

DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES

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**POLICY ON THE ALLOCATION AND MANAGEMENT OF COMMERCIAL FISHING RIGHTS IN
THE PATAGONIAN TOOTHFISH FISHERY: 2015**

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(In case of any inconsistency, the English text prevails)

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1. Introduction

The Department of Agriculture, Forestry and Fisheries (“the Department”) is responsible for administering the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (“the MLRA”), regulations promulgated thereunder and policies issued by the Minister of Agriculture, Forestry and Fisheries (“the Minister”), in consultation with the Department.

This policy on the allocation and management of fishing rights in the Patagonian Toothfish fishery (“the fishery”) shall be referred to as the “**Patagonian Toothfish Policy:2015**”.

This policy must be read in conjunction with the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (“the MLRA”) and regulations under the MLRA; the General Policy on the Allocation and Management of Fishing Rights: 2013 (“the 2013: General Policy”); and all other relevant Sector Specific Policies including the Policy for the Small Scale Fisheries Sector in South Africa: 2012; and the Policy for the Transfers of Commercial Fishing Rights: 2009. This policy must be interpreted to be consistent with the MLRA, and all of the other relevant regulations and policies.

This policy sets out objectives, criteria and, considerations that will guide the allocation application, evaluation and management of fishing Rights in the Patagonian Toothfish fishery sector (“the fishery”). This policy will also guide the Delegated Authority in taking decisions on applications in this fishery.

Only persons issued with permits in terms of the MLRA may harvest Patagonian Toothfish, transport Patagonian Toothfish catch from a landing site to the permitted Fish Processing Establishment (FPE) and export Patagonian Toothfish catch and products thereof.

2. Profile of the fishery

2.1 Description of the fishery

Patagonian Toothfish, also known as Chilean sea bass, is a deep-water, demersal species which is found on sub-Antarctic continental shelves down to 3 000 metres. Several countries can lay claim to Patagonian Toothfish, which occur within the exclusive economic zones (“EEZ’s”) of Chile, Argentina and other countries with sovereignty over the southern Ocean islands. South Africa’s EEZ around the Prince Edward Islands (“PEI”) is a prime fishing ground for Patagonian Toothfish. Much of the range of Patagonian

Toothfish, however, falls within the high seas.

The Prince Edward Islands are situated within the Convention area of the Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR"). CCAMLR is the regional fishery management organisation tasked with, among other roles, monitoring catches of Patagonian Toothfish in the Southern Ocean.

Patagonian Toothfish live for longer than 50 years and reach a length of over two metres. Maturity is attained between six and nine years of age, equivalent to a length range of 70 to 95 centimetres. Spawning occurs on continental shelves in winter, but eggs only hatch in spring.

Global catches of Patagonian Toothfish have declined sharply since the origins of the fishery in the late 1980s. A combination of its high value, late maturity and occurrence in the high seas has caused the near-collapse of the fishery, which has seen unprecedented levels of illegal, unregulated and unreported ("IUU") fishing. South Africa's waters around the Prince Edward Islands were extensively targeted and CCAMLR estimates that as much as 32 000 tons of toothfish, with a value of US\$100 million was illegally fished from the PEI-EEZ between 1996 and 1998.

There has been no indication of IUU fishing in the PEI-EEZ since 2004, however IUU vessels are active on the nearby fishing grounds of Ob and Lena Banks and an IUU vessel was sighted close to the PEI-EEZ in 2015. Therefore there is a concern that, as the resource in the PEI-EEZ recovers, IUU fishing could once again become an issue. The fishery remains commercially sustainable, according to the scientific advice provided by the relevant Department's Scientific Working Group. The Minister has decided to re-allocate long-term commercial fishing Rights in this fishery.

The harvesting of Patagonian Toothfish within the South African EEZ around the Prince Edward Islands (PEI-EEZ) started in 1996 as an experimental fishery until the end of 2005.

2.2 Resource users

Currently, there are five South African Right Holders operating in the PEI-EEZ. The Department has set annual Total Allowable Catch (TAC) limits for this fishery over the period 2001 to 2015.

Fishing Year	Legal			Illegal	TOTAL	TAC
	Longline	Pot	Trotline			
1997	2754.9			21350.0	24104.9	
1998	1224.6			1808.0	3032.6	
1999	945.1			1014.0	1959.1	
2000	1577.8			1210.0	2787.8	
2001	267.8			352.0	619.8	2250
2002	237.3			306.0	543.3	600
2003	251.1			256.0	507.1	500
2004	182.5	34.3		156.0	372.8	500
2005	142.6	141.9			284.5	450
2006	169.1				169.1	450
2007	245.0				245.0	450
2008	88.8		56.4		145.2	450
2009	41.8		30.7		72.5	450
2010	49.2		174.6		223.8	450
2011	1.0		323.9		324.9	400
2012	70.7		205.5		276.2	320
2013	50.0		215.3		265.3	320
2014*	0.0		400.0		400.0	450

* The total catch for 2014 is the *expected* catch for the year as the fishing season is still ongoing, and is assumed to be entirely caught with trotlines

The Patagonian Toothfish fishery is a high-risk and extremely capital-intensive fishery that requires Right Holders to make substantial investments in vessels, gear, research and marketing. Start-up costs would require a capital investment of several million rand and operational costs are substantial.

3. The 2005/2006 long term rights allocation process

In 1996 five experimental permits were issued for the fishing of Patagonian Toothfish in 1996. In order to improve the economic gains from the fishery, the experimental permit-holders consolidated costs and effort by reducing the number of vessels in the fishery from three to two. Four of the operators concluded a joint venture agreement to operate one vessel and effectively pooled their resources. Long-term commercial fishing Rights were allocated to five Right Holders for the first time in 2006. The Patagonian Toothfish

fishing Rights will be expiring on the 31st of October 2015.

4. Objectives

4.1 The objectives of allocating fishing rights in the Patagonian Toothfish fishery are to:

- (a) promote transformation through allocation of fishing Rights to entities owned and/or controlled historically disadvantaged persons which shall include designated groups (youth, women and people with disabilities), broaden meaningful participation (increased participation, sharing value-creation opportunities and profits, and forging links);
- (b) ensure sustainable livelihoods through the promotion of fair permanent employment.
- (c) promote adherence to fair labour practices and improved working conditions;
- (d) promote food security and poverty alleviation;
- (e) prefer applicants who rely on the harvesting of Patagonian Toothfish for a significant portion of their gross annual income above applicants deriving income from sources outside the Patagonian Toothfish fishery;
- (f) facilitate the recovery of over-exploited and collapsed fish stocks; and
- (g) achieve optimum utilisation and ecologically sustainable development of marine living resources.

5. Granting of fishing rights

Fishing rights are granted in terms of section 18 of the MLRA. In terms of section 79 of the MLRA the Minister has delegated the power to grant rights in each fishery to a Delegated Authority in the Department. Unless otherwise determined by the Minister only South African persons shall acquire or hold rights in terms of section 18 of MLRA. In this fishery the Minister has not exercised his power to allow persons of other nationalities to acquire rights, meaning that only South African persons can acquire rights in this fishery.

The Delegated Authority shall allocate proportions of TAC to each successful applicant based on the applicable balancing criteria and it will be reflected as a proportion of the local commercial TAC available at the time the fishing right is allocated. All rights granted shall be valid from the date of allocation for a period not exceeding 15 years, whereafter it they will automatically terminate and revert back to the State to be reallocated. It should be further noted that in terms of section 16 of the MLRA the Minister may suspend any fishing in the fishery or impose effort restrictions, in order to address a state of emergency.

5.1 Form of right holder

- (a) Section 18 of the MLRA provides that only South African persons may hold fishing Rights.
- (b) With regard to the nature of operations and resource accessibility in the Patagonian Toothfish fishery, only the following South African persons will be considered for a right in the fishery:
 - (i) close corporations (Legal entity); and
 - (ii) companies (Legal entity);

5.2 Duration of right

Having regard to the right allocation process, and need to encourage investment, fishing rights in the Patagonian Toothfish fishery will be granted for the maximum period of 15 years.

5.3 Total Allowable Catch and Total Applied Effort Allocation

In terms of section 14 of the MLRA the Minister is empowered to determine a TAC, Total Applied Effort (TAE), or combination thereof to apply in each fishery. The fishery is one regulated by the determination of a TAC. The TAC and/or TAE or combination thereof is determined by the Delegated Authority considering the history, resource users, sustainability of the operations of right holders, and the viability of the fishery. The Delegated Authority will only allocate a local commercial portion of the determined TAC and/or TAE or combination thereof to commercial right holders based on the proportion granted to each successful applicant at the time of commercial fishing rights allocation process. The right holder's allocation may decrease or increase should the annual local commercial portions of determined TAC and/or TAE or combination thereof decrease or increase respectively. In terms of section 14(4) of the MLRA, if the allowable commercial catch in respect of which commercial fishing rights exist increases, the mass of the increase shall be available for allocation by the Minister.

5.4 Transfer of Rights Allocated in terms of this Policy

In terms of section 21 of the MLRA the Minister may approve the transfer of fishing rights in whole or in part. However, Patagonian Toothfish rights allocated in terms of the MLRA and this Policy shall not be transferred within the first two (2) years of allocation.

Rights can only be transferred in terms of the Policy for the Transfer of Commercial Fishing Rights (Government Gazette No 32449, 31 July 2009) or relevant amendments thereof.

A notification of transfer of shares or members' interest must be served on the Department within 30 days of such sale or transfer or any time-period set in applicable permit conditions in all cases in which shares or a member's interest in a right holder are sold or transferred,. In addition, the Department's approval is required for all cases in which the sale or transfer of shares or a member's interest in a right holder results in a change of control of the entity, or in the entity being less transformed than it was at the date on which rights are allocated in particular regard to any decrease in black ownership of such entity.

Failure to pay the required fees for the grant of a right fee, or apply for any permits, or to, declare any catches during the first two (2) years, shall result in a cancellation of the right by the Minister.

6. Multi-sector involvement

Applicants for the allocation of rights in this Patagonian Toothfish fishery will not be precluded from applying for, or holding commercial rights in other local commercial fisheries sectors.

This shall mean any person can apply for a Right in any fishery sector regardless whether the applicant has applied for a right or holds a right in any fishery sector. In this case, the "applicant" shall mean an individual, a shareholder or director in a company, or a member in a close corporation or a co-operative applying for a right in any fishery sector. However the Delegated Authority reserves the right to grant a right in any sector.

Natural persons who hold shares or a member's interest in an entity which is applying for the allocation of rights in the fishery, may also hold shares, an interest or a stake in a an entity or cooperative which is applying for, or already holds rights in another fishery.

Natural Persons, who are directors or employees of an entity which is applying for the allocation of rights in the fishery, may also be a shareholder, member, director or employee of an entity which is applying for, or already holds rights in another fishery; or be a participant in a cooperative operating in another fishery.

The Delegated Authority reserves the right to grant a right to the applicant in any sector and may, however, prefer applicants who rely on the Patagonian Toothfish fishery for a major source of their gross annual income.

7. Evaluation criteria

Applications for the allocation of rights in the Patagonian Toothfish fish will be screened in terms of a set of “exclusionary criteria”. All applicants will thereafter be separately scored in terms of a set of weighted “comparative balancing criteria”. A cut-off will then be determined in order to select the successful applicants and a portion of the TAC and/or TAE or combination thereof will be apportioned to successful applicants.

7.1 Exclusionary criteria

Apart from the criteria described in the 2013: General Policy pertaining to the lodgement of applications and material defects, the Delegated Authority will exclude applicants that fail to meet the following requirements/criteria:

(a) Compliance

An applicant will be excluded if it, a controlling shareholder, a member with a controlling interest, or a director, has been convicted of a serious transgression of the MLRA (without the option of the payment of a fine).

An applicant will also be excluded if it, a controlling shareholder, a member with a controlling interest, or a director, has had any fishing right cancelled or revoked in terms of the MLRA. For these purposes individuals will be treated as having had rights cancelled or revoked if that person was a controlling shareholder, a member with a controlling interest, or a director of an entity which had its rights cancelled or revoked.

Minor infringements, including those in respect of which an admission of guilt fine was paid, may be taken into account as a balancing criterion and may also adversely affect an application

(b) Paper quotas

Applications from paper quota applicants, as defined in the 2013: General Policy, will be excluded.

(c) Non-utilisation

- (i) Applicants that held a Patagonian Toothfish right within the period 2006 to 2014 and did not harvest any Patagonian Toothfish during the entire duration of that right shall be excluded.

7.2 **Balancing criteria**

Applicants will be evaluated in terms of the following balancing criteria which will be weighted in order to evaluate and assess applications:

(a) **Transformation**

When assessing and scoring applications, and when allocating portions of the TAC and/or TAE or combination thereof to successful applicants, the Delegated Authority may prefer applicants based on transformation criteria. When attributing a score for transformation criteria, or allocating portions of the TAC and/or TAE or combination thereof, the Delegated Authority may have regard to: census statistics or other information provided by Statistics South Africa regarding the composition of the population of South Africa, and the percentage of that population made up by different demographic groups; the need to ensure the recognition and meaningful participation in the fishing industry of Historically Disadvantaged Individuals (HDIs); and the codes of good practice under the Broad-Based Black Economic Empowerment Amendment Act.

Applicants, depending on the form of the applicant will be assessed and scored on the following transformation criteria:

- (i) The percentage of ownership and represented of black, youth and women at top salary, board of directors, members and senior official and management levels;
- (ii) Whether employees (other than top salary earners) benefit from an employee share scheme;
- (iii) Compliance with the Employment Equity Act 55 of 1998 and the representatively of designated groups and Historically Disadvantaged Individuals (HDIs) at the various levels of employment below senior official and management level;
- (iv) Affirmative procurement;
- (v) Compliance with legislation on skills development and the amounts spent on the training of Black persons, youth, women, including people with disabilities, and participation in learnership programmes; and
- (vi) Corporate social investment.

(b) **Fishing performance**

- (i) The historical fishing performance of applicants who have held fishing rights in the Patagonian Toothfish fishery will be examined to determine if they have effectively utilised their fishing rights. Effective utilisation shall mean activation of the catch permit, landing of catch, and subsequent submission of catch data for at least five years during the period 2007-2014. Applicants should submit this information with their application forms.

(c) **Local economic development**

- (i) In order to promote local economic development, the Delegated Authority will give preference to applicants who will land catches at harbours situated outside of metropolitan areas, and process catches at land-based processing establishments outside of metropolitan areas.
- (ii) The Delegated Authority may, in order to ensure that all fishing communities share in the marine living resources, use the locality of landing sites and fishing processing establishments as scoring or tie-breaking criteria. For these purposes the Delegated Authority may give preference to applicants, with the aim of ensuring an equitable distribution of opportunities to communities along the coastline.

(d) **Job creation**

- (i) The Delegated Authority may give preference to any applicant which commits to retaining existing employment opportunities, or to increasing employment opportunities if it is allocated rights in the Patagonian Toothfish. For these purposes the Delegated Authority will consider the quality of the employment opportunities which will be created, including compliance with the Basic Conditions of Employment Act, 1997 (No. 75 of 1997) ("BCEA"); and the applicant's commitment to provide their employees with: permanent employment;
- (ii) medical aid, pension / provident fund;
- (iii) safe working conditions in accordance with the applicable legislative requirements; and
- (iv) an employee share scheme as a shareholding entity of the Right Holder.

(e) **Access to a suitable vessel**

An applicant will be required to demonstrate a right of access to a vessel suitable for the harvesting of Patagonian Toothfish in the fishery. Access may be in the

form of ownership, part-ownership, a catch agreement, a charter agreement, or a bank guarantee for sufficient capital to purchase or build a vessel. If an applicant intends purchasing a vessel, then additional information must be provided to prove a firm and binding offer by the current owner of the vessel to sell the vessel to the applicant. If an applicant intends building a new vessel, then additional information must be provided including the vessel plans, the cost to be incurred and a firm and binding commitment by a vessel building company to build the vessel. A suitable vessel in the Patagonian Toothfish fishery is a vessel that has a minimum South African Maritime Safety Authority ("SAMSA") registered length of 30 metres or such maximum length as may be reflected in the permit conditions, must be over 400GT or such minimum gross tonnage as may be reflected in the permit conditions and is equipped for Patagonian Toothfish fishing using the longline method. The Department will require each vessel owner to invest in an acceptable Vessel Monitoring System ("VMS") after the allocation of fishing rights and also that the vessel shall be fitted with such a VMS at all times for the entire duration of the fishing right. The VMS shall be functional at all times during fishing operations.

(f) **Applicant's involvement and relationship with other applicants**

(i) **Entity and their subsidiaries involvement**

A company and its subsidiary/ies may not be granted more than one right in the fishery, so as to avoid fronts and monopolies and to promote broaden access to the Patagonian Toothfish resource. Applicants may be required to disclose their relationship to other applicants for the allocation of rights in the fishery, as well as in other commercial fisheries. If an entity and its subsidiary both apply for a right in Patagonian Toothfish, the holding/umbrella/parent company will be preferred over any subsidiary.

(ii) **Brother-Sister Corporations**

If two or more entities which are owned and controlled by the same person or persons or shareholders apply for a commercial fishing right in the fishery, and qualify for allocation of such rights, then the Department may consider allocating a fishing right to one of the qualifying entities only; or dividing the TAC/TAE between the qualifying entities.

8. Provisional lists, consultations and representations

- 8.1 The Delegated Authority may issue provisional lists for comment on any aspect relating to an application in any fishery/sector.
- 8.2 The Delegated Authority may request comment on any of the information provided by an

applicant and on the basis of the comments received make a final decision.

- 8.3 The Delegated Authority may invite representations regarding the assessment of the applications before making final decisions.

9. Announcement of decisions

The Delegated Authority shall after making a final decisions on the applications, inform all applicants of the outcome of their individual applications giving specific reasons for such decisions.

Further General Reasons for decisions in a specific fishery sector will be published informing all applicants on how the decisions were formulated and reached. The General Reasons shall also include an annexure referred to as decision sheet outlining the scores obtained by all applicants in the Patagonian Toothfish Fishery.

10. Payment of application and grant of right fees

- 10.1 The application fees for this fishery will be determined having regard to:
- (a) The cost of the entire fishing Rights allocation process, including consultation, receipting, evaluation of applications, verification, appeals and reviews; and
 - (b) The value of the fish being allocated over the duration of the Right.
- 10.2 The non-refundable application fee shall be payable before submitting the application form and only proof of payment shall be brought to the receipting center.
- 10.3 The grant of right fee is payable by all successful applicants upon the granting of rights.

11. Management measures

The management measures discussed below reflect a number of the Department's principal post-right allocation management intentions for this fishery.

11.1 Ecosystem approach to fisheries

This fishery will be managed in accordance with the ecosystem approach to fisheries ("EAF"). An ecosystem approach to fisheries management is a holistic approach that maintains or improves the health of an ecosystem and balances the diverse societal needs and values. This approach also defines the ecosystem in its broadest sense and includes ecological, social, economic and governance systems. An EAF strives to balance diverse societal objectives, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems and their interactions and applying an integrated approach to fisheries within ecologically meaningful boundaries.

11.2 Observer Programme

- (a) The right holder of a commercial Patagonian Toothfish fishing right shall accommodate an observer on board the right holder's nominated vessel when required to do so by the Department or its agent.
- (b) The right holder may bear the costs of the observer deployment when so required by the Department.
- (c) The right holder shall allow the Observer unrestricted access to monitor fishing activity and compliance with permit conditions and all applicable laws.
- (d) Should the Department reasonably believe that an Observer is being prevented from carrying out his or her obligations in any way or threatened in any way while on board, the Department may implement proceeding under section 28 of the MLRA.

11.3 Performance measuring

Successful applicants will be subjected to a number of performance measuring exercises for the duration of their fishing Rights. The purpose of performance measuring will be to ensure that the objectives of the fishery are being met and that management methodologies and procedures remain current and suitable for the fishery.

11.4 Offences

- (a) A Successful applicants that fails to utilise their Patagonian Toothfish fishing Right for one season without any reasonable explanation or that contravenes the provisions of the MLRA, will be subjected to proceedings of under section 28 of the MLRA.

12. Permit conditions

Permit conditions for this fishery will be issued annually. The permit conditions will be determined after consultation with the successful applicants in this fishery and will be subject to revision as and when it may be necessary.

13. Glossary of terms

- 13.1 "Brother-Sister Corporations" A subsidiary company owned by the same parent company.
- 13.2 "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.
- 13.3 "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
- 13.4 "Historically disadvantaged person" means a person who belongs to a group of persons who suffered racial discrimination in terms of the system of apartheid and includes women
- 13.5 "Legal entity" means a close corporation or company.
- 13.6 "MLRA" means the Marine Living Resources Act, (Act No. 18 of 1998
- 13.7 "Rights" means fishing or harvesting Rights granted in terms of section 18 of the Marine Living Resources Act, (Act No. 18 of 1998).
- 13.8 "Right Holder" means a person that was previously granted or lawfully acquired a fishing Right or which will be granted a right in the allocation process envisaged in this Policy
- 13.9 "Subsidiary company" is a company that is partly or completely owned by another company that holds a controlling interest in the subsidiary company.
- 13.10 "The 2013: General Policy" means the General Policy on the Allocation and Management of Fishing Rights: 2013.
- 13.11 "The Department" means the Department of Agriculture, Forestry and Fisheries.
- 13.12 "The Minister" means the Minister of Agriculture, Forestry and Fisheries.
- 13.13 "Historically Disadvantaged Person" means a person who belongs to a group of persons who suffered racial discrimination in terms of the system of apartheid and includes women.
- 13.14 "Total Allowable Catch (TAC)" means the maximum quantity of fish of individual species or groups of species made available annually or during such other period of time as may be prescribed, for combined recreational, small-scale, commercial and foreign fishing.
- 13.15 "Total Applied Effort (TAE)" means the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licences or permits to fish may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species.
- 13.16 "Ownership" means beneficial ownership, in terms of which the shareholder or member is entitled to participate equitably in the profits of the entity.