



environmental affairs

Department:
Environmental Affairs
REPUBLIC OF SOUTH AFRICA

GENERAL PUBLISHED REASONS FOR THE DECISIONS ON APPEAL WHITE SHARK CAGE DIVING (WSCD) NON-CONSUMPTIVE SECTOR

1. Introduction

The general reasons for the assessments of the appeals in the White Shark Cage Diving (WSCD) non-consumptive sector by the Minister of Environmental Affairs (*the Minister*) are set out in this document, which will be referred to as the *“Appeals GPR”*.

Appellants applied in 2017 to the Delegated Authority in terms of regulation 68 of the Threatened or Protected Marine Species Regulations (TOPS) (*Government Gazette* 40876 GNR 477 of 30 May 2017), published in terms of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) (NEMBA) for a permit to operate a White Shark Cage Diving business (WSCD). The Delegated Authority considered the applications and provisionally awarded permits for the reasons as set out in the decision letters.

During February and March 2018, the internal appeals submitted were considered in the WSCD sector against the Delegated Authority’s decisions in November 2017. After considering the grounds, it was decided to refer all WSCD applications back to the Delegated Authority for reassessment. This decision was communicated to all applicants and appellants on 14 March 2018. After

reassessment, each applicant received a new decision-letter from the Delegated Authority on 13 April 2018. Applicants were then given another opportunity to lodge an internal appeal in respect of the new decisions.

Both successful and unsuccessful applicants appealed. The reason for this is that it was made clear to all applicants that the Minister, as the appeal authority, is entitled to increase scores on appeal and that she may change the decision of the Delegated Authority. This Appeals GPR is concerned with the general approach followed and methodology used by the Minister in deciding the appeals. Any systemic changes made by the Minister to the scoring methodology are also set out in the Appeals GPR. Specific reasons for the Minister's decision for each appeal are provided in the appellant's individual Appeal Record of Decision (ROD). In general this process must be guided by the objectives of transformation, inclusivity, job creation and the expansion and economic growth of the WSCD sector, in order to contribute to the broader government objectives for transformation, economic growth and expansion. The details of how this is achieved are contained in the paragraphs below.

Each appellant in the sector will receive the following documents by email:

- a notification letter informing the appellant of the Minister's decision on the appeal together with the Minister's ROD, the Appellant's individual score sheet;
- the Appeals GPR; and
- an Appeal decision-sheet for the WSCD sector.

2. Delegated Authority's decisions

2.1 False Bay

False Bay is an existing area of operation with three permits available for allocation. Three existing permit-holders operating in the False Bay area applied and one existing operator from the Gansbaai area, namely, Apex Shark Expeditions, African Shark Eco Charters, False Bay White Shark Adventures and White Shark Ventures. Although White Shark Ventures applied as a new entrant, they were assessed as an existing operator as they have been operating in the sector for many years and could not be considered as a new entrant.

The Delegated Authority decided to provisionally allocate the permits to the top three highest scoring existing permit-holders, namely, Apex Shark Expeditions, White Shark Ventures and False Bay White Shark Adventures, while African Shark Eco Charters was unsuccessful as the lowest scoring applicant out of the 4.

2.2 Gansbaai

Gansbaai is an existing area of operation with nine permits available for allocation. It was the most contested area. All eight existing permit-holders applied in Gansbaai, namely White Shark Ventures, Marine Dynamic Tours, White Shark Projects, Sharklady Adventures, Shark Diving Unlimited, Ibhongo Holdings, WS Dive Co and Great White Shark Tours. Nineteen new entrants applied and one existing permit holder, Elim Springs from Quoin Point also applied.

One of the new entrant applicants, Sandown Bay Fishing, were excluded on the basis of failing to submit an operational plan. The remaining 27 applicants were scored and the Delegated Authority decided to provisionally award permits to the

top nine scoring applicants. This resulted in two existing permit-holders being provisionally awarded permits, namely Marine Dynamics and White Shark Projects and, 7 new entrants were provisionally awarded permits, namely, Artidex, Canzocure, Shark Diving Gansbaai, Solar Spectrum, Wantu Holdings, Danga and Martimanzi.

2.3 Mossel Bay

Mossel Bay is an existing area of operation with one permit available for allocation. The existing permit-holder in Mossel Bay, namely Sea Spirit/Shark Africa and one new entrant applicant, namely, Simanyene Logistics, applied. The Delegated Authority decided to allocate the permit to the new entrant, Simanyene Logistics.

2.4 Quoin Point

Quoin Point is an existing area of operation with two permits available for allocation. One existing permit holder, Elim Springs and four new entrant applicants namely, Fronteras Adventures, Mothinet, Oct2b and Fairy Connection, applied for permits. Fairy Connection was excluded for failing to sign the declaration of oath on the application form. The Delegated Authority decided to award the permits to the two highest scoring applicants, namely, Fronteras Adventures and Mothinet.

2.5 Port Elizabeth

Port Elizabeth is an existing area of operation with two permits available for allocation. No permits were allocated during the previous allocation process as there were no applicants for this area. During this process, three new entrants applied, namely, Raggie Charters, Sida JV and Black Version Projects. The

Delegated Authority decided to award the two permits to the highest scoring applicants, namely, Raggie Charters and Black Version Projects.

- 2.6 In respect of all areas and decisions, the Delegated Authority's decisions were made subject to the outcome of the appeals process - no permit accrued until the appeals were finalised.

3. **Appeals Process**

Systemic changes and general decision-making criteria by Minister.

- 3.1 The scoring methodology for enterprise development for existing permit-holders was slightly changed on appeal. This issue was raised with the Delegated Authority and it was determined that in addition to the issue of whether or not mentorship agreements had been signed, the Delegated Authority also assessed whether operators had working relationships with other operators to pass on clients etc. These relationships were with other existing permit-holders. The initial assessment of this additional aspect, by the Delegated Authority, resulted in the partial points scored for this criterion. After considering what was stated in the application form and the WSCD policy, the Minister requested that this criterion be rescored and checked for all existing permit-holders. The criteria does not reference working relationships with other operators and is in fact intended to focus on the willingness of an existing operator to mentor/work with a new entrant. As such, if there were signed agreements to this effect then the applicant should score full points, but in the absence of signed agreements, if the applicant expressed a willingness to assist and mentor a new entrant, then they would receive partial points for this criterion. In addition those existing operators who provided signed agreements with any operator who was a new entrant from the previous allocation process would also receive partial points, as this demonstrated actual mentorship over the last 6 years. Since neither the WSCD policy nor the application form expressly requested applicants to attach signed

agreements, the Minister decided that it would not be fair to only award points for signed agreements and rather to award some points if the applicant expressly stated that it would assist/mentor a new entrant or had in fact done so during the previous allocation period. This criteria is intended to contribute to inclusivity within the sector and contribute to the expansion of the sector and job creation.

- 3.2 Consideration of new information on appeal, particularly in relation to new entrants and their operational plans, was carefully evaluated. It would not be considered fair to allow appellants to supplement information and have a second opportunity to improve their operational plan, for these types of criteria where the information was clearly requested either in the application form or the WSCD policy. It is only where certain criteria that were scored by the Delegated Authority, but were not clearly provided for in the application form or the WSCD policy, that this additional/supplementary information was considered and scored on appeal. An example of this is waste management – which was not specifically addressed in the application form or the WSCD policy and so all appellants who addressed this aspect on appeal have been considered for additional points. Another example of this was the criteria relating to financial projections, which was not adequately explained in the application form and resulted in numerous new entrants not providing the required detail as scored by the Delegated Authority. Appellants who therefore on appeal provided a more detailed financial breakdown were then scored accordingly.
- 3.3 While the Delegated Authority exclusively utilised the overall scores of applicants to determine the outcome of the provisional allocation, the Minister has, in addition to scores, where appropriate, decided to consider the overall strength of the application and has also had regard to statements made in the Appeals GPR for the previous allocation process, which specifically referenced future allocations. The sector was highly contested with 41 applicants for only 17 permits. Gansbaai was the most competitive area and had three times more applicants than there were permits available. While the scores achieved were an important factor, particularly when comparing new entrants with other new

entrant-applications, and when comparing existing operators with other existing operator applications, the Minister has decided that it was not the only determining factor, especially when new entrants and existing operators had to be assessed in the same area, where the criteria upon which they were assessed were not the same. As such, in addition to the score achieved, the overall strength of the application was considered, to determine which applicants would be able to beneficially use the permit allocated and who best met the criteria for the sector in order to effectively transform, grow and expand the sector.

In addition, paragraph 6 of the previous Appeals GPR stated the following:

“All successful applicants should take note that efforts to improve their transformation profile over the five year permit period, will be evaluated at the end of the period and a failure to show a consistent, incremental and significant improvement in the permit holder’s transformation profile, could result in such permit not being re-allocated after the five year period.”

The Minister has therefore also considered the implications of an unsuccessful application of an existing permit holder, who has invested and laid out significant capital to run a WSCD operation and who currently employs a number of staff and crew, many of whom are breadwinners for their families. This has to be balanced against the need to introduce new entrants into a sector which has historically not been transformed and dominated by the same role-players for many years. As such, where an existing permit-holder scored very high – above 90% and has either retained or improved its BBBEE level to a Level 1 or 2, the Minister has decided to award the existing permit-holder a permit on appeal. This threshold only applies in competitive areas when assessing new entrants and existing permit holders in the same area. This approach promotes inclusivity and ensures that only those existing permit-holders who have performed well over the last allocation period and who have made an effort to transform, will retain their permit. This further ensures, as will be seen from the outcome per area below, that there will still be a sufficient number of existing operators in the sector who can assist, guide, mentor and train new entrants to

optimise the success of these new entrant-operations into the future. This responsibility will be included in all existing operator permit conditions.

4. Discussion of allocation on appeal per designated area

4.1 False Bay

All four applicants appealed. In most instances, their scores increased on appeal. Since there were no new entrant-applicants in this area, these four applicants could be directly compared with one another as they were assessed on the same criteria. Both White Shark Ventures and Apex Shark Expeditions scored high and have demonstrated transformation. When assessing the last two applicants, both of them were lower scoring and both level 4 BEE, the overall score was the determining factor in awarding the permit and it has therefore been awarded to False Bay White Shark Adventures. The Minister decided to confirm all the decisions of the Delegated Authority in respect of the allocation of permits in this area.

4.2 Gansbaai

Of the 28 applicants in the Gansbaai area, 18 appealed against the decisions of the Delegated Authority. A number of the appellants increased their scores on appeal. This area presented a significant challenge in that there were 8 existing permit-holders and a significant number of new entrant applicants but only 9 permits available for allocation. In addition, the criteria used to assess existing permit-holders and new entrants were different, which meant that overall scores should not be directly compared where possible, but were considered as one of the main determining factors. It is in this area where the reasoning articulated in paragraph 3.3 above was applied.

Of the 9 permits available in this area, the Minister decided to award 5 to current permit-holders. These were Marine Dynamics, White Shark Projects, Sharklady Adventures, WS Dive Co and Great White Shark Tours. The 4 remaining permits were awarded to the following top scoring new entrant applicants: Arctidex,

Canzocure, Danga and Shark Diving Encounters. It should be noted that 4 out of the 5 successful existing permit holders scored in the top nine and would have qualified for a permit even if only the overall scores were utilised. The ratio of 5 to 4 provides an ideal split of existing versus new, and allows for the opportunity for appropriate support, capacity building, and skills transfer by existing operators to new entrants to expand the sector, while still ensuring the sustainability of the sector and its reputation.

4.3 Mossel Bay

Prior to finalizing these appeals an applicant in the Mossel Bay area, Sea Spirit t/a White Shark Africa, lodged an application with the Western Cape High Court to review and set aside the then Minister's decision of 13 March 2018 to revert the Mossel Bay WSCD application back to the Delegated Authority for reconsideration and assessment. Simanyene Logistics were also joined as a party to the litigation as the new entrant applicant in the area. The main issue in the case was whether Simanyene applied for a permit in Mossel Bay or Gansbaai. While the front of their application stated Mossel Bay, there were numerous references throughout the application to Gansbaai. In addition, when the Delegated Authority assessed the application in November 2017, the application was initially allocated to the Gansbaai area and when Simanyene filed its first appeal during December 2017, there was no objection by them to the application being allocated to the Gansbaai area, despite having indicated Mossel Bay on the front page. As a result of these factors and many others detailed in the Court judgment, the Court determined that Simanyene's application was clearly an application for Gansbaai and not Mossel Bay and therefore since there was no appeal in the Mossel Bay area, the then Minister was not allowed to send that application back for reconsideration. As such, the then Minister's decision of 13 March 2018 and the Delegated Authority's decision of 13 April 2018 were set aside by the Court insofar as they relate to the Mossel Bay area. The Delegated Authority was directed by the Court to issue a permit in Mossel Bay to Sea Spirit. As a result of this Court order, Simanyene's appeal

and application can only be considered as an application for a permit in the Gansbaai area.

There were therefore no appeals in Mossel Bay and the permit for this area has been issued to Sea Spirit/Wrote Shark Africa.

4.4 Quoin Point

All 5 applicants appealed in this area. Fairy Connections submitted a signed declaration and were therefore scored on appeal. Since the only existing permit holder, Elim Springs scored significantly lower than most other new entrant applicants, the Minister decided to award the 2 permits to the top scoring new entrants in this area, namely, Fronteras and Oct2B.

4.5 Port Elizabeth

Only 1 out of the 3 applicants appealed in this area. Raggie Charters's score was increased slightly on appeal. Since this area only had new entrant applicants, the Minister decided to award the 2 permits to the 2 top scoring applicants, namely Raggie Charters and Black Version Projects.

5. Conclusion

The final appeal decision sheet after consideration of all the appeals is annexed hereto marked "A".

6. Winding up of operations of existing permit-holders

In the interests of fairness, those existing permit-holders who have not been awarded a permit in their area of operation, will be given a period of 60 calendar days to wind down their existing businesses and cease all WSCD advertising and operations. Any permit in the possession of such existing operator will be deemed invalid within 60 calendar days of receipt of their letter of notification of the outcomes of this appeals process and the permit should be returned to the Department at the conclusion of the 60-day period. New entrant applicants who

will be commencing operations in areas where there are existing permit holders will only be able to commence after this 60-day period has elapsed, which should provide them with sufficient time to prepare and make arrangements to commence business.



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