applicable) has no outstanding catch returns or other documentation required by the Department in terms of the applicable permit conditions, MLRA or regulations;
- 10.2.10 an application is not from a paper quota Applicant/Transferor and Transferee as defined in the General Policy.
- 10.2.11 whether the Transferor and the Transferee are from the same household or family and the Transferee is dependent on fishing for his or her livelihood;
- 10.2.12 the Transferee's historical involvement in the fishing industry (confirmation letter/s from marketer/s, processor/s, vessel owner/s who held permits or licenses issued in terms of the MLRA at the time of the Transferee's involvement in fishing, etc.) and is dependent on fishing for his or her livelihood; and
- 10.2.13 whether the Transferee has access to a suitable vessel in that the vessel that is nominated by the Transferee meets the vessel requirements that are prescribed in the General Policy and the relevant Sector Specific Policy in which the right is being transferred. In the fisheries where management employs controls on effort to limit fishing mortality, the Department will give consideration to manage effort creep which may increase risk of hyperstability, over-estimation to stock biomass and under estimation of fishing mortality. In doing so, the Department will take into account the relevant effort management prescripts as enshrined in the General Policy, the Sector Specific Policy, and the fisheries management documents which include but not limited to approved submissions on determination of the total allowable catch (TAC), total applied (allowable) effort (TAE), or a combination thereof in terms of section 14 of the MLRA and the permit conditions for a relevant fishing sector.

10.3 In the event that there are incomplete supporting documents, Applicants will be notified of this and afforded fourteen (14) working days to provide such outstanding documents. Failure to comply with such request will result in the Application not being processed further, the application will be returned, and applicants will be required to submit a new application.

10.4 If an Applicant/Transferor or Transferee submits falsified or misleading information or documentation or concealed material information, the Department may institute legal proceedings (civil and/or criminal) and proceedings in terms of section 28 of the MLRA.

11. PRINCIPLES APPLICABLE TO TRANSFER OF SHARES/MEMBERS' INTEREST

11.1 Approval for transfer of a commercial fishing right is required:

11.1.1 If more than half of the issued shares capital (in the case of a company) or more than 50% of members' interests (in the case of a close corporation) are transferred in a single transaction within the right holding entity this is considered a transfer.

11.1.2 If the minority shares or members' interests transferred within the right holding entity since the allocation of the right that have accumulated over time to more than 50%, this will be considered a change in control and a transfer.

11.2 In evaluating applications arising from a change in control the following will be considered:

11.2.1 The change in shareholding/members' interest relating to race, youth, gender and people with disability in the right holding entity;

11.2.2 the number (percentage) of shares/ members' interest to be sold;

11.2.3 whether the entity or person acquiring the shares/ members' interest is an existing commercial fishing Right Holder and if so in which sector;

11.2.4 the investment of the transferee entity or person acquiring the shares/members' interest in the fishing industry;

11.2.5 if the entity or person acquiring the shares or members' interest is a holder of a commercial fishing right, its/his or her fishing performance for that commercial fishing right will be considered;

- 11.2.6 performance of the entity or person acquiring the shares/members' interest;
- 11.2.7 whether or not there is evidence that the Transferee will be a 'paper quota' and not become directly involved in the catching, processing and/or marketing of the fish caught.
- 11.2.8 whether or not there is evidence that the Transferee is not a "front" as defined in the General Policy 2021.
- 11.2.9 if the transfer of shares or members' interest results in the entity being less transformed as at the date of allocation, in addition to the above stated factors listed in paragraph 11.2.1 to 11.2.9, the Department will consider 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;
- 11.3 The transfer of majority shares or members' interest will not result in the new majority shareholder or member having the commercial fishing right being transferred into his/her/its name. The commercial fishing right will remain in the name of the right holding entity which was originally allocated a fishing right for the purposes of the Department's records and permitting processes. In other words, the Transferee will not replace the Right Holder by way of a transfer of majority of shares or members' interest.
- 11.4 In the case where shareholding or members' interest within a right holding entity is owned by a legal entity and shares/ members' interests are transferred in that legal entity but do not result in a change in control of that legal entity, right holders will be required to submit a notification of change in shareholding/ members' interests.
- 11.5 If the transfer of shares/members' interest does not fall within the listed scenarios set out in paragraph 11.1.1, 11.1. 2 and 11.1.3 the Right Holder will still be required to complete a notification form informing the Department of the change so that it can be recorded and acknowledged. The notification together with supporting documents as determined in it must be submitted to the Department within thirty (30) days of such change.

11.6 The Department acknowledges that given the nature and the operations of Right Holders trading in the platform of Johannesburg Stock Exchange, as well as the challenges and practicalities of having to comply with reporting of shares traded up to a stipulated threshold. The Department in ensuring that it exercises its power to monitor and evaluate conformity with legislative prescripts in this regard will put in place a temporal arrangement where these Right Holders will be required to submit annual reports detailing all the shares traded in that particular financial year. Amongst others, the report should cover the BBBEE status and ownership of shares by South African persons within the entity throughout the reporting period. The purpose of this is to collect data of the shares traded in that platform which will then place the department at a position to set a yardstick or threshold for reporting of shares. Just the same, these Right Holders are strongly encouraged to take proactive action in ensuring that even with the nature of their business the objectives of the MLRA are adhered in that transformation is achieved.

12. APPLICATION FOR CONVERSION OF ENTITIES AND NAME CHANGE

- 12.1 Where an application for a name change of a legal entity or straight conversion from a close corporation to a company does not involve a change in shareholding and/or members' interest, the Right Holder is required to complete the relevant form notifying the Department of such a change and supply all supporting documents in that regard for the Department to update its records.
- 12.2 In circumstances where there will be change in majority shareholding/ members' interest in addition to the name change or conversion, then the application will also be considered in terms of applicable paragraphs in section 11 above.
- 12.3 Failure to comply with the provisions of section 21 of the MLRA or any provision of this policy may result in the institution of legal proceedings (civil or criminal), including but not limited to proceedings in terms of section 28 of the MLRA.

13. DURATION OF TRANSFERRED RIGHTS

A commercial fishing right or part thereof transferred in terms of section 21 of the MLRA will only be valid for the remainder of the original period for which a commercial fishing right is valid.

14. FEES

14.1 Fees payable for the transfer of a commercial fishing right or a part thereof or for the applications of change in shareholding and/or members' interest will be payable in accordance with the most recent Fees Government Gazette Notice published in terms of section 25 of the MLRA.

14.2 The application fee for the transfer of a commercial fishing right or part thereof or for the applications of change in shareholding and/or members' interest is non-refundable, except where there are reasonable grounds for a refund.

15. APPEAL OF DECISIONS

In terms of Section 80 of the MLRA, any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated in terms of this Act. As permitted by section 80 of the MLRA, an aggrieved person may exercise his or her or its right and appeal decisions taken by the Delegated Authority under this Policy.

16. MANAGEMENT AND ADMINISTRATION OF THE TRANSFERRED RIGHT

16.1 The transferred commercial fishing right or part thereof will be subject to the fisheries management and administration provisions as described in each of the commercial Fisheries Sector-Specific Policies and the General Policy.

17. MULTI-SECTOR INVOLVEMENT

The policy does not preclude or discourage the transfer of commercial fishing rights to or from applicants holding fishing rights in more than one fishery. However, due consideration will be given by the Department to prevent or avoid concentration of rights into the hands of a few companies which may result in monopoly and/or oligopoly.

18. FRONTING

- 18.1 The Department shall take reasonable steps to prevent fronting from occurring. The Department may request verification or investigation on any matter, including the correctness of information provided by the Applicant(s).
- 18.2 Applicants must co-operate with the terms and conditions of the investigation, by timeously submitting responses to written requests for information or explanations, attending meetings with investigators, answering questions satisfactorily at such meetings, and where necessary, by granting investigators access to shareholders, employees, premises, vessels and documents. Failure to co-operate with the investigation, may constitute an independent ground for refusal of the application.
- 18.3 In terms of section 82 of the MLRA, the Department may order an enquiry into any matter identified. The Applicant/Transferor must fully co-operate with the enquiry as lack of cooperation from any of the parties will negatively affect the evaluation of the application. Failure to co-operate may constitute an independent ground for refusing the application.

APPROVAL SIGNATURE**NAME: DR D T GEORGE****DESIGNATION: MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT****DATE: 7/10/2024**



DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

**DRAFT POLICY ON THE ALLOCATION AND MANAGEMENT OF RIGHTS TO OPERATE FISH
PROCESSING ESTABLISHMENTS: 2024 (available at www.dffe.gov.za)**

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DEFINITIONS

“close corporation” means close corporation in terms of the Close Corporations Act, (Act No. 69 of 1984), of which the majority of members are South African persons;

“company” means a company registered in terms of the Companies Act, (Act No. 71 of 2008), of which the majority of shareholders, as prescribed by the Minister, are South African persons;

“corporate entity” means a close corporation, company, trust or Cooperative registered under Cooperatives Act (Act No. 14 of 2005);

“fish processing establishment” means any vehicle, vessel, premises or place where any substance or article is produced from fish by any method, including the work of cutting up, dismembering, separating parts of, cleaning, sorting, lining and preserving of fish, or where fish are canned, packed, dried, gutted, salted, iced, chilled, frozen or otherwise processed for sale in or outside the territory of the Republic;

“MLRA” means the Marine Living Resources Act (Act No. 18 of 1998);

“NRCS certificate” means a certificate issued by the National Regulatory for Compulsory Specifications (NRCS) for approval of products that have met the requirements of applicable compulsory specifications.

“right” means a right to operate Fish Processing Establishment granted in terms of section 18 of the MLRA;

“Right Holder” means a person who holds a right acquired in terms of section 18 of the MLRA;

“SAMSA” means South African Maritime Safety Authority;

“South African citizen” means a South African citizen in terms of the South African Citizenship Act, 1995 (Act No. 88 of 1995);

“the Department” means the Department of Forestry, Fisheries and the Environment;

“the Minister” for Department of Forestry, Fisheries and the Environment; and

“the 2021: General Policy” means the General Policy on the Allocation of Commercial Fishing Rights: 2021.

1. INTRODUCTION

- 1.1. This policy on the allocation and management of rights to operate fish processing establishments (“FPEs”) is issued by the Minister for the Department of Forestry, Fisheries and the Environment (“the Minister”). It shall be referred to as the “*Fish Processing Establishment Policy: 2024*” (“FPE Policy”).
- 1.2. The Department administers the Marine Living Resources Act, 1998 (Act 18 of 1998) (“the MLRA”), regulations promulgated thereunder, and policies issued by the Minister.
- 1.3. The FPE Policy must be read in conjunction with the MLRA; regulations under the MLRA; the General Policy on the Allocation and Management of Fishing Rights: 2021 (“the 2021: General Policy”); other relevant Sector Specific Policies, including the Policy for the Small-Scale Fisheries Sector in South Africa: 2012 and the Policy for the Transfer of Commercial Fishing Rights: 2024. This policy must, as far as possible, be interpreted in a manner which is consistent with the MLRA, and all other relevant regulations and policies. In the event of a discrepancy or conflict between this policy and the MLRA or regulations published thereunder, the legislation takes precedence.
- 1.4. The FPE Policy sets out objectives, criteria and considerations that will guide the evaluation, allocation, and management of rights to operate fish processing establishments. This policy will thus guide the Delegated Authority in taking decisions on applications received in this sector.
- 1.5. The provisions of this FPE Policy will take precedence in the event of any conflict between the provisions of the 2021 General Policy and sector specific policies insofar as they relate to fish processing activities.

2. DESCRIPTION OF THE SECTOR

- 2.1. In terms of section 18(1) of the MLRA, no person is permitted to operate an FPE unless a right to do so has been granted by the Minister or person to whom this power has been delegated in terms of section 79 of the MLRA.
- 2.2. Section 13 of the MLRA expands on section 18 and provides that no person shall exercise any right granted in terms of section 18 or perform any other activity in terms of the MLRA unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.

- 2.3. Accordingly, in order lawfully to process fish a person is required to hold a right to operate an FPE and a valid permit issued in terms of section 13 of the MLRA. An exception to this is where an exemption has been granted in terms of section 81 of the MLRA and in that instance, such exempted activities must take place subject to the conditions of that exemption, if any.
- 2.4. Section 1 of the MLRA defines an FPE to mean any vehicle, premises or place where any substance or article is produced from fish by any method, including the work of cutting up, dismembering, separating parts of, cleaning, sorting, lining and preserving of fish, or where fish are canned, packed, dried, gutted, salted, iced, chilled, frozen or otherwise processed for sale in or outside the territory of the Republic of South Africa. A fish product is defined to mean any product, whether in a processed form or not, wholly, or partially derived from fish.
- 2.5. By regulating the operation of FPEs, the Department sought to curb the processing of fish that had been caught in contravention of the MLRA, without necessarily resulting in unintended over regulation or causing difficulties with the enforcement of the MLRA.
- 2.6. Given the broad definition of an FPE as contained in the MLRA, the Delegated Authority, acting in terms of section 81 of the MLRA, exempted certain categories of persons undertaking certain activities involved in the processing of fish as defined, from the requirement to obtain a permit and right as required by sections 13 and 18 of the MLRA. This exemption was issued on 18 September 2017 and published in GN. 1395 of 15 December 2017 ("Exemption"). Despite the Exemption, the Department having received several queries from persons involved in the drying of legally caught and purchased fish, is accordingly in the process of withdrawing and updating the Exemption to include specific conditions and to provide clarity on the exact categories that are exempted. The amended exemption, once issued, must be read together with this policy and applicable sector specific permit conditions.

3. CURRENT RESOURCE USERS AND TRANSFORMATION PROFILE OF THE SECTOR.

There are currently approximately 346 (138 land-based, 198 vessel-based and a combination 10 of land based and vessel-based) right/exemption holders across the country. Currently 68% of right holders in this sector are black-owned.

4. OBJECTIVES

- 4.1. The objectives and principles of allocating rights are set out in section 2 of the MLRA, and include, *inter alia*, the following:

- 4.1.1. the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;
- 4.1.2. the need to promote equitable access to and involvement in all aspects of the fishing industry and, in particular, to rectify past prejudice against women, the youth and persons living with disabilities;
- 4.1.3. the need to recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty;
- 4.1.4. achieve optimum utilisation and ecologically sustainable development of marine living resources;
- 4.1.5. the need to apply precautionary approaches in respect of the management and development of marine living resources;
- 4.1.6. the need to minimise marine pollution; and
- 4.1.7. any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law.

5. GRANTING OF RIGHTS

5.1. General

- 5.1.1. Rights to operate FPEs are not allocated in respect of a shared resource and, as such, FPE rights can instead be seen as statutory permission to process fish for a specified period of time and subject to the conditions of that right. As such, it is open to a person to apply for an FPE right at any time and is not a competitive process.
- 5.1.2. FPE rights are granted in terms of section 18 of the MLRA. Unless otherwise determined by the Minister, only South African persons may acquire or hold such rights. Once granted, a right is valid from the date of allocation for a period specified in that right which may not exceed 15 years, whereafter the right will automatically terminate and revert to the State.
- 5.1.3. It is also worth noting that in terms of section 16 of the MLRA the Minister may suspend any fishing in any fishery or any specified part of it or impose restrictions to address a

state of emergency which would, in turn, affect processing operations.

5.1.4. In terms of section 28 of the MLRA, the institution of proceedings to cancel, revoke, suspend, alter or reduce the right and/ or permit may be initiated if the holder of the right or permit:

- a) *“has furnished information in the application for that right, licence or permit, or has submitted any other information required in terms of this Act, which is not true, or complete;*
- b) *contravenes or fails to comply with a condition imposed in the right, licence or permit;*
- c) *contravenes or fails to comply with a provision of this Act;*
- d) *is convicted of an offence in terms of this Act; or*
- e) *fails to utilise that right, licence or permit”.*

5.2. Form of Right Holder

5.2.1. Section 18 of the MLRA provides that only South African persons may acquire or hold rights.

5.2.2. Having regard to the nature of operations the following South African persons will be considered for rights to operate FPEs:

5.2.2.1. A citizen (individual) as defined in terms of the South African Citizenship Act, 1995 (Act No. 88 of 1995);

5.2.2.2. A company where the majority of shareholders, as prescribed by the Minister, are South African persons;

5.2.2.3. Close corporation of which the majority of members are South African persons;

5.2.2.4. A trust in which the majority of trustees having the controlling power at any given time are South African citizens or a majority of the beneficial interests are held by South African citizens; and

5.2.2.5. A Co-operative registered in terms of the Co-operatives Act, 2005 (Act No. 14 of 2005), of which all the members of the co-operative who are natural persons are

South African citizens and any member that is a juristic person has its registered office and principal place of business in the Republic.

5.3. Conflict of interest

Section 8 of the Public Administration Management Act 11 of 2014, states that “Conducting business with State (1) In this section and in section 9, “employee” includes persons contemplated in section 12A of the Public Service Act and a person performing similar functions in a municipality, (2) An employee may not (a) conduct business with the State; or (b) be a director of a public or private company conducting business with the State”.

In addition, Regulation 13(c) states that “an employee shall not conduct any business with any organ of state or be a director of a public or private company conducting business with an organ of state, unless such employee is in an official capacity a director of a company listed in schedule 2 and 3 of the Public Finance Management Act”. Accordingly, an FPE application received from an entity where its member, director or shareholder is the employee of any organ of state will be declined, as will any application for a permit in terms of section 13 of the MLRA to exercise a right that may have been granted.

5.4. Duration of the right

The duration of rights will be determined by the Minister or Delegated Authority up to a maximum of 15 years.

5.5. Transfer of rights allocated in terms of this policy

5.5.1. Rights in this sector may not be transferred and the Policy for the Transfer of Commercial Fishing Rights (Government Gazette No 32449, 31 July 2009), or any updated versions, and consequently section 21 of the MLRA, are therefore not applicable.

5.5.2. In the event that it is intended that the fish processing business is purchased or otherwise taken over by another person including a juristic person with a different name and registration number, that person must apply for a new FPE right and permit and meet the criteria contained in this policy read with any applicable application form.

5.5.3. Where an FPE right holder is a corporate entity, shares or members' interests may be transferred or sold without the permission of the Delegated Authority. However, where such FPE right holder also hold a right in another commercial fishing sector, that commercial fishing right will be subject to the provisions of the Transfer Policy.

5.6. Multi-sector involvement

Applicants for the allocation of FPE rights will not be precluded from applying if they hold rights in other local commercial/small scale fishing sectors. This means that any person can apply for a right in any fishery sector regardless of whether the applicant has applied for a right or holds a FPE right, and vice versa.

6. APPLICATION FOR AN FPE RIGHT

FPE application forms will be available from, and must be completed through, a designated FRAP FPE online portal. An IP address/ link of the online portal will be communicated.

7. EVALUATION CRITERIA

Applications for the allocation of rights in the FPE sector will be screened in terms of a set of “exclusionary criteria”.

7.1. Exclusionary criteria

In addition to the criteria described in the 2021: General Policy pertaining to the lodgment of the applications and material defects, the Delegated Authority will exclude applicants that fail to meet the following requirements/criteria

- i. An applicant will be excluded, if it, a member, a director, a trustee, or a shareholder (where such shareholding or members interest exceeds 10%) or skippers of the applicant has been convicted of a serious transgression of the MLRA (without the option of the payment of a fine) during the preceding ten (10) years.
- ii. An applicant will also be excluded, if it, a member, a director, a trustee, or shareholder (where such shareholding or members interest exceeds 10%) had any fishing right cancelled or revoked in terms of the MRA For these purposes a natural person will be treated as having had rights cancelled or revoked if that person was a shareholder, a member, a director, or a trustee of an entity which had a right cancelled or revoked.
- iii. An applicant will also be excluded, if any of its Directors, Trustees, Senior Management, Shareholders or Members (where such shareholding or members interest exceeds 10%) or Skippers' fishing vessel, motor vehicle, premises or assets been detained, arrested or seized

under the MLRA or restrained, preserved, confiscated or forfeited under the Prevention of Organised Crime Act 121 of 1998 during the preceding ten (10) years.

7.2. Factors to be considered when FPE right is evaluated.

7.2.1. Access to a suitable vessel-based Fish Processing Establishment

“An applicant for a vessel based FPE will be required to demonstrate ownership of a suitable vessel for the processing of fish. In the case where the applicant is a part-owner of the nominated vessel, consent needs to be obtained from the other part owner(s) to prevent multiple rights.”

7.2.2. Vessel suitable for processing of fish must meet the following criteria:

- i. Commercially registered with the South African Maritime Safety Authority (“SAMSA”);
- ii. South African flagged;
- iii. South African owned; and
- iv. Valid NRCS certificate to process fish using the method and species stated in the FPE application for a right.

7.2.3. Access to a suitable land-based Fish Processing Establishment

An applicant for a land-based FPE will be required to demonstrate access to suitable premises by means of a valid lease agreement or title deed and any other relevant documents will demonstrate access to suitable premises.

7.2.4. Compliance

Whether a member, a director, a trustee, or a shareholder (where such shareholding or members interest exceeds 10%) or skippers of the applicant has been convicted of a minor transgression of the MLRA (i.e. the option of a fine as opposed to direct imprisonment) during the preceding ten (10) years.

7.3. Environmental Authorisation

If an applicant in the Aquaculture sector or wild capture fisheries is advised that an environmental authorisation is required for the activity, such applicant must register the Directorate: Sustainable Aquaculture Management of the Department as an interested and affected party and should forward all environmental impact reports for comments to the Directorate: Sustainable Aquaculture Management.

7.4. Health and Safety Authorisation

7.4.1. The Regulations published in Government Notice No. R918 of 1999 in terms of the Health Act, 1977 (Act No. 63 of 1977), set out certain general hygiene requirements for food premises and the transport of food. In terms of these Regulations, a certificate of acceptability for food premises is required before a person is authorised to handle food on such premises.

7.4.2. An applicant is required to apply in writing to the Health Services section of the local municipality in whose area of jurisdiction the food premises and or FPEs, where applicable, are situated for a certificate of acceptability. A certificate of acceptability must accompany the application to operate an FPE.

7.5. Coastal waters discharge permit

Section 69 of the National Environmental Management: Integrated Coastal Management Act, 2008 (Act No. 24 of 2008) (ICM Act) requires a person to obtain a coastal waters discharge permit prior to discharging effluent which originates from land into coastal waters. If this discharge will take place, a copy of the coastal waters discharge permit or application to obtain one must be submitted with the application.

7.6. Environmental and land use planning laws

An FPE must in all respects comply with all relevant and applicable environmental laws and land use planning laws, including by-laws of the municipality governing the area in which the FPE is located, and any conditions attached to any statutory approval or authorisation applicable to the FPE. A failure to do so may, amongst others, result in the Department implementing proceedings under section 28 of the MLRA.

7.7. Valid SARS tax clearance certificate

An applicant is required to declare the financial status of the business with the South African Draft Policy on the Allocation and Management of Rights to Operate Fish Processing Establishments: 2024

Revenue Services (SARS). A valid SARS tax clearance certificate must accompany the application.

8. DECISIONS

The Delegated Authority shall, after making its decision on an application, inform the applicant of the decision together with the reasons, therefore.

9. PAYMENT OF APPLICATION FEES

9.1. Applicable fees have been published in Government Gazette No.33518, volume No. 795, 10 September 2010, separately in terms of section 25 of the MLRA. 5.3.2 Applicants must pay the Application Fee to the Marine Living Resources Fund before the submission of their Application Form and proof of payment must be submitted with the Application Form when applying for a right.

8.2. An FPE application fee is non-refundable, except where there are reasonable grounds for a refund. Banking details are as follows:

Account Holder: Marine Living Resources Fund

Bank Name: First National Bank

Account Number: 62123256382

Branch Code: 210554

Reference Number: [Applicant must insert the commercial fishing right application number]

10. MANAGEMENT AND ADMINISTRATION MEASURES

FPE rights allocated in terms of this policy will be subjected to the fisheries management and administration provisions i.e. permit conditions and the relevant sector specific policies.

11. MONITORING AND EVALUATION OF THE POLICY

11.1. In order to ensure the effectiveness of the 2024: FPE Policy in addressing the social and economic needs of the fishing industry and affected fishers and the ecological sustainability of Draft Policy on the Allocation and Management of Rights to Operate Fish Processing Establishments: 2024

the resources, the Department will monitor and evaluate the policy by instituting a number of formal performance measuring exercises. It is envisaged that the Department may institute several performance measuring exercises as and when required.

- 11.2. Research and ongoing monitoring by both the Department and stakeholders will play an important role in identifying gaps, weaknesses and flaws in the policies and the implementation thereof. South Africa has not been immune from the negative impacts of climate change on fisheries resources and communities who depend on fisheries for their livelihoods. The impacts of climate change may be addressed through adoption of adaptation and mitigation measures in the sector. Research and ongoing monitoring by both the Department and stakeholders will play an important role in identifying gaps, weaknesses and flaws in existing fisheries policies and management measures.
- 11.3. In line with the Food and Agriculture Organization of the United Nations's Code of Conduct for Responsible Fisheries, South Africa has published the National Plan of Action for the Conservation and Management of Sharks (NPOA-Sharks) and the National Plan of Action for Reducing the Incidental Catch of Seabirds in Longline Fisheries (NPOA-Seabirds). In order to achieve the optimum utilisation and ecological sustainable development of marine living resources, South Africa will implement the National Plans of Action to ensure that the ecosystem is protected, and fishing strategies are consistent with the principles of biological sustainability and rational long-term economic use. These Plans of Action will be reviewed from time to time to assess their implementation and to identify cost-effective strategies for increasing their effectiveness.
- 11.4. The Department will provide useful, reliable and timely feedback on the effectiveness of the policy to all relevant stakeholders.

12. PERMIT CONDITIONS

Permit conditions for this sector will be issued annually. The permit conditions will be determined after consultation with right holders in this sector and will be revised as and when necessary, with due regard to the laws at the time such permits are issued.

13. EFFECTIVE DATE

This policy will take effect on the date of publication in the *Gazette*.

14. APPEAL OF DECISION

In terms of Section 80 of the MLRA, any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated in terms of this Act. As permitted by section 80 of the MLRA, an aggrieved person may exercise his or her or its right and appeal decisions taken by the Delegated Authority under this Policy.

15. REPEAL

This policy repeals all previous Policies on the Allocation of Rights to Operate Fish Processing Establishment and will be the exclusive Policy on Allocation of Rights to Operate Fish Processing Establishments informing the rights allocation process.



NAME: DR D-T GEORGE

DESIGNATION: MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 7/10/2024