



12 September 2006

GENERAL REASONS FOR THE DECISIONS ON APPEALS PATAGONIAN TOOTHFISH SECTOR

1. Introduction

The general reasons for the assessments of the appeals in the Patagonian Toothfish 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 Patagonian Toothfish 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 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

The decisions in the Patagonian Toothfish sector were announced on 18 November 2005. Appeals had to be submitted by 30 January 2006. A total of 4 appeals were submitted in the sector.

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 2nd 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 26 January 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 under 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 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.

In the Patagonian Toothfish sector, the **scoring system** for both medium term right holders and new entrants in the Patagonian Toothfish sector was changed in the following ways:

- 3.1 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 applicants that did not provide a response, the value is 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.

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

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.

Unfair to distinguish between right holders that participated in the experiment

- 4.1 **Complaint:** It was inappropriate and unfair for the delegated authority to distinguish between the right holders that participated in the experimental phase. All five right holders played a significant role in opening up a new fishery. To reward 1 right holder at the expense of 4 others on the basis that it participated alone rather than in a consortium is grossly unfair. Complainant suggests that the TAC of 450 tons be divided equally between all 5 successful applicants.
- 4.2 **Response:** There is no reason why the delegated authority could not distinguish between those that participated in the experiment. The Department has done so in the past. It is therefore not clear why an applicant's performance during the experiment should not be taken into account, both in respect of the allocation of a right and the allocation of quantum.

Complaint about the method of re-allocating quantum

- 4.3 **Complaint:** The consortium partners accepted a deduction of 10 tons from each of the successful applicants and the re-allocation of the 50 ton pool. The consortium partners did not support the delegated authority's method of re-allocation. The method of the delegated authority was effectively one of “the winner takes it all”. The consortium members pooled their resources to enable them to pursue

more effectively the aims and objectives of the Patagonian toothfish experiment. The Policy states that "Applicants may also be rewarded for having concluded agreements in terms of which operating or other costs are shared". This is the reason why the number of vessels could be reduced from 3 to 2. The reduction was made possible by the fact that 4 out of the 5 pooled their resources and participated in the fishery via a consortium.

4.4 **Complaint:** The scoring criteria used as the ultimate determinant of quantum were totally inappropriate for an experimental fishery. Performance-related criteria is not an accurate yardstick for an experimental fishery where the intention is to invest in gaining knowledge of the fishery as opposed to creating permanent jobs and acquiring assets for a fishery with no definite future. The method employed by the delegated authority ran contrary to the Specific Policy and could only lead to one possible outcome. The method of redistribution employed by the delegated authority was grossly unfair, irrational and discriminatory. It discriminated fundamentally against those participants in the experimental fishery, who in line with the Department's policy participated via a consortium and did not reward them as stated in the sector policy. The appeal authority, if the concept of the 50 ton redistribution pool is maintained, should adopt an entirely different method of allocation out of the redistribution pool. The method adopted by the delegated authority, ie using "the mean" when scoring applicants in respect of job creation, investment and performance, ensured that 1 contender fall on one side of the mean and the other 4 contenders on the other side.

4.5 **Response:** The re-allocation mechanism was not designed in order to ensure that whole pool goes to one applicant, even though this was the result. As stated above, there is no reason why the delegated authority could not reward performance, even if the Patagonian Toothfish sector was an experimental fishery during the medium term period. One of the five experimental right holder operated its own vessel, and consistently caught a great percentage of the TAC allocated to it than any of the other experimental right holders. It is therefore not irrational to re-allocate more of the TAC to this applicant and its vessel. The one experimental right holder outperformed the other four. Indeed, in 2002, 2003, 2004 a total of respectively 50, 100 and 50 tons were transferred from the 4 right holders to Ziyabuya fishing Co (from the South Princess to the Koryo Maru 11).

Reasons for not permitting new entrants not persuasive

4.6 **Complaint:** The reasons for not considering new entrants are not persuasive. The GPR states that the fishery requires substantial amounts of financial investments, skill, knowledge and infrastructure.

Complainant states that the owners of the nominated vessel have made considerable investment in terms of knowledge and infrastructure required.

- 4.7 **Complaint:** Complainant has signed a charter agreement with a vessel operator with a longstanding history of harvesting Patagonian Toothfish. Complainant has already established reliable markets in America and Japan both of which have substantial demand for Patagonian Toothfish. Complainant is the sole operator of two processing establishments, which create direct employment for 59 employees. The delegated authority is mistaken in its argument that the experimental permit holders have made substantial investment in skills, knowledge and infrastructure.
- 4.8 **Complaint:** The GPR states that the fishery is able to sustainably accommodate no more than two vessels. Complainant states that if the delegated authority does not wish to consider new entrants owing to the limited number of vessels, then the delegated authority can make the allocation conditional upon new entrants entering into a Joint Venture with one of the existing two vessels.
- 4.9 **Complaint:** The GPR states that catch rates have continued to decline and that the TAC may also reduce further increasing the financial and environmental risks associated with this fishery. Complainant states that it accepts that the granting of a right is not a guarantee of financial success. The financial risk is a business risk that the board of complainant must be allowed to decide on. If the TAC declines further there might be further consolidation in the industry and there is no reason why complainant cannot be part of that consolidation.
- 4.10 **Complaint:** In part 8 of the GPR page 6 point 4 the delegated authority states that the number of vessels was reduced from 3 to 2 in order for the experimental permit holders to consolidate costs and effort. Complainant submits that the decision to reduce the number of vessels was based on economical and financial grounds and not on scientific grounds as alleged in the GPR. Such reasoning would in any event be questionable as Ziyabuya Fishing has retained its independence and operates alone in an economically sustainable manner. The other 4 successful applicants using the South Princess have subsequent to the lodgement of their application sold their vessel to a foreign entity as is evident from the SA Maritime Safety Authority's records.
- 4.11 **Complaint:** The delegated authority's refusal on the basis that it would increase the financial and environmental risk is unfounded if one has regard to the delegated authority's own methodology as set out in the GPR page 22 where 100 tons have been set aside for redistribution to successful applicants

that meet the criteria. If the delegated awarded 70 tons to the complainant a balance of 30 tons will be available for redistribution to successful applicants who scored above the means.

4.12 **Complaint:** The GPR states that the experimental permit holders are significantly transformed. Complainant stated that acceptance of complainant's application will not detract from the transformation in the fishery but rather enhance it.

4.13 **Response:** The reasons for not permitting new entrants into the fishery are dealt with below. In addition it should be pointed out that it was decided that the infrastructure and knowledge of experimental right holder need to recognised before those of vessel operators nominated by new entrants.

Procedural objections

4.14 **Complaint:** Adequate reasons were not given for the administration actions taken. The reasons provided in the GPR are not adequate reasons as contemplated in section 5(3) of the Promotion of Administrative Justice Act 3 of 2000. The written reasons provided concerned average black ownership, female ownership and senior management profiles of the experimental permit holders and not those of the new entrant applicants. The formulas used to score existing permit holders were not made available to the Complainant.

4.15 **Response:** The issue of reasons was carefully considered and, based on legal advice, it was decided that adequate reasons were provided. It was decided that applicants did not need the mathematical formulas in this sector in order to fully substantiate their appeals.

Broad-based black economic empowerment not recognised

4.16 **Complaint:** Complainant transformed its structures in accordance with the principles of broad based black economic empowerment opposed to the narrow based empowerment. Complainant submits that it has complied with all seven core components of the Broad Based Black Economic Empowerment Act in that 26% of ownership is black and 21.8% is held by females; 33% of directorships and top management profile are held by black persons; and complainant has complied with the Employment Equity Act, Skills Development Act, has a preferential procurement policy and supports CSI.

4.17 **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.

5. **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.

Consortium partners incorrectly assessed

5.1 **Complaint:** The consortium partners ought to have submitted identical or at least very similar information when answering questions in relation to jobs and investment in the Toothfish sector. The Ladywood (the Norwegian company) provided the skipper and all the crew on the vessel and should have resulted in each consortium member stating that they created no specific jobs. The financial information provided by the other consortium members is startling as well. The Appeal Authority needs to look at this.

5.2 **Response:** The jobs and investments claimed by the consortium members was re-assessed, also the financials. There was no need to consult further with any of these applicants as the situation was clear. No jobs and investments claimed by any of the consortium partners were ultimately recognised.

5.3 **Complaint:** The GPR states in para 10.3 that it only applied the competitive scoring process to the existing permit holders and not to new entrants. The delegated authority's decision was unreasonable since the delegated authority's decision to grant the permit holders applications and refuse complainant's application is not capable of objective substantiation for the following reasons: (a) 4 Right holders over/under caught by more than 10% without good reason (b) Bato Star was convicted under the Marine Pollution Act, (c) only Ziyabuya Fishing made significant investment in skills and knowledge in the fishery, (d) Arniston and Bato Star did not comply with the EEA, (e) Suidor did not

indicate if they complied with the EEA and the scores of all successful applicants were incorrectly added.

- 5.4 **Response:** The scores were re-calculated. The rest of the issues raised concerns the scores of applicants and not the application of exclusionary criteria. In other words, applicants were penalised for non-compliance with the EEA, and were not rewarded for the failure to invest, but they were not excluded on these grounds. Bato Star fully explained the circumstances surrounding the fine paid to secure the release of the Sandile in Annexure 7 J to the application form. The offence has nothing to do with their operations in the PT sector. In the circumstances Bato Star was not be penalised. It is true that the members of the consortium under-caught by more than 10%. All of them provided the same reasons for under-catching. These reasons are captured in annexure 5A to their application forms. The explanations were accepted by the delegated authority and there are no reasons to change those decisions on appeal (reasons: IUU fishing in the PEE EEZ, losses due to toothed cetaceans taking fish off the lines, South Princess also active in the Ross sea and may not have a presence for longer than 6 months in EEZ).

6. The Decisions on Appeals and the Allocation of Quantum

- 6.1 Commercial fishing rights have never previously been allocated in this fishery. In 1996, five experimental permits were issued for the fishing of Patagonian Toothfish. With a constant decline in the Total Allowable Catch ("TAC"), the five experimental permit-holders consolidated costs and effort by reducing the number of vessels in the fishery from three to two. Four of the operators concluded a joint venture agreement to operate one vessel and have effectively pooled their resources. All permit holders operate in both the PEI-EEZ (the South African coastal waters around Prince Edward Island) and on the high seas within the CCAMLR (the Commission for the Conservation of Antarctic Marine Living Resources) Convention area.
- 6.2 The Minister confirmed the decisions made by the delegated authority responsible for the allocation of fishing rights, who decided to re-allocate rights to five companies that previously participated in the experimental fishery and not to accommodate any new entrants in this sector.
- 6.3 The Minister agreed with the delegated authority that new entrants could not be accommodated in the fishery as:

- 6.3.1 The fishery requires substantial amounts of financial investments in skills, knowledge and infrastructure, which have been made by the experimental permit holders. The Minister felt that the investments made by Experimental Right Holders and their knowledge and infrastructure need to be recognised.
- 6.3.2 The fishery is unable to sustainably accommodate more than 2 vessels at this point in time.
- 6.3.3 Current catch rates have continued to decline and the TAC may also be reduced further, increasing the financial and environmental risks associated with this fishery. The Minister felt that, as this is already a marginal fishery, the TAC should not be divided up even further by accommodating new entrants. This will increase the risk of participation to the point where it may no longer be economically viable to fish in the PEI-EEZ and in the CCAMLR region. It is important to retain a presence of South African permit holders in the PEI-EEZ and on the high seas within the CCAMLR to deter IUU fishing.
- 6.3.4 The experimental permit holders are significantly transformed.
- 6.4 As far as the allocation of quantum is concerned, the total allowable catch for this fishery for the 2005/2006 fishing season was set at 450 tons. In accordance with paragraph 8 of the Patagonian Toothfish sector specific policy, quantum was allocated with reference to the catching ability and, where applicable, the past performance of an applicant. It is also stated in the policy that the mechanism in terms of which quantum will be allocated will be the subject of consultation between successful applicants and the delegated authority before permits are issued. After consultation, the following quantum distribution model was adopted:
- 6.4.1 The starting point was the permit holder's allocation during the 2004/2005 Patagonian Toothfish fishing season. Each of the five permit holders was allocated 90 tons each.
- 6.4.2 The next step was to deduct 10 tons from each permit holder and redistribute this amount equally to the successful applicants that have -
- scored above the mean for job creation; and
 - either fished, or have committed in their respective fishing plans to fish, more than the mean in South Africa's EEZ; and
 - scored above the mean for insured fixed asset value; and

- neither significantly under-caught nor over-caught, if compared to others, over the duration of the experimental permit.

6.5 In applying the quantum model, the delegated authority allocated the 50 tons deducted from Irvin and Johnson Ltd, Arniston Fish Processors Ltd, Bato Star Fishing (Pty) Ltd and Suidor Fishing (Pty) Ltd to Ziyabuya Fishing (Eastern Cape) (Pty). The first four companies operate in the form of a joint venture (they are referred to above as the “consortium”), while the latter operates alone.

6.6 This decision was upheld by the Minister on appeal.

6.7 The Minister did not regard it to be inappropriate or unfair to distinguish between those who participated in the experimental phase. The sector policy indeed specifically recognises that there must be regard to performance during the experimental phase, when assessing the applications for long term rights.

6.8 Although the delegated authority’s decision effectively amounted to a transfer of 40 tons from the consortium to one company (Ziyabuya), this was justified, given the catching ability of Ziyabuya (it operates its own vessel) and its performance during the experimental phase. As far as the latter aspect (performance) is concerned, it was clear that Ziyabuya created significantly more jobs, made significantly greater investment, spent significantly more days fishing in South Africa’s EEZ and had a significantly better catch performance record than the consortium. These criteria were appropriate for purposes of considering a quantum re-distribution. Thus, whether one had regard to a “mean” as the delegated authority did, or whether one compared Ziyabuya in a less technical manner to the other four, it was clear that Ziyabuya outperformed the consortium during the experimental phase. This was correctly recognised by a re-distribution of quantum from the consortium to Ziyabuya.

MCJ van Schalkwyk

Minister of Environmental Affairs and Tourism