

## GENERAL NOTICE

### NOTICE 396 OF 2013

#### DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES

#### INVITATION TO COMMENT ON THE DRAFT REVISED GENERAL POLICY ON THE ALLOCATION AND MANAGEMENT OF FISHING RIGHTS: APRIL 2013

The Department of Agriculture, Forestry and Fisheries hereby publishes for comment the DRAFT REVISED GENERAL POLICY ON THE ALLOCATION AND MANAGEMENT OF FISHING RIGHTS: APRIL 2013. Interested and affected parties are invited to submit written comments on this Draft Revised General Policy on the Allocation and Management of Fishing Rights: April 2013 in the manner provided for in this Notice.

The Draft Revised General Policy applies to the following fishing sectors:

- |  |  |
|--|--|
| <ul style="list-style-type: none"> <li>▪ Hake Deep Sea Trawl</li> <li>▪ Hake Inshore Trawl</li> <li>▪ Horse Mackerel</li> <li>▪ Small Pelagics</li> <li>▪ Patagonian Toothfish</li> <li>▪ South Coast Rock Lobster</li> <li>▪ Kwazulu-Natal Prawn Trawl</li> <li>▪ Hake Long Line</li> <li>▪ West Coast Rock Lobster (Off Shore)</li> <li>▪ Squid</li> </ul> | <ul style="list-style-type: none"> <li>▪ Tuna Handline</li> <li>▪ Seaweed</li> <li>▪ Shark Demersal</li> <li>▪ Hake Handline</li> <li>▪ West Coast Rock Lobster (Near Shore)</li> <li>▪ Oysters</li> <li>▪ White Mussels</li> <li>▪ Netfishing</li> <li>▪ Abalone</li> <li>▪ Traditional Linefish</li> <li>▪ Fish Processing Establishments</li> </ul> |
|--|--|

Interested parties may submit written comments to the Department by no later than **17h00 on 10 May 2013** by mail, by hand, e-mail or telefax transmission. Please note that comments received after the closing date may be disregarded.

<u>Per Facsimile</u>	<u>Per Post</u>	<u>Per E-mail</u>	<u>Per Hand</u>
Fax Number (021) 4215151 DDG: Fisheries Attention: R Scott Fishery (specify which fishery): General Policy Comment	DDG: Fisheries Attention: R Scott Private Bag X2 Roggebaai Cape Town 8001 Fishery (specify which fishery): General Policy Comment	Fishingrights@daff.gov.za DDG: Fisheries Attention: R Scott Fishery (Specify which fishery): General Policy Comment	DDG: Fisheries Attention: R Scott Foretrust Building, Martin Hammer-schlag Way, Cape Town Fishery (Specify which fishery):General Policy Comment

The draft policy is also available on the Department's website [www.daff.gov.za](http://www.daff.gov.za)



**DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES**

**DRAFT REVISED GENERAL POLICY ON THE ALLOCATION AND MANAGEMENT OF FISHING  
RIGHTS: 2013**

**THIS POLICY MUST BE READ WITH THE APPLICABLE FISHERY SPECIFIC POLICY  
(available at [www.daff.gov.za](http://www.daff.gov.za))**

**This document is also available in Afrikaans, isiXhosa and isiZulu  
Hierdie document is ook in Afrikaans, isiXhosa, en isiZulu beskikbaar  
Lencwadi iyafumeneka nangolwimi lwesiBhulu, lwesiXhosa nolwesiZulu  
Lencwadi iyatholakala nangolwimi lwesiBhulu, lwesiXhosa nolwesiZulu**

## Contents

<b>PART A: INTRODUCTION AND BACKGROUND .....</b>	<b>5</b>
1. Introduction .....	5
2. Application of the General Policy .....	5
3. Purpose and Objectives .....	6
4. Key Government Policies .....	6
4.1.1 The National Development Plan .....	7
4.1.2 The Integrated Growth and Development Plan (IGDP) for Agriculture, Forestry and Fisheries .....	7
4.1.3 The New Growth Path (NGP) .....	7
4.1.4 The 2012 Industrial Policy Action Plan (IPAP) .....	7
4.1.5 The Comprehensive Rural Development Programme .....	8
<b>PART B: ALLOCATION METHODOLOGY AND PROCESS .....</b>	<b>9</b>
5. The Allocation of Fishing Rights .....	9
5.1 The Marine Living Resources Act 18 of 1998 .....	9
5.2 The legal nature of the Fishing Right .....	9
5.3 Core Allocation and Management Considerations .....	10
5.4 Allocation process determined by Clusters .....	12
5.5 Provisional lists .....	14
5.6 Multi-sector involvement .....	15
5.7 Participation of applicants .....	15
5.8 Design of criteria and weighting .....	15
5.9 Information to be considered .....	15
5.10 Calls for further information, investigations and consultation .....	17
5.11 Support for delegated authorities .....	17

5.12	Notification of decisions and the reasons .....	17
5.13	Appeals .....	18
5.14	Access to information .....	18
6.	Criteria used for decision-making on the allocation of rights .....	19
6.4	Exclusionary criteria .....	19
6.5	Balancing criteria .....	20
6.6	Tie-breaking factors .....	21
6.7	Criteria used for awarding quantum or effort .....	21
<b>PART C: CROSS CUTTING POLICY CONSIDERATIONS FOR THE ALLOCATION OF RIGHTS .....</b>		<b>22</b>
7.1	Duration of right .....	22
7.2	Form of right holder .....	22
7.3	Employment Equity .....	22
7.4	Skills Development .....	23
7.5	Affirmative Procurement .....	23
7.6	Corporate Social Investment .....	23
7.7	New entrants .....	23
7.8	Paper quotas .....	24
7.9	Financial performance .....	24
7.10	Payment of levies .....	25
7.11	Compliance .....	25
7.12	Fishing performance .....	25
7.13	Investment .....	26
7.14	Value adding .....	26
7.15	Enterprise development .....	26
7.16	Job creation .....	26

7.17	Local economic development and geographic considerations .....	27
7.18	Vessels and fishing effort .....	27
7.19	Safety of staff and crew .....	28
<b>PART D: CROSS CUTTING POLICY CONSIDERATIONS FOR THE ALLOCATION OF QUANTUM OR EFFORT .....</b>		<b>29</b>
8.	Policy Considerations.....	29
<b>PART E: POLICY REVIEW .....</b>		<b>29</b>
9.	Policy review .....	29
10.	<b>GLOSSARY OF TERMS.....</b>	<b>30</b>

## PART A: INTRODUCTION AND BACKGROUND

### 1. Introduction

- 1.1 This **General Policy on the Allocation and Management of Fishing Rights** is issued by the Minister of Agriculture, Forestry and Fisheries and will be referred to as the “**General policy**”. The General policy must be read in conjunction with policies that will be referred to as the “**Fishery specific policies**” or “**Sector specific policies**” that have been adopted for each fishing sector. In the General policy a number of issues are dealt with that are relevant to all the fishing sectors listed in paragraph 2. These cross-cutting policy considerations also inform the contents of the Fishery specific policies, which set out the Minister’s specific intentions with regard to the allocation of rights in each fishery. Potential applicants and interested parties should read this General policy in conjunction with the applicable Fishery specific policy.

### 2. Application of the General Policy

- 2.1 The General policy applies to:
- (a) The allocation of rights in the following fishing sectors: Hake Deep Sea Trawl, Hake Inshore Trawl, Horse Mackerel, Small Pelagics, Patagonian Toothfish, South Coast Rock Lobster, KwaZulu-Natal Prawn Trawl, Hake Long Line, West Coast Rock Lobster (Off Shore), Squid, Tuna Handline, Seaweed, Shark Demersal, Handline Hake, West Coast Rock Lobster (Near Shore), Traditional Linefish, Oysters, White Mussels, Netfishing (Trek- and Gillnets and Beach Seine), Kwazulu-Natal Beach Seine, Traditional Linefish, Abalone, Fish Processing Establishments and the Small-Scale Fisheries sector.
  - (b) The allocation of rights to operate fish processing establishments.
  - (c) The management of permit fisheries and non-consumptive marine activities such as underwater photography.

### 3. Purpose and Objectives

- 3.1 The purpose and objectives of the General policy, together with the Fishery specific policies, is to:
- (a) promote food security and socio-economic development through the sustainable utilization of fisheries resources;
  - (b) promote transformation, broaden meaningful participation (increase participation, value-creation, linkage) and growth in the fisheries sector;
  - (c) support and develop regulatory and management mechanisms aimed at promoting sustainable utilization/management of fisheries resources;
  - (d) achieve the recognition, protection and support of small-scale fishers;
  - (e) promote the recognition of the interdependency of the social, cultural, economic and ecological dimensions of small-scale fishery systems;
  - (f) achieve the incorporation of a community-based rights approach to the allocation of marine living resources;
  - (h) promote the allocation of resources through a multi-species approach;
  - (i) ensure the sustainable development of fisheries identified as small-scale, making sure that small-scale fishing communities maximise the benefit from those resources and are the main beneficiaries;
  - (j) introduce measures and mechanisms that prioritise the small-scale fisheries sector within the fishing industry; and
  - (k) introduce mechanisms and structures that promotes a community orientation, co-management and community-based approach in the harvesting and management of marine living resources within the small-scale fisheries sector.

### 4. Key Government Policies

- 4.1 The General and Fishery specific policies are informed by government's key policies, namely the National Development Plan, the Integrated Growth and Development Plan (IGDP) for agriculture, forestry and fisheries New Growth Path (NGP), the Industrial Policy Action Plan (IPAP), the Comprehensive Rural Development Programme (CRDP)

#### **4.1.1 The National Development Plan**

4.1.1.1 The National Development Plan (NDP) offers a long-term perspective. It defines a desired destination and identifies the role different sectors of society need to play in reaching that goal. The NDP aims to eliminate poverty and reduce inequality by 2030. According to the plan, South Africa can realise these goals by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout the country.

#### **4.1.2 The Integrated Growth and Development Plan (IGDP) for Agriculture, Forestry and Fisheries**

4.1.2.1 The IGDP provides a structural view of the fishing sectors' current circumstances and the challenges face it. It further describes the goals and the actions needed to achieve South Africa's vision for fisheries management and in so doing ensuring a productive and sustainable sector.

#### **4.1.3 The New Growth Path (NGP)**

4.1.3.1 The New Growth Path provides bold, imaginative and effective strategies to create the millions of new jobs South Africa needs. It also lay out a dynamic vision on the collective achievement of a more developed, democratic, cohesive and equitable economy and society over the medium term, in the context of sustained growth. The strategy sets out critical markers for employment creation and growth and identifies where viable changes in the structure and character of production can generate a more inclusive and greener economy over the medium to long term.

#### **4.1.4 The 2012 Industrial Policy Action Plan (IPAP)**

4.1.4.1 Government interventions set out in the National Development Plan Vision 2030, the NGP and other policy documents seek to ensure that critical steps in support of the restructuring of the economy are secured to set it on a more value-adding and labour-intensive growth path. The IPAP is framed by and constitutes a key pillar of such interventions.



#### 4.1.5 The Comprehensive Rural Development Programme

- 4.1.5.1 The CRDP is a strategic priority in government's Medium Term Strategic Framework (MTSF). The design of the programme is predicated on lessons learnt from pilot sites selected through socio-economic profiling, community participatory processes and intergovernmental cooperation.
- 4.1.5.2 The CRDP is different from past government strategies in rural areas because it is premised on a proactive participatory community-based planning approach rather than an interventionist approach to rural development. It is aimed at being an effective response to poverty and food insecurity by maximising the use and management of natural resources to create vibrant, equitable and sustainable rural communities.
- 4.1.5.3 The CRDP must improve the standards of living and welfare and rectify past injustices through rights-based interventions and by addressing skewed patterns of distribution and ownership of wealth and assets.
- 4.1.5.4 The strategic objective of the CRDP is therefore to facilitate integrated development and social cohesion through participatory approaches in partnership with all sectors of society.

## PART B: ALLOCATION METHODOLOGY AND PROCESS

### 5. The Allocation of Fishing Rights

#### 5.1 The Marine Living Resources Act 18 of 1998

5.1.1 The transformation of the fishing industry is a constitutional and legislative imperative. The primary vehicle for the promotion of the transformation of the South African fishing industry is the Marine Living Resources Act 18 of 1998 (the "MLRA").

5.1.2 Another important purpose of the MLRA is to provide for the orderly exploitation of marine living resources, and to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa.

#### 5.2 The legal nature of the Fishing Right

5.2.1 The "*fishing rights*" allocated under the MLRA are not property rights and should be understood as statutory permission to harvest a marine living resource for a specified period of time. Accordingly, cancellation or revocation does not constitute the expropriation of a property right within the meaning of section 25 of the Constitution or the Expropriation Act 63 of 1975. This is clear from section 18(6) of the MLRA, which provides that a fishing right is valid for the period determined by the Minister (or his delegate) whereafter it automatically reverts back to the State.

5.2.2 A fishing right is granted to a specific person or entity and, in terms of section 21 of the MLRA, the right may not be transferred without the approval of the Minister or his delegate. Upon the death, sequestration, or liquidation of the right holder, the right vests respectively in the executor, trustee or liquidator and the right may continue to be exploited for the period of time permitted by the applicable legal provisions.

5.2.3 Any transfer of the fishing right to a third party or the sale of shares/member's interest resulting in change of control of the company/close corporation or resulting in the company/close corporation not being as transformed as at date of allocation of the fishing right an application requires prior written approval of the Minister.

### 5.3 Core Allocation and Management Considerations

This General policy and the Fishery specific policies are based on the following principles that guide the allocation and the management of fishing rights. They are:

#### 5.3.1 Transformation

- (a) The MLRA requires decision-makers to have regard to the need to restructure the fishing industry in order to address historical imbalances and to achieve equity within all the sectors of the fishing industry. Transformation is also a constitutional imperative in South Africa.
- (b) The Broad-Based Black Economic Empowerment Act 53 of 2003 is one of a number of statutory instruments giving effect to this constitutional imperative. This Act provides that the Minister of Trade and Industry may by notice in the Gazette issue codes of good practice on black economic empowerment. The codes provide for a "*balanced scorecard*" to measure progress and status within enterprises as well as the adoption of transformation charters for specific sectors of the economy by the major stakeholders in those sectors.
- (c) The Act and the codes were considered in the development of this policy and the fishery specific policies. However, owing to the nature of the fishing rights allocation process, the Minister of Agriculture, Forestry and Fisheries has not adopted the weighting and benchmarks set in the codes relating to ownership and management. When allocating fishing rights, the delegated authority is called upon to compare applicants with each other, rather than against an external benchmark.
- (d) Transformation is an extremely important consideration in this comparative balancing process. The process is competitive and no "*benchmark*" can be set in advance. In a sector that is not sufficiently transformed, applicants with higher transformation scores than others will always stand a better chance of being allocated a right or a larger proportion of the available TAC or TAE. The policy is that within such a competitive comparative process, the adoption of charters or benchmarks is not always the appropriate vehicle to further transformation.
- (e) The policy is to further transformation and to improve on the levels of transformation in the fishing industry. Only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons. Persons were historically disadvantaged in the

fishing industry on account of their race and gender in respect of access to rights. It is accordingly necessary to promote the participation of such historically disadvantaged persons within all branches in the fishing industry. It is also necessary to address historical imbalances and achieve equity within the fishing industry.

- (f) In the allocations process the race and gender of applicants, and in the case of juristic persons, the race and gender of the applicant's shareholders or members, management, suppliers and workforce, will also be taken into account. In addition, corporate social investment will be taken into account.
- (g) Beneficial ownership of the applicant by black people, in the form of unrestricted voting rights and economic interest associated with equity ownership, will be assessed and taken into consideration. In determining whether voting rights and economic interest is "*unrestricted*" the delegated authorities may have regard to Code 100 of the Broad-based Black Economic Empowerment Act. The weighting set out in the Code will not be used.
- (h) Additional points may be allocated to those applicants that have succeeded in empowering employees through worker trusts, provided that the applicant can demonstrate that the employees derived real benefits (such as dividends, trustees or joint management) from the trust. The delegated authority may set a level of transformation for achieving the maximum number of points for black ownership. The maximum number of points for ownership by blacks will then be awarded to applicants that achieved that level.
- (i) The senior or executive management of an applicant entity by black persons will be taken into account. Senior or executive management generally describes those persons responsible for guiding the strategic activities of the company and who report directly to either the managing director or the Board. For purposes of the rights allocations process, the management of the applicant will be assessed in three ways. First, the data submitted in employment equity reports will be considered, if available. If not available, applicants will be requested to submit similar data. Second, the composition of the board of directors will be taken into account. Third, applicants will be required to submit data concerning the top salary earners of the applicant.

### **5.3.2 Socio-economic and economic considerations**

The socio-economic impact of allocations on fishing communities, workers and consumers are considered, in particular those communities and individuals dependent on marine living resources for their livelihood.

Commercial considerations including the nature and value of investments in fixed assets, marketing and processing and fishing capacity are considered.

The enhancement of the global competitiveness of the South African fishing industry is an important consideration.

The prevention of anti-competitiveness in the fishing industry is an important consideration.

### **5.3.4 Biological considerations**

The impact on the target species must be considered. This is primarily done through the setting of a Total Allowable Catch ("TAC") or a Total Allowable Effort ("TAE"), or both.

### **5.3.5 Ecosystem Approach to Fisheries Management (EAF)**

The EAF management is based on two main principles, i.e., maintaining and enhancing ecosystem health and balancing diverse societal needs and values.

### **5.3.6 Performance or potential to perform**

Economic growth and development, job creation, rural development, Sustainable use of natural resources, food security, value adding, enterprise development and job creation, as well as compliance with the MLRA, the Regulations, permit conditions and other legal requirements, are considered.

## **5.4. Allocation process determined by Clusters**

For purposes of the rights allocation process, the fishing sectors are grouped together in four clusters for the assessment of applications for fishing rights. The purpose of clustering fisheries together is administrative, procedural and, to a lesser extent, substantive. However, different

criteria and weighting may be applied to sectors falling within the same cluster. The clusters are:

**Clusters A, B, C and D.**

**(a) Cluster A**

Hake Deep Sea Trawl  
Hake Inshore Trawl  
Horse Mackerel  
Small Pelagics  
Patagonian Toothfish  
South Coast Rock Lobster  
KwaZulu-Natal Prawn Trawl

**(b) Cluster B**

Hake Long Line  
West Coast Rock Lobster (off shore)  
Squid  
Seaweed  
Tuna Pole  
Demersal Shark

**(c) Cluster C**

Handline Hake  
West Coast Rock Lobster (nearshore)  
Traditional Linefish  
Abalone

**(d) Cluster D**

Net Fish (trek- and gillnets; beach seine)  
KZN Beach Seine  
Oysters  
White Mussels

#### 5.4.1 Clusters A and B

- (a) The allocation of quantum in the Cluster A and B sectors is dealt with in the sector specific policies. The following principles will be applied in the allocation of quantum:
- (i) The delegated authorities must determine a minimum amount to be allocated to applicants.
  - (ii) It is government policy to support small, micro and medium enterprises (SMME) and broad based black economic empowerment. The delegated authority must allocate a reasonable amount of the TAC/TAE to SMMEs. In considering the allocations to SMMEs, the delegated authorities must have regard to the nature of the fishery and the level of transformation. In fisheries that are sufficiently transformed and representative of SMMEs, distribution may be unnecessary.
  - (iii) In fisheries that are capital intensive in nature and are accordingly not ideally suitable for SMME development, the delegated authorities must allocate at least 10% of the TAC/TAE to applicants that have transformed and performed well in a sector.
- (b) In addition to the above principles, the delegated authorities may allocate quantum based on criteria intended to achieve the objectives set out in the respective sector policies, such as transformation and performance. These criteria must be designed in a manner which should ensure that all successful applicants, regardless of size, will be able to benefit if they meet the criteria.

#### 5.4.2 Clusters C and D

- (a) Successful applicants in the **Cluster C and D** sectors will be allocated a fixed amount of the available TAC or TAE.

### 5.5 Provisional lists

- 5.5.1 The delegated authority may issue provisional lists for comment on any aspect in any sector.

- 5.5.2 The delegated authority may request comment on whether the provisionally successful applicants are dependent on the resource and on the basis of the comments received make a final decision.
- 5.5.3 The delegated authorities may invite representations regarding the assessment of the applications before making final decisions.
- 5.5.4 The delegated authorities may consult with interested and affected parties on the method of allocating quantum or effort before taking these decisions.

**5.6 Multi-sector involvement**

In general, it is not a policy objective to preclude or discourage the holding of rights in more than one fishery.

**5.7 Participation of applicants**

- 5.7.1 It will be a requirement that applicants be involved in the full value chain of the fishing sector.

**5.8 Design of criteria and weighting**

- 5.8.1 Information submitted by applicants will be captured on a database. The policies, the database and information submitted by way of annexures, will be then be used for the development of detailed criteria and weighting for each sector for the purposes of assessing the applications and thereafter the allocation of quantum or effort.

**5.9 Information to be considered**

- 5.9.1 The approach set out below will be adopted by the delegated authority and the appellate authority regarding information to be taken into account for assessing the applications.

**(a) Parts of application form not completed**

Unless otherwise indicated, if a part of the application form is not completed, it will be assumed that that part of the form does not apply to the applicant. If the section has positive points associated with the answer, no points will be awarded. A specific icon will be used to indicate where, if not completed, an answer adverse to the applicant will be assumed.



**(b) Late information**

Information submitted after closing day will not be considered, unless requested by the Fishing Rights Verification Team, the delegated authority or the Minister as part of the rights allocation or the appeal process. The approach to the submission of additional information on appeal is described below.

**(c) Information from external sources**

Prejudicial information about an application received from external sources will not be taken into account by the Minister or the delegated authority unless the applicant is afforded the opportunity to make representations in respect of that information.

**(d) Use of Departmental databases**

The Minister or the delegated authority may use information contained in the Department's own databases during the long term rights allocation process, but will do so only to the extent that applicants were afforded the opportunity to make representations concerning the correctness of the data.

**(e) Submission of false information or documents and non-disclosure**

Applicants or their authorised representatives are required to attest to a declaration before a commissioner of oaths stating, amongst other things, that they have not submitted false information or false documents and that they have not failed to disclose material information. The submission of false information or false documents or the failure to disclose material information will constitute an independent ground for refusing an application. It will be assumed that an applicant has provided false information if there is a material discrepancy between the information provided by the applicant and the information contained in databases held by the Department and where both versions cannot be correct. It will further be assumed that an applicant has provided false information when there is a material discrepancy between the information provided by the applicant in the original application and information provided by the applicant on appeal, and where both versions cannot be correct. In addition, the making of a false statement in an attested declaration, knowing it to be false, constitutes a criminal offence.

**5.10 Calls for further information, investigations and consultation**

5.10.1 The Minister or the delegated authority may invite applicants to make oral submissions or to present further information in writing if there is uncertainty concerning a material issue in a substantial number of the applications. If oral hearings are held, legal representatives will be permitted to address the Minister or the delegated authority.

5.10.2 The Minister or the delegated authority may request the Fishing Rights Verification Team to investigate any matter, including the correctness of information provided. Applicants must co-operate with investigators by timeously submitting responses to written requests for information or explanations, by attending meetings with investigators, by answering questions satisfactorily at such meetings, and where necessary, by granting investigators access to premises, vessels and documents. The failure to co-operate will constitute an independent ground for refusing an application.

**5.11 Support for delegated authorities**

5.11.1 The delegated authority responsible for the decisions on the applications in a sector may be supported by a "Fishing Rights Assessment Panel", and also by professional project managers, consultants and legal practitioners.

5.11.2 The role of the Fishing Rights Assessment Panel will be determined by the delegated authority. The Fishing Rights Assessment Panel may be called upon to assist in the assessment of the applications under the supervision of, and in accordance with the criteria and weighting determined by, the delegated authority.

**5.12 Notification of decisions and the reasons**

5.12.1 After the delegated authority has made decisions on the allocation of rights and quantum or effort, the Department will notify an applicant in writing of the decision on the application.

5.12.2 In addition, the Department will publish the results electronically and communicate the results through recognised industrial bodies and interest groups.

### **5.13 Appeals**

5.13.1 Every applicant will have the right to appeal against the decisions of the delegated authority. The appeal may be lodged against a refusal to grant a right or against the decision on quantum or effort. Details about the submission of appeals will be contained in the notification letter.

5.13.2 The appellate authority will consider the facts as they were at the closing date for applications and will not take into account facts that came into existence thereafter. For example, if an applicant made an investment in a vessel after the closing day for applications that fact will not be taken into account when considering the appeal.

5.13.3 Once a decision is taken, the appellant will be informed of the appellate authority's decision in writing.

### **5.14 Access to information**

5.14.1 The following records will be automatically available for inspection or purchase at the prescribed fee after the results are announced:

- (a) Any score sheet, spreadsheet or other document used by the delegated authority, the Minister, or their assistants, to record the assessments of the applications; and
- (b) At the request of the applicant or its authorised representative, the applicant's own application or appeal documentation.

5.14.2 Requests for access to the following records will be dealt with under the Promotion of Access to Information Act 2 of 2000:

- (a) The application form of another applicant;
- (b) The annexures submitted together with an application of another applicant;
- (c) Appeal documentation submitted by another applicant;
- (d) In respect of access to these records, the Department's information officer will apply the procedures and provisions of PAIA.
- (e) In order to assist with the administration of access to information applications, applicants will be required to submit certain documents in respect of which the information officer may refuse access, such as those relating the applicant's fishing plans, marketing plans and financial statements, in a separate folder.

**6. Criteria used for decision-making on the allocation of rights**

- 6.1 The policies and the database compiled after the applications are received, will be used to develop more refined criteria and weighting for purposes of the assessment of the applications. These criteria are developed with reference to data received after closing day and are accordingly not released before the allocation process.
- 6.2 The Department expects a large number of applications for fishing rights and anticipates that, given the current limits on catch or effort in all the fisheries, not all applicants will be granted rights. Some applicants will be rejected because they do not meet the basic requirements. The rest are ranked according to a set of objective criteria in order to identify the best applicants in terms of the policies and weighted criteria. The process is competitive and the aim is to identify the best applicants. The Small-Scale Fisheries sector, however, may be assessed differently.
- 6.3 Four types of criteria will be used to assess the applications. Applications will be screened in terms of a set of "*exclusionary criteria*", and thereafter ranked in terms of a set of "*weighted balancing criteria*". In addition, and in some sectors, the delegated authority may employ one or more of a number of "*tie-breaking factors*" in order to make a decision if there are too many applicants with the same score. A proportion of the TAC or TAE will then be allocated to each successful applicant in terms of a set of "*quantum or effort criteria*".

**6.4 Exclusionary criteria**

- 6.4.1 The following types of exclusionary criteria will be employed.
- (a) an application will be screened to determine whether it was properly lodged. An application is improperly lodged if it was received late; if the applicant made no payment or short payment or late payment of the application fee; or if it was lodged in a manner contrary to the instructions, such as by fax, or on a form other than the official prescribed application form. The delegated authority and the Minister has no discretion to condone non-compliance with the lodgement requirements.
  - (b) an application will be screened to determine whether it is materially defective. An application is materially defective if the declaration is not signed by the applicant, or if the applicant's declaration was not attested to by a Commissioner of Oaths, or if more than one application was received from

the applicant for a fishing right in the same sector, or if the applicant provided false information or false documents, or failed to disclose material information, or attempted to influence the Minister or the delegated other than in the manner provided for in this General policy during the application period.

- (c) an application will be screened to determine whether the applicant was subjected to a Section 28 process in terms of the MLRA which resulted in the revocation or cancellation or suspension or alteration of the conditions of a right held by such applicant.
- (d) in Cluster A, independent auditors are required to verify certain responses by the applicant and to prepare and sign a report in this regard. If the applicant relies on information provided by holding companies or other members of a group of companies or joint venture partners, the authorised representatives of these entities are also required to sign and to attest to a declaration. The application will be also be materially defective if a report of the independent auditor is not provided and signed (if applicable) or if the declaration of the authorised representative of the holding company, member of a group of companies or joint venture partner is not signed and attested. The delegated authority and the Minister has no discretion to condone non-compliance with the requirements relating to materially defective applications.
- (e) an application will be screened to determine whether an applicant meets the minimum essential requirements for participating in the sector. The delegated authority and the Minister has no discretion to condone non-compliance with an essential requirement for participating in the sector. The essential requirements differ from sector to sector.

## **6.5 Balancing criteria**

6.5.1 Applications that were properly lodged, not materially defective and that meet the essential requirements will be scored in terms of set of balancing criteria ("*the balancing criteria*").

6.5.2 The balancing criteria will be weighted for purposes of ranking the applicants. Some of the criteria, such as transformation, will apply across all sectors, while others will be sector specific. The

applications from current right holders will not be scored in terms of the same criteria and weighting as potential new entrants and will be ranked separately.

- 6.5.3 Cut-offs will then be determined separately for current right holders and potential new entrants. All applicants with a score equaling or more than the cut-off will be allocated rights.

**6.6 Tie-breaking factors**

- 6.6.1 If there are too many applicants with the same score, the delegated authority may use tie-breaking criteria, in order to choose between the applicants with the same score.

- 6.6.2 The tie-breaking factors may comprise of criteria not scored or scored criteria differently weighted.

**6.7 Criteria used for awarding quantum or effort**

- 6.7.1 There are two separate decisions.

- 6.7.2 After the decisions identifying the successful applicants are taken, the delegated authority will decide on the allocation of quantum or effort to each successful applicant in line with the policy.

## PART C: CROSS CUTTING POLICY CONSIDERATIONS FOR THE ALLOCATION OF RIGHTS

### 7.1 Duration of right

7.1.1 Fishing rights will be granted in all the fishery sectors for a period of up to 15 years.

7.1.2 The duration of rights will be determined by, amongst other things, the level of transformation in the fishery, the current knowledge of the biological status of the target species; the capital intensity of the fishery and the need to encourage further investment and economic growth, and the performance of participants in the fishery.

### 7.2 Form of right holder

7.2.1 Section 18 of the MLRA provides that only South African persons may hold fishing rights.

7.2.2 The following South African persons will be considered:

- (a) a company;
- (b) a close corporation;
- (c) a trust;
- (d) a co-operative established in terms of the Small-Scale fisheries policy; and
- (e) a communal property association established in terms of the Small-Scale fisheries policy.

### 7.3 Employment Equity

7.3.1 Applicants who are required by law to comply with the Employment Equity Act 55 of 1998 must demonstrate that they comply.

7.3.2 The number of black persons and women employed by the applicant may also be a balancing criterion. More points will be allocated to blacks and women employed at the higher end of the applicant's salary bands or in professional and skilled positions, than at the lower end and in unskilled positions. For example, applicants may be required to specify the percentage of persons of blacks and women in the top 10% of their salary earners, between the top 10% and the top 30%, between the top 30% and the top 50%, and below the top 50%, or to specify the number of blacks and women appointed in professional and other skilled positions.

- 7.3.3 More points will be allocated for blacks and women in the top earning brackets than at the bottom earning brackets and more points will be allocated for blacks and women appointed in skilled positions than unskilled positions. Because of the racial structuring of the South African workplace, wage differentials may be taken into account.

#### **7.4 Skills Development**

- 7.4.1 Applicants will be required to demonstrate that they comply with the Skills Development Act 97 of 1998 and the Skills Development Levies Act 9 of 1999.

- 7.4.2 If an applicant participate in learnership programmes or spends proportionately more on the training of blacks, this factor may be taken into account.

#### **7.5 Affirmative Procurement**

- 7.5.1 Affirmative procurement (procurement from black companies) may be considered as a factor.

#### **7.6 Corporate Social Investment**

- 7.6.1 The percentage of net profit spent on corporate social investment, may be taken into account.

- 7.6.2 Tax-deductible donations will be considered to be corporated social investment but other donations may also be considered.

#### **7.7 New entrants**

- 7.7.1 In general, there is very little room to accommodate additional entrants because most of the fisheries are already over-subscribed. However, new entrants may be accommodated through the replacement of unsuccessful right holder applicants. This will be done if current right holders have failed to transform meaningfully, or if current right holders have failed to perform or invest adequately, or if the current effort within a specific fishery is considered to be less than optimal.

- 7.7.2 As a general rule, the Department will not allow right holders who sold or in any way alienated a fishing right in a fishery to re-enter that fishery as a new entrant. The same applies to shareholders or members of close corporations who sold a significant share of the right holder.



## **7.8 Paper quotas**

7.8.1 In the rights allocation process, the delegated authority will exclude applicants who may be considered to be paper quota risks. For this purpose, the delegated authority will consider an applicant to be a "*paper quota risk*" if that applicant appears to have no serious intention to share the risk of fully participating in the sector, especially if a danger exists that an applicant has not applied in order to enter the industry but to gain some financial benefit without direct involvement in the main activities associated with exploiting any right that may be granted. In determining whether a new entrant applicant poses such a paper quota risk, the applicant's assets and access to capital and its financial and business planning and commitments should be considered.

7.8.2 The delegated authority must endeavour to prevent paper quota applicants from entering the fishing industry and to remove paper quotas that currently hold rights. Paper quotas undermine or circumvent the objectives of the rights allocation process.

7.8.3 Delegated authorities will also exclude current right holders who are paper quotas. For this purpose, the delegated authorities will consider as paper quotas, current right holders with weak or non-existent performance records combined with no investment or involvement.

7.8.4 The delegated authorities will also exclude as "*paper quota risk*" applicants considered to be "*fronts*" for other beneficiaries. Fronting occurs when, in order to circumvent a policy objective, an application is made through another entity. An example is an application made by an ostensibly transformed entity with the intention that the main benefits will flow to an untransformed entity or individuals that are not black persons.

7.8.5 The Department will withdraw the rights of right holders who turn out to be paper quota holders.

7.8.6 As a rule, the Department will revoke fishing rights held by right holders who fail to effectively utilise their rights.

## **7.9 Financial performance**

7.9.1 Financial performance of the applicant may be assessed in terms of a set of financial ratios which lend themselves to benchmarking backed up by audited financial statements.

7.9.2 The financial statements may also be used to determine who the real beneficiaries of the allocation are ("follow-the-buck" principle) and to determine whether the right holder has invested in the industry.

**7.10 Payment of levies**

7.10.1 Applicants will be required to provide proof that they are up to date on the payment of their levies on fish landed.

**7.11 Compliance**

7.11.1 Applicants convicted for serious infringements of the MLRA, the Regulations, permit conditions and other fishing related offences, may be excluded.

7.11.2 Minor infringements, including the payment of admission of guilt fines, may be taken into account as a balancing criterion.

7.11.3 Vessels listed on the negative lists of any Regional Fisheries Management Organisation ("RFMO") will not be allowed to harvest fish stocks. Applicants who own (wholly or in part) or nominate vessels that are negatively listed will be rejected.

**7.12 Fishing performance**

7.12.1 The fishing performance of current right holders may be examined to determine whether such a right holder applicant has effectively harvested an allocation.

7.12.2 Applicants that did not harvest any fish during a fishing season or who have not collected a permit for an entire season may be excluded.

7.12.3 Under-catching and over-catching may be used as balancing criteria.

**7.13 Investment**

7.13.1 Investment in a vessel nominated to harvest the resource and other fixed assets will be recognised as long as that investment demonstrates a genuine intention to share the risk of participating in the sector.

7.13.2 Shareholding in vessels obtained at minimum or no cost to the applicant, will not be recognised as investment.

7.13.3 The level of investment will be assessed with reference to the quantum held by an applicant by virtue of a fishing right.

**7.14 Value adding**

7.14.1 *Value-adding* means those activities that add commercial value to fish, regardless of whether such value is attained on the South African or international market.

7.14.2 Value-adding may be rewarded because, amongst other things, it stimulates the creation of jobs and wealth.

**7.15 Enterprise development**

7.15.1 Enterprise development constitutes measures to increase black ownership, management and skills in existing and new enterprises, including investment programmes and access to finance.

7.15.2 These measures may be rewarded provided that they do not constitute attempts to circumvent the legislative protection of workers contained in the labour, health and safety laws.

**7.16 Job creation**

7.16.1 An important purpose of allocating fishing rights is to create an environment conducive to job creation, in particular, the creation of more permanent and better quality jobs in the fishing industry.

7.16.2 Jobs created by right holders per ton allocated and increases in jobs as a result of the allocation of fishing rights, will be considered positively.

7.16.3 The creation of permanent employment is preferred over seasonal employment and seasonal employment is preferred over contract employment.

**7.17 Local economic development and geographic considerations**

7.17.1 Delegated authorities may reward the landing of catches in fishing harbours outside the metropolitan areas to promote local economic development.

7.17.2 In order to ensure that all fishing communities share in the marine living resources, the delegated authorities may use landing sites as scoring or tie-breaking criteria.

7.17.3 Applicants are encouraged to land or process fish in harbours and fishing communities that are economically depressed.

**7.18 Vessels and fishing effort**

7.18.1 Applicant may be required to demonstrate a right of access to a vessel suitable for the harvesting of that particular fish stock or stocks. All vessels will have to be registered with the Department in order to be nominated as a catching vessel.

7.18.2 A suitable vessel will be described in the applicable fishery specific policy, but the minimum requirements for suitability will be:

- (a) South African flagged (unless an exception is made in a Fishery policy);
- (b) Unless exempted, fitted with an approved and functioning vessel monitoring system ("VMS");
- (c) Registered by the South African Maritime Safety Association as being suitable for fishing; and
- (d) Not listed on any RFMO negative list.

7.18.3 The Department will require all applicants for fishing rights to utilise the nominated vessel for harvesting the resource. Vessel changes will only be allowed in appropriate instances.

7.18.4 A key element in the management and conservation of marine resources is the limitation of applied fishing effort to ensure the optimum utilisation of such resources.

7.18.5 The Department is generally opposed to any further increase in vessel effort. Vessel overcapacity is regarded as one of the primary threats to South African fish stocks. It also places additional burdens on the Department, both in respect of monitoring and enforcing compliance and managing the exploitation of the resource.

7.18.6 Subject to fishery specific policies, joint and cross-sectoral use of vessels is encouraged, as this will result in more effective and efficient use of vessels throughout the season. On the other hand, it is recognised that ageing vessels must be replaced, inter alia for safety reasons. Modernisation of the fleet will inevitably result in an increase in catch capacity. Where necessary, effort limitations will be introduced to limit effort.

#### **7.19 Safety of staff and crew**

7.19.1 Applicants will be required to demonstrate that they have complied with the regulatory requirements of the South African Maritime Safety Authority Act 5 of 1998 and the regulations promulgated in terms of the Merchant Shipping Act, 57 of 1951.

7.19.2 Applicants will be required to show that they comply with the Compensation for Occupational Injuries and Diseases Act, Act 130 of 1993. Applicants are further reminded of the Department's directive that companies are required to adopt HIV/AIDS policies and may be required to attach these to the applications.

**PART D: CROSS CUTTING POLICY CONSIDERATIONS FOR THE ALLOCATION OF QUANTUM OR EFFORT****8. Policy Considerations**

- 8.1 In general, the decision to allocate quantum or effort is taken separately from the decision, although interlinked, of identifying successful applicants.

**PART E: POLICY REVIEW****9. Policy review**

- 9.1 The Department is committed to ongoing and continued review of the effectiveness of the General Policy and Fishery Specific policies in addressing the socio-economic and economic needs of the fishing industry and affected fishing communities and the ecological sustainability of the resources.
- 9.2 Research and ongoing monitoring by both the Department and stakeholders will play an important role in identifying weaknesses and flaws in the policies and the implementation thereof.
- 9.3 The Department will put in place a monitoring and evaluation system to ensure that useful, reliable, and timely feedback on the effectiveness of the policies is provided to the Department and relevant stakeholders.

## 10. GLOSSARY OF TERMS

- 10.1 "Application period" means the period commencing with the publication of the invitation to apply for a commercial right in the sector to the date on which the appellate authority finally decides the appeals in the sector.
- 10.2 "Black People / Person" [is a generic term which] means Africans, Coloureds, and Indians who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation-
- (a) before 27 April 1994 or
  - (b) on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies.
- 10.3 "Codes of Good Practice" means the BEE Codes of Good Practice published by the Minister of Trade and Industry in 2004 in terms of the Broad-Based Black Economic Empowerment Act 53 of 2003.
- 10.4 "Department" means the Department of Agriculture, Forestry and Fisheries
- 10.5 "Right Holder" means a right holder that was granted a fishing right during the period 2005 – 2006 in the specific sector, or became a right holder in the sector by way of an approved transfer of the fishing right.
- 10.6 "Minister" means the Minister of Agriculture, Forestry and Fisheries.
- 10.7 "New entrant" means an applicant that is not a right holder in the particular sector applied for.