



MINISTER
FORESTRY, FISHERIES AND THE ENVIRONMENT
REPUBLIC OF SOUTH AFRICA

GENERAL PUBLISHED REASONS FOR DECISIONS ON APPEALS
KZN CRUSTACEAN TRAWL SECTOR
FISHING RIGHT ALLOCATION PROCESS 2021/2022

INTRODUCTION

1. These are the General Published Reasons for the Decisions on appeal in the KZN Crustacean Trawl Fishery: 2021/2022 by the Minister of Forestry Fisheries and the Environment (Minister). This document is titled the "General Published Reasons for Decisions on Appeals in the KZN Crustacean Trawl Fishery: 2021/2022" (the Appeals GPR).
2. The Appeals GPR is structured as follows:
 - 2.1 Introduction;
 - 2.2 Grounds of Appeal;
 - 2.3 Decisions on Systematic/Cross cutting Grounds of Appeals;
 - 2.4 Quantum Allocation Methodology (QAM);
 - 2.5 Outcome of the Assessment;
 - 2.6 Conclusion; and
 - 2.7 The final allocation of commercial fishing rights in the KZN Crustacean Trawl sector is set out in Annexure A to the Appeals GPR.
3. During February 2022, the Department of Forestry, Fisheries and the Environment (the Department) completed its process relating to the consideration of applications in the Fishing Rights Allocation Process of 2021/2022 (FRAP2021/22), in the KZN Crustacean Trawl sector. The Director: Resources Research, in her capacity as the Delegated Authority (DA) in the KZN Crustacean Trawl sector, published her decisions in respect of the FRAP 2021/2022 in the "*General Published Reasons for the Decisions on the Allocation of 2015/16 Fishing Rights and Quantum in the KZN Crustacean Trawl*" (GPR).
4. Applicants who were dissatisfied with the DA's decision were entitled to appeal against the decision(s) of the DA, in terms of section 80 of the MLRA, read with regulation 5 of the Regulations to the MLRA, via the Department's FRAP Appeals online system. The closing date for FRAP 2021/2022 appeals was 29 July 2022. The Department received eight (8) appeals in the KZN Crustacean Trawl sector across the different categories of applicants.

5. Appeals are governed by section 80 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (MLRA) read with Regulation 5(3) of the Regulations to the MLRA, published under Government Notice R1111 in Government Gazette 19205, dated 2 September 1998.
6. This Appeals GPR addresses the issues raised in the appellants grounds of appeal, and it sets out how I, in my capacity as the Appeal Authority in terms of section 80 of the MLRA, dealt with these issues to determine and decide the appeals in general.
7. I note, at the outset, that in making my decisions on the appeals that have been submitted against the FRAP 2021/2022, I considered and balanced a wide range of factors. These include, but are not limited to, the following:
 - 7.1 The principles and objectives derived from the Constitution that are relevant to the FRAP 2021/2022;
 - 7.2 The principles and objectives of the MLRA as stated in section 2 thereof;
 - 7.3 The purpose and objectives of the General Policy on the Allocation of Commercial Fishing Rights: 2021 (the General Policy) read with the various sector specific policies on the allocation of commercial fishing rights: 2021 (the Sector Specific Policies);
 - 7.4 The need to broaden access to the fishing industry, by introducing new entrants to the various fisheries;
 - 7.5 The need for transformation of the fishing industry to achieve equity and to address historical imbalances;
 - 7.6 The desirability of multi sector involvement, facilitating participation through the value chain;
 - 7.7 The need to minimise negative impacts on the fishing industry, including instability or disruption of existing participation in job creation, and minimising job losses;
 - 7.8 The need for sustainable development of the natural resource through, among other, the determination of the Total Allowable Catch (TAC) and Total Allowable Effort (TAE);
 - 7.9 The need to address the dynamics of each specific fishery;
 - 7.10 The need to minimise the risk of paper quota holders;
 - 7.11 The adjustments that need to be made where related entities have applied for rights in the sectors;

- 7.12 The need to assess applicants within a category against other applicants in the same category so that new entrants are not unfairly prejudiced on certain criteria where existing right holders may score higher;
- 7.13 The desirability of giving successful applicants a reasonable prospect of active and meaningful participation in the fishery
- 7.14 The Constitutional Court judgment in the matter of *Bato Star (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others (CCT 27/03) [2004] ZACC*, which provides important guidelines for me to consider when I exercise my duties as gate-keeper of the Department of Forestry, Fisheries and the Environment (the Department).
8. In arriving at my decisions, I also had regard to the following considerations:
- 8.1 The General Policy on the Allocation of Commercial Fishing Rights 2021 (2021 General Policy) is a guideline document on the allocation and granting of commercial fishing in terms of section 18 of the MLRA. The granting of rights for the KZN Crustacean Trawl fishery will be guided by the 2021 General Policy read with the Sector Specific Policy on the Allocation of Commercial Fishing Rights in the KZN Crustacean Trawl Sector: 2021 (the Sector Specific Policy).
- 8.2 The General Policy and the Sector Specific Policy are based on, among other, the Constitution, the MLRA, the Broad Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003) (BBBEEA), the National Empowerment Fund Act, 1998 (Act No 105 of 1998) (NEFA), the Promotion of Administrative Justice Act, 2000 (Act No 3 of 2000), the Promotion of Access to Information Act, 2000 (Act No 2 of 2000), and the Protection of Personal Information Act, 2013 (Act No. 4 of 2013) (POPI).
- 8.3 The 2021 General Policy and the Sector Specific Policy give effect to the objectives of the MLRA as listed in Section 2 thereof. The objectives identified in section 2 of the MLRA are the following:
- (a) *The need to achieve optimum utilisation and ecologically sustainable development of marine living resources;*
- (b) *the need to conserve marine living resources for both present and future generations;*

- (c) *the need to apply precautionary approaches in respect of the management and development of marine living resources;*
- (d) *the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government;*
- (e) *the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;*
- (f) *the need to preserve marine biodiversity;*
- (g) *the need to minimise marine pollution;*
- (h) *the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;*
- (i) *any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law; and*
- (j) *the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.”*

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

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

9. In determining each of the appeals, I considered all relevant factors and the information before me, including the grounds of appeal, the Regulation 5(3) reports prepared by the DA.
10. Where necessary and appropriate, the Appeals GPR refers to individual appeals. However, the Appeals GPR does not respond to each appeal and to every allegation by individual appellants made therein. Where appropriate and necessary, specific grounds of appeals that are not addressed in the Appeals GPR are dealt with in the individual appeal decisions that will be sent to appellants.
11. Each appellant in the sector will receive the following documents:
 - A letter incorporating the appellants score on appeal and indicating whether successful in being granted a right or not;
 - The individual 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
 - The Appeals GPR.
12. The Appeals GPR is final. However, the allocation of fishing rights is subject to the correctness of the assertions made and information submitted by the applicants/ appellants, and performance reviews. If any information in the online application or online appeal process are found not to be true or complete, or if false information is provided, or material information is not disclosed, this may lead to the revocation, suspension, cancellation, alteration or reduction, in terms of section 28 of the Marine Living Resources Act, 1998 (Act No. 18 of 1998) (MLRA), of any right, license or permit granted on the strength of the Fishing Right Allocation Process 2021/2022 (FRAP 2021/2022) application or appeal.

GROUND OF APPEAL

13. The appellants raised a variety of grounds of appeal. These may be summarised as follows:

- 13.1 Errors in scoring applicants;
 - 13.2 Compliance with the MLRA per question 3.1 and 3.5 of application form;
 - 13.3 Suitability of vessels;
 - 13.4 Exclusion on the basis of being a paper quota risk within the sector;
 - 13.5 Access to Information required to lodge an appeal; and
 - 13.6 Transformation.
14. This is not an exhaustive list, but a summary of the general issues raised by appellants on appeal.

DECISIONS ON SYSTEMATIC/CROSS CUTTING GROUNDS OF APPEAL

15. In this Appeals GPR, I address certain overarching issues that apply to a number of the appeals. My individual Appeal Decision should in each instance be read with this Appeals GPR for wider context.

Errors in scoring applicants

16. Several appellants highlighted an error in the decision letters that were issued by the DA to each of them. The letters had a typographical error which indicated that the appellants had each scored zero (0). The DA acknowledged that this error was due to a technical error in the generation of the decision letters that were sent from the Department to unsuccessful applicants in the KZN Crustacean Trawl sector. The letters however did not reflect the correct weighted score per applicant that was meant to appear therein. In my assessment of this ground of appeal, I found that this error was immaterial as it did not have any effect on the final outcome relating to the awarding of any commercial fishing rights to successful applicants in the KZN Crustacean Trawl sector and that the error was a clerical error that was capable of rectification. Nonetheless, this issue has now been addressed on the revised appeal score sheet that were submitted to appellants.

Compliance with the MLRA per question 3.1 and 3.5 of application form

17. Several Appellants submitted that there had been an error in their scoring on section 3 because they were scored 0 (zero) on question 3.1 even though they had fully complied with Section 3 of the application form. The appellants argued that they were supposed to score 100% for this section.
18. The question 3.1 reads: *"Has the applicant or any of its Directors, Trustees, Senior Management, Shareholders or Members (where such shareholding or members interest exceeds 10%) or Skippers been charged with an offence under the MLRA, or the regulations or permit conditions between 2005/2006 – 2019/2020 and/or 2013/2014 - 2019/2020 (as per the duration of the applicable sector-specific policy)?"*
19. Question 3.5 reads: *"Has the applicant or any of its Directors, Trustees, Senior Management, Shareholders or Members (where such shareholding or members interest exceeds 10%) or Skippers' fishing vessel, motor vehicle, premises or assets been detained, arrested or seized under the MLRA or restrained, preserved, confiscated or forfeited under the Prevention of Organised Crime Act 121 of 1998 during the long-term right period?"*
20. The DA responded that the decision was taken to zero (0) weight section 3.1 for all applicants in this sector because an applicant cannot be penalised for having been charged with an offence, when the appellant has not been found guilty thereof.
21. Similarly, the DA decided that the aspect relating to having assets confiscated as per section 3.5 of the application form was not a relevant consideration, because assets can be confiscated and later returned. This section was also accordingly zero (0) weighted.
22. As all applicants were scored "0" for these criteria, no applicants were unfairly prejudiced relative to one another. For all applicants this accounted for 0.5% of their total score. I was satisfied with the approach adopted by the DA and I agree with the rationale. It is entrenched as a human right in our Constitution that all accused have the right to, among other, to be presumed innocent. These questions therefore remain zero (0) weighted and the appellants scores remain the same.

Suitability of vessels:

23. Some appellants contended that the Department had unilaterally and without fair process deviated from the criteria regarding suitability of vessels as set out in the Sector Specific Policy. Section 7.1.6 in the General Policy deals with access to a suitable vessel and it states that a suitable vessel will be described in the relevant sector specific policy. Section 8.2.3 of the Sector Specific Policy states that a *suitable vessel* in the KZN Crustacean Trawl fishery is as follows:
- a large vessel;
 - rigged to trawl for prawns;
 - capable of fishing in the deep water trawl >7nm offshore; and
 - has a functioning vessel monitoring system (VMS).
24. In my assessment of this ground of appeal, I considered that neither the General nor the sector specific policy defined a "large vessel" and/or the metres in length that a vessel must comply with to operate in the sector. The DA contended that it based its decision to use a 25-metre cut off on the information in the draw reports and data on the size of vessels that operated in this sector during the previous rights period, which reflected that only vessels that were over 30 metres in length successfully operated in this fishery during that time.
25. Although I am satisfied that the DA applied her mind in determining what would constitute a suitable vessel in terms of the policy, the crux of the issue is that the 25-metre cut-off was determined during the consideration of applications and it was therefore not known to the industry before the application process commenced, rendering it patently unfair and inconsistent with the requirements of administrative justice. I accordingly upheld this ground of appeal.
26. Some appellants argued that where an applicant submits a vessel purchase agreement and a Bank Guarantee to secure the purchase price, this *de facto* financial commitment to invest in the fishery sector should be treated differently and should be evaluated to a higher scoring level, namely that of ownership. The DA's GPR on the scoring on this question records that it is not a collective scoring across each all these items. Scoring is awarded based on the highest score demonstrated in each one of these items. Financial backing to a purchase or build agreement is solely a means of proof of the intention to realize such agreement and is not interpreted to mean ownership, nor is that a reasonable interpretation of the guiding policy. As such, this argument was not upheld on appeal.

Exclusion based on being a paper quota risk within the sector

27. Some appellants argued that they should not have been excluded from the sector on the basis that “they did not land any fish” because failure to land any fish is not an exclusionary criterion.
28. The General Policy sets out the grounds for which the Minister may consider an applicant a paper quota risk and may exclude such applicants. Section 6.4.1 of the General Policy reads that:

“An applicant will be considered to be a paper quota risk and may be excluded if they.... (b) have not been directly involved in the catching, processing or marketing of their fish during the period which they held a right in the sector they are applying for; (c) did not apply for a catch permit during the period which they held a right in the sector they are applying for; (d) did not land any fish during the period which they held a right in the sector they are applying for; (e) will not catch and land any fish.” In addition, the General Policy states that *the Minister* must take all reasonable steps to remove paper quota applicants that may have been granted commercial fishing rights.
29. The General Policy (section 6.4.2) further states that *“an applicant will be considered to present a paper quota risk by the Minister as defined by the 2021: General Fisheries Policy if - a) it appears from the application that the right holder applicant fails to demonstrate a substantive interest in the exploitation, processing and/or marketing the fishing right held or to be allocated. In determining whether the right holder applicant poses a paper quota risk, the following will be considered: (i) Cumulative conduct of the right holder applicant over the period of the right allocated”*.
30. Considering the above I am satisfied that I may consider applicants that have been granted commercial fishing rights but who are reflecting weak or non-existent performance records as paper quota right holders. In addition, where an applicant has made no investment or direct involvement in fishing industry, the applicant may be considered a paper quota risk holder. Accordingly, I upheld the decision of the DA to exclude applicants who on the evidence before me are paper quota right holders.

Access to Information required to lodge an appeal.

31. Several appellants submitted that there may still be information required for them to determine whether they had been correctly scored in certain of the sections where complicated formulas were used.

32. It was submitted that if the Department did not provide them with such information in a timely manner, prior to 29 July 2022, to enable them to review their scoring measured against the formulas provided, then they reserve their rights to resubmit their appeals and/or to amend/amplify same.
33. The appellants failed to furnish me with the specific details regarding among other, the relevant questions/ sections where information was allegedly outstanding, and the specific formulae that they sought to rely on. In any case, the appellants did in fact lodge their appeals within the required timeframe. Moreover, certain information was provided in terms of the PAIA (albeit in a redacted form) on the Departments website, in compliance with the POPI Act.
34. In as far as applicants were dissatisfied with the information provided, it was within their right to appeal against such decisions pertaining to the information that had been provided- which they chose not to.

Scoring on transformation criteria

35. Certain appellants raised as a ground of appeal that they had not been scored on certain sub-sections dealing with transformation of their management profile and demographics and that they were accordingly prejudiced in their assessment as they had in fact fully transformed the Directorships of their entities.
36. In my consideration of this ground of appeal I was mindful that transformation of the fishing industry is a constitutional and legislative imperative and that section 2(j) of the MLRA specifically prescribes "*the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.*"
37. In my assessment of this ground of appeal, I considered the KZN Crustacean Trawl sector. This sector was already a successfully transformed sector as at the commencement of FRAP 2021/2022. In this regard, Table 5 on page 38 of the KZN Crustacean Trawl Sector Policy demonstrates that by the year 2014 the sector was 84% black owned and by year 2022, the sector was 98.64% black owned. The aspect of transformation of management in this sector was thus zero (0) weighted.

38. Applicants were thus scored on those aspects of transformation that showed actual benefits being accrued to previously disadvantaged persons as a result of an applicant's participation in the industry, such as: the creation of an employee shareholding scheme; the demographics of its employees; the percentage shareholding held by employees through the scheme; and any capital payments that had been made out over the last 5 years to employees through such employee ownership scheme.
39. It must be noted that scoring of questions in each sector will be different to meet the specific nuances of that industry to ensure that transformation is applied in a way that is not a simple tick box approach, but an assessment that enables applicants to be compared with each other in a manner that gives meaning and purpose to the intention of section 2 of the MLRA.

QUANTUM ALLOCATION METHODOLOGY (QAM)

40. I have considered all the information and documentation that were placed before me during the appeals process. I note that none of the appellants take issue with the DA's QAM for the KZN Crustacean Trawl sector. I have in any case considered the DA's QAM and I have adopted the QAM of the DA. I discuss this aspect in relation to the allocation of rights to successful appellants more fully below.
41. The following methodology was used for the allocation of Total Allowable Effort (TAE) to successful applicants:

Category A

42. All category A applicants that achieve a score of > 70% were considered successful. Each successful applicant will be allocated one unit of effort (vessel).

Category B and C

43. New entrants were considered and those with fishing experience and access to suitable infrastructure were preferred and accommodated within the vessel TAE allocation. Category C applicants who achieved a total score of >70% were considered for allocation. New entrants were selected on total score achieved.

OUTCOMES OF THE ASSESSMENT

Category A

44. Three applicants appealed against the decisions of the DA in terms of section 80 of the MLRA. These were Hacky Fishing (Pty), Horap Sea Ventures (Pty) Ltd and Sea Harvest Corporation (Pty) Ltd. The outcome of these appeals were as follows:
- 44.1 Hacky Fishing (Pty) remains excluded on appeal;
- 44.2 Horap Sea Ventures (Pty) Ltd remains unsuccessful;
- 44.3 Sea Harvest Corporation (Pty) Ltd was awarded a commercial fishing right by the DA but appealed against the one effort (vessel) that was allocated to it. Sea Harvest Corporation (Pty) Ltd's appeal was dismissed; and
- 44.4 One late appeal was received on 23 September 2022 by Ocean Trawling of South Africa (Pty) Ltd. Section 80 of the MLRA nor regulation 5 of the Regulations thereto, empower me to condone the late filing of an appeal, to do so would be beyond the scope of my authority (ultra vires) and therefore unlawful. Unfortunately, the appeal was out of time and was not considered.

Category B

45. Three applicants appealed against the decisions of the DA in terms of section 80 of the MLRA. These were Atlantis Seafood Products (Pty) Ltd, Braxton Security Services CC and Finecorp Trading 113 CC. The outcomes of these appeals were as follows:
- 45.1 Atlantis Seafood Products (Pty) Ltd, was successful before the DA. On appeal, its score remains the same.
- 45.2 Braxton Security Services CC was unsuccessful in its appeal and the decision of the DA is upheld.
- 45.3 Finecorp Trading 113 CC, was initially excluded by the DA. On appeal it was successful against the decision of its exclusion but still scored less than 70%.

Category C

46. Two applicants appealed against the decisions of the DA in terms of section 80 of the MLRA. These were Khanyisile Fishing (Pty) Ltd and Samaki Fisheries (Pty) Ltd. The outcome of the appeals are as follows:
- 46.1 Khanyisile Fishing (Pty) Ltd was successfully awarded a commercial fishing right by the DA and appealed against the scores allocated in certain sections. The appeal was upheld and its score was increased.
- 46.2 Samaki Fisheries (Pty) Ltd's appeal was dismissed.
47. One commercial fishing right and one unit of effort (vessel) was held in reserve pending the outcomes of the appeals (the reserve).¹ As none of the appellants were successful in being allocated an additional right and one (1) unit of effort (vessel) in the sector, the allocation of such commercial fishing right and one (1) unit of effort will be granted to the highest scoring applicant in either Category B or C.
48. I note that the highest scoring Category B applicant is Dyer Eiland Visserye (Pty) Ltd with a weighted score of 65,51% and that the highest scoring Category C applicant is Thalassa Investment (Pty) Ltd with a weighted score in 57.04%. In my determination on who to the allocate the reserve to, I considered and balanced a wide range of factors, including the need to transform and broaden access to the sector through the introduction of new entrants into the sector. On this aspect, I am mindful that Category B applicants hold rights in other sectors other than the fishery in which they are applying for a right, whereas Category C applicants do not. Therefore, although Dyer Eiland Visserye (Pty) Ltd (Category B applicant) has a higher weighted score of 65,51% than Thalassa Investment (Pty) Ltd (Category C applicant) with a weighted score in 57.04%, I deem it appropriate to allocate the additional commercial fishing right and one (1) unit of effort that was held in reserve pending this appeal process to Thalassa Investment (Pty) Ltd.

¹ See para 10.3 (page 39- General Published Reasons for the decision on the allocation of 2021/22 fishing rights and effort in the KZN Crustacean Trawl sector.

CONCLUSION

49. Section 80 of the MLRA deems me to be the Appeal Authority over decisions of the DA and I have wide appeal powers in terms thereof. I have the power on appeal to award fishing rights, and to overturn the decisions of the DA to allocate rights, including decisions related to TAC and TAE, where such decision-making is rationale, fair and in line with the provisions of the MLRA and specific policies. My decisions on the appeals in relation to this sector are recorded under the heading "OUTCOMES OF THE ASSESSMENT".
50. Should any appellant be dissatisfied with any aspect of my decision(s), it may apply to a competent court to have this decision judicially reviewed. Judicial review proceedings must be instituted within 180 days of notification hereof, in accordance with the provisions of section 7 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) (PAJA).



MS B D CREECY, MP

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT

DATE: 5/11/2022

General Published Reasons for Decisions on Appeals in the KZN Crustacean Trawl Fishery: 2021/2022

ANNEXURE A

SUCCESSFUL

Application number	Name of Entity	Category	Score %
KPT21005	Sea Harvest Corporation (Pty) Ltd	A	92.27
KPT21012	Ocean Trawling of Southern Africa (Pty) Ltd	A	71.01
KPT21015	Atlantis Seafood Products (Pty) Ltd	B	85.67
KPT21016	Khanyisile Fishing (Pty) Ltd	C	84.64
KPT21003	Thalassa Investment (Pty) Ltd	C	57.04

UNSUCCESSFUL

Application number	Name of Entity	Category	Score %
KPT21014	Horap Sea Ventures (Pty) Ltd	A	43.17
KPT21030	Ukuloba Kulungile Investments (Pty) Ltd	B	56.14
KPT21026	Finecorp Trading 113 CC	B	55.68
KPT21023	Braxton Security Services CC	B	48.25
KPT21008	Dyer Eiland Visserye (Pty) Ltd	B	65.51
KPT21013	Samaki Fisheries (Pty) Ltd	C	43.96

EXCLUSIONS

Application number	Name of Entity	Category	Score %
KPT21022	Hacky Fishing (Pty) Ltd	A	50.94
KPT21017	Live Fish Tanks East Coast (Pty) Ltd	C	70.11
KPT21029	Lufra Traders (Pty) Ltd	C	45.71
KPT21031	Elecmatix General	C	42.71
KPT21034	Gqeherba Nolwande Primary Fishing Co-Operative Ltd	C	35.46