



**MINISTER  
FORESTRY, FISHERIES AND THE ENVIRONMENT  
REPUBLIC OF SOUTH AFRICA**

**GENERAL PUBLISHED REASONS FOR DECISIONS ON APPEAL  
IN THE SMALL PELAGIC (SARDINE) SECTOR  
FISHING RIGHT ALLOCATION PROCESS 2021/2022**

## INTRODUCTION

1. These are the General Published Reasons for the Decisions on appeal in the Small Pelagic sector: Sardine 2021/2022 by the Minister of Forestry, Fisheries and the Environment (Minister). This document is titled the “*General Published Reasons for Decisions on Appeal in the Small Pelagic (Sardine) Sector- Fishing Right Allocation Process 2021/2022*” (the Appeals GPR).
2. The Appeals GPR is structured as follows:
  - 2.1 Introduction;
  - 2.2 Systematic/Cross cutting Grounds of Appeals;
  - 2.3 Quantum Allocation Methodology (QAM);
  - 2.4 Outcome of the Appeals;
  - 2.5 Conclusion; and
  - 2.6 The final allocation of commercial fishing rights in the Sardine sector is set out in **Annexures A, B and C** to the Appeals GPR.
3. During February 2022, the Department of Forestry, Fisheries and the Environment (the Department) completed the Fishing Rights Allocation Process of 2021/2022 (FRAP 2021/22), in the Small Pelagic (Sardine) sector. Ms Susan Clare Middleton, the Deputy Director General: Fisheries Management, in her capacity as the Delegated Authority, published her decisions in respect of the FRAP 2021/2022 in the “*General Published Reasons for the Decisions on the Allocation of 2021/22 Fishing Rights and Quantum in the Small Pelagic: Sardine sector*” (GPR).
4. Applicants who were dissatisfied with the Delegated Authority's decision were entitled to appeal against the decision(s) of the Delegated Authority, in terms of section 80 of the Marine Living Resources Act 18 of 1998 (MLRA), read with regulation 5 of the Regulations to the MLRA, via the Department's FRAP Appeals online system. The closing date for FRAP 2021/2022 appeals was 29 April 2022. In response to several requests from the fishing industry, the closing date for the submission of appeals was extended to 29 July 2022. The Department received one hundred and sixty nine (169) appeals in the Small Pelagic (Sardine) sector across the different categories of applicants.

5. Appeals are governed by section 80 of the MLRA read with Regulation 5(3) of the Regulations to the MLRA, published under Government Notice R1111 in Government Gazette 19205, dated 2 September 1998.
6. This Appeals GPR addresses the issues raised in the appellants grounds of appeal, and it sets out how I, in my capacity as the Appeal Authority in terms of section 80 of the MLRA, dealt with these issues to determine and decide the appeals in general.
7. I note, at the outset, that in making my decisions on the appeals that have been submitted against the decisions of the Delegated Authority, I considered and balanced a wide range of factors. These include, but are not limited to, the following:
  - 7.1 The principles and objectives derived from the Constitution that are relevant to the FRAP 2021/2022;
  - 7.2 The principles and objectives of the MLRA as stated in section 2 thereof;
  - 7.3 The purpose and objectives of the 2021 General Policy on the Allocation of Commercial Fishing Rights: 2021 (the 2021 General Policy) read with the various sector specific policies on the allocation of commercial fishing rights: 2021 (the Sector Specific Policies);
  - 7.4 The need to broaden access to the fishing industry, by introducing new entrants to the various fisheries;
  - 7.5 The need for transformation of the fishing industry to achieve equity and to address historical imbalances;
  - 7.6 The desirability of multi sector involvement, facilitating participation through the value chain;
  - 7.7 The need to minimise negative impacts on the fishing industry, including instability or disruption of existing participation in job creation, and minimising job losses;
  - 7.8 The need for sustainable development of the natural resource through, among other, the determination of the Total Allowable Catch (TAC) and/or Total Applied Effort (TAE);
  - 7.9 The need to address the dynamics of each specific fishery;
  - 7.10 The need to minimise the risk of paper quota holders;
  - 7.11 The adjustments that need to be made where related entities have applied for rights in the sectors;
  - 7.12 The need to assess applicants within a category against other applicants in the same category so that new entrants are not unfairly prejudiced on certain criteria where existing right holders may score higher;

- 7.13 The desirability of giving successful applicants a reasonable prospect of active and meaningful participation in the fishery;
- 7.14 The Constitutional Court judgment in the matter of *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC*, which provides important guidelines for me to consider when I exercise my duties as gate- keeper of the Department of Forestry, Fisheries and the Environment (the Department).
8. In arriving at my decisions, I also had regard to the following:
- 8.1 The 2021 General Policy is a guideline document on the allocation and granting of commercial fishing in terms of section 18 of the MLRA. The granting of rights in the Small Pelagic (Sardine) sector will be guided by the 2021 General Policy on the Allocation and Management of Commercial fishing rights read with the Sector Specific Policy on the Allocation and Management of Commercial Fishing Rights in the Small Pelagic (Sardine ) Hake Longline fishery: 2021 (the Sector Specific Policy).
- 8.2 The 2021 General Policy and the Sector Specific Policy are based on, among other, the Constitution, the MLRA, the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (BBBEEA), the National Empowerment Fund Act, 1998 (Act No 105 of 1998) (NEFA), the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPIA).
- 8.3 The 2021 General Policy and the Sector Specific Policy give effect to the objectives of the MLRA as listed in Section 2 thereof. The objectives identified in section 2 of the MLRA are the following:
- (a) *The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;*
  - (b) *the need to conserve marine living resources for both present and future generations;*
  - (c) *the need to apply precautionary approaches in respect of the management and development of marine living resources;*
  - (d) *the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches,*

*employment creation and a sound ecological balance consistent with the development objectives of the national government;*

- (e) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;*
- (f) the need to preserve marine biodiversity;*
- (g) the need to minimise marine pollution;*
- (h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;*
- (i) any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and*
- (j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.”*

8.4 The objective of transformation of the fishing industry is a constitutional and legislative imperative. The primary vehicle for the promotion of the transformation of the South African fishing industry is the MLRA. Therefore, in exercising any power under the MLRA, regard must be given to the stipulated objectives and principles set out in section 2 of the MLRA with measures to achieve the objective to restructure the fishing industry, to address historical imbalances and to achieve equity within the fishing industry.

8.5 The assessment of appeals is undertaken per the different categories of applicants to ensure that new entrants are not prejudiced when compared to existing rights holders. Those applicants who held rights in the fishery for which they are re-applying during the period 2006 to 2020 are considered as Category A applicants. Applicants who held rights in sectors other than the fishery they are applying for during the period 2006 to 2020 are considered as Category B applicants. Applicants who did not hold commercial fishing rights during the period 2006 to 2020 are considered as Category C applicants. Category B and C applicants are also referred to as “new entrant” applicants.

9 In determining each of the appeals, I considered all relevant factors and the information before me, including but not limited to:

9.1 The Marine Living Resources Act, 1998 (Act No 18 of 1998);

9.2 The Regulations in terms of the Marine Living Resources Act;

- 9.3 General Policy on the Allocation of Commercial Fishing Rights: 2021;
  - 9.4 The Policy for the Allocation and Management of Commercial Fishing Rights in the Commercial Hake Longline fishery: 2021;
  - 9.5 The FRAP applications;
  - 9.6 The Delegated Authority's GPR dated 28 February 2022;
  - 9.7 The Delegated Authority's decision letters;
  - 9.8 The Appeal forms;
  - 9.9 Regulation 5 (3) reports; and
  - 9.10 Relevant case law
- 10 Where necessary and appropriate, the Appeals GPR refers to individual grounds of appeal. However, the Appeals GPR does not respond to each appeal and to every allegation by individual appellants made therein. Specific grounds of appeals which are not addressed in the Appeals GPR, are dealt with in the individual appeal decisions that will be sent to appellants.
- 11 Each appellant in the sector will receive the following documents:
- 11.1 The individual Appeal Decision, incorporating the reasons for such decision;
  - 11.2 Where applicable, a copy of the adjusted score sheet on appeal;
  - 11.3 Entities who are allocated an sardine right on appeal will receive a Grant of Right letter; and
  - 11.4 The Appeals GPR will be published on the Department's website.
- 12 The Appeals GPR is final. However, the allocation of fishing rights is subject to the correctness of the assertions made and information submitted by the applicants / appellants, and performance reviews. If any information in the online application or online appeal process is found not to be true or complete, or if false information is provided, or material information is not disclosed, this may lead to the revocation, suspension, cancellation, alteration or reduction, in terms of section 28 of the MLRA, of any right, license or permit granted on the strength of the FRAP 2021/2022 application or appeal.

## **SYSTEMATIC/CROSS CUTTING GROUNDS OF APPEAL**

### Provision of new information on appeal

13 Section 8.4 of the 2021 General Policy regulates information to be considered during the application process and provides *inter alia* that:

8.1 Information to be considered

8.1.1 The approach set out below will be adopted by the Delegated Authority regarding information to be taken into account for assessing the applications:

- (a) ...
- (b) Late information

Information submitted after closing date for applications will not be considered.

14 Whilst the provisions in the various applicable policies are couched in strict terms, I am aware that a policy serves as a guide to decision-making and cannot bind the decision-maker inflexibly. In this regard, I am guided by the Constitutional Court's judgement in the case of *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*<sup>1</sup> where the court held that an approach to procedural fairness requires that policy not be applied rigidly and inflexibly.

15 Moreover, appeals in terms of section 80 of the MLRA are regarded as wide appeals which entail a reconsideration of the application and may include consideration of additional information.

16 In light thereof, where appellants sought to provide additional information to their application forms, on appeal, based on the wide powers afforded to me in my capacity as the Appeal Authority, I considered such further information, provided that the information was in existence at the time when the appellant submitted its original application. This was to ensure that the fairness of the competitive process was not compromised.

17 Similarly, where appellant's provided information on appeal to address any exclusionary criterion, this information was considered provided that it was valid and in existence at the time of the closing date for applications, and the exclusion was overturned.

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<sup>1</sup> (2004 (7) BCLR 687 (CC).

### Calculation of Scores

- 18 Several applicants argued that they were not able to test the correctness of the scores which the Delegated Authority allocated to on certain aspects of the application form because they were not clear on how these scores were calculated.
- 19 In my view, the Delegated Authority provided sufficient information on the calculation of scores. These are set on the Delegated Authority's GPR, read with the scoresheets.
- 20 Nevertheless, I have set out below the manner in which certain calculations were applied, relevant to the specific sections appeals were raised in. In addition, an excel file will be published on the DFFE website, which sets out each step in the calculation of scores.

### **Section 5: Fishing Performance**

- 21 This criterion was assessed for Category A applicants only. In this regard, Category A applicants were screened and evaluated on whether, and to what degree, they had utilized their rights allocated during the previous rights allocation period (2006-2020) in the Small Pelagic Sector. Fishing performances were assessed by comparing each applicant's confirmed catches with their allocation of Total Allowable Catch during the previous rights allocation period. The information provided by applicants were verified using Departmental allocation and catch data records for the period between 2007 to 2020 only. The data for 2006 was not assessed because the appeals process relating to the allocations for the previous rights allocation period had not yet been finalised at that time and allocations were adjusted on appeal. Data for 2021 was not used because the year 2021 was not part of the previous right allocation period. Allocations and catches were summed for the 2007-2020 period and the ratio of catch : allocation was calculated and expressed as a percentage for each applicant. Fishing performance scores for each Category A applicant was based on their catch : allocation percentage, scaled to the maximum achieved for all Category A applicants and using Table 6, in the Delegated Authority's GPR.



## Section 6: Transformation

22. Transformation remained a key criterion and a number of indices were used to evaluate the various levels of transformation achieved by each applicant. Applicants were rewarded for maintaining and/or improving their ownership profile and employment of black people (as defined in terms of the B-BBEE 53 of 2003 and Codes of Good Practice) women, youth and people living with disabilities during the period between 2005/06 and 2020/21. Scores were awarded for employee share schemes, expenditure on corporate social investment, compliance with Employment Equity, affirmative procurement, skills development and enterprise development.
23. Question 6.03, scores were awarded based on an Applicant's present transformation level in terms of shareholding/membership interest held by black persons (as defined in terms of the B-BBEE 53 of 2003 and Codes of Good Practice), women, youth and persons with disabilities, for all categories of applicant. Applicants were assessed on the data for the year 2020 for Category A and B applicants, and for the year 2021 for Category C applicants. The change in transformation level was also assessed for Category A and B applicants only. Category C applicants were not assessed on the change in transformation level because many of these entities are recently-formed companies or close corporations. The change in transformation level for Category A applicants was calculated for the period from 2006 to 2020 and for Category B applicants it was calculated for the longest period for which data was supplied (e.g. 2006-2020; 2013/14-2020; 2018-2020 or 2019-2020).
24. Present transformation level scores were calculated for all applicants by: (i) summing the values provided for the percentages of black people, women, youth, and people living with disabilities employed (maximum = 400%; i.e. if everyone employed by that applicant were young, black women living with disabilities) in the appropriate year; (ii) normalizing that sum relative to the maximum sum for applicants in that category only normalized value for the applicant with the highest sum in that Category would be 100); and (iii) awarding a score from 1 to 12 based on that normalization whereby applicants that had a normalized value of were awarded 12 scores and those that had a normalized value of <80 were awarded a score of one twelfth (1/12) of their normalized value expressed as a proportion and not a percentage.

25. The change in transformation level was calculated for Category A and B applicants only (insufficient data was available for Category C Applicants), by: (i) summing the values provided for the percentages of black people, women, youth, and people living with disabilities employed (maximum = 400%) for the start and end years of the assigned period; (ii) subtracting the summed value at the start of the period from that at the end of the period and expressing the resultant value as a percentage of the starting value; (iii) normalizing that value by dividing it by the maximum change in transformation calculated for applicants in that category only; and then (iv) dividing that normalized value by the average change in transformation value for all applicants in that Category only. The final score for Q.6.3 was the sum of the values calculated for present transformation level and change in transformation level, with substantially more weighting given to an applicant's present transformation level than their change in transformation level. A maximum score of 12 could be achieved for this question; applicants who provided no data for this question were awarded a score of zero (0).
26. Applications were scrutinised to ensure that Applicants had provided actual numbers on each transformation group and not percentages in relation thereto, or where this information was not provided, information was sought from Question 6.4 of the application form and from the attached CIPC documents, and where applicable was used to recalculate or calculate their transformation scores.
27. Question 6.06- I refer you to the Delegated Authority's GPR. If applicants answered Yes in 6.5 to having an employee share scheme, system points were awarded as follows based on the percentage supplied by the applicant in 6.6.
28. Question 6.07, all applicants (Category A, B and C) were awarded 2 points for every year during the years 2016 to 2020 that a capital payment was made to an employee ownership scheme. The points out of 10 were scaled up to 100 and a score was awarded according to Table 6 in the Delegated Authority's GPR. Applicants scored zero (0) points for years in which no information was provided. Table 7 at page 29 of the Delegated Authority's GPR awarded scores to applicants for capital payments made to employee ownership schemes.

29. Question 6.10, all applicants (Category A, B and C) were awarded points for the percentage of their wage bill that was paid to previously disadvantaged individuals across 4 classes, i.e., Race (Black, Coloured, Indian, Chinese), Gender, Youth and disabled persons according to Table 8 below. Points awarded for gender, youth and disability were doubled and added to the score for race, giving a higher weighting to classes other than race. The total score was normalized to the maximum score across all applicants within a particular category (A, B or C) and scaled up to a score out of 24. I refer you to the Table 8 at page 30 in the DA's GPR.
  
30. Question 6.14 and 6.15, scores could not be awarded based on the percentage of an applicant's turnover or profit that was spent on Corporate Social Investment (CSI) in each year over the period 2019 to 2021, as the data provided by applicants was found to be unreliable and in some cases not credible. Instead, scores were allocated to applicants based on the actual amount (in Rand) that each applicant spent on CSI, as per their response to Question 6.15, relative to the average amount expended by all applicants in that Category of applicants only. In other words, the CSI spend of each applicant in a given year was expressed as a proportion of the average CSI spend by applicants in that Category for that year, and an average CSI proportion was then determined for each applicant only using years for which data was provided. Applicant scores were based on these average CSI proportions using the table below. However, because the average CSI spend per category per year was strongly impacted by the small number of applicants that had indicated a substantial CSI spend in all three categories, almost all proportion values were  $<1$ , hence values  $>1$  were set to 1. Applicants that did not provide information for this question received a score of zero, and the maximum possible score was nine (Table 9 at page 31 in the Delegated Authority's GPR).
  
31. Question 6.16, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to procuring goods/services from majority black owned companies.
  
32. Question 6.17, a score of 5 was awarded for all applicants (Category A, B and C) if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to being compliant with the Skills Development Act, 97 of 1998.

33. Question 6.19, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to paying levies in terms of the Skills Development Levies Act, 9 of 1999.
34. Question 6.21, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to having appointed a skills development facilitator.
35. Question 6.23, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to having developed a workplace skills plan.
36. Question 6.24, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to participating in learnership programmes.
37. Question 6.26, a score of 5 was awarded for all applicants (Category A, B and C), if the applicant answered "yes" and a score of zero (0) was awarded if the applicant answered "no" to having embarked upon enterprise development projects to address increasing black ownership, management and skills in new business enterprises.

### **Job Creation**

38. Category A applicants were assessed in terms of their number of permanent employees (Question 7.1) and seasonal employees (Question 7.2) relative to their average allocation (tonnes) in the Sardine sector during the period 2018 to 2020. The total number of permanent and seasonal employees of an applicant, as recorded in its application form, was multiplied by the proportion of employees in the small pelagic sector for each component (part time or seasonal) and divided by the average allocation (in 1000 t) to derive a jobs/1000 t value. This was translated into a score from 1 to 10 for permanent employees based on Table 8 in the Delegated Authority's GPR and a score from 1 to 5 for seasonal workers.

39. Category B and C applicants were assessed in terms of their total number of permanent employees (Question 7.1) and seasonal employees (Question 7.2). This was similarly translated into a score from 1 to 10 for permanent employees and a score from 1 to 5 for seasonal employees, although the ranges over which scores applied had to be adapted to the particular category. Applicants that did not provide information for either of these questions received a score of one. Table 10 in the Delegated Authority's GPR deals with the points allocation.

### **Section 8: Dividends and Additional Societal Benefit**

40. Question 8.4 assessed all categories (A, B and C) of applicants for benefits accrued to society, based on the data provided on the total income tax paid by an applicant to Revenue Services (in Rand), annual dividends paid to black shareholders (in Rand), annual dividends paid to shareholders (in Rand), the number of issued shares and the average share price (in Rand). The annual total income tax paid and annual dividends paid to black shareholders was summed for the period 2007 to 2020, whereas the number of annual issued shares and the annual average share price was averaged over the period 2007 to 2020. The final benefit value was calculated from the sum of the total tax paid, dividends paid to black shareholders and the average number of shares issued multiplied by the average share price.
41. For Category A applicants, this value was divided by the total directed sardine TAC allocation during the period from 2007 to 2020, to derive a benefit per tonne value (Rand per tonne). For Category B and C applicants, the value was used as calculated (Rand benefit) and not compared to any previous TAC allocation. Values calculated were converted to a score out of 10 using the category specific values and scores in Table 11 of the Delegated Authority's GPR.
42. Question 8.6, for Category C only, a score was awarded based on the number of years that an entity has been operating in its local area: (i) 1-5 years=5 points; (ii) 6-10=10 points; (iii) 11-20=15 points & (iv) 21 and above=20 points.
43. Question 8.7, for Category A and B applicants, scores were awarded based on the identified Fish Processing Establishments (FPEs) where applicants had their catches processed. This data was extracted from the DFFE Sybase research catch database. The highest scores were awarded to

applicants that had processed on the south coast, intermediate scores were awarded to applicants that had processed on the west coast (excluding the Cape Metropolitan Area), and lowest scores were awarded to those that had processed catches at FPEs within the Cape Metropolitan Area. Each FPE was allocated either 1, 2 or 3 scores depending on its regional location in accordance with Table 12 of the Delegated Authority's GPR.

44. For Category A applicants, both the location where directed catches of sardine had been processed and the quantities of those catches processed at each FPE during the period 2007 to 2020 were used in deriving a score (2006 was not used for the reason given in 8.2.5.1, in the Delegated Authority's GPR. Scores were calculated for each applicant as follows: (i) the total amount of directed sardine processed at each listed FPE during the 2007-2020 period was multiplied by that FPE's score value to provide a weighted location value; (ii) landings of directed sardine were summed across all FPEs where they had been processed by the applicant during the 2007-2020 period; (iii) the weighted location values were summed across all FPEs listed by the applicant; and (iv) the sum of the weighted location values was then divided by the sum of directed sardine landings. The resultant scores were normalized to the maximum value of 3 and were then multiplied by the maximum possible score of 97 to provide the final score for this question.
45. For Category B applicants only, scores were awarded based on the identified harbours where applicants had landed their catches. The highest scores were awarded to applicants that had landed catches on the south coast, intermediate scores were awarded to applicants that had landed catches on the west coast (excluding the Cape Metropolitan Area), and lowest scores were awarded to those that had landed catches at harbours within the Cape Metropolitan Area. Each harbour was allocated either 1, 2 or 3 points depending on its regional location (see Table 13 in the Delegated Authority's GPR).
46. Question 8.8, scores were awarded for all categories of applicants based on the identified harbours where applicants intended to land their catches and their intended frequency of usage of those harbours. The highest scores were awarded to applicants that intend to land fish on the south coast, intermediate scores were awarded to applicants that intend to land catches on the west coast (excluding the Cape Metropolitan Area), and lowest scores were awarded to those intending to land fish at harbours within the Cape Metropolitan Area. Only data for the first three identified

harbours were used in calculating scores, and for applications where the intended frequency of harbour usage for the first three harbours listed did not sum to 100% those values were re-expressed as a percentage of the total sum of percentages for those first three harbours. Scores were calculated as follows: (i) each harbour was allocated a point value depending on its regional location (see table 13 at page 38 of the DA's GPR ); (ii) the intended % of usage of listed harbours was expressed as a proportion and multiplied by the scores value for that harbor; and (iii) these values were then summed for the first three listed harbours to derive a final score for each applicant. Applicants that did not provide information for this question received a score of zero, and the maximum possible score was fifteen (15).

### **Section 9: Investment**

47. Consideration was given to the amount that applicants had invested in vessels, marketing and fish processing. In contrast to Section 4: Access to a Suitable Vessel (see 8.2.4. of the DA's GPR), investment in any type of fishing vessel, whether suitable for operation in the Small Pelagic Sector or not, was scored positively. For Category A applicants, the total rand value (insured value) of the applicant's total fixed assets in 2020 in the small pelagic sector was used as the value for investment. This investment value was divided by the total TAC allocation for the applicant summed from 2007 to 2020 to derive an estimate of investment per ton (Rand/tonne). Based on that value, a score from Table 14 was assigned to the applicant. For Category B and C applicants, the (insured value) of the applicant's total fixed assets in 2020 was used with no consideration of TAC allocations in other sectors.

#### Access to Information

48. Several appellants alleged a lack of access to information with respect to the FRAP 2022 and/or reasons to verify their scores.
49. In the relevant Regulation 5(3) reports, the Delegated Authority responded that in the release of information, the Department has complied with the provisions of PAIA and POPIA. The POPIA prohibits the Department from sharing third-party confidential information and details without their consent. Applicants were able to request further information as per the process set out in the Delegated Authority's GPR, in accordance with PAIA and POPIA. I note that spreadsheets were

made available on the Departmental website to assist applicants with understanding the scoring methodology used. The Appellant was also able to request further information via [CSCapplications@dffe.gov.za](mailto:CSCapplications@dffe.gov.za) as stated in the GPR.

50. I am cognisant that section 32 of the Constitution of the Republic of South Africa, 1996, affirms the right to access information held by the State;<sup>2</sup> and that the PAIA gives effect to this constitutional right of access to any information held by the State and enables a person to fully exercise and protect all of its rights.
51. The 2021 General Policy<sup>3</sup> and the GPR under section 6 on page 16 give provisions for access to information. The GPR stipulates that every applicant will receive: a notification letter informing the applicant of the Delegated Authority's decision, together with the reason for that decision and the manner in which Appeals must be submitted; a scoresheet indicating the applicant's score; access to the electronic copy of the General Published Reasons.
52. Furthermore, the GPR sets out provisions for accessing other applicants' information by using PAIA. The GPR also prescribes provisions and conditions upon granting access to information for the other applicants' applications.
53. I note that subsequent to releasing the GPR, the Delegated Authority also addressed notification letters to applicants informing them that they may the scoresheets used to record the assessment of every application in the fishery at the Department's Offices, Foretrust Building, Martin Hammerschlag Way, Foreshore, Cape Town on the Departments FRAP online system.
54. The Department published on its website the relevant score sheets and quantum allocation methodology formulae, albeit in a redacted format, so as to comply with the POPI Act.
55. Considering all this information I find that applicants were indeed provided with all the necessary information and data, in order to determine whether they have, in fact, been correctly scored and whether quantum/effort has been allocated in a reasonable and correct manner. Each applicant

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<sup>2</sup> Section 32 of the Constitution of the Republic of South Africa 1996.

<sup>3</sup> Clause 9.



also received a notification letter informing them of the Delegated Authority's decision on their application, together with the reason for that decision and the manner in which appeals must be submitted.

56. The letters together with the GPR and the information published on the Departments website was found to be sufficient and reasonable. Appellants were also able to lodge and canvass detailed appeals on their scoring issues undertaken by the Delegated Authority.
57. Furthermore, if an applicant wanted to access application forms of other applicants, they should have taken further steps to request such further information in terms of the procedures and provisions of the PAIA, including an appeal in respect of such information granted by the relevant information officer, that it was still dissatisfied with.
58. I note that this Appeals GPR only seeks to address overarching issues that apply to several of the appeals as categorised above. Scoring issues on specific questions by individual entities requires that this document and the calculation formulae explanations provided herein, must be read together with individual Appeal Decisions.

#### Preferential Treatment of Category A applicants

59. The allegations made under this ground of appeal were not supported by any evidence or facts. Category A applicants were assessed and scored based on the information provided in their respective application form. In addition, applicants were scored within their respective Categories to ensure a fair and justifiable assessment and to ensure that no entity was unfairly assessed.
60. In addition, the weightings that were attached to each of the questions within each category was aligned with the MLRA and the relevant Policies. I am satisfied that the Delegated Authority achieved a balance between the various factors listed under section 2 of the MLRA.

#### Not enough consideration was given to Black Ownership

61. Applicants were scored on black shareholding but also on promotion of wider benefits and opportunities for other Historically Disadvantaged Individuals: women, youth and persons with disabilities. The factors considered were, among other: (i) the percentage women ownership and women representation at top salary, board of directors and senior official and management levels. (ii) The percentage of disabled persons and youth ownership and representation at top salary, board of directors and senior official and management levels. (iii) Whether employees (other than top salary earners) benefit from an employee share scheme. (iv) Compliance with the Employment Equity Act 55 of 1998, particularly with regards to the representation of women, people living with disabilities and the youth at the various levels of employment below senior official and management level.

### **OUTCOMES OF THE DELEGATED AUTHORITY**

62. On the comparative balancing criteria, the Delegated Authority determined that Category A applicants with a final weighted score of 50% or more would be granted a right, and applications with a final weighted score of less (i.e. <50) would not be successful.
63. The top 5 scoring Category B applicants and the top 5 scoring Category C applicants (in terms of their Final Score), were examined in detail on the **following criteria**:
- 63.1 Evidence of developed or in-development methods for anchovy product beneficiation and hence value-adding to industrial fish;
  - 63.2 Demonstrated investment in fishing-related industries;
  - 63.3 Their previous job creation performance;
  - 63.4 Their location as broadening access to impoverished coastal regions, particularly on the east coast, was considered important.
64. Ten percent (10%) of the TAC was reserved for appeals.

### **Category A**

46 of the 80 Category A applicants were successful sharing 92, 592% of the TAC,

### **Category B**

2 of the 59 Category B applicants were successful sharing 1,6667% of the TAC.

### **Category C**

4 of the 105 Category C applicants were successful sharing 5.7407% of the TAC.

## **OUTCOME OF THE APPEALS**

65. There was a total of one hundred and sixty nine (169) appeals submitted against the decisions taken by the Delegated Authority in this sector. Below is an overview of the outcome on appeals:

### **Category A**

Fourteen (14) additional Category A appellants now qualify on appeal to be awarded a right, having scored higher than the 50% threshold. The re-evaluation of all successful applicants/appellants in terms of their performance results in some previous above average performers become below average performers and vice-versa. These adjustments have been incorporated in my appeal decisions.

### **Category B**

One (1) additional Category B appellant now qualifies to be awarded a right on appeal.

## **REVISED CALCULATIONS**

66. Where I upheld the grounds of appeal relating to the calculations of the Delegated Authority that had either been incorrectly calculated or the incorrect formula applied for the scores, I did the following:

- 66.1 To ensure that I achieve a fair and consistent outcome, the calculations of all the applicants in the sector was revised. It was important to revise all the calculation based on the correct formula to ensure that a like-for-like comparison between the applicants per category could be achieved;
- 66.2 The revised calculations revealed that there was no material impact on any of the applicants in the sense that none of the successful entities were prejudiced;
- 66.3 Importantly, the revised calculations are separate from the method used to calculate the quantum.

### **QUANTUM ALLOCATION METHODOLOGY (QAM) ON APPEAL**

- 67. The DA allocated 100% of the TAC to successful applicants but withheld 10% of the TAC tonnage for appeals (100% of 30 000t was allocated instead of 90% of 30 000t).
- 68. The determination of quanta was based on a TAC of 30 000t with 10% of the 3 000t TAC held in reserve for appeals. 100% of the TAC was allocated.
- 69. The allocation of TAC was as follows by the Delegated Authority applied the following:
  - 69.1 The 5 largest successful Cat A right holders (i.t.o their previous allocations) had their TAC values reduced by 5% (ie to 95% of what they had);
  - 69.2 This reduction in allocation resulted in TAC being available for reallocation to new entrants as well as smaller Cat A applicants that had performed better than others of a similar size;
  - 69.3 The Delegated Authority divided successful Cat A applicants into 10%-ile groups according to the size of their previous allocations and their performance was evaluated relative to the average of that group. Applicants that performed higher than average had their initial allocation increased slightly whereas applicants that performed below average had their allocations reduced slightly.
- 70. I note the rationale of the Delegated Authority and the balancing of considerations undertaken in adopting the quantum allocation methodology and the allocation of rights that was undertaken per the FRAP, specifically in homage to the General Policy and the advice of the Assessment team. I have thus followed a similar approach on appeal, in having consideration to:

- 70.1 the number of successful applicants in each category;
  - 70.2 the level of access to fishing vessels, investment in the sector and job creation amongst others;
  - 70.3 the anticipated sardine TAC over the short to medium term;
  - 70.4 the determination of a minimum viable allocation
  - 70.5 a projected average of 3,000 t was used as it is anticipated that the Sardine TAC will decrease sharply over the next few years as the resource is under strain.
71. I note that the Delegated Authority initially determined the TAC to be 220 t (conservatively), but that the Delegated Authority did not allocate TAC to any entity below 225t. I have retained the allocation of 225t on appeal. On appeal, the 10% reserved TAC tonnage (3,000t) is to be distributed amongst the 14 successful Category A appellants and 1 successful Category B appellant, using the DA's allocation method (including not allocating any entity TAC below 225t), and incorporating the evaluation of performance of Category A appellants during the previous rights period.
72. This will ensure there is sufficient additional TAC available while still achieving the minimum TAC of 225t. The method also allows for some TAC to be made available to TAC to be made available to reward above-average performers (8% increase) and reduces the negative impact on poor performers (17.9% decrease).
73. Paragraph 4.3 of the Grant of Right letters advised right holders that the TAC "may be reduced or increased, in the manner and circumstances set out in the GPR and after reserved decisions, appeals and reviews have been finalised".
74. The above Quantum allocation methodology seeks to ensure amongst other, a more equitable distribution of TAC across all right holders, whilst maintaining stability in the sector and promoting small to medium enterprises and transformation.
75. The final list of commercial fishing rights holders in the Sardine sector are set out in:
- 75.1 **Annexure A** (Category A);
  - 75.2 **Annexure B** (Category B); and
  - 75.3 **Annexure C** (Category C).

## CONCLUSION

76. This decision will be effective from the commencement of the 2024 fishing season for small p.
77. Section 80 of the MLRA deems me to be the Appeal Authority over decisions of the Delegated Authority and I have wide appeal powers in terms thereof. I have the power on appeal to award fishing rights, and to overturn the decisions of the Delegated Authority to allocate rights, including decisions related to TAC, where such decision-making is rationale, fair and in line with the provisions of the MLRA and specific policies.
78. Should any appellant be dissatisfied with any aspect of my decision(s), it may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof, in accordance with the provisions of section 7 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA).



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 20/12/2023

