



THE FW DE KLERK FOUNDATION

Upholding South Africa's National Accord

31 July 2015

The Director-General

Department of Agriculture, Forestry and Fisheries
Branch Fisheries Management
Customer Service Centre
Foretrust Building
Martin Hammerschlag Way
Foreshore
Cape Town 8000
FRAP2013appeals@daff.gov.za

Dear Sir/Madam,

SUBMISSION ON THE DRAFT SECTOR SPECIFIC POLICIES FOR THE ALLOCATION OF FISHING RIGHTS IN THE ABALONE, HAKE INSHORE-TRAWL, HORSE MACKEREL, KWAZULU-NATAL SARDINE, BEACH SEINE, LARGE PELAGICS, NETFISH, PATAGONIAN TOOTHFISH, SEAWEED, WEST COAST ROCK LOBSTER NEARSHORE, WEST COAST, ROCK LOBSTER OFFSHORE AND THE FISH PROCESSING ESTABLISHMENT SECTORS - CONTAINED IN THE GOVERNMENT GAZETTE, NO 38771 OF 12 JUNE 2015

1. Introduction

- a. The FW de Klerk Foundation ("the Foundation") is a non-profit organisation which incorporates the Centre for Constitutional Rights. The Foundation seeks to defend and promote the Constitution and the Bill of Rights and works for harmonious relations in multicultural societies. In this context it monitors any actions, statements or developments that might affect the Constitution, the Bill of Rights or harmonious relations between communities in our multicultural society.
- b. The Foundation wishes to respond to the Department's invitation to comment on the above-mentioned Draft Sector Specific Policies. It would, in particular, like to comment on the balancing criteria in paragraph 7.2(a) of the Draft Sector Specific Policies which state that
"applicants will be evaluated in terms of the following balancing criteria which will be weighted in order to evaluate and assess applications:
(a) Transformation
The South African population percentage composition of demographic groups (79.6% Black, 9% Coloured, 8.9% White, and 2.5% Asian) may amongst other transformation criteria be used to prefer applicants from others when allocation of fishing rights and Rights Holder's apportionment of the Total Allowable Catch (TAC) and /or Total Applied Effort, (TAE) is being considered."

2. Comments relating to the constitutionality of the criteria proposed in paragraph 7.2(a)

a. The Constitution

Legislative and other measures designed to protect or advance persons or groups of persons disadvantaged by unfair discrimination may be used for that purpose. Although the intention of this Policy seems to be aimed at creating such just and equitable access to our natural resources, it will, in fact, result in the opposite. The Policy's proposed use of exact national demographics as a measure for creating just and equitable access to natural resources has no basis in terms of the Constitution and could instead result in absolute, unfair and unjustified exclusion of certain groups of people. As such, the application of exact national demographics in the evaluation of applicants as a possible ground for disqualification will be inconsistent with a number of provisions of the Constitution, as discussed below.

Section 1: Founding Provisions

Paragraph 7.2 of the Draft Specific Policies is irreconcilable with the value of non-racialism which is one of the founding provisions of the Republic of South Africa.

Section 9: Equality

Paragraph 7.2 of the Draft Specific Policies is inconsistent with section 9(2) insofar as the measures involved are directed not in favour of, but against, a community who themselves are a category of persons disadvantaged by unfair discrimination.

Paragraph 7.2 of the Draft Specific Policies is inconsistent with section 9(3) insofar as it unfairly and directly discriminates against Coloured fishermen on the basis of their race.

Paragraph 7.2 of the Draft Specific Policies is inconsistent with section 9(5) insofar as no attempt has been made to establish whether the discrimination that it would institute against the Coloured fishing community is in any conceivable manner fair.

Section 10: Human Dignity

The deprivation of the Coloured fishing community of their traditional means of livelihood - which constitutes an intimate aspect of their identity, culture, traditions and self-respect - would seriously undermine their right to human dignity.

Section 22: Freedom of Trade, Occupation and Profession

Paragraph 7.2 of the Draft Specific Policies would deprive the Coloured fishing community of the Western Cape of their right to choose their trade, occupation or profession freely.

Section 30: Language and Culture

Paragraph 7.2 of the Draft Specific Policies would seriously undermine the right of the Coloured fishing community of the Western Cape to practise the cultural life of their choice - which is intimately interwoven with their traditional involvement in the fishing industry.

b. Judgment of the Labour Appeals Court in *Solidarity and Others v Department of Correctional Services and Others*

The Foundation is of the view that even though the above-mentioned matter must still be dealt with by the Constitutional Court, the Department cannot ignore in the formulation

of its policies the clear guidance that has been laid down by the Labour Appeals Court in this case with regard to the application of national demographics to regional situations.

In their judgment in the abovementioned matter in the Labour Appeals Court Waglay JP and Davis JA pronounced as follows on the question of the regional demographics:

“In summary, the respondents failed to take account of the particular regional demographics of the Western Cape which was a mandatory requirement at the time that the plan was conceived. The failure to do so could result in a large-scale reduction in the workforce of members of the designated group, who themselves had suffered egregious discrimination as a result of Apartheid. Even if the word “may” is employed in this enquiry, it is our view that, given South African history, the failure to take account of the impact of regional demographics on the nature and purpose of the plan adversely reduces the contribution of restitution towards substantive equality, and hence the attempt to achieve the goal of developing a non-racial and non-sexist society. This complete failure to examine the region in which the plan is conceived, constitutes a sufficient legal obstacle against the plan being held to be in compliance with the EEA.”

c. Conclusion

It is the Foundation’s opinion that the application of national demographics in the evaluation of applicants is inconsistent with the following provisions of the Constitution. This is particularly the case with regard to members of the Coloured community of the Western Cape who have for generations made their livelihood from the sea fisheries off the Western Cape Coast.

In the light of the abovementioned considerations, Foundation would like to request the deletion of section 7.2(a) of the Draft Specific Policies.

Sincerely,

DW Steward

PP. 

EXECUTIVE DIRECTOR