



18 August 2006

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## GENERAL REASONS FOR THE DECISIONS ON APPEALS SOUTH COAST ROCK LOBSTER SECTOR

### 1. Introduction

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The general reasons for the assessments of the appeals in the South Coast Rock Lobster (“SCRL”) 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 SCRL 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 made. Complaints that clearly had 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 and score sheets used to record the assessment of each appeal in the sector.

The Minister approved the R5(3) reports. The reasons for the Minister’s decisions are accordingly contained in the R5(3) report, 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 South Coast Rock Lobster sector were announced on 4 November 2005. Appeals had to be submitted by 13 February 2006. A total of 19 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 for inspection in the Department’s Access to Information Centre (“ATIC”) on the 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 27 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 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**

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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 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.

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

- 3.1 Financial Performance disregarded: It became clear that some applicants provided ratios in their responses in different categories instead of percentages. Not all the affected applicants provided the correct figures 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 financial performance was, in any event, not an appropriate criterion to use in the allocation process as it was dependent on many factors not relevant to the objectives of the allocation process. The Minister therefore decided to disregard the financial performance scores.
- 3.2 Use of medians instead of means: The Minister instructed the project manager to use “medians” where “means” were previously used. The former was regarded to be a safer assessment tool than the latter.
- 3.3 The weightings given to various components of transformation (especially black ownership, female and employee ownership) were brought in line with weightings given to these criteria in the Horse Mackerel, Hake Deep Sea Trawl, Hake Inshore Trawl and Small Pelagics sectors. The Minister decided that, while it was in principle not incorrect for different delegated authorities to weight the various transformation criteria differently, he was not persuaded that there is a rational basis for him to differentiate between these sectors.

A spreadsheet containing the criteria and weightings in the South Coast Rock Lobster sector (as amended) is annexed, marked Annexure A.

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

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

- 3.4 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 project manager to revise the system so that, in the case where applicants did not provide a response, the value was assumed to be zero or the response least favourable to such an applicant. In the above example, it means that all 17 applicants would be assessed against one another even though all of them did not provide a response.

3.5 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 changed in the following two ways:

3.6 The contributions to the first pool were reduced to 5%.

3.7 Pool 1 was redistributed amongst successful applicants with small allocations in the same manner as this was done in the Hake Deep Sea Trawl, Hake Inshore Trawl and Small Pelagics sectors. Instead of rewarding only those applicants that scored above the mean for performance (jobs and investment) and transformation, the pool was re-distributed to all applicants that were placed above the 40th percentiles for both performance and transformation. To achieve a maximum allocation from this pool, an applicant must rank above the 60th percentile for both scores. Applicants that achieved intermediate scores between the 40<sup>th</sup> and 60<sup>th</sup> percentiles are allocated a proportion of the maximum allocation on a sliding scale, which is such that the proportion is small if one or both scores are only slightly greater than the 40th percentile in question, and increases towards 100% as both scores approach their respective 60th percentiles.

3.8 The application of this quantum allocation mechanism resulted in small right holders that transformed and performed well (“small achievers”) being awarded more than 20% of the TAC.

## 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, scoring system or the quantum allocation mechanism.

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

- 4.1 **Complaint:** It is 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 is 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 is 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.

### **Increase in black ownership should not be scored**

- 4.3 **Complaint:** It is unfair to applicants that were 100% black-owned over the medium term period to reward others for increases in their black ownership over this period.
- 4.4 **Response:** Disagreed. A company that was 100% black-owned over the medium term period was not prejudiced at it scored the maximum points for black ownership.

### **Cut-off too high**

- 4.5 **Complaint:** The cut-off of 50 set in the sector is too high when compared to other sectors and is arbitrary.
- 4.6 **Response:** There is no merit in the complaint. The cut-off is set after the assessment of all the applications in a sector. There is no reason why the cut-offs should be the same in all the sectors.

### **Eastern Cape applicants should have been preferred**

- 4.7 **Complaint:** In terms of the general and sector specific policy entities from the Eastern Cape should be advanced through the allocation process.
- 4.8 **Response:** This is an incorrect description of policies in respect of SCRL. Geographic justice, in this sense, was not a consideration.

### **Quantum allocation mechanism**

- 4.9 **Complaint:** The first pool should have been redistributed to small businesses or to support broad based black economic empowerment. Outside these two reasons the delegated authority was neither authorised nor empowered to create the 10% pool.
- 4.10 **Response:** There is no merit in the complaint. The SCRL policy provides for the empowerment of small businesses or right holders with small allocations that have transformed and performed well. Right holders with small allocations were empowered in the sector.

### **Insufficient information provided**

- 4.11 **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.
- 4.12 **Response:** Appellants were provided with this information on 28 March 2006. Although this was after the appeals closed, appellants could have motivated that they should be allowed to supplement their appeals, with reference to this information.

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

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

### **Permanent employees versus IRP 5 employees**

- 5.1 **Complaint:** The number of IRP 5 employees and the number of “total less seasonal employees” are not necessarily the same. In other words an employee may be “permanent” but not an IRP5 employee and *vice versa*.
- 5.2 **Response:** Agreed. In Cluster A, job creation was measured in four ways: total; total less seasonal; IRP5s and salary bill.

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

- 5.3 **Complaint:** A number of Appellants argued that the Minister should recognise, for example, investments made, jobs created, learnerships provided and the like, outside the period (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.
- 5.4 **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 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; if the information related to the medium term period; and if the action was not artificially taken purely for purposes of rights allocation.

### **Catching capacity not considered when allocating quantum**

- 5.5 **Complaint:** It is highly undesirable and contrary to the objectives of the SCRL policy to allocate too much fish to one vessel.
- 5.6 **Response:** Disagreed. The SCRL policy does not require catching capacity to be directly considered when allocating quantum – to do so would undermine transformation in the form of a redistribution of quantum to right holders with smaller quotas who are transformed and performed well.

### **Medical Aid, ATR and WSP provided by the joint venture**

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

### **Members of close corporations as employees**

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

### **Close corporations and employee share scheme**

- 5.11 **Complaint:** Close corporations cannot have employee share schemes. The members' profit sharing arrangement should be deemed an employment share scheme.
- 5.12 **Response:** Disagreed. While not common, there is no reason why a close corporation could not have a scheme in terms of which its workers would take up membership interest. The members' profit sharing arrangement is obviously not the equivalent of an employee share scheme.

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

- 5.13 **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.
- 5.14 **Response:** Every attempt to re-apportion jobs and investments or re-merge 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.

### **Compliance with Employment Equity Act 55 of 1998**

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

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

### **IT3(A) and IRP5 employees**

5.17 **Complaint:** IT3(A) should also be considered proof of permanency of employment in the same manner as IRP5 employees.

5.18 **Response:** While IT3(A) employees may be considered “permanent employees” ( in the sense of total less seasonal employees) the system could not be changed on appeal to equate IT3(A) employees with IRP5 employees. This would affect all other applicants’ comparative position and data regarding the former were in any event not requested in the application form.

## **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.

### **Ruwekus group: Jobs**

6.1 **Complaint:** The Ruwekus group claimed 51 sea based IRP5 employees while the vessel is only certified for 31 crew. The Minister must determine whether all these employees were employed as at 28 February 2005 or over the period 1 March 2004 to 28 February 2005.

6.2 **Response:** A letter was sent to this group of applicants, requesting them to clarify the position. A response was received and a minor reduction of the jobs claimed by these applicants was effected.

### **More than the maximum points given to transformation (directors)**

6.3 **Complaint:** Certain applicants scored a total of 3 out of a maximum of 2 points for transformation (directors).

6.4 **Response:** This error was corrected.

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

6.5 **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%.

6.6 **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 rights to 4 appellants, bringing the total of successful Medium Term Right Holder applicants to 16 out of the 17 of the medium term right holder applicants. A spreadsheet list of the allocations made to the successful 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, 72% of the TAC was held by black controlled (50% + 1) rights holders. This figure remains at 72%.

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. SCRL commercial fishing rights were not allocated to new entrant applicants for the following reasons:

- Decades of over-fishing has required that SCRL stocks be managed in terms of a conservative recovery strategy;
- The SCRL fishery is a capital intensive fishery. The successful medium-term right holders have invested significantly in this fishery by way of vessels, infrastructure and access to international markets;
- Transformation levels amongst the successful medium-term right holder applicants are considered acceptable; and
- The successful medium-term right holders each employ significant numbers of persons and have sustained jobs notwithstanding difficult market conditions during the medium-term period.

**MCJ van Schalkwyk**  
**Minister of Environmental Affairs and Tourism**