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AGRICULTURE, AQUACULTURE & FISHING SECTOR ALERT

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Long-term Fishing Rights Allocation Process: Ready, set ... *FRAP?*

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Long-term Fishing Rights Allocation Process: Ready, set ... *FRAP*?

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On 26 June 2020, the Minister of Forestry, Fisheries and the Environment (Minister) announced the commencement of the 2020/21 Fishing Rights Allocation Process (FRAP) for the granting of long-term commercial fishing rights in terms of section 18 of the Marine Living Resources Act 18 of 1998 (MLRA).

In terms of section 18(1) of the MLRA, no person is permitted to undertake commercial or small-scale fishing, engage in mariculture, or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister. Furthermore, in terms of section 13 of the MLRA, no person shall exercise any right granted in terms of section 18 of the MLRA or perform any other activity in terms of the MLRA unless a permit has been issued by the Minister to that person.

There are currently 12 fishing sectors that were allocated long-term commercial fishing rights in 2005 and 2013 that are now due for reallocation in terms of section 18 of the MLRA, namely:

1. KZN Prawn Trawl
2. Demersal Shark
3. Tuna-Pole Line
4. Hake Handline
5. Line Fish
6. White Mussels
7. Oysters
8. Squid
9. Small Pelagics (Pilchard and Anchovy)
10. Hake Deepsea Trawl
11. Hake Longline
12. South Coast Rock Lobster

FRAP timeline

The 2020/21 FRAP was set to kick off on 12 October 2020, with calls for written comments from interested and affected parties and public consultations on the relevant policies, draft application forms and proposed fees for the application and granting of commercial fishing rights, running until 30 November 2020. Applications for commercial fishing rights were set to open between 1 February 2021 and 1 April 2021, and the allocation and adjudication thereof was set to occur between 17 May 2021 and 30 November 2021.

There has been a considerable shift in the FRAP timeline due to departmental delays and COVID-19-related impediments. The Department of Forestry, Fisheries and the Environment (Department) outlined its revised timeline at its presentation to the parliamentary portfolio committee in November 2020. Most notably, (i) the review of the relevant policies, including the public consultations, was now to be conducted between January and July 2021; (ii) the finalisation and gazetting of the policies between March and July 2021; (iii) the call for applications for commercial fishing rights being moved out to June/July 2021; and (iv) the allocation of commercial fishing rights to run between July and November 2021.

Long-term Fishing Rights Allocation Process: Ready, set ... *FRAP?...*continued

In light of Cabinet's decision in September 2019 to extend the time frames dealing with the fishing rights in these sectors, the Department issued an exemption in terms of section 81 of the MLRA to all holders of expired commercial fishing rights in these 12 sectors, allowing them to continue fishing without a right in terms of section 18 of the MLRA until 31 December 2021 (Section 18 Exemption).

Is FRAP on track?

As part of its review of the relevant sector-related policies, the Department has conducted the initial phase (Phase 1) of the Socio-Economic Impact Assessment System (SEIAS). This is a mandatory consultative process which recognises the need for a consistent assessment of the socio-economic impact of all policy initiatives, legislation and regulations and typically precedes the policy review process. The Phase 1 SEIAS reports were only published for public comment in May 2021, with submissions by the relevant role-players and interested and affected stakeholders to be submitted by 11 June 2021. Other than this, there has not been much movement in the 2020/21 FRAP to date. To follow is the formal consultation on policy imperatives, which the Department has stated will be conducted "at a later stage". According to the revised timeline, the relevant policies were meant to have been gazetted in July 2021.

As the Department finds itself falling behind schedule with the 2020/21 FRAP, it is unclear when calls for applications in respect of long-term commercial fishing rights will open. The growing delays are causing much agitation in the fishing industry. A rush to complete the 2020/21 FRAP within the last four months of 2021, however, may not be a desirable route when considering the need for an efficient appeals process and other administrative law obligations and practical considerations.

Although yet to be confirmed, the call for applications for commercial fishing rights will be published in the Government Gazette and will contain the necessary information on the process governing the applications, including where to obtain or access the application forms, the allocation criteria, with reference to the relevant revised policies, and the prescribed application fee.

In the meantime, what is the status quo?

The commercial fishing rights allocated in respect of the abovenamed 12 sectors expired on 30 September 2020 and/or 31 December 2020. In light of Cabinet's decision in September 2019 to extend the time frames dealing with the fishing rights in these sectors, the Department issued an exemption in terms of section 81 of the MLRA to all holders of expired commercial fishing rights in these 12 sectors, allowing them to continue fishing without a right in terms of section 18 of the MLRA until 31 December 2021 (Section 18 Exemption).

The catch, however, is that holders of commercial fishing rights and exemptions may not engage in commercial fishing without a permit, as per section 13 of the MLRA. Given the slow processing and issuing of permits due to, among other things, a rise in COVID-19 infections within the Department, the Department issued an exemption in terms of section 81 of the MLRA to all fishing sectors, in terms of which commercial fishing rights and exemption holders that do not have valid permits to undertake commercial fishing in their respective sectors for the 2020/21 or 2021/22 fishing season(s) are exempt from the provisions of section 13 of the MLRA and are authorised to harvest their respective allocations without a valid permit (Section 13 Exemption). The Section 13 Exemption has been extended to 31 August 2021.

Given that the Department has managed to significantly reduce its backlog to date, the KZN Prawn Trawl and South Coast Rock Lobster sectors, amongst others, no longer require the Section 13 Exemption. Commercial fishing rights and exemption holders in other fishing sectors remain exempt until 31 August 2021, but must, during the validity period of the exemption,

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Certain holders of commercial fishing rights in the relevant 12 sectors due for reallocation have raised questions around the transferability of the Section 18 Exemption to another person or entity.

apply online for the requisite permits and may not exercise any right or exemption granted in terms of section 18 or 81 of the MLRA prior to this application.

Transfer of fishing exemption

Certain holders of commercial fishing rights in the relevant 12 sectors due for reallocation have raised questions around the transferability of the Section 18 Exemption to another person or entity. Section 21 of the MLRA states that a commercial fishing right may be transferred if an application has been made to the Minister, and is subject to the approval and conditions that the Minister may determine. In this instance, these holders' commercial fishing rights have expired and have reverted to the State to be re-allocated, as per section 18(6) of the MLRA. The latter rights holders no longer hold the commercial fishing rights and therefore cannot transfer these rights, and, as such, are holders of Section 18 Exemptions (Exemption Holders).

The Department further clarified its position by supplementing the Section 18 Exemption to state that same cannot be transferred to any other person, and where the Exemption Holder is a company or a close corporation, no share or member's interest may be transferred or sold at any time during the validity period of the Section 18 Exemption. Exemption Holders trading as public companies, including companies listed on the Johannesburg Stock Exchange, will, however be allowed to trade their shares, save for in the event that such trade results in a change of control or a decrease in transformation (in which case the Exemption Holder must make an application in terms of section 21 of the MLRA, the Policy for the Transfer of Commercial Fishing Rights: 2009 and the sector-specific policies).

Companies and close corporations that are Exemption Holders are urged to familiarise themselves with these additional exemption conditions relating to the Section 18 Exemption as issued by the Department on 10 June 2021.

*Akhona Mgwaba overseen by
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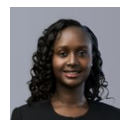
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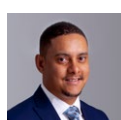
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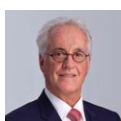
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