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GOVERNMENT NOTICE

DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM

No. 722

4 July 2008

MARINE LIVING RESOURCES ACT, 1998 (ACT NO. 18 OF 1998)

POLICY ON BOAT-BASED WHALE AND DOLPHIN WATCHING

I, Marthinus van Schalkwyk., Minister of Environmental Affairs and Tourism, hereby publish the Policy on Boat-Based Whale and Dolphin Watching in the Schedule hereto for general information.

MARTHINUS VAN SCHALKWYK

MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM



**DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM
BRANCH MARINE AND COASTAL MANAGEMENT**

POLICY ON BOAT-BASED WHALE AND DOLPHIN WATCHING

July 2008

This Policy is also available at www.mcm-deat.gov.za

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Glossary of Terms

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| Department | The Department of Environmental Affairs and Tourism. |
| Minister | The Minister of Environmental Affairs and Tourism. |
| Fishery Control Officer | Any incumbent of a post of Fishery Control Officer designated by the Minister in terms of section 9 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998). |
| Boat-Based Whale Watching | The observing of whales and dolphins from Sea-going vessels. |
| Delegated Authority | A person to whom power has been delegated in terms of section 79 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998). |
| Suitable BBWW vessel | A vessel that is registered by SAMSA as being suitable for BBWW. |
| BBWW | Boat-Based Whale and Dolphin Watching |
| DEAT | Department of Environmental Affairs and Tourism |
| HDIs | Historically Disadvantaged Individuals |
| MCM | Marine and Coastal Management branch of the Department |
| MLRA | Marine Living Resources Act, 1998 (Act No. 18 of 1998) |
| SAMSA | South African Maritime Safety Authority, statutory body established in terms of the South African Maritime Safety Authority Act, 1998 (Act No. 5 of 1998) |
| BBWW Policy | Policy on Boat-based Whale and Dolphin Watching |
| VMS | Vessel Monitoring System |

1. Introduction

This policy on *Boat-based Whale and Dolphin Watching* ("BBWW Policy") is issued by the Minister of Environmental Affairs and Tourism in terms of the Marine Living Resources Act, 1998 (Act No.18 of 1998) ("the MLRA"). The MLRA, a statute for the conservation of the marine ecosystem and the long-term sustainable utilisation of marine living resources, provides the legislative framework for the exercise of control over the exploitation of marine living resources so as to ensure their sustainable use and exploitation in a fair and equitable manner. This policy is issued together with a set of *Regulations for Boat-based Whale and Dolphin Watching* ("the BBWW Regulations").

2. Background to the development of the Industry

Boat-based Whale Watching (BBWW), the observing of whales and dolphins from sea-going vessels, is a fast-growing activity across the world. This activity generates considerable economic benefits for coastal communities and provides educational benefits for those with an interest in the cetacean family (both for recreational and research purposes). Starting as a commercial activity in 1955, in North America, it has become the most acceptable sustainable use of the cetacean resource compatible with Agenda 21. This commercial activity has grown significantly in the 1990s into a distinct industry within the tourism sector. Between 1991 and 1992 there were about 50 countries that practised BBWW, 65 in 1998 and 87 in 2002, benefiting more than 500 coastal communities through the creation of job opportunities.

BBWW currently contributes more than US\$1 billion annually to the economies of coastal states around the world. Japan began whale watching in 1998 and now has more than 100,000 mostly Japanese whale watchers a year. In Norway whale watching is now a significant tourist attraction with whale watchers spending more than US\$12 million in 1998 (Berrow, 2003).

3. Previous Management Efforts to Regulate Whale Watching

In South Africa, BBWW was regulated for the first time in 1998 when three year experimental permits were issued. In 1998/9 20 areas of operation were demarcated,

increasing to 25 in 2001/2. Dolphin-watching had not been regulated in the past, except to a very limited extent and indirectly through the regulation of BBWW vessels. In the past, few requirements had been prescribed for the issuing of BBWW permits. Permits were issued to natural as well as legal persons who complied with citizenship requirements (e.g. applicants had to be South African). In 2001 additional requirements such as the endorsement of nominated vessels by SAMSA and the qualifications for skippers and guides were prescribed. The permits/exemptions of the current operators will expire when new allocations are made. These operators are referred to as the “*current permit holders*” in this policy document.

4. Policy Objectives

The objectives of this policy are:

- To provide a regulatory framework for the protection of whales and dolphins.
- To grow the South African BBWW industry through the allocation of a greater number of permits;
- To transform the BBWW industry.

5. Policy Implementation

5.1. Regulation of the BBWW industry

Responsible whale and dolphin watching is a key objective of this policy. The Department shall, through its BBWW regulations or other appropriate means, prohibit whale and dolphin watching operations (and the advertising of such operations) without a permit. The Department will set the requirements for qualification (See Annexure “A”) which shall include:

- i. Accreditation of a vessel and its skipper;
- ii. Safety precautions for the customers;
- iii. Tourism standards to be observed by operators;
- iv. Conduct of customers relating to cetaceans.

5.2. Transformation of the BBWW industry

In promoting transformation, the Department shall prescribe actions or conditions that should advance this objective. Factors to be considered include placing restrictions on changing of shareholding or controlling interest in Companies or Close Corporations that have been allocated permits. If the majority of shares are sold and/or the controlling interest of a company or close corporation is changed, to an extent that the equity considerations on the basis of which the permit was issued no longer exist, this will be regarded as a change in ownership and therefore a transfer of a permit must comply with the provisions of paragraph 14 below. Transfer of a permit without the authority of the Department may result in the cancellation of the permit. This requirement will form part of the permit conditions. When considering competing permit applications, preference will be given to the applicant whose operation will have the biggest impact in terms of transformation and Black Economic Empowerment.

5.3. Growth of the BBWW industry

The Department will facilitate growth of the industry. It will also seek to encourage the development of this activity in those areas where it has not yet been taken up.

6. Permits

Permits will be issued for designated areas. The designation of areas of operation and the number of permits will be informed by a precautionary management plan that is flexible to allow for feedback from scientific studies. The designation of areas and number of permits to be allocated will be reviewed and adjusted from time to time, based on scientific grounds. Permits will be allocated only under section 13 of the MLRA for a maximum period of one (1) year. Successful permit holders will be re-allocated their permits each year for five (5) years from the date of the first allocations, provided that they fully complied with permit conditions. There will be a review of the number of BBWW operators in each of the designated areas five (5) years from the date of the first allocations. A fresh invitation for applications will therefore occur every five years (see paragraph 10).

Each BBWW permit shall be issued subject to such conditions considered necessary to satisfy the objectives of this policy. Any permit conditions may be amended from time to time.

7. Optimal Socio-economic Benefits

When considering competing permit applications, the Minister or delegated authority will give preference to the applicant whose operations will have the biggest impact in terms of socio-economic benefits.

8. Vessels

A suitable BBWW vessel is a vessel that:

- is registered by SAMSA as being suitable for BBWW; and
- has a functioning vessel monitoring system.

It is important that properly adapted vessels are used for whale and dolphin watching tours. Operators will be required to provide proof that they have and intend to use such vessels, and will be expected to provide a detailed description of the nominated vessel.

Vessels that cause the least amount of disturbance to the resource are more desirable from a management viewpoint and the replacement of ageing vessels with modern, cost-effective vessels that provide better facilities to paying clients will therefore be encouraged.

Each successful applicant will be restricted to two vessels per permit and specifically the use of the vessels specified in the application form. The permit conditions will, however, prohibit the simultaneous use of the vessels for the purposes of BBWW. Should the permit holder subsequently wish to change the specified vessel/s, the permit holder shall advise the Department of the change and provide proof that the vessel is certified by SAMSA as suitable for BBWW.

Should the vessel change occur without SAMSA's certification, the permit holder will not be allowed to operate until SAMSA has formally certified the replacement vessel as being safe for BBWW.

9. Responsibilities

The Department of Environmental Affairs and Tourism is the sole authority for issuing permits for BBWW. The recognised Industrial Body will be consulted on management issues.

10. Ongoing Applications for Permits

Should there be a vacant area; a permit may be allocated to any other person who, in response to an invitation placed in the *Government Gazette*, satisfies the criteria set out in this policy and the BBWW regulations.

11. Experimental Permits in Plettenberg Bay Area

Three experimental dolphin watching permits will be issued within the next five years in the Plettenberg Bay area. For the duration of the experiment, additional restrictions may be placed on the BBWW operators in the area. A different, open and transparent process will be followed for the allocation of these permits. A BBWW operator that already has a permit may apply for an experimental permit as well.

12. Observer Programme

All permit holders will be required to carry observers upon written instruction by the Department. The costs of accommodating the observer on board will be for the permit holder.

13. Transfer of Permits

Transformation and black economic empowerment are some of the factors that will be taken into account when permits are issued. The Delegated Authority, in transferring a permit, must be satisfied that the application for a transfer of a permit will not result in the undermining of the transformation objectives of the Department in the BBWW industry, especially by allocating the transferred permit to applicants who do not satisfy the transformation criteria.

There will be a one year moratorium on the transfer of permits, during which time the Department will develop a regulatory framework to manage the transfer of permits.

ANNEXURE A

CRITERIA FOR THE ALLOCATION OF BBWW PERMITS

The following are criteria that will be considered in the evaluation of applications for Boat-based Whale Watching (BBWW) permits. Some of these criteria will have the effect of excluding applications that do not comply with them, hence called "Exclusionary Criteria. The other set of criteria listed refers to "Balancing Criteria", which are mainly intended to bring transformation into the industry so as to be representative of the South African demographics in a number of its key aspects and effects (i.e. economic benefits) and improve growth of the industry. While the rest of other criteria listed will be considered in the evaluation of applications, the manner of their consideration shall be determined during the application process and are thus referred to as "Other Criteria".

1. Exclusionary Criteria

Every applicant is expected to adhere to certain requirements pertaining to the completion and submission of application forms. If these requirements are not adhered to, the application will be excluded. The requirements will be stated in detail in the *Instructions* attached to the BBWW application form and may include:

- a) Using only the applicable application form;
- b) Paying the application fee in full; and
- c) Signing the application form and attesting to the declaration.

2. Balancing criteria

Although the following criteria will generally be applied to both current permit holder applicants and new entrant applicants, the weighting that will be applied to each of the categories may differ.

(a) Transformation

A key objective with the allocation of permits in this sector is to improve the levels of transformation. Accordingly, applicants will be assessed and scored on:

- The percentage Black and Black women representation at ownership and executive management levels as well as other levels below it;
- Compliance with the Employment Equity Act, 1998 (Act No. 55 of 1998), and skills development laws;
- Preferential Procurement;
- Enterprise development;
- Corporate social investment;
- Training: Apart from the requirements relating to crew already mentioned, BBWW operators are encouraged to provide ongoing training and education for crew members pertaining to all facets of running a BBWW operation.

(b) Investment in the Sector

Applicants will be evaluated having regard to investments made in the BBWW sector and local community. In this regard applicants who reside within a radius of 25km from the nominated area of operation will be positively scored.

As far as current permit holder applicants are concerned, specific consideration will be given to:

- Investments in suitable vessels and equipment and the form of shareholding will be considered.
- Investment in marketing: In this regard, the delegated authority will reward current permit holder applicants that have invested in marketing South Africa and their local area as a BBWW tourist venue.
- Efforts made by the permit holder to collect data for the Department.

New entrant applicants will be required to demonstrate whether they have or intend to invest in a suitable vessel and equipment. New entrant applicants must also demonstrate how they intend marketing BBWW to both local and international tourists.

(c) Local Economic Development

BBWW permits are allocated on an area basis. A number of new areas have now been added. Accordingly, further BBWW operators may now be accommodated. The intention is to stimulate further growth of the BBWW industry in coastal towns. Those current permit holder applicants that demonstrate that they have made investments in infrastructure in the area from which they have operated may be positively scored. Involvement, where possible, of local community members will be taken into account.

(d) Jobs

Those current permit holders that have provided (or new entrants that undertake to provide) their employees with –

- Secure employment during the entire BBWW season;
- Medical aid and pension; and
- Safe working conditions.

will be favourably considered.

(e) Operational Plan

Applicants will have to compile an operational plan on which they will be evaluated. An operational plan should include the following as a minimum:

- The expected frequency of trips and numbers of passengers;
- The marketing strategy;
- The anticipated duration of trips;

- The areas of intended operation; and
- A description of the anticipated trip activity, safety precautions and tourist education.

The education that will be given to cetacean watching tourists will, in particular be assessed. Not only does education enrich the experience of tourists, but it also adds to the eco-tourism bottom line as well as increase compliance with regulations and codes of conduct applicable to whale watching. BBWW operators capable of educating tourists and providing educational material for their clients will be favourably considered.

Since BBWW is growing into a lucrative form of eco-tourism in which more than half the clientele comes from abroad, a solid reputation for safety needs to be built in order to portray a positive image of the industry. Experience in tourism and knowledge of local sea and weather conditions will therefore be taken into account.

(f) Research

There is growing consensus that commercial BBWW operators are often in possession of very useful information and data which can make a valuable contribution to the more effective management of whale and dolphin populations. Co-operation between operators and managers with scientists is therefore essential. Plans and the ability for making meaningful contributions by operators will be positively scored. In particular, favourable consideration will be given to operators who have undertaken practical steps and demonstrate capability to co-operate and assist scientists in the gathering of data to assist in research, such as assisting with the monitoring of individual as well as populations of cetaceans including number, size, sex and individual identification.

(g) Compliance

Minor infringements of the Marine Living Resources Act, including its Regulations, by the applicant, its directors or controlling shareholders or members will result in the applicant being negatively scored. Applicants unable to demonstrate that they comply with their obligations under the Employment Equity Act 55 of 1998, the Skills Development Act 97 of 1998 and the Skills Development Levies Act 9 of 1999, the Occupational Health and Safety Act, 1993 and the Compensation for Occupational Injuries and Diseases Act, 1993, will be negatively scored.

(h) Vessel Monitoring System.

BBWW applicants that have or can demonstrate the intention to invest in a vessel monitoring system will be positively scored.

3. Other criteria

In addition, the following criteria will also be considered during the evaluation of applications. Applicants are expected to:

- a) demonstrate access to a suitable BBWW vessel,
- b) employ or contract a skipper certified by the South African Maritime Safety Authority ("SAMSA") as capable of operating a nominated vessel with passengers.
- c) employ or contract a tour guide who has obtained a SATOUR "DTI" certification and badge. All tour guides must be certified as Level 2: General Guides, as a minimum by the South African Qualifications Authority. All crew members must have completed a Site Guide course, accredited by the Department
- d) employ or contract a skipper and at least one tour guide if the nominated vessel is certified to carry more than 5 persons. Applicants that nominate a suitable vessel that is certified to carry 5 persons and less must employ or contract with a skipper who must also be the tour guide.

- e) demonstrate that they have public liability insurance. New entrant applicants will have to provide an undertaking confirming that they will purchase public liability insurance up to an amount to be determined and for the duration of the permit.
- f) understand that if they are the current permit/exemption holders and failed to utilise their WSCD permits or exemptions, or that they failed to regularly submit logbooks in terms of their permit or exemption conditions, or undertook an average of less than 50 trips per season over the duration of the exemption period, may not be allocated a permit. This criterion will be applied in a flexible manner
- g) understand that if they or their members, directors or controlling shareholders have been convicted of a serious infringement of the MLRA, the regulations, permit conditions or other serious fishery related offences during the exemption period, they will not be allocated a BBWW permit. This does not include the payment of an admission of guilt fine. Permits may also not be allocated to an applicant if the applicant, or its members, directors or controlling shareholders, have had any right or permit cancelled, suspended or revoked in terms of the MLRA, or assets seized under the Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998) or the MLRA. Decisions may be deferred if an applicant (or its members, directors or controlling shareholders) is being investigated for a contravention of the provisions of the MLRA. Directors and members with controlling interests must declare any offences or contraventions outlined above whether in their personal capacity or as members or directors of other organisations which were convicted of the above offences
- h) show a significant investment or participation in the BBWW sector if they are current permit holders. As a minimum, significant investment or participation by current permit holders (as at 31 December 2007) will comprise of:
- Investment in a suitable BBWW vessel and equipment, whether as sole owner or as a shareholder (provided that the value of the shareholding is equal to or more than 5% of the market value of the vessel); and

- Some of the natural person's shareholder(s) or members must have actively participated in the operation of the business.
- i) demonstrate that they have obtained access to a suitable white shark cage diving vessel and that they are committed to participate in the operation of the business, if they are new entrant applicants. This commitment will be determined having regard to, *inter alia*, knowledge of the sector and the ability to safely carry on the business of white shark cage diving.
- j) undertake that they will commence operation within one year of being issued a permit. If the applicant has not commenced operation within one year of being issued a permit, the permit will be cancelled.

ANNEXURE B

APPLICATION PROCESS FOR BBWW

The process described below informs prospective applicants of the procedures to be followed subsequent to the invitation to apply for BBWW permits.

(i) Public participation in policy formulation

The policy sets out the basis or terms on which permits will be allocated. The policy will also be distributed along with the application forms to be used in the permit allocation process. Application forms will also be available on www.mcm-deat.gov.za. It will be assumed that applicants will have read this policy when applications are evaluated.

(ii) Communication Processes

After applications are invited by notice in the Government Gazette, the Minister will not communicate with individual applicants, other than in the manner set out in this policy document and the invitation for applications. Communication will take place only through electronic media and the Government Gazette.

(iii) Language

This Policy, the application form and all explanatory notes to the application forms will be available in English. See www.mcm-deat.gov.za.

(iv) Fees

Application and permit fees are payable in accordance with the Schedule of fees set out in *Government Gazette* Notice 878 of 2 September 2005 published in terms of section 25 of the MLRA. These fees may in consultation with the Minister of Finance be amended from time to time.

(v) Departmental Assistance

Applicants will be able to submit queries relating to the application process to the Department. The query period will be open for a specified time, after which all queries will be collated and responses published on the Departmental website prior to the closing date for applications. The Department's customer services centre may also be contacted on 0861 123 626.

(vi) Number of Copies

All applicants will be required to submit one original and copy of the application (including annexures).

(vii) Calls for Further Information and Investigations

A matter will be investigated where it is suspected that an applicant may have provided false information or documents or failed to disclose material information or misrepresented information (in any other matter) and random verification of information provided may be undertaken.

(viii) Capturing of information on a database and development of detailed criteria and weighting

Information submitted by applicants will be captured on a database. The policy and the database will be used for the development of detailed criteria and weighting for the purposes of assessing the applications.

(ix) Notification of decision.

All applicants will be notified in writing of the decision on their applications. Letters to unsuccessful applicants will include the reason for the application being unsuccessful. The process followed in allocating the permits, including the criteria and weighting applied will be made available on request.

(x) Appeals

An applicant will be permitted to submit a written appeal in terms of section 80 of the MLRA against the decision to deny/reject their application within the prescribed period.

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