



DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM

GENERAL POLICY ON THE ALLOCATION AND MANAGEMENT OF LONG
TERM COMMERCIAL FISHING RIGHTS: 2005

**THIS POLICY MUST BE READ WITH THE APPLICABLE FISHERY SPECIFIC
POLICY**

This document is also available in Afrikaans, isiXhosa and isiZulu

Hierdie document is ook in Afrikaans, isiXhosa, en isiZulu beskikbaar

Qaphela ukuba lencwadi iyafumeneka nangolwimi lwesixhosa

Qaphela ukuba lencwadi iyafumeneka nangolwimi lwesiBhulu, lwesiXhosa nolwesiZulu

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PART A: INTRODUCTION AND BACKGROUND

1. Introduction

This *General Policy on the Allocation and Management of Long Term Commercial Fishing Rights* is issued by the Minister of Environmental Affairs and Tourism 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 commercial and experimental 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

The General policy applies to the allocation of rights in the 19 commercial 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), Oysters, White Mussels, Netfishing (Trek- and Gillnets and Beach Seine) and Kwazulu-Natal Beach Seine.

The General policy does not apply to –

- ❑ Subsistence fishing. A separate policy will be adopted dealing specifically with subsistence fishing, including the subsistence fishing of East Coast Rock Lobster and Abalone in the Eastern Cape.
- ❑ Recreational fishing. A separate policy will be adopted dealing specifically with recreational fishing.
- ❑ Foreign fishing.
- ❑ Fish processing establishments. A separate policy will be adopted dealing specifically with fish processing establishments.
- ❑ Mariculture. A separate policy will be adopted dealing specifically with the regulation and management of mariculture in South Africa.
- ❑ Non-consumptive marine activities, including boat based whale watching, shark cage diving, sport diving and SCUBA diving. Separate policies will be adopted dealing specifically with these non-consumptive marine activities.
- ❑ Traditional Linefish. A separate policy will be adopted dealing specifically with Traditional Linefish.

Although this policy does apply to Hake Handline, West Coast Rock Lobster (near shore), Netfish (Trek- and Gillnets, Beach Seine), Kwazulu-Natal Beach Seine, Oysters and White Mussel sectors, applicants in those sectors are advised to focus on the Fishery specific policy for the considerations that will be applied to the allocation of rights. It will be essential for applicants in these sectors to study the fishery specific policies before they apply.

3. Purpose

The General policy, together with the Fishery specific policies, is intended to serve as a guide for the long term rights allocation process. It describes the core functions of the Department which support the rights allocation process. The Minister also considers it necessary, for the benefit of applicants, to set out some of the Department's management objectives for the immediate future. These may be reviewed from time to time by the Department if considered desirable.

4. What informs this policy?

The General and Fishery specific policies are informed by South Africa's international legal obligations, non-binding undertakings at international and regional level, and the legislative framework for the allocation of fishing rights.

4.1 International obligations pertaining to sustainable resource use

During the *World Summit on Sustainable Development* ("WSSD"), held in Johannesburg during September 2002, countries undertook to maintain or restore fish stocks to levels that can produce the maximum sustainable yield. The goal is to be achieved on an urgent basis for depleted stocks, and if possible, by not later than 2015. Countries also undertook to develop and implement national plans of action. The WSSD identified the need to maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, within and beyond national jurisdictions. The aim is to protect the ecosystem, using an approach that eliminates destructive fishing practices, establishes marine protected areas, imposes and supervises time and area closures for the protection of nursery grounds during spawning periods. In terms of the *Reykjavik Declaration* of 2001 and Johannesburg Plan of Implementation emanating from the WSSD, South Africa has committed itself to introducing such an Ecosystem Approach to Fisheries ("EAF") management by 2010.

The *Food and Agriculture Organisation's 1995 Code on Responsible Fisheries* is a voluntary instrument that recognises that fisheries, including aquaculture, provide a vital source of food, employment, recreation, trade and economic wellbeing for people throughout the world and should therefore be conducted in a responsible manner. The Code sets out principles and international standards of behaviour for responsible practices with a view to ensuring the effective conservation, management and development of living aquatic resources, with due respect for the ecosystem and biodiversity. The Code recognises the nutritional, economic, social, environmental and cultural importance of fisheries. The Code has led to four International Plans of Action ("*IPOAs*"). The IPOAs are the IPOA on Capacity; the IPOA to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ("*IUU Fishing*"); the IPOA for the Reduction of Shark By-catches; and the IPOA for the Reduction of the Incidental By-catch of Seabirds. As a state party, South Africa has undertaken and is committed to apply the Code, the four IPOAs and, if necessary, to give effect to them by way of a National Plan of Action, as was done with the adoption of NPOA for reducing incidental by-catches of seabirds and certain species of shark. In an endeavour to implement the IPOA to Prevent, Deter and Eliminate IUU Fishing, the monitoring and control of fishing vessels will be strengthened.

The United Nations Convention on the Law of the Sea, 1982 ("UNCLOS") seeks to establish a legal order for the world's seas and oceans in order to facilitate communication in international waters. It also promotes the peaceful use of the world's seas and oceans, the equitable and efficient utilisation of marine resources, the conservation of marine living resources and the study, protection and preservation of the marine environment.

The United Nations Fish Stocks Agreement, 1995 complements the Convention by specifying how straddling fish stocks (such as hake) and highly migratory fish stocks (such as tunas) should be exploited and managed.

South Africa is further a party to a number of *Regional Fishery Management Organisations ("RFMO's")* responsible for the management and conservation of shared fish stocks, including tuna, swordfish and Patagonian toothfish. These include the International Commission for the Conservation of Atlantic Tunas ("*ICCAT*"), the Commission for the Conservation of Southern Bluefin Tunas ("*CCSBT*"), the Indian Ocean Tuna Commission ("*IOTC*") and the Convention for the Conservation of Antarctic Marine Living Resources ("*CCAMLR*"), the South East Atlantic Fisheries Organisation ("*SEAFO*") and the Southwest Indian Ocean Fisheries Commission ("*SWIOFC*").

As a member of the Southern African Development Community ("*SADC*"), and in particular as a signatory to the *SADC Protocol on Fisheries*, South Africa is obligated to ensure the sustainable use of shared fish stocks with its SADC neighbours. These shared stocks include hake, pelagics, prawns, linefish and horse mackerel.

4.2 The legislative framework for the allocation of commercial fishing rights

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"). 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. In terms of section 2 of the MLRA, the Minister and any organ of state shall have regard to a number of objectives and principles when exercising any power under the Act. These are:

- (a) *The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;*
- (b) *the need to conserve marine living resources for both present and future generations;*
- (c) *the need to apply precautionary approaches in respect of the management and development of marine living resources;*
- (d) *the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;*
- (e) *the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;*
- (f) *the need to preserve marine biodiversity;*
- (g) *the need to minimise marine pollution;*
- (h) *the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;*
- (i) *any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and*
- (j) *the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.*

In order to commercially exploit marine resources, a person or entity needs to apply and be granted a right under the MLRA. Section 18 provides as follows:

- (1) *No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.*

The allocation of rights has been the primary mechanism to further transformation and give effect to the other principles and objectives set out in section 2 of the MLRA. In order to exercise a right granted under section 18, a person needs to be issued with a permit under section 13 of the MLRA, which provides as follows:

(1) No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.

Apart the MLRA, the General Regulations, promulgated in GN 1111 in Government Gazette 19205 of 2 September 1998 (as amended) are relevant. These regulations contain certain procedures relating to appeals against decisions made under sections 13 and 18 of the Act, and by regulating closed seasons and closed areas, the use of gear and species restrictions. The Regulations further deal with the landing, transportation, delivery, receipt, processing and marketing of fish and fish products, compliance control, the leaving of objects in the sea, fishing harbour regulations and offences and penalties.

The MLRA and its Regulations were interpreted in a number of court decisions concerning the medium term rights allocation process, some setting important legal precedents. These decisions were taken into consideration with the design of the long term allocation process.

The National Environmental Management Act 107 of 1998 ("*NEMA*") provides the framework for the adoption of environmental management and policy. To the extent that an action of an organ of state significantly affects the environment the principles set out in section 2 of NEMA apply.

5. Departmental Functions and Delegations

5.1 Delegation of Powers

The MLRA confers powers on the Minister of Environmental Affairs and Tourism ("*the Minister*") and the Director-General. In the past, the Minister and the Director-General have delegated many of their powers to officials in the Department, including the powers under section 13 (granting of permits), section 18 (granting of commercial fishing rights), section 28 (cancelling, revoking or suspending fishing rights / permits), section 81 (granting and cancelling of exemptions) and section 83 (permitting experiments and scientific investigations).

A complete set of all current delegations is available from the Department or may be viewed at www.mcm-deat.gov.za. The Minister intends to delegate his power to grant fishing rights and permits in the 19

commercial fishing sectors to officials in the Department. This General Policy and the Fishery Specific Policies are adopted by the Minister in order to guide the delegated authorities when allocating fishing rights and permits.

5.2 Core departmental functions supporting rights allocation

(a) *Fisheries Research*

The Chief Directorate: Research, Antarctica and Islands is responsible for managing the performance of this function. The principle purpose of scientific research is to ensure the ecologically sustainable utilisation of fish stocks and the conservation of marine ecosystems, including species which are not targeted for exploitation such as seals and seabirds.

The Department subscribes to Principle 15 of the Rio Declaration of the UN Conference on Environment and Development (Rio de Janeiro, 1992), which states that *"In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall be not used as a reason for postponing cost-effective measures to prevent environmental degradation."*

The Department supports a precautionary approach to all fisheries. Because uncertainty affects all elements of a fishery system, precaution is required at all levels of the system.

Scientific research is aimed at understanding the dynamics of fish stocks and informs the Total Allowable Catch ("TAC") or the Total Applied Effort ("TAE") determined in terms of section 14 of the MLRA. The scientific working groups are responsible for interpreting the stock analyses carried out on the different fish stocks and this interpretation ultimately informs the determination of the TAC/TAE. Scientific research further informs the designation of marine protected areas, the designation of fisheries management areas, the determination of closed areas, closed seasons, prohibited fishing times, minimum species size, vessel and gear restrictions and fishing methods, including by-catch prevention methods. Scientific research is also conducted in order to develop new fisheries, in line with the Department's *New Fisheries Policy*.

Scientific working groups currently function in respect of each fishery sector. Each working group is made up of departmental scientists as well as external experts from other marine science institutions, such as institutions of higher learning. Most sectors are scientifically managed in terms of an Operational Management Procedure ("OMP"). Others are managed by means of annual assessments.

(b) Fisheries Management

The Chief Directorate: Fisheries and Coastal Management is primarily responsible for the performance of two functions. Firstly, to facilitate and regulate the sustainable and equitable development as well as the utilisation of marine living resources through the administration of fishing rights, permits, exemptions and licenses. Secondly, its function is to optimise the sustainable use of South Africa's coastal resources, by controlling human impacts on the environment (other than commercial fishing), such as coastal development, subsistence fishing, recreational fishing, marine pollution and marine eco-tourism. The Chief Directorate is supported by specialists in fisheries economics, fisheries management, oil and marine pollution management and coastal zone management.

(c) Fisheries and Coastal Compliance

The performance of this function is managed by the Chief Directorate: Fisheries and Coastal Compliance. In order to ensure compliance with fisheries laws, the Chief Directorate uses a number of measures aimed not only at encouraging and enforcing compliance. Those measures include:

- ❑ State of the art inshore and offshore environmental patrol vessels;
- ❑ Specialised environmental courts;
- ❑ Observer programmes;
- ❑ Marine protected areas;
- ❑ Vessel monitoring systems;
- ❑ Public education programmes;
- ❑ Co-management of fish stocks;
- ❑ Employment of fishery control officers responsible for ensuring that all fishing takes place in a regulated and lawful manner and that all landings are properly recorded;
- ❑ Honourary fishery control officers; and
- ❑ Strategic compliance partnerships with non-governmental organisations, local governments, conservation bodies and other applicable organs of state.

(d) Access to information

The Department's designated information officers for purposes of the Promotion of Access to Information Act, 2 of 2000 ("PAIA") are the Chief Director: Research, Antarctica and Islands, the Chief Director: Fisheries and Coastal Management and the Chief Director: Fisheries and Coastal Compliance.

A large body of information regarding previous rights allocations, such as policies, records of decisions, general published reasons, and other records such as compliance databases, TAC's and TAE's are available from the Department. Some records are also available at fishery control offices or at the Department's website (www.mcm-deat.gov.za). More information on how to access these records may be obtained in one of the following ways:

- Contact the Department's Client Care Line on 0861 123 626; or
- Visit the Department's Customer Services Centre at the Foretrust Building, 2nd Floor, Martin Hammerschlag Way, Foreshore, Cape Town.

As in the past, once the assessment of the applications is completed and the decisions are announced, most records held by the Department will be disclosed voluntarily and will be automatically available, as provided for in section 15 of PAIA. In other words, access to information forms do not have to be completed. Records may be inspected and copies will be furnished on informal request at the prescribed fee for reproduction. In general, the Department will only require access to information forms to be completed, and will only assess requests in terms of the provisions of PAIA, when access to the records created by third parties (such as completed application forms and their annexures) are sought. The approach to access to information is dealt with in greater detail below.

PART B: ALLOCATION METHODOLOGY AND PROCESS

6. The Allocation of Fishing Rights

6.1 The legal nature of the Fishing Right

Before the MLRA came into force in 1998, the Department granted fishing "*quotas*" under the Sea Fisheries Act, 12 of 1988. Section 18 of the MLRA now provides for the allocation of fishing "*rights*". The legal nature of the "*right*" allocated under the MLRA is similar to the "*quota*" allocated under the Sea Fisheries. The "*rights*" allocated under the MLRA are not property rights and should be understood as statutory permission to harvest a marine 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 and may be re-allocated (to the previous right holder or another entity) in terms of the applicable provisions of the MLRA.

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. However, any transfer of the fishing right to a third party requires approval.

6.2 Core Allocation and Management Considerations

This General policy and the Fishery specific policies are based on five core principles that guide the allocation and the management of commercial fishing rights. The five principles complement and give effect to the objectives listed in Section 2 of the MLRA. They are:

- (a) **Transformation:** Transformation and the need to achieve equality within all branches of the fishing industry.

- (b) **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.
- (c) **Ecological considerations:** The impact on the marine ecosystem in which the target species occurs must be considered.
- (d) **Industry and socio-economic and commercial considerations:** In so far as is practical and relevant, the socio-economic impact of allocations on right holders, workers and consumers are considered, in particular those individuals and communities dependent on the resource. Industry and commercial considerations include the nature and value of investments in fixed assets, marketing and processing and fishing capacity.
- (e) **Performance or potential to perform:** In so far as is practical and relevant, financial and fishing performance, value adding, enterprise development and job creation, as well as compliance with the MLRA, the Regulations, permit conditions and other legal requirements, are considered.

6.3 The Allocation Process

(a) *Public participation in policy formulation*

The Minister held 6 Imbizos in coastal communities during the latter half of 2004. These meetings were the informal start to a process of public consultation regarding the allocation of long term fishing rights.

The formal process of public consultation entailed a notice-and-comment process in respect of both the General policy and the Fishery specific policies. A full report concerning the public participation process and the adoption of the policies will be available at www.mcm-deat.gov.za. In brief, in the beginning of March 2005, the Department published a draft version of this General policy and a draft Fishery specific policy for each sector. Interested and affected parties were invited to comment on the policies. However, stakeholders in the various fisheries come from very different backgrounds and accordingly it was not appropriate to engage all of them in the same manner. Apart from the general notice and comment procedure, and in order to assist participants in the traditional sectors to comment, a series of public meetings were held where the proposed policies were explained, questions were answered and views from the audience were minuted. Interested and affected parties will also be given the opportunity to comment on proposed application forms.

(b) Allocation Process determined by Cluster

For purposes of the long term rights allocation process, the 19 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:

Cluster A

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

Cluster B

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

Cluster C

- Handline Hake
- West Coast Rock Lobster (near shore)

Cluster D

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

(c) Communication

During the application period, officials of the Department, the delegated authority and the Minister, will not communicate with individual applicants regarding their applications, other than in the manner described in this General Policy. Similarly, applicants or their representatives may not communicate with the Minister, the delegated authority or officials of the Department regarding their applications other than in the manner described in this General policy. No reliance may be placed on any information given or obtained in any other manner. Attempts to influence a decision of the delegated or appellant authority on the allocation or a right or quantum or effort in any other manner will constitute an independent ground for refusing an application or an appeal.

Clusters A and B

Unless otherwise provided in this General policy, communication between the Minister, the delegated authority and officials of the Department Communication on the one hand, and applicants on the other, may only take place through three mechanisms in the **Cluster A and B** sectors:

- ❑ Electronic Media: Policies and other materials will be published on the Department's official website, www.mcm-deat.gov.za. Electronic-mail distribution lists will be established in order to communicate directly with applicants. During the application period, queries and questions of clarification will be answered by way of e-mail. There will be no communication on a private individual basis. All queries and questions received, and responses thereto, will be compiled and then distributed simultaneously to all registered applicants. The information will also be available on the Department's official website.
- ❑ Government Gazette: All policies, invitations to apply and general notices will be published in the Government Gazette.
- ❑ Recognised industrial bodies and interest groups: Policies and other materials will be circulated through recognised industrial bodies and interest groups.

Clusters C and D

Unless otherwise provided in this General policy, communication between the Minister, the delegated authority and officials of the Department Communication on the one hand, and applicants on the other, may only take place through six mechanisms in the **Cluster C and D** sectors:

- ❑ Electronic Media: Policies and other materials will be published on the Department's official website, www.mcm-deat.gov.za).
- ❑ Government Gazette: All policies, invitations to apply and general notices will be published in the Government Gazette.
- ❑ Recognised industrial bodies and interest groups: Policies and other materials will be circulated through recognised industrial bodies and interest groups.
- ❑ Call centre: The Department has established a call centre with assistants to answer rights allocations queries.
- ❑ Customer Services Centre: The Department has established a customer services centre in Cape Town.
- ❑ Departmental officials will render assistance to applicants at the distribution and receipting points.

(d) Language

In **Cluster A**, the policies and explanatory notes to the application forms will be available in English and Afrikaans.

In **Clusters B, C and D**, the policies and explanatory notes to the application forms will be available in English, Afrikaans, isiXhosa and isiZulu.

(e) Invitation to apply for rights

Invitations to apply for commercial fishing rights will be published in the Government Gazette. The Department will also ensure that notices are placed on the Department's website and in regional newspapers.

Invitations gazetted in the Government Gazette will comprise the following parts:

- ❑ A short invitation to apply for the applicable commercial fishing right within a specified period.
- ❑ The fishery specific policy.
- ❑ A specimen applicable application form with a set of instructions, explanatory notes, notes to the schedules of documents to be submitted and, if applicable, procedures for independent auditors.

The invitation will not include this General policy as well. Applicants will however be provided with copies of the General policy on request. Invitations will be staggered on a cluster basis.

(f) Application Forms

Each fishery will have a separate application form designed to obtain the information considered relevant to effectively evaluate applications for the commercial fishing right in question. Application forms will be designed having regard to the fishery cluster and fishery in question.

Proposed application forms will be published for comment on the Departmental website, as part of the public participation process.

(g) Distribution of application forms and payment of fees

Cluster A

In **Cluster A**, applicants will be required to enter the Department's official website and to submit a brief set of biographical details, such as name, company registration number, contact details and the like. On completion, the applicant will be informed how to make payment of the application fees.

Applicants will be required to pay the application fee prior to receiving the application form. Application fees must be paid directly into designated bank account of the Rights Verification Unit. On receipt of proof of payment, the applicant will be permitted to collect an application form in compact disc ("CD") format from the Right Verification Unit's head office, together with the applicable software to utilize the form.

Cluster B

Hard copy application forms will be distributed at a stipulated venue in Cape Town. Applicants will be required to deposit the application fee into the Rights Verification Unit's designated bank account, and to furnish proof of payment (an original deposit slip or an electronic payment confirmation) at the distribution point before collecting the form. Applicants will be required to submit a brief set of biographical details at the distribution point, such as the name, company registration number, contact details and the like. On completion, and on proof of deposit of application fee, applicants will be provided with a hard copy of a numbered application form.

Clusters C and D

In **Clusters C and D**, application forms will be distributed at various pre-advertised regional venues along the coastline. Applicants will be required to deposit the application fee into the Rights Verification Unit's designated bank account, and to furnish proof of payment (an original deposit slip or an electronic payment confirmation) at the distribution point. Applicants will be required to submit a brief set of biographical details to the staff members at the distribution point, such as name, identification number, close corporation number (if applicable), contact details and the like. On completion, and on proof of deposit of the application fee, applicants will be provided with an application form.

(h) Application fees

The Minister, in consultation with the Minister of Finance, is responsible for setting application fees. The policy regarding application fees will be settled after a separate public consultation process.

(i) Verification by Auditors

Applicants in the **Cluster A** fisheries will be required to engage independent auditors to verify the information provided in certain components of their own application forms. This does not apply to **Clusters B, C and D**.

(j) Receipting

In **Cluster A**, applicants will be required to hand deliver the completed CD's and printed versions of the application and annexures at a stipulated venue and during a specified period in Cape Town.

In **Cluster B**, applicants will be required to hand deliver the completed application forms and annexures at a stipulated receiving venue and during a specified period in Cape Town.

In **Cluster C**, applicants will be required to hand deliver the completed application forms and annexures at various pre-advertised regional receiving points along the coastline during a specified period.

In **Cluster D**, applicants will be required to hand deliver the completed application forms and annexures at various pre-advertised regional receiving points along the coastline during a specified period. The receiving points will be the same as the distribution points and distribution and receiving will occur at the same venue and during the same period.

(k) Copies

Cluster A

The Department will require **Cluster A** applicants to complete their application form electronically and save it on to the CD's provided for this purpose. Applicants will be required to print out a hard copy version of the application form. The printed version has to be signed and the declaration must be attested to before a commissioner of oaths. This version must then be photocopied. In total, applicants will be required to hand deliver at the stipulated venue and time period:

- ❑ Two copies of the electronic version of the application on CD provided for this purpose;
- ❑ A print-out of the electronic version, duly signed and commissioned, with the required schedules in the form of annexures; and
- ❑ A copy of the signed and commissioned printed version of the application and the annexures.

Clusters B, C and D

The applicant or authorised representative of a **Cluster B, C and D** applicant will be required, after the application form and the annexures are completed, to sign the application form and to attest to the declaration before a commissioner of oaths. This application form, together with its annexures must be photocopied and both original and copy must be submitted.

(l) Design of criteria and weighting

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.

(m) Information to be considered

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.

(i) 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 (the “warning sign” icon) will be used to indicate where, if the answer to a positively framed or an open-ended question is left blank, it will be assumed that the applicant answered the question negatively. For example, if left blank, it will be assumed that the applicant answered “no” to a question such as: “Have you participated as a crew member on a vessel that operated in a limited or full commercial fishery?”. In such instances, if the uncompleted part of the application form has negative points associated with the answer, the failure to complete will result in the applicant being awarded negative points.

The warning sign icon may also be used to indicate where, if neither of the two available options to a “yes or no” question are completed, it will be assumed that the applicant answered the question positively. For example, if left blank, it will be assumed that the applicant answered “yes” to a question such as: “Have you ever been convicted of an offence under the MLRA”?

(ii) Late information

Information submitted after closing day will not be considered, unless requested by the Rights Verification Unit, 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.

(iii) 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.

(iv) 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.

(v) 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.

(vi) Copies of documents

Applicants will not be required to have any copy certified as a true copy, provided that they attest to the declaration stating that any copy of a document submitted in the application is a true copy of the original document. If such declaration is made, it will be assumed that any copy submitted is an exact replica of the original.

(n) Calls for further information, investigations and consultation

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.

The Minister or the delegated authority may request the Rights Verification Unit 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.

(o) Support for delegated authorities

The delegated authority responsible for the decisions on the applications in a sector may be supported in each sector by an "Advisory Committee", and also by professional project managers, consultants and legal practitioners. The role of the Advisory Committees will be determined by the delegated authority. The Advisory Committee 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.

(p) Provisional lists

The delegated authority may issue provisional lists for comment on any aspect in any sector. So, for example, in **Clusters C and D** 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.

The delegated authorities for **Cluster A and B** fisheries may invite representations regarding the assessment of the applications before making final decisions. In these sectors, delegated authorities may consult with interested and affected parties on the method of allocating quantum or effort before taking these decisions.

(q) Notification of decisions and the reasons

After the delegated authority has made decisions on the allocation of rights and quantum or effort, the Department will notify applicants in writing of the decision on their applications. In addition, the Department will publish the results electronically and communicate the results through recognised industrial bodies and interest groups.

Unsuccessful applicants

Unsuccessful applicants will receive the following together with the letter informing them of the outcome of the decision:

- ❑ The General Published Reasons which will record the criteria, the decision-making process and the methodology pertaining to decisions on quantum or effort;
- ❑ A specific reason why the application was unsuccessful;
- ❑ An appeal form, which applicants must submit together with the appeal;
- ❑ A notification of the closing date, details of the appellate authority and other formal requirements for the submission of appeals; and
- ❑ A copy of any final score sheet used to record the assessment of the application.

In addition, the following documents will be automatically available for inspection or purchase at the prescribed fee:

- ❑ The Spreadsheet of Decisions which contains a summary of the assessment of all the applications in a sector;
- ❑ Final Score sheets of other applicants; and
- ❑ The actual decision-making lists of the delegated authority and the Minister.

The specific reason contained in the notification letter to unsuccessful applications, together with the General Published Reasons, the final score sheet and the information that is automatically available, constitute the reasons for decisions to refuse an application.

Successful applicants

Successful applicants will receive the following together with the letter informing them on the decision on their application:

- ❑ A set of General Published Reasons which record the criteria, the decision-making process and the methodology pertaining to decisions on quantum or effort;
- ❑ An Appeal Form, which is a form which applicants may use to submit an appeal;
- ❑ A notification of the closing date for the submission of appeals;
- ❑ A copy of any final score sheets used to record the assessment of the application; and
- ❑ A set of generic permit conditions that are applicable to the specific fishery.

In addition, the following documents will be automatically available for inspection or purchase at the prescribed fee:

- ❑ The Spreadsheet of Decisions which contains a summary of the assessment of all the applications in a sector;
- ❑ Final Score sheets of other applicants; and
- ❑ The actual decision-making lists of the delegated authority or the Minister.

The General Published Reasons, the final score sheet and the information that is automatically available, constitute the reasons for decisions to grant an application for a commercial fishing right and to award quantum or effort.

(r) Appeals

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.

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.

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

(s) Access to information

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

- ❑ 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
- ❑ At the request of the applicant or its authorised representative, the applicant's own application or appeal documentation.

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

- ❑ The application form of another applicant;
- ❑ The annexures submitted together with an application of another applicant; and
- ❑ Appeal documentation submitted by another applicant.

In respect of access to these records, the Department's information officer (the Chief Director: Resource and Coastal Management) will apply the procedures and provisions of PAIA. 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.

6.4 Decision-making

All decisions will be based on the applicable laws and guided by the applicable policies. 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.

(a) Criteria used for decision-making

The Department expects a large number of applications for long term rights and anticipates that, given the current limits on catch or effort in all the fisheries, not 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.

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*".

(i) Exclusionary criteria

Three types of exclusionary criteria will be employed.

Firstly, 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.

Secondly, an application will be screened to determine whether it is materially defective. An application is materially defective if the application form 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. The delegated authority and the Minister has no discretion to condone non-compliance with the requirements relating to materially defective applications.

Thirdly, 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. For example, in the previous allocation process for abalone divers, applicants were required to demonstrate, amongst others, that the applicant was a qualified diver and certified as a Class I (with surface supply), II or III Commercial Diver under regulation 14 of the Regulations promulgated under the Occupational Health and Safety Act, 1993 (GN Regulation 10 of 11 January 2002).

(ii) Balancing criteria: new entrants and medium term right holders

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*"). 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 medium right holders will not be scored in terms of the same criteria and weighting as potential new entrants and will be ranked separately. Cut-offs will then be determined separately for medium term right holders and potential new entrants. All applicants with a score equalling or more than the cut-off will be allocated rights.

(iii) Tie-breaking factors

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

(b) Criteria used for awarding quantum or effort

There are two separate decisions. 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 described in paragraph 7.2 below.

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

7. Policy Considerations

This General policy must be read with the fishery specific policy adopted for each fishing sector. The latter prevails over the former, if more specific in respect of a particular sector.

The policy considerations set out below, along with the database compiled after applications are received, will guide the delegated authority in developing detailed exclusionary criteria, the balancing criteria for medium term right holders and new entrants and the tie-breaking factors. The Fishery specific policies will provide further guidance in this regard.

This General policy and the fishery specific policies do not lay down hard and fast rules or cover every aspect and consideration that will be taken into account in determining and applying criteria for balancing, tie-breaking and determining quantum or effort. Delegated authorities will be empowered to develop and refine criteria as long as these may be inferred from, and are consistent with, the applicable laws, this General policy and the applicable fishery specific policy.

Unless otherwise specified in the application forms, only information pertaining to the applicant will be taken into account. In respect of transformation, performance, value adding, enterprise development and job creation, applicants that form part of a group of companies, may be required to submit data about the group (and not the data of the applicant alone).

7.1 Duration of right

Long term fishing rights will be granted in all the commercial fisheries, for a period of up to 15 years, except in the Oysters and White Mussel fisheries, which are in an early stage of development.

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

Section 18 of the MLRA provides that only South African persons may hold fishing rights. Section 1 of the Act defines a South African person as a South African citizen or a company, close corporation or trust. Therefore, fishing rights may not be allocated to entities such as partnerships, associations, joint ventures, community associations or co-operatives.

In terms of this policy, commercial fishing rights in the Cluster C and D fisheries will be granted only to individuals (natural persons), except in the Hake Handline and KZN Beach Seine sectors, where close corporations will also qualify. Individuals who were members of close corporations, shareholders of companies and beneficiaries of trusts when these entities were allocated medium term rights in 2001 and 2002 in Cluster C and D fisheries (except Hake Handline and KZN Beach Seine) will be considered to be medium term right holders for the purpose of the long term rights allocation process. The delegated authority may regard other individuals as medium term right holders if, for example, they obtained control over a medium term right, by way of a transfer approved by the Department.

In terms of this policy, commercial fishing rights in the Cluster A and B fisheries will be granted only to entities incorporated in terms of the Close Corporations Act 69 of 1984 and the Companies Act 61 of 1973. Medium term right holders that operated in the form of trusts or co-operatives or sole proprietorships, must take steps to convert to a close corporation or a company before the allocation process and nominate the new entity as the applicant. The nominated close corporation or company will be treated as an existing right holder, provided

that such an applicant demonstrates that the close corporation of company will be the sole successor of the previous right holder. A right will be granted to the new entity and not to the individual or the trust. This policy does not mean that a trust is precluded from holding shares in an applicant or right holder.

In some fisheries, applicants will be encouraged to merge or to share resources after the allocation process. Further details are provided in fishery specific policies.

7.3 Transformation

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 branches of the fishing industry. Transformation is also a constitutional imperative in South Africa. 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. Draft codes on certain aspects have been published for comment. 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.

The Act and the draft codes were considered in the development of this policy and the fishery specific policies. However, owing to the nature of the rights allocation process, the Minister of Environmental Affairs and Tourism has thus far not encouraged the adoption of charters for fishing sectors and has not adopted the weighting and benchmarks set in the draft 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. 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.

The policy is to further transformation and to improve on the levels of transformation achieved during the medium-term rights allocations. In the long term rights allocation process, 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 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 insofar as the participation of women is concerned, as they too, were marginalised in the past. 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, may therefore be taken into account. This will be done in the manner described below. In addition, corporate social investment may be taken into account in the manner described below.

In **Cluster A**, applicants will be required to engage external auditors to verify the information submitted in terms of a set of prescribed procedures. In the case of a group of companies, the data of the holding company and the subsidiaries may be assessed and taken into account, as far as management, employment equity, skills development, corporate social investment and wage differentials are concerned.

(a) Race

South African citizens historically classified as "*African*", "*Coloured*" and "*Indian*" will be considered to be historically disadvantaged on account of race.

In **Clusters C and D**, a fixed number of points will be allocated to black applicants. Where close corporations qualify (hake handline and KZN Beach Seine), the close corporation applicant will be granted a percentage of the points allocated with reference to the percentage of the membership interest held by black persons in the close corporation. Black management, employment equity, affirmative procurement and corporate social investment may also be considered in **Clusters C and D**.

In **Clusters A and B**, points will be allocated for black ownership and management, in the manner described immediately below.

(i) Ownership

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 must have regard to draft Code 100, published for comment in terms of the Broad-based Black Economic Empowerment Act. The weighting set out in the Act will not be used.

The flow-through principle, proposed in Code 100, may also be used, if appropriate. For example, if company A holds 20% of the shares in company B and company A is 10% owned by the designated race groups, its share contributes 2% to the economic ownership of company B of such groups. If company A held 55% of company B's share and company A was 60% owned by blacks, it contributes 33% to B's economic ownership by black persons.

Additional points may be allocated to those applicants that have succeeded in empowering employees through share participation schemes, provided that the applicant can demonstrate that the employees derived real benefits (such as dividends) from the scheme.

In the case of applicants for medium term rights (successful or unsuccessful), points may be attached to both present status and progress made from medium term rights closing day to long term rights closing day. 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.

(ii) Management

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. This type of management is often conducted by "*the executive team*", which reports to the board of directors of a company. For purposes of the long term 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.

(b) Gender

If practical, beneficial ownership and management by women will be taken into account in **Clusters A and B**. In **Clusters C and D**, gender may be taken into account, for example, as a tie-breaking factor.

(c) Employment Equity

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

(d) Skills Development

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

(e) Affirmative Procurement

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

(f) Corporate Social Investment

The percentage of net profit spent on corporate social investment during the previous rights allocation process, may be taken into account. Tax-deductible donations will be considered to be corporated social investment.

7.4 Multi-sector involvement

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

Firstly, right holders in the **Cluster A and B** fisheries (including their controlling shareholders or members and members of their executive management teams) will not be allowed to hold commercial rights in the **Cluster C**

and D fisheries, which are fisheries reserved for small and medium enterprises and individual fishers reliant on those fish stocks for their livelihood. Right holders in **Clusters C and D** who intend to obtain shares or interests in **Cluster A and B**, after allocations, may be permitted to transfer their **Cluster C and D** rights to other natural persons. The delegated authorities for the transfer of rights will consider applications for such transfers.

Secondly, right holders will not be permitted to hold rights in more than one **Cluster C or D** fishery, except that:

- ❑ Right holders may hold any combination of the following rights: white mussel, west coast rock lobster (near shore) and netfish (Gill and Treknet and Beach Seine);
- ❑ A KZN Beach Seine right may also be held with an oyster right.

7.5 Consolidation

Between 1994 and 2004, the number of right holders in the commercial fisheries increased dramatically. When allocating rights, there was a particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society. As a result, in many sectors there are numerically representative levels of historically disadvantaged right holders. But numeric representivity does not always translate into broad-based and effective participation of historical disadvantaged persons in the fishing industry. The consolidation, rather than the proliferation of right holders, has become necessary in order to advance effective participation.

Consolidation is also necessary to rationalise the industry, to improve compliance and to reduce the administrative burdens and costs to the Department and right holders. This means reducing the number of entities, particularly those that share the same or similar shareholders and executive management team and physical addresses in a particular fishery. In a number of sectors, window periods will be opened after the allocation process where the Minister will look favourably at forms of consolidation, which do not undermine transformation. In the long term right allocation process, medium term right holders will not be permitted to proliferate within the same sector by applying for additional rights under a different guise and may not hold a share in potential new entrant applicants.

7.6 New entrants

The issue of new entrants is a Fishery specific one and is dealt with in the fishery specific policies. A distinction is drawn, in the Fishery specific policies, between "*additional*" entrants and "*new entrants*". In order to permit the participation of additional entrants the number of participants in a sector will have to be increased

from the existing number. 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. In some sectors, in order to consolidate the right holders in a sector, the number of participants will be reduced by not granting rights to low scoring existing right holders, and not replacing them with new entrants.

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

7.7 Performance

The performance of existing right holders may be assessed in the manner described below.

(a) Financial performance

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. 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.

(b) Payment of levies

Applicants will be required to provide proof that they are up to date on the payment of their levies on fish landed during the medium term right period. If levy payments have been outstanding for a period in excess of 60 days, the applicant may be penalised. Should the applicant nevertheless succeed in being granted a right, the Department will not issue a permit until the full amount outstanding is paid.

(c) Compliance

Applicants convicted for serious infringements of the MLRA, the Regulations, permit conditions and other fishing related offences, during the medium term right period, may be excluded. Minor infringements, including the payment of admission of guilt fines, may be taken into account as a balancing criterion.

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

The Department's records relating to infringements of the MLRA will be made available for inspection prior to the allocation process.

(d) *Fishing performance*

The fishing performance of medium term right holders will be examined to determine whether an existing right holder applicant has effectively harvested a medium-term allocation. 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. Undercatching and overcatching may be used as balancing criteria in certain sectors.

The Department's records relating to catch returns will be made available for inspection prior to the allocation of rights, if they are to be used in the allocation process.

7.1.8 Investment

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. Shareholding in vessels obtained at minimum or no cost to the applicant, will not be recognised as investment. The level of investment will be assessed with reference to the quantum held during the medium term rights allocation process.

7.1.9 Paper Quotas

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

(a) *New entrants*

In the long-term rights allocation process, the Department will exclude new entrant applicants who appear to be paper quota risks. For this purpose, the Department 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.

The Department 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 and or individuals that are not black persons.

(b) *Medium term holders*

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

Delegated authorities will also exclude "*fronts*" and will for this purpose employ the "*follow the buck*" principle to determine whether a policy objective has been circumvented. For example, delegated authorities will seek to determine whether ostensibly transformed right holders have in fact granted any financial or other benefit to black persons. This kind of front will not be re-allocated rights.

As a general rule, the Department will not allow right holders who have sold or in any way alienated a fishing right to re-enter that commercial fishery under a different guise.

(c) *Clusters C and D*

In **Cluster C and D** sectors, large groups of identical or very similar applications sponsored by third parties, will be excluded as paper quota fronts. In general, no more than one right will be allocated per household. In these sectors, applicants will be required to disclose their relationship to other applicants in the sector. If more than one member of a household applies for a right, all the applications from that household may be excluded, unless the applicants clearly and convincingly demonstrate that they have established separate small commercial operations.

(d) *Future right holders*

After the long-term rights allocation process, the Department will endeavour to withdraw the rights of paper quota right holders by applying section 28 of the MLRA. As a rule, the Department will revoke fishing rights held by participants who fail to effectively utilise a right.

7.10 Value adding

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

7.11 Enterprise development

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

7.12 Job creation

An important purpose of allocating long term 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.

Jobs created by medium right holders per ton allocated and increases in jobs as a result of the allocation of medium term rights, will be rewarded, at least in clusters A and B. The creation of permanent employment is favoured over seasonal employment and seasonal employment is favoured over contract employment.

7.13 Dependency and on-board participation

An important objective of the allocation of rights in **Cluster C and D** fisheries is to grant right so that individuals can establish small commercial enterprises and create full-time occupations for themselves. Financial dependency on the income generated by fishing will therefore be a factor in most of the **Cluster C and D** fisheries. It will be a requirement that the applicant is personally involved in the fishing or harvesting of the resource. More particularly, "*on-board participation*" by the right holder will be a requirement in most of the

Cluster C and D fisheries. Only applicants incapable of participating due to a permanent physical disability will be exempt from this requirement. Women applicants will not be exempt from having to participate on board.

Current right holders will be required to provide proof of their dependency by way of financial statements and tax returns. Potential new entrants will be required to provide proof of dependency by demonstrating their historical involvement in the sector applied for or their involvement in the fishing industry.

7.14 Local economic development and geographic justice considerations

Delegated authorities may reward the landing of catches in fishing harbours outside the metropolitan areas to promote local economic development, although it may not be possible to achieve this objective in all sectors. In order to ensure that all fishing communities share in the resource, the delegated authorities may use landing site as a scoring or tie-breaking criteria. In addition, the Department may develop policies and a system of levy concessions that encourage rights holders to land or process fish in harbours that are economically depressed.

7.15 Vessels and fishing effort

(a) Vessels

If applicable to the sector, every applicant will be required to demonstrate a right of access 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.

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

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

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

(b) Fishing effort

The Minister and the Department is obliged to conserve marine living resources in terms of the MLRA and to apply precautionary approaches in respect of the management and utilisation of these resources. 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.

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. 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.

7.16 Safety of staff and crew

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 Miscellaneous Amendment Regulations of 2004 promulgated in terms of the Merchant Shipping Act, 57 of 1951.

In addition, 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 2005 applications.

7.17 By-catch management and reduction measures and dumping

The reduction of and mitigation against unutilised and undersize by-catches is an important consideration. Delegated authorities may accordingly take into account measures taken and planned to mitigate against these types of by-catch. In some fisheries by-catch is unavoidable and constitutes an accepted part of a catch that requires appropriate management procedures. The Department will continue to develop policies that ensure improved assessment and management of by-catch species.

The Department is in the process of developing a comprehensive management plan regarding by-catch. In determining the appropriateness of by-catch mitigation and reduction devices the Department will consider its suitability to a fishery having regard to the nature of fishery itself; the cost implications of mandating any particular device or mitigation strategy; the local and foreign comparative learnings; and inputs of local fishers and their role in developing such strategies (if applicable).

The Department encourages measures to minimize incidental bycatch of seabirds, sharks, marine mammals, juvenile fish and various vulnerable or threatened marine species. South Africa has developed a National Plan of Action (NPOA) for reducing incidental bycatch of seabirds as well as a NPOA for reducing incidental bycatch of certain species of shark. In this regard, the Department would strongly urge various fishing sectors to employ the use of mitigation devices such as, the tori-line (bird by-catch mitigation for longliners), escapement or exclusion devices for trawl sectors (escapement of juvenile fish and possibly marine mammals) as well as specific mesh sizes to curtail retention of juvenile fish in trawl nets. In addition, the Department strongly condemns the practice of high grading and dumping fish as well as deliberate targeting of by-catch species. The Department would further consider temporal and spatial closures for fishing, where it is deemed necessary for the protection of spawning stocks as well as protection of nursery grounds.

7.18 Environmentally sustainable practices

The delegated authorities may reward fishing operations that have embarked upon, and invested in or supported research into, environmentally sustainable best practices. In particular, the Department has identified the following issues as requiring attention:

- ❑ Introducing energy and fuel reduction mechanisms in factories and vessels;
- ❑ Reducing by-catches and bird mortality;
- ❑ Reducing light pollution; and
- ❑ Minimising the adverse affects of ballast water release and other forms of marine pollution.

7.19 Bait Fisheries

The delegated authorities will not allocate commercial rights for the purposes of bait collection. The only exception to this policy will be in the white mussel sector, which is still developing a commercially viable market for human consumption.

PART D: CROSS CUTTING POLICY CONSIDERATIONS FOR THE ALLOCATION OF QUANTUM OR EFFORT

8. Policy Considerations

In general, the decision to allocate quantum or effort is taken separately from the decision, although inter-linked, of identifying successful applicants. The considerations that apply to rights allocation apply in general to quantum decisions. In this part of the policy, additional considerations that apply to quantum or decisions are set out. The policy considerations for the allocation of effort are dealt with in the sector specific policies.

8.1 Clusters A and B

The allocation of quantum in the Cluster A and B sectors is dealt with in the sector specific policies. In some sectors, the mechanism for allocating quantum will form the subject of further consultation, once the applications in a sector have been assessed and the successful applicants have been identified. Subject to the outcome of these consultations, the following principles will be applied in the allocation of quantum:

Firstly, quantum will be allocated with reference to the applicant's 2005 allocation. The delegated authority will determine a minimum amount to be allocated to new entrants, which as a general principle will not be less than the lowest amount allocated to a successful medium term right holder applicant.

Secondly, because it is government policy to support small business and broad based black economic empowerment, the Minister directs the delegated authorities to consider re-distributing at least 10% of the TAC to small businesses, which will include new entrant and medium term right holders. In considering whether to re-distribute to small businesses, 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 small businesses, re-distribution may be unnecessary. In fisheries that are capital intensive in nature and are accordingly not ideally suitable for small business development, the delegated authorities must endeavour to re-distribute at least 10% of the TAC to those right holders that have historically received smaller allocations but who have transformed and performed well.

Thirdly, and in addition to the above two principles, the delegated authority 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.

8.2 Clusters C and D

Successful applicants in **Cluster C and D** sectors will be allocated a fixed amount of the available TAC or TAE. This amount will not necessarily be the same for each zone or TURF.

8.3 Excess quantum left after appeals

Excess quantum left after appeals will be distributed proportionately.

8.4 Increases in the TAC/TAE

Increases in the TAC or TAE will be allocated in terms of the applicable provisions of the MLRA.

PART E: POST ALLOCATION MANAGEMENT CONSIDERATIONS

In this part, a number of post-allocation policy considerations are addressed in general terms. Although these policies will not be directly applied in the long-term rights allocation process, it is necessary to include them in this General policy in order to inform potential applicants of the Department's management objectives after the rights allocation process is completed.

9. Co-Managing the Commercial Fisheries

The Department is gradually introducing a change in the management and regulation of South Africa's commercial fisheries, by moving towards a system of co-managing the fisheries with right holders, fishing communities and other relevant stakeholders.

In terms of this approach, management of the commercial fisheries will not rest solely with the Department. The responsibility will be shared with right holders and, where applicable, with the coastal communities who rely on marine resources for their livelihood. A TURF (Territorial User Rights Fishery) system was introduced in the abalone fishery, and the Department is considering introducing a similar approach in some of the other fisheries, such as Hake Handline, West Coast Rock Lobster (Near Shore), Oysters, White Mussels and Netfishing.

As far as the larger commercial fisheries are concerned, the Department will seek closer working relations with recognised industrial bodies and interest groups to promote investment in fisheries research, management and compliance.

In order to facilitate co-management, Fishery specific **Management Working Groups** have been established in most of the fishing sectors. Right holders are represented on these Working Groups by industrial bodies and interest groups. The main purpose of a Management Working Group is to make recommendations regarding the management of the fishery, including permit conditions, closed seasons, restricted areas, the adoption and variation of sectoral management plans, compliance and vessel restrictions. As far as the larger commercial fisheries are concerned, the Department envisages sharing its biological and scientific research obligations of fish stocks and the impact of fishing on ecosystems with right holders through the Working Groups or other appropriate mechanisms.

Section 8 (1) of the MLRA provides that the Minister may, by notice in the *Gazette*, recognize any industrial body or interest group in a branch of the fishing industry which, in the opinion of the Minister, is representative of the specific body or group. A draft Policy on Recognised Industrial Bodies (*RIB's*) containing proposed recognition criteria will be made available for public comment, before the policy will be adopted. Where recognised industrial bodies exist, the Department may elect to communicate via the recognised industrial body only.

10. Levies and costs recovery

Levies are a fixed amount payable by right holders of commercial fishing rights per unit of fish landed and are therefore linked to the value of the landings. Levies are currently imposed in terms of section 29 of the Sea Fishery Act 12 of 1988.

Currently the income from levies is used to recover some of the costs that the Department incurs in managing the fisheries (including compliance and research costs). After the allocation process, the Department will investigate the feasibility of introducing a system of up-front levy payments or payment by monthly instalments on the basis of the proportion of Total Allowable Catch allocated (and not landed). The Department has also invited proposals for the introduction of a complete costs recovery system for the management of commercial fisheries.

11. Observer programme

The Department's current observer programme focuses on vessel and shore-based scientific monitoring and reporting. The Department intends to expand the role of observers in respect of compliance monitoring and reporting and to progressively increase observer coverage to as many commercial fisheries as is practically possible. The Department also intends to introduce new methods of ensuring compliance such as on-board cameras. Right holders will be expected to cover the costs associated with managing and implementing observer programmes.

12. Transfer of rights

Applications for the transfer of fishing rights are dealt with in terms of section 21(2) of the MLRA which provides that fishing rights may be transferred if approved by the Minister or his delegate.

If the members of a close corporation or shareholders of a company alienate some or all of their interests or shares, the fishing right remains with the same legal entity, and approval for the transfer of that right does not generally have to be obtained. However, any transfer of shares or of membership interest that results in a change of control over the juristic person holding a fishing right, requires approval. This is to prevent the circumvention of section 21(2) of the MLRA. In the case of a listed public company, a sale of more than 35% of the shareholding requires approval. If the right holder is an individual, an application for transfer must not only be made when the intention is to sell the right, but also when the right holder dies and the executor wishes to transfer the right to another person.

The current policy regarding the transfer of fishing rights is set out in Government Notice 1771 of 27 July 2001. This policy will be applied until replaced or amended after the allocation of long term rights. The following factors have been taken into account when considering an application for the transfer of a commercial fishing right:

- ❑ The death, dissolution, liquidation or sequestration of the right holder.
- ❑ Transformation.
- ❑ The promotion of consolidation of the number of right holders and effort in a fishery.

After the allocation of long term rights, "window" periods for the transfer of rights may be created where, in order to further transformation and consolidation, new entrants may be allowed to enter and existing rights holders may be allowed to merge.

13. Vehicle use in the coastal zone

Right holders that require the use of a vehicle in the coastal zone in order to operate effectively must apply for a permit in terms of the applicable Regulations. Right holders are advised to consider the Guidelines on the Implementation of Regulations Pertaining to the Control of Vehicles in the Coastal Zone: 2004. Both the Regulations and Guidelines are available from the Department (Chief Directorate: Fisheries Compliance) or from www.mcm-deat.gov.za. A permit fee of R500 is applicable and the permit issued will be valid for the duration of the commercial fishing right.

14. Marine protected areas and Fisheries management areas

14.1 Marine Protected Areas

The Department recognises marine protected areas as an important refuge for fish stocks under fishing pressure. At present these fish stocks include over 50 species of linefish and abalone. Marine protected areas are also recognised as an important tool to reduce illegal, unreported and unregulated fishing.

The Minister has designated a number of marine protected areas, protecting approximately 20% of South Africa's coastline. It remains the intention of the Minister and the Department to increase the extent of marine areas protected from fishing from the current 1% to the internationally determined 20% by 2015.

14.2 Fisheries Management Areas

Section 15 of the MLRA makes provision for the declaration of fisheries management areas for the management of a specified species and for the approval of a plan for the conservation, management and development a fishery. The declaration of fisheries management areas is a further tool that may be used, in addition to the emergency measures provided in section 16 and priority fishing areas provided for in section 17, to better manage fisheries and to reduce user conflict.

15. Compliance and section 28 notices

The Department has invested in monitoring, control and surveillance ("*MCS*") equipment, including vessel monitoring and positioning systems, and has procured state of the art patrol vessels. The Department has further obtained the services of dedicated forensic auditing experts and specialised fisheries prosecutors.

The Department will increasingly focus on the prevention of transgressions and on self-regulation. This will be coupled with strict performance monitoring, forensic auditing, co-operation with other regulatory agencies such as the South African Revenue Service and the South African Bureau of Standards, and the application of stricter sanctions, including the revocation or suspension of rights in accordance with the provisions of section 28 of the MLRA. The Department has already concluded various memoranda of understanding with key regulatory enforcement agencies both nationally and internationally, to share information and monitor the export and import of fish products.

The Department will issue notices under section 28(1) and pursue the cancelling, revoking or suspending of fishing rights in terms of section 28(4) of the Act in all circumstances where the Department considers a breach of any provision of the MLRA, its regulations or permit conditions, to be significant. If a fishing right has been allocated and the right holder subsequently fails to pay any fee or levy imposed in terms of the applicable legislation, the Department will not hesitate to issue a notice under section 28 of the MLRA. In addition to revoking rights under section 28 of the MLRA, the Department is investigating methods of reducing quotas in cases of transgressions of the MLRA.

GLOSSARY OF TERMS

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.
Black persons	means Africans, Coloureds and Indians, provided the person is a South African citizen.
Codes of Good Practice	means the Draft 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.
Department	means the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management.
Medium Term Right Holder	means a right holder that was granted a medium term commercial fishing right during the period 2001/2002 – 2005 in the specific sector, or became a right holder in the sector by way of an approved transfer of the fishing right.
Minister	means the Minister of Environmental Affairs and Tourism.
New Entrant	means an applicant that is not medium term right holder in the particular sector applied for.