



**DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM
BRANCH MARINE AND COASTAL MANAGEMENT**

QUERIES AND RESPONSES

CLUSTER A

29 JUNE 2005

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PLEASE NOTE:

*The responses are those of the Minister of Environmental Affairs and Tourism.
When considering the responses, applicants should keep in mind that the policies will be flexibly applied to specific factual scenarios by delegated authorities in order to achieve the aims and objectives of the allocation process.*

1. GENERAL (NOT RELATED TO SPECIFIC SECTIONS OF THE APPLICATION FORM)

Q: I cannot find the definition of "Black" persons anywhere in the policy documents nor the application form instructions nor the "Explanatory Notes". While clause 7.3 (a) of the General Policy Document refers to African, Coloured and Indian persons being considered historically disadvantaged, it does not state these persons will all be deemed to be Black persons for application purposes. Please confirm that these historically disadvantaged persons can all be included as Black persons.

R: In the Glossary of terms, the following definition is provided for "black persons":
"Black persons" means Africans, Coloureds and Indians, provided the person is a South African citizen by birth or obtained citizenship prior to 27 April 1994.

2. AUDIT PROCEDURES

Q: Question 7.9 has an icon indicating that it needs to be audited, however the Agreed-Upon Procedures have no section explaining what needs to be audited.

R: Auditors are should verify whether an employer has registered with the commissioner.

3. APPLICANT DETAILS (SECTION 1 OF THE APPLICATION FORM)

Q: If an individual had a medium term right transferred in terms of s21 of the MLRA to a company in which the individual holds a majority shareholding, can the historical data relating to the catch records, levies paid, turnover, investments, financial data, in the person's individual capacity be included in those sections where it is called for? If this data is allowed to be included where can an explanation be provided to appease the auditor?

R: Yes, data about the previous (natural person) right holder must indeed be included where appropriate. Paragraph 7.2 of the General policy provides as follows:

"In terms of this policy, commercial fishing rights in the Cluster A and B fisheries will be granted only to entities incorporated in terms of the Close Corporations Act 69 of 1984 and the Companies Act 61 of 1973. Medium term right holders that operated in the form of trusts or co-operatives or sole proprietorships, must take steps to convert to a close corporation or a company before the allocation process and nominate the new entity as the applicant. The nominated close corporation or company will be treated as an existing right holder, provided that such an applicant demonstrates that the close corporation of company will be the sole successor of the previous right holder. A right will be granted to the new entity and not to the individual or the

trust. This policy does not mean that a trust is precluded from holding shares in an applicant or right holder.”

Questions 2.2 and 2.3, under Applicant Details, provide the opportunity to explain that the transfer.

4. JOINT VENTURES (SECTIONS 6, 8, 9 AND 12)

Q: Questions 6.3.1 and Employment Equity (EE) questions in general: Must the applicant provide the details of Employees and Directors/Members for all JV partners or only for the JV partners that are involved in the particular sector that is being applied for. In other words in a Deep Sea Trawl application would the applicant have to disclose only the details applicable to the Hake directed JV or would it have to disclose the EE details of all JV's across all sectors that it has JV's.

R: Kindly refer to the explanations provided in the previously published queries and responses. There is no need to provide the statistics of “other” joint ventures in the Deep Sea Trawl application. It should further be stressed that applicants have a choice to present themselves in this form, if they choose to do so.

Q: Question 6.11: In this question the explanatory notes state that “*If applicable, the questions in these sections must be answered with reference to the merged data of all the entities in a group or a JV*”. The question is what does an applicant state where an applicant has complied but a JV partner has not?

R: Kindly refer to the explanation provided in the previously published queries and responses. Applicants have a choice to present themselves in the form of a JV, if they choose to do so. Question 6.11 refers to learnership programs. It is not a matter of compliance but whether the applicant (or, if applicable members of the JV) have registered such learnerships.

Q: If company A has a 40% share in a joint venture with company B which is part of a large group having a holding company and sister companies, what data needs to be included relating to those questions calling for information to be included in respect of other entities? The explanatory notes imply that 100% of the JV data plus the data relating to all members of the JV should be merged and included. Does one then also have to include all the data of Company B's holding company and sister companies as well? Frankly this does not make sense as it would significantly distort the data which needs to be disclosed. In addition, the collation and consolidation of the data would also take an enormous amount of time, bearing in mind that this all has to be audited as well. Please clarify urgently

R: Kindly refer to the explanation provided in the previously published queries and responses. Applicants have a choice to present themselves in the form of a JV, if they

choose to do so. If A and B choose to present their applications in the form of a JV, then they may do so provided that A and B (or its holding company and sister companies) does not attempt to claim the same jobs/investments/turnover that they claim for the JV with in another application. If A choose to present its application in the form of a JV (and B agrees), it will not be necessary to include information about B's holding company and sister companies. The Explanatory Notes do not require this. In B's application information about the holding entity/sister companies must be provided in the transformation and other sections, if required.

5. GROUPS OF COMPANIES, HOLDING COMPANY AND SISTER COMPANIES (SECTIONS 6, 8, 9 AND 12)

Q: Questions 6.3.1, 6.3.2, 6.4.1 etc.: In the explanatory notes for the application form for these sections the Department refers to the details of JVs/holding companies/sister companies etc. being "merged" with the information of the applicant into a single set of data. The applicable schedules to the application form, however, suggest that the data of these entities should be kept separate and supplied as annexures to the application form. Which is correct?

R: Where indicated in the explanatory notes, the data should be merged when completing the application form, but separate sets of data (the relevant pages of the form should be copied and completed by hand) should be provided in the annexures, setting out the data of the various entities (holding company, subsidiary or members of a JV) before the data was merged.

6. FORM OF APPLICANT (SECTION 2)

Q: It is noted that only CC's and companies may apply for rights in Cluster A and B. If the medium term rights were previously issued in someone's personal capacity and that person then forms a CC or a company of which he is a majority member or shareholder to overcome the aforementioned restriction, then one assumes from the wording of Clause 7.2 of the Policy document that no s21 transfer is required as the clause states that the new CC or Company will be treated as an existing (and not a new) rights holder. Is this interpretation / assumption correct? Please confirm.

R: Yes the interpretation is correct.

7. VESSELS (SECTION 4)

Q: We wish to nominate a purse seine vessel (currently Namibian flagged) that has been fishing for us in 2004. Due to the shift of the sardines from the West Coast to the East Coast , we entered into an agreement to purchase the vessel to replace an aging wooden vessel, subject to approval by the Vessel Limitation

Committee. The vessel is equipped with very good refrigeration to ensure optimal utilisation of the sardines for freezing and canning. However we will not have the SAMSA/ registration certificates etc in time for the closing date for the applications.

R: Kindly provide this explanation in the application form as an annexure. If the applicant cannot provide any information required by the schedules, it may instead provide an explanation for this as the relevant annexure.

Q: **If an applicant will nominate more vessels than the application form makes provision for, shall the applicant complete the information required in section 4 as an annexure?**

R: Yes. Applicants may photocopy the relevant pages and submit them as annexures.

Q: **It would be appreciated if you could provide me with the definition of a Bareboat charter agreement and a charter agreement as a client of this consultancy hold a 46% share in a vessel belonging to the vessel owning company that was used to catch the 2004 hake trawl allocation. The nature of access to the vessel does not make provision for this type of shareholding.**

R: Less than 50% ownership of a vessel is not deemed to guarantee access to the vessel. Access must then be demonstrated by way of an agreement, which may be a bareboat charter agreement or any other form of agreement and it is not necessary to define these terms.

8. CATCH UTILISATION (SECTION 5)

Q: **On my printable reference it states that I should deposit the amount of R 10 800 into the RVU account. My reference also states that the sector for application is Hake Inshore Trawl and not Sole Inshore Trawl or both which would explain the amount being R 10 800. According to schedule G the individual fees are R8, 800 and R 2,000 respectively. What I need to know is whether or not this is an error and what steps to take. Should I only pay the R 8,800 as I am only applying for Hake Inshore Trawl?**

R: The application fee for the hake inshore trawl / sole sector is R 10 800.00. This is the amount that must be paid by all applicants in the sector.

Q: **I understand we have asked to apply for Sardine (pilchard) and anchovy. However we are only wishing to apply for Pilchards I understand we have paid for both but firstly want to know if it is a different application form or if the cost is different. Please advise as to what the situation would now be if we only applied for pilchards or if it makes no difference what we apply for.**

R: In this sector, applicants apply on separate forms and should only complete one form if they wish to target one specie only. The application fees are different for pilchards (R 6 400.00) and anchovy (R 2000.00).

9. TRANSFORMATION (SECTION 6)

Q: We would like to seek your advice and clarification on the cut-off date for directors referred to in Section 6.3.1. The date referred to in the application form is the 28th of February 2005. We have a real scenario where one of our directors and shareholders had been a director of another fishing company (which held medium term fishing rights) on 28 February 2005.

R: This director should not be included in the table. The situation is different in respect of his or her shareholding (here, the date of application is the relevant date). If the applicants wish to provide some sort of explanation they may do so in the annexure.

Q: Information to be supplied in section 6.7.5 is confidential. Can we record in section 6.7.5 of the application form "see list included in confidential envelope" and include confidential information in separate envelope?

R: The information must be supplied electronically (ie on the CD provided) and the relevant pages of the printed version may be placed in the sealed envelope. The electronic forms and the pages in the envelope will be treated as confidential.

Q: **Question 6.22:** The explanatory notes for this question state that the flow through principle must be applied when disclosing your procurement data. How is an applicant supposed to come by this information? What happens if the supplier refuses to provide you with the relevant information or cannot do so timeously?

R: In terms of the Agreed Procedures for Auditors, one must obtain a confirmation, signed by the chief executive officer (CEO) or equivalent and appearing either on the supplier's letterhead or bearing the supplier's company stamp, from each supplier listed by the applicant in section 6.22 which confirms the percentage of black ownership of the supplier. Kindly provide an explanation if such a supplier refuses to provide the information.

Q: **Question 6.9 - please explain "Transformation Plan".**

R: This question refers to the transformation plan that was requested in Question 4.4 in the 2001 application form. Accordingly this question only applies to MTR holders

Q: In determining the percentage black shareholding, voting rights and economic interest, the flow through principle must be used. How must Business Partners Ltd black shareholding & voting rights be determined?

R: The principles are set out in the explanatory notes to section 6.7.1. If in doubt, approach Business Partners and request them to provide the relevant percentages on flow through.

Q: Paragraph 6.7 of the Explanatory Notes calls for an affidavit from the “chairperson of the board of directors” of the applicant. If no director is designated as such, can an applicant have a director depose to the affidavit? If one of the applicant’s director’s is a suitable deponent to the affidavit, then Paragraphs 2.4(c) and 6.7.1 and 6.7.2 of the Agreed-Upon Procedures for Auditors will have to be amended or clarified.

R: It may also be a director authorised to do so by way of resolution.

Q: Paragraph 6.22 of Agreed-Upon Procedures for Auditors requires applicants to obtain a statement on the letterhead of the supplier “confirming the percentage of black ownership of the supplier”. We point out that applicant’s have no control over the suppliers, and are unable to compel them to produce such a statement, particularly within the limited time provided. The Agreed-Upon Procedures for Auditors should provide flexibility to allow auditors to accept other reasonable evidence of supplier BEE status.

R: Kindly provide an explanation for this as an annexure if there is a refusal to provide the information or the applicant is unable to obtain the information.

Q: We understand that the table set out in paragraph 6.3.2 calls for the “Organisational Title” of the relevant employees to be specified. We are however unclear as to the intended meaning of the Explanatory Note, which states that: “Designation or actual title held by the employee, as indicated on the organogram or organisational structure must be provided” (“our emphasis”). Does the Explanatory Note intend to require that an employee organogram or organisational structure must be generated?

R: No, but if such an organogram or organisational structure exist, the designation or actual title may be ascertained with reference thereto.

Q: Paragraphs 6.7.1 and 6.7.2 call on the applicant to furnish information regarding shareholding “at date of application”. We draw your attention to the fact that in the case of a listed company the date of calculation of shareholding will of necessity be a date some time in advance of the date of application. This is because the information needs to be collated and analysed in good time before the date of application. In the circumstances, the shareholding will have to be calculated at the end of May 2005. In these circumstances, we ask the department issue an appropriate directive to applicants and auditors to confirm that the date of assessment of shareholding should be regarded as a date as near practically possible to the date of application.

R: Listed companies may submit this information relating to shareholding at a date as near as practically possible to the date of application.

Q: Paragraphs 6.14.1 and 6.14.2. We draw your attention to the fact that the application form does not have a clipboard icon for these questions, but the

schedule purports to require an annexure 6S to be provided. Must applicants follow the application form or the schedule?

R: The schedule only applies if the Applicant intends to rely on information of both the Applicant and other entities.

Q: Paragraphs 6.18, 6.19 and 6.20. These paragraphs relate to donations which are not tax deductible. The application form only seeks information regarding non-tax deductible donations made in 2004. The Agreed-Upon Procedures for Auditors (page 19) however appear to require information for such info for such donations for 2001, 2002, 2003 and 2004. In other words, the auditors are being asked to audit information which the application does not seek. This is irrelevant and costly. In view of the above, we ask that the Department issue an appropriate directive to amend the terms of the Agreed-Upon Procedures for Auditors.

R: If the schedules need to be compiled specifically for purposes of making application, then a schedule for non-tax deductible donations must only be prepared for 2004. If separate records are not maintained in respect of tax deductible and non-tax deductible records, then one set of documents may be submitted to the auditor and the applicant may indicate on the schedule which donations are tax-deductible.

Q: Why are details of directors and employees as at 28 Feb 2005 and not as at date of application?

R: This was done, *inter alia*, as yearly remuneration is required to be completed.

Q: Section 6.3.2 talks about permanent employees, section 8.1.1 also refers to seasonal employees, must seasonal employees be included in determining the number of employees per 6.3.2?

R: No.

Q: Regarding the merged tables required in section 6.4.1, 6.5, 6.6.1 and 6.6.2 and so on (Management & Employment Equity section), would it be correct that group tables are effectively completed resulting in an identical tables submitted in each company's application? i.e. these companies would effectively submit the same information (completed group tables) in their individual applications. So, for example, if in a group structure of say 10 companies employing say 100 employees each and each company needs to submit an application, then each company would submit an application completing most of the tables for 1000 employees applicable to the group?

R: Yes. If the Group falls within the definition provided in the Explanatory Notes (ie a holding entity which owns more than 50% of the applicant) then the group information (fishing companies only) must be provided in these sections of the form and employees, investments and turnover must be divided, as set out in sections 8, 9 and 12.

Q: **Question 6.9.** According to the explanatory notes, this question pertains only to the applicant not the holding company etc. However in the medium term application process, Company A and its subsidiaries submitted the same (holding company) information (with regard to its Transformation Plan) as Skills Development is done for employees through the holding company, which relates to the relevant SETA and has a skills development number.)

The explanatory notes therefore pose a dilemma as to how we answer **Question 6.9.** as it specifically states that the holding company information may not be taken into account, yet this information is relevant if one is to answer the question.

For example, if we should answer "No" in relation to the subsidiaries, we would be seen as not having met the targets stated in our medium term rights applications. However if we answer "Yes", it could said that this is information pertaining to the holding company and not the subsidiary applicants. Please advise.

R: The Explanatory Notes mean that the Applicant must explain whether it met the targets set in its transformation plan (and not the transformation plan submitted by another entity). If it presented a group transformation plan in 2001 then it must explain the extent to which targets in that plan was met.

10. SAFETY (SECTION 7)

Q: What data is held by MCM pursuant to Hake Trawl Policy 7.1 (b) concerning the under-reporting of catches? Also, what data is held in relation to Q3 and/or Q7 in the application form? Is there a list of offenders who will be penalised or excluded and, if so, how do I get a copy please? How do I find out what information is held and may be used?

R: Information that delegated authorities will use will be made available on the web-site: www.mcm-deat.gov.za

Q: Question 7.4, should the question not enquire as to whether an accident has been reported during the MTR, rather than ever? This question is currently out of sync with the time period for the compliance and safety related questions.

R: During the MTR period.

11. JOB CREATION (SECTION 8)

Q: Question 8.1.1: How is an applicant supposed to allocate staff to a particular sector where it is operationally involved in more than one sector? This is with particular reference to head office/general administration staff, quayside staff,

engineering staff, cold store/processing staff i.e.staff who are active in more than one sector for the majority of their employment?

R: An rough estimate or apportionment must be made, for example, allocating 2.5 administrative staff members to one sector, and 3.5 to another. It is important that the same apportionment be used when applying in the other sectors and that there is no double claiming of jobs/investment or turnover.

Q: **The form asks for information regarding employee's numbers across different categories. Where the form refers to, for example "2004 (financial year end)", is it intended to refer to the period from the 2003 (financial year end) to that date (i.e. the period of the year) or is it intended to refer to employment at a particular year end date?**

R: At the financial year end.

Q: **Can the column "Employees in respect of which the applicant does not prepare IRP 5 certificate's (Sea Based)" be used to include information of skippers and crew who have jobs created on vessels, but are technically independent contractors? This is a particular issue for the pelagic sector where significant numbers of jobs fall into this category.**

R: Independent contractors are not employees.

Q: **Shouldn't the first columns of paragraph 8.1.2 Table 2 and 8.1.3 Table 3 refer to "sector" rather than "fishery"?**

R: The terms "sector" and "fishery" are used interchangeably throughout the policies and forms.

12. INVESTMENT (SECTION 9)

Q: **Question 9.1.1: How does the applicant split assets that are used in multiple sectors including common equipment, cold stores, head office buildings etc.?**

R: An rough estimate or apportionment must be made, for example, allocating 40% to the value of the cold store to one sector, and 60% to another. It is important that the same apportionment be used when applying in the other sectors and that there is no double claiming of jobs/investment or turnover.

Q: We note that neither table 9.1.2 nor the schedule referring to investment contains any reference to the need for an applicant to furnish an affidavit. However, we note that the Agreed-Upon Procedures for Auditors states that the auditors must obtain an affidavit. In the circumstances, there appears to be a difference between the application form and Agreed-Upon Procedures for Auditors. Must an affidavit be provided or not? If an affidavit is to be provided, can it be furnished by one of the directors of the applicant if no "chairman of the board" has been designated?

R: The affidavit must be provided to the auditors as specified in the Explanatory Notes. It may be provided by one of the directors authorised to do so by a resolution if no chairman of the board has been designated.

13. FINANCIAL PERFORMANCE (SECTION 12)

Q: **Question 12.1:** Does this question refer to the applicant's audited, verified annual turnover across all sectors and operations or its turnover specific to the sector being applied for. The explanatory notes and actual question seem to be at odds as the explanatory notes state that the turnover figure required is the one "for the sector applied for". This must please be clarified.

R: The Explanatory Notes clarifies that the turnover requested is for the sector applied, in respect of medium term right holders.

14. FISHING LEVIES (SECTION 15)

Q: Is the applicant required to submit information regarding levies paid solely in respect of the sector in which the application is being made? If not, must the applicant provide details for just Cluster A sectors, or for other sectors as well?

R: For medium term right holders, the information regarding levies paid must be submitted only in respect of the specific sector applied for.

15. DECLARATION (SECTION 16)

Q: The declaration at the end of the application form seems to be designed for signature by a deponent representing the applicant company. It is submitted that where authorized representatives of either sister companies or JV partners is required to sign, they should only be obliged to swear as to the correctness of the information pertaining to the entity on behalf of whom they sign. Much of the information in the application form will be beyond their knowledge and control. In view of the above, can signatories for sister companies and JV partners sign an appropriately amended declaration which is limited to the information pertaining to the entity which they represent.

R: It is implicit in the declaration that the JV partner only attest to the declaration in respect of information about that partner. This may be added to the declaration if considered necessary.