



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

**GENERAL PUBLISHED REASONS FOR DECISIONS ON APPEALS
HAKE INSHORE TRAWL SECTOR FRAP 2015/2016**

INTRODUCTION

1. This document sets out the General Published Reasons for Decisions on Appeals in the Hake Inshore Trawl (HIT) Sector 2015/2016 (the Appeals GPR) by the Minister of Forestry, Fisheries and the Environment (the Minister). The document is structured as follows: (A) Introduction (B) Appeals Process (C) Decisions on Systemic Grounds of Appeals, and (D) Adapted Quantum Allocation Methodology (QAM). Annexed to this spreadsheet are the results of the appeals process in terms of fishing rights allocations.
2. It is important to clarify at the outset that whilst this Appeals GPR is final, the allocation of fishing rights is subject to the correctness of the assertions made and information submitted by the applicants, and performance reviews. In light of the lengthy process of finalizing the verification process and in view of the fact that fishing in the new Fishing Rights Allocation Process 2021/22 (FRAP 2021/22) is soon to commence, with attendant ramifications for the industry and beneficiaries, I have decided to make the appeal decisions now. If the continuing verification process, which may include a forensic audit, reveals that a rights holder provided false information or made a material misrepresentation, I will exercise my powers in terms of section 28 of the Marine Living Resources Act, Act 18 of 1998 (MLRA).

3. This Appeals GPR addresses grounds of appeal of a systemic nature raised by appellants, and sets out how I deal with these issues and determine and decide the appeals in general. Where necessary and appropriate, the Appeals GPR makes specific references to individual appeals. However, it does not respond to each and every claim and allegation by individual appellants, especially where such complaint is overtaken by the decision I have made on other grounds of appeal which have been raised. Where appropriate and necessary, specific individual complaints that are not addressed by the Appeals GPR, are dealt with in the individual appeal decisions and notification letters that will be sent to appellants.
4. Each appellant or affected applicant in the sector will receive the following document by e-mail:
 - A letter incorporating the appellant's score on appeal and indicating whether it is successful in being granted a right;
 - The Minister's Appeal Decision and the full reasons for such decision on the appeal score;
 - Where applicable, a copy of the adjusted score sheet on appeal; and
 - Appeals GPR.
5. Appeals are governed by section 80 of the MLRA read with Regulation 5(3) of the Regulations, published under Government Notice R1111 in Government Gazette 19205, dated 2 September 1998. In arriving at my decisions, the following considerations apply:
 - 5.1 I am guided by the objectives of the MLRA as per section 2 thereof and I have endeavoured to ensure that my appeal decisions are in line with these objectives;
 - 5.2 I am also guided by the prevailing norms of the Constitution and the prescripts of administrative law and specific policies applicable to the fishing industry.
 - 5.3 I have considered all relevant information including: (i) the grounds of appeal, (ii) supplementary appeal information, (iii) the Regulation 5(3) reports prepared by the Delegated Authority; and (iv) the outcome of the various review applications in the High Court;
 - 5.4 I have also considered legal memoranda and legal opinions, the contents of which documents are confidential and privileged and will not be released without the consent of the Department and myself.
 - 5.5 I am also mindful of the guidance of the Courts in exercising my duties as gate-keeper of the DFFE, and its resources. The Constitutional Court, in the matter of *Bato Star(Pty) Ltd v Minister*

of *Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 151 made the following remarks:

"[5] ... Deep-sea trawling for hake was pioneered in South Africa by a handful of companies who remain dominant in the sector. Like most of the South African economy, the sector is dominated by companies that historically were established, owned and managed by white people. Accordingly, one of the ten objectives identified in section 2 of the Marine Living Resources Act, 18 of 1998 (the Act) is:

'(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

[6] This objective as well as all the other objectives set out in section 2 of the Act are, by their nature, incapable of immediate or short-term fulfilment. The objectives require action by the executive to facilitate their fulfilment in the medium- and long-term. Measures aimed at the achievement of the goal identified in section 2(j) of the Act need to be taken side by side with the steps designed to fulfil the other objectives identified in the Act. In particular, the Act recognises that the industry exploits a scarce marine resource that may be destroyed if not carefully managed and monitored. Most of the other objectives flow from this realisation. The other objectives identified in s 2 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;

¹ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (CCT 27/03) [2004] ZACC 15 at paragraphs [5] and [6]

- (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...'*

5.6 The Court also remarked as follows:

"[34] The provisions of s 2 and s 18 make it plain that the obligation imposed upon the decision-maker is an obligation to 'have regard to' the factors mentioned in s 2, and to 'have particular regard to' the factor mentioned in the case of s 18(5). The repetition of the requirement of the factor of transformation indicates its importance and the need for special attention to be given to the questions of restructuring and redress in the fishing industry. The historical imbalances which continue to disfigure the South African economy are felt acutely in the fishing industry. By underlining the importance of restructuring so as to redress imbalances, the Act emphasises that the unjust status quo cannot be maintained simply in the interest of stability. The thrust of the Act in this respect is in keeping with the Constitution, which opens its Preamble by recognising the injustices of the past, and then declares in s 1 that equality is a foundational value. When making his determination on quotas the Chief Director was accordingly obliged to give special attention

to the importance of redressing imbalances in the industry with the goal of achieving transformation in the industry.

[35] However, what is also clear, as indicated above, is that the broad goals of transformation can be achieved in a myriad of ways. There is not one simple formula for transformation. To the extent that the Act emphasises the need for decisions to facilitate the process of transformation, it suggests no particular preference for the manner in which this should be achieved. The manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker.

[36] Section 18(5) is of great importance at the stage when fishing rights are allocated. This section requires the Minister to make allocations that will achieve the objective contemplated in s 2 and, in doing so, he is enjoined to 'have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society'.

[37] Various objectives are set out in s 2. Sections 2(d) and 2(j) are directed to transformation and capacity building. They provide that regard must be had to:

(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;

...

(j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry'."

APPEALS PROCESS

6. Following the consideration of applications for fishing rights in the Fishing Rights Allocation Process of 2015/2016 (FRAP2015/16), in the HIT sector, the then Deputy Director-General: Fisheries Management (DDG:FM) as the Delegated Authority (DA) published her decisions in respect of such process, as recorded in the "*General Published Reasons for the Decisions on the Allocation of 2015/16 Fishing Rights and Quantum in the Hake Inshore Trawl*" (GPR), during November 2016.
7. Applicants who were dissatisfied with the DA's decision, appealed to the then Minister of Agriculture, Forestry and Fisheries (former Minister). Having considered the appeals before him, the former Minister published his decisions per the "*General Published Reasons for Decision on Appeals Hake Inshore Trawl Sector 2015/2016*" (2017 Appeals GPR), on 10 July 2017. These decisions of the former Minister of 10 July 2017 were reviewed and set aside by the Western Cape Division of the High Court, per orders made under Case Numbers 13778/17 and 23424/18. The former Minister was simultaneously ordered to start the appeals process afresh (the reconsideration order).
8. On 7 December 2018, the former Minister published a Media Statement setting out the outcomes of the reconsideration of the appeals in the process of complying with the reconsideration order. On 29 January 2019, the former Minister also published the "*General Published Reasons for the Minister's Decisions on Appeals filed in the Hake Inshore Trawl Fishery following the decision of the Western Cape Division of the High Court of South Africa under Case Numbers: 13778/17 and 23424/18 to Review and Set Aside the Minister's Appeal Decision of 10 July 2017*" (2019 Appeals GPR).
9. In terms of the reconsideration order, the former Minister had to revisit the 70/30 split in relation to the Total Allowable Catch (TAC) in the HIT sector. The former Minister decided to increase the 30% TAC allocated to Category B and C applicants to more than 40% to accommodate ten (10) additional new entrants in the HIT sector.
10. Dissatisfied with the former Minister's decisions in the reconsideration of the appeals, on 1 August 2019, Seavuna Fishing Company (Pty) Ltd (Seavuna) and Others, successfully applied to the Western Cape High Court under Case Number 3330/19 for the decisions of the former Minister to amend the 70/30 split, to be reviewed and set aside. The Court granted the following order, *inter alia*:

- “1. *The [former Minister’s] appeal decision of 10 July 2017 for the Hake Inshore Trawl Sector stands and is of full force and effect insofar as it establishes that Category A right-holders will share 70% and Category B and C right-holders will share 30% of the total allowable catch for the Hake Inshore Trawl fishery;*
2. *The [former Minister’s] appeal decision of 7 December 2018 is reviewed and set aside in its entirety; and the Category B and C appeals are remitted to the [Minister] for her to reconsider allocating 30% of the total allowable catch in the Hake Inshore Trawl Fishery to these new entrants.”*

11. The order in the Seavuna matter is the basis upon which I am required to reconsider the appeals in relation to category B and C applicants afresh, for the allocation of the remaining 30% of the TAC to successful applicants in these categories.

GROUNDS OF APPEAL

12. The following section highlights the various grounds of appeal raised by appellants per category:
 - 12.1 Ambiguity/lack of clarity on certain questions in the application form;
 - 12.2 Unsuitable vessels nominated by applicants;
 - 12.3 Errors in scoring applicants;
 - 12.4 Allegations against other applicants;
 - 12.5 Underweighting of black ownership under the transformation scores;
 - 12.6 Scoring of sections that were not applicable to completely new entrants who had never been involved in the fishing industry; and
 - 12.7 Exclusion on the basis of being a paper quota risk within the sector..

DECISIONS ON SYSTEMATIC/CROSS CUTTING GROUNDS OF APPEAL

13. In this Appeals GPR, I address certain overarching issues which apply to a number of the appeals. My individual Appeal Decisions should in each instance be read together with this Appeals GPR for wider context.
14. First, a number of appellants correctly pointed out in their appeals that certain questions in the application form cannot fairly be applied to new applicants. This was recognized by the former Minister when he dealt with the appeals, and those elements were zero weighted or discarded. I have done the same.
15. Secondly, many Category C applicants complained that sub-para 1.27 of the application form was ambiguous, in that it was not clear that the question was intended to determine the applicant's or its shareholders' involvement in other fishing businesses such as fish farming, processing, marketing etc. This question sought to score applicants on whether they owned equity in a fishing vessel, were involved in fish processing, fish marketing or aquaculture or held a fishing right. It is important to note that in regard to vessel ownership, it is not HIT sector specific. To resolve this issue, I have taken into consideration facts in that regard which were submitted by the applicant after the DA's decision, but which existed at the time that the application was made.
16. Thirdly, in response to question 6.1 applicants were required to complete the table and indicate what percentage shareholding/membership interest was held by black persons during 2005, 2009 and 2015. This question disadvantages new entrants since they would in most instances only have come into existence in 2015. In order not to prejudice new entrants who were only able to record their black shareholding/membership in 2015, full points were awarded if the applicant had 100% black shareholding/membership in 2015.
17. Fourthly, the GPR allocates points per black/female/youth/disabled shareholder or member in respect of question 6.3 on the application form. It permits a maximum of 150 points in respect of these categories and years of service of employees. It gives rise to potential anomalies where there are more than ten shareholders/members: For example:
 - 17.1 An applicant which has 100 members/shareholders will easily reach the maximum of 150 points even if many of the members/shareholders satisfy none of the qualifying criteria; and

- 17.2 That applicant will score much more than (for example) an applicant which has 10 shareholders/members, all of whom satisfy some of the qualifying criteria.
18. This would be a perverse outcome given that the goal of this question is to encourage and reward transformation.
19. I have therefore dealt with this on the following basis:
- 19.1 Where an appellant has not more than 10 shareholders/members, points are allocated per each qualifying person;
- 19.2 Where an appellant has more than 10 shareholders/members, points are allocated per each qualifying person, but the score in that regard is reduced pro rata to the points which would be awarded if there were 10 shareholders/members. This is because the maximum score of 150 allows for a maximum of 10 shareholders/members;
- 19.3 Where an appellant is a Trust, I, took a wide view to award points based on the beneficiaries of the Trust;
- 19.4 Where an appellant is an NPO, no points were allocated to the entity or its Directors, in line with the Policy.
20. Fifth, some Category B and C appellants did not indicate in Section 4 of the application form that they had access to a suitable vessel with proof of such access. Paragraph 7.2 (e) of the Policy for the HIT sector states that: "An applicant will be required to demonstrate a right of access to a vessel suitable for the harvesting of hake in the HIT fishery." This statement appears in paragraph 7.2 which deals with "Balancing criteria" and this matter was treated as such. In certain instances, however, access to a suitable vessel was also a factor that was taken into account in considering whether an applicant was a 'paper quota risk', in terms of paragraph 7.8.1 of the General Policy on the Allocation and Management of Fishing Rights: 2013. Access to a suitable vessel is in terms of paragraph 6.1.1(e) of the General Policy regarded as a minimum essential requirement for participating in the sector, and the DA has no discretion to condone non-compliance with an essential requirement for participating in the sector. Once an application is excluded from participation in the sector as contemplated in paragraph 6.1.1(e) of the General Policy, such an application could not be advanced to the stage where it could be scored in terms of the set of balancing criteria. Paragraph 6.2.1 of the General Policy provides that only applications that

were properly lodged, that are not materially defective and that meet the essential requirements, will be scored in terms of the set of balancing criteria. I have therefore excluded these appeals from the scoring process in terms of the set of balancing criteria.

MINISTER'S ADOPTED QUANTUM ALLOCATION METHODOLOGY

21. Having consulted with the HIT Technical Advisory Team, and based on the information that has been provided, I have adopted the QAM which is discussed below with regard to the allocation of rights to successful appellants.

Background:

22. Following the previous appeals and legal action, the structure of Rights Holders in the HIT sector at the time of my consideration of the appeals was as follows:
 - Category A: Fifteen (15) entities that collectively hold 70% of the hake inshore trawl TAC (as per court order in the Seavuna matter)
 - Category B: Six (6) entities that collectively hold 10.576% of the hake inshore trawl TAC
 - Category C: Six (6) entities that collectively hold 18% of the hake inshore trawl TAC
23. The FRAP 2015/2016 HIT sector's QAM of the DA effectively ranked the applicants within each category according to their scores (from highest to lowest) and granted rights to the top six (6) scoring entities in each of categories B and C.
24. Category C Right Holders were each allocated 3% of the HIT TAC in accordance with the "minimum allocation" approach developed during the FRAP 2015/2016 HIT process (3% being, on average, the amount of quota that was recognised by the industry as required to keep an average inshore trawler operational for 220 days per annum, which was felt to represent an allocation that would promote meaningful participation in the fishery and avoid paper quota risks).
25. I have decided that this "minimum allocation" could be reduced for entities that held rights in other sectors (i.e. Category B applicants), who were not as reliant on the HIT sector as are Category C entities.

Minister's consultation on Quantum Allocation Methodology

26. To assist me in reconsidering the appeals per the relevant Court orders, I appointed the Appeals Advisory Team (AAT) through the Office of the State Attorney, Cape Town. The AAT consists of a panel of practising advocates.
27. Members of the AAT were required to advise me, as the appeal authority, on issues of a legal and substantive nature in respect of certain of the appeals.
28. The AAT had to consider and evaluate each of the relevant Regulation 5(3) reports prepared by the DDG: FM, in respect of such appeal instructed upon, in line with the objectives and provisions of the Act, the General Policy on Management and Allocation of Fishing Rights: 2013, and the Sector Specific Policies: 2015. The AAT considered and evaluated each matter instructed upon and advised me on the merits thereof.
29. The AAT made certain preliminary appeal recommendations to me, after evaluating and assessing each appeal. Having considered such recommendations, as well as the advice of the Technical Advisory Team in the HIT sector, I have made final Appeal Decisions in each of the appeals and rescored successful appellants. I also re-ranked successful appellants and current right holders in accordance with their scoring.
30. The six (6) top scoring FRAP 2015/2016 Category B right holders per the DA's decision remain among the highest scoring entities, with an additional five (5) appellants scoring sufficiently high to be considered for a commercial fishing right in the sector. I have decided to retain the existing six entities in the sector, with the result that total of eleven (11) entities now need to be accommodated in Category B. I have done so having regard to the relevant considerations, and particularly the following factors:
 - 30.1 the need for stability in the sector;
 - 30.2 these entities have a substantial black ownership profile. If they are permitted to fish, this will broaden the pool of Historically Disadvantaged Individual rightholders going forward;

- 30.3 The Category B and C appellants in HIT have not been allowed to fish since the review process set aside such decisions of the DA and/or former Minister. This will be mitigated by retaining them in the sector, having met adequate scores on appeal, pending the new FRAP.
- 30.4 It is desirable to increase the number of new entrants in the fishery and to retain new entrant rights holders who have already invested in the sector.
- 30.5 The quantum allocated to the Category B entities will be reduced by the admission of the five new entities on appeal, which will result in some fragmentation. On the other hand, I note, that Category B rights holders already hold rights in another sectors and will thus not be as affected as Category C entities would be.
31. The six (6) top scoring FRAP 2015/2016 Category C right holders per the DA's decision, remain the only successful Category C entities in the fishery.
32. I have decided that the 70:12:18 ratio apportionment of the HIT TAC among the three categories (A:B:C) should be retained. Twelve percent (12%) of the HIT TAC should therefore be allocated among the eleven (11) successful Category B entities in a manner that accounts for multisector involvement and relationships with other HIT sector entities (note that the latter will not affect the allocations of related Category A entities per the order in the Seavuna matter). The 12% HIT TAC apportionment to Category B entities is distributed equally among the 11 successful entities – see Table 1 below.
33. The “sector penalty” is applied as a further reduction of each allocation in accordance with the approach used during the FRAP2015/2016 QAM, which I likewise apply herein:
- Each entity is assigned a “sector penalty” factor calculated as the sum of the points for each other sector in which the entity is involved (2 points for each Cluster A fishery and 1 point for each Cluster B or C fishery) – See Table 2 below.
 - The allocation of each entity resulting from table 1 is reduced by twice the sector penalty expressed as a percentage (i.e. $2 \times [\text{sector penalty} / 100]$).
 - The balance of the Category B apportionment following these adjustments is then redistributed *pro rata* among the entities, with the exception of Mayibuye and Fisherman Fresh (to account for these entities being related to Category A Right Holders in HIT).

34. The five (5) successful 2021 appellants in Category B (Cyrel Burrel, Full Deck Investments, T&N Visserye, Offshore Fishing Company and Zimele Enterprises), do not appear to be related to any of the previously successful FRAP 2015/2016 entities. The only “related” entities consequently remain as Mayibuye (related to Category A Right Holders Capenis, Seeheim, Namutoni and Vecto) and Fisherman Fresh (related to Category A Right Holder Nkunga Fishing).
35. Eighteen percent (18%) of the HIT TAC is to be allocated among the six (6) successful Category C entities. The allocation of three percent (3%) of the HIT TAC to each successful Category C entity, consequently, remains unchanged. See table 1 below.
36. Following the Eyethu Fishing (Pty) Ltd decision, eighty percent (80%) of the Inshore Trawl Agulhas sole TAC is allocated among the Category A entities. The remaining 20% will thus be allocated among the successful Category B and C entities *pro rata* as per their proportional allocations of the HIT TAC. The final Category B and C HIT and sole allocations are listed in Table 3 below.

CONCLUSION

37. The abovementioned takes into account and balances concerns with regard to: the number of entrants already in the sector; the need to admit new entrants into the sector; the limited availability of the resource and TAC; the risk of paper quota holders; the allocation of rights in a manner that is viable for new entrants; and the capital intensive nature of the HIT sector.
38. Whilst it is noted that the previous process allowed for 2% of HIT TAC to be allocated to successful category B applicants, I decided that this “minimum allocation” could be reduced for entities that hld rights in other sectors, who are therefore not as reliant on the hake inshore trawl sector as are Category C entities.
39. It is noted that I have the power on appeal to award fishing rights, as well as to overturn such decisions by the DA to allocate rights, including decisions related to TAC, where such decision-making is rational, fair and in line with the provisions of the MLRA and specific policies.

40. I note that individual HIT TAC apportionments may be split/limited where there are “brother-sister” relationships between existing right holders and those appellants who are allocated rights on appeal by Minister, per the provisions of the relevant policies.

Table 3: Final Inshore Trawl hake and sole allocations to successful Category B and C entities following the 2021 Appeals process.

Cat	App #	Applicant Name	GoR	Score	Hake	Sole	
B	HITM151510	LETAP CC	FRAP2016	96,15	1,0757	0,7171	
B	HITM151503	MAYIBUYE FISHING (PTY) LTD	FRAP2016	83,56	1,0109	0,6739	
B	HITM151514	FISHERMAN FRESH CC	FRAP2016	80,15	1,0309	0,6873	
B	HITM151132	CYREL BURREL FISHING CC	Appeals2021	75,47	1,1183	0,7455	
B	HITM150567	FULL DECK INVESTMENTS (PTY) LTD	Appeals2021	72,17	1,1183	0,7455	
B	HITM150054	T&N VISSERYE CC	Appeals2021	71,80	1,1396	0,7597	
B	HITM150124	OCEAN UKHOZI FISHING (PTY) LTD	FRAP2016	71,65	1,1183	0,7455	
B	HITM150003	OFFSHORE FISHING COMPANY (PTY) LTD	Appeals2021	69,43	1,0544	0,7030	
B	HITM150008	CAPE FISH PROCESSORS CC	FRAP2016	69,42	1,0970	0,7313	
B	HITM151545	ZIMELE FISHING ENTERPRISES CC	Appeals2021	69,09	1,0970	0,7313	
B	HITM151549	DAZZELLE TRADERS	FRAP2016	67,34	1,1396	0,7597	
C	HITM150067	UKULOKA KULUGILE INVESTMENTS (PTY) LTD	FRAP2016	78,9	3,0000	2,0000	
C	HITM150552	BOLOKO TRADING AND INVESTMENTS (PTY) LTD	FRAP2016	74,66	3,0000	2,0000	
C	HITM150038	OCEAN PRINCE MARINE PRODUCTS (PTY) LTD	FRAP2016	61,84	3,0000	2,0000	
C	HITM151121	KALMIA TRADING 1001 CC	FRAP2016	59,22	3,0000	2,0000	
C	HITM151108	ATLANTIS SEAFOOD PRODUCTS (PTY) LTD	FRAP2016	58,18	3,0000	2,0000	
C	HITM151128	SOUTHERN PENINSULA TRAWLING CO. (PTY) LTD	FRAP2016	57,61	3,0000	2,0000	
					TOTAL	30,0000	20,0000
					Category B Total	12,00	8,00
					Category C Total	18,00	12,00



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 20/12/2021