



18 August 2006

GENERAL REASONS FOR THE DECISIONS ON APPEALS HAKE DEEP SEA TRAWL SECTOR

1. Introduction

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

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

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

The Minister approved the R5(3) reports. The reasons for the Minister’s decisions are accordingly contained in the R5(3) reports, the score sheets, this Appeals GPR and the notification letter. The Minister also considered legal memoranda and legal opinions. The contents of these documents are confidential and

privileged and will not be released without the consent of the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management (“the Department”) and the Minister.

2. Appeals process

The decisions in the Hake Deep Sea Trawl sector were announced on 12 January 2006. Appeals had to be submitted by 14 March 2006. A total of 58 appeals were submitted in the sector.

Thereafter, on 31 March 2006, all the appeals submitted in the sector were made available for comment in terms of section 80(3) of the MLRA. The appeals were available in the Department’s Access to Information Centre (“ATIC”) on 2nd Floor, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town from 31 March 2006 to 6 April 2006. Comments on the appeals had to be submitted by 13 April 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 20 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.

Two additional submissions were received after the closing date for appeals. The first, by SACO Fishing (Pty) Ltd was not made available for comment as it was decided that the contents would not affect the outcome of the appeals. The second, by the Sea Harvest Corporation Limited were e-mailed to all applicants in the sector on 31 July 2006. Comments on this late submission had to be submitted by 2 August 2006. The vast majority of applicants contended that the Minister should take the submission into account, even though it was late. The Minister agreed and took it into account. Two appeals (Noordkaap Visserman Onderneming (Pty) Ltd, and Visko Seeproducte (Pty) Ltd) were dealt with on an urgent basis. One other appeal was submitted on an urgent basis but was assessed not to be urgent.

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 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 HDST 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.

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

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

- 3.3 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. 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 a response.
- 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 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.

3.5 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.

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

4. Systemic complaints not accepted

This part of the Appeals GPR deals with some of the systemic complaints that were not accepted and that, accordingly, did not result in a change of the criteria, weighting, scoring system or quantum allocation mechanism.

Broad-based black economic empowerment

4.1 **Complaint:** It was argued that the delegated authority erred by not adopting the criteria and weightings for the assessment of black economic empowerment ("BEE") set in the Broad-Based Black Economic Empowerment Act 53 of 2003 and the Codes of Good Practice. The delegated authority, it was further argued, focussed unduly on certain pillars of BEE and either ignored or gave too little consideration to other nationally recognised pillars of BEE. It was further contended that the delegated authority erred in adopting a scoring system that allocated points to applicants for their relative positions rather than in accordance with their objective BEE achievements.

4.2 **Response:** This issue is dealt with in paragraph 7.3 of the General Policy. The Codes of Good Practice were not followed as they had not been formally adopted when the policies were written and the criteria

and weightings designed. The level of transformation in a cluster and sector and the veracity of information received from applicants were considered when designing the criteria and weightings. The relative scoring system was preferred over external benchmarks, for the reasons set out in the General Policy. It is believed that the competitive nature of the system resulted in applicants verifying the information submitted by others to a much greater extent than in the past, which adds to the credibility of the results.

Weighting of harbour and sea-based assets

4.3 **Complaint:** A weighting of 15 points were given to harbour and sea-based assets whereas only 5 points were given to land-based assets. Appellant states that no indication was given that sea-based assets would be so substantially favoured in the ultimate scoring. Appellant further contends that applicants were informed that there are no hard and fast rules regarding the classification of assets. Those entities that grouped harbour based with “sea-based” scored significantly more than those that grouped harbour-based with “land-based” assets. Land-based investment is important in the sector as value-adding should be encouraged.

4.4 **Response:** It is true the value-adding is encouraged in terms of the policies. However, there appears to be no reason why the delegated authority could not weight assets employed more directly in the harvesting of the resource (such as harbour and sea-based assets) higher than assets used to process or transport the resource on land.

First pool unfair to large quota holders

4.5 **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 HDST 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.

4.6 **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.

Size measured incorrectly

4.7 **Complaint:** Appellant opposes the delegated authority's approach in terms of which size was measured in relation to the hake sector only and not with reference to the entire fishing industry. If larger right holders are to be excluded from the right to participate in the first pool, then the exclusion should apply to all right holders above a specified size.

4.8 **Response:** It will be very difficult to implement this proposal as it will turn on the size of the applicant (including, presumably, its subsidiaries and even JV partners – ie the size of the economic unit) and not the size of the applicant's allocation in a sector. The sector policy affords the Minister the choice whether to redistribute to small companies or to those with smaller allocations.

Scoring system unfair to smaller players

4.9 **Complaint:** The principal error in the design of the process appears to be the decision to evaluate applicants primarily by comparing each one against an arithmetic mean of certain scores achieved by the existing industry players overall. Jobs are important but that does not mean that it should be created without good reason. Investment should be adjudged in the same way, by rewarding efficiency not the reverse. It can hardly be reasonably expected of a small rights holder to create the same sort of value adding activities, as larger players have been able to develop. Comparing smaller companies against larger ones in relation to jobs is a case of comparing the proverbial apples with pears. Furthermore in comparing similarly sized companies, merely counting heads in terms of IRP5's issued does not serve to reveal either the quality or the sustainability of the jobs concerned. It should be noted that the weightings have the hallmarks of having been gerrymandered to produce a result that would approximate an intended one. In this regard, the weighted scoring of certain categories amounts to no more than tokenism. For example safety and financial performance at 1.5% each. Even when a substantial (but insufficient) weight is attached to certain categories such as investment, one finds that arbitrary and irrelevant criteria are utilised. Thus 15% of applicants' scores are based on the insured value of assets, which may be very different from the real value as some choose to act as their own insurers in respect of a portion of any loss. Others insure for replacement value while others over-insure. Yet companies are rewarded for their misjudgements by the award of a greater quantum of fishing

rights. The result is that certain criteria in fact should not have been used or at least not given the weight they were. The most controversial category and the one most subject to criticism is the criterion of Transformation. It is indeed ironical that this factor more than any other have resulted in the appellant's loss of fishing rights despite the fact that it is sufficiently transformed. It is unreasonable and impracticable to require a score above the 75th percentile when a company with 51% black ownership gets a score placing in the range of 25th to 50th percentiles. 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 400 tons from each applicant, which would have been unobjectionable if all participants enjoyed the same rights. The appellant's share of the quantum after adjustment for the reduction in the TAC was only 397 tons. Bearing in mind that this is an established capital intensive fishery such a procedure exposed the appellant to a significant danger of arbitrary and inordinate loss of fishing rights.

- 4.10 **Response:** There is no merit in these complaints. Most of them are dealt elsewhere. Several features (for example, the recognition of investment made and jobs created through a joint venture and the assessment of these aspects on a per ton allocated basis) made it possible to compare big with small.

Quantum allocation mechanism unfair

- 4.11 **Complaint:** The quantum allocation mechanism used by the delegated authority is inequitable, unjust and invalid. It is inequitable as it utilises a double reward/penalty system as the final score not only contributes to the final allocation from the MTR pool but it is also used to assess the relative contribution to the initial 10% pool. It is invalid and the delegated authority erred in using it as in terms of the HDST 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 delegated authority has breached the requirements of the General Policy and has acted *ultra vires*. The mechanism is wholly inequitable and does not comply with the objectives as set out in the Minister's policy. A clear example from this inequitable result is the fact that as a result of this pool the biggest right holder in this sector contributed 400 tons to the MTR pool and was reallocated 684.29 tons representing an increase of 71% from this pool. The largest right holder contributed 1% of its total allocation while the smallest right holder contributed almost 200% of its allocation, which is wholly inequitable. The factual situation is that through the use of this mechanism the smaller right holders have subsidised the redistribution of quantum in the HDST sector.

4.12 **Response:** There is no merit in this complaint. There was extensive consultation regarding the quantum allocation mechanism. In respect of the allegation that the smaller right holders subsidise the larger ones, as stated above, the mechanism was purposively designed not to discriminate irrationally against big or small.

Insufficient information provided

4.13 **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.

4.14 **Response:** Appellants were provided with this information on 8 March 2006, prior to closing day for appeals.

Reserving right to appeal any change in score or quantum

4.15 **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. Appellant reserves the right to appeal any change in score or quantum.

4.16 **Response:** This allegation is misconceived. Comparatively balancing is done on the basis of raw (real) data that Appellants may comment on. There is no merit in the argument that an applicant must “*first see the effect of changes to their score*” before they 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.

Consequences of reduction of allocations

4.17 **Complaint:** The economic impact of the delegated authority’s decision to reduce allocations is severe. Appellant refers to the HDST policy where the Minister sets out as over-arching objectives the support of the economic viability of the sector and the creation of “*an environment that attracts investment and stimulates job creation*”. Clearly, no credence has been given to the economic viability of allocations or the stimulation of job creation as the allocations that have been made have reduced barely viable allocations to unviable allocations. The result of this allocation process is that investment has been

wasted and jobs will be lost. The appellant places on record that it will not be able to maintain its current level of employment in the community if the Minister reduces its allocation by 61%. The delegated authority's use of an objective scoring and allocation system has failed to take into account the wider implications of the results of the allocations. The delegated authority has erred in making the allocations he has made, especially with regard to quantum and the Minister is requested to amend the allocations to bring them in line with historical allocations made during the MTR period.

- 4.18 **Response:** The delegated authority reduced the quantum allocated to low scoring applicants. As stated in the GPR, the delegated authority did not have sufficient reason to refuse these applications and he considered it better to let the market determine, in the period ahead, what further consolidation is desirable or appropriate. The comment is noted, but re-distribution of quantum is imperative in the sector. The system chosen to effect re-distribution is fair and rational.

Improper comparison of 2005 black ownership to 2001 figures

- 4.19 **Complaint:** Appellant argues that black ownership was measured and determined on a completely different basis in 2005 as compared to 2001. In 2005 applicants were obliged to exclude pension funds and public entities from the calculation of black shareholders. In 2005 applicants were obliged to adopt a flow-through principle which differed materially from that followed in 2001. In the circumstances, appellant argues, there was a markedly different basis for the calculation of black ownership in 2001 and 2005. Appellant argues that it is accordingly not rationally possible to compare the results of two different methods of calculation.

- 4.20 **Response:** It is agreed that the methods of calculating black ownership are different. However, in order to determine whether there was an increase in black ownership, the comparison should now be done on the 2005, (flow-through) basis. In other words, the 2001 percentage of black ownership should be done on a flow-through basis and then compared to the 2005 percentage.

Insufficient information taken into account

- 4.21 **Complaint:** Appellant contends that the approach taken by the delegated authority was limited in that it only took the applicants' 2004 performance into account. Appellant feels that the delegated authority should have considered investment over a longer period of time in order to provide him with a more realistic view of applicants' performance over the medium term period. The Appellant has been a right holder since 1996 and has consistently invested in the sector. However the appellant holds that it is

being assessed against other applicants who have only made an initial investment in 2004. In light of this, the appellant feels that it has not been sufficiently awarded for investment and job creation. Furthermore, the appellant avers that “insured value” of assets is not a true representation or true extent of an applicant’s investments. The reasoning is that the longer an applicant has had an asset, the less the replacement value will be and in turn, the insured value would be less too.

4.22 **Response:** A point of comparison had to be found. In many (but not all) instances it was decided to use the 2004 financial year. It is not clear why the “length” of investment should be taken into account. As for the allegation regarding insured value, applicants were allowed to specify market value if the insured value was not a true reflection of the value of the investment.

Exclusion of new entrants

The following objections are raised against the exclusion of new entrants:

4.23 **Complaint:**

- It is submitted that the delegated authority’s decision to exclude new entrants in this sector is unlawful as the delegated authority did not have regard to the Act and the Policies.
- The delegated authority is bound by the provisions of the Act and the Policy.
- S 18(5) states of the Act provides that particular regard must be given to new entrants,” particularly those from historically disadvantaged sectors”.
- Further, the Appellant refers to the *Bato Star* court case, in which the judge had emphasized the need to transform the fishing industry. In fact, transformation was referred to as the “foundational principle”.
- It is clear that the intention of the legislature and the pronouncements of the Constitutional Court stipulate that one of the main tools of achieving transformation in the fishing industry is by admission of New Entrants.

- The New Entrants should take the place of the low scoring or excluded MTRH's as those MTRH's should not receive the right and have shown, due to their low scoring that they should not be allocated a right in the long term process.
- The Appellant accordingly demands that it is reimbursed its application fees and the fees spent on auditors, consultants for the expenses incurred by it in order to apply for this process as the decision to not allow new entrants into the sector was already taken prior to the invitations to applicants.

4.24 **Complaint:** The fact that 7 MTRH's were excluded should allow for exceptionally strong new applicants to enter the industry.

4.25 **Complaint:** the Female ownership in this sector is only 22% which indicates that the policy objective to “notably” improve the transformation policy of the sector, especially in relation to female ownership was disregarded. National targets for female empowerment was 33% for 2005 and 50% for 2010. The Minister can not be satisfied that this percentage of empowerment has been achieved in the sector.

4.26 **Complaint:** Appellant argued that the delegated authority erred in excluding new entrants from the HDST sector. Appellant argues that in view of the fact that section 18(5) of the MLRA stipulates that *“the Minister shall, in order to achieve the objectives contemplated in section 2 [of the Act – such as, for example, the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry], have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sector of society”*, the Minister should include one or more new entrants.

4.27 **Complaint:** Appellant argues that the delegated authority erred in finding that no new entrants should be allowed into the HDST sector. Appellant argues that the obligation on the delegated authority to take special steps to accommodate applicants from previously disadvantaged communities is highlighted in various provisions of the MLRA and is entirely congruent with the Constitution, particularly section 9(2) which authorizes special measures to achieve equality. Appellant argues that the upfront decision to exclude all new entrants to the sector is contrary to the provisions of the MLRA and the Constitution.

4.28 **Complaint:** Appellant argues that various late applications in the Hake Trawl sector were granted an inexplicable indulgence by allowing their applications to be considered, scored and rights granted pursuant thereto. In the medium term allocations late applications were categorically excluded with the

Minister taking matters to the Supreme Court of Appeal where the Minister was ultimately successful in his policy for late applications. In the current procedure, the matter did not even reach the Court and for some unknown reason the Minister decided to allow late applications. Appellant argues that had these late applications been excluded, as the legal precedent indicate they should have been, there would have been further spare tonnage for allocation to new entrants.

4.29 **Complaint:** Appellant argues that the delegated authority's decision to exclude new entrants in this sector is unlawful, having regard to the Act and the policies (both General and Sector specific) as issued by the Minister. Appellant argues that the intentions of the legislature and the pronouncements of the Constitutional Court in the *Bato Star Fishing* case make it clear that one of the main tools of achieving transformation in the fishing industry is by the admission of new entrants. Appellant argues that the Minister should overturn the delegated authority's decision not to admit new entrants in the sector and the highest scoring new entrants should be admitted to replace those excluded and low scoring MTRH applicants.

4.30 **Complaint:** Appellant argues that the delegated authority misdirected himself by excluding new entrants. Appellant argues that in doing so the delegated authority acted in breach of the equality provisions in the Constitution.

4.31 **Complaint:** Appellant argues that the delegated authority's decision not to grant any fishing rights to new entrants goes against all government policies, i.e. redistribution of wealth and the upliftment of PDIs as well as the Department's policy which was promoted by the Minister.

4.32 **Response:** The Minister agreed with the delegated authority that the stated need for consolidation in the sector and the reduction of the TAC from 2005 to 2006 (8000 tons) and the probable further reduction of the TAC in coming years, meant that the number of participants in the fishery could not be increased. As the delegated authority, the Minister was also not persuaded that any of the new entrant applicants was sufficiently strong to replace the excluded medium term right holder applicants.

5. Approach to assessment of information

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

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

- 5.1 **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.
- 5.2 **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 provided it was not unfair to other applicants. 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

- 5.3 **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 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 to certain applicants. Events that took place after the specified date or outside the specified period were accordingly taken into consideration if this was not unfair to other applicants; if the information related to the medium term period; and if the action was not artificially taken purely for purposes of rights allocation.

IT3(A) and IRP5 employees

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

5.6 **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 required in the application form.

Under-utilisation

5.7 **Complaint:** Complaint that there has been inconsistency in the manner in which under-utilisation has been assessed.

5.8 **Response:** On appeal, the reasons for under-utilisation, were assessed again. In the result, all explanations by appellants were accepted. The assessments of applicants that did not appeal were not changed.

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.

Anglo Mar

6.1 **Complaint:** Anglo Mar claims a high land based investment. Appellant believes that the investment has been incorrectly boosted by the inclusion of an investment in a salt-fish processing factory in Atlantis which is equipped for the salting of snoek, horse mackerel and barracuda and plays no role whatsoever in the processing of hake. The factory also produces Barracuda, Jack Mackrel, Saithe, Blue Whiting, Horse Mackrel and other by-catch species from New Zealand, Chile, Europe, South Atlantic and South Africa. The employment of the 35 employees is also incorrectly included as these employees have no connection with the HDST sector and should therefore be excluded.

6.2 **Response:** The Viking Group does address this issue satisfactorily in their appeal and section 80(3) comments. As became clear from the assessment of this issues over several sectors, a rough apportionment of investment was good enough (it is not necessary that the asset be employed full-time in the HDST sector). The real danger is double counting. The approach has not been to insist on a technically correct manner of apportioning jobs and investments to various sectors.

Azanian Fishing

6.3 **Complaint:** The number of employees (inc. seasonal) is claimed to be 0.08. This is incorrect as 8 employees divided by 614 tons = 0.013.

6.4 **Response:** This was corrected.

Bato Star

6.5 **Complaint:** Bato Star Fishing (BSF) claims to hold 70% of the shares in Ntlanzi Fishing Enterprises (NFE), owners of the vessel Sandile. Algoa Bay Sea Products (ABSP) holds 20% of the shares in NFE. Whilst ABSP claimed investment at an insured value of R 3 million, BSF seems to have claimed 100% of the vessel's insured value and not just their 70% claimed shareholding. According to a contract signed 21 June 2005 annexed to BSF application, they own 60% of NFE. The 60% agrees to the data in the ABSP application.

6.6 **Response:** A letter was written to Bato Star. After assessing the response, the claim in respect of Ntlanzi Fishing Enterprises has been reduced to 60% due to the 30% that was not deducted and a further 10% that is now claimed by Eigelaars Bote. This was also admitted by Bato Star in the section 80(3) comment process.

Bayview

6.7 **Complaint:** The audit report of Bay View Fishing points to a number of errors and omissions in the application form. In short, there appears to be very little correct in respect of the application form. The original audit report was wholly inadequate.

6.8 **Response:** The audit report of Bay View Fishing submitted on appeal was taken into account but claims that could not be verified by auditors were not recognised.

Community Workers Fishing Enterprise

6.9 **Complaint:** Community Workers claims 32.85 jobs. However, the table 8.1.1, which should agree to 8.1.3, it claims total jobs provided in this sector as 107, of which 104 is claimed to be employed by the

Marie Claire Vessel Company. The MFV Marie Claire has a maximum crew of 42 employees, thus the claimed 104 employees must be incorrect. The vessel Marine Claire is also authorised for use by Hoxies and Fernpar. Annexure 6G to table 8.1.1 in the Hoxie application claims Marine Claire employees per ton to 0.03 which is also incorrect. The applicant incorrectly recorded the number of employees per ton as 5.43 instead of 0.0543. Applicant's assessment sheet states "Applicant appears to have merged its own employees with all the employees in the MFV Marine without apportioning per shareholding. Other applicants using the same vessel provided that vessel has 56 employees". The data amendment sheet reflects that the number of employees should be reduced to 9 for 8.1.1 and 8.1.3. Both sections were scored on 18 employees. This amendment was not done to the number of IRP5 employees or salaries and wages per ton.

- 6.10 **Response:** A letter was sent to the applicant. An explanation was given and the claims were recognised at 0.015 IRP5 jobs per ton, and 0.0284 total and total (less seasonal) jobs per ton.

Dyer Eiland Visserye

- 6.11 **Complaint:** As can be seen from the tables 8.1.1 in both HDST and HIST, Dyer Eiland has submitted identical information in respect of the two sectors. The apportionment of jobs and salaries should have been included as an annexure 8A which has not been provided by Dyer Eiland in either their HDST or HIST applications and accordingly the IRP5 jobs calculation for Dyer Eiland in both sectors is incorrect. The salaries declared by Dyer Eiland also seem to be incorrect..

- 6.12 **Response:** Letter was sent to Dyer Eiland. From its response, it is clear that Dyer Eiland has double claimed the 6 jobs shared between the hake deepsea and inshore sectors. This has now been apportioned by allocated 3 jobs in each sector. The apportionment of the rest of the jobs and the salaries appears to be correct.

EFH Walters Trawling

- 6.13 **Complaint:** EFH Walters Trawling (Pty) Ltd claims a percentage of 23.07 learnerships but it claims no IRP 5 jobs.
- 6.14 **Response:** A letter was sent to EFH Walters Trawling. EFH Walters admitted in reply that it did not provide learnerships. In the response it appears as if the question was misunderstood. The claim

was not recognised and the points allocated to EFH Walters Trawling for this category were taken away.

6.15 **Complaint:** EFH Walters' jobs per ton were incorrectly calculated as 2.93 and should be 0.03 as it has 13 employees and an allocation of 443 tons.

6.16 **Response:** A letter was sent to EFH Walters. In its reply EFH Walters Trawling states that its joint venture partner refused to provide it with information pertaining to the jobs. It is clear there was double claiming and the jobs creation score of EFH Walters has accordingly being reduced to zero.

Eigelaars Bote

6.17 **Complaint:** Eigelaars Bote claimed that the investment of R 1.8 million made on 21 June 2005 should be recognised. BCP states that this investment was made well after the cut-off date and that it should be ignored.

6.18 **Response:** The claim was recognised. It appears that the investment was sufficiently related to the medium term period.

Eyethu

6.19 **Complaint:** Eyethu Fishing (Pty) Ltd's black ownership should be investigated as they state in annexure 1A that two of its current shareholders namely Ziyabuya Fishing and Siyabambili Fishing will no longer be shareholders as from 1 January 2006.

6.20 **Response:** The fact that Ziyabuya Fishing and Siyabambili Fishing will no longer be shareholders as from 1 January 2006 is not strictly speaking relevant as it refers to an event after closing day. The issue is addressed by Eyethu Fishing in their section 80(3) comments and there appears to be nothing abnormal about this issue. It does not appear as if the shareholding was held at closing date purely for purposes of the application process.

6.21 **Complaint:** According to calculations done by Eyethu, which catches and processes Saco's fish, 72 of the total employees of Eyethu is allocated to Saco Fishing Hake Trawl (Deep Sea). Saco, however, again allocates 58 of 72 employees to hake and the balance to mackerel. This casts doubt over the allocation of employees by Eyethu to their JV partners G&T Fishing Enterprises and Ziyabuya Fishing in the HDST sector.

6.22 **Response:** The matter was analysed and it was found that the apportionment was done correctly.

Fernpar

6.23 **Complaint:** Fernpar should not be allowed to include shareholders loans and retained earnings as “investment”.

6.24 **Response:** The shareholders loans and retained earnings were not recognised as “investment”.

6.25 **Complaint:** The interest in the vessel Marie Clair is claimed to be 40% as per the organogram in annexure 1A. The access to vessel agreement signed 29 July 2005 states an interest of 11%. Insured value of sea-based assets include 19% = R 1.4 million of the vessel Donna Maria Liga. This vessel is not nominated or authorised for use by Fernpar. Also in annexure 1A the applicant claims it owns 13% of the vessel company, not 19%. Annexure 1A also states that Fernpar has equity in Ntlanzi Fishing Enterprises that forms part of Fernpar’s midwater trawl investment. Has the correct split of investments been done? Insufficient data is available in the application file to resolve these concerns.

6.26 **Response:** The issue is addressed by Fernpar in the section 80(3) process. On assessment, it was found that the apportionment was correctly done and no further explanation was requested.

Foodcorp

6.27 **Complaint:** Foodcorp’s employee ownership is not 97.76% but 20%.

6.28 **Response:** This has been addressed across all sectors. Foodcorp admitted in its response that the employee ownership is 20%. Foodcorp misunderstood the question, which was admittedly not very clearly formulated.

6.29 **Complaint:** Foodcorp should not be allowed to claim the insured value of leased buildings in the V & A Waterfront.

6.30 **Response:** A long lease in respect of buildings owned by a third party is not investment. This was made clear in the Queries and Responses where it was stated that ownership of land would be

included as insured investment but leased premises not. Foodcorp's insured value of leased buildings in the V & A Waterfront was not recognised.

6.31 **Complaint:** Annexure 8A reflects how salaries and the number of employees is split between hake, pelagic, west coast rock lobster and abalone. The calculation reflects salaries being split to abalone. This seems to be an error. No split is done to horse mackerel and south coast lobster, fisheries in which the applicant is involved.

6.32 **Response:** No further information was requested as the apportionment is clear from the outset. See also the section 80(3) comments of Foodcorp. The interest in the abalone factor was sold during the financial year ended August 2004 – at the end of February 2005 there was no employees for the headcounts. No split was made to Horse Mackerel and South Coast Rock Lobster.

Hangberg Fishing Company

6.33 **Complaint:** Hangburg claims 57 jobs. This seems very high as Hangburg operates a single vessel, the Sveinn Jonsson, which has an authorised crew of 22. This seems to emanate from a detailed crew list of the company Sentrawl, owner of the Sveinn Jonsson, which lists 54 employees.

6.34 **Response:** A letter was written to Hangburg. The issue was fully addressed (crew rotates) and the jobs were accordingly recognised. The matter was also addressed in the section 80(3) comments process. Hangberg claims Land-based IRP 5 – 3, Sea-based IRP 5 – 22 and Land-based (casual) – 32. The total of 57 jobs claimed is therefore correct, according to Hangberg.

Hoxies

6.35 **Complaint:** Hoxies seemed to be double counting their employees as its states that the total employees less seasonal is 31 and their total number employees in the fishery as a whole is 17. Applicant claims investment in land-based assets calculated as a pro rata portion of their total assets divided by the total volumes sold multiplied by fish volumes sold. Assets have been claimed using fish volumes of 3 452 tons, whilst they have a quota of only 481 tons. The allocated quota is furthermore caught and processed on board a freezer trawler, with no valued being added on land. Hoxies is a trading operation and the land-based assets cannot be claimed as “in this fishery”. Hoxies' assessment sheet indicates that the number of employees claimed under section 8 has been

reduced from a claimed 266 IRP5 jobs to just 9, stating “applicant has provided information not involved in the sector.”

- 6.36 **Response:** A letter was sent to Hoxies. An analysis of the response reveals that Hoxies has been correctly assessed with 31 employees, all of whom are apportioned to the vessel Marie Claire, in which Hoxies has a 26% share. The new claims made by Hoxies on appeal relating to land-based jobs and investments were recognised.

Irvin & Johnson

- 6.37 **Complaint:** Complaint that “unknowns”, such as the pension fund shareholding may not be carried forward, otherwise everyone should be allowed to do this.

- 6.38 **Response:** The manner in which I & J calculated the black shareholding is logical and rational. It was never explicitly stated that “unknowns” and “neutrals”, such as pension funds, may not be carried forward. The re-calculation of Sea Harvest (the complainant) is accepted subject to one qualification. Brimstone Ltd should be taken as 47.4% black and not as 65.8% black. If this factor is taken into account, then the black shareholding in Sea Harvest, according to the new calculation would be 36.13%.

- 6.39 **Complaint:** I&J’s black ownership was amended to 36.85%, the direct black shareholding in I&J is 21.27%. Indirect black shareholding in Anglovaal Industries Limited must therefore be 15.58% (36.85% - 21.27%), which seems very high and the Minister must investigate the black shareholding of I&J.

- 6.40 **Response:** This matter is fully dealt with by I & J in the section 80(3) comments. The argument is based on wrong facts.

- 6.41 **Complaint:** According to the data provided I & J has also invested in Meat products, Abalone, Squid, Tooth fish and Horse Mackerel. Has the investment in these non-hake sectors and activities been deducted from their investment? The vessels Roxana Bank and Iris are also nominated in the I&J horse mackerel application at an insured value of R 49.4 million. Inclusion of any value of these two vessels in the I&J sea-based assets in the HDST fishery would reflect a duplication of investment values over the horse mackerel and HDST sectors. Insufficient data is available in the application file to resolve these concerns.

6.42 **Response:** No further information was requested as the matter has been fully explained by I & J, inter alia in its section 80(3) comments, and there appears to be no need to clarify matters.

J & J Visserye

6.43 **Complaint:** J & J Visserye contend on appeal that it should be scored points for the investment and job creation relating to the vessel “Dantago”. This vessel was only registered in its name on 16 February 2005.

6.44 **Response:** J & J Visserye: the claims regarding the vessel “Dantago” was recognised This vessel was only registered in the name of Dantago on 16 February 2005 but it was sufficiently related to the medium-term period.

Luzizi

6.45 **Complaint:** Blue Continent Products and Luzizi has been double scored for employment equity compliance and 0.5 points should be deducted.

6.46 **Response:** This mistake was been corrected.

Mayibuye

6.47 **Complaint:** Mayibuye’s wage bill relative to sectoral turnover is 54% which is incorrect and in addition they state that they own a vessel, yet in the section dealing with sea and harbour assets no mention is made of any book or insured values.

6.48 **Response:** A letter was sent to Mayibuye and a satisfactory explanation was received. Mayibuye operates a processing plant and a vessel in the HDST sector. The plant also processes the Hake Inshore Trawl quotas of Chetty’s Fisheries and Capensis.

Noordkaap Visserman Onderneming

6.49 **Complaint:** Noordkaap Visserman claims that it does contribute towards medical aid and pension fund on behalf of employees. However, in the application (Annexure 6E) it is stated that the provident

fund is “currently being registered” and in the application (Annexure 6F) it is stated that Noordkaap “is in the process of investigating the establishment of a new medical fund for the industry through Thebe Medical Benefits”. Also, Noordkaap claims 35 employees in relation to this fishery. This seems too high as applicant utilises two freezer trawlers in a JV with DMA Fishing Enterprises and no value is added to the product on shore. These two freezer trawlers have a total of 22 crew according to the Fishing Industry Handbook. Assessment sheet states “No annexure 8A explaining the jobs”). Applicant’s response was however not amended and applicant was allocated a score of 6 for (S8) jobs.

- 6.50 **Response:** The claims regarding medical aid and pension fund on behalf of employees were recognised as sufficient proof was provided on this aspect on appeal. A letter sent to the applicant in respect of the jobs claim. The issue is fully addressed and the claim has been assessed to be correct. Noordkaap also commented on this aspect in the section 80(3) process. The jobs and investments of the joint venture were apportioned correctly.

Oceana Group of Companies

- 6.51 **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%.
- 6.52 **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%.
- 6.53 **Complaint:** Blue Continent Products and Luzizi has been double scored for employment equity compliance and 0.5 points should be deducted.
- 6.54 **Response:** This mistake was been corrected.

Offshore

- 6.55 **Complaint:** Offshore Fishing should not be allowed to claim jobs and investments relating to the Eyodidi, as this vessel was only ready to catch Offshore’s quota in July 2005 (the investment was therefore made after the relevant period and the jobs were created after the relevant period).

6.56 **Response:** A letter was sent on this aspect and a response was received. The investment and jobs were recognised. It appears that the investment and jobs are sufficiently related to the medium term period.

Pellsrus

6.57 **Complaint:** Pellsrus Historical Fishing Corporation CC is not entitled to claim more than 11% of the joint venture as the apportionment was based on quota actually caught. During 2004 Pellsrus arranged for a portion of their quota to be caught by another vessel and they retained the income. There is also a letter from attorneys, acting on behalf of the Emile Adrien Vessel, stating that Pellsrus and Impala have refused to put their permits on the vessel since 2006 and the vessel has not been able to go to sea.

6.58 **Response:** The full 29% was recognised as per the original allocations. There appears to be an internal dispute between the parties that arose after the applications were made – no changes were accordingly made to the scores on appeal.

Premier

6.59 **Complaint:** According to its access to the vessel agreement, Premier owns 13 out of 64 = 20.3% of the vessel shares of the MFV Realeka. Premier however claimed 48% ownership (which seems to be the profit share, not ownership). The assessment sheet also states “no detail of how total insured is calculated”. The score allocated to Premier was unaffected by the concerns raised on the assessment sheet.

6.60 **Response:** No further information was requested as it was clear that the parties agreed on the apportionment and there is accordingly no need to clarify matters. In the section 80(3) Premier explained that while Premier claimed 20.3% of the insured value of the vessel, and it claimed 48% of the jobs per the JV agreement with Blue Continent Products.

Quayside Fish Suppliers (Cape):

6.61 **Complaint:** Applicant claimed all its 120 employees against the HDST fishery. This may be incorrect as applicant is involved in pilchard and lobster fisheries as well as being a “quality processor of by-catch species previously discarded by most of the large companies”.

6.62 **Response:** The issue was addressed in the section 80(3) process, where it is stated that the correct numbers of employees were claimed.

SACO

6.63 **Complaint:** Eyethu and SACO took into account a percentage ownership of a trust, established for the benefit of the citizens of the Ciskei. The latter no longer exists. If SACO and Eyethu are justified in their approach to the calculation of black ownership through the Trust, then the complainant (Viking) and its associated companies should have its black ownership re-assessed. The Viking Social Upliftment Trust owns 5% in the complainant.

6.64 **Response:** A letter was sent to Eyethu, calling for a full explanation of the black ownership on a flow-through basis. In its letter of reply, Eyethu provides a comprehensive explanation showing that the beneficiaries of the trust, although discretionary, are 100% black persons from the Eastern Cape and that this is in accordance with the objectives of the trust. This issue was also dealt with in the section 80(3) process. With regard to the supplementary late appeal of Viking requesting that it be accorded additional points on account of the black ownership by the Social Upliftment Trust in Viking, this claim cannot be accepted even if it were to be considered. It is not clear that the beneficiaries of the Viking Trust are black persons.

Sea Harvest

6.65 **Complaint:** Brimstone’s equity stake in Sea Harvest Corporation Limited should not be taken into consideration as it consists of a put option which Brimstone can sell at any time for a set price.

6.66 **Response:** This issue is fully addressed by Sea Harvest in the section 80(3) process. The argument that this type of shareholding is normal in black economic empowerment transactions is accepted. The fact of the matter is that Brimstone did hold the shares in Sea Harvest at closing day. It is not clear why it is relevant that Brimstone can sell shares at any time at a given price.

Selecta Sea Products

- 6.67 **Complaint:** Annexure 11A states that the Selecta factory “receives most of the production required by the group” and also produces snoek and shark products. Selecta claims R 14.3 million insured value of land-based assets against its hake quota. It seems as if the full value of the factory is claimed against the Selecta quota, which is incorrect as the application states that the factory provides services to the Viking group as well as produce snoek and shark products.
- 6.68 **Response:** No response was sought from the applicant, as it was felt that the applicant had already fully explained how the asset is linked to the HDST sector.
- 6.69 **Complaint:** Selecta Sea Products claims 146 employees of their factory as employed in this fishery. This cannot be correct as applicant’s quota is caught and processed by the freezer trawler Lepanto.
- 6.70 **Response:** This issue was addressed in the section 80(3) process. Selecta Sea Products that it would be absurd to recognise only employees that process the applicant’s quota. What about a company that imports fish world wide and process for other participants? Why should there be an apportionment to match their own quotas?

Snoek Wholesalers

- 6.71 **Complaint:** Snoek Wholesalers claimed the value of land-based assets that have clearly not been invested in the processing of its hake quota. Assets include those used for processing herrings, squid, snoek, mussels, pilchards, salmon and mackerel. The delegated authority changed applicant’s investment rating to nil, according to the assessment sheet due to “information not apportioned and therefore unreliable”. This principle has however not been applied consistently as the full labour complement of this factory was used and accepted. The number of employees reflected in their application is the total of Snoek Wholesalers’ workforce who are mostly not involved in catching or processing of the allocated hake quota. The hake quota of Snoek Wholesalers is caught and processed on board a freezer trawler, with no value added on-shore. Applied to the small quota which was allocated to them in 2004, it creates a situation that the applicant scores the maximum 20 points in the job creation section. This is clearly not the intention of this section. Employees not involved in the catching and processing of the hake quota should be excluded. The delegated authority recognised this problem and adjusted the investment in land-based assets to nil. The job creation sections were however not adjusted, reflecting an inconsistent approach by the delegated authority.

6.72 **Response:** A letter was sent to Snoek Wholesalers. The issue was fully addressed by the Snoek Wholesalers and the investment and jobs were accordingly recognised.

Usuthu Fishing and Rainbow Nation Fishing

6.73 **Complaint:** Usuthu Fishing and Rainbow Nation Fishing use the vessel CODESA I to catch and process their quota. Usuthu has a 30% ownership share in the vessel. However, they claim 50% of the insured value.

6.74 **Response:** A letter was sent to Usuthu Fishing. It is clear that the parties agreed on this particular apportionment and no changes were accordingly made.

Viking Fishing

6.75 **Complaint:** Viking Fishing comprises of 8 right holders of which all but one makes use of Selecta Sea Products and its factory for processing, freezing and packaging of their landings. The companies in the group reflect significantly higher jobs per ton than the norm and also the wage bills constitute a very high percentage of the turnover derived from the HDST fishery. Concerns that double counting might have taken place. The three vessels have a crew of 68 in total according to the Fishing Industry Handbook 2005. The claimed total number of employees is 329, thus 261 more than the vessel crews. For an operation that does limited shore based processing of HDST, the number of employees seems too high. The allocation of employees to JVs, associate and subsidiary companies of the Viking Group is not consistent. It seems as if applicants selectively use combined or own employment values. From available data in the applicant's files it is impossible to determine the accuracy of the employment numbers and values. The following applicants are associated with the Viking Group: Selecta Sea Products, Viking Fishing Company (Deep Sea), Viking Fishing Company (Inshore), New South Africa Fishing Enterprises, Anglo Mar Fishing Rights Company, Hangberg Fishing Company, Quayside Fish Suppliers, Sistro Trawling and Siyaloba Fishing.

6.76 **Response:** The Viking Group did address the issue of the apportionment of jobs satisfactorily in their appeal and section 80(3) comments.

Vuna fishing and Seavuna

- 6.77 **Complaint:** Vuna Fishing (HDST) and Seavuna (HIST) utilise the same harbour infrastructure in Mossel Bay and because of uncertainty a review was physically conducted at the premises in Mossel Bay in order to obtain more accurate job estimation. This information was discussed with senior employees and from this the actual job estimates that Seavuna should be claiming in the HIST sector approximates 180 to 200 jobs and not 613 jobs while Vuna Fishing should only be claiming approximately 60 to 70 jobs in HDST and not 133 jobs. It would be appropriate for the delegated authority to request additional information so as to clarify the situation from Vuna Fishing.
- 6.78 **Response:** This issue was addressed by Seavuna in their section 80(3) comments in the Hake Inshore Trawl sector. There was an overclaim by Seavuna, which has been corrected. It was confirmed that Vuna did not overclaim.
- 6.79 **Complaint:** Vuna Fishing states that they were erroneously advised that they did not have to comply with the Employment Equity Act This is not an acceptable excuse.
- 6.80 **Response:** Vuna Fishing was penalised for non-compliance with the Employment Equity Act.

High wage bills claimed by some applicants

- 6.81 **Complaint:** A number of applicants have very high wage bills as a percentage of their turnover. They are: BCP, Mayibuye, Surmon, Usuthu, Vuna, BP Marine and Algoa Bay.
- 6.82 **Response:** It was not possible to address complaints at this level of generality. An analysis of claims made by these applicants were done and no obvious mistakes were made.

7. The Decisions on Appeals and the Allocation of Quantum

The Minister decided to allocate rights to 6 appellants, bringing the total successful Medium Term Right Holder applicants to 52 out of the 53 medium term right holder applicants. The Minister agreed with the quantum allocation mechanism adopted by the Delegated Authority. A spreadsheet list of the allocations made to the applicants in the sector, after the decisions made on appeal were incorporated, are annexed marked "A".

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.

Prior to the allocation of long term fishing rights, black controlled (50% + 1) ownership of the TAC stood at 25%. This figure now stands at 27%, and beneficial black ownership is at 47.24%.

MCJ van Schalkwyk

Minister of Environmental Affairs and Tourism