



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

Final General Published Reasons for the Decisions on Appeal in the Horse Mackerel Fishery: 2015/16

1. INTRODUCTION

- 1.1 This document is titled “Final General Published Reasons for the Decisions on Appeal in the Horse Mackerel Fishery: 2015/16” (Final Appeals GPR).
- 1.2 On 21 December 2021, in my capacity as the Appeal Authority in terms of section 80 of the Marine Living Resources Act 18 of 1998 (MLRA), I released my Provisional General Published Reasons for the Decisions on Appeal in the Horse Mackerel Fishery: 2015/16 (Provisional Appeals GPR) and on 11 January 2022, I further published the Addendum to the Provisional Appeals GPR (the Addendum).
- 1.3 On 11 January 2022 a notice was published on the Departmental website inviting comments/representations from all applicants in the Horse Mackerel sector on the proposed Quantum Allocation Methodology (QAM) and in general inviting representations by interested parties, as contemplated by section 80(3) of the MLRA, by 10 February 2022. I have considered the comments that were submitted.
- 1.4 This Final Appeals GPR should be read in conjunction with the Provisional Appeals GPR and the Addendum.

2. COMMENTS / REPRESENTATIONS RECEIVED

- 2.1 The comments/representations covered a wide range of issues, including the following:
 - 2.1.1 Allegations of scoring errors in relation to balancing criteria.
 - 2.1.2 The contention that fishing rights previously awarded by the Delegated Authority (DA) were final, and the only aspect of the DA's decision that was provisional was the decision on the final QAM. It was contended that the Minister is not entitled to make a decision on appeal that has the effect that an entity to which the DA had allocated a fishing right would not receive a fishing right. It was further contended that the thrust of the reconsideration of the appeals was to develop a lawful and equitable QAM, not to rescind rights.

- 2.1.3 Objections to the proposed QAM having the effect of certain appellants being excluded on appeal.
- 2.1.4 Assertions that there is no correlation between scores that applicants obtained during the appeals process and the quantum allocation that appellants received.
- 2.1.5 Assertions that the proposed QAM is defective and susceptible to judicial review.
- 2.1.6 Assertions that allocations to category B entities were as per the initial QAM (although slightly adjusted on a *pro rata* basis to accommodate successful appellants in previous appeals processes).
- 2.1.7 Assertions of an over-emphasis on black ownership, and that a purported reduction in Total Allowable Catch (TAC) based on a lack of black ownership is irrational and improper. It is contended that this constitutes unfair discrimination based on the race of the shareholders.

3. INTRODUCTORY REMARKS

- 3.1 I note at the outset that in making my decisions, I have had to consider and balance a wide range of factors. They include, but are not limited to, the following:
 - 3.1.1 The broad principles applying to the allocation of fishing rights, derived from the Constitution and the MLRA;
 - 3.1.2 The purpose and objectives of the 2013 General Policy read with the Horse Mackerel Sector Specific Policy;
 - 3.1.3 The need to broaden access to the fishery, by introducing new entrants;
 - 3.1.4 The need for transformation;

- 3.1.5 The desirability of multi sector involvement, facilitating participation throughout the value chain;
- 3.1.6 The need to minimise negative impact on the fishing industry, including instability or disruption of existing participation and job creation;
- 3.1.7 The risk of job losses;
- 3.1.8 The dynamics of this specific fishery, including that it is highly monopolised, which is undesirable in the context of a natural resource;
- 3.1.9 The available TAC;
- 3.1.10 The number of existing rights holders in the sector;
- 3.1.11 The need to minimise the risk of paper quota holders;
- 3.1.12 The adjustments which need to be made where related entities have both applied for rights in the sector;
- 3.1.13 The fact that in most instances Category A and B entities have rights in other sectors, and are therefore not completely reliant on the horse mackerel allocation alone;
- 3.1.14 The fact that Category C applicants will generally score lower than Category A and B applicants;
- 3.1.15 The desirability of giving successful applicants a reasonable prospect of active and meaningful participation in the fishery;
- 3.1.16 The historical allocations, commencing with the Long Term Rights Allocation Management Process (LTRAMP) cycle and culminating in the 2019 appeals allocations;

- 3.1.17 The terms of the court order in the matter of *Blue Continent Products (Pty) Ltd and 2 others v Minister of Environment, Forestry and Fisheries and 35 others*, under case number 19974/19 and the argument in that matter as to the legality and fairness of the former Minister's decisions, which had introduced 30 new entrant applicants to the fishery, and had allocated to those new entrants 62.62% of the TAC, leaving only 35.54% of the TAC available for allocation to successful Category A right holders.
- 3.2 I recognise that opinions will vary as to what weight should be given to each of these factors and other factors, and how they should be balanced with each other. Ultimately I have been given the responsibility of undertaking this task.

4. RESPONSE TO COMMENTS / REPRESENTATIONS RECEIVED

- 4.1 As I have stated, I have considered the comments/representations which were submitted. I do not respond specifically to each of the comments/representations individually. This should however not be construed as acceding thereto or accepting such comment or representations as being correct.
- 4.2 The following is a summary of my response to the principal comments/representations:
- 4.2.1 A Minister, acting in the capacity of an appeal authority in terms of section 80 of the MLRA, has the power on appeal to confirm, set aside or vary any of the decisions of the DA.
- 4.2.2 The MLRA confers upon me the power to award a fishing right. I have been advised that I have the authority and the responsibility also on appeal, to determine who shall be granted such a right. I have been further advised that decisions by the DA are by necessary implication provisional, in the sense that they are subject to the outcome of appeal. It was for this reason that I provided all concerned entities with the opportunity to address me before making my final decision on appeal.
- 4.2.3 I have noted the allegations regarding paper quota right holders. At the time of considering the appeals, I did not have before me all relevant information in respect of active participation of all applicants in the sector, and the evidence of such participation. I have thus called for a

full verification process to be undertaken by the DA, which may include a forensic audit. If it reveals that a right holder provided false information or made material misrepresentations in its application or appeal, or is not actively participating in the sector, the DA is entitled to exercise his/her powers in terms of section 28(1) of the MLRA.

- 4.2.4 In response to the assertion that there was an over emphasis on black ownership, I am aware that I am obliged not only to consider transformation, which forms a critical part of the Fishing Rights Allocation Process (FRAP), but also to balance considerations of transformation with all other relevant factors.
- 4.2.5 It is not possible to determine with scientific certainty what portion of the TAC would enable an entity to participate actively in the industry. There are a number of variables specific to each entity, and each entity will have its own costs, resources, capacity and challenges. However, as a guiding principle the Department has deemed a “minimum allocation” in the Horse Mackerel midwater trawl sector as the proportion of the TAC that would, generally, be required to keep a vessel at sea for about 220 days per *annum*, as per the capacity management model that is used in the trawl sectors.
- 4.2.6 The calculation of the TAC allocated to each successful entity is not based on the entity's score. Scoring is used to rank entities in order of allocation of rights. I recognised that awarding allocation of the TAC on the basis of an entity's score, would negatively impact the introduction of new participants into the sector. In this regard I had to consider HDI ownership and rights held in other sectors so as to adjust LTRAMP allocations, all in an effort to minimise the impact of a reduction in allocations, but also to promote the interests of smaller entities where appropriate. Allocations were as per the initial QAM (although slightly adjusted on a *pro rata* basis to accommodate successful appellants in previous appeals processes) and to account for changes in the apportionment of the TAC between the Category A, B and C entities.

5. DECISIONS

5.1 Having considered all the relevant information before me, including the individual appeals, as well as all the comments that have been received in response to the Provisional Appeals GPR, and having had regard to the multiple relevant considerations, I determine the following entities are awarded a right in the Horse Mackerel sector:

5.2 **Category A:**

5.2.1 Sea Harvest Corporation (Pty) Ltd;

5.2.2 Eyethu Fishing (Pty) Ltd;

5.2.3 Irvin & Johnson Ltd;

5.2.4 Blue Continent Products (Pty) Ltd;

5.2.5 Seavuna Fishing Co. (Pty) Ltd;

5.2.6 Bhana Coastal Fishing CC;

5.2.7 Visko Sea Products (Pty) Ltd;

5.2.8 Klipbank Visserye Personeel (Edms) Bpk;

5.2.9 Hentiq 3043 (Pty) Ltd; and

5.2.10 BP Marine Fish Products CC

5.3 **Category B:**

5.3.1 Ulwandle Fishing (Pty) Ltd;

5.3.2 Ulwandle Inshore (Pty) Ltd;

- 5.3.3 Fisherman Fresh CC;
- 5.3.4 Premier Fishing SA (Pty) Ltd;
- 5.3.5 Le Tap CC;
- 5.3.6 Mayibuye Fishing (Pty) Ltd;
- 5.3.7 Offshore Fishing Company (Pty) Ltd;
- 5.3.8 Capenis Investments (Pty)Ltd;
- 5.3.9 JC Fishing CC;
- 5.3.10 Algoa Marine Exporters (Pty) Ltd;
- 5.3.11 Zimkhitha Fishing (Pty) Ltd; and
- 5.3.12 Vecto Trade 126 (Pty) Ltd.

5.4 **Category C:**

- 5.4.1 Kalmia Trading 1001 CC;
- 5.4.2 Ukuloba Kulungile Investments (Pty) Ltd;
- 5.4.3 Atlantis Seafood Products (Pty) Ltd;
- 5.4.4 Pavilion Investments (Pty) Ltd;
- 5.4.5 K2015290802 (Pty) Ltd: I point out in this regard that at paragraph 5.6.4 of the Provisional Appeals GPR, XCape Tuna (Pty) Ltd was incorrectly included as a successful Category C

appellant. This was a typographical error, when one has regard to the individual appeal decisions, score sheets and tables of TAC provided. The correct successful appellant is. K2015290802 (Pty) Ltd

5.4.6 Yamkela Khoisan Marine NPC; and

5.4.7 Korana Fishing (Pty) Ltd.

The allocation of the TAC

5.5 Category B – 20.00% of the TAC allocated among 12 successful applicants:

5.5.1 FRAP2016 resulted in 23 successful Category B applicants, which were collectively allocated 45.10% of the TAC. The allocations were calculated using the 2% minimum allocation for entities with Rights in other sectors as a starting point. The 2% was then adjusted downwards for each entity using the “sector penalty” adjustment. Allocations to related entities were split equally among the entities.

5.5.2 Following the 2019 Appeals process, an additional 2 Category B entities were successful. The allocations to these Category B entities were calculated as per the FRAP2016 process described above. Although the rewards pool was largely used to accommodate the extra entities, a slight downwards adjustment of the allocations of all successful entities was also required to ensure that the TAC would not be exceeded.

5.5.3 Following the 2022 appeals process and the decision to apportion the Horse Mackerel TAC according to a 60:20:20 split, 12 Category B applicants are considered successful. The allocations of these entities resulting from the adjustments described above, are reduced *pro rata* to yield a collective 20% allocation to Category B.

5.6 Category C – 20 % of the TAC allocated equally among 7 successful applicants, yielding an allocation of 2.857% per successful entity:

5.6.1 FRAP 2016 resulted in 4 successful Category C applicants. Following the 2019 appeals, Korana was also successful. The 2022 appeals resulted in 2 additional appellants (K2015290802 and Yamkela Khoisan) scoring higher than Korana, and therefore also having to be considered successful. I retained Korana, in light of its sufficiently high score, active participation and the need to support new entrants into a sector that is financially challenging and highly monopolised by larger role players.

5.7 Category A - 60.00% of the TAC allocated among 10 successful applicants

5.7.1 The remaining proportion of the Horse Mackerel TAC is distributed *pro rata* among the Category A entities, resulting in a final allocation to Category A of 60% of the Horse Mackerel TAC among 10 successful applicants.

5.7.2 FRAP 2016 resulted in 4 successful Category A applicants being collectively allocated 28.04% of the TAC. The December 2016 allocations were calculated using the LTRAMP allocations as a starting point. These allocations were first adjusted (*pro rata*) downwards to “release” TAC to enable establishing the “rewards pool”. The resulting allocations were then adjusted downwards even further (using a “transformation” adjustment based on the percentage HDI ownership of the entity) to “release” TAC for new entrants. In the case of BCP, the final allocation (24.33%) was split equally between BCP and the related Category B applicant Ulwandle Inshore, resulting in 12.16% being allocated to each of these entities.

5.7.3 The 2019 appeals process resulted in the inclusion of an additional 3 Category A entities (as well as 2 Category B entities and 1 Category C entity). The allocations to these Category A entities were calculated as per the FRAP2016 process described above. Although the rewards pool was largely used to accommodate the extra entities, a slight downwards adjustment of the allocations of all successful entities was also required to ensure that the TAC would not be exceeded.

5.7.4 Following the 2022 appeals process, an additional 3 Category A applicants are successful (scored higher than a 50% threshold). The allocations to these Category A entities are calculated as per the FRAP2016 process described above. To then give effect to the

60:20:20 decision, the allocations of all 10 successful Category A entities are then increased *pro rata* to yield a collective 60% allocation to Category A.

6. CONCLUSION

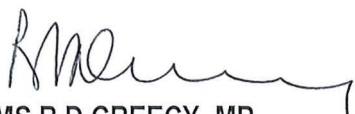
6.1 I determine that the following entities are awarded a right in the Horse Mackerel, per the TAC allocations set out in the table below.

6.2 I note that following this appeals process, two entities related to Mayibuye (Seeheim and Namutoni) are no longer successful, which was not taken into account when undertaking the calculations for Mayibuye in the Provisional Appeals GPR. The situation has been corrected accordingly in the table herein.

2022 60:20:20 (10A + 12B + 7C)		
Registered Name	Weighted Score (%)	Allocation (%)
CATEGORY A		
Sea Harvest Corporation (Pty) Ltd	89,72	8,2
Eyethu Fishing (Pty) Ltd	86,05	7,4
Irvin & Johnson Limited	85,85	5,69
Blue Continent Products (Pty) Ltd	83,33	16,02
SeaVuna Fishing Co. (Pty) Ltd	*NS ¹	6,67
Bhana Coastal Fishing CC	67,5	2,73
Visko Sea Products (Pty) Ltd	61,51	2,4
Klipbank Visserye Personeel (Pty) Ltd	52,18	4,14
Hentiq 3043 (Pty) Ltd	51,34	4,14
BP Marine Fish Products CC	51,09	2,61
CATEGORY B		
Ulwandle Fishing (Pty) Ltd	88,15	1,27
Ulwandle Inshore Fishing (Pty) Ltd	85,38	7,87
Fisherman Fresh CC	82,99	1,31

* NS (No Score): SeaVuna Fishing Company (Pty) Ltd is the holder of commercial fishing rights in the Horse Mackerel fishery having obtained a transfer of rights that were originally granted to Viking Fishing Co (Deep Sea) (Pty) Ltd under application HMCK 151112 and Selecta Fishing (Pty) Ltd under application MHCK151113 in the fishing rights allocation process undertaken in 2015/2016.

Premier Fishing SA (Pty) Ltd	82,81	1,19
Le Tap Fishing CC	81,15	1,23
Mayibuye Fishing (Pty) Ltd	80,92	0,42
Offshore Fishing Company (Pty) Ltd	78,9	1,23
Capenis Investments (Pty) Ltd	74,36	0,42
JC Fishing CC	74,28	1,95
Algoa Marine Exporters (Pty) Ltd	72,99	1,34
Zimkhitha Fishing (Pty) Ltd	71,78	1,34
Vecto Trade 126 (Pty) Ltd	71,59	0,42
CATEGORY C		
Kalmia Trading 1001 CC	79,36	2,86
Ukuloba Kulungile Investments (Pty) Ltd	71,38	2,86
Atlantis Seafood Products (Pty) Ltd	62,6	2,86
Pavillion Investments (Pty) Ltd	53	2,86
K2015290802 (Pty) Ltd	49,05	2,86
Yamkela Khoisan Marine NPC	45,42	2,86
Korana Fishing (Pty) Ltd	43,93	2,86



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 31/03/2022