



25 August 2006

GENERAL REASONS FOR THE DECISIONS ON APPEALS SMALL PELAGICS SECTOR

1. Introduction

The general reasons for the assessments of the appeals in the Small Pelagics 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 Small Pelagics sector. Given the large volume of complaints and submissions received during the appeals process, 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 Small Pelagics sector were announced on 30 January 2006. Appeals had to be submitted by 31 March 2006. A total of 162 appeals were submitted in the sector.

On 19 April 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 19 April 2006 to 24 April 2006. Comments on the appeals had to be submitted by 15 May 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 3 February 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 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 Small Pelagics sector, the **comparative balancing criteria and weightings for medium term right holders** were changed in the following ways:

- 3.1 Financial Performance was disregarded: it became clear that some applicants provided ratios in their responses instead of percentages. Not all the affected applicants provided the correct percentages on appeal. The Minister decided that these applicants should not be penalised as the instructions relating to this part of the form were not clear enough. The Minister decided that the many complaints about this criterion showed that financial performance was, in any event, not an appropriate criterion to use in the allocation process. Financial performance was dependent on many factors not relevant to the objectives of the allocation process. The Minister therefore decided not to take the scores given for the financial performance criteria into account in the appeal decision.
- 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 Non-utilisation was disregarded: As result of a number of biological, commercial and practical reasons, which influenced catch performance across the sector over the medium term period, it was decided that this criteria should also be abandoned for purposes of the decisions on appeal. In other words, no applicant was penalised for the failure to fully utilise.

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

- 3.4 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.
- 3.5 Financial ability : for the reasons stated above, it was not possible to score operating entities in terms of the ratios. Instead, the operating entities were scored in the same manner as new entities, ie 20 points were awarded if the applicant had the necessary financial capacity to enter the sector.

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

- 3.6 In the first round of allocations, applicants that did not respond to a section were not assessed in terms of the “comparative 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.

3.7 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 that, 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 may 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.

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.

3.9 The **quantum allocation mechanism** was changed in order to accommodate the additional right holders that were successful on appeal. The granting of an additional 19 rights on appeal resulted in negative anchovy allocations to some applicants. In terms of the allocation mechanism, the third anchovy allocation pool (Pool A3) consisted of amounts allocated in terms of Pools A1 and A2, which exceeded the amounts requested by applicants (“the excess amounts”). The excess amounts were distributed to the successful medium term right holder applicants using the Pool A2 formula, provided that the distribution did not result in any successful applicant being allocated more than it requested. On appeal, Pool A3 was first used to take the negative allocations up to zero, before redistributing the remainder in terms of the Pool A2 formula (provided that the distribution did not result in any successful applicant being allocated more than it requested).

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:** If there is a change in various scoring criteria there may also be 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 said appeals that give rise to the change in its score. Appellant reserves the right to appeal any change in score or quantum.

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 10 March 2006, prior to the closing day for appeals.

Procedure: too little time for complicated form to be completed

4.5 **Complaint:** The following objections are raised about the process: short period of time to complete application forms; Queries & Responses lacked clarity and several responses were contradictory in nature; applicants were not made aware previously of the weighting to be assigned to various criteria

and it is generally accepted by industry that the application form and the process as a whole was more complicated than previously.

- 4.6 **Response:** The comments are noted, but it is not agreed that there was insufficient time, that the Q & Rs lacked clarity and that “several” were contradictory. It is not legally necessary nor desirable to announce the weightings beforehand. There are good reasons why the system was more complicated than before.

Procedure: access to information

- 4.7 **Complaint:** For the appellant to determine whether or not its application has been properly balanced and scored as against other applicants, the appellants need to have access to copies of at least all the successful applicants’ applications. The appellant should also be able to determine whether the exclusionary criteria have been properly and consistently applied to all applicants. It is not possible to verify whether the score allocated is correct since the department did not supply the spreadsheet and the formula as a whole reflecting the ranking used for all applicants.

- 4.8 **Response:** There is no merit in complaint. See the approach to access to information set out above. The formulae and data were made available, as stated above.

Investigations

- 4.9 **Complaint:** Appellant notes that the cut-off score to select successful applicants was not discussed with members of the industry. Thus it appears that the score cut-off and criteria weighting were determined after the assessment process to achieve pre-determined rights allocation objectives. As a result considerably weaker performers retained their rights. Appellant opines that these rights should have been revoked and distributed amongst the top performers in the industry and/or new entrants. The Appellant further states that applicants who lodged their appeals late were allowed into the sector, thus excluding any potential new entrants. Also, the applicants who were under investigation for should have been reserved until the outcome of their court cases. Lastly, the RVU failed to verify information which has led to applicants misrepresenting their real situation.

- 4.10 **Response:** The complaints are dealt with elsewhere except the one relating to applicants under investigation. The situation is that the investigation has thus far not produced the kind of results that can

be taken into account in the right allocations process. It may form the basis of section 28 proceedings after the allocations process.

Investment and jobs not scored correctly

- 4.11 **Complaint:** The delegated authority did not apply his mind to the appellant's application and the information supplied. The delegated authority has opted for a system that does not entertain the unique way in which each applicant has structured their business but has preferred to measure applicants with various different structures against each other. By using the industry mean the delegated authority has penalised the applicant who really made progress with black economic empowerment. The delegated authority rewarded right holders from the pre-1994 era by allowing these applicants to be measured against post -1994 right holders. Appellant request the delegated authority to reconsider the methods used to determine which applications were to be successful and the resulting quantum allocated. If the delegated authority were to look at investment made in previous years (2002 and 2003) it would see that the investment was higher. This was reduced because appellant had the knowledge of the industry to realise that it would be sitting with over-capacity when the TAC is substantially reduced. The appellant is penalised for applying good business principles.
- 4.12 **Complaint:** The assessment of investment is erroneous as it only takes into account the costs and not the affordability of the investment claimed. Applicants are claiming huge investments that they can hardly afford or have not paid for.
- 4.13 **Complaint:** Some applicants may pay their staff more than others but this does not necessarily guarantee that the entity is financially sound. Applicants should rather be credited for good financial management.
- 4.14 **Response:** The comments are noted but they have little merit. In terms of the General policy, it is clear that applicants had to be compared to one another. Score is also given for investment based on the degree of risk an applicant is prepared to take and the commitment shown. The focus on rewarding job creation was also placed on numbers of employees and not only on salary bill.

Rounding up of decimals in jobs per ton

- 4.15 **Complaint:** The application form did not allow for three decimal places when calculating jobs per ton. SASP rounded 0.003 up to 0.01. Premier rounded 0.003 up to 0.01. Foodcorp indicates 430.70 jobs per ton. This in fact reflecting tons per job.
- 4.16 **Response:** The issue has been addressed: the jobs per ton has been recalculated for the entire sector, in order to ensure that impermissible rounding up did not take place.

Financial performance score : medium term right holders

- 4.17 **Complaint:** The Appellant states that it is a generally accepted accounting practice to reflect ratios such as RONA, Current Ratio and Quick Ratio, as a ratio and not as a percentage. Thus the appellant calculated its ratios in accordance with GAAP and the formulae supplied in the explanatory notes. It is further submitted that the delegated authority failed to apply his mind to the Appellant's ratios. If he did so, he would have noted the discrepancy in all the applications. The delegated authority should have either resolved the discrepancy or corrected the figures by converting them into percentages.
- 4.18 **Complaint:** Appellant submits that the utilizing of financial ratios of applicants is arbitrary and does not account for the differing business models. Many applicants are involved in other sectors and other industries. Further, it is evident from the scoresheets that there are numerous incorrect responses given by applicants which in turn skews the averages of this category. It is also irrational that the delegated authority only looked at ratios in 2004 and not in any other year.
- 4.19 **Complaint:** The assessment of only one financial year is unfair. Certain applicants may have performed better in certain other years.
- 4.20 **Complaint:** It is argued that an investor's RONA would always be better than that of an operator. The former does not have liabilities (only assets and profit).
- 4.21 **Complaint:** Appellant states that the use of ratios to determine the financial performance produces a skewed result as the method of using ratios is very mechanical. It does not allow for the wide variances in the businesses of different applicants (various models specific to the appellant's complaints are further discussed in his appeal).
- 4.22 **Complaint:** Appellant argues that to score the ratios as the delegated authority has done is a superficial method of testing financial performance particularly where no recognition is given to the

varying values of the different allocations of each particular applicant who in turn may have a different business model. Certain applicant will have rights in other sectors, which will make their financial ratios difficult to compare to other applicants who are only involved in the Small Pelagics sector.

4.23 **Complaint:** There is a major anomaly in the scoring of this section. The percentage sign was incorrectly inserted in the application form, as the clear unambiguous instruction was to calculate the relevant ratios and the instructions did not require the ratios to be multiplied by 100 or to be expressed as a percentage. This mistake lead to confusion, as a cursory look at the scores awarded to this section shows. Some applicants, when confronted with the percentage sign, did the necessary additional calculation to express it as a percentage, whilst many others, including the appellant, followed the instructions to the letter and inserted the ratios as calculated in accordance with the instructions.

4.24 **Response:** Financial performance was disregarded for medium term right holders as per paragraph 3.1 above.

Financial performance score : new entrants

4.25 **Complaint:** The comparison that was devised did not adequately address the wide variances in the business of different applicants. In other jurisdictions, applications are largely considered by those who have a long experience in the fishing industry. The delegated authority has sought to replace discretion and insight with pure mechanical number crunching of a selection of financial data. No attempt is made to recognise or allow for the variations in earning potential of a particular sector. The lack of discretion was borne out by the results of OCAD who held a right of 55.037 in 2002, 38.421 in 2003 and 24.196 tons in 2004 and since abalone has the highest potential earnings and OCAD is the largest right holder, they will show the highest ratio and score. The delegated authority failed to consider the particular state of development of an applicant. The delegated authority has further fettered his discretion by singling out 2004 as the year in which current and quick ratios are to be compared. In short the test employed was not one of comparing financial performance but rather one of comparing the value of the fishing right held, the applicant's orientation towards exports and a variety of extraneous factors.

4.26 **Complaint:** The manner in which the financial performance and in particular the exceptionally high weighing (i.e. 20%) attached to the component has resulted in the appellant being placed at a distinct disadvantage despite it meeting all 5 "core allocation and management considerations" designed to give effect to section 2 of the MLRA. The delegated authority is therefore urged to reconsider the extraordinary high weighting attached to financial ability, particularly for those applicants who have

made substantial investments, created employment yet have not had the opportunity of being allocated commercial fishing rights conducive towards improving their financial state.

- 4.27 **Complaint:** Financial scoring system is not fair: Applicant with superior financials were at a distinct advantage. PQRs could score easily.
- 4.28 **Complaint:** Manner in which financial performance was calculated undermine policy objectives. Applicants fortunate enough to demonstrate higher financial yields (irrespective of actual investment) are at a distinct advantage. PQR's at an advantage in financial performance measurements. The refurbishment of a vessel severely impacted on financial ratios. Return on assets would have been substantially better measurement, according to auditors.
- 4.29 **Response:** It was not possible to score operating entities in terms of the ratios. Instead, the operating entities were scored in the same manner as new entities, ie either 20 or 0 depending on whether the applicant had the necessary financial capacity to enter the sector.

Broad-based black economic empowerment

- 4.30 **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.
- 4.31 **Complaint:** The delegated authority has failed to comply with the Minister's policy requirements in respect of the assessment of transformation. The delegated authority's approach to transformation does not effectively achieve the Minister's policy objectives. The delegated authority has effectively paid lip service to "the constitutional imperative" of Broad-Based Black Economic Empowerment. The current weighing system not only favours smaller companies and close corporations due to the fact that they are not significantly affected by the application of the flow-through principle as they have limited shareholding, but it also disallows the companies (which despite the use of the codes of good practice which have subsequently been amended, remain black empowered) an opportunity to be considered on

an equal footing with these smaller entities by its compliance and support of the Broad-Based Black Economic Empowerment.

4.32 **Complaint:** The delegated authority erred in the exercise of administrative discretion by adopting criteria and weighing for assessment of BEE that failed to properly assess the broad-based BEE initiatives undertaken by the appellant. This is contrary to the Broad-Based Black Economic Empowerment Act, the government's adopted Strategy for Broad-Based Black Economic Empowerment and the Codes of Good Practice; and focussed unduly on certain pillars of broad-based black economic empowerment and either ignored or gave too little consideration to other nationally recognized pillars of black economic empowerment. There is no justification or reason for the DA to depart from the nationally accepted and adopted broad-based means of assessing BEE.

4.33 **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.

Transformation: directors

4.34 **Complaint:** The delegated authority should decide which ratio is to be used. Appellant has 5 black members and 3 white members. If it expresses "...black directors as a percentage of total directors..." the answer is: $5/8 \times 100 = 62.5\%$ (or 0.625). But if the appellant calculate the "...ratio of black directors to white directors...", the answer will be $5:3 = 1.668$. In which case the 0.625 figure in the appellant's score is incorrect and must be edited and rescored. The same applies with the female to male ratio.

4.35 **Response:** There is no merit in the comment as the system calculated black directors as a percentage of total directors.

Transformation: close corporations and employee share scheme

4.36 **Complaint:** Close corporations cannot have employee share schemes. The members' profit sharing arrangement should be deemed an employment share scheme.

4.37 **Response:** Disagreed. While not common, there is no reason why a close corporation could not have a scheme in terms of which its workers could qualify for membership interest. The members' profit sharing arrangement is obviously not the equivalent of an employee share scheme.

Transformation: increase in black ownership

4.38 **Complaint:** Applicant was prejudiced in that it had already significantly transformed in 2001; which transformation initiative has remained intact and viable, therefore the applicant does not score as well as it should. This approach is unfair as it punishes the applicants who had taken drastic steps to transform as early as 2001. They are not allocated any points.

4.39 **Response:** There is no merit in the complaint. This applicant would have been rewarded in the medium term allocation process and the long term allocation process for its efforts.

4.40 **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.

4.41 **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

Fishing plan not rewarded

4.42 **Complaint:** Appellant states that it provided a comprehensive fishing plan, which demonstrates the ability to harvest the species but was not scored any points.

4.43 **Response:** Fishing plan was not scored in the case of medium term right holder applicants.

Geographic justice not considered

4.44 **Complaint:** Appellant is based in Port Elizabeth. It has invested in Port Elizabeth. Its joint venture partners, and its shareholders live in and around Port Elizabeth and the allocation would provide downstream beneficiation to the Eastern Cape economy.

4.45 **Response:** The sector policy did not require this factor to be taken into account.

Method of scoring new entrants not rational

4.46 **Complaint:** A newly established entity will never stand a chance against already existing entities, as the existing entities are able to furnish a whole lot of information on, for example, investment, financial performance, job creation, enterprise development, salaries paid ratios, skills development, corporate social investment and affirmative procurement. This enables them to out-score newly established companies with ease. This is the case even for entities that do not have rights in the fishery but have already existing infrastructure in other departments. This is totally unfair to the poor men in the street, many of whom have been actively involved fishermen who cannot afford to set up companies to conduct business in normal day to day operation.

4.47 **Complaint:** It is unfair for a newly established entity with no assets to compete with entrants who made investments in other fisheries or trade. If such applicants created jobs and safety precautions, it certainly was not in the pelagic fishing sector.

4.48 **Complaint:** Applicants who are not newly established entities completed these sections with information that was not generated by being actively involved in the pelagic fishing sector. It is unfair to compete against new entrants, who have figures available to them, if those figures were generated outside the pelagic fishing sector.

4.49 **Response:** Comment noted, but the system was designed in a manner which allowed new entities to compete with existing entities.

Quantum allocation: first pool unfair and insufficient consultation

4.50 **Complaint:** The quantum allocation used by the DA is inequitable, unjust and invalid. It is inequitable as it utilises a double reward/penalty system as the final score not only contributes to their final allocation received from the MTR pool but is also used to assess their relative contribution to the initial 10% pool. It is invalid and the DA erred in using it as in terms of the sector policy it is stated that *"In this fishery the mechanism for allocating quantum will form the subject of further consultation with applicants once the applications in the fishery have been assessed and the successful applicants identified"*. There was no consultation whatsoever on the quantum allocation mechanism utilised and as such the DA has breached the requirements of the General Policy and has acted *ultra vires*.

4.51 **Response:** There is no merit in these complaints. There was extensive consultation regarding the quantum allocation mechanism. The mechanism does not operate irrationally. One reason why there is a double reward in the first pool is to ensure that the system does not discriminate purely on the basis of size as far as this pool is concerned.

Quantum mechanism: first pool unfair to large quota holders

4.52 **Complaint:** Appellant objects to the concept of a pool to which larger participants must contribute but from which they cannot benefit. In the medium term rights policy guidelines it is stated that “The hake longline and handline has been identified as a suitable vehicle for the promotion of HDI’s in the hake sector, more specifically small-and-medium sized enterprises”. The appellant and other participants in the small pelagics sector have structured themselves on the basis of these policy announcements and at no stage prior to the publication of the draft policies did the appellant contemplate that its size *per se* would be utilised as a negative factor with regard to the allocation of long term rights. A policy, which by definition excludes larger participants from the possibility of participating in the first pool runs contrary to the medium term rights policy. Appellant is not opposed to the establishment of the first pool but opposes the policy, which prohibited it from potentially participating in the first pool.

4.53 **Response:** The two-pool system was worked out in a manner which does not discriminate against companies purely on their size. It is, in principle, possible for a large quota holder to gain in the application of the system. It will be very difficult to implement the proposal which focuses on the size of the applicant (including, presumably, its subsidiaries and even JV partners – ie the size of the economic unit) instead of the system based on the size of the applicant’s allocation in a sector. In any event, it is not clear why large companies with small allocations in a sector should not be treated the same as small companies with small allocations in a sector. The sector policy affords the Minister the choice whether to redistribute to small companies or to those with smaller allocations.

Quantum allocation mechanism unfair to smaller entities

4.54 **Complaint:** It is a policy objective to affirm right holders with smaller allocations in the small pelagics fishery that are transformed and have performed well. In terms of section 2(j) of the MLRA it is an objective to have regard to the need to restructure the fishing industry to address imbalances and to achieve equity within all branches of the fishing industry. “Equity” is not defined in the Act but it is submitted that it includes fairness and balance. When allocating fishing rights, the delegated authority is

called upon to compare applicants with each other rather than against an external benchmark. There was no logical basis established as to why it was considered appropriate to compare the scores of companies in the industry with one another and to favour those falling above an arbitrary proportion or percentile usually 40th or 50th. One of the most remarkable features of the small pelagics long term rights allocation process is that it both rejected the insights and guidelines of the BBBEE Act and furthermore elected to set no level of ownership as envisaged under its own general policy. It can hardly be expected of smaller right holders to create the same sort of value adding activities as larger players have been able to develop such as processing, packaging and marketing. Thus comparing smaller companies against larger ones in relation to jobs is a case of comparing the proverbial apples with pears. The weightings have the hallmarks of having been gerrymandered to produce a result that would approximate an intended one and in this regard the weighting and scoring of certain categories amounts to no more than tokenism. For example to score safety at 1,5% is tantamount to saying that it is irrelevant and similar criticism can be levelled at financial performance. Even when a substantial weight is attached to certain categories such as investment, one finds that arbitrary and irrelevant criteria are utilised. The most controversial category and the one most subject to criticism is the criterion of transformation. Female ownership is accorded a weighting of 5% and employee ownership 2%. The point is that it is unreasonable and impracticable to require a score above the 75th percentile when a company that has improved its black ownership 37,5% gets a score placing in the range of the 25th to 50th. A further aspect of the scoring mechanism that is unfair and inequitable is the method by which the redistribution pool was sourced. This was done by taking 75t from each applicant and this would be unobjectionable if all applicants received the same rights. The actual tonnage awarded to the appellant is simply uneconomically small. An advisory committee member suited to the task for which they were employed should have appreciated this. The advisory committee should have contained the names of persons having sufficient in-depth knowledge of the sector. The persons listed are not recognised as well known in this regard. One would have expected that the adjudication of fishing rights of such importance would involve persons of stature and experience.

- 4.55 **Response:** The comments are noted but the Minister is not persuaded that the system should be changed in the light of the comments.

Quantum: applicants allocated amounts without capacity to catch and process

- 4.56 **Complaint:** A number of applicants were successful with revised tonnages they applied for without real proof that they indeed have the capacity to land or process this fish.

4.57 **Complaint:** The appellant does not agree with the methodology for the allocation of quantum used by the delegated authority. A pure mechanistic device was used to make the allocations. The delegated authority is obliged to weigh up all the objectives of the Act when making allocations and the method chosen does not enable him to do so. Where the scoring on any particular point was marginal, no discretion was exercised leaving any applicant's score and hence quantum open to the vagaries of the choice of cut-offs or percentile calculations used. The outcome derived is that it results in certain vessels and crew being under-utilised whilst quota is allocated to companies who do not possess the means to harvest.

4.58 **Response:** Capacity was not **directly** considered when quantum was determined. It was indirectly considered by rewarding investment, jobs etc. To consider capacity directly, would undermine any attempt to re-distribute quantum in the sector in terms of an objective scoring system.

Quantum allocation mechanism: unfair

4.59 **Complaint:** The strict application of the criteria, weighting and the mathematical calculations to determine point scoring together with the quantum allocation mechanism has lead to the unreasonable and irrational result that the appellant's tonnage was reduced by 26,7% and 29,22% for its sardine and anchovy allocations respectively. The quantum allocation model distorts the prejudice by making low scoring applicants contribute more to the 10% pool and thereafter the same applicants are not able to participate in such pool based on generally (transformation and performance) the same low point scoring. They are therefore punished twice for the same reason notwithstanding the fact that the weighting and the point scoring does not effectively achieve the objectives of the policy and statutes.

4.60 **Response:** The comments are noted but it is not agreed that the system is irrational.

5. Approach to assessment of information

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

Jobs: merged data inflate values

5.1 **Complaint:** Merged data can inflate the payroll values, lifting the mean value for all applicants and forcing the unmerged data to be artificially positioned below the mean.

5.2 **Response:** There is no merit in the complaint. Applicants were permitted to apply in the form of an economic unit.

Investment: Method of scoring investment inaccurate

5.3 **Complaint:** The methodology used for scoring investment does not accurately reflect the significant investments made by the appellant. To deny the appellant points on the basis of the lack of insurance, results in the anomalous situation where its investment of over R12 million is disregarded. Alternative valuations of the appellant's assets for investment purposes can be taken from either the book value or market value of these assets or a combination of the two to arrive at a fair valuation. The Department's decision to assess this criteria based on insured asset value is patently unfair as it unjustifiably disadvantages applicants in the position of the appellant.

5.4 **Response:** In the Queries and Responses, applicants were specifically instructed that the market value (based on valuation) may be used instead of the insured value (if the investment is not insured).

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

5.5 **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 often 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.

5.6 **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

5.7 **Complaint:** A number of appellants argued 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. 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 in respect of 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; 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.

Black ownership of Oceana Group of Companies

6.1 **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%.

6.2 **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 the R5(3) reports concerning applicants forming part of this group of companies, the beneficial black ownership was assessed at 19.57%.

Overclaim of insured investment

6.3 **Complaint:** The following applicants overclaimed insured investments: SMPM00151- the correct figure will be roughly R1 747 per ton.; SMPM00254 – the investment per ton should be R1 452 per ton; SMPM00034 – incorrect figure was erroneously entered showing an investment of R351 428.4 per ton and not the correct amount of R1 123 per ton.

6.4 **Complaint:** The following applicants have skewed data for investment -: Extra Dimensions; Azanian Fishing; Ithemba Labantu and Salburg Pty Ltd.

6.5 **Response:** On assessment, it was found that some of the calculations were done incorrectly and this was corrected.

Jobs overclaim

6.6 **Complaint:** Applicant SMPM00059 scored full marks for creating 430 jobs, which mean the applicant created 16 854 280 jobs while the actual calculation is 0.014 746 per ton.

6.7 **Complaint:** Orgel (1269) and Foodcorp's (430) responses skewed the data ranking. Alberts scored R 68 245 spent on salary per ton.

6.8 **Response:** On assessment, it was found that the calculations were done incorrectly and this was corrected.

CSI score wrong

6.9 **Complaint:** Fisherman's Fresh were awarded the maximum points for CSI but provided no indication that they had made donations other than purchasing items from an auction benefit of the ANC.

6.10 **Response:** The donations made by Fisherman's Fresh were recognised as non-tax deductible donations were also recognised in the case of new entrants.

Apportionment of investment in Towerkop

6.11 **Complaint:** SMPM00062 – Pelagic Fishing Enterprises claims to own 16% in the "Towerkop" owned by Ntabeni. Foodcorp (claimed) 74% and 10% is held by Community Processors & Distributors.

6.12 **Response:** On assessment, the apportionment was found to be proper and it was recognised.

Bongolethu group and Gansbaai Marine

6.13 **Complaint:** Some members of the Bongolethu Fishing Group claimed a 30% stake in Gansbaai Marine. Gansbaai Marine claimed this same investment.

6.14 **Response:** A letter was sent to all the parties on this issue. After assessing the response, claims by the members of the Bongolethu Fishing Group claim in Gansbaai Marine were not recognised.

Laagety Visserye

6.15 **Complaint:** Some members of the Bongolethu Fishing Group claims a 30% stake in Gansbaai Marine: Gansbaai Marine claimed this same investment. Appellant has picked up certain discrepancies in the responses that elevated Laagety's score, including the following -:

- The skills development levy number given should begin with a letter "L" and not "U".
- Laagety stated that their turnover for 2004 was R 405 336 but their gross asset value was R 41 300. It seems irregular that Laagety could have claimed so much investment despite the figures that they have reflected for their turnover and gross asset value.
- Laagety indicated that it had not under-caught in any other sector but in fact stated in 5.2 that it had under-caught by 16,80%.
- Laagety scored for having 10 employees but has no other medical benefits.
- Appellants are concerned that Laagety did not comply with the most important part of the allocation process in that they failed to comply with section 6.2.1, 6.2.2, 6.2.3, 6.2.4, registration with the Compensation Commissioner or pay any of its levies.
- Laagety also indicates that it sold lobster and hake but they do not have turnover in 2002.

6.16 **Response:** On assessment, it was found that the issues pertaining to Laagety did not require their scores to be amended.

Suitable vessels: Fishermen Fresh CC and Mayibuye Fishing

6.17 **Complaint:** Appellant contends that both Fishermen Fresh CC and Mayibuye Fishing nominated unsuitable vessels for the small pelagic sector. The former applicants' vessel is a longline vessel and the latter's vessel is suitable for hake inshore trawl. The appellant raises the question whether these vessels have been converted into small pelagic vessels with purse-seining gear.

6.18 **Response:** The suitability of the vessels nominated by Fishermen Fresh CC and Mayibuye was assessed.

7. The Decisions on Appeals and the Allocation of Quantum

The Minister decided to allocate 19 additional rights on appeal. The number of successful Medium Term Right Holder applicants increased from 90 to 104, and the number of successful New Entrants increased from 5 to 10. The Minister agreed with the quantum allocation mechanism adopted by the Delegated Authority, other than the change described in paragraph 3.9 above. The re-application of the (revised) quantum model after appeals resulted in a number of changes to the allocations made to applicants in the first round of allocations. The reasons for these are as follows:

- 7.1 The Minister decided to allocate 19 additional rights on appeal. This meant that all applicants had to sacrifice some of the quantum allocated to them in order to accommodate these additional right holders. Further, the size of both Pool S2 and Pool A2 was reduced, as the amounts of the successful appellants was no longer part of the pool.
- 7.2 Amendments were made to applicants' data on appeal. This resulted changes to the total scores of others who then fell into a different category of percentiles.
- 7.3 The change to the percent rank function (see paragraph 3.7 above) resulted in changes to scores in some cases.
- 7.4 An applicant's total score determines how much they contribute to Pools S1 and A1, and also how much they can gain back from Pools S2 , S3, A2 and A3.

A spreadsheet list of the allocations made to the applicants in the sector, after the decisions made on appeal were incorporated, is annexed marked "A".

Prior to the allocation of long term commercial fishing rights, the black controlled (50% + 1) of the Sardine TAC was 67.2% and of Anchovy was 68%. After appeals, the black controlled ownership of the TAC is 62.9% for sardine and 57.9 % for anchovy, and the beneficial black ownership of sardine is 61.7% and of anchovy is 60.9%.

MCJ van Schalkwyk

Minister of Environmental Affairs and Tourism