



11 September 2006

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## GENERAL REASONS FOR THE DECISIONS ON APPEALS SQUID SECTOR

### 1. Introduction

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The manner in which the appeals were assessed in the Squid sector by the Minister of Environmental Affairs and Tourism (“the Minister”) is 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, promulgated in GN 1111 in Government Gazette 19205 of 2 September 1998 (the “R5(3) reports”).

Each applicant in the sector will receive the following documents:

- If the applicant appealed, the R5(3) report and a notification letter, informing the applicant of the Minister’s decision on the appeal, together with the reason for that decision; and
- The Appeals GPR.

Copies of all the R5(3) reports and all the score sheets after appeals are available in the Department’s Access to Information Centre (“ATIC”) on 2<sup>nd</sup> Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town. These reports and score sheets were approved by the Minister. The reasons for the Minister’s decisions are accordingly contained in the notification letters, the 5(3) reports, the score sheets and this Appeals GPR.

Apart from the Regulation 5(3) reports, 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 (“the Department”) and the Minister.

### 2. Appeals process

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The decisions in the Squid sector were announced on 28 February 2006. Appeals had to be submitted by 31 May 2006. A total of 86 appeals were submitted in the sector.

All applicants were given access to the original applications of others, unless an 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 April 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 the confidential folder. Requests for access to this folder or to objected parts of the application 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 and the Scoring System**

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The exclusionary criteria were not changed, but, after considering legal advice, the Minister decided that the failure to sign the declaration and to have it attested 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 **comparative balancing criteria for medium term right holders** were changed in the following ways:

- 3.1 Use of means: The Minister determined that the use of medians instead of means would improve the fairness of the criteria as certain applicant responses appeared to be skewing the mean upwards. On appeal, all criteria that were scored with reference to a mean were scored with reference to the median.
- 3.2 The method used in assessing catching performance did not take into account the fact that some right holders operated more than one vessel during the medium term period. This affected the “mean”. Catch performance was disregarded for purposes of the decisions on appeal.

The **comparative balancing criteria for new entrants** were not changed.

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

- 3.3 In the first round of allocations applicants that did not respond to a question that was being scored using means or percentile ranking, were excluded for purposes of ranking the others. For example, if

there were 17 applicants and only 10 provided a response to a section, then the 7 were excluded and the 10 were ranked. The Minister instructed the IT specialists to revise the system. In terms of the revised system, if an applicant 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 responses.

3.4 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 could 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 effort allocation mechanism was changed as described below.

#### **4. Complaints about scores of other applicants**

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

##### **Kupukani Fishing**

4.1 **Complaint:** Kupukani Fishing is a new company which only registered in 2005 and it was never the holder of a medium term fishing right. Kupukani applied for rights on the basis that it was the sole successor of the Fishing Trust which held an 8 man squid permit. The rights that were held by the Fishing Trust was never transferred to Kupukani and they did not provide any evidence of the sale of business by the Fishing Trust to them. Kupukani alleges no legal basis upon which it acquired the rights and obligations held by the Fishing Trust.

- 4.2 **Response:** Only close corporations and companies could apply for long term rights. If such a close corporation or company was the “successor” of an entity such as a trust that held a medium term right, the new entity was recognised as a medium term right holder. Kupukani was assessed as such a successor to a medium term right holder.

Paragraph 7.2 of the General Policy provides as follows:

*“In terms of this policy, commercial fishing rights in the Cluster A and B fisheries will be granted only to entities incorporated in terms of the Close Corporations Act 69 of 1984 and the Companies Act 61 of 1973. Medium term right holders that operated in the form of trusts or co-operatives or sole proprietorships, must take steps to convert to a close corporation or a company before the allocation process and nominate the new entity as the applicant. The nominated close corporation or company will be treated as an existing right holder, provided that such an applicant demonstrates that the close corporation or company will be the sole successor of the previous right holder. A right will be granted to the new entity and not to the individual or the trust. This policy does not mean that a trust is precluded from holding shares in an applicant or right holder.”*

- 4.3 **Complaint:** Kupukani does not have access to a suitable vessel, the jobs claimed by Kupukani is incorrect since these employees are employed by Jurassic. In section 6.4.3 Kupukani claimed to have provided benefits to its employees but this cannot be correct as it does not have any employees. In annexure 6J Kupukani claimed to have paid salaries to shareholders which are actually employees of another entity. In section 7.9 Kupukani claimed to be registered with Compensation Commissioner and submits a notice of assessment in of another entity. In In 7.10 Kupukani claimed to have an HIV policy but annexes the policy of another entity. In 7.12 Kupukani claimed to have an Alcohol and Substance abuse policy but annexes the policy of another entity. The investment claimed by Kupukani is actually investment made in a vessel in the hake longline sector.

- 4.4 **Response:** The allegations against Kupukani will be investigated after the allocations process is completed.

## 5. 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 quantum allocation mechanism.

### **Salaries spend on training**

- 5.1 **Complaint:** According to the GPR, points were given if the percentage of salaries spent on training in 2004 was higher than the mean but the score sheets states that applicants were awarded points if the training spend was higher than one percent of the salary bill.
- 5.2 **Response:** Complainant refers to an incorrect version of the GPR. Applicants were allocated the points if training spend was higher than one percent of salary bill.

### **Training of black persons**

- 5.3 **Complaint:** The delegated authority erred in not granting the complainant 0.5 points as none of the applicants including the complainant provided an answer under this category in terms of the internal scoring breakdown.
- 5.4 **Response:** This aspect was not scored and it was decided not to allocate points for this criterion on appeal.

### **Discretion to reduce crew**

- 5.5 **Complaint:** The discretion afforded to the delegated authority to allocate a lesser number of crew than that indicated in the table is problematic, according to complainant.
- 5.6 **Response:** This discretion is essential in order to afford the power to the Minister to reduce crew in order to accommodate more vessels and therefore more appellants, as he has done in the present appeals process.

### **Broad-based black empowerment incorrectly assessed**

- 5.7 **Complaint:** The basis upon which the delegated authority sought to compare and assess applicants based on an increase in black ownership is fundamentally flawed. The definitions of black ownership in 2001 applications process differed from those in 2005. No meaningful comparison can be made of the raw numbers inserted by applicants into the table in section 6.7.1 of the application form. If points are awarded to applicants for improvement in BEE ownership during the period between the 2001

applications and the long term rights applications, then the Minister will unfairly prejudice applicants that undertook BEE transactions prior to 2001.

5.8 **Response:** The comparison should be made on a flow-through basis. In other words, an applicant had to apply the flow-through principle to both the 2001 and 2005 calculation of black ownership. Applicants that transformed prior to 2001 were rewarded in the medium term allocation process and the long term allocation process.

5.9 **Complaint:** The decisions of the delegated authority as reflected in the GPR read with the criteria and weightings are based on an incorrect and improper assessment of BEE. This error will have a serious impact on the assessment of applicants. The delegated authority failed to follow the nationally identified pillars of broad-based BEE and the weightings in the Codes of Good Practice. The following weightings should have been given to the seven pillars of broad-based BEE:

• Ownership	20%
• Management	10%
• Employment Equity	10%
• Skills Development	20%
• Preferential Procurement	20%
• Enterprise Development	10%
• Residual Elements (CSI)	10%

The delegated authority has given some of the pillars of the broad-based BEE insufficient weighting. Conversely the delegated authority has erred in over-weighting some of the core elements of broad-based BEE. The assessment of BEE used by the delegated authority is extremely narrow-based and is heavily focused on equity ownership and black management earnings, which is clearly contrary to the national policy on BEE. The delegated authority has failed to consider non tax-deductible donations in the assessment of CSI. Accordingly the assessment of CSI is flawed. The assessment of BEE is also inconsistent with the approach followed by the Department in other sectors of the fishing industry. There is no rational explanation for assessing BEE initiatives differently in different sectors of the fishing industry.

5.10 **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. Tax deductible donations were scored as these were verified by SARS and the data was accordingly more reliable.

5.11 **Complaint:** The delegated authority erred by adopting a scoring system, which allocated points to right holders under various headings according to the percentile into which they fell. The scoring of BEE by the delegated authority should be amended by the Minister to remove undue focus on the relative positions of different applicants in arriving at the score of each individual.

5.12 **Response:** 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.

#### **Insufficient information provided**

5.13 **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.

5.14 **Response:** Applicants were provided with this information on 26 April 2006.

#### **Reserve right to appeal if score changes**

5.15 **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. Complainant reserves the right to appeal any change in score or quantum.

5.16 **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.

## New entrants

5.17 **Complaint:** Complainant was granted a right on appeal in 2001, but excluded in 2001 for being late. It argues that it should not be treated in the same manner as other “*new entrants*”. Argument is made that it is not correct to exclude new entrants on the basis that “*current effort levels cannot be sustained*” in light of the fact that in the sector policy it is stated that the resource is “*optimally exploited*”. It is also argued that “*effort creep*” is best addressed by having a closed period (more than the current month). While the 15% increase in black ownership is an improvement, transformation of the squid fishery lags behind other sectors of the fishing industry. Compared to the others (30% increase in Tuna Pole) there has not been “*notable*” improvement.

5.18 **Complaint:** Complainant argues that the policy provides that new entrants must be accommodated if necessary to notably improve the transformation profile of the fishery. It is then argued that 49.23% black ownership does not represent a notable improvement. This is particularly so in light of the fact that it is stated that of the more than R 327 million paid in dividends, only R 5.6 million was paid to blacks.

5.19 **Response:** For the reasons stated in the delegated authority’s GPR, it was decided that new entrants could not be accommodated. The Minister agreed with the reasons for excluding new entrants.

## **6. The Decisions on Appeals and the Allocation of Effort**

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The Minister decided to allocate rights to 13 appellants, bringing the total of successful Medium Term Right Holder applicants to 122. While there were more than enough vessels available to allocate to the successful appellants, an insufficient numbers of crew were available to accommodate all the successful appellants. The Minister obtained the requisite number of crew by reducing the maximum numbers of crew allocated to the larger vessels in the following manner:

- 15- 17 metres vessels, maximum crew allocated reduced from 20 to 19
- 17- 19 metres vessels, maximum crew allocated reduced from 22 to 21
- over 19 metres vessels, maximum crew allocated reduced from 26 to 25

Prior to effecting this reduction, the Minister consulted with the applicants. A letter was sent to all squid applicants, inviting them to comment on the proposed change in the crew allocation mechanism. These comments are dealt with below.

- 6.1 **Comment:** There are vessels which are permitted for more crew in Tuna Pole than the reduced Squid allocations provide for.
- 6.2 **Response:** The SAMSA certificate must be amended to reflect the reduced allocation and by necessity the crew that may catch Tuna Pole would then also be the reduced number.
- 6.3 **Comment:** DMA and Gerombe each asked for one more crew and this resulted in the allocation to the vessel "The Don" at 23 crew instead of 22.
- 6.4 **Response:** Successful appellants were also allocated the reduced crew numbers. In terms of the reduced allocations table, The Don should be allocated 21 crew and not 22 crew, which meant that DMA and Gerombe were not given any increase. The same applied to any other successful appellant. They were also given an increase up to the new maximums, ie 19, 21 and 25.
- 6.5 **Comment:** There were a large number of complaints about the allocation of 20 crew to Le Tap on the Celia. The allegations were basically that this entity has not been actively involved in the industry for the last 9 or so years and that it was supposed to be apply with another entity for long term rights. Le Tap reneged on this deal and applied instead on its own with the vessel Celia, a 38 year old vessel that was withdrawn from the fishery some time ago.
- 6.6 **Response:** The vessel Celia was found to be suitable and a right was therefore allocated to Le Tap to use this vessel. The other allegations were not considered relevant or strong enough to warrant further investigation.
- 6.7 **Comment:** There were a number of complaints about the restricted right holders receiving unrestricted rights.
- 6.8 **Response:** Doing away with restricted rights was a clear policy objective in the long term rights allocations process.
- 6.9 **Comment:** It was pointed out that some right holders share equally 11 or 13 or 10 crew each (example Saggiarius and Offshore each have 11 crew on the vessel Galaxy).
- 6.10 **Response:** They were allocated 10.5 crew each.

- 6.11 **Comment:** The Sikelela is 14.6 metres and should be allocated 16 and not 20 in terms of the table. Lucky Luke is 12.6 metres and should be allocated 12 not 16 crew.
- 6.12 **Response:** Unfortunately in the list sent to the applicants, the new amended lengths were not given. The Lucky Luke is in fact 14 metres (SAMSA incorrectly recorded the length as 12.6) However, the claim for an increased length of the Sikelela of over 15 metres were not recognised. The evidence attached was a Certificate of Registry and not the SAMSA certificate. The latter still stated 14.6 metres and 16 crew was allocated.
- 6.13 **Comment:** Some medium term right holders brought in vessels on the express promise that they will operate with a certain number of crew.
- 6.14 **Response:** The allegation was not specific and could accordingly not be taken into consideration. It was in any event not clear how such promises could bind the applicant and the decision-makers in the long term rights allocations process.
- 6.15 **Comment:** The Ichabo is 15.9 metres long and should be given 20 crew and not 16.
- 6.16 **Response:** This is correct.

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

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

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



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• Residual Elements (CSI)	10%

The delegated authority has given some of the pillars of the broad-based BEE insufficient weighting. Conversely the delegated authority has erred in over-weighting some of the core elements of broad-based BEE. The assessment of BEE used by the delegated authority is extremely narrow-based and is heavily focused on equity ownership and black management earnings, which is clearly contrary to the national policy on BEE. The delegated authority has failed to consider non tax-deductible donations in the assessment of CSI. Accordingly the assessment of CSI is flawed. The assessment of BEE is also inconsistent with the approach followed by the Department in other sectors of the fishing industry. There is no rational explanation for assessing BEE initiatives differently in different sectors of the fishing industry.

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## New entrants

5.17 **Complaint:** Complainant was granted a right on appeal in 2001, but excluded in 2001 for being late. It argues that it should not be treated in the same manner as other “*new entrants*”. Argument is made that it is not correct to exclude new entrants on the basis that “*current effort levels cannot be sustained*” in light of the fact that in the sector policy it is stated that the resource is “*optimally exploited*”. It is also argued that “*effort creep*” is best addressed by having a closed period (more than the current month). While the 15% increase in black ownership is an improvement, transformation of the squid fishery lags behind other sectors of the fishing industry. Compared to the others (30% increase in Tuna Pole) there has not been “*notable*” improvement.

5.18 **Complaint:** Complainant argues that the policy provides that new entrants must be accommodated if necessary to notably improve the transformation profile of the fishery. It is then argued that 49.23% black ownership does not represent a notable improvement. This is particularly so in light of the fact that it is stated that of the more than R 327 million paid in dividends, only R 5.6 million was paid to blacks.

5.19 **Response:** For the reasons stated in the delegated authority’s GPR, it was decided that new entrants could not be accommodated. The Minister agreed with the reasons for excluding new entrants.

## **6. The Decisions on Appeals and the Allocation of Effort**

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The Minister decided to allocate rights to 13 appellants, bringing the total of successful Medium Term Right Holder applicants to 122. While there were more than enough vessels available to allocate to the successful appellants, an insufficient numbers of crew were available to accommodate all the successful appellants. The Minister obtained the requisite number of crew by reducing the maximum numbers of crew allocated to the larger vessels in the following manner:

- 15- 17 metres vessels, maximum crew allocated reduced from 20 to 19
- 17- 19 metres vessels, maximum crew allocated reduced from 22 to 21
- over 19 metres vessels, maximum crew allocated reduced from 26 to 25

Prior to effecting this reduction, the Minister consulted with the applicants. A letter was sent to all squid applicants, inviting them to comment on the proposed change in the crew allocation mechanism. These comments are dealt with below.

- 6.1 **Comment:** There are vessels which are permitted for more crew in Tuna Pole than the reduced Squid allocations provide for.
- 6.2 **Response:** The SAMSA certificate must be amended to reflect the reduced allocation and by necessity the crew that may catch Tuna Pole would then also be the reduced number.
- 6.3 **Comment:** DMA and Gerombe each asked for one more crew and this resulted in the allocation to the vessel "The Don" at 23 crew instead of 22.
- 6.4 **Response:** Successful appellants were also allocated the reduced crew numbers. In terms of the reduced allocations table, The Don should be allocated 21 crew and not 22 crew, which meant that DMA and Gerombe were not given any increase. The same applied to any other successful appellant. They were also given an increase up to the new maximums, ie 19, 21 and 25.
- 6.5 **Comment:** There were a large number of complaints about the allocation of 20 crew to Le Tap on the Celia. The allegations were basically that this entity has not been actively involved in the industry for the last 9 or so years and that it was supposed to be apply with another entity for long term rights. Le Tap reneged on this deal and applied instead on its own with the vessel Celia, a 38 year old vessel that was withdrawn from the fishery some time ago.
- 6.6 **Response:** The vessel Celia was found to be suitable and a right was therefore allocated to Le Tap to use this vessel. The other allegations were not considered relevant or strong enough to warrant further investigation.
- 6.7 **Comment:** There were a number of complaints about the restricted right holders receiving unrestricted rights.
- 6.8 **Response:** Doing away with restricted rights was a clear policy objective in the long term rights allocations process.
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- 6.10 **Response:** They were allocated 10.5 crew each.

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- 6.13 **Comment:** Some medium term right holders brought in vessels on the express promise that they will operate with a certain number of crew.
- 6.14 **Response:** The allegation was not specific and could accordingly not be taken into consideration. It was in any event not clear how such promises could bind the applicant and the decision-makers in the long term rights allocations process.
- 6.15 **Comment:** The Ichabo is 15.9 metres long and should be given 20 crew and not 16.
- 6.16 **Response:** This is correct.

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

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

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



11 September 2006

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## GENERAL REASONS FOR THE DECISIONS ON APPEALS SQUID SECTOR

### 1. Introduction

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The manner in which the appeals were assessed in the Squid sector by the Minister of Environmental Affairs and Tourism (“the Minister”) is 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, promulgated in GN 1111 in Government Gazette 19205 of 2 September 1998 (the “R5(3) reports”).

Each applicant in the sector will receive the following documents:

- If the applicant appealed, the R5(3) report and a notification letter, informing the applicant of the Minister’s decision on the appeal, together with the reason for that decision; and
- The Appeals GPR.

Copies of all the R5(3) reports and all the score sheets after appeals are available in the Department’s Access to Information Centre (“ATIC”) on 2<sup>nd</sup> Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town. These reports and score sheets were approved by the Minister. The reasons for the Minister’s decisions are accordingly contained in the notification letters, the 5(3) reports, the score sheets and this Appeals GPR.

Apart from the Regulation 5(3) reports, 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 (“the Department”) and the Minister.

### 2. Appeals process

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The decisions in the Squid sector were announced on 28 February 2006. Appeals had to be submitted by 31 May 2006. A total of 86 appeals were submitted in the sector.

All applicants were given access to the original applications of others, unless an 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 April 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 the confidential folder. Requests for access to this folder or to objected parts of the application 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 and the Scoring System**

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The exclusionary criteria were not changed, but, after considering legal advice, the Minister decided that the failure to sign the declaration and to have it attested 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 **comparative balancing criteria for medium term right holders** were changed in the following ways:

- 3.1 Use of means: The Minister determined that the use of medians instead of means would improve the fairness of the criteria as certain applicant responses appeared to be skewing the mean upwards. On appeal, all criteria that were scored with reference to a mean were scored with reference to the median.
- 3.2 The method used in assessing catching performance did not take into account the fact that some right holders operated more than one vessel during the medium term period. This affected the “mean”. Catch performance was disregarded for purposes of the decisions on appeal.

The **comparative balancing criteria for new entrants** were not changed.

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

- 3.3 In the first round of allocations applicants that did not respond to a question that was being scored using means or percentile ranking, were excluded for purposes of ranking the others. For example, if

there were 17 applicants and only 10 provided a response to a section, then the 7 were excluded and the 10 were ranked. The Minister instructed the IT specialists to revise the system. In terms of the revised system, if an applicant 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 responses.

3.4 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 could 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 effort allocation mechanism was changed as described below.

#### **4. Complaints about scores of other applicants**

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

##### **Kupukani Fishing**

4.1 **Complaint:** Kupukani Fishing is a new company which only registered in 2005 and it was never the holder of a medium term fishing right. Kupukani applied for rights on the basis that it was the sole successor of the Fishing Trust which held an 8 man squid permit. The rights that were held by the Fishing Trust was never transferred to Kupukani and they did not provide any evidence of the sale of business by the Fishing Trust to them. Kupukani alleges no legal basis upon which it acquired the rights and obligations held by the Fishing Trust.

- 4.2 **Response:** Only close corporations and companies could apply for long term rights. If such a close corporation or company was the “successor” of an entity such as a trust that held a medium term right, the new entity was recognised as a medium term right holder. Kupukani was assessed as such a successor to a medium term right holder.

Paragraph 7.2 of the General Policy provides as follows:

*“In terms of this policy, commercial fishing rights in the Cluster A and B fisheries will be granted only to entities incorporated in terms of the Close Corporations Act 69 of 1984 and the Companies Act 61 of 1973. Medium term right holders that operated in the form of trusts or co-operatives or sole proprietorships, must take steps to convert to a close corporation or a company before the allocation process and nominate the new entity as the applicant. The nominated close corporation or company will be treated as an existing right holder, provided that such an applicant demonstrates that the close corporation or company will be the sole successor of the previous right holder. A right will be granted to the new entity and not to the individual or the trust. This policy does not mean that a trust is precluded from holding shares in an applicant or right holder.”*

- 4.3 **Complaint:** Kupukani does not have access to a suitable vessel, the jobs claimed by Kupukani is incorrect since these employees are employed by Jurassic. In section 6.4.3 Kupukani claimed to have provided benefits to its employees but this cannot be correct as it does not have any employees. In annexure 6J Kupukani claimed to have paid salaries to shareholders which are actually employees of another entity. In section 7.9 Kupukani claimed to be registered with Compensation Commissioner and submits a notice of assessment in of another entity. In In 7.10 Kupukani claimed to have an HIV policy but annexes the policy of another entity. In 7.12 Kupukani claimed to have an Alcohol and Substance abuse policy but annexes the policy of another entity. The investment claimed by Kupukani is actually investment made in a vessel in the hake longline sector.

- 4.4 **Response:** The allegations against Kupukani will be investigated after the allocations process is completed.

## 5. 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 quantum allocation mechanism.

### **Salaries spend on training**

- 5.1 **Complaint:** According to the GPR, points were given if the percentage of salaries spent on training in 2004 was higher than the mean but the score sheets states that applicants were awarded points if the training spend was higher than one percent of the salary bill.
- 5.2 **Response:** Complainant refers to an incorrect version of the GPR. Applicants were allocated the points if training spend was higher than one percent of salary bill.

### **Training of black persons**

- 5.3 **Complaint:** The delegated authority erred in not granting the complainant 0.5 points as none of the applicants including the complainant provided an answer under this category in terms of the internal scoring breakdown.
- 5.4 **Response:** This aspect was not scored and it was decided not to allocate points for this criterion on appeal.

### **Discretion to reduce crew**

- 5.5 **Complaint:** The discretion afforded to the delegated authority to allocate a lesser number of crew than that indicated in the table is problematic, according to complainant.
- 5.6 **Response:** This discretion is essential in order to afford the power to the Minister to reduce crew in order to accommodate more vessels and therefore more appellants, as he has done in the present appeals process.

### **Broad-based black empowerment incorrectly assessed**

- 5.7 **Complaint:** The basis upon which the delegated authority sought to compare and assess applicants based on an increase in black ownership is fundamentally flawed. The definitions of black ownership in 2001 applications process differed from those in 2005. No meaningful comparison can be made of the raw numbers inserted by applicants into the table in section 6.7.1 of the application form. If points are awarded to applicants for improvement in BEE ownership during the period between the 2001

applications and the long term rights applications, then the Minister will unfairly prejudice applicants that undertook BEE transactions prior to 2001.

5.8 **Response:** The comparison should be made on a flow-through basis. In other words, an applicant had to apply the flow-through principle to both the 2001 and 2005 calculation of black ownership. Applicants that transformed prior to 2001 were rewarded in the medium term allocation process and the long term allocation process.

5.9 **Complaint:** The decisions of the delegated authority as reflected in the GPR read with the criteria and weightings are based on an incorrect and improper assessment of BEE. This error will have a serious impact on the assessment of applicants. The delegated authority failed to follow the nationally identified pillars of broad-based BEE and the weightings in the Codes of Good Practice. The following weightings should have been given to the seven pillars of broad-based BEE:

• Ownership	20%
• Management	10%
• Employment Equity	10%
• Skills Development	20%
• Preferential Procurement	20%
• Enterprise Development	10%
• Residual Elements (CSI)	10%

The delegated authority has given some of the pillars of the broad-based BEE insufficient weighting. Conversely the delegated authority has erred in over-weighting some of the core elements of broad-based BEE. The assessment of BEE used by the delegated authority is extremely narrow-based and is heavily focused on equity ownership and black management earnings, which is clearly contrary to the national policy on BEE. The delegated authority has failed to consider non tax-deductible donations in the assessment of CSI. Accordingly the assessment of CSI is flawed. The assessment of BEE is also inconsistent with the approach followed by the Department in other sectors of the fishing industry. There is no rational explanation for assessing BEE initiatives differently in different sectors of the fishing industry.

5.10 **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. Tax deductible donations were scored as these were verified by SARS and the data was accordingly more reliable.

5.11 **Complaint:** The delegated authority erred by adopting a scoring system, which allocated points to right holders under various headings according to the percentile into which they fell. The scoring of BEE by the delegated authority should be amended by the Minister to remove undue focus on the relative positions of different applicants in arriving at the score of each individual.

5.12 **Response:** 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.

#### **Insufficient information provided**

5.13 **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.

5.14 **Response:** Applicants were provided with this information on 26 April 2006.

#### **Reserve right to appeal if score changes**

5.15 **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. Complainant reserves the right to appeal any change in score or quantum.

5.16 **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.

## New entrants

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