



27 November 2006

GENERAL REASONS FOR THE DECISIONS ON APPEALS HAKE LONGLINE SECTOR

1. Introduction

The general reasons for the assessments of the appeals in the Hake Longline (“HLL”) sector by the Minister of Environmental Affairs and Tourism (“*the Minister*”) are set out in this document, which will be referred to as the “*Appeals GPR*”.

The Delegated Authority prepared a report on each appeal submitted in the sector, as required by Regulation 5(3) of the General Regulations (“*the R5(3) reports*”), promulgated in terms of the Marine Living Resources Act 18 of 1998 (“*the MLRA*”) as GN 1111 in Government Gazette 19205 of 2 September 1998. The R5(3) reports deal with specific arguments made by appellants for an increase of their own scores. This Appeals GPR is concerned with complaints of a more systemic nature and with appellants’ complaints about the scores given to others in the HLL sector. Given the large volume of complaints and submissions received during the appeals processes, it is not possible to deal with each and every argument made in the appeals process. Complaints that have no merit are therefore not dealt with in this GPR.

Each applicant in the sector will receive the following documents by mail:

- if the applicant appealed, the notification letter and the R5(3) report informing the appellant of the Minister’s decision on the appeal together with the reason for that decision;
- the applicant’s scoresheet after the results of the appeals were taken into consideration; and
- the Appeals GPR.

Copies of the Regulation 5(3) reports used to record the assessment of each appeal in the sector and copies of the score sheets of all the applicants in the sector will be made available on the Department’s website (www.mcm-deat.gov.za) and for inspection at the Department’s Access to Information Centre (“*ATIC*”).

The Minister approved the R5(3) reports. The reasons for the Minister's decisions are accordingly contained in the R5(3) reports, the score sheets, this Appeals GPR and the notification letter. The Minister also considered legal memoranda and legal opinions. The contents of these documents are confidential and privileged and will not be released without the consent of the Department of Environmental Affairs and Tourism : Branch Marine and Coastal Management ("*the Department*") and the Minister.

2. Appeals process

The decisions in the HLL sector were announced on 9 March 2006. The General Published Reasons for Decisions in the Hake Longline sector, the assessments sheets and the scoresheets were published on the Department's website on 22 March 2006. Appeals had to be submitted by 9 June 2006.

A total of 304 appeals were submitted in the sector. On 19 June 2006, all the appeals were made available for viewing and copying. The appeals were available in the ATIC on the 2nd Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town from 19 June to 23 June 2006. Comments on the appeals had to be submitted by 7 July 2006.

Access was also granted to the original applications of all the applicants in the sector, unless the applicant objected to the release of specific parts of its application. In terms of the notification letter sent to the applicants, such objections had to be lodged by 5 May 2006. If the objection was lodged after this day, it was only taken into account in respect of subsequent applications for access to information. No access was granted to documentation contained in the confidential folder. Requests for access to the confidential folder or for access to parts objected to were dealt with in terms of the Promotion of Access to Information Act 2 of 2000.

The Minister was assisted by the Delegated Authority, legal advisors; the RVU; IT specialists; and administrative and project management specialists.

3. Changes to Criteria, Weightings, the Scoring System and the Quantum Allocation Mechanism

Changes were made to the criteria, weightings, scoring systems and the quantum allocation mechanism when it was decided that an appellant's submissions had merit or after considering the advice of the Delegated Authority, the Department's legal advisors or external legal advice, or after considering the advice of the project management team and the IT specialists.

The **exclusionary criteria** were not changed in the Cluster B fisheries, but, after considering legal advice, the Minister decided that the failure to sign the declaration and to have it attested to by the authorised representative of the applicant, and if applicable, the authorised representative of the Holding Company, the Sister Company or the JV Partner(s), could be cured on appeal.

In the HLL sector, the **comparative balancing criteria and weightings for medium term right holders** were changed in the following manner:

- 3.1 The reliance criterion and its weighting was abandoned on appeal. This means that the scores awarded for reliance played no role in the appeal decisions. The Delegated Authority and the Minister felt that the information presented by applicants and appellants regarding their reliance on the HLL resource was unreliable and, since the assessment of this aspect affected all the applicants in the sector (and not only the appellants), it would have taken too long to obtain greater clarity on this issue by means of requests for further information. Another problem was that the questions in the application form were not clear, and the Queries and Responses, the explanatory notes and schedules did not provide sufficient assistance to the applicants. The reliance criterion also became difficult to apply in the case of joint ventures and groups of companies where a member of the economic unit was more (or less) reliable on the HLL resource than the unit itself. There was a significant risk that scores given for reliance would prejudice applicants that operate in the form of a single entity as opposed to through a group of companies.
- 3.2 Use of medians instead of means: The Minister instructed the IT specialists to use “*medians*” where “*means*” were previously used. The former was regarded to be a safer assessment tool than the latter.
- 3.3 In terms of the criteria announced with the GPR, applicants had to answer “yes” to questions 6.21, 6.23 and 6.24 to be awarded points for affirmative procurement. There was no question 6.24 in the application form and the system accordingly scored applicants 0.5 points for answering “yes” to questions 6.21 and 6.23.
- 3.4 All applicants were awarded 1 point for Skills Development if, instead of submitting an annual training report (“*ATR*”) and a skills development plan (“*SDP*”), they participated in any skills development programme through the SETA in 2004 such as an SMME Support Strategy programme. Applicants were not awarded points if they scored the maximum of one point for the submission of the ATR and the SDP.

The **comparative balancing criteria for new entrants** were changed in the following manner:

- 3.5 Use of medians instead of means: For the reason set out above, the Minister instructed the IT specialists to use medians where means were previously used.

The **scoring system** for both medium term right holders and new entrants in the HLL sector was changed in the following manner:

- 3.6 In the first round of allocations, applicants that did not respond to a section were not assessed in terms of the “*comparatively balancing method*” against other applicants. For example, if there were 17 applicants and only 10 provided a response to a section, then the 7 were excluded and the 10 were ranked. The Minister instructed the IT specialists to revise the system so that for applicants that did not provide a response the value was assumed to be zero or the response least favourable to such an applicant. In the above example, it means that all 17 applicants would be assessed against one another even though all of them did not provide a response.
- 3.7 In the first round of allocations, the default database calculation of “*percent ranks*” was used. This meant that where tied values existed, the percent rank was calculated at the first occurrence of the value, and then all applicants with this value were placed at the lowest value. For example if there were a large number of applicants that were 100% black owned in a particular sector, the first occurrence of this value would fall below the top percentile. The Minister decided that this calculation method did not meaningfully give effect to the criteria and weightings. The calculation method has been revised as follows:
- Applicant(s) whose assessed response for the section is the worst (minimum) of all the applicants’ responses is allocated a percent rank score of 0.
 - Applicant(s) whose assessed response for the section is the best (maximum) of all applicants’ responses is allocated a percent rank score of 100.
 - Applicants whose assessed responses for the section are greater than the worst (minimum) and less than the best (maximum) of all applicants’ responses are allocated a percent rank score of between 0 and 100.
- 3.8 One of the criteria, percentage training budget spent on black employees between 2001 and 2004, was not scored. This error has been corrected and the criterion is now scored.

The **quantum allocation mechanism** was changed in respect of successful applicants that held more than 89.043 tons in 2005 in that an amount of 50 tons (and not 30% of the adjusted 2005 allocations) was subtracted from each successful applicant’s allocation and redistributed to all applicants falling in this group in accordance with their performance scores (total score for job creation and investment).

4. Systemic complaints not accepted

This part of the Appeals GPR deals with some of the systemic complaints that were not accepted and that, accordingly, did not result in a change of the criteria, weighting, scoring system or quantum allocation mechanism.

Procedure: reserving right to appeal any change in score or quantum

- 4.1 **Complaint:** A change in various scoring criteria may cause a movement in percentile placements and if an applicant is affected by such a change, it must be granted an opportunity to appeal the change and must be given access to the appeal(s) that gave rise to the change in its score.
- 4.2 **Response:** This allegation is misconceived. Comparatively balancing is done on the basis of raw (real) data that all applicants could comment on. There is no merit in the argument that an applicant must “*first see the effect of changes to their score*” before it can meaningfully comment on the raw data of others or, for that matter, the Delegated Authority’s assessment of that data or their own data.

Procedure: insufficient information provided

- 4.3 **Complaint:** The Delegated Authority has not provided sufficient information to applicants to allow them to consider the assessment of their applications and in particular their score sheets. Where applicants were scored against the “*mean*” the mean should have been provided and similarly the calculations for percentile placements.
- 4.4 **Response:** Applicants were provided with this information on 9 May 2006, prior to the closing day for appeals.

Procedure: insufficient verification took place

- 4.5 **Complaint:** Insufficient verification took place of claims made by applicants.
- 4.6 **Response:** The authorised representative of an applicant was required to attest to the declaration that formed part of the application form. The provision of false information is not only a criminal offence, but may also lead to the revocation of any right that was allocated. It is also believed that the competitive nature of the system resulted in applicants verifying the information submitted by others to a much

greater extent than in the past. Access to the information contained in the application forms (other than the information in the confidential folder and parts objected to) was granted. All the hake longline appeals were made available for viewing and copying between 19 June 2006 and 23 June 2006. Comments on the appeals and applications could be submitted either by fax or by e-mail to the Rights Verification Unit. This had to be done by 7 July 2006. During the course of compiling the R5(3) reports it appeared to the Delegated Authority that a large number of appellants did not correctly present the information pertaining to job creation and investment in the HLL sector. Letters were then dispatched to the appellants to obtain further information from them. Some 34 letters were sent and 25 responses were timeously received. Most of the letters were sent on the 26th of September 2006 and the responses had to be in on the 5th of October. Oral hearings were held in respect of one application in the sector.

Transformation: increase in black ownership

- 4.7 **Complaint:** The IT system used is defective in that it is incapable of calculating a percentage increase as percentage increases require an initial score of above 0 in order to be ascertainable.
- 4.8 **Response:** This issue has now been addressed by changing the assessment from percentage increase to the difference between the percentage black ownership in 2005 and 2001
- 4.9 **Complaint:** Appellant argues that black ownership was measured and determined on a different basis in 2005 as compared to 2001. In 2005 applicants were obliged to exclude pension funds and public entities from the calculation. In 2005 applicants were obliged to adopt a flow-through principle which differs materially from that followed in 2001. In the circumstances, appellant argues, there was a markedly different basis for the calculation of black ownership in 2001 and 2005. Appellant contends that it is not possible to compare the results of two different methods of calculation.
- 4.10 **Response:** It is agreed that the methods of calculating black ownership are different. However, in order to determine whether there was an increase in black ownership, the comparison should now be done on the 2005, flow-through basis. In other words, the 2001 percentage of black ownership should be determined on a flow-through basis and then compared to the 2005 figure.

Transformation: weightings to be attached to broad-based black economic empowerment pillars

4.11 **Complaint:** The delegated authority erred by not adopting the criteria and weightings for the assessment of black economic empowerment (“BEE”) set in the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Codes of Good Practice. The Delegated Authority focussed unduly on certain pillars of BEE and either ignored or gave too little consideration to other nationally recognised pillars of BEE. The Delegated Authority erred by adopting a scoring system that allocated points to applicants for their relative positions rather than in accordance with their objective BEE achievements.

4.12 **Response:** This issue is dealt with in paragraph 7.3 of the General Policy. The Codes of Good Practice were not followed as they had not been formally adopted when the policies were written and the criteria and weightings designed. The level of transformation in a cluster and sector and the reliability of information received from applicants were considered when designing the criteria and weightings. The relative scoring system was preferred over external benchmarks, for the reasons set out in the General Policy. It is believed that the competitive nature of the system resulted in applicants verifying the information submitted by others to a much greater extent than in the past, which adds to the credibility of the results.

Eastern Cape not afforded preferential treatment

4.13 **Complaint:** Appellant states that it is based in the Eastern Cape which has a high unemployment rate.

4.14 **Response:** This issue was not specifically required to be taken into consideration by the General Policy and the HLL sector specific policy. In terms of paragraph 7.2(e) of the HLL Sector policy, the Delegated Authority could reward applicants that have invested in smaller coastal towns outside of the large metropolitan areas of Port Elizabeth and Cape Town. This was done.

Quantum Model : Not only performance should have been taken into account

4.15 **Complaint:** A quantum allocation mechanism based only on performance in the form of investment and job creation, is flawed. The General Policy makes it clear that the performance of existing right holders may be assessed by having regard to *inter alia* financial performance, payment of levies, compliance with the MLRA and fishing performance. Catch utilization and financial performance is crucial to

determine whether right holders have the ability to invest in infrastructure and to create jobs on a sustainable basis.

- 4.16 **Response:** The General policy does not define the term “*performance*”. The Delegated Authority was entitled to focus on job creation and investment when he designed the quantum allocation model. It should further be pointed out that financial performance was abandoned in several sectors due to unreliability of the responses to the relevant section.

5. Approach to assessment of information

This part of the Appeals GPR deals with complaints about the assessment of information.

Investment: Method of scoring investment inaccurate

- 5.1 **Complaint:** The methodology used for scoring investment does not accurately reflect the significant investments made by appellant. To deny appellant points on the basis of the lack of insurance, results in an anomalous situation where its investment is disregarded.
- 5.2 **Response:** In the Queries and Responses, applicants were specifically instructed that the assessed value (based on valuation) may be used instead of the insured value (if the investment is not insured).

Members of close corporations as employees

- 5.3 **Complaint:** Members of close corporations should be recognised as employees and amounts paid to them should be recognised as part of the applicant’s salary bill.
- 5.4 **Response:** This issue was dealt with on a case by case basis. In general, members were not recognised as employees and amounts paid to them were not recognised as part of the applicant’s salary bill, unless the applicant described the nature of employment and clearly and convincingly demonstrated that the members were *bona fide* employees of the applicant or the joint venture entity.

Medical Aid, ATR and WPSP provided by the joint venture

- 5.5 **Complaint:** Applicants should be scored if medical aid benefits, annual training reports and work place skills plans, were provided by the joint venture (as opposed to the applicant itself).

5.6 **Response:** Agreed.

Claiming of jobs and investment not used in sector

5.7 **Complaint:** Applicants should only be permitted to claim jobs and investments “*actually*” employed in the fishery.

5.8 **Response:** The explanatory notes make clear that applicants that are involved in more than one sector must submit a breakdown of jobs and investment on a per sector basis. Only a rough estimate for this was required provided that the same apportionment was used across all sectors. It was not required that an investment had to be used permanently or predominantly in a sector or that an employee had to be employed pre-dominantly in a sector, in order to allocated to the sector. This means that, unless there was a risk of double counting, the apportionments provided by applicants were generally accepted.

Compliance with Employment Equity Act 55 of 1998

5.9 **Complaint:** If turnover is more than R 2 million, but the applicant does not have any employees of its own whatsoever, then compliance with the Employment Equity Act is not required.

5.10 **Response:** Agreed, but positive points may not be scored if a joint venture partner or the holding company (but not the applicant) complies with the Employment Equity Act.

Catching, processing and marketing capacity not considered when allocating quantum

5.11 **Complaint:** Capacity to catch, process and market should be considered when allocating quantum.

5.12 **Response:** Disagreed. The HLL sector policy does not require capacity to be directly considered when allocating quantum – to do so would undermine the objective of redistribution of quantum to right holders with smaller quotas that performed well.

Re-apportionment of jobs and investment and re-merging of transformation data

5.13 **Complaint:** If jobs and investments were not properly apportioned between sectors or between joint venture partners or the members of an economic unit, no score was awarded. The same approach was

followed in respect of the failure to properly merge transformation data. Affected applicants sometimes presented a re-apportionment of jobs and investments on appeal or re-merged the transformation data. The new apportionment or merger did not always correspond to the ones presented in the application forms, but appellants nevertheless contended that it should be accepted.

- 5.14 **Response:** Every attempt to re-apportion jobs and investments or re-merged transformation data was assessed on its own merits. In many instances, the reason for the re-apportionment or re-merging was because the instructions were not understood when the forms were completed. In such instances, applicants were accommodated. The Minister instructed that attempts by appellants “*to trim their sails to the wind*” should not be allowed.

Information relating to events falling outside specified period

- 5.15 **Complaint:** A number of appellants contended that the Minister should recognise, for example, investments made, jobs created, learnerships provided and the like, outside of the period (mostly after) specified in the application form.

- 5.16 **Response:** This issue was dealt with on a case by case basis. In principle, in order to be fair, applicants had to be compared to one another at a fixed point in time or in respect of a specified time period. However, some flexibility was needed in order to prevent the system from operating unfairly in respect of certain applicants. Events that took place after the specified date or outside the specified period were taken into consideration if this was not unfair to other applicants; and if the information related to the medium term period; and if the action was not artificially taken purely for purposes of rights allocation.

6. Complaints about the scores of others

This part of the Appeals GPR deals with complaints made by appellants about the scores given to other applicants. As stated above, 34 letters were sent to the applicants requesting clarification on the apportionment of jobs and investment and the merging of transformation data in the sector. These letters and the responses received will form part of the sectoral Appeals report. Some of the letters were written in response to queries raised.

- 6.1 **Complaint:** The internal scoring breakdown indicates a mean Ratio of Black Directors to White Directors of 1.201. This is non-sensical as clearly a ratio of greater than one cannot exist. It appears

as if an error was made by amending the data of Balobi Processors from 0.666 to 66.6 which is blatantly incorrect and drastically affected the mean calculation. The female to male directors mean was also incorrectly calculated. The mean currently stands at 0.567. Balobi Processors' figure was amended from 0.333 to 46.6.

6.2 **Response:** The data of Balobi Processors were corrected and the system was changed by having regard to means instead of medians (see above).

7. The Decisions on Appeals and the Allocation of Quantum

The Minister decided to allocate 7 additional rights on appeal, bringing the total number of successful Medium Term Right Holder applicants to 140. The quantum allocation mechanism was slightly amended as set out above. A spreadsheet list of the allocations made to the applicants in the sector, after the decisions made on appeal were incorporated, are annexed marked "A".

The delegated authority decided not to allocate rights to any new entrant applicants. The Minister agreed with the reasons provided by the Delegated Authority in his GPR on this aspect.

Prior to the allocation of long term commercial fishing rights, the black controlled (50% + 1) portion of the TAC stood at 90%. After appeals, the black controlled ownership of the TAC is at 91.1% and the beneficial black ownership of the TAC is at 75.5%.

MCJ van Schalkwyk

Minister of Environmental Affairs and Tourism