



18 August 2006

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## GENERAL REASONS FOR THE DECISIONS ON APPEALS HORSE MACKEREL SECTOR

### 1. Introduction

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The general reasons for the assessments of the appeals in the Horse Mackerel (“HM”) 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 HM sector. Given the large volume of complaints and submissions received during the appeals process, it is not possible to deal with each and every contention. Complaints that clearly have no merit are not dealt with in this GPR. .

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

- The notification letter, if the applicant appealed, informing the appellant of the Minister’s decision on the appeal together with the reason for that decision;
- The Appeals GPR; and
- Copies of the Regulation 5(3) reports to record the assessment of each appeal in the sector and copies of the score sheets of all the applicants in the sector after appeals.

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**

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The decisions in the Horse Mackerel sector were announced on 28 December 2005. Appeals had to be submitted by 10 February 2006. A total of 19 appeals were submitted in the sector.

Thereafter, on 15 March 2006, all the appeals submitted in the sector were made available for comment in terms of section 80(3) of the MLRA. The appeals were available in the Department’s Access to Information Centre (“ATIC”) on 2<sup>nd</sup> Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town from 15 March 2006 to 17 March 2006. Comments on the appeals had to be submitted by 24 March 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 30 January 2006. If the objection was lodged after this date, it was only taken into account in respect of subsequent applications for access to information. No access was granted to 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.

One applicant (Sea Harvest Corporation (Pty) Ltd) submitted a “supplementary appeal” on 30 March 2006, in addition to the appeal that was submitted before the closing day for appeals (10 February 2006). The question of whether this appeal should be considered by the Minister was the subject of oral hearings, held on 15 June 2006. External legal advice was also sought on the matter. The Minister ultimately decided to consider the supplementary appeal on the basis that the same information was properly before him in another sector (Hake Deep Sea Trawl) and that all the applicants in the HM sector were given the opportunity to comment on the contents of the supplementary appeal.

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

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

The **exclusionary criteria** were not changed in the Cluster A 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. The same decision was taken in respect of the failure to provide an audit report. If an applicant mistakenly signed the sister company or joint venture partner declaration instead of the applicant declaration, this was regarded to be sufficient compliance and the application was not regarded to be materially defective.

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

- 3.1 Use of "medians" instead of "means": The Minister instructed the project manager to use medians where means were previously used. The former is less likely to be skewed by applicant responses than the latter.

The **comparative balancing criteria for new entrants** were not changed in the HM sector.

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

- 3.2 In the first round of allocations, applicants that did not respond to a section was not assessed in terms of the comparatively balancing method against the others. 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 project manager to revise the system. In terms of the revised system, if an applicant did not provided 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 not of them provided a response.

3.3 In the first round of allocations, the default database calculation of “percent ranks” was used. This meant that in the default database calculation, 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. This meant, for example, that if there were a large number of applicants that were 100% black owned in any 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 has been revised as follows:

- Any applicant(s) whose assessed response for the section is the minimum of all the applicants’ responses is allocated a percent rank score of 0.
- Any applicant(s) whose assessed response for the section is the maximum of all applicants’ responses is allocated a percent rank score of 100.
- Other applicants (whose assessed responses for the section are greater than the minimum and less than the maximum of all applicants’ responses) are allocated a percent rank score between 0 and 100.

The **quantum allocation mechanism** was not changed.

## **4. Systemic complaints not accepted**

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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 or scoring system.

### **Broad-based black economic empowerment**

4.1 **Complaint:** It was argued that 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, it was further argued, focussed unduly on certain pillars of BEE and either ignored or gave too little consideration to other nationally recognised pillars of BEE. It was further contended that the delegated authority erred in adopting a scoring system that allocated points to applicants for their relative positions rather than in accordance with their objective BEE achievements.

4.2 **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 veracity 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.

### **White Shark**

4.3 **Complaint:** Applicants that nominated the White Shark were not excluded (they were granted rights) but were required to nominate an alternative vessel. Some appellants contended that the applicants that nominated the White Shark should have been excluded as this vessel is not a “suitable vessel” as defined in the applicable policies. The argument was that the vessel is foreign flagged and owned. Other appellants argued that the decision not to allow the White Shark strengthens a monopoly that exists in the sector.

4.4 **Response:** The HM sector policy is clear: “the Department does not intend to allow a further midwater directed trawler into this fishery based on current resource data. Right holders could also nominate deep sea trawl vessels.

## **5. Approach to assessment of information**

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

### **Under-utilisation**

5.1 **Complaint:** Many applicants under-utilised in 2002 when there was a problem with the issuing of a licence for the Desert Diamond and permit conditions did not allow the use of vessels for catching HM and Hake Deep Sea Trawl on the same trip.

5.2 **Response:** This explanation was accepted but the reasons for under-utilisation in the years 2003 and 2004 were assessed on a case-by-case basis.

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

5.3 **Complaint:** If jobs and investments were not properly apportioned between joint venture partners and the members of an economic unit, and if it was not clear to the delegated authority how to correct the apportionment, the jobs creation score and the investment score of the members of the unit, were reduced to zero. 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.

- 5.4 **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.

### **Value adding**

- 5.5 **Complaint:** No medium-term right holder applicant really value-adds and the allegations in the application forms concerns either past attempts or future plans.

- 5.6 **Response:** It is clear that some of the medium term right holders have attempted in the past to develop products for the local market, but have found such products to be non-viable because it does not cater to the target market. The normal processing (heading, gutting, freezing, salting etc.) associated with HM does not qualify as value adding. Value adding has not been consistently assessed and the scores should be adapted on appeal. The net effect will be that no medium term right holder should be scored for value adding.

### **Information relating to events falling outside specified period**

- 5.7 **Complaint:** A number of Appellants argued that the Minister should recognise, for example, investments made, jobs created, learnerships provided and the like, outside (mostly after) the period specified in the application form. For example, it was argued that learnerships provided in 2005 should be recognised, even though the application form required applicants to specify the number of learnerships provided during the 2004 financial year.

- 5.8 **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 over a specified time period. However, some flexibility was needed in order to prevent the system from operating unfairly to certain applicants. Events that took place after the specified date or outside the specified period were accordingly taken into consideration if this was not unfair to other applicants; if the information related to the medium term period and if the action was not artificially taken purely for purposes of rights allocation.

### **Claiming of jobs and investment not used in sector**

- 5.9 **Complaint:** It is argued that applicants should only be permitted to claim jobs and investments “*actually*” employed in the fishery.

- 5.10 **Response:** The explanatory notes make it 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 for this was done across all sectors. It was not required that an investment had to be employed 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 double counting, the apportionments provided by applicants were generally accepted.

#### **Black ownership : determination of neutral shareholding**

- 4.5 **Complaint:** It submitted that it is incorrect to classify “unknown” shareholders as “white”. Instead, their shareholding should be classified as “neutral”.
- 4.6 **Response:** Agreed, provided that the applicant provide an explanation why the status of the shareholder could not be determined.

#### **Black ownership : differences between voting rights and beneficial ownership**

- 4.7 **Complaint:** In a situation where voting rights of a certain type of share is significantly diluted, the shareholding should be considered a loan and should not be taken into account.
- 4.8 **Response:** Not agreed, it was decided to assess black ownership on the basis of beneficial ownership and not voting rights.

#### **Investment in White Shark**

- 4.9 **Complaint:** It was contended that an applicant should not be allowed to claim costs for agreements relating to the White Shark as the agreement was entered into 4 days before closing day and the voyages were all undertaken after closing day. The sharing of costs relating to the operation cannot be regarded as “investment” or “job creation”. South African rights holders only pay if and when fish is actually caught and sold by the operator of the White Shark. Apart from making their fish available to be caught, no obligation or risk is undertaken in respect of the White Shark operation. A percentage of the price fetched by the fish is subtracted for the vessel owner and the operator.
- 4.10 Agreed. If one has regard to the Vessel Charter Agreement and the Vessel Management Agreement it is clear that the White Shark was brought in to catch Horse Mackerel in South African waters with its own operator. None of the right holders can truly be said to have invested in the vessel or have created jobs by using it.

#### **Lease of buildings**

- 4.11 **Contention:** One applicant contended that its operations are based in the Cape Town harbour and that it entered into long leases in respect of the buildings it uses there. The current long leases expire on 31 January 2019. The buildings are insured by the V & A Waterfront but the applicant pays the insurance. The applicant claim the insured value of these buildings as “investment”.
- 4.12 **Response:** A long lease in respect of buildings owned by a third party is not investment. This was made clear in the Queries and Responses where it was stated that ownership of land would be included as insured investment but leased premises not.

## **6. Complaints about the scores of others**

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This part of the Appeals GPR deals with complaints made by appellants about the scores given to other applicants.

### **Transformation (top salary earners)**

- 6.1 **Complaint:** Some applicants were scored twice under this heading.
- 6.2 **Response:** This error was corrected.

### **Salary Bill on Training**

- 6.3 **Complaint:** Some applicants were scored 0.5 instead of 0.25 under this heading.
- 6.4 **Response:** This error was corrected.

### **Employee ownership**

- 6.5 **Complaint:** The percentages of employee ownership claimed by some applicants (SACO, Sea Harvest, Fernpar, Scenematic, Luzizi, Foodcorp and Klipbank) were questioned.
- 6.6 **Response:** The affected applicants' claims were re-assessed. In two cases obvious mistakes were corrected and changes to the claims were made. The claims of the rest were left unchanged. It was decided that it was not necessary to revert to the affected applicants.

### **Beneficial black ownership of Oceana Group of Companies**

- 6.7 **Complaint:** If the flow through principle is properly applied, the beneficial black ownership of companies forming part of the Oceana Group of Companies, should be assessed at 5.3%.
- 6.8 **Response:** This issue was the subject of an oral hearing held on 15 June 2006, various internal legal memoranda and two external legal opinions. For the reasons set out in R5(3) reports concerning applicants forming part of this group of companies, the beneficial black ownership was assessed at 19.57%

## **7. The Decisions on Appeals and the Allocation of Quantum**

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The Minister decided to allocate three additional rights on appeal, and the number of successful Medium Term Right Holder applicants increased from 15 to 17. The Minister agreed with the quantum allocation mechanism adopted by the Delegated Authority. 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".

Prior to the allocation of long-term commercial fishing rights in this fishery, 41% of the TAC was held by black owned (50% + 1) rights holders. This figure has increased to 42.5%. Beneficial black ownership of the TAC stands at 39.8%.

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.

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**MCJ van Schalkwyk**

**Minister of Environmental Affairs and Tourism**