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DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

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

DRAFT GENERAL POLICY ON THE ALLOCATION OF COMMERCIAL FISHING RIGHTS FOR THE FISHING RIGHTS ALLOCATION PROCESS OF 2021/2022

I, Barbara Dallas Creecy, Minister of Forestry, Fisheries and the Environment hereby publish for comment the Draft General Policy on the Allocation of Commercial Fishing Rights for the 2021/2022 Fishing Rights Allocation Process as contained in the schedule to this notice.

The socio-economic impact assessment study completed for the draft policy is available for download from the Department's website at www.environment.gov.za/branches/fisheriesmanagement/frap and may also be requested via email by sending an email to FRAPSEIAS_2020@environment.gov.za.

Any person who wishes to comment on the draft policy may submit written comments to the Department in the following manner:


By post: Department of Forestry, Fisheries and the Environment
Attention: Deputy Director: Administration (FRAP)
Private Bag X2, VLAEBERG
8018

By hand: 4th Floor Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town

By email: FRAPpolicycomments@environment.gov.za

Telephone queries – **Mr Msimelelo Mdledle – 084 304 0170**

All written comments must be received by the Department within 30 calendar days of the publication of this notice in the *Government Gazette*. Comments received after this time may not be considered.



BARBARA DALLAS CREECY
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

SCHEDULE



DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DRAFT GENERAL POLICY ON THE ALLOCATION OF COMMERCIAL FISHING RIGHTS: 2021

**THIS DRAFT POLICY MUST BE READ WITH THE APPLICABLE DRAFT FISHERY SPECIFIC
POLICIES AND THE DRAFT POLICY FOR THE TRANSFER OF COMMERCIAL FISHING
RIGHTS (available at www.environment.gov.za)**

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I. **Definitions**

“Applicant” means a South African person as defined in the Marine Living Resources Act 18 of 1998 that has submitted an application for a commercial fishing right in a sector-specific fishery due for allocation.

“Application period” means the period which commences with the publication of an *“invitation to interested parties to apply for a commercial fishing right in a fishery sector”* to the date on which the appellate authority finally decides on the appeals in that fishery.

“Black people or person” as per the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) means Africans, Coloureds, Chinese and Indians who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation-before 27 April 1994; or on or after 27 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies.

“By-catch” means the catch of species other than the intended target species in a fishing operation as stipulated in the sector specific policies. By-catch includes landed and discarded species as well as those injured or killed by fishing gear.

“Catch agreement” means a legally binding agreement entered into between two or more parties which stipulates the manner in which fishing vessel will be utilised by contracting parties and/or the manner in which catch will be apportioned among contracting parties. Catch agreement shall provide a legal framework within which persons can transact business and exchange resources, secure in the knowledge that the law will uphold their agreements and, if necessary enforce them. The law of contract underpins private enterprise in South Africa and regulates it in the interest of fair dealings. A catch agreement should provide for remedies for breach aimed either at the fulfilment or at the rescission or cancellation of such an agreement.

“**Codes of Good Practice**” means the BEE Codes of Good Practice published by the Minister of Trade, Industry and Competition in 2004 in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003).

“**Current assets**” means assets that can be converted into cash within one year or within a normal operating cycle.

“**Current liabilities**” are company’s debts or obligations that are due within one year or within normal operating cycle.

“**Department**” means the Department of Forestry, Fisheries and the Environment.

“**Designated Group**” means black people, women and persons with disabilities as defined in the Employment Equity Act, 1998 (Act No. 55 of 1998).

“**Exclusive economic zone**” means an area of coastal water and seabed out to 200 nautical miles from the coastline or the outer reefs, in which an adjacent country has control and responsibility.

“**Effort**” means the amount of time and fishing power used to harvest fish. Fishing power includes gear size, boat size, and horsepower.

“**Fishery**” means (1) one or more stocks of fish, or any fishing operations based on such stocks which can be treated as a unit for purposes of conservation and management purposes and identified on the basis of geographical, biological, technical, commercial, recreational, economic and/or other relevant characteristics; and (2) any fishing for such stocks.

“**Fishing**” means (a) searching for, catching, taking or harvesting fish or an attempt to any such activity; (b) engaging in any other activity which can reasonably be expected to result in the locating, catching, taking or harvesting of fish; (c) placing, searching for or recovering any fish aggregating device or associated gear, including radio beacons; (d) any operation

in support or in preparation of any activity described in this definition; or (e) the use of an aircraft in relation to any activity described in this definition.

“Fishing rights” means a right to catch a specific targeted species for a specified period of time.

“Family” means a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and goes beyond a particular physical residence.

“Fronting” means a deliberate circumvention or attempted circumvention of the B-BBEE Act and the Codes. Fronting commonly involves reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance or by any other person.

“Landings” means the number or weight of fish brought to dock (commercial) or shore (recreational). Landings are reported at the points at which fish are brought to shore.

“Minister” means the Minister of Forestry, Fisheries and the Environment.

“New entrant” means an applicant that, historically, never had a commercial fishing right in the fishery sector applied for or in any particular fishery sector.

“Paper quota” means an applicant that will use its allocation or right merely to receive an income with no intention to invest or have no serious intention to share the risks or fully participate in the sector – i.e. will sell or transfer the quota to another company or individual¹.

“Productive Assets” means assets, including assets of a referent person owned directly or indirectly through ownership of capital stock of a kind used or useful in the cable related business.

¹ Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism & others 2004(7) BCLR687 (CC)

“**Quota**” means a limit on the weight of fish that may be caught in a particular stock or area; a bag limit is a quota (usually in number of fish caught) applied to recreational fishers.

“**Right Holder**” means a person that has a valid commercial fishing right.

“**Target species**” means the species or species assemblages for which fishing rights have been granted and that are the primary or intended catch in a particular fishing sector as stipulated in the sector specific policies.

“**Targeting**” means deploying fishing gear in a specific manner at an appropriate time and space with the intention to catch a particular species or species assemblage.

“**Total Allowable Catch (TAC)**” means the maximum quantity of fish of individual species or groups of species made available annually or during such other period of time as may be prescribed, for combined recreational, small-scale, commercial and foreign fishing or the maximum catch allowed from a fishery in accordance with a specified management plan.

“**Total Applied/ Allowable Effort (TAE)**” means the maximum number of fishing vessels, the type, size and engine power thereof or the fishing method applied thereby for which fishing vessel licenses or permits to fish may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licenses or permits may be issued to fish for individual species or groups of species or the maximum amount of time and/or fishing power allowed to be used to harvest fish. Fishing power includes gear size, boat size, and horsepower.

II. Acronyms

CAF	Consultative Advisory Forum
CPUE	Catch per unit effort
CRDP	Comprehensive Rural Development Plan
EEZ	Exclusive Economic Zone
FTC	Fisheries Transformation Council
IGDP	Integrated Growth and development Plan
IPAP	Industrial Policy Action Plan
MLRA	Marine Living Resources Act, 1998 (Act No. 18 of 1998)
MLRF	Marine Living Resources Fund
NDP	National Development Plan
NGP	New Growth Path
PUCL	Precautionary Upper Catch Limit
RFMO	Regional Fisheries Management Organisation
TAC	Total Allowable Catch
TAE	Total Applied Effort

PART A: INTRODUCTION

1. INTRODUCTION

- 1.1 This **General Policy on the Allocation of Commercial fishing rights: 2021** is issued by the Minister of Forestry, Fisheries and the Environment (“the Minister”) and will be referred to as the “**2021: General Policy**”.
- 1.2 The purpose of the **2021: General Policy** is to guide the allocation and granting of commercial fishing rights prescribed by section 18 of the Marine Living Resources Act 18 of 1998 (“the MLRA”) across all fisheries as is guided by each respective “**Fishery sector specific policy**”.
- 1.3 The allocation and granting of rights as provided for by section 18 of the MLRA for each fishery will be guided by each sector specific “**Fishery Policy**”, also referred to as the “**Fisheries sector specific policies**”.
- 1.4 The General and Fisheries sector specific policies are informed by the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996) (“the Constitution”), the MLRA, the Broad-Based Black Economic Empowerment Act 53 of 2003 (“the BBBEE Act”), the National Empowerment Fund Act 105 of 1998 (“the NEFA”), the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) (“the PAJA”), the Promotion of Access to Information Act, No. 2 of 2000 (“the PAIA”), the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (“the POPI”), the National Archives Act of South Africa, 1996 (Act No 43 of 1996) and the key government policies, such as the National Development Plan (NDP), the Integrated Growth and Development Plan (IGDP) for Agriculture, Rural Development and Land Reform, New Growth Path (NGP), the 2012 Industrial Policy Action Plan (IPAP) and the Comprehensive Rural Development Programme (CRDP) as well as other relevant international instruments and treaties South Africa is party to, and are applicable to the allocation of commercial fishing rights.
- 1.5 The 2021: General Policy must be read together with the “**Fisheries sector specific policies**” that have been adopted for each fishery.

- 1.6 The powers to allocate and grant commercial fishing rights in terms of section 18 of the MLRA are vested with the Minister. The Minister may, in terms of section 79 of the MLRA, delegate any of the powers conferred upon her to any official(s) of the Department of Forestry, Fisheries and the Environment (“the Department”) to allocate and grant commercial fishing rights. As with all other delegated powers, once such power(s) has been exercised by the Delegated Authority, the Delegated Authority cannot review his or her decision (i.e. the *functus officio* doctrine applies).

2. APPLICATION OF THE 2021: GENERAL POLICY

- 2.1 The 2021: General Policy applies to:

- (a) The allocation of commercial fishing rights in the following commercial fishing sectors: Abalone, Demersal Shark Longline, Hake Deep Sea Trawl, Hake Handline, Hake Inshore Trawl, Hake Longline, Horse Mackerel, KwaZulu-Natal Beach Seine, KwaZulu-Natal Prawn Trawl, Large Pelagic Longline, Netfishing (Gillnets and Beach Seine), Oysters, Patagonian Toothfish, Seaweed, Small Pelagics, South Coast Rock Lobster, Squid, Traditional Linefish, Tuna Pole-Line, West Coast Rock Lobster (Nearshore), West Coast Rock Lobster (Offshore), and White Mussels, unless the sector becomes managed under a fishing sector other than commercial fishing sector;
- (b) Should any of the fishing sectors be allocated or moved to the Small-Scale fishing sector, then those fishing sectors will be managed in terms of the Small-Scale Fishing Policy and associated Regulations; and
- (c) new fisheries that may be established and commercialised.

- 2.2 The provisions of the 2021: General Policy are to be read with the Fisheries sector specific policies. The provisions of the 2021: General Policy will take precedence in the event of any conflict between the provisions of the 2021: General Policy and the Fisheries sector specific policies.

3. PROFILE OF THE SOUTH AFRICAN FISHERY

- 3.1 South Africa has jurisdiction over an Exclusive Economic Zone (EEZ) which covers 1071 883 km². The EEZ has important marine resources including fisheries. Fishing is restricted to South African

vessels. The coastline of South Africa stretches from the Orange River (desert border with Namibia on the west coast), southwards around the tip of Africa, and northeast to the border with Mozambique, and is approximately 3000 km. The oceanography around South Africa is one of the most complex and variable in the world. It is essentially influenced by two main drivers, the warm, fast-flowing Agulhas Current along the east and south coasts and the cold, nutrient-rich, eastern-boundary Benguela Current along the west coast.

- 2.2 According to the paper on South African Fisheries and the SADC-EU Economic Partnership Agreement: 2017, the South African fisheries sector contributes less than 1% of total Gross Domestic Product (GDP), and 5% of the Western Cape's provincial GDP, but it is an extremely strategic sector for food security, employment, and environmental impact. Fisheries resources are self-renewable, and if well managed their duration is practically unlimited. The South African fisheries sector is worth around R8 billion a year, directly employs 28 000 people and is a good source of protein.
- 2.3 The wild capture fishing sectors in South Africa constitutes local commercial, small-scale, recreational and foreign fishing, and are managed in terms of the provisions of the MLRA under the jurisdiction of the National Department. Under this Act, the responsible authorities are obliged to manage these fisheries responsibly and sustainably. They are therefore required to respond to major and lasting changes in the distribution and abundance of resources with adjustments in policies on research and management. These include Rights Allocations, the seasonal setting of sustainable TACs and TAEs, and the development of Operational Management Procedures (OMPs), which are flexible enough to take into account possible fluctuations in abundance and possibly other factors such as Climate Change. Successful applicants are granted Rights to undertake commercial or small-scale fishing, engage in mariculture or operate a fish processing establishment in terms of the provisions of Section 18 of the MLRA. Global TACs or TAEs, or a combination thereof, are determined and apportioned to existing fishing sectors in terms of the provisions of section 14 of the MLRA, and the commercial TACs or TAEs are thereafter apportioned proportionally to existing commercial right holders. Right holders are also issued with permits to exercise their rights annually in terms of the provisions of section 13 of the MLRA, subject to meeting the relevant conditions determined by the Minister in that permit. Issuing of future permits may be refused where such permit conditions are not complied with.

2.4 The challenge of implementing the MLRA has been to reform South Africa's fisheries to balance racial representation and the need to increase and balance the social and economic benefits of fishery resources against the finite nature of the resource and the need to ensure sustainability for future generations. The fishing industry has since been reformed by granting a number of new entrants or historical disadvantaged individuals the right of access into most commercial fisheries in terms of the provisions of section 18 of the MLRA. Several fishing companies also transformed internally to become racially representative through Broad-Based Economic Empowerment ('BBBEE') and employment equity practices, but the process of reforming the fishing industry continues as a work in progress.

2.5 According to the 2020 Status of the South African Marine Fishery Resources Report, 61% of the marine fisheries resources stocks are considered not to be of concern (blue and green category), while 39% of the stocks are of concern (orange and red categories). These figures indicate an improvement over the past eight (8) years, with 46% of stocks having been considered not to be of concern in 2012, 49% in 2014 and 52% in 2016. The details in terms of each commercial fishery profile can be found in the Fisheries sector specific policies.

2.6 The Department has noted with concern over the duration of the long-term Commercial fishing rights that there is public outcry from the fishing industry regarding the economic empowerment of historical disadvantaged persons, economic viability of quotas and social injustices, which need to be redressed strategically. The process of reforming the fishing industry is ongoing.

4. PURPOSE AND OBJECTIVES

4.1 The purpose and objectives of the 2021: General Policy, together with the Fisheries sector specific policies is aimed at giving effect to objectives of the MLRA listed in section 2 of the MLRA which are all relevant to the allocation and granting of commercial fishing rights.

4.2 This policy recognises the need to ensure the optimal, long-term and justifiable use of marine living resources in order to ensure sustainable development of the fishing sector to achieve inclusive economic growth, to build capacity within the Marine Living Resources Fund (MLRF) and to create sustainable employment consistent with the development objectives of National Government. The

MLRA requires decision-makers to give regard to the need to conserve marine living resources for both present and future generations. The impact on both the target species and the ecosystem as a whole, including species not targeted ("by-catch") for exploitation must be considered, as set out in section 2 of the MLRA. The need to preserve marine biodiversity as well as the need to minimize marine pollution must be considered. The policy seeks to ensure sustainable use of marine living resources, based on scientific principle and international best practice. This is primarily done through the setting of a Total Allowable Catch (TAC) per targeted species or species group in a particular area, a Total Applied Effort (TAE) of units of time spent fishing, fishing gear, vessel or fishers, or other management tools (such as Precautionary Upper Catch Limit (PUCL)) or a combination thereof. The list of target species, as well as by-catch limits for species of particular concern will be specified in the Sector Specific Policies and relevant Permit Conditions. Management measures for by-catch species of conservation concern particular to an individual fishery will be stipulated in the respective Sector Specific Policies.

- 4.3 These quantities or measures set out in paragraph 4.2 above will be considered primarily before fishing rights are allocated, to avoid overcapacity, overexploitation and conflict amongst resource users while enhancing food security, effective management, sustainable growth and stability.
- 4.4 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 of 1998 (MLRA)
- 4.4.1 The MLRA requires decision-makers to give regard to the need to restructure the fishing industry in order to address historical imbalances and to achieve substantive equity within all the sectors of the fishing industry. Transformation is also a constitutional imperative in South Africa.
- 4.4.2 The Broad-Based Black Economic Empowerment Act 53 of 2003 (the BBBEE Act) is one of a number of statutory instruments giving effect to this constitutional imperative. The BBBEE Act provides that the Minister of Trade, Industry and Competition may, by notice in the Gazette, issue codes of good practice on black economic empowerment. The codes provide for a balanced scorecard to measure progress and status within enterprises as well

as the adoption of transformation charters for specific sectors of the economy by the major stakeholders in those sectors.

4.4.3 The BBBEE Act and the codes were considered in the development of this Policy and the Fishery Specific Policies. Due to the nature of the Commercial fishing rights allocation process and also because there is no code that can be identified in relation to the granting of statutory authorisations to catch fish, the Minister of Forestry, Fisheries and the Environment has not adopted the weighting and benchmarks set in the codes relating to ownership and management. When allocating Commercial fishing rights, the Delegated Authority is called upon to compare applicants with each other, rather than against an external benchmark.

4.4.4 The 2021 General Policy seeks to further transform and to improve on the levels of transformation already achieved in the fishing industry. Only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons as defined in the National Empowerment Fund Act 105 of 1998 (NEFA).

PART B: COMMERCIAL FISHING RIGHTS ALLOCATION PROCESS

5. APPLICATION FOR COMMERCIAL FISHING RIGHTS

5.1 Teams

The Minister or Delegated Authority may appoint teams and/or committees that will assist in the management and implementation of the commercial fishing rights allocation process.

5.2 Policies and application forms

5.2.1 The Minister will publicly announce the way the Policies and Application Forms for the allocation of commercial fishing rights will be consulted on and on how Application Forms will be distributed and submitted.

5.2.2 The applicants must ensure that they meet all requirements prior to completion and submission of application forms.

5.2.3 It is the responsibility of all prospective applicants to ensure that their applications are properly completed and submitted timeously.

5.2.4 No late applications will be accepted.

5.3 Application Fee

5.3.1 The fees will be published separately in terms of section 25 of the MLRA and will be made available at the time of application.

5.3.2 The Application Fees will be determined by, amongst others:

- (a) The cost of the administration of the entire Commercial fishing rights allocation process, including consultation, distribution, receipting, evaluation of applications, verification, appeals and judicial reviews; and
- (b) The relative value of the resource(s) being allocated.

5.3.3 Applicants must pay the Application Fee to the Marine Living Resources Fund before the submission of their Application Form and proof of payment must be submitted with the Application Form when applying for a fishing right. Banking details are as follows:

<p>Account Holder: Marine Living Resources Fund</p> <p>Bank Name: First National Bank</p> <p>Account Number: 62123256382</p> <p>Branch Code: 210554</p> <p>Reference Number: [Applicant must insert the commercial fishing right application number]</p>

5.3.4 The Application Fee is non-refundable, except where there are reasonable grounds for refund.

5.4 Management of applications

5.4.1 A record of all applications received will be kept by the Department.

- 5.4.2 The applications will be sorted and categorized by fisheries sector in terms of the categories of the applicants per each fishery. Applications will be sorted into entities and individual applicants.
- 5.4.3 Those applicants who held rights in the fishery for which they are re-applying during the duration of the rights granted in the previous rights allocation process in the specific sector, may be considered to be **Category A Applicants**. Applicants who held rights in sectors other than the fishery they are applying for during the period 2006 to 2020 may be treated as **Category B Applicants**. There will be a third category – **Category C Applicants** – who comprise of applicants that have never held commercial fishing rights in any of the commercial fishery sectors of South Africa. The third category is also referred to as “new entrant” applicants.
- 5.4.4 Applications from individual applicants who became deceased during the process of assessment of the applications and on/or before a right to engage in commercial fishing activity in a fishing sector is decided will be assessed in terms of the set criteria. If an applicant is deceased after the right has been granted only an Executor or Master’s Representative, whose appointment has been confirmed by the Master of the High Court, may deal with the assets and liabilities of a deceased's estate.
- 5.4.5 Family member(s) of the deceased applicant shall immediately inform the Department, in writing, after such applicant is deceased. On receipt of the notification of a deceased applicant, the Delegated Authority, may in terms of section 82 of the MLRA order an enquiry into the matter.
- 5.4.6 The applications will be assessed by the Department in terms of the exclusionary and the balancing criteria.

6. **EXCLUSIONARY CRITERIA**

The following exclusionary criteria will apply to all applications for a right in each of the fisheries.

6.1 Improper Lodgment Criteria

The Delegated Authority has no discretion to condone the inclusion of improperly submitted applications.

An application will be considered improperly lodged and will be excluded if –

- 6.1.1 an applicant submits his or her or its application after the set due date and time for submission of the application;
- 6.1.2 an applicant did not pay the prescribed application fee in full and on time;
- 6.1.3 an applicant submits his or her or its application without using the prescribed application form and lodges his or her or its application contrary to the instructions of the Department i.e., such as by fax, email, or post;
- 6.1.4 an applicant is not a South African person;
- 6.1.5 an application is submitted by a deregistered juristic person or the applicant is not Tax Compliant;
- 6.1.6 an application is not submitted by the applicant or his or her or its authorized representative; and
- 6.1.7 an individual applicant is under the age of 18.

6.2 Criteria for materially defective applications

An application will be considered materially defective and will be excluded if –

- 6.2.1 an applicant or the applicant's authorized representative did not sign the application form and if his/her signature was not properly commissioned by an independent Commissioner of Oaths and stamped;
- 6.2.2 the applicant submits more than one application for a right in the same fishing sector;

- 6.2.3 the applicant submits false and/or misleading information or false documentation;
- 6.2.4 the applicant fails to disclose material information for the purposes of evaluating his or her or its application; and
- 6.3 an applicant or any of its authorized personnel / representative(s) attempt to improperly influence the Delegated Authority or Minister with regard to its application (e.g. an applicant attempts to communicate directly with the Minister or Delegated Authority with regards to the application).Requirements
- An application will be excluded if -
- 6.3.1 an applicant or any of its members and shareholders or directors has entered into a plea bargain in terms of section 105A of the Criminal Procedure Act, Act 51 of 1977, for a contravention of the MLRA, the regulations, or permit conditions and subjected to sentencing of imprisonment without the option of a fine. The details of the period of exclusion will be indicated in the Fishery Sector Specific Policies;
- 6.3.2 an applicant or any of its members and shareholders or directors has been convicted in terms of the MLRA or its regulations or permit conditions since the period determined in the Fishery Sector Specific Policies (e.g. an applicant or any of its members and shareholders or directors has been convicted with more than two contraventions and subjected to sentencing exceeding R5000 or imprisonment without an option of the fine);
- 6.3.3 an applicant had an asset forfeited to the State for a violation of a provision of the MLRA² ³;
- 6.3.4 an applicant had a fishing right or permit cancelled or revoked for a period defined in the Fishery Sector Specific Policies. In the event a fishing right or permit has been cancelled or revoked, the decision of the Minister or the Delegated Authority remains in place until such time that the appeal has been considered and adjudicated by the relevant appeals authority or judicially reviewed by a court of law;

² The Delegated Authority will determine whether the applicant was ordered by a court of law to forfeit an asset. Only in cases of a court ordered forfeiture of an asset will an applicant be penalized under this scoring criterion.

³ Applicants who have been arrested or detained or had asset(s) seized, arrested or detained but where no finding of guilt has been ordered by a court of law will similarly not be prejudiced by the weighting and scoring criteria.

6.3.5 With respect to Category A and Category B applicants, an applicant will be considered to be a quota risk and excluded if they fail to present any of the following:

- (a) Banking Accounts
- (b) Financial Statements
- (c) List of productive assets in the name of the Applicant
- (d) Insurance in the name of the Applicant
- (e) Employee under the Employ of the Applicant
- (f) Export Permits issued in the name of the company
- (g) Business Plan [Fishing plan] containing
- (h) If they have never been involved directly in the Catching Processing and Marketing of their fish during the duration under which they held a right in the sector they are applying for.
- (i) Did not apply for a Catch Permit during the duration under which they held a right in the sector they are applying for.
- (j) Did not land any fish during the duration under which they held a right in the sector they are applying for.
- (k) If they will not catch and land any fish

6.3.6 an applicant will be considered to present a paper quota risk by the Delegated Authority as defined by the 2021: General Fisheries Policy as follows -

- (a) If it appears from the application that the right holder applicant fails to demonstrate a substantive interest in the exploitation, processing and/or marketing the fishing right held or to be allocated. In determining whether the right holder applicant poses a paper quota risk, the following will be considered:
 - (i) Cumulative conduct of the right holder applicant over the period of the right allocated.
 - (ii) Right holder applicants who have failed to invest in jobs, the harvesting of their fishing right(s), the processing and beneficiation of fish and/or the marketing and sale of their fish.
- (b) The Delegated Authority will consider an applicant to be a "paper quota risk" if it appears from the application that the right holder applicant has 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 the right that may be granted. In determining whether an applicant poses such a paper quota risk, the applicant's assets and access to capital and its financial and business planning and commitments will be considered. The Delegated Authority must endeavor to prevent paper quota applicants from entering the fishing industry because paper quotas undermine and circumvent the objectives of the commercial fishing rights allocation process.

- (c) The Delegated Authority must take all reasonable steps to remove paper quota applicants that may have been granted commercial fishing rights. The Delegated Authority will consider as paper quotas applicants that have been granted commercial fishing rights but who are reflecting weak or non-existent performance records combined with no investment or direct involvement in fishing industry.
- (d) The Delegated Authority 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 submitted through another compliant entity. This commonly involves reliance on data or claims of compliance based on misrepresentations of facts, whether made by the party claiming compliance or by any other person. An example is an application made by an ostensibly transformed entity with the intention that the main benefits will flow to an untransformed entity or individuals that are not designated persons. Another example is when a foreign entity or individual collude with the South African person by not declaring the actual owner(s) of the vessel, which the applicant has indicated to be his or her or its vessel whilst submitting the application for a right thereby subverting the rights allocation process.
- (e) The Department will ultimately institute section 28 proceedings in terms of the MLRA against right holders who turn out to be paper quota holders or fronts.
- (f) The Department may revoke commercial fishing rights held by right holders who fail to utilise their rights in the first two years after being granted their rights.

6.3.7 An applicant failed to utilise any of his or her or its fishing right, in the same fishing sector for which a right is applied, during the duration of the commercial fishing right which was granted to him or her or its in LTRAMP2005 and FRAP 2013.⁴

7. BALANCING CRITERIA

Applications that pass through the exclusionary criteria will be further assessed and subjected to a weighted scoring criteria or balancing criteria to determine the successful applicants in each of the fishing sectors. Weighting and scoring criteria will be developed and designed for Categories A, B and C applicants. The weighting per criteria will be set at a certain percentage based on its importance in ensuring that the objects as outlined in Chapter 4 are met. The criteria to be weighted and scored are as follows:

7.1 Balancing criteria: Category A / previous right holder applicants

Applicants, in accordance with the sector specific policies and their application form, will be awarded a weighted score based on: –

7.1.1 Multi-sector involvement

- (a) The number of fishing sectors the applicant is involved in and applicant's involvement in fishing sectors other than the fishing sector applying for may also be considered for the purpose of prioritizing the broadening of access, transformation, and inclusive economic development of the South African fishing industry.
- (b) The size of the allocation in the sectors in which they are holding a right.

7.1.2 Fishing experience and knowledge

- (a) the number of years the applicant held a commercial fishing right in the sector where he or she or it is applying for a right;
- (b) the number of years the applicant held commercial fishing rights in fishing sectors other than the fishing sector where he or she or it is applying for a right; and

⁴ Previous Right Holder Applicants who failed to record any landings in the fishery during the long term period (2007-2020), will be excluded for failing an essential requirement.

- (c) the number of years the applicant has been involved in the South African fishing industry value chain (catching, processing, marketing and management of finance).

7.1.3 Investment

- (a) Fair value of the productive non-current fishing and fishery related liabilities and assets registered under the name of the applicant. The long-term assets and liabilities employed in the business are defined as non-current – they are not expected to be received or paid within one year. The non-current assets include but not limited to property, plant and equipment (including a vessel), investment property, intangible assets and investments valued using the equity method.
- (b) Fair value of the productive current fishing and fishery related liabilities and assets registered under the name of the applicant. Current assets and liabilities are short-term and circulate as part of the operating cycle of the business. It is assumed they are received or paid in cash within a year. The current assets included but not limited to inventories, trade and other receivables, cash and cash equivalents.

7.1.4 Reliance

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on —
 - (i) the percentage (%) income derived from a fishing sector/s within South Africa; and
 - (ii) the percentage (%) income derived from a fishing sector/s outside of South Africa.

7.1.5 Compliance

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on whether—
 - (i) Minor violations: - the applicant has been convicted of an offence under the MLRA, or the regulations or permit conditions as per the period as determined in the Fishery Sector Specific Policies.
 - (ii) Minor violations: - the applicant has paid an admission of guilt fine only for a contravention of the MLRA, the regulations, or the permit conditions as per the period as determined in the Fishery Sector Specific Policies. These

types of violations will result into a minor scoring penalty during comparative balancing phase.

- (iii) Minor violations: - an applicant had a fishing right or permit suspended or reduced as per the period defined in the Fisheries Sector Specific Policies.
 - (iv) Substantive violations: - the applicant has entered into a plea bargain under the Criminal Procedure Act 51 of 1977, for a contravention of the MLRA, or the regulations, or permit conditions as per the period as determined in the Fishery Sector Specific Policies. These types of violations will result into substantial scoring penalty during comparative balancing phase in the case of a single infraction. In the case of repeat violations of the MLRA by the applicant, the applicant will be excluded.
 - (v) Substantive violations: - the applicant's fishing vessel, motor vehicle, premises or any of the applicant's assets has been seized under the MLRA or forfeited under the Prevention of Organised Crime Act 121 of 1998 as per the period as determined in the Fishery Sector Specific Policies. These types of violations will result in substantial scoring penalty/ies during the comparative balancing phase in the case of a single infraction. In the case of repeat violations of the MLRA by the applicant, the applicant will be excluded.
- (b) Applicants with pending legal proceedings will be assessed and evaluated in the same manner as all other applicants. In the event these applicants are successful the rights will be granted but reserved pending finalisation of such proceedings. If the applicant is successful in the legal proceedings, the applicant will be permitted to exercise the right. If the legal proceedings are unsuccessful, the right will be distributed pro-rata among all other successful applicants in the same category.

7.1.6 Access to suitable vessel

- (a) Applicants, depending on the form of an applicant and on the sector specific policy, will be awarded a weighted score based on whether -
 - (i) the applicant owns or has access to a suitable vessel; and

- (ii) the applicant's nominated vessels are compliant with safety at sea and vessel specifications in terms of the Merchant Shipping Act 57 of 1951, the South African Maritime Safety Authority ("SAMSA") Act 5 of 1998, the Marine Traffic Act 2 of 1981 and its Regulations.

- (b) A suitable vessel will be described in the applicable fishery sector specific policy, but for any vessel to operate in the South African fishing industry, the vessel must:
 - (i) be a South African flagged vessel (unless an exception is made in a fishery sector specific policy);
 - (ii) be fitted with a departmental approved and functioning vessel monitoring system (VMS) (unless exempted by the Department);
 - (iii) be registered by the South African Maritime Safety Association (SAMSA) as being suitable for fishing; and
 - (iv) not be listed negative on any Regional Fisheries Management Organisations (RFMO) list and/or Treaties.

7.1.7 Fishing performance

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on –
 - (i) the number of fishing seasons that the applicant exercised his or her or its right to undertake commercial fishing activity in the fishing sector where the applicant applied for re-allocation of the right.
 - (ii) the proportion of the catch that the applicant has landed in the fishing sector for which the applicant applied.
 - (iii) over-harvesting of their allocations by more than a certain percentage determined in the Fishery Sector Specific Policy in any fishing season and in final season before the allocation of commercial fishing rights.

7.1.8 Transformation

- (a) In the rights allocation process, race, gender and age of applicants, and in the case of juristic persons, race, gender and age of the applicant's shareholders or members,

management, suppliers and workforce, will also be taken into account. In addition, corporate social investment will be taken into account.

- (b) Only beneficial ownership of applicants by historically disadvantaged persons, 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 Authority may give regard to Code 100 of the BBBEE Act. Code 100 is the Measurement of the Ownership Element of Broad Based Black Economic Empowerment.
- (c) Points will be allocated to applicants that have succeeded in empowering their employees through employee ownership schemes, provided that applicants can demonstrate that the employees derived real benefits (such as dividends and joint management) from the scheme and that such benefits can be verified. The number of historically disadvantaged persons in the senior or executive management of an applicant's fishing business entity 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.
- (d) When assessing and scoring applications, and when allocating portions of the TAC to successful applicants, the Delegated Authority may prefer applicants based on transformation criteria. When attributing a score for transformation criteria, or allocating portions of the TAC, the Delegated Authority may have regard to: census statistics or other information provided by Statistics South Africa regarding the composition of the population of South Africa, and the percentage of that population made up by different demographic groups; the need to ensure the recognition and meaningful and justifiable participation in the fishing industry of Historically Disadvantaged Individuals (HDIs) and the codes of good practice under the Broad Based Economic Empowerment Amended Act.
- (e) Applicants, in accordance with the sector specific policies and their application form, will be awarded a weighted score based on –
 - (i) applicant's profile with regard to race, gender and age for individuals;
 - (ii) applicant's black ownership profile for companies;
 - (iii) applicant's empowerment profile and employee service record with regard to black people, female, youth, persons with disabilities and years of service;
 - (iv) the percentage HDI Wage Bill of the Total Wage Bill;

- (v) Dividends paid to the shareholders or members and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries;
- (vi) Dividends paid to the Employee Trust and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries;
- (vii) the percentage of the applicant's net profit is spent on corporate social investment;
- (viii) whether the applicant procures goods/services from majority black owned company(ies);
- (ix) whether the applicant is a designated employer as defined in Section 1 of the Employment Equity Act 55 of 1998;
- (x) whether the applicant complied with the Employment Equity Act 55 of 1998;
- (xi) whether the applicant has developed an employment equity plan;
- (xii) whether the applicant has complied with the Skills Development Act 97 of 1998;
- (xiii) whether the applicant has paid levies in terms of the Skills Development Levies Act 9 of 1999;
- (xiv) whether the applicant has appointed a skills development facilitator;
- (xv) whether the applicant has developed and implemented a workplace skills plan;
- (xvi) whether the applicant participates in learnership programmes;
- (xvii) whether the applicant has embarked upon enterprise development projects to address increasing black ownership, management and skills in new business enterprises, which includes investment programmes and access to finance;
- (xviii) the actual amount and percentage spent on goods and services within and outside South Africa;
- (xix) whether the applicant has initiated value adding activities in the specific sector/fishery that it operates within;
- (xx) the promotion of local economic development in respect of harbours where catch has been landed and processed; and

- (xxi) the promotion of local economic development by making commitments in respect of harbours where catch is to be landed and processed.

7.1.9 Job creation

- (a) An important purpose of allocating commercial fishing rights is to create an environment conducive to job creation, in particular, the creation of more permanent ('year-round') and better quality jobs in the fishing industry.
- (b) Jobs created by applicants holding commercial fishing rights and increases in jobs as a result of the allocation of commercial fishing rights over time, will be taken into consideration.
- (c) The creation of permanent (year-round) employment is preferred over seasonal employment and seasonal employment is preferred over contract (short term) employment.
- (d) Therefore, applicants, depending on the form of an applicant, will be awarded a weighted score based on –
 - (i) the number of permanent (year-round), seasonal and contract (short term) employees in respect of the financial years as specified in the fishery sector specific policies;
 - (ii) whether the applicant is compliant with employment working conditions on fishing vessels and factories, safety at sea, health and safety in terms of Occupational Health & Safety Act 85 of 1993 and the Compensation for Occupational Injuries & Diseases Act 130 of 1993; and
 - (iii) the wage bill payable to the employees.

7.1.10 Tie-breaking factors

- (a) if there are applicants with the same score, the Delegated Authority may use tie-breaking criteria in order to choose between the applicants with the same score.

- (b) the tie-breaking factors will be rational, equitable and objective and may comprise criteria not scored or scored criterions differently weighted in order to give effect to objectives and principles of the MLRA.

7.2 Balancing criteria: Category B applicants

Applicants, in accordance with the fishery sector specific policies and their application form, will be awarded a weighted score based on: –

7.2.1 Multi-sector involvement

- (a) The number of fishing sectors the applicant is involved in and applicant's involvement in fishing sectors other than the fishing sector applying for may also be considered for the purpose of prioritizing the broadening of access, transformation and inclusive economic development of the South African fishing industry.
- (b) The size of the allocation in the sectors where they are holding a right

7.2.2 Fishing experience and knowledge

- (a) the number of years the applicant held commercial fishing rights in those sectors.
- (b) the number of years the applicant has been involved in the South African fishing industry value chain (catching, processing, marketing and management of finance).

7.2.3 Investment

- (a) Fair value of the productive non-current fishing and fishery related liabilities and assets registered under the name of the applicant. The long-term assets and liabilities employed in the business are defined as non-current – they are not expected to be received or paid within one year. The non-current assets include but are not limited to property, plant and equipment (including a vessel), investment property, intangible assets and investments valued using the equity method.
- (b) Fair value of the productive current fishing and fishery related liabilities and assets registered under the name of the applicant. Current assets and liabilities are short-term and circulate as part of the operating cycle of the business. It is assumed they are received or paid in cash within a year. The current assets include but are not limited to inventories, trade and other receivables, cash and cash equivalents.

7.2.4 Reliance

Applicants, depending on the form of an applicant, will be awarded a weighted score based on the percentage (%) income derived from:

- (a) fishing sector/s within which the applicant is holding a commercial fishing right.
- (b) other areas within fishing sector other than in the sector where the applicant is holding a right.
- (c) a fishing sector/s outside of South Africa.

7.2.5 Compliance

Applicants, depending on the form of an applicant, will be awarded a weighted score based on whether–

- (a) the applicant has been convicted with an offence under the MLRA, or the regulations or permit conditions as per the period determined in the Fishery Sector Specific Policies.
- (b) the applicant has entered a plea bargain under the Criminal Procedure Act 51 of 1977, for a contravention of the MLRA, or the regulations, or permit conditions as per the period determined in the Fishery Sector Specific Policies.
- (c) the applicant has paid an admission of guilt fine for a contravention of the MLRA, the regulations, or the permit conditions during the long-term right period as per the period determined in the Fishery Sector Specific Policies.
- (d) the applicant's fishing vessel, motor vehicle, premises or any of the applicant's assets have been seized under the MLRA or forfeited under the Prevention of Organised Crime Act 121 of 1998 as per the period determined in the Fishery Sector Specific Policies.

Applicants with pending legal proceedings will be assessed and evaluated in the same manner as all other applicants. In the event these applicants are successful the rights will be granted but reserved pending finalisation of such proceedings. If the applicant is successful in the legal proceedings, the applicant will be permitted to exercise the right. If the legal proceedings are unsuccessful, the right will be distributed pro-rata among all other successful applicants in the same category.

7.2.6 Access to suitable vessel

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on whether -
- (i) the applicant owns or has access to a suitable vessel.
 - (ii) the applicant's nominated vessels are compliant with safety at sea and vessel specifications in terms of the Merchant Shipping Act 57 of 1951, the South African Maritime Safety Authority ("SAMSA") Act 5 of 1998 ("the **Act**"), the Marine Traffic Act 2 of 1981 and their Regulations.
- (b) A suitable vessel will be described in the applicable fishery specific policy, but for any vessel to operate in the South African fishing industry, the vessel must:
- (i) be a South African flagged vessel (unless an exception is made in a fishery specific policy);
 - (ii) be fitted with a departmental approved and functioning vessel monitoring system (VMS) (unless exempted by the Department);
 - (iii) be registered by the South African Maritime Safety Association (SAMSA) as being suitable for fishing; and
 - (iv) not be listed negative on any RFMO list and/or Treaties.

7.2.7 Fishing performance

- (a) Applicants, depending on the form of applicant, will be awarded a weighted score based on –
- (i) the number of fishing seasons that the applicant exercised his or her or its right to undertake commercial fishing activity in the fishing sector for which the applicant applied for re-allocation of the right.

7.2.8 Transformation

- (a) The 2021 General Policy seeks to further transform and to improve on the levels of transformation already achieved in the fishing industry. Only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons as defined in the National Empowerment Fund Act 105 of 1998 (NEFA). In terms of the NEFA "historically disadvantaged persons" means

those persons or categories of persons who, prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996), were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons.

- (b) Persons were historically disadvantaged in the fishing industry on account of their race and gender, particularly with regard to access to Commercial fishing 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.
- (c) In the rights allocation process, race, gender and age of applicants, and in the case of juristic persons, race, gender and age of the applicant's shareholders or members, management, suppliers and workforce, will also be taken into account. In addition, corporate social investment will be taken into account.
- (d) Only beneficial ownership of applicants by historically disadvantaged persons, 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 Authority may give regard to Code 100 of the BBBEE Act. Code 100 is the Measurement of the Ownership Element of Broad Based Black Economic Empowerment.
- (e) Points will be allocated to applicants that have succeeded in empowering their employees through employee ownership schemes, if applicants can demonstrate that the employees derived real benefits (such as dividends and joint management) from the scheme and that such benefits can be verified. The number of historically disadvantaged persons in the senior or executive management of an applicant's fishing business entity will be considered. 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.
- (f) When assessing and scoring applications, and when allocating portions of the TAC to successful applicants, the Delegated Authority may prefer applicants based on transformation criteria. When attributing a score for transformation criteria, or

allocating portions of the TAC, the Delegated Authority may have regard to: census statistics or other information provided by Statistics South Africa regarding the composition of the population of South Africa, and the percentage of that population made up by different demographic groups; the need to ensure the recognition and meaningful participation in the fishing industry, of Historically Disadvantaged Individuals (HDIs) and the codes of good practice under the Broad Based Economic Empowerment Amended Act.

- (g) Applicants, depending on the form of an applicant, will be awarded a weighted score based on –
- (i) applicant's profile with regard to race, gender and age for individuals.
 - (ii) applicant's black ownership profile for companies.
 - (iii) applicant's empowerment profile and employee service record with regard to black people, female, youth, persons with disabilities and years of service.
 - (iv) the percentage HDI Wage Bill of the Total Wage Bill.
 - (v) Dividends paid to the shareholders or members and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries.
 - (vi) Dividends paid to the Employee Trust and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries.
 - (vii) the percentage of the applicant's net profit spent on corporate social investment.
 - (viii) whether the applicant procures goods/services from majority black owned company(ies).
 - (ix) whether the applicant is a designated employer as defined in Section 1 of the Employment Equity Act 55 of 1998.
 - (x) whether the applicant complies with the Employment Equity Act 55 of 1998.
 - (xi) whether the applicant has an employment equity plan.
 - (xii) whether the applicant has complies with the Skills Development Act 97 of 1998.
 - (xiii) whether the applicant has paid levies in terms of the Skills Development Levies Act 9 of 1999.
 - (xiv) whether the applicant has appointed a skills development facilitator.

- (xv) whether the applicant has a workplace skills plan.
- (xvi) whether the applicant participates in learnership programmes.
- (xvii) whether the applicant embarks upon enterprise development projects to address increasing black ownership, management and skills in new business enterprises, which includes investment programmes and access to finance.
- (xviii) the actual amount and percentage spent on goods and services within and outside South Africa.
- (xix) whether the applicant has initiated value adding activities in the specific sector / fishery that it operates within.
- (xx) the promotion of local economic development in respect of harbours where catch has been landed and processed.
- (xxi) promotion of local economic development by making commitments in respect of harbours where catch is to be landed and processed.

7.2.9 Job creation

- (a) An important purpose of allocating Commercial fishing rights is to create an environment conducive to job creation, in particular, the creation of more permanent and better quality jobs in the fishing industry.
- (b) Jobs created by applicants holding Commercial fishing rights and increases in jobs as a result of the allocation of Commercial fishing rights over time, will be taken into consideration.
- (c) The creation of permanent employment is preferred over seasonal employment and seasonal employment is preferred over contract employment.
- (d) Therefore, applicants, depending on the form of an applicant, will be awarded a weighted score based on –
 - (i) the number of permanent employees in respect of each financial year of which the right was granted for.
 - (ii) whether the applicant is compliant with employment working conditions on fishing vessels and factories, safety at sea, health and safety in terms of

Occupational Health & Safety Act, 1993 (Act No 85 of 1993) and Compensation for Occupational Injuries & Diseases Act, 1993 (Act No. 130 of 1993).

7.2.10 Tie-breaking factors

- (a) if there are applicants with the same score, the Delegated Authority may use tie-breaking criteria in order to choose between the applicants with the same score.
- (b) the tie-breaking factors will be rational, equitable and objective and may comprise criteria not scored or scored criterions differently weighted in order to give effect to objectives and principles of the MLRA.

7.3 Balancing criteria: Category C / new entrant applicants

Applicants, in accordance with the sector specific policies and the form of an applicant, will be awarded a weighted score based on: –

7.3.1 Fishing experience and knowledge

The number of years the applicant operated or were involved in fishing related activities (e.g. fishing, crew member, factory worker, marketing or selling fish etc.) and for companies, the number of years that shareholders have operated in the fishing industry.

7.3.2 Investment

- (a) Fair value of the productive non-current fishing and fishery related liabilities and assets registered under the name of the applicant. The long-term assets and liabilities employed in the business are defined as non-current – they are not expected to be received or paid within one year. The non-current assets include but not limited to property, plant and equipment (including a vessel), investment property, intangible assets and investments valued using the equity method.
- (b) Fair value of the productive current fishing and fishery related liabilities and assets registered under the name of the applicant. Current assets and liabilities are short-term and circulate as part of the operating cycle of the business. It is assumed they

are received or paid in cash within a year. The current assets included but not limited to inventories, trade and other receivables, cash and cash equivalents.

7.3.3 Reliance

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on —
- (i) the percentage (%) income derived from a fishing sector/s within South Africa.
 - (ii) the percentage (%) income derived from a fishing sector/s outside of South Africa.

7.3.4 Compliance

Applicants, depending on the application form of the applicant, will be awarded a weighted score based on whether—

- (a) the applicant has been convicted of an offence under the MLRA, or the regulations as per the period determined in the Fishery Sector Specific Policies.
- (b) the applicant has entered into a plea bargain under the Criminal Procedure Act 51 of 1977, for a contravention of the MLRA, or the regulations as per the period determined in the Fishery Sector Specific Policies.
- (c) the applicant has paid an admission of guilt fine for a contravention of the MLRA as per the period determined in the Fishery Sector Specific Policies.
- (d) the applicant's fishing vessel, motor vehicle, premises or any of the applicant's assets has been seized under the MLRA or forfeited under the Prevention of Organised Crime Act 121 of 1998 as per the period determined in the Fishery Sector Specific Policies.

Applicants with pending legal proceedings their applications will be determined at the finalisation of such proceedings. If the applicant is successful in the legal proceedings, the applicant will be permitted to exercise the right. If the legal proceedings are unsuccessful, the right will be distributed pro-rata among all other successful applicants in the same category.

7.3.5 Access to suitable vessel

- (a) Applicants, depending on the form of an applicant, will be awarded a weighted score based on whether -
 - (i) the applicant owns or has access to a suitable vessel.
 - (ii) the applicant's nominated vessels are compliant with safety at sea and vessel specifications in terms of the Merchant Shipping Act 57 of 1951, the South African Maritime Safety Authority ("SAMSA") Act 5 of 1998 ("the Act"), Marine Traffic Act 2 of 1981 and their Regulations.

- (b) A suitable vessel will be described in the applicable fishery sector specific policy, but for any vessel to operate in the South African fishing industry, the vessel must:
 - (i) be a South African flagged vessel (unless an exception is made in a fishery specific policy);
 - (ii) be fitted with a departmental approved and functioning vessel monitoring system (VMS) (unless exempted by the Department);
 - (iii) be registered by the South African Maritime Safety Association (SAMSA) as being suitable for fishing; and
 - (iv) not be listed negative on any RFMO list and/or Treaties.

7.3.6 Transformation

- (a) The 2021 General Policy seeks to further transform and to improve on the levels of transformation already achieved in the fishing industry. Only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons as defined in the National Empowerment Fund Act 105 of 1998 (NEFA). In terms of the NEFA "historically disadvantaged persons" means those persons or categories of persons who, prior to the new democratic dispensation marked by the adoption and coming into force of the Constitution of the Republic of South Africa Act, 1996 (Act No. 108 of 1996), were disadvantaged by unfair discrimination on the basis of their race and includes juristic persons or associations owned and controlled by such persons.

- (b) Persons who were historically disadvantaged in the fishing industry on account of their race and gender, particularly with regard to access to Commercial fishing 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.

- (c) In the rights allocation process, race, gender and age of applicants, and in the case of juristic persons, race, gender and age of the applicant's shareholders or members, management, suppliers and workforce, will also be taken into account. In addition, corporate social investment will be taken into account.
- (d) Only beneficial ownership of applicants by historically disadvantaged persons, 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 Authority may give regard to Code 100 of the BBBEE Act.
- (e) Points will be allocated to applicants that have succeeded in empowering their employees through employee ownership schemes, provided that applicants can demonstrate that the employees derived real benefits (such as dividends and joint management) from the scheme and that such benefits can be verified. The number of historically disadvantaged persons in the senior or executive management of an applicant's fishing business entity 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.
- (f) When assessing and scoring applications, and when allocating portions of the TAC to successful applicants, the Delegated Authority may prefer applicants based on transformation criteria. When attributing a score for transformation criteria, or allocating portions of the TAC, the Delegated Authority may have regard to: census statistics or other information provided by Statistics South Africa regarding the composition of the population of South Africa, and the percentage of that population made up by different demographic groups; the need to ensure the recognition and meaningful participation in the fishing industry, of Historically Disadvantaged Individuals (HDIs) and the codes of good practice under the Broad Based Economic Empowerment Amended Act.
- (g) Applicants, depending on the form of an applicant, will be awarded a weighted score based on –

- (i) applicant's profile with regard to race, gender and age for individuals;
- (ii) applicant's black ownership profile for companies;
- (iii) applicant's empowerment profile and employee service record with regard to black people, female, youth, persons with disability and years of service;
- (iv) the percentage HDI Wage Bill of the Total Wage Bill;
- (v) Dividends paid to the shareholders or members and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries;
- (vi) Dividends paid to the Employee Trust and the average financial flow to the beneficiaries, including breakdown of race and gender of beneficiaries;
- (vii) the percentage of the applicant's net profit is spent on corporate social investment;
- (viii) whether the applicant procures goods / services from majority black owned company(ies);
- (ix) whether the applicant is a designated employer as defined in Section 1 of the Employment Equity Act 55 of 1998;
- (x) whether the applicant complies with the Employment Equity Act 55 of 1998;
- (xi) whether the applicant has an employment equity plan;
- (xii) whether the applicant has complies with the Skills Development Act 97 of 1998;
- (xiii) whether the applicant has paid levies in terms of the Skills Development Levies Act 9 of 1999;
- (xiv) whether the applicant has a skills development facilitator;
- (xv) whether the applicant has a workplace skills plan;
- (xvi) whether the applicant participates in learnership programmes;
- (xvii) whether the applicant embarks upon enterprise development projects to address increasing black ownership, management and skills in new business enterprises, which includes investment programmes and access to finance;
- (xviii) the actual amount and percentage spent on goods and services within and outside South Africa;
- (xix) whether the applicant has initiated value adding activities in the specific sector / fishery that it operates within;
- (xx) the promotion of local economic development in respect of harbours where catch has been landed and processed; and

- (xxi) the promotion of local economic development by making commitments in respect of harbours where catch is to be landed and processed.

7.3.7 Job creation

- (a) An important purpose of allocating commercial fishing rights is to create an environment conducive to job creation, in particular, the creation of more permanent and better quality jobs in the fishing industry.
- (b) Jobs created by applicants holding commercial fishing rights and increases in jobs as a result of the allocation of commercial fishing rights over time, will be taken into consideration.
- (c) The creation of permanent employment is preferred over seasonal employment and seasonal employment is preferred over contract employment.
- (d) Therefore, applicants, depending on the form of an applicant and a fishing sector, will be awarded a weighted score based on –
 - (i) the number of permanent employees in respect of the financial year which ends on a date as specified in the Fishery Sector Specific Policies.
 - (ii) whether the applicant is compliant with employment working conditions on fishing vessels and factories, safety at sea, health, and safety in terms of Occupational Health & Safety Act 85 of 1993 and the Compensation for Occupational Injuries & Diseases Act 130 of 1993.

7.2.8 Tie-breaking factors

- 7.2.8.1 if there are too many applicants with the same score, the Delegated Authority may use tie-breaking criteria in order to choose between the applicants with the same score.
- 7.2.8.2 the tie-breaking factors may comprise criteria not scored or scored criterions differently weighted.

8 GRANTING OF COMMERCIAL FISHING RIGHTS

8.1 Total Allowable Catch (TAC), Total Applied Effort (TAE) or a combination thereof

- 8.1.1** The Minister or the Delegated Authority is empowered to determine, in terms of section 14 of the MLRA a global TAC, TAE or combination thereof to apply annually in each fishery.
- 8.1.2** The TAC, TAE or combination thereof are determined by the Delegated Authority considering, amongst other things, the latest fishery sector specific stock assessment report, the history, resource users, sustainability of the operations of right holders and the viability of the fishery. The Delegated Authority will only allocate a local commercial portion of the determined TAC, TAE or a combination thereof to commercial right holders based on the proportion granted to each successful applicant at the time of the commercial fishing rights allocation process. The right holder's allocation may decrease or increase should the annual local commercial portions of the determined TAC, TAE or a combination thereof decrease or increase respectively. In terms of section 14(4) of the MLRA, if the allowable commercial catch in respect of which commercial fishing rights exist increases, the mass of the increase shall be available for allocation by the Minister.
- 8.1.3** A portion of the commercial TAC, TAE or a combination thereof may be reserved at the discretion of the Minister or her/his Delegated Authority for appeals or any other priority matter/s that would serve to promote the fulfillment of the objectives of the MLRA outlined in section 2.
- 8.1.4** With respect to appeals, the remaining portion of the TAC, TAE or a combination thereof, alluded to in 8.1.3 above, after finalization of appeals process and court proceedings following unsuccessful appeals or if there were no appeals lodged, will be allocated proportionally to successful applicants or existing right holders.
- 8.1.5** In the event that the TAC, TAE portion reserved for an appeals process is not sufficient, based on the outcomes of the court judgement on the same subject matter, the proportion available to successful applicants will be adjusted downwards so as not to exceed the approved TAC, TAE or a combination thereof. The implementation of adjustments will be dealt with in the fishery sector specific policies.

8.1.6 The Minister may, in respect of any fishery, determine, after consultation with the Consultative Advisory Forum, that the portions of TAC, TAE, or a combination thereof, allocated in any year to small-scale, local commercial and foreign fishing, and rights granted in respect thereof, shall be reduced.

8.2 Fisheries Transformation Council

Once established, the Minister may allocate commercial fishing rights to the Fisheries Transformation Council ("the Council) in terms of section 31 of the MLRA. The Council, once established, shall lease rights according to the criteria determined by the Minister to persons from historically disadvantaged sectors of society and to small and medium size enterprises.

8.3 Provisional decision and announcement thereof

8.3.1 The Delegated Authority may issue provisional lists for comment on any aspect relating to an application/s in any fishing sector.

8.3.2 The Delegated Authority may request comment on any of the information provided by an applicant and on the basis of the comments received make its final decision.

8.3.3 The Delegated Authority may invite representations regarding the assessment of the applications before making a final decision.

8.4 Information to be considered

8.4.1 The approach set out below will be adopted by the Delegated Authority regarding information to be taken into account for assessing the applications:

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

Unless otherwise indicated, if a part of the application form is not completed, it will be assumed that 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 and if the

section has negative point associated with the answer, negative points will be awarded.

(b) **Late information**

Information submitted after closing date for applications will not be considered.

(c) **Information from external sources**

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

The delegated authority may use information contained in the Government Departments or Entities database during the rights allocation process when evaluating and assessing the applications.

(d) **Use of Departmental database**

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

(e) **Use of Right Holder information**

The delegated authority may require applicants to submit an audited verified information during the rights allocation process. The delegated authority will require successful Right Holder applicants to keep the information for the duration of the right.

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

- (i) 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 documents and that they have not failed to disclose material information.

- (ii) 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 database and records held by the Department and where both versions cannot be correct.
- (iii) The making of a false statement in an attested declaration, knowing it to be false, constitutes a criminal offence.

8.5 Calls for further information, investigations and consultation

- 8.5.1** 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 Delegated Authority.
- 8.5.2** The Delegated Authority may request the commercial fishing rights Verification Team to investigate any matter, including the correctness of information provided.
- 8.5.3** Applicants must co-operate with the terms and conditions of the commercial fishing rights Verification Team (for example, by timeously submitting responses to written requests for information or explanations, attending meetings with investigators, answering questions satisfactorily at such meetings, and where necessary, by granting investigators access to shareholders, employees, premises, vessels and documents). Failure to co-operate may constitute an independent ground for refusing an application.

8.6 Applicant involvement and relationship with other applicants

8.6.1 Entity and their subsidiaries involvement

A company and its subsidiary/ies may not be granted more than one right in the sector applied for, to avoid fronts and monopolies and to broaden access to the marine resources. Applicants may be required to disclose their relationship to other applicants for the allocation of rights in this sector, as well as in other commercial sectors. If an entity and its subsidiary both apply for a right in this sector, the holding company will be preferred over any subsidiary.

8.6.2 Brother-Sister Cooperation

If two or more companies which are owned and controlled by the same shareholders apply for a commercial fishing right in any fishing sector, the Delegated Authority will consider allocating a fishing right to one of the companies if two or more of the brother-sister companies qualify for a fishing right in that particular sector. The Delegated Authority may also consider dividing one fishing right between the brother-sister companies if they all qualify for a fishing right in the fishing sector applied for.

8.6.3 Same household individuals

The same household may not be granted more than one right in the fishery applied for, so as to avoid fronts and monopolies and to broaden access. Applicants are required to disclose their relationship to other applicants in other commercial fisheries. If more than one member of the same household applies for a right, the Department may engage the applicants and thereafter determine who the preferred successful applicant will be. The Delegated Authority may also consider dividing one fishing right between the successful applicants if they all qualify for a fishing right in the fishing sector applied for.

8.7 Final decision and announcement thereof

8.7.1 The “*commercial fishing rights*” allocated under the MLRA are **not property rights** and should be understood as statutory permission to harvest a marine living resource for a specified period of time. Accordingly, cancellation or revocation does not constitute the

expropriation of a property right within the meaning of section 25 of the Constitution of the Republic of South Africa, 1996 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/her delegate), where after it automatically reverts back to the State.

8.7.2 The Delegated Authority will grant rights to successful applicants in terms of the provisions of section 18 of the MLRA, the General Policy: 2021 and the relevant fishery specific policy after the assessment of the applications and consideration of input or comments with regard to the provisional lists.

8.7.3 After the Delegated Authority has made final decisions on the allocation of rights and quantum or effort, the Department will notify all applicants in writing at their registered addresses of business of the final decisions in respect of their applications.

8.7.4 Once the Delegated Authority has made and announced the final decision on the allocation of commercial fishing rights in a specific fishery or communicated the final decision on granting of rights to the applicants in a specific fishery, the mandate of the Delegated Authority to allocate commercial fishing rights in that fishery will expire and cannot be re-opened by the Delegated Authority unless the Delegated Authority has made an error in granting of the right which needed to be corrected. In other words, the Delegated Authority will be *functus officio* in a specific fishery once the final outcomes of the fishing right allocation are communicated to the applicants in that fishery unless there is an error which requires correction.

8.8 Continuous granting of Commercial Fishing Rights

Should any commercial fishing right be revoked in terms of section 28 of the MLRA or any other right after conclusion of any legal review proceedings instituted thereof, a right may be allocated to an applicant who applied during the most recent allocation process in that particular fishing sector, met all the exclusionary criteria and scored sufficiently amongst the unsuccessful applicants as recorded in the last General Published Reasons of the Minister or her or his Delegated Authority.

These applicants will be placed on a waiting list and will be allocated a right as and when it becomes available without the need to invite or call for further applications.

Alternatively the Minister may allocate such commercial fishing rights to the Council in terms of section 31 of the MLRA upon which the Council, once established, shall lease rights according to the criteria determined by the Minister to persons from historically disadvantaged sectors of society and to small and medium size enterprises.

8.9 Form of Right Holders

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

8.9.2 Having regard to the nature of operations and resources accessibility, only the following South African persons as defined in the MLRA as stipulated in the Fishery Sector Specific Policies will be granted commercial fishing rights:

- (a) a South African citizen;
- (b) a company;
- (c) a close corporation;
- (d) co-operatives; and
- (e) Trust

8.10 Duration of right

8.10.1 Commercial fishing rights will be granted in all the sectors for a period not exceeding 15 years.

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

8.11 Appeals

8.11.1 The Delegated Authority will, where necessary and justifiable, set aside a portion of the TAC, TAE or a combination thereof for appeals. The unallocated portion of the TAC, TAE or a combination thereof that has been set aside for appeals, if any, will be allocated proportionally to all successful applicants and appellants. The allocations of successful applicants may also be adjusted depending on the outcome of the appeals process.

8.11.2 The Delegated Authority will inform all applicants of the dates set for appeals.

8.11.3 Any applicant or affected or interested person 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, process, and methodology on quantum or effort.

8.11.4 The Minister, as the appeal 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 date for applications, that fact will not be taken into account when considering the appeal.

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

8.11.6 Following the appeals authority's decision, appellants may approach the courts for judicial review within 180 days after the appellant has been informed of the decision of the appellate authority.

8.12 Payment of grant of right fee

8.12.1 The Department will determine the applicable grant-of-right fee payable for each fishery after the necessary consultation. The grant-of-right fee for each fishery will be determined by the Minister in consultation with the Minister of Finance.

8.12.2 The grant-of-right fee is payable by all successful applicants upon the granting of their commercial fishing rights. The grant-of-right fee must be paid in full within 60 days of receipt of their grant of right letter. The Department will not accept any application for and

issue permits/licenses to successful right holders until such time that the grant-of-right fee is paid. Should the right holder fail to pay his or her or its grant-of-right fee within the prescribed timeframes, the Department will, in terms of section 28 of the MLRA, initiate section 28 proceedings against such a right holder.

8.13 Transfer of fishing right

8.13.1 Transfer of fishing right granted in terms of the MLRA will be dealt with in accordance with the Policy for the Transfer of Fishing Right and fishery specific policies.

8.13.2 For the purposes of the current rights allocation process, the transfer of shares and/or notifications of change in shareholding and/or members' interests from companies and/or close corporations who were in possession of the exemption granted in terms of section 81 of the MLRA, should not result in the applicant benefitting because of such transfers after the expiry of their rights.

8.14 Exercise of fishing right

8.14.1 Section 13 of the MLRA prescribes that *"No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of the MLRA unless a permit has been issued by the Minister to such person to exercise that right or perform that activity"*.

8.14.2 Permits to exercise commercial fishing rights will be issued to right holders in terms of the provisions of section 13 of the MLRA -

- (a) For a specified period not exceeding one year;
- (a) Subject to the conditions determined by the Minister in the permit; and
- (b) Against payment of any fees determined by the Minister in terms of section 25 of the MLRA.

8.14.3 The commercial fishing right may only be exercised once a fishing permit has been issued by the relevant Delegated Authority.

8.14.4 A permit to exercise a commercial fishing right may be refused if the conditions of a previously issued permit in terms of the MLRA had not been adhered to.

8.15 Payment of levies

8.15.1 Applicants that were granted commercial fishing rights in previous rights allocation processes will be required to provide proof that they are up to date on the payment of their levies on fish landed at the date of submitting their applications.

8.15.2 The levies payable for fish landed during the validity period of the right granted in this right allocation process will be as determined by the Minister.

8.16 Cancellation and suspension of rights, licences and permits

8.16.1 A right, licence and permits issued in terms of the MLRA may be revoked, suspended, cancelled, altered or reduced in terms of the provisions of section 28 of the MLRA.

8.16.2 A breach of the provisions of the MLRA, the Regulations promulgated thereunder and or permit conditions by a right holder or a permit holder or a licence holder, his or her or its employees (whether permanent or temporal), his or her or its contractors, agents, advisers or the skippers may result in the initiation of legal proceedings, which may include section 28 proceedings and or criminal proceedings.

9 ACCESS TO INFORMATION

9.1 Requests for access to information relating to the records of the allocation and appeal processes will be dealt with in terms of the procedures and provisions of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) as well as the Protection of Personal Information Act, 2013 (Act No. 4 of 2013).

9.2 The application forms and requirements for access to information relating to the records of the allocation and appeal processes held by the Department are available at Customer Service Centre, which is located at Ground Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town, 8001. For more information with regard to the application process for access to the Departmental records, the Department can be contacted via the customer care helpline on 086 000 3474 (Share Call).

PART C: EFFECTIVE DATE AND POLICY REVIEW

10 EFFECTIVE DATE

This policy will be effective on the date it is gazetted by the Minister.

11 MONITORING AND EVALUATION OF THE POLICY

11.1 In order to ensure the effectiveness of the 2021: General Policy and Fishery Specific Policies in addressing the social and economic needs of the fishing industry and affected fishers and the ecological sustainability of the resources, the Department will monitor and evaluate the policy by instituting a number of formal performance measuring exercises for the duration of the 15-year period. It is envisaged that the Department may institute several performance measuring exercises as and when required.

11.2 Although the Department will finalise the precise criteria against which right-holders will be measured after the allocation of commercial fishing rights - and after consulting with right-holders - the following broad performance-related criteria may be used:

- (a) Transformation;
- (b) Investments; and
- (c) By-catch mitigation compliance with applicable laws and regulations.

11.3 Research and ongoing monitoring by both the Department and stakeholders will play an important role in identifying gaps, weaknesses and flaws in the policies and the implementation thereof.

11.4 The Department will provide useful, reliable and timely feedback on the effectiveness of the policies to all relevant stakeholders.

11.5 During the performance measuring exercise, any Right Holder that has been found to have contravened any condition upon which the Right was granted for, may result in the initiation

of legal proceedings, (which may include initiation of section 28 proceedings in terms of the MLRA and/or criminal proceedings).

APPROVAL SIGNATURE

A handwritten signature in black ink, appearing to be 'R. M. ...', written over a horizontal dashed line.

NAME:

DESIGNATION: MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 9/9/2021