

Assessment of Applications for Authorisations for Aquaculture and Pearling in Coastal Waters of Western Australia

Issued Pursuant to Section 246 of the *Fish Resources
Management Act 1994* and Section 24 of the *Pearling Act
1990*



Government of Western Australia
Department of Fisheries

DRAFT

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1. BACKGROUND

Under s.246 of the *Fish Resources Management Act 1994* (FRMA) and under s.24 of the *Pearling Act 1990* (PA) (collectively, ‘the Acts’), the Minister for Fisheries (Minister) may issue guidelines for the administration or enforcement of the Acts. This Administrative Guideline (Guideline) replaces Ministerial Policy Guideline No.8, *Assessment of applications for authorisations for aquaculture and pearling in coastal waters of Western Australia*, which outlined the role and function of the Department of Fisheries (Department) in assessing applications for aquaculture and pearling¹ proposals in coastal waters of Western Australia.

This Guideline includes amendments to accommodate new legislative arrangements in the FRMA and is intended to assist the Chief Executive Officer (CEO) and the staff of the Department. It aims to streamline the process for assessment of pearl oyster farm lease and aquaculture applications, whilst providing guidance to the CEO and continued certainty and transparency to the public and industry regarding decisions in these matters.

The principles and matters in this Guideline do not limit in any way the statutory discretion exercised by the CEO in a particular case. The CEO will exercise discretion based on the merits of each individual case, and may take into account matters not set out in this Guideline. Furthermore, if the matters contained in this Guideline are inconsistent with a provision of the Acts, the Acts prevail.

In considering the exercise of discretion, the CEO gives regard to the merits of the application, including the issues set out in this Guideline. That requires balancing the opposing considerations against the supporting considerations. For any detrimental factors, the CEO gives regard to how detriments may be minimised and controlled.

Industry and the community were consulted during the development of this Guideline. This document may be reviewed as necessary pursuant to the relevant provisions of the Acts. On the commencement of the Aquatic Resources Management Act 2016, minor amendments to this Guideline may be made, particularly in relation to pearling matters that will no longer be managed under the PA.

2. OBJECTIVES

The objective of this Guideline is to assist and provide the CEO, industry and the community with guidance in the consideration and assessment of applications under s.92 and s.97 of the FRMA for aquaculture licences and leases and s.23 of the PA for pearl oyster farm leases; and certain applications to vary a pearling lease or aquaculture licence. Please note that within this document, the term ‘licence’ refers to a licence for aquaculture purposes under the FRMA.

¹ “Pearling” means the culture of the Australian South Sea pearl oyster (*Pinctada maxima*) that is managed under the *Pearling Act 1990*. The aquaculture of all other species of pearl oysters (referred to as non-*P. maxima* pearl oysters) is managed under the *Fish Resources Management Act 1994*.

It should be noted that the consultation process outlined within this Guideline is not intended to apply to the renewals of aquaculture or pearl oyster farm leases. Aquaculture leases are renewed for up to 21 years under section 97 (4) of the FRMA. Pearl oyster farm leases are renewed for up to 21 years as a matter of policy.

3. LEGISLATION

The CEO of the Department performs many functions under the provisions of the Acts.

The CEO and the Minister (in the case of aquaculture leases) determine applications for licences and leases over areas of Western Australia to enable the operations of the pearling and aquaculture industries. These decisions are made pursuant to relevant sections of the Acts, outlined below.

Pearling

The culture of pearls utilising the Australian South Sea pearl oyster, *Pinctada maxima*, is managed under the provisions of the PA. The aquaculture of all other species of pearl oysters (referred to as non-*P. maxima* pearl oysters), is managed under the provisions of the FRMA and the *Fish Resources Management Regulations 1995*.

Pearling leases and holding sites

The CEO may issue leases under s.23 of the PA for up to 21 years, subject to a number of conditions being satisfied. Persons aggrieved by a decision of the CEO may appeal to the State Administrative Tribunal (SAT) in accordance with section 33 of the PA. 'Persons aggrieved' includes a person who holds a pearl farm lease, pearling licence or hatchery licence.

The holder of a pearl oyster farm lease may also apply to vary the authorisation, for example, to modify an existing area. If the proposed variation to an existing pearl oyster farm lease is considered a major variation, i.e. where the change results in a 10% increase in area or a new site, the information and consultation process outlined in this guideline should apply. If the proposed variation to an existing pearl oyster farm lease is considered a minor variation (i.e. less than a 10% increase in area), the area is not within 30 km of a regional centre and, in the opinion of the CEO, is not within a high or multi use area the CEO may determine the application subject to consultation with any relevant decision making authorities only. If the proposed variation results in the reduction of an existing pearl oyster farm lease only, the consultation process within this guideline is not required.

Holding sites are used by pearling companies to temporarily hold seeded pearl oysters prior to transport to pearl oyster farm leases. The Minister approves the use of an area as a holding site. Specific consultation, as outlined in this guideline, for holding sites is only considered necessary in cases where the holding site is in a high or multi-use area, within 30 km of a regional centre or, in the opinion of the CEO, subject to some other special circumstance. The basis for this position is outlined below:

- Holding sites do not restrict or preclude access by other legitimate users;
- They are used on a temporary basis only and do not result in the grant of any lease rights associated with a particular site;
- Under the PA, all pearl oysters must be removed from holding sites by 31 December each year (unless otherwise specified);
- Only bottom culture is used; and
- Anchors and bottom structures are positioned to minimise any potential damage to corals and seagrass beds. Apparatus is not to be placed on top of hard reef platforms.

Aquaculture Licences

The CEO may grant licences; impose, delete or vary conditions on a licence; vary a licence; and cancel, suspend or refuse to renew a licence under relevant provisions of the FRMA.

Under s.92(1) of the FRMA, the CEO may grant an aquaculture licence to a person if satisfied of all of the following:

- (a) the person is fit and proper to hold an aquaculture licence;
- (ba) the person has, or will have, appropriate tenure over the land or waters on or in which the activities under the licence are to be conducted;
- (b) it is in the better interests of the State and the community to grant the licence;
- (c) the proposed activities are unlikely to adversely affect other fish or the aquatic environment;
- (d) the proposed activities have been approved by other relevant authorities; and
- (e) any other matters prescribed for the purposes of this subsection.

Under s.95 of the FRMA, an aquaculture licence is subject to any conditions imposed by the CEO. The CEO may, at any time, by notice in writing given to a licence holder, delete or vary any conditions of the licence or add new conditions to the licence.

An aquaculture licence application will either be for a new licence or a variation to an existing licence. For variations the CEO will determine the level of consultation with consideration to the extent of the variation and its potential impact or risks.

Under s.142 of the FRMA, the CEO may vary an authorisation if:

- (a) the holder of the authorisation applies to the CEO for the variation; or
- (b) it is necessary to correct any error in the authorisation; or
- (c) it is necessary to give effect to the provisions of the FMRA.

Before granting an aquaculture licence, the CEO must advertise a notice of the proposal to allow affected persons the opportunity to apply to the SAT for a review of the decision. Pursuant to s.146(e) of the FRMA, an 'affected person' is any person who holds an aquaculture licence and is likely to be significantly affected by the proposal.

Under s.143 of the FRMA, the CEO may, by notice in writing given to the holder of an authorisation, cancel, suspend for any period, or refuse to renew the authorisation.

Management and Environmental Monitoring Plans

Under the provisions of s.92A of the FRMA, unless exempt under s.92A(4), all applications for an aquaculture licence must be accompanied by a Management and Environmental Monitoring Plan (MEMP).

The purpose of a MEMP is to ensure aquaculture projects authorised by the Department achieve identified environmental values and objectives and their impact on the environment is minimised. This follows the removal of aquaculture operations as “specified premises” under the *Environmental Protection Act 1986* (EP Act); the subsequent execution of a Memorandum of Understanding (MoU) between the Department and the Department of Environment and Conservation (now Department of Parks and Wildlife); and ensuing amendments to the FRMA. Applications for aquaculture projects that may be considered to have a significant environmental impact will still be referred to, and may be formally assessed by, the Environmental Protection Authority (EPA).

The Department has developed a MEMP Guidance Statement, which details the management and monitoring activities licence holders must undertake to minimise and manage the potential environmental impacts from aquaculture activities. Among other things, the MEMP Guidance Statement:

- outlines the process for identifying the relevant environmental parameters and appropriate management strategies; and
- sets out the format and content of a MEMP that applicants must develop and implement and on which they report to the Department.

Aquaculture leases

Aquaculture leases are granted under s.97 of the FRMA by the Minister. The same consultation process set down in this Guideline for aquaculture licences should be used in the Minister’s assessment of lease applications. The Minister must publish notice of the grant of a lease in the Government Gazette. There is no right of review.

Licences and leases in Aquaculture Development Zones

Persons undertaking aquaculture activities in aquaculture development zones (ADZs) will require an aquaculture licence and lease. ADZs will generally have in place a strategic environmental approval.² Aquaculture proponents seeking approval to operate within an ADZ will be required to submit a Derived Proposal³ to the EPA, to ensure the proposal meets requirements of Ministerial Conditions set on the relevant zone.

Following the Minister’s declaration of an ADZ, the Department may invite interested persons to make applications for aquaculture licences and leases within that zone and

² Aquaculture development zones for marine finfish will almost invariably require a strategic environmental approval; those for filter-feeding shellfish species, or for proposals where no feed is added to the environment, may not.

³ A future proposal that was identified in the strategic proposal, which has been referred to and considered by the EPA, and is then declared to be a derived proposal.

advise a date by which applications should be made. The CEO will then consider applications according to the relevant provisions of the FRMA and in respect of the relative merits of competing applications. The assessment process for ADZs is outlined in Fisheries Occasional Publication No. 127 *Aquaculture Development Zones in Western Australia – Policy Principles Relating to Considerations for Aquaculture Licences and Leases*.

In the case of application processes for aquaculture licences for areas within ADZs, the Strategic Environmental Assessment process to establish each zone will include a comprehensive consultation process, so additional consultation on the application pursuant to this Guideline is not required.

4. ASSESSMENT PROCESS AND TIMEFRAMES FOR CONSIDERING APPLICATIONS⁴

4.1. Lodgement of Application

An applicant for an aquaculture licence and lease is required to submit the following:

1. aquaculture licence & lease application form;
2. MEMP document;
3. business plan;
4. Guidance Statement for Determining Categories of Marking and Lighting for Aquaculture and Pearling Leases/Licences (marking and lighting form); and
5. translocation application form (if applicable).

An applicant for a pearl oyster farm lease is required to submit the following:

1. application form for a pearl oyster farm lease; and
2. Guidance Statement for Determining Categories of Marking and Lighting for Aquaculture and Pearling Leases/Licences (marking and lighting form).

4.2. Initial Assessment of Application

The Department's initial review of the application is expected to take between seven and 28 days. Through this process the Department must ensure that all relevant information, including that required by other decision making authorities, has been received and any application fee paid. The timeframe is dependent on the applicant providing any additional information requested in a timely manner.

4.3. Preparation of Application Summary

Once the Department is satisfied the applicant has provided all relevant information, an application summary will be prepared and the consultation process outlined below is expected to begin within 14 days.

⁴ It will be specified if there are different requirements for aquaculture and pearling. If not specified it applies to both.

Having regard to the confidentiality of some information contained within applications, the Department will provide sufficient information to enable respondents to have a proper understanding of the proposal. Generally this will be:

- in the case of decision making authorities, a summary of the application, excluding information that is commercial in confidence (unless the applicant consents);
- in other cases, a brief summary of information, excluding anything commercial in confidence, will include, but not necessarily be restricted to:
 - the applicant;
 - the general location and a map of the area proposed;
 - the species to be cultured;
 - a general description of culture methods proposed;
 - a description of the benthic habitat of the proposed site;
 - the location of other aquaculture and pearl oyster farm leases within five nautical miles (on request, maps showing other aquaculture and pearl oyster farm sites within the region of the proposed site may be provided); and
 - advice where further information on applications can be obtained.

4.4. Summary of Consultation

4.4.1. Internal Consultation

General information, and MEMPs where relevant, will be circulated to appropriate Departmental staff for comment.

4.4.2. Referral to Decision Making Authorities

The Department is required to refer applications and consult with relevant decision making authorities, the approval of which may be required for the activities to be conducted under the authorisation. These may include, but are not limited to:

- Environmental Protection Authority (as a matter of course where proposals are within a declared Aquaculture Development Zone or determined environmentally significant);
- Department of Parks and Wildlife ;
- Department of Transport (with a copy of the marking and lighting form);
- Local port authority;
- Department of Lands (for proposals which have an associated non-freehold land component); and
- Local government authority (for proposals which have an associated land component or require land-based access).

4.4.3. Marine Parks and Marine Management Areas

Proposals within an area of a marine park or a marine management area that allows aquaculture and pearling must be referred to the Minister for the Environment for

approval prior to the grant of an authorisation. Further information is available in s. 23A of the PA for pearling and in ss. 92 and 98 of the FRMA for aquaculture.

4.4.4. Consultation with Native Title Parties

It is also necessary, under Section 24HA of the Commonwealth *Native Title Act 1993* to notify any representative Aboriginal/Torres Strait Islander bodies, registered native title bodies corporate and registered native title claimants in relation to the land or waters.

4.4.5. Consultation with Other Agencies

The Department may consult with involved agencies that may have expertise in, or be directly affected by or have an interest in, the activities to be conducted under the authorisation. These may include, but are not limited to:

- Department of Planning;
- Department of Commerce;
- Department of Water;
- Department of Mines and Petroleum;
- Department of Aboriginal Affairs;
- Relevant regional development commission; and
- Tourism WA.

There may be a different level of consultation for individual proposals. For example, for proposals that do not comprise a terrestrial component, the Department of Lands is not required to be consulted. Similarly, the interest of the Department of Water extends to matters such as the management of certain waters in declared Management Areas, inland waters, in some cases estuarine waters and water supply matters.

The Department will exercise discretion when deciding if consultation with other agencies is warranted.

4.4.6. Consultation with Representative Community and Industry Groups

The Department may consult with peak community and industry representative groups that may have expertise in, or be directly affected by or have an interest in, the activities to be conducted under the authorisation. These may include, but are not limited to:

- Western Australian Fishing Industry Council (WAFIC);
- Aquaculture Council of Western Australia (ACWA);
- Pearl Producers Association (PPA);
- Recfishwest; and
- Conservation Council of Western Australia (Inc.).

The peak representative bodies set out above will be requested to ensure appropriate regional associations or representative bodies or members are notified of proposals and advised that they can convey their comments directly to the Department.

If a specific interest is drawn to the attention of the Department, then that organisation should be consulted to the extent that other organisations are consulted.

The Department should exercise discretion when deciding if consultation with certain community and industry groups is warranted.

4.4.7. Opportunity for Public Comment on Applications

In addition to the referral of applications to relevant organisations for comment, the Department may also advertise applications to grant or vary aquaculture licences on the Department's website, or in another form of media if appropriate, to seek public comment.

This process does not apply where the application is in an ADZ. The strategic assessment process undertaken prior to the declaration of an ADZ provides opportunity for public comment on future derived proposals for aquaculture within the zone.

4.4.8. Matters to be Considered When Making a Submission

The consultation process provides an opportunity for an affected interest group and, or, person to make comment on a proposal. When an interest group or person is commenting on a proposal, that group or person should ensure all relevant information is provided in the submission, including, where possible, supporting data, evidence or justification. Decision making on an application can only proceed on the substance and quality of information available.

4.4.9. Time Limit on Submissions

To ensure submissions are taken into account in the assessment process, they are to be received by the Department within 28 days of the date of notice of an application. When the consultation process involves statutory processes as a result of the responsibility of a decision-making authority, different timeframes for that particular decision-making authority may apply.

The assessment and decision-making process for the Department should operate in accordance with the timeframes outlined in this Guideline; however, the CEO will not be in a position to complete the decision-making process until all required approvals have been obtained from relevant decision-making authorities. The total timeframe for applications to be determined may therefore differ for individual applications.

For aquaculture licence variations the CEO will determine the time limit of consultation based on considerations to the extent of the variation.

4.5. Revision of Applications

Within seven days of the closing date of submissions, the Department is expected to provide to the applicant copies of all submissions received and provide an opportunity for the applicant to respond. This will allow a balanced consideration of the application and an opportunity for the applicant to make appropriate amendments or changes to it.

If any significant issues emerge from the consultation process, the Department may discuss with the applicants possible amendments to their applications, to attempt to achieve an outcome that satisfies the objects of the relevant Act, meets the requirements of the applicant and that considers the relevant submissions received. If significant changes are identified, an appropriate timeframe will be discussed; otherwise, a 14 day period will be allowed for the applicant to provide a response to any submission or to revise the application.

If the applicant does not respond within this timeframe (14 days unless otherwise negotiated) the Department will commence the statement of decision or relevant considerations document. To ensure a transparent and timely assessment process, applicants will not be permitted to amend or revise their aquaculture licence or pearl oyster farm lease applications once this has occurred.

4.6. Statement of Decision/Relevant Considerations

The Department will aim to commence the statement of decision or relevant considerations document with a view to providing it to the CEO within 14 days of receiving the applicant's response to the submissions.

4.7. Determination and Advice of Decision

When all advice is available, including approvals from relevant decision making authorities, the CEO will determine the application.

After the CEO has determined the application;

- written advice will be provided to the applicant, including advice on any issues raised during the assessment process;
- the decision or proposed decision will be advertised in accordance with the provisions of the relevant act [refer to 4.8 or 4.9 below]; and
- all persons or bodies who made submissions will be advised by email that information regarding the decision (with any information considered commercial-in-confidence having been redacted) is available on the Department's website.

4.8. Procedures for Advertising – Aquaculture

In accordance with s.148(1)(c)-(d) of the FRMA, before giving effect to a decision to grant, vary or transfer an aquaculture licence the CEO must cause notice of the

decision to be published in a newspaper circulating generally in the State or in such other manner as is prescribed.

The CEO will ensure that advertisements for either applications or decisions appear in the *West Australian* newspaper and on the Department's website.

Noting s.148(1)(c)-(e) of the FRMA, the CEO must allow sufficient time for any affected person to make an application for review of the decision by the SAT. This period will be 28 days.

In accordance with s.97(9) of the FRMA, if a lease is granted, the Minister is to cause notice of the grant to be published in the *Gazette*.

4.9. Procedures for Advertising – Pearling

In accordance with s.23(8) of the PA, the CEO will cause a notice of the decision to be published in the *Gazette*, in which notice attention will be drawn to s.33 of the PA, which sets out the right of an aggrieved party to have the decision reviewed by the SAT.

The CEO is also required to provide notice in writing to aggrieved parties of a decision made to refuse to issue a pearl oyster farm lease under s.23 of the PA, which draws attention to the rights of the aggrieved party as set out in s.33.

The period provided for aggrieved parties to make an application for review will be 28 days.

4.10. Review by the State Administrative Tribunal of Decision

The SAT is the primary place for the review of decisions made by Government agencies, public officials and local governments.

The main objectives of the SAT in dealing with matters within its jurisdiction are:

- to achieve the resolution of questions, complaints or disputes, and make or review decisions, fairly and according to the substantial merits of the case;
- to act as speedily and with as little formality and technicality as is practicable, and minimise the costs to parties; and
- to make appropriate use of the knowledge and experience of SAT members.

5. SUMMARY OF PROCESS AND TIMEFRAMES

The flow chart at **Appendix 1** provides a summary of the Department's consultation and assessment process for applications and the timeframes that apply at each stage. A table at **Appendix 2** outlines the process, where the time taken by both the Department and applicant can be logged at each stage, is provided.

For an outline of the licence and lease application process for aquaculture development zones, refer to Fisheries Occasional Publication No. 127 *Aquaculture*

Development Zones in Western Australia – Policy Principles Relating to Considerations for Aquaculture Licences and Leases
(http://www.fish.wa.gov.au/Documents/occasional_publications/fop127.pdf).

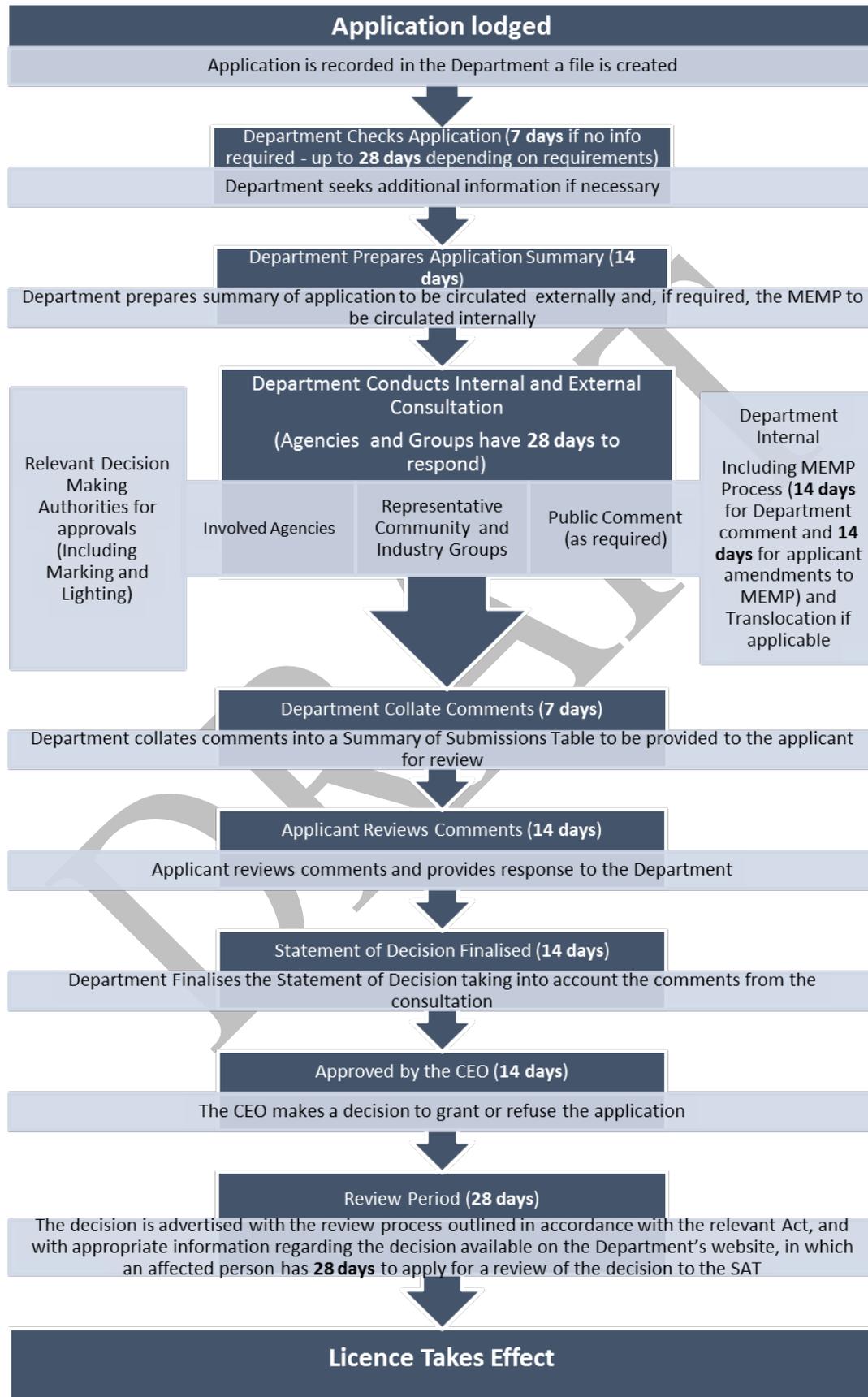
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Joe Francis MLA
MINISTER FOR FISHERIES

SEPTEMBER 2016

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6. APPENDIX 1 – FLOW CHART OF ASSESSMENT PROCESS



7. APPENDIX 2 – TABLE OF ASSESSMENT PROCESS

Stage	Process	Timeframe Guide	Actual Time Taken (Department)	Actual Time Taken (Applicant)
Pre-Application meetings and enquiries with the Department	Applicant may discuss their project with the Department prior to submitting the application.	This is prior to receiving an application		
Application Lodged – Processing Time Begins				
Records and Filing	Application recorded and a file is created.	1 week		
Department initial check of Application	Department checks application and seeks additional information from the applicant if necessary (e.g. more detail in the MEMP or business plan etc.).	Variable (dependent on the level of detail in the application and the applicant responding with the required information) Between 7 – 28 days		
Consultation preparation	Writing of a project summary to be provided for external comment (application is confidential cannot be disclosed), where appropriate circulating MEMP for internal comment, preparing information to external agencies to seek comments.	14 days		
Consultation period	Consultation is conducted internally (where appropriate including MEMP), external agencies and Industry.	28 days (as per agreement with ACWA through WAFIC)		
Compile summary of submissions	A table summarising the comments received is created to be sent to the applicant and is referenced in the Statement of Decision.	7 days		
Submissions sent to applicant	Applicant reviews comments and provides a response to the Department.	14 days		
Write Statement of Decision	Department finalises the Statement of Decisions taking into account comments from the consultation process.	14 days (may be longer if contentious or complex or requires further consideration)		
Sign Off	Approval by CEO (or delegate).	14 days (may be longer if contentious or complex and need to refer to Legal Branch)		
SAT Review period	The decision and review process is advertised in accordance with the relevant Act.	28 days		
Total Time Taken		Approx. 5 Months		