MINISTER

FORESTRY, FISHERIES AND THE ENVIRONMENT

REPUBLIC OF SOUTH AFRICA

REASONS FOR DECISIONS ON THE REMITTED AND SUPPLEMENTARY APPEALS IN THE SMALL PELAGIC: SARDINE SECTOR FISHING RIGHT ALLOCATION PROCESS 2021/2022

INTRODUCTION

1. This document is titled the *Reasons for Decisions on the Remitted and Supplementary Appeals in the Small Pelagic Sardine (SPS) Sector.* This document is issued by the Minister of Forestry, Fisheries and the Environment (Minister). It sets out the Minister's decisions taken on reconsideration of the appeals remitted to him for reconsideration by Judge Mantame of the Western Cape High Court during February 2025.

BACKGROUND

2. 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. The Deputy Director General: Fisheries Management (DDG:FM), in her capacity as the Delegated Authority (DA), 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).*

3. 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 Department received one hundred and sixty-nine (169) appeals in the Small Pelagic (Sardine) sector across the different categories of applicants.

4. In or during December 2023, the then Minister of Forestry, Fisheries and the Environment, former Minister of Forestry, Fisheries and the Environment, Ms. Barbara Dallas Creecy, in her capacity as the Appeal Authority in terms of section 80 of the MLRA, finalised her consideration of these appeals; and issued her "General Published Reasons for Decisions on Appeal in the Sardine Sector: 2021/2022" (Appeal GPR). The former Minister recorded her decision on the allocation of rights in each Category of the Sardine Sector in Annexure A, B and C to the Appeal GPR.

5. Thereafter, several judicial review applications were instituted out of the Western Cape Division of the High Court against the decisions of the Delegated Authority and that of former Minister Creecy, which led to consent orders handed down during February 2025, by the honourable Judge Mantame of the Western Cape High Court. In terms of these orders, the Appeal Authority was directed to, inter alia, reconsider 24 remitted appeals in the small pelagic sector (13 appeals in the Sardine sector) with due regard to the grounds of review raised by the applicants in the above mentioned review proceedings.

6. As part of the reconsideration of the remitted appeals, the orders expressly authorised and directed, amongst other, as follows:

6.1 The Minster is to revisit any and all decisions originally made on appeal and to make such alterations and/or new decisions (including, without limitation, the revocation, cancellation or reduction of any rights and/or permits and/or quantum granted or issued pursuant to any decisions previously made on appeal) as are necessary to give effect to the determinations and allocations following my reconsideration of the appeals read together with the grounds of review, and to do so in a manner consistent with the MLRA and the applicable Regulations and policies;

6.2 That the applicants/appellants will be advised if there is any information from the Department's database as contemplated in paragraph 8.4.1(d) of the General Policy, or any other information outside of their application or appeal that had been relied on by the DA, and simultaneously will be provided with such information, and any other reasons relevant to their application, within 30 (thirty) calendar days from the date of this order (the further information date);

6.3 Applicants/appellants will be afforded 30 (thirty) calendar days from the date of the further information date, with an opportunity to supplement their appeals to the Minister or make representations arising solely in relation to such information or reasons, including being afforded an opportunity to confirm or make written representations in relation to the correctness of information contained in the Department's database as contemplated in paragraph 8.4.1(d) of the General Policy insofar as such information was relied on by the DA;

6.4 The Minister to publish and email to the applicants/appellants any proposed outcome of the reconsidered decision in respect of or affecting the rights of the applicants/appellants (which shall include a proposed reduction of the percentage of the total allowable catch allocated to each of the applicants/appellants by the DA, or a proposed alteration of their score on appeal, or a proposed decision adversely affecting the applicants/appellants rights or the allocation made to it by the DA), together with the proposed reasons for the reconsidered decision, and all information and documents relevant to the proposed decision (but not yet provided to the applicants/appellants), affording them and all interested and affected parties with an opportunity to state their case in relation thereto, within 30 (thirty) calendar days thereafter;

6.5 Pending the final outcome of the Minister's reconsidered appeal decision by no later than Friday, 29 August 2025, the appeal decision taken on 20 December 2023 (of the DA) shall in the interim remain in force and in effect;

6.6 The Deputy Director General: Fisheries Management (DDG:FM) within the Department of Forestry Fisheries and the Environment is directed to issue permits to the applicants/appellants for commercial fishing rights in the Small Pelagic, Sardine sector pursuant to the abovementioned steps on application by such applicants/appellants and subject to fulfilling the prescribed requirements for

such permits to enable such applicants/appellants to utilise their aforementioned fishing rights from a date following on the above process which date shall be no later than 1 September 2025.

7. In compliance with the orders, on or about 4 April 2025, the DDG: FM addressed a letter to the relevant applicants/appellants, providing them with the information obtained from the Department's internal database as contemplated in Paragraph 8.4.1(d) of the General Policy, which had been relied upon in the assessment of their applications (DDG:FM's letter). The letter also provided the applicant/ appellants the opportunity to supplement their appeals or make representations solely in relation to such information or reasons, within 30 days thereof.

8. A further settlement order was handed down on 16 July 2025, by Mantame J in the Western Cape High Court, in the matter of Jaffa's Bay Fishing Pt Ltd (Case Nr.:7828/2024), in terms whereof Jaffa's Bay was remitted to the Appeal Authority for reconsideration on the same terms as contained in the orders set out above.

9. To accommodate the reconsideration of the remitted Jaffa's Bay appeal, the date of finalisation of the sector was extended, by agreement between the parties, to 31 October 2025. This was to ensure a wholistic consideration of the sector and to avoid piecemeal decision-making.

10. Various appellants submitted supplementary grounds of appeal for my consideration and determination.

11. In compliance with the court orders of Mantame J, I considered the remitted appeals, the supplementary appeal grounds and in so doing, I had regard to the grounds of review as set out in the respective review applications.

12. Provisional Reconsidered Appeal Decisions on the remitted and supplementary grounds of appeal were issued to each of the appellants of the remitted appeals.

13. In addition, a Provisional General Published Reasons for Remitted and Supplemented Appeals in the Small Pelagic Sector: Sardine (Provisional GPR) was issued.

14. To give effect to section 80(3) of the MLRA, and to comply with the requirement of procedural fairness in accordance with the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000) PAJA, in further compliance with the court orders, the following steps were undertaken:

    14.1. Each appellant associated with a remitted appeal, was provided with their respective Provisional Reconsidered Appeal Decisions and the Provisional GPR, and afforded 30 days to comment, in writing, on each document.

    14.2. The Provisional GPR was published on 15 July 2025 on the Department's website affording all affected parties 30 days within which to comment thereon.

15. The Provisional GPR outlined the reasoning for the proposed outcome of the reconsidered remitted and supplemented appeals and several options for the proposed outcome on the allocation of rights and allocation of TAC in the sector. The options provided were intended to address the various concerns raised in the judicial review proceedings, grounds of appeal in the remitted appeals, and issues raised in the supplemented appeals, while giving effect to the guiding principles set out in section 2 of the MLRA. These options were as follows:

15.1. Option 1: The first option was to follow a similar QAM to that adopted during the previous appeals process as follows:

15.1.1. The same percentage (%) decrease of TAC from the largest 5 companies (14.5%) and of poor performers (25%) would be undertaken;

15.1.2. A minimum TAC of 225 t would be applied.

15.1.3. However, in allocating rights to new entrants, only the highest-ranking Category B and C applicants would be considered for allocation of a right (in an amount that would fall equal to or less than the number of entrants previously admitted by the former Minister).

15.1.4. In addition, the recalculation of some scores during the reconsideration process of the appeals and the subsequent detection of errors in the capturing of revised appeal scores in the evaluation of performance spreadsheets, required a new evaluation of the performance of applicants relative to their 10 percentile groups. Some applicants who were previously above average were now below average and vice-versa. This freed up 2.34% of the 100% allocation of the TAC, which was to be allocated as a bonus for above-average performers within this sector.

15.2. Option 2:

15.2.1. This option differed from Option 1 in that the number of Category C right holders would be reduced by 2, such that the new entrants decreased from a total of 7 to a total of 5.

15.2.2. A minimum TAC of 200t was applied.

15.2.3. In addition, the TAC allocation to Afro Fishing was decreased from 2.92% to 2.33% so that the total percentage (%) TAC allocated to new entrants is reduced from 7.42% to 5%.

15.2.4. The freed-up TAC allowed for a substantial decrease in the percentage by which the TACs allocated to the largest 5 companies was reduced (from -14.5% to -5%) as well as a small

increase in the bonus of above-average performers (from +2.34 to +3.5%) and a reduction in the penalty of poor performers from -25% to -19%.

15.3. Option 3:

15.3.1. This option reduces the number of Category B new entrants from 3 to 2. The decreases in the allocations to the 5 largest companies are reduced and the bonus to above-average performers is increased from 3.5% to 5% while keeping the size of allocations to poor performers approximately the same as in option 2 above. The percentage by which the largest 5 companies is reduced (relative to their previous allocations) is 4.5% and the % decrease of poor performers increases slightly from option 2 (-19.1% to -19.6%). The total percentage allocated to new entrants is reduced from 5 to 4.5%.

15.4. Option 4:

15.4.1. This option mirrors option 3 above, save that the minimum threshold of Category A applicants would have been increased by 1 % (to 51%), resulting in 3 right holders losing their commercial fishing rights.

15.4.2. This allowed for a further reduction in the percentage (%) decrease of the largest 5 companies (from -4.5% in option 3 to -2.5%) and enabled above-average performers to be rewarded slightly more (+5.78%) while poor performers are reduced by a more reasonable 10%.

15.5. Option 5:

15.5.1. This option mirrored option 4 above, save that although the minimum threshold of Category A applicants was increased by 1 % (to 51%), resulting in 3 right holders losing their commercial fishing rights, the largest 5 companies are evaluated in terms of their performance rather than having a fixed percentage (%) deducted upfront. This results in a reduction in the reward for above-average performers (from +5.78% to +4%) and an increase in the reduction for below-average performers (from -10% to -16.2%).

16. The Provisional GPR notified applicants/appellants of the potential revocation of rights and/or any proposed reduction in the percentage of TAC, where any of the proposed options on QAM would lead to a potential revocation of their right and/or the allocation on TAC previously made by the DA.

17. Approximately 50 comments were received for consideration. I have considered all the comments provided, mindful of my constitutional and legislative obligations, and policy considerations.

DELEGATED AUTHORITY'S QAM AND RIGHTS ALLOCATION PROCESS

18. On the comparative balancing criteria, the Delegated Authority determined that Category A applicants with a final weighted score of 50% or more (≥50%) would be granted a right, and applications with a final weighted score of less (i.e. <50%) would not be successful.

19. The top 5 scoring Category B applicants and the top 5 scoring Category C applicants (in terms of their Final Scores), were examined in detail on the following criteria:

    19.1. Evidence of developed or in-development methods for product beneficiation and hence value-adding to the landed raw product.

    19.2. Demonstrated investment in fishing-related industries;

    19.3. Their previous job creation performance;

    19.4. Their location, as broadening access to impoverished coastal regions, particularly on the East Coast, was considered important.

20. In terms of the Delegated Authority's decision:

    20.1. Ten percent (10%) of the TAC tonnage was reserved for appeals but 100% of the TAC % was allocated;

    20.2. 46 of the 80 Category A applicants were successful sharing 92, 592% of the TAC;

    20.3. 2 of the 59 Category B applicants were successful sharing 1,6667% of the TAC; and

    20.4. 4 of the 105 Category C applicants were successful sharing 5.7407% of the TAC.

OUTCOME OF THE APPEALS UNDER THE FORMER MINISTER

21. In considering the 169 appeals submitted against the decisions taken by the Delegated Authority in this sector, the former Minister determined the following outcome on appeal:

    21.1. 14 additional Category A appellants qualified on appeal to be awarded a right, having scored higher than the 50% threshold. The Minister also undertook a re-evaluation of all successful applicants/appellants. In terms of their performance results, some previous above-average performers become below-average performers and vice-versa and incorporated those adjustments in her appeal decisions.

    21.2. 1 additional Category B appellant qualified to be awarded a right on appeal.

21.3. All allocations were reduced by 10% given that the DA had already awarded 100% of the resource allocation.

22. The Delegated Authority allocated 100% of the TAC to successful applicants. The Delegated Authority applied the following QAM:

22.1. The 5 largest successful Category A right holders (based on their previous allocations) had their TAC values reduced by 5% (ie. to 95% of what they had held under the previous rights allocation process);

22.2. This reduction in allocation resulted in TAC being available for reallocation to new entrants as well as smaller Category A applicants that had performed better than others of a similar size;

22.3. The Delegated Authority divided successful Category A applicants into 10%-percentile 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.

23. The former Minister followed a similar approach on appeal, but gave consideration to the following:

23.1. Although the DA had determined the minimum TAC to be 200 t she did not allocate TAC below 225t, so in effect, a minimum allocation of 225t was adopted on appeal;

23.2. The 10% reserved TAC tonnage (3,000t) was added to the 27000 t and the total of 30 000t was then distributed amongst the 14 successful Category A appellants and 1 successful Category B appellant, using the minimum 225t, and Category A right holders that had already been allocated rights by the Delegated Authority by incorporating a re-evaluation of performance of Category A right holders and successful appellants, during the previous rights period.

OUTCOME ON THE RECONSIDERATION OF THE REMITTED AND REMITTED APPEALS

24. In my consideration of these appeals I was guided by the objectives and principles set out in section 2 of the MLRA. These guiding principles, which must be applied and balanced alongside each other, are as follows: (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.

25. I have also applied my mind to the General Policy on the Allocation of Commercial Fishing Rights: 2021 (the General Policy) and the Sector Specific Policy on the Allocation of Commercial Fishing Rights in the Sardine Sector: 2021 (the Sector Specific Policy), both of which informed and guided the FRAP 2021/2022.

26. Upon reviewing the decisions of the Delegated Authority and former Minister Creecy, and after having considered the remitted grounds of appeal, supplemented grounds of appeal, grounds of review and the comments received, I found as follows:

26.1. Revocation of Rights:

26.1.1. Some Interested and affected parties and/or appellants correctly commented that the Appeal Authority is not empowered to revoke those rights that had been awarded by the Delegated Authority but were not before the Appeal Authority on appeal. Nothing in the court orders remitting the appeals for reconsideration empowered the Appeal Authority to do so.

26.1.2. I am accordingly constrained in that my authority to revoke rights is limited to those appeals that are formally before me on appeal. To do otherwise would be outside the scope of my authority (ultra vires) and therefore unlawful.

26.2. Impact of Increasing the Threshold

26.2.1. Any option that increases the threshold for allocation of rights would axiomatically result in certain existing right holders, who now score below the adjusted threshold, losing their rights.

26.2.2. Such an outcome would be unlawful and subject to review, in so far as it would result in those right holders who have no appeal before me losing their rights.

26.2.3. Where an increase in the threshold results in the revocation of a right on an appeal pending before me, a further consultation process under section 80(3) of the MLRA and PAJA, to ensure a fair procedural process would need to be followed.

26.3. The Reductions of TAC allocated to larger Category A Right Holders

26.3.1. Larger companies argue that their TAC allocations were arbitrarily reduced to accommodate additional right holders into the sector. These reductions were not connected to any rational basis and unreasonably led to the highest performers being "penalised".

26.3.2. Some commenting parties stated a preference for performance-based adjustments to TAC:

26.3.2.1. Reward Pool: Incentivise high-performing right holders.

26.3.2.2. Penalty Pool: Penalise poor performers.

26.3.3. Any increase in penalties would require a further commenting process under section 80(3) of the MLRA and PAJA.

26.4. Fair and Correct Outcome:

26.4.1. In allocating rights to Category B and C applicants, the Delegated Authority deviated from allocating rights to the top ranking applicants.

26.4.2. Instead, the Delegated Authority applied additional criteria to the allocation of rights to Category B and C applicants, which resulted in outcomes that were not aligned with the original scoring, leading to inconsistencies.

26.4.3. This approach was not aligned to the general policy and the sector specific policy, rendering the outcome of the Delegated Authority's decision unlawful, unreasonable and procedurally unfair and therefore reviewable under PAJA.

26.4.4. I am unable to rectify this scoring error and inconsistent outcome within the appeal process, as not all Category B and C applications have been submitted for reconsideration on appeal.

26.4.5. The error in the allocation process has materially influenced the number of entrants admitted into Category B and C by the Delegated Authority. This means the limited TAC is to be shared amongst more entities which affects the meaningfulness of the distribution of the Total Allowable Catch (TAC), and the overall stability of the sector.

26.4.6. Furthermore, I am not vested with the legal authority to revoke rights granted to applicants whose matters are not currently before me on appeal. Accordingly, on the current court orders, I am unable to exclude those who may have been erroneously awarded rights by the Delegated Authority and I am obliged to include on reconsideration appellants who now score higher who had not previously been awarded a right. Such inclusion would result in an increase in the total number of right holders, thereby necessitating smaller allocations of TAC to the right holders in general.

26.4.7. The sardine resource is a limited resource, requiring the need to limit right holders to ensure meaningful participation in the fishery. An increase in the number of rights awarded could in future be used to pressurize the department to reconsider management objectives, apply less conservative management measures and ultimately threaten the sustainability of the resource for present and future generations.

27. While several commenting parties favoured the adoption of Options 1, 2 or 3 as set out above, a prudent approach supports the retention of the threshold applied by the Delegated Authority for the allocation of rights to Category A applicants, as well as the continued recognition of rights allocated to qualifying Category B and C applicants, particularly as I am constrained in my authority to revoke rights.

28. Moreover, on every permutation of the options considered, I am unable to rectify the error of the Delegated Authority in her allocation of rights to Category B and C applications. I thus am unable to achieve a correct and fair outcome for this sector. To achieve such an outcome, the errors of the Delegated Authority must be rectified.

29. I am also mindful that the law does not favour piecemeal decision-making. It would thus be prudent to finalise the outcome of TAC to Category A right holders, simultaneously with allocation of rights to Category B and C applicants.

30. Given that these errors cannot be lawfully corrected within the scope of the appeal process, and that they materially affect the fairness and legality of the rights allocation, I am unable to render a final decision in this sector, unless and until the decisions of the Delegated Authority on the allocation of rights to Category B and C applicants are set aside, by a court of law on review. It is also impractical for me as an appeal authority to factor in the practical complexities of these adjustments, noting that the management of the sardine resource is interwoven with that of other sectors such as anchovy and consideration needs to be given to downstream impacts on operational aspects of the industry.

31. Accordingly, the only appropriate decision for me to take is to not take a decision on the allocation of rights and TAC in this sector, but to rather institute proceedings to judicially review and set aside the following:

31.1. The decisions taken by the Delegated Authority and the former Minister on appeal, on the allocation of rights and TAC in Category B and C within the Sardine Fishery;

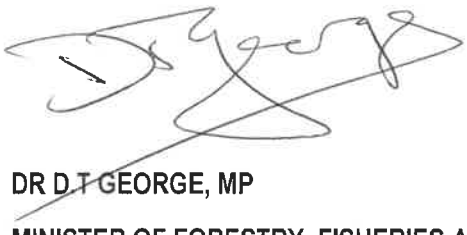
31.2. The decisions taken by the Delegated Authority and the former Minister on appeal on the allocation of rights to Category A right holders will not be reviewed and set aside. However, the percentage allocation of TAC will be reviewed and set aside to allow the Delegated Authority to adjust the TAC in accordance with her revised outcome.

32. Should the judicial review succeed, the applications for allocation of rights and TAC to Category B and C, and percentage allocation of TAC to category A right holders will be remitted to the Delegated Authority for reconsideration. The Delegated Authority will be required to re-evaluate the applications in accordance with the MLRA and the Sector Specific policies. This approach affords the Delegated Authority an opportunity to rectify the errors and afford applicants who are aggrieved with the outcome of the reconsidered decisions of the Delegated Authority to submit an appeal to me for consideration under section 80 of the MLRA.

33. In the interim, pending the outcome of the judicial review proceedings to be instituted and the finalisation of the reconsideration of the remitted applications by the Delegated Authority (should the review proceedings succeed), the allocation of rights and TAC as was determined by the former Minister in her Appeal GPR will continue to apply. Furthermore, the permits that are due to expire on 31 October 2025 should be extended to the 31st December 2025. This approach ensures stability in the sector pending the outcome of the review proceedings and decisions of the Delegated Authority.

34. In summary, the decision to initiate judicial review proceedings is based on the inability to lawfully correct material errors within the appeal process, the constraints imposed by the court orders, and the need to ensure procedural fairness, legal compliance, and sectoral sustainability. The review will seek to set aside the affected decisions of the Delegated Authority and former Minister, thereby enabling a lawful and equitable reallocation process.

35. Should any appellant be dissatisfied with any aspect of my decision(s), it may apply to a competent court to have the 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).



DR D.T GEORGE, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 30 | 10 | 2025