

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE DIVISION CAPE TOWN)**

Case No.: **11478/18**

In the matter between:

**WWF SOUTH AFRICA**

Applicant

and

**MINISTER OF AGRICULTURE, FORESTRY  
AND FISHERIES**

First Respondent

**DEPUTY DIRECTOR GENERAL:  
FISHERIES MANAGEMENT BRANCH OF  
THE DEPARTMENT OF AGRICULTURE,  
FORESTRY AND FISHERIES**

Second Respondent

**RIGHT HOLDERS IN THE WEST COAST  
ROCK LOBSTER SECTOR  
(the particulars of which are set out in  
annexure "A")**

Third Respondent &  
Further Respondents

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**REPLYING AFFIDAVIT**

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I, the undersigned,

**THERESSA ROSETTA FRANTZ**

do hereby make oath and state:



1. I am the Head of the Environmental Programmes Unit of the Applicant and am duly authorised to depose to this affidavit on behalf of the Applicant.
2. The facts stated in this affidavit are within my personal knowledge, unless the contrary is stated or indicated by the context. To the best of my knowledge and belief they are true and correct.
3. Unless otherwise stated, words defined in the founding affidavit have the same meaning in this affidavit. In this affidavit I refer to the First and Second Respondents collectively as "DAFF".
4. In this replying affidavit I deal with the following issues:
  - 4.1 the two preliminary issues raised by DAFF;
  - 4.2 the failure of the DDG to depose to an affidavit;
  - 4.3 the inadequate explanation in respect of the response to the PAIA request and the DDG's decision making process;
  - 4.4 the basis of the DDG's determination of the TAC;
  - 4.5 mootness;
  - 4.6 the relief in respect of 2018/2019 and future TAC determinations;
  - 4.7 paragraph - by - paragraph response.



### **Preliminary points**

5. DAFF has raised two preliminary issues without providing a full and proper motivation for them.

### **Exhaustion of internal remedies**

6. The first preliminary issue is that WWF has allegedly failed to exhaust the internal remedy as it is required to lodge an internal appeal with the Minister in accordance with section 80 of the MLRA.
7. WWF denies that the internal appeal in section 80 is applicable in these circumstances and that it was required to exhaust that remedy. Section 80(1) provides that any affected person may appeal to the Minister against a decision taken by any person under a power delegated in terms of the MLRA. "Affected Person" is not defined in the MLRA.
8. I deny that WWF is an affected person as intended by section 80(1) of the MLRA. I understand that a right of appeal is given to disappointed applicants for rights, or other persons directly affected by decisions made under the MLRA.

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9. If the court finds that WWF is an affected person within the meaning of section 80(1) and that it was obliged to have appealed, WWF conditionally applies for an exemption in terms of section 9 of PAJA from the duty to exhaust internal remedies. This is dealt with in the last section of the affidavit.

The 180 day period

10. DAFF contends that WWF has failed to institute its proceedings for judicial review within the requisite 180 day time period from when the TAC decision was made on 2 November 2017.
11. WWF denies that it has failed to comply with section 7 of PAJA. I am advised that the time period only commences on the date on which the reasons for the decision were made known to WWF.
12. It is common cause that the DDG furnished WWF with the written reasons on 8 March 2018. The application was launched on 28 June 2018, well within the 180 day period.

The failure of the DDG to depose to an affidavit

13. The relief sought by WWF in this application, calls for a full and proper explanation on oath by the person who made the decision(s), namely the DDG, as to what she in fact decided, and her reasons for that decision.

14. However, the decision-maker, in this instance, has not explained the reasons for her plainly inconsistent decisions.
15. I understand all references to the DDG's actions or thoughts, to be no more than the product of speculation, and to be inadmissible. There are fundamental aspects pertaining to the decision-making process which remain inadequately explained and are, on the face of it, both procedurally and substantively, irrational. I deal with this further below.

**The inadequate explanation in respect of the response to the PAIA request and the DDG's decision making process**

16. In the founding affidavit, WWF explained that, in response to the PAIA request, it had been furnished with a number of documents, including a copy of the general submission which reflected that the DDG had made a determination of the TAC for 2017/2018 of 790 tons ("JAD3").
17. On 6 August 2018 (more than a month after the application was launched, and after the date of 31 July 2018 stipulated in the Notice of Motion for the delivery of answering affidavits) the State Attorney sent a letter to WWF's attorneys explaining that the documentation which had been sent to WWF pursuant to the PAIA request had been redacted and was incomplete, annexing further documents and requesting WWF to advise as a matter of urgency whether it wished to supplement its papers



in the light of the further information. The letter is annexed to DAFF's answering affidavit marked "AA2".

18. WWF declined to supplement its founding affidavit for various reasons, including that we were of the view that the aspects referred to in the letter called for a proper explanation on oath by the relevant officials, particularly the DDG.
19. However, there is no explanation by the DDG. Mr Semoli deals in paragraphs 11 to 21 of his affidavit with DAFF's response to the PAIA request. He alleges that the PAIA request was dealt with by DAFF's Deputy Director: Administration, Mr Mdledle, who furnished a redacted version of the general submission to WWF without informing WWF that it had been redacted. He alleges that a copy of the general submission in its original form with the handwritten comments made by DAFF's officials is annexed to DAFF's answering affidavit marked "AA1". I shall refer to that document as "*the un-redacted general submissions*".
20. Mr Semoli indicated in paragraph 8 of the answering affidavit that he would endeavour to procure affidavits from the relevant officials where possible. Mr Mdledle has only filed a simple confirmatory affidavit. This important aspect clearly calls for a full explanation from Mr Mdledle, including on what basis he thought that section 44 of PAIA was applicable, or whether he was influenced by anyone else to adopt that view and act on it.

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21. In those paragraphs of the answering affidavit, the impression is created that the un-redacted general submissions are consistent with the press statement of 10 November 2017 (i.e. the determination of a TAC of 1924.08 tons). However, as I explain further below, the un-redacted general submissions document reflects that it was first signed by the DDG on 27 October 2017 and does not contain any determination of the TAC.
  
22. This is dealt with in the section of the answering affidavit entitled "factual background". In paragraph 42 of the answering affidavit it is alleged that on 27 October 2017, the general submission was presented to the DDG and that she provided her comments which are to be found at p.29 of the un-redacted general comments. There is no evidence given in respect of the alleged presentation to the DDG, i.e. by whom it was made and how it was made. In those comments, the DDG requested a consultation in accordance with the decision during the allocation meeting regarding a 21.1% savings of the TAC and apparently noted that whilst the TAE reduction was supported, there was a need to explore a "sea days" option with the stakeholders if possible.
  
23. In paragraph 43 of the answering affidavit it is alleged that Ms West prepared a memorandum in response to the DDG's comments. The memorandum is annexed to the answering affidavit as "AA3" ("the memorandum"). It is one of the documents that should have been



furnished to WWF pursuant to the PAIA request. There is no explanation as to why that document was not included.

24. The contents of the memorandum, and the role and implications thereof in respect of the DDG's decision making process, are not dealt with at all in the answering affidavit. It is pointed out in the memorandum that the DDG had signed the general submission but had not indicated what it was that she was approving in terms of section 14 of the MLRA.
25. WWF dealt with a meeting that took place on 27 October 2017 in paragraph 95 of the founding affidavit and the DDG's announcement that she could not cut the TAC by 59% as recommended by the SWG but that there would be a 21.1% saving. WWF pointed out that it was unclear how the DDG intended to apply the 21.2% saving and whether this would be in the form of a TAC reduction.
26. The memorandum sheds light on this aspect. It comprises of the allocations to the small-scale fishing sector (nearshore) and offshore) and the TAC that was allocated to applicants "made unsuccessful in FRAP 2015/2016". There are three important points to be made here.
  - 26.1 Firstly, the savings in respect of the small-scale sector would only eventuate if rights in the small-scale sector are not allocated to small-scale sector co-operatives in the 2017/2018 season.



- 26.2 Secondly, it was pointed out in the recommendation that no allocation was placed in reserve for exemptions and unsuccessful appeals. It was therefore recommended that the 88.5 tons "saved" in FRAP 2015/2016 be ring-fenced for exemptions and appeals which would reduce the "savings: to 16.6%.
- 26.3 Thirdly, it is evident from Table 1 on page 15 of "JAD 7" (record p.163) that the SWG's recommendations were based upon the suggested TAC reductions being implemented until 2021, not for the 2017/2018 season only. The effect of this possible saving for one year only is not as large as it might seem.
27. The DDG's handwritten comments on page 29 of the un-redacted general submissions reflects that consultation should take place in respect of the 21.2% savings. There is no mention of any such consultation in the memorandum or in the answering affidavit.
28. The crucial issue of what decision the DDG made on 2 November 2017 is dealt with in paragraphs 44 and 45 of the answering affidavit. The unsubstantiated, speculative hearsay allegation is made that the DDG considered the memorandum on 2 November 2017 and determined that the 2016/2017 global TAC of 1924.08 tons must be implemented for the 2017/2018 season. A copy of what is described as a "revised page 29 of

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the general submission” with the DDG’s *“handwritten comments reflecting the determination”* is annexed to the answering affidavit marked “AA4”. It would appear that this is the version of page 29 of the general submission that Mr Mdledle redacted and which clearly reflects that the DDG marked recommendation 9.1 as having been approved (i.e. the TAC of 790 tons).

29. In paragraph 45 the following is stated *“It was thereafter realised that the inscription by her was at odds with the box that she had marked in response to the recommendation in paragraph 9.1. That was corrected by her on the same day. The corrected page is annexed hereto marked “AA5”.* This paragraph also constitutes unsubstantiated hearsay.
30. No details are given as to who had the realization, nor how it was brought to the DDG’s attention.
31. DAFF alleges that it is *“clear”* that the DDG’s decision was in fact consistent with the announcement of 10 November 2017 issued in the media and that the declaratory relief should not be granted in the face of *“certainty that there exists only one determination by Ms Ndudane.”*
32. WWF denies that it is clear and certain that there was only one determination by Ms Ndudane which is consistent with the announcement of 10 November 2017. There are in fact three different versions of page 29, all signed by the DDG.



33. If the court finds that the TAC for WCRL for the 2017/2018 season was determined as a mass of 1924,08 tons, the documents that DAFF furnished to WWF after the application was launched give even greater force to the grounds of review in respect of such a determination. They also show that the decision-making process followed by the DDG was procedurally both unfair and irrational. I deal with this further below.

**The basis of the DDG's determination of the TAC**

34. DAFF's opposition to the review of the 1924,08-ton determination are limited to a reproduction of the contents of the DDG's written reasons "JAD2", and an argument that the DDG's decision was "clearly" rational, reasonable and lawful.

35. The following further relevant arguments are advanced in the paragraph – by – paragraph response: -

35.1 the scientific advice supposedly supports the DDG's reasoning in that it points out that even if the TAC were set to zero, the recovery target would not be reached due to poaching (para 78);

35.2 as a result, it is said to be logical to address the poaching of WCRL which will in turn manage and sustain the WCRL resource in line with the principles and objectives identified in



the MLRA and NEMA. This supposedly supports the contention that the DDG's determination was rational (para 79);

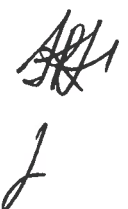
35.3 DAFF's commitment to determine the TAC in accordance with the recommendation of the MWG or SWG could never impose a duty on the DDG merely to rubber-stamp the recommendation (para 85);

35.4 Various other officials were opposed to the recommendation to drastically reduce the TAC from 1924,08 tons to 790 tons (para 87);

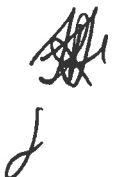
35.5 The (supposed) decision took into account the scientific advice, the comments of those officials who had provided their written comments as well the objectives and principles under the MLRA (para 92);

35.6 In bolstering DAFF's compliance and enforcement strategies, poaching will be tackled and the WCRL resource will be managed to prevent further depletion of the resource (para 102).

36. These contentions are repeated in paragraph 104 in the answering affidavit. The further allegations are made there that:



- 36.1 The scientific advice confirms that, in the absence of addressing poaching, even when the TAC is reduced to zero this will not necessarily improve the status of the WCRL resource in South Africa (para 104.3);
- 36.2 “The drastic cut” recommended of a TAC of 790 tons would have an “extreme” socio – economic impact resulting in significant job losses, laying up of approximately 50% of the WCRL fleet and social harm (para 104.5);
- 36.3 In this regard, regard had to be had to the fact that the MLRA seeks to broaden access to the fishing industry to those previously disadvantaged people who had been excluded as a result of apartheid laws of the previous government whilst giving due consideration to biological sustainability as well as economic efficiency. The drastic cut would inevitably impact those previously disadvantaged most (para 104.5);
- 36.4 The determination made and implementation tools identified by the DDG would ensure that the WCRL is not jeopardized or endangered by over-exploitation (para 104.6);
- 36.5 The absence of specific reference to the international agreements or applicable rules of international law in the written reasons and in the PAIA documents does not mean that the determination is contrary to those provisions as the



Applicant seems to suggest. In fact, the MLRA incorporates the principles and objectives of the international agreements and applicable rules of international law which the Applicant has referred to, although it is not in the exact terms (para 104.8).

37. The Applicant denies that DAFF has established that the 1924.08 TAC determination was lawful or rational on the bases alleged. I deal with WWF's response to the grounds of opposition below.

Comments from the officials

38. DAFF alleges that "various other officials" were opposed to the recommendation to drastically reduce the TAC from 1924,08 tons to 790 tons and that the determination was guided by the scientific advice and advisory comments received from DAFF's officials contained in the general submission.
39. In paragraph 21 of the founding affidavit, WWF alleged that the TAC of 790 tons was recommended by the five persons listed in that paragraph. Those allegations were made on the basis of "JAD3" (i.e. the redacted general submissions). The un-redacted general submissions ("AA1") confirm that those officials did support the 790 ton recommendation.
40. One of the documents which DAFF failed to provide to WWF pursuant to the PAIA request is a note prepared by Dr Kim Prochazka on behalf of Mr



Justice Matshili, DAFF's Chief Director: Fisheries Research and Development for purposes of commenting on the general submissions, including the recommendations. It is Annexure B to "AA2". In that note, strong support is given for the 790-ton recommendation, acknowledging that the resource is highly depleted and pointing out that the recommendation is based on a downwards revised recovery plan.

41. The general submissions reflect only two officials who did not support the 790-ton recommendation: Mr Vico (Chief Director: Monitoring, Control and Surveillance (Acting) and Ms Middleton (Chief Director: Fisheries Operations Support). Both of them made handwritten comments which are reflected in the un-redacted general submissions.
42. WWF denies that the comments from these officials support a finding that the DDG's determination was lawful.
43. The un-redacted general submissions reflect that Mr Vico gave his comments and signed the general submissions on 3 October 2017. Mr Vico did not tick any of the four boxes in either the "yes" or "no" column. His handwritten comment indicates that he did not support the 59% reduction because it is a recommendation made in the absence of new assessments conducted in 2017. This is not a justifiable reason not to support the reduction in the TAC in these circumstances. It is at odds with the views of the specialists in assessments as reflected in the SWG recommendation. DAFF's failure to conduct a full stock assessment in



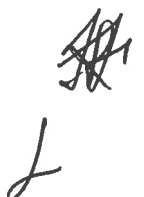
2017 supports a more cautionary approach in accordance with the applicable legal framework, especially in the light of Mr Njobeni's comment on page 19 of the General Submission that "*We have not done much to address poaching since 2016/17 season.*" (record p.399). Mr Vico did not give any indication of what TAC recommendation he would support. Critically, he raised serious concerns in respect of DAFF's monitoring, control and surveillance (MCS) capacity i.e. that its capacity in terms of personnel had been reduced significantly in the past five years which requires urgent attention (our emphasis). Mr Vico further noted that MCS "*is also working towards developing a West Coast Rock Lobster Compliance Plan in Collaboration with the other Chief Directorates of the Fisheries Branch.*"

44. The un-redacted general submissions reflect Ms Middleton as having signed the general submissions on 5 October 2017. Ms Middleton also did not tick any of the four boxes in either the "yes" or "no" column. Her comments were as follows: "The points about the status of the resource and the need to reduce poaching and the need to rebuild the stock are noted and supported but a 59% reduction in one season is too extreme. I would support a revised reduction over a longer period and adjusted recovery target". Although Ms Middleton's comments do not support the 790-ton recommendation (i.e. the 59% reduction) they clearly do not support the DDG's determination of 1924.08 tons which did not include any reduction, nor any recovery target.

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45. On DAFF's version, the general submission was presented to the DDG on 27 October 2017 (paragraph 42 of the answering affidavit) and she ultimately made her decision on 2 November 2017. However, DAFF also admits that on 27 October 2017 the DDG announced at a meeting of the WCRL Collaborative Group that she had made the decision that she could not cut the TAC by 59% as recommended by the SWG as that would have drastic implications for rights holders, but that the TAC would be reduced by a 21.2% saving compared to the previous year's TAC (paragraph 95 of the founding affidavit and paragraph 88 of the answering affidavit). As appears from John Duncan of WWF's e-mail to the DDG later that day, the meeting took place in the morning ("JAD22").
46. There is no evidence in respect of whether the general submissions were presented to the DDG before or after the WCRL Collaborative meeting. If they were only presented to her after the meeting, the DDG would then not have had any regard to the recommendations of the officials as reflected in the general submissions before making the announcement at the meeting.
47. WWF denies that the 1924,08 ton determination is supported by the comments from the officials. Not a single official recommended that the TAC remain unchanged from 2016/2017 or that it be determined at 1924,08 tons.

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Alleged "drastic" social and economic consequences

48. One of the bases upon which DAFF seeks to justify the DDG's decision is that the "drastic cut" of a TAC of 790 tons would have an "extreme" socio – economic impact resulting in significant job losses, laying up of approximately 50% of the WCRL fleet and social harm (para 104.5).
49. The only evidence that is expressly relied upon in that regard is the paragraph in the DDG's written reasons in which she purports to balance what she refers to as competing scientific, ecological, economic and social interests and relies on the following economic and social interests to override scientific and ecological interests: she claims that "my" (i.e. her own) consultations with individual small-scale fishers, fishing companies and representatives of fishing communities dependent on WCRL (whether for fishing or processing) confirmed that a substantial cut to the TAC (by 59%) would result in significant job losses, laying up of approximately 50% of the WCRL fleet and social harm.
50. In paragraph 142 of the founding affidavit, WWF indicated that it is not aware of any consultations that confirmed those alleged outcomes and that there was a reference in "JAD3" to representations by the WCRL Association raising such a contention but that that could not be the private consultations the DDG claims to have had. In its answering affidavit, DAFF has not denied this paragraph.



51. Notably, in respect of this aspect, DAFF has not placed any evidence before the court other than that contained in the general submissions and the DDG's written reasons. In any event, none of the comments from stakeholders in the general submissions supported an unchanged TAC of 1924.08 tons. Comments took issue with the size of the TAC reduction.
52. To the extent that the DDG places reliance on the comments from the WCRLA and small-scale fishers in the written reasons, the WCRLA recommended reducing the stock recovery target from 7% to 3% (not abandoning it entirely as the DDG has done) and the most representative comment from small-scale fishers did not take issue with the 59% reduction and supported a recovery plan for the stock.

*Impact on the previously disadvantaged previously excluded from access to the fishery*

53. In the written reasons, the DDG does not specifically rely on the impact of the 790 ton recommendation on previously disadvantaged persons who were excluded from the fishery as a result of apartheid, save for the reference to her alleged consultations with "individual small-scale fishers", "fishing companies" and "representatives of fishing communities dependent on WCRL".
54. In any event, to the extent that DAFF may now be relying in the answering affidavit on the impact of a 59% reduction in the TAC on



HDI's, the only evidence that it could be relying on is the comments from stakeholders reflected in tabular form in the general submissions.

55. Read as a whole, the comments and recommendations from the small-scale fishing sector do not support the DDG's determination:-

55.1 The most representative comment is from a broad range of associations in the small-scale sector which did not take issue with the proposed 59% reduction, supported a recovery plan for the stock and made other recommendations (p.6 of the general submissions);

55.2 Hangberg / Hout Bay interim relief's comment is reflected as "Not in support of the large TAC reduction". That should, however, be read with the recommendation "Reduce the Offshore TAC only, not Nearshore and Interim relief / Small-Scale" (p.6 of the general submissions);

55.3 Buffelsjag Coastal Links SA branch commented that a low TAC and allocation to the Interim Relief fishers will force fishers into poaching and recommended that lobster allocation for the small-scale sector should be given to Interim Relief Fishers until the SSF policy is implemented.



56. In making these assertions the DDG and DAFF fail to properly appreciate and give recognition to the fact that if the resource is driven down any further by determining a TAC at a level that is not sustainable, the small-scale fishers will suffer. The 1924,08 ton TAC determination will inevitably result in further reductions in stock abundance that will require even more radical reductions in future TAC's to achieve sustainability.

*Implementation of an array of management tools*

57. DAFF relies on the DDG having stated in her written reasons that the recovery of WCRL stocks will be achieved by *"implementing an array of management tools, including bolstering the department's compliance and enforcement strategies."*
58. In the answering affidavit, it is contended (based on the written reasons) that in bolstering DAFF's compliance and enforcement strategies, poaching will be tackled and the WCRL resource will be managed to prevent further depletion of the resource, and further that the determination made and implementation tools identified by the DDG would ensure that the WCRL is not jeopardized or endangered by over-exploitation.
59. Neither the DDG in the written reasons, nor DAFF in the answering affidavit, have given any indication of what those planned



“implementation tools” are, nor shown how or that they would meaningfully address poaching in the 2017/2018 season, or thereafter.

60. The reality is that DAFF has in the past failed dismally in respect of implementation of recovery plans (including claims that poaching would be reduced). In the founding affidavit, WWF outlined the initiative to develop a West Coast Rock Lobster Fishery Recovery Plan / Fisheries Conservation Project (“FCP”) with other stakeholders which culminated in a comprehensive workplan finalized between DAFF and stakeholders in July 2016 (“JAD9”).
61. Despite having adopted the FCP, DAFF subsequently rejected and completely ignored it. The DDG and DAFF don’t even refer to it in the written reasons and the answering affidavit.
62. In respect of MCS, which is obviously critical to tackling poaching, it is evident from Mr Vico’s comments on the general submission that there are systemic problems which would not be addressed in the 2017/2018 season, i.e. a significant reduction in MCS personnel in the past five years and the absence of a WCRL Compliance Plan. The comments from Mr. Njobeni, the Acting Chief Director: Marine Resource Management, expressly state that DAFF has *“not done much to address poaching in the 2016/2017 season”* (general submissions p.19).

63. The comments from stakeholders also pointed out DAFF's failure to address poaching. The comments from SACRAA included that compliance is either not present when poached lobster is landed or the Compliance officials turn a blind eye and no additional personnel and budget has been allocated to anti-poaching strategies. The Nearshore Crayfishers Association stressed the need for the formulation of an anti-poaching plan.
64. It is precisely because of the failure of DAFF over an extended period of time to meaningfully address poaching that the WCRL and Abalone SWG's have for many years recommended that a reduction in poaching must have been demonstrated before projections for the resource should assume that such actions will produce the impact intended. This approach was also applied in respect of the WCRL SWG's 2017 recommendation: *"If evidence is forthcoming that points to a quantifiable extent of reduction of present poaching levels, or sustained improvement in resource status is detected, it will become possible to consider increasing the TAC recommended in future years"* (p.3 of "JAD7").
65. DAFF has a poor record in following through with promises of compliance enhancement. The reason that the re-opening of the abalone fishery was not successful rests with DAFF failing to effect the 15% per annum reduction in poaching that was the basis on which the re-opening was permitted. Instead, there has been no increase in compliance since then,



while analysis of DAFF's compliance data has shown that poaching has continued to increase appreciably.

66. Again, for this reason, to ensure sustainability, necessary TAC decreases need to be implemented until such time as sufficient reductions in poaching have been objectively quantified to allow reconsideration.

TAC reductions do not aid recovery of nearshore high value resources

67. In her written reasons, the DDG claims that *"history and previous experience having proven that TAC reductions do not aid the recovery of nearshore high value resources, such as abalone and WCRL and even linefishes (sic). The substantial TAC cuts in the abalone fishery over the past 15 years has not assisted with the recovery of abalone stocks"* and states that *"The notion that simply reducing TAC's in high value nearshore fisheries will result in stock recovery cannot be supported"*.
68. Neither the DDG (nor DAFF) have provided any evidence in support of these bald, sweeping assertions. The DDG's approach is inconsistent with the very basis upon which fish stocks are assessed and managed worldwide, and is also in breach of internationally accepted principles for the responsible management of a marine resource. There are many examples across the world of reductions in TAC's of depleted resources having been followed by resource increases, including for nearshore resources such as rock lobster and abalone in New Zealand fisheries





(which are also subject to poaching), and rockfish species off the west coast of the United States of America. This is evident from the RAM Legacy Stock Assessment database, widely considered as the world's leading depository for such information). Similar recoveries have also been demonstrated for a number of local linefish species, such as carpenter, after fishing pressure was reduced by the Minister earlier this century.

69. As dealt with below, the operational management procedure (OMP) expressly make provision for "exceptional circumstances" measures which allow for radical reductions in TAC's should resource monitoring data indicate that trends in abundance are proving worse than projected. The DDG offers the unsubstantiated opinion that "*In fact, the closure of the abalone fishery in 2007 ... resulted in a massive increase in illegal fishing ...*". The results from separate quantitative analyses of the DAFF compliance database and by TRAFFIC of import/export statistics are at variance with this opinion.

The DDG's discretion

70. Contrary to what DAFF alleges, WWF is not of the view that the DDG ought simply to have rubberstamped the SWG's recommendation without more.
71. DAFF has effectively adopted a policy to manage the WCRL fishery in terms of OMPs which include achievement of socio-economic objectives

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and trade-offs within the OMPs such as specified recovery targets. In respect of the 2017/2018 season, the SWG's recommendation in respect of the TAC, made in terms of the exceptional circumstances provisions of the 2015 WCRL OMP, in respect of the TAC was for a mass of 790 tons. However, a number of options were presented with analyses of what those options would mean for the status of the resource. Those options present a range within which the DDG could have lawfully exercised her discretion in respect of the determination of the TAC. A decision anywhere within this range would have been consistent with sustainable utilisation.

### **Mootness**

72. DAFF contends that the declaratory relief in respect of the 790 tons determination and the review are both moot. In respect of both those causes of action it relies upon the WCRL fishing season having ended on 31 July 2018.
73. The bald allegation is made that the 2017/2018 WCRL TAC determination will not be relevant for the WCRL TAC determination for 2018/2019 or other later seasons. No explanation is given for that assertion.
74. In a letter dated 1 August 2018 from the State Attorney to WWF's attorneys, a copy of which is annexed marked "TRF 1", it was alleged

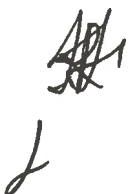
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that it is incorrect that the 2017/2018 TAC is relied upon by the SWG for making its recommendations on the TAC for the following year, for the following reasons:

- 74.1 The SWG's recommendation is based on scientific data;
  - 74.2 DAFF is unaware of any restriction in the OMP in respect of the extent to which the TAC may change from year to year;
  - 74.3 The OMP is in any event not binding and has no legal effect;
  - 74.4 The OMP is a management tool that is subject to review from time to time as required;
  - 74.5 The OMP is currently suspended which occurred prior to the 2017/2018 being set.
75. For the reasons given below, WWF denies that the application is moot on any of the above bases.
76. When the application was launched, the WCRL season for 2017/2018 had not ended yet. On the basis of the redacted general submissions i.e. "JAD3", there was clear evidence that the DDG had determined a TAC of 790 tons which was at variance with the public announcement of the TAC.



77. WWF is obviously not a right holder in the WCRL sector and has brought this application in the public interest to ensure that TAC's are determined in a manner that is sustainable.
78. It is simply not correct that the determination of the TAC is not relevant to a determination of the TAC for 2018/2019 and later seasons. I say this for a number of reasons which I deal with below.
79. Regard must be had to the process of determination of TACs. As outlined in the founding affidavit, since 1997, scientific recommendations for the TAC's for the WCRL resource have been based on OMP's. The intention is that OMP's are revised every four years. The latest revision was OMP 2015.
80. In the answering affidavit delivered by DAFF in the matter of *Judith Anne Sole N.O* under case number 356/2013 ("the Sole matter"), DAFF emphasized the importance of OMP's. Due to its bulk, I only annex (marked "TRF 2") a copy of the section of that affidavit dealing with OMPs, as well as the front and signature pages thereof, as uplifted from the court file. A full copy of the affidavit will be placed before the court is required.
81. I highlight the following statements that were made:

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- 81.1 At more or less the same time that the MLRA was enacted a key management concern was that the decrease in biomass of the WCRL may have been associated with the decline in recruitment and hence future sustainable yields;
- 81.2 Extensive research was undertaken with the aim of developing an OMP to provide a basis for setting the TAC for the resource;
- 81.3 The 1997 OMP which was developed after intensive consultation with industry and other role players applies a precautionary approach in respect of managing the resource and adhered to a number of guidelines, including a focus on long-term objectives not only short-term considerations;
- 81.4 "The concept of rebuilding any resource implied sacrificing potential TAC in the short term, which remained the greatest stumbling block to its unqualified acceptance by fishermen (including aspirants) and industry managers. However, the principle of a rebuilding strategy and the concept of an OMP have both been widely accepted by most of the relevant stakeholders. Consequently, the OMP-1997 for the WCRL had a target recovery of 20% above the 1996 level of the exploitable male biomass by the year 2006";
- 81.5 OMP-2011 aims to rebuild the exploitable male component of the WCRL resource to 35% above the 2006 level by 2021 ("the

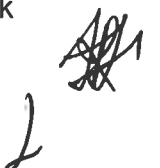
35% recovery target"). All four subsectors of the WCRL committed to this and that they would accept future TAC recommendations as a result of the application of OMP 2011 using a 35% resource building level;

81.6 OMP-2011 is empirically based which means that it uses data collected from the fishery directly for calculating the TAC;

81.7 The "exceptional circumstances" provision in OMP 2011 furthermore allows for more radical reductions in TAC's should resource monitoring data indicate that trends in abundance are proving worse than projected. Occasionally such circumstances can arise which indicate the need for recommendations to deviate from the outputs from OMPs;

81.8 It is apparent from the above and the contents of Appendix 6 to the current WCRL OMP which deals with exceptional circumstances that there are comprehensive procedures in place to identify emergency or exceptional circumstances in the WCRL fisheries, which would necessitate either a substantial decrease in the TAC allocation or a complete suspension of the fishery.

82. As is apparent from the above, OMP development already takes socio-economic considerations into account. The adoption of OMP 2011 took

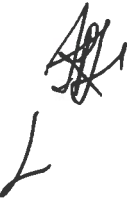
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into account socio-economic considerations when adopting the 35% recovery target.

83. The next OMP adopted by DAFF after that answering affidavit was deposited to, was OMP 2015. It also included the 35% recovery target. The fact that DAFF adopted OMP 2015 means that it accepted that as the basis for the recommendations in respect of the TAC for the next four years. Minimising inter-annual TAC changes is one of the fundamental objectives of an OMP in the interests of promoting industrial stability. Contrary to what DAFF alleges, the OMP's, including OMP 2015, expressly impose inter-annual TAC constraints. I annex, marked "TRF 3", the relevant page of OMP 2015. (If necessary a fully copy will be made available to the court. It is not annexed on account of its bulk). As appears from the extract, both the global TAC and total Offshore TAC values are constrained by the amount they can vary from the previous year's value.
84. Any decision deviating from the OMP output is something intended to occur very infrequently and only given highly compelling reasons. That is governed by Appendix 6 to the OMP which deals with exceptional circumstances.
85. As outlined in the founding affidavit, in 2016 the SWG invoked the exceptional circumstances provision of the OMP and made recommendations in accordance with the exceptional circumstances

provision in the OMP which contemplate recommendations for substantial reductions in the TAC.

86. In accordance with the overall scheme in the OMPs of adopting an approach that will apply for a number of years (typically four), the SWG's recommendations are in general based on both the previous year's TAC and further scientific data forthcoming over the most recent year.
87. The recommendation that was made in 2016 in terms of the exceptional circumstances provision took into account the TAC for 2015 (i.e. the previous year) and made a recommendation of a phased reduction in the TAC in the 2016/2017 and 2017/2018 seasons. The recommendation that was made in 2017 took into account the TAC that was determined in 2016 (which was not in accordance with the SWG's 2016 recommendation) and made its recommendation for the 2017/2018 season premised on that reduction continuing until 2021.
88. As appears from the affidavit filed by DAFF in the *Sole* matter, DAFF has effectively adopted a policy to manage the WCRL in accordance with OMPs. Each OMP is adopted by DAFF. OMP 2015 is not currently suspended. For the last two years it has been operating under the Exceptional Circumstances Provisions, pending revision. The OMP's place restrictions on inter-annual TAC changes. Even under the exceptional circumstances provisions, the SWG takes into account the

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need not to vary the TAC more than is justifiable, taking into account sustainability considerations.

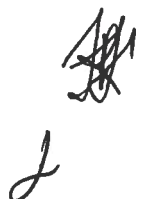
89. Thus, the TAC determination of a previous year is highly relevant to, and is used for, the determination of the TAC for the following year.
90. In any event, I am advised that mootness is not an absolute bar to justiciability and that further legal argument will be made in this regard at the hearing of the matter. The bringing of this application is in accordance with the precautionary principle embedded in section 24 of the Constitution, NEMA and the MLRA. The WCRL resource is in such a perilous state that to avoid irreparable environmental harm it is in the public interest for this application to be determined before the SWG makes its next recommendation and the next TAC is determined.

#### **Relief in respect of 2018/2019 and future TAC determinations**

91. DAFF's only defence to this order sought by WWF is that it is unenforceable because the wording is not clear and unambiguous and is not readily enforceable. It has not engaged at all with the specific wording of the three sub-prayers in prayer 4.
92. When regard is had to the applicable legal framework, the founding affidavit and the expert affidavits filed on behalf of the WWF, it is readily apparent that prayer 4 is clear and enforceable.



93. As explained by Professor Branch, under normal circumstances, best scientific practice is to strive for a TAC that will be equivalent to a Maximum Sustainable Yield, i.e. one at which the potential maximum population growth of the resource balances the amount that is taken. This allows a high economic return without diminishing the resource in the long term. For most fisheries MSY is achieved at an abundance of approximately 40% of pristine level.
94. WCRL abundance at present is radically below the desired abundance at which MSY is achieved. In terms of international norms, concern is expressed when a stock drops below 20% of pristine and values below 10% are considered perilous. The 2010 biomass of males with a carapace length exceeding 75mm (the formal unit of biomass employed) ("the biomass") had dropped by 2016 to around 1.9% of pristine.
95. In practical terms what prayer 4 means is that when determining the TAC, a decision such as the DDG's determination of the 2017/2018 TAC would not be legally permissible. Any determination of the TAC which would result in the biomass dropping any further, i.e. below 1.9% of pristine, would jeopardise the integrity of the resource. Furthermore, a determination of the TAC which does not include any recovery of the WCRL resource would also be legally impermissible. This means that, when regard is had to the 2017 SWG recommendations, the maximum TAC that could legally have been determined would have been below 1167 tons (1 167 tons would have meant a 0% recovery level).



96. The relief sought seeks to ensure compliance with DAFF's legal obligations whilst being mindful of separation of powers and the discretion of the person making the determination. For that reasons, the relief does not, for example, refer to specific recovery targets.
97. The remainder of the aspects of the relief sought in paragraph 4 will be dealt with in legal argument.

### **Paragraph-by-paragraph response**

#### Ad paragraphs 1 - 2

98. Mr Semoli has not annexed any proof that he has been appointed as the acting DDG. Given the level of turmoil in DAFF and the suspension of the DDG, in the absence of proper proof, WWF denies that Mr Semoli has the authority to depose to this affidavit and to oppose these proceedings.

#### Ad paragraph 3

99. In the light of the contents of the answering affidavit, WWF denies that Mr Semoli has any personal knowledge of all the matters dealt with therein.



Ad paragraph 5

100. Mr Semoli has not disclosed the reasons for the DDG's suspension and has also not stated that those reasons are unrelated to the DDG's role in determining the impugned TAC. WWF submits that these reasons should have been disclosed, particularly in the light of all the unexplained circumstances pertaining to the three different versions of the TAC determination that the DDG signed.

Ad paragraph 6

101. The application was launched on 28 June 2018. DAFF had more than enough time to ensure that Ms Ndudane could depose to an affidavit and for the relevant officials who actually have knowledge of the making of the impugned decision to depose to affidavits.

Ad paragraphs 7 - 8

102. There is no evidence that Mr Semoli relied on any advices from officials other than what is contained in the written documentation.

Ad paragraphs 13 – 21

103. I have already dealt with these aspects above. Mr Mdedle has not deposed to an affidavit. There is no explanation as to why he hasn't.

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Given the three signed versions of the TAC determination, and the fact that the DDG has not deposed to an affidavit, a negative inference should be drawn from the absence of such an affidavit.

Ad paragraphs 22 - 42

104. The contents of these paragraphs are admitted only to the extent that they reproduce the contents of the documentation referred to.

Ad paragraph 43

105. In the absence of any evidence in respect of who presented the general submission to the DDG on that day and any confirmatory affidavit in that regard, WWF denies that it was presented to the DDG on that day and that she provided her comments.

Ad paragraphs 44 - 45

106. I have dealt with this above. In the absence of any corroboratory evidence, WWF disputes this explanation in respect of the two further versions of the general submissions that the DDG signed.

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Ad paragraphs 47 – 48

107. It is denied that it is clear that the DDG's decision was consistent with the announcement of 10 November 2017 and that there is any certainty that there exists only one determination by the DDG.

Ad paragraph 49

108. I deny that should the order be granted this might be a moral victory for WWF but nothing more, that the status quo will remain and that the court should refuse to exercise its power to make a declaratory order. The status quo is considerable uncertainty in respect of the determination that the DDG in fact made. That uncertainty call for the court to consider all the evidence and make a finding in respect of what TAC was determined for 2017/2018. The remainder of the aspects have been dealt with above in response to the mootness argument.

Ad paragraphs 50 – 54, 56 - 57

109. It is admitted that these paragraphs reproduce the DDG's written reasons. It is telling that DAFF has not placed any further evidence before the court in an attempt to explain and justify the DDG's decisions. Notably, DAFF has not made any attempt to respond to the four expert affidavits which WWF relies upon.



Ad paragraphs 55 and 58

110. The contents of these paragraphs are denied.

Ad paragraphs 59 – 60

111. For the reasons already given, the contents of these paragraphs are denied.

Ad paragraphs 63 – 65

112. For the reasons already given, WWF denies that the court should refuse to exercise its discretion in so far as the relief in section 4 is concerned and that the relief sought is unenforceable.

Ad paragraph 71

113. WWF denies that the TAC determination in any one year is not relevant to future determinations. I have dealt with this above. It is notable that DAFF has failed to refer to the OMPs. Any implication that the impugned decision was lawfully made is denied. There is no evidence that the DDG took into account or had regard to the advice of the SWG or the officials



that gave advice and made recommendations in the general submissions.

Ad paragraph 75

114. For the reasons given, the contents of this paragraph are denied.

Ad paragraph 78

115. It is denied that the scientific advice supports the DDG's advice as alleged, or at all. I deal with this below in response to paragraph 104.3.

Ad paragraph 79

116. This paragraph is premised on the contents of paragraph 78, which is at best misleading, and paragraph 104.3 which is incorrect. I have dealt above with the DDG's "implementation tool" to address poaching and why this does not support the contention that the DDG's determination was rational.

Ad paragraph 80

117. The contents of this paragraph are denied.





Ad paragraph 85

118. For the reasons given, the Applicants deny that they suggest that the DDG should rubberstamp the recommendation of the MWG or SWG.

Ad paragraph 87

119. I deny that "various other officials" were opposed to the recommendation as alleged. I have dealt above with the comments of Mr Vico and Ms Middleton.

Ad paragraphs 92 – 93

120. The contents of these paragraphs are denied for the reasons given above.

Ad paragraph 102

121. It is denied that DAFF has implemented any compliance and enforcement strategies which would effectively tackle poaching. In any event and in the light of DAFF's historic failure to address poaching, there would only be a justifiable rationale not to reduce the TAC once there is evidence that points to a quantifiable extent of reduction in poaching levels.



Ad paragraph 103

122. The contents of this paragraph are denied. I have dealt with these allegations above.

Ad paragraph 104

123. It is denied that the DDG's decision was rational, reasonable, took into account all relevant factors and considerations and thus constitutes a lawful decision for the reasons alleged by DAFF. I have dealt with the reasons in 104.1 – 104.7 above.

124. Further, in respect of paragraph 104.3, the scientific advice as reflected in the SWG's recommendation was that, although a 35% recovery target could no longer be reached, a TAC reduction could provide at least some recovery, whereas maintaining the TAC would lead to a reduction in abundance contrary to the principle of sustainability.

125. The first sentence of paragraph 104.8 is denied. The remaining matters will be dealt with in legal argument.

Ad paragraphs 106 – 107

126. It is denied that this is a case of self-created urgency. There was a lengthy delay in the DDG providing her written reasons and DAFF

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responding to the PAIA request. For the reasons given, WWF denies that the TAC determination for the 2017/2018 fishing season will not be relevant for the 2018/2019 fishing season.

Ad paragraph 110

127. The circumstances surrounding the signature by the DDG of three versions of the general submission and the furnishing of the incomplete information calls for an explanation from the DDG and the relevant officials on oath. The subsequent delivery of the answering papers has still not satisfactorily explained these aspects, nor provided the necessary confirmations on oath.

Ad paragraph 111

128. For the reasons given above, WWF denies that DAFF's assertion that the 2017/2018 TAC determination for WCRL will not be used to determine the WCRL TAC is correct. In any event, for the reasons given, there are compelling public interest reasons to determine the application.

Ad paragraphs 112 and 114

129. The contents of paragraph 112 are denied. DAFF conveniently overlooks the fact that, on its version, the relief sought by the Applicant is centred around the incomplete information which it received from DAFF. It is



astounding that DAFF seeks costs against WWF, including the costs of two counsel. This aspect will be addressed further in legal argument.

Ad paragraph 113

130. The contents of this paragraph are denied.

**Exemption from duty to exhaust internal remedies**

131. As outlined in paragraph 83 of the founding affidavit, after the TAC was determined in 2016 for the 2016/2017 season WWF did lodge an appeal in terms of section 80 of the MLRA. A copy of the appeal is annexed to the founding affidavit marked "JAD15". It was on similar grounds to the issues raised in this application. There were various unsuccessful interactions between WWF, the Minister and the DDG in respect of the appeal. It is not in dispute that it was never decided.

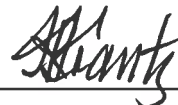
132. After the TAC was announced in November 2017 WWF sought written reasons in terms of PAJA and documents in terms of PAIA. By the time that WWF had all the responses, there had been such a delay on the part of DAFF that it would have been futile to lodge an appeal. In any event, WWF has lost complete confidence in the internal appeal process being an effective remedy for the issues raised in this application. They are in any event not the types of administrative issues which appropriately fall to first be dealt with by way of an internal appeal. The application raises

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important issues in the public interest in respect of the giving effect to section 24 of the Constitution, the MLRA and NEMA when determining TACs in a manner which ensures the sustainability of the WCRL resource for present and future generations, when the resource is in a perilous state. In the circumstances it is in the interest of justice for WWF to be exempt from the duty to exhaust internal remedies (if there is such a duty, which WWF denies).

### CONCLUSION

133. In the circumstances WWF asks for the relief in the Notice of Motion.



\_\_\_\_\_  
THERESSA ROSETTA FRANTZ

I certify that:

1. the deponent acknowledged to me that:
  - 1.1 he/she knows and understands the contents of this declaration;
  - 1.2 he/she has no objection to taking the prescribed oath;
  - 1.3 he/she considers the prescribed oath to be binding on his/her conscience;
2. the deponent thereafter uttered the words, "I swear that the contents of this declaration are true, so help me God";
3. the deponent signed this declaration in my presence at the address set out hereunder on this \_\_\_\_\_ day of **AUGUST 2018**.

ADV. SITHI NGOMBANE  
PRACTISING ADVOCATE OF THE  
HIGH COURT OF SOUTH AFRICA  
ROOM 1, 42 KEEROM STREET CHAMBERS  
CAPE TOWN



\_\_\_\_\_  
COMMISSIONER OF OATHS

23/08/2018

Designation and Area  
Full Names  
Street Address

*J* ~~SH~~

"TRF 1"

**The State Attorney  
Die Staatsprokureur  
iGqweta likaRhulumente**

4<sup>th</sup> FLOOR / 4<sup>de</sup> VLOER  
LIBERTY LIFE CENTRE / SENTRUM  
22 LONG STREET / LANGSTRAAT 22  
CAPE TOWN / KAAPSTAD / KAPA  
8001

**DOCEX 156**

Private Bag X 9001  
Privaatsak X 9001  
CAPE TOWN  
KAAPSTAD  
KAPA  
8000

(021) 441-9200

(021) 421-9364

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My Ref./My Verw./ Isalathiso  
sam: 1510/18/P12

Your Ref./ U Verw./ Isalathiso sakho:

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1 August 2018

**Webber Wentzel**

Attention: **Mr M Diemont**

Email: [Marius.Diemont@webberwentzel.com](mailto:Marius.Diemont@webberwentzel.com)

Dear Sir

**RE: WWF SOUTH AFRICA / MINISTER OF AGRICULTURE, FORESTRY &  
FISHERIES & OTHERS – WESTERN CAPE HIGH COURT CASE NO.  
11468/2018**

The aforesaid matter refers.

1. We are instructed that the 2017/2018 WCRL fishing season ended on 31 July 2018.

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2. To the extent that your client is of the view that the 2017/2018 TAC is relied upon by the Scientific Working Group ("SWG") for making its recommendations on the TAC for the following year this is an incorrect view, since the SWG's recommendation is based on scientific data.
3. Our clients are unaware of any restriction in the Operational Management Procedure ("OMP") in respect of the extent to which the TAC may change from year to year. The OMP is in any event not binding and has no legal effect; it is instead a management tool that is subject to review from time to time as required; moreover the OMP is currently suspended, which occurred prior to the 2017/2018 TAC being set.
4. In the circumstances, the relief in prayers 2 and 3 of your client's notice of motion has become moot and it would serve no purpose in the aforesaid relief being persisted with or adjudicated.
5. As you are aware the delegated authority has to consider a variety of aspects in deciding the TAC. Our clients remain committed to ensuring the sustainability of the WCRL resource, notwithstanding the other imperative factors they have to consider in deciding the TAC. Consequently, we are of the view that the relief in prayer 4 is , similarly, not required. This is apart from the fact that we are of the respectful view that such relief is impermissibly vague, incapable of enforcement, and thus incompetent.
6. We are instructed to request that your client withdraws the application with each party paying its own costs. We kindly request that you by 12h00 on 2 August 2018 in writing indicate whether or not your client intends proceeding with this application.
7. Our senior counsel has also been in discussion with your junior counsel regarding an extension until Friday 10 August 2018 for our clients to file their answering





papers. Kindly furnish us with your response in this regard should your client decide to continue with the application.

8. We await your response.

Yours faithfully,

**STATE ATTORNEY**

  
Per: L. Manuel



IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 356/2013

In the matter between:

**JUDITH ANNE SOLE, N.O.**

First Applicant

and

**THE HON. MS TINA JOEMAT-PETTERSSON**

First Respondent

**MS GRETA APELGREN-NARKEDIEN**

**DEPUTY DIRECTOR-GENERAL OF FISHERIES**

**BRANCH: DEPARTMENT OF AGRICULTURE,**

**FORESTRY AND FISHERIES**

Second Respondent

**MINISTER – DEPARTMENT OF FINANCE**

Third Respondent

**MINISTER – DEPARTMENT OF SOCIAL DEVELOPMENT**

Fourth Respondent

**FURTHER RESPONDENTS AS REPRESENTED BY THE**

**ORGANISATIONS LISTED IN ANNEXURE "7"**

**ANSWERING AFFIDAVIT OF FIRST AND SECOND RESPONDENTS**

I the undersigned,

**CAREL JOHANN AUGUSTYN**

do hereby make oath and say:

*J* *AG*  
*[Signature]* *[Signature]*

34. Although I concede that the WCRL is under pressure, neither the First Respondent nor the officials and scientists in the Department have established any scientific or other grounds to declare emergency measures for the WCRL fisheries in terms of section 16 of the MLRA nor to suspend all or any part of the WCRL fisheries.

35. The MLRA permits the First Respondent to delegate her powers to persons she deems fit and in practice most of her powers are delegated to various officials in the Department who in turn rely on the various experts in fisheries management as well as fisheries scientists who all input into the process of managing our marine living resources. The Department has established a Scientific Working Group for WCRL ("the SWG") to provide scientific advice in the management of the fisheries. The SWG consists of various well-respected scientists together with fisheries management experts and other stakeholders, who in theory attend as observers, but in who in practice participate fully and actively in discussions. The SWG meet regularly to assess the status of the WCRL resource based on all available data and evidence in order to consider the status of the resource, the projected growth of the resource, recommendations on the rebuilding strategy for the resource as well as recommendations regarding the size of the TAC in line with the Operational Management Procedures ("OMP"), which have been adopted by the Department. I will briefly explain the role of OMPs hereunder.

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Operational Management Procedures

36. At more or less the same time that the MLRA was being enacted a key management concern was that the decrease in biomass of the WCRL may have been associated with a decline in recruitment and hence future sustainable yields. For the West Coast species, assessments indicated that the recruitment during recent decades was much less than the average for the pristine stock, presumably in large part because of the smaller parent population. Therefore the drop in biomass since the mid 1980s may have resulted in a further decline in recruitment. Another crucial issue was that scientists were of the opinion that any medium term strategy for the utilisation of the resource should incorporate a rebuilding strategy. The two key questions in this regard was the desired level of rebuilding and the period of time to achieve it.
37. For at least five years, extensive research was undertaken with the aim of developing an Operational Management Procedure to provide a basis for setting the TAC for the resource. The Department therefore developed an OMP approach to manage various fisheries, including the WCRL. The OMP developed and put into place during late 1997 is a relatively simple formula that uses the data gathered from resource monitoring to adjust the TAC up or down dependant on whether the data indicate an improving or deteriorating stock situation.

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38. The 1997 OMP, which was developed after intensive consultation with industry and other role players, applies a precautionary approach in respect of managing the WCRL resource and adhered to the following guidelines:

38.1 A focus on long-term objectives, not only short term considerations;

38.2 An improved basis for taking account of risk;

38.3 Allowance is made for uncertainties associated with input data;

38.4 Account is taken of whether future data will prove adequate to adjust TAC levels (up or down) timeously to correct for errors in perception of resource status;

38.5 A more efficient framework for conducting scientific research and providing TAC recommendations;

38.6 More transparency regarding scientific recommendation of TAC each year, enhancing credibility.

39. The concept of rebuilding any resource implied sacrificing potential TAC in the short term, which remained the greatest stumbling block to its unqualified acceptance by fisherman (including aspirants) and industry managers. However, the principle of a rebuilding strategy and the

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concept of an OMP have both been widely accepted by most of the relevant stakeholders. Consequently, the OMP-1997 for the WCRL had a target recovery of 20% above the 1996 level of the exploitable male biomass by the year 2006.

40. By 2003, the resource had improved to 16% above the 1996 level. However by 2006 resource abundance had decreased again dramatically to 18% below the 1996 level. This decline was due primarily to recruitment failure during the early 2000s. The commercial TAC was therefore decreased by 10% for the following three consecutive seasons (2006/2007, 2007/2008, and 2008/2009) in an attempt to rebuild the stock to the new target of 20% above the 2006 level by 2016.

increase in the natural population

41. The intention was and remains that these OMPs be used as routine basis to provide scientific management advice, subject to regular four-yearly reviews. This first OMP-1997 was subsequently revised on 4 occasions, namely in 2000, 2003, 2007 and 2011. The OMPs that have been developed and used in managing the WCRL resource over the years have been subjected to rigorous international scientific peer review by leading fisheries scientists and have earned significant praise and respect over the years.

42. The OMP adopted in 2011, OMP-2011, aims to rebuild the exploitable male component of the WCRL resource to 35% above the 2006 level by 2021. At that stage all four sub-sectors committed to the application of

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"OMP-2011" using a 35% resource rebuilding level from the 2012/2013 season onwards and they were fully appraised of the implications thereof for each and every subsector. There was also a commitment from the four subsectors that they would accept future TAC recommendations as a result of the application of "OMP-2011" using a 35% resource rebuilding level.

43. OMP-2011 is empirically based, which means that it uses data collected from the fishery directly for calculating the TAC. Four indices of abundance are used to input data into the OMP in order to set the TAC, namely:

- 43.1 trap catch per unit effort ("CPUE") – these catch rates are obtained from commercial fishery;
- 43.2 hoop-net CPUE – these catch rates are obtained from commercial fishery;
- 43.3 CPUE obtained from fisheries-independent monitoring survey ("FIMS"), which is independent from commercial fishing industry;
- 43.4 somatic growth rates calculated from results of tag recapture studies.

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44. The OMP formula, which has been pre-tested using computer simulations is then applied with this information input to provide TAC recommendations.

45. The "Exceptional Circumstances" provision in OMP-2011 furthermore allows for more radical reductions in TACs, should resource monitoring data indicate that trends in abundance are proving worse than projected. Occasionally such circumstances can arise, which indicate the need for recommendations to deviate from the outputs from OMPs or which might bring the regular four-yearly review forward. OMP-2011 includes an Appendix 6, which is titled *"Procedures for Deviating from OMP Output for the Recommendation for a TAC, and for initiating an OMP review for West Coast Rock Lobster"* hereinafter after referred to as Appendix 6. Appendix 6 specifies the procedures governing the identification of such exceptional circumstances, and the resultant actions that may follow. Although Applicant has attached OMP-2011 to her founding affidavit, for ease of reference I have attached Appendix 6 hereto as annexure **"GAN2"**. - l. 207.

46. Appendix 6 sets out the process for determining whether exceptional circumstances exist. Paragraph 1.1 stipulates that,

*"If a WG Member or Observer, or DAFF Management, is to propose an exceptional circumstances review, then such person (s) must outline in writing the reasons why they consider that*

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sustainability of the WCRL resource and its fisheries. I furthermore deny that the Applicant has made out a proper case for both the relief and alternative relief being sought.

133.2 I deny that the Applicant has made out a proper case for the relief being sought and accordingly submit that the application be dismissed with costs.



*[Signature]*  
CAREL JOHANN AUGUSTYN

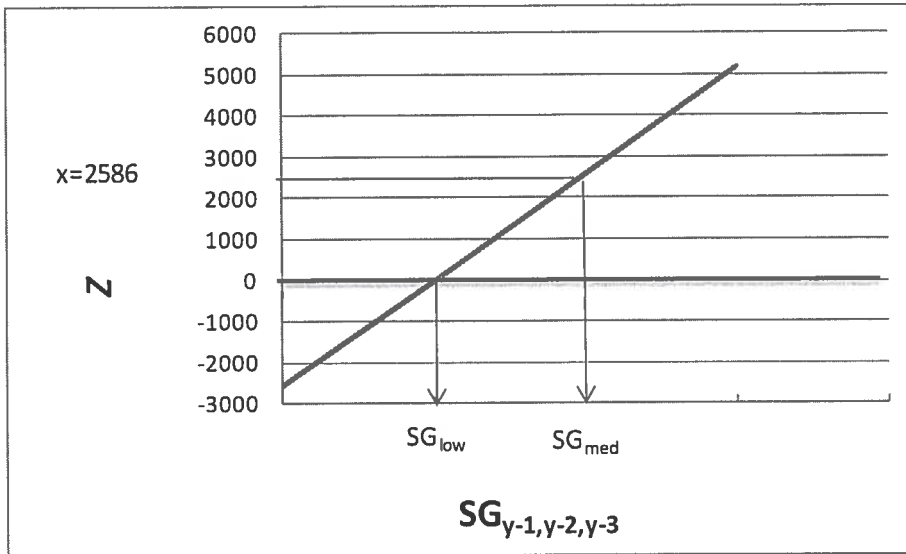
I certify that the Deponent acknowledged to me that he knows and understands the contents of this Declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience. The Deponent thereafter uttered the words: "I swear that the contents of this Declaration are true, so help me God". The Deponent signed this Declaration in my presence at CAPE TOWN on this the 3<sup>rd</sup> day of MAY 2013.

(CERTIFISEER DAT DIE DOKUMENT 'N WAER AFDRUK (AFSKRIF) IS VAN 'N OORSPRONKLIKE DOKUMENT WAT AAN MY VIR WAARNEMING VOORGELE...  
CERTIFY THAT THIS DOCUMENT IS A TRUE REPRODUCTION (COPY) OF THE ORIGINAL DOCUMENT WHICH WAS HANDLED TO ME FOR AUTHENTICATION...  
AGSNOMMER / ORCE NUMBER: 70090917  
NAME IN DRUKSKRIF / NAME IN PRINT: S. MAMBA

*[Signature]*  
COMMISSIONER OF OATHS

*[Handwritten marks]*

Figure 2: The relationship between Z and future values of  $SG_{y-1,y-2,y-3}$  (see Equation 9).



If  $SG_{y-1,y-2,y-3}$  is equal to  $SG_{low}$ , then the value of Z will be zero. If the value of  $SG_{y-1,y-2,y-3}$  is equal to  $SG_{med}$ , then the value of Z will be 2586 MT. If  $SG_{y-1,y-2,y-3}$  drops below  $SG_{low}$ , then the value of Z will be negative, and the TAC will be adjusted downwards.

*Inter-annual TAC constraints*

Both the global TAC and total Offshore TAC values are constrained by the amount they can vary from the previous year's value. This amount has been set at 10% for TAC reductions and a maximum of 11% for TAC annual increases. However, a further rule, "RULE 1", allows for the TAC values to decrease by as much as 30% under certain conditions of poor resource performance, as indexed by  $\bar{J}_y$ . Figure 3 below shows how this TAC decrease constraint will be set. The amount of TAC decrease permitted is dependent on the  $\bar{J}_y$  value and is set equal to 10% for values of  $\bar{J}_y > 0.95$  and to 30% for values of  $\bar{J}_y < 0.85$ , with linear interpolation for  $\bar{J}_y$  values between 0.85 and 0.95.

Following implementation of these constraints, the global TAC calculated may change:

$$TAC_y^{G,2} \rightarrow TAC_y^{G,3}$$

## Appendix 6: PROCEDURES FOR DEVIATING FROM OMP OUTPUT FOR THE RECOMMENDATION FOR A TAC, AND FOR INITIATING AN OMP REVIEW FOR WEST COAST ROCK LOBSTER

### Preamble

Currently scientific recommendations for management controls (e.g. total allowable catch (TAC) or total allowable effort (TAE)) for South Africa's major fisheries are provided by Operational Management Procedures (OMPs). These are pre-agreed formulae for computing these control levels (usually annually), based on pre-agreed resource monitoring data inputs. This combination of formulae and data will have been simulation tested to ensure anticipated performance that is adequately robust given inevitable scientific uncertainties about data and models of the resource dynamics and fishery. (Typically these tests are divided into a core set (or "Reference Set") of "Operating Models" for the underlying dynamics, which cover the more plausible scenarios that have quantitatively important implications, and "Robustness tests" which involve operating models for scenarios considered relatively less plausible or important.)

The intention is that these OMPs be used on a routine basis to provide such scientific management advice, subject to regular four-yearly reviews. However, occasionally "Exceptional Circumstances" can arise which may indicate the need for recommendations to deviate from the outputs from such OMPs, or necessitate bringing the regular review forward. The purpose of this document is to specify the procedures governing the identification of such circumstances, and the resultant actions that may follow.

This document is constructed as a template that applies generally to OMPs, whatever the fishery to which they apply, but it does also include sections which are fishery-specific. Places where entries pertinent to a specific OMP are to be made are indicated by [ ]. These entries, and possible additions to them, require review and finalisation by the relevant DAFF<sup>5</sup> Scientific Working Group in parallel with adoption of a new/revised OMP for a specific fishery.

Note that purely for simplicity of expression, the text that follows is written as if a global TAC were the only management recommendation output by an OMP. However, the provisions following should be understood to apply equally should global effort, either on its own or in conjunction with a global TAC be the output, and similarly if either or both of such measures are disaggregated by space or time or both.

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<sup>5</sup> Note "DAFF" in this Appendix refers to DAFF Fisheries Branch.

When an OMP is adopted, the Working Group concerned will ratify a document that contains a complete specification of the formulae used by the OMP to compute recommended management control levels, and of the data to be input. The latter may, as appropriate, contain details concerning pre-processing of such data: for example the specification of a Generalised Linear Model (GLM) to standardise a resource abundance index for the effects of co-variates other than the year factor related to the abundance trend.

On a number of occasions below, the text requires judgements to be made of whether an effect is “appreciable” (for example, whether an abundance survey result is *appreciably* outside the range predicted in the simulation tests used in selecting the OMP). Such judgements are the province of the Scientific Working Group concerned.

Simulation tests of OMPs assume, at basis, that future resource monitoring data required for input into the OMP will indeed become available as assumed, and that OMP recommendations will be implemented (and in an effective manner). Specific OMPs may include (simulation tested) rules for dealing with the absence of (some) such data, and to indicate adjustments perhaps necessary if implementation differs from the scientific recommendation arising from a previous application of the OMP. To the extent that circumstances arise that are not covered by such rules, and are adjudged by the Working Group to have a likely appreciable impact on the performance of the OMP that would otherwise have been anticipated, the Working Group may consider such an instance of “Exceptional Circumstances” as conceived in the text following.

## **1. Metarule Process**

Metarules can be thought of as “rules” which prespecify what should happen in unlikely, Exceptional Circumstances when application of the TAC generated by the OMP is considered to be highly risky or highly inappropriate. Metarules are not a mechanism for making small adjustments, or ‘tinkering’ with the TAC from the OMP. It is difficult to provide firm definitions of, and to be sure of including all possible, Exceptional Circumstances. Instead, a process for determining whether Exceptional Circumstances exist is described below (see Fig. 1). The need for invoking a metarule should be evaluated by the DAFF [West Coast Rock Lobster] Working Group (hereafter indicated by WG), but only provided that appropriate supporting information is presented so that it can be reviewed at a WG meeting.

### **1.1 Description of Process to Determine Whether Exceptional Circumstances Exist**

While the broad circumstances that may invoke the metarule process can be identified, it is not always possible to pre-specify the data that may trigger a metarule. If a WG Member or Observer, or DAFF Management, is to propose an Exceptional Circumstances review, then

such person(s) must outline in writing the reasons why they consider that Exceptional Circumstances exist, and must either indicate where the data or analyses are to be found supporting the review, or must supply those data or analyses in advance of the WG meeting at which their proposal is to be considered.

Every year the WG will:

- Review population and fishery indicators, and any other relevant data or information on the population, fishery and ecosystem, and conduct a simple routine updated assessment (likely no more than core reference set models used in the OMP testing refitted taking a further year's data into account).
- On the basis of this, determine whether there is evidence for Exceptional Circumstances.

Examples of what might constitute an Exceptional Circumstance in the case of [West Coast Rock lobster] include, but are not necessarily limited to:

- CPUE trends that are appreciably outside the bounds predicted in the OMP testing.
- FIMS trends that are appreciably outside the bounds predicted in the OMP testing.
- Somatic growth trends that are appreciably outside the bounds predicted in the OMP testing.
- Allocations or catches that are appreciably larger than the OMP recommended.

Every two years the WG will:

- Conduct an in depth stock assessment (more intensive than the annual process above, and in particular including the conduct of a range of sensitivity tests).
- On the basis of the assessment, indicators and any other relevant information, determine whether there is evidence for Exceptional Circumstances.

The primary focus for concluding that Exceptional Circumstances exist is if the population assessment/indicator review process provides results appreciably outside the range of simulated population and/other other indicator trajectories considered in OMP evaluations. This includes the core (Reference case or set of) operating models used for these evaluations, and likely also (though subject to discussion) the operating models for the robustness tests for which the OMP was considered to have shown adequate performance. Similarly, if the review process noted regulatory changes likely to effect appreciable modifications to outcomes predicted in terms of the assumptions used for projections in the OMP evaluations (e.g. as a result, perhaps, of size limit changes or closure of areas), or changes to the nature of the data collected for input to the OMP beyond those for which allowance may have been made in those evaluations, this would

constitute grounds for concluding that Exceptional Circumstances exist in the context of continued application of the current OMP.

(Every year) IF the WG concludes that there is no or insufficient evidence for Exceptional Circumstances, the WG will:

- Report to the Chief Director Research, DAFF, that Exceptional Circumstances do not exist.

IF the WG has agreed that Exceptional Circumstances exist, the WG will:

- Determine the severity of the Exceptional Circumstances.
- Follow the “Process for Action” described below.

### ***1.2 Specific issues that will be considered annually (regarding Underlying Assumptions of the Operating Models (OMs) for the OMP Testing Process)***

The following critical aspects of assumptions underlying the OMs for [West Coast Rock lobster] need to be monitored after OMP implementation. Any appreciable deviation from these underlying assumptions may constitute an Exceptional Circumstance (i.e. potential metarule invocation) and will require a review, and possible revision, of the OMP:

- The areal distributions of poaching and recreational catches (the latter as monitored using telephone surveys) do not differ substantially from assumptions made for OM projections.
- Selectivities-by-size do not differ substantially from assumptions made for OM projections.
- New CPUE, FIMS and somatic growth estimates are within the bounds projected by the OMs.
- An allocation to or catch made by a sector is appreciably greater than the OMP recommendation, either globally or within a super-area. (For the recreational sector, this will be determined from telephone survey and permit sale information.)
- The normalised gear-aggregated abundance index for a super-area ( $J_{area}$ ) falls below the threshold for that super-area (see Low Abundance rule in main text).
- A walk-out of appreciable size appears imminent because of environmental conditions (this usually occurs near the end of the season), in which case:
  - a) Transfers from other areas, within the allocation to each sector concerned, may be permitted to be taken from lobsters in the vicinity where the walkout is anticipated.
  - b) The rights holders in the area will be asked to catch their remaining allocations as soon as possible.

- c) If an allocation is unable to be caught prior to the walkout, then the remaining allocation may be allowed to be caught in adjacent areas.
- d) The fishery may be closed to all sectors in that effected area/areas once the walkout occurs, for the remainder of the season.

### **1.3 Description of Process for Action**

If making a determination that there is evidence of Exceptional Circumstances, the WG will with due promptness:

- Consider the severity of the Exceptional Circumstances (for example, how severely “out of bounds” are the recent survey results or recruitment estimates).
- Follow the principles for action (see examples below).
- Formulate advice on the action required (this could include an immediate change in TAC, a review of the OMP, the relatively urgent collection of ancillary data, or conduct of analyses to be reviewed at a further WG meeting in the near future).
- Report to the Chief Director Research, DAFF that Exceptional Circumstances exist and provide advice on the action to take.

The Chief Director Research, DAFF, will:

- Consider the advice from the WG.
- Decide on the action to take, or recommendations to make to his/her principals.

#### ***Examples of ‘Principles for Action’***

If the risk is to the resource, or to dependent or related components of the ecosystem, principles may be:

- The OMP-derived TAC should be an upper bound.
- Action should be at least an x% decrease in the TAC output by the OMP, depending on severity.

If the risk is to socio-economic opportunities within the fishery, principles may be:

- The OMP-derived TAC should be a minimum.
- Action should be at least a y% increase in the TAC output by the OMP, depending on severity.

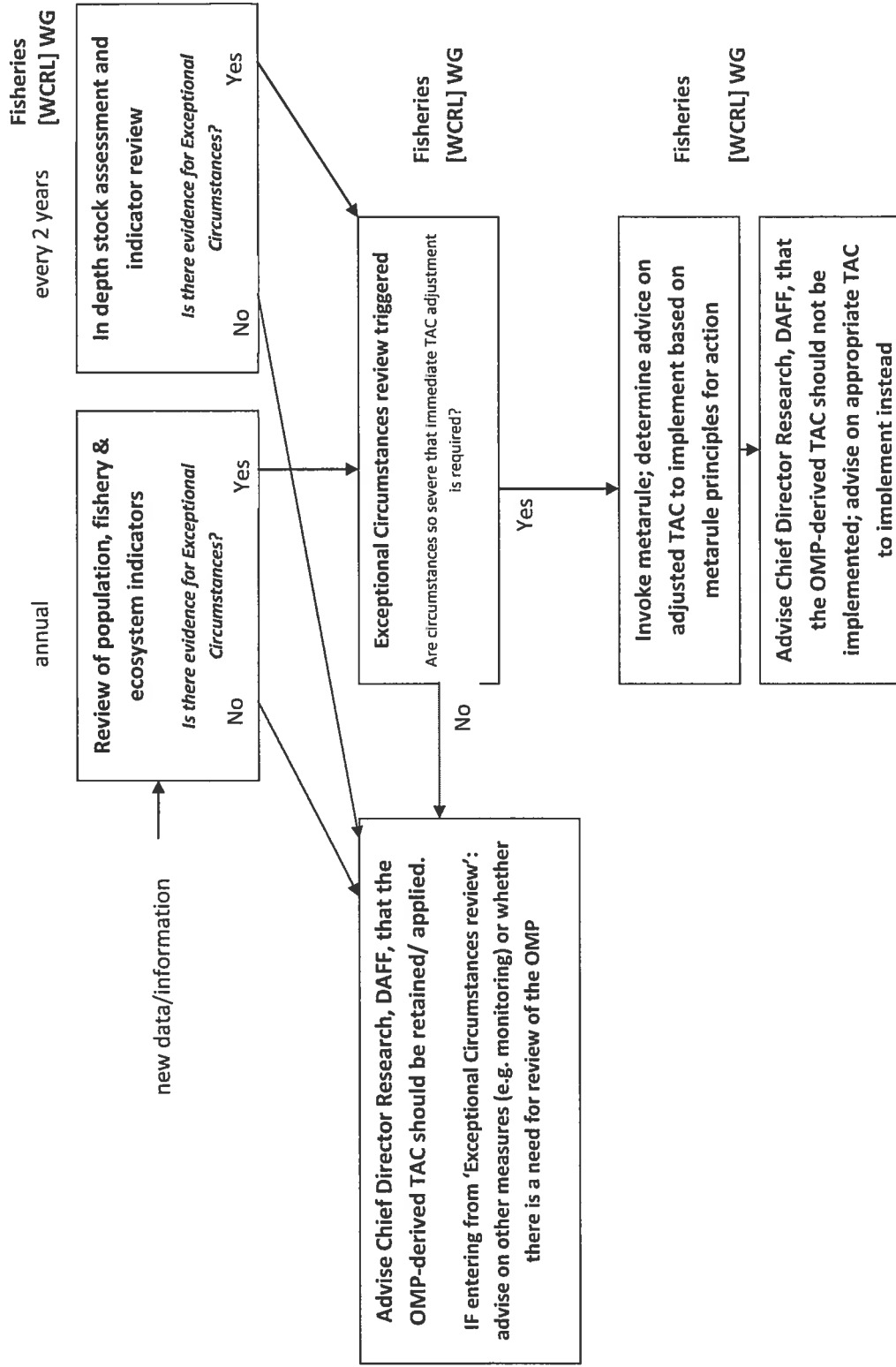


For certain categories of Exceptional Circumstances, specific metarules may be developed and pre-agreed for implementation should the associated circumstances arise (for example, as has been the case for OMP's for the sardine-anchovy fishery where specific modified TAC algorithms come into play if abundance estimates from surveys fall below pre-specified thresholds). Where such development is possible, it is preferable that it be pursued.

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**Figure 1: Flowchart for Metarules Process**



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## 2. Regular OMP Review and Revision Process

The procedure for regular review and potential revision of the OMP is the process for updating and incorporating new data, new information and knowledge into the management procedure, including the operating models (OMs) used for testing the procedure. This process should happen on a relatively long time-scale to avoid jeopardising the performance of the OMP, but can be initiated at any time if the WG consider that there is sufficient reason for this, and that the effect of the revision would be substantial. During the revision process the OMP should still be used to generate TAC recommendations unless a metarule is invoked.

### 2.1 Description of Process for Regular Review (see Fig. 2)

Every year the WG will:

- Consider whether the procedure for Metarule Process has triggered a review/revision of the OMP. Note that if proposals by a WG Member or Observer, or DAFF Management, for an Exceptional Circumstances review include suggestions for an OMP review and possible revision, they must outline in writing the reasons why they consider this necessary, and must either indicate where the data or analyses are to be found supporting their proposed review, or must supply those data or analyses in advance of the WG meeting at which their proposal is to be considered. This includes the possibility of a suggested improvement in the manner in which the OMP calculates catch limitation recommendations; this would need to be motivated by reporting results for this amended OMP when subjected to the same set of trials as were used in the selection of the existing OMP, and arguing that improvements in anticipated performance were evident.

Every two years the WG will:

- Conduct an in depth stock assessment and review population, fishery and related ecosystem indicators, and any other relevant data or information on the population, fishery and ecosystem.
- On the basis of this, determine whether the assessment (or other) results are outside the ranges for which the OMP was tested (note that evaluation for Exceptional Circumstances would be carried out in parallel with this process; see procedures for the Metarule Process), and whether this is sufficient to trigger a review/revision of the OMP.
- Consider whether the procedure for the Metarule Process triggered a review / revision of the OMP.

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Every four years since the last revision of the OMP the WG will:

- Review whether enough has been learnt to appreciably improve/change the operating models (OMs), or to improve the performance of the OMP, or to provide new advice on tuning level (chosen to aim to achieve management objectives).
- On the basis of this, determine whether the new information is sufficient to trigger a review/revision of the OMP.

In any year, IF the WG concludes that there is sufficient new information to trigger a review/revision of the OMP, the WG will:

- Outline the work plan and timeline (e.g. over a period of one year) envisaged for conducting a review.
- Report to the Chief Director Research, DAFF that a review/revision of the OMP is required, giving details of the proposed work plan and timeline.
- Advise the Chief Director Research, DAFF that the OMP can still be applied while the revision process is being completed (unless Exceptional Circumstances have been determined to apply and a metarule invoked).

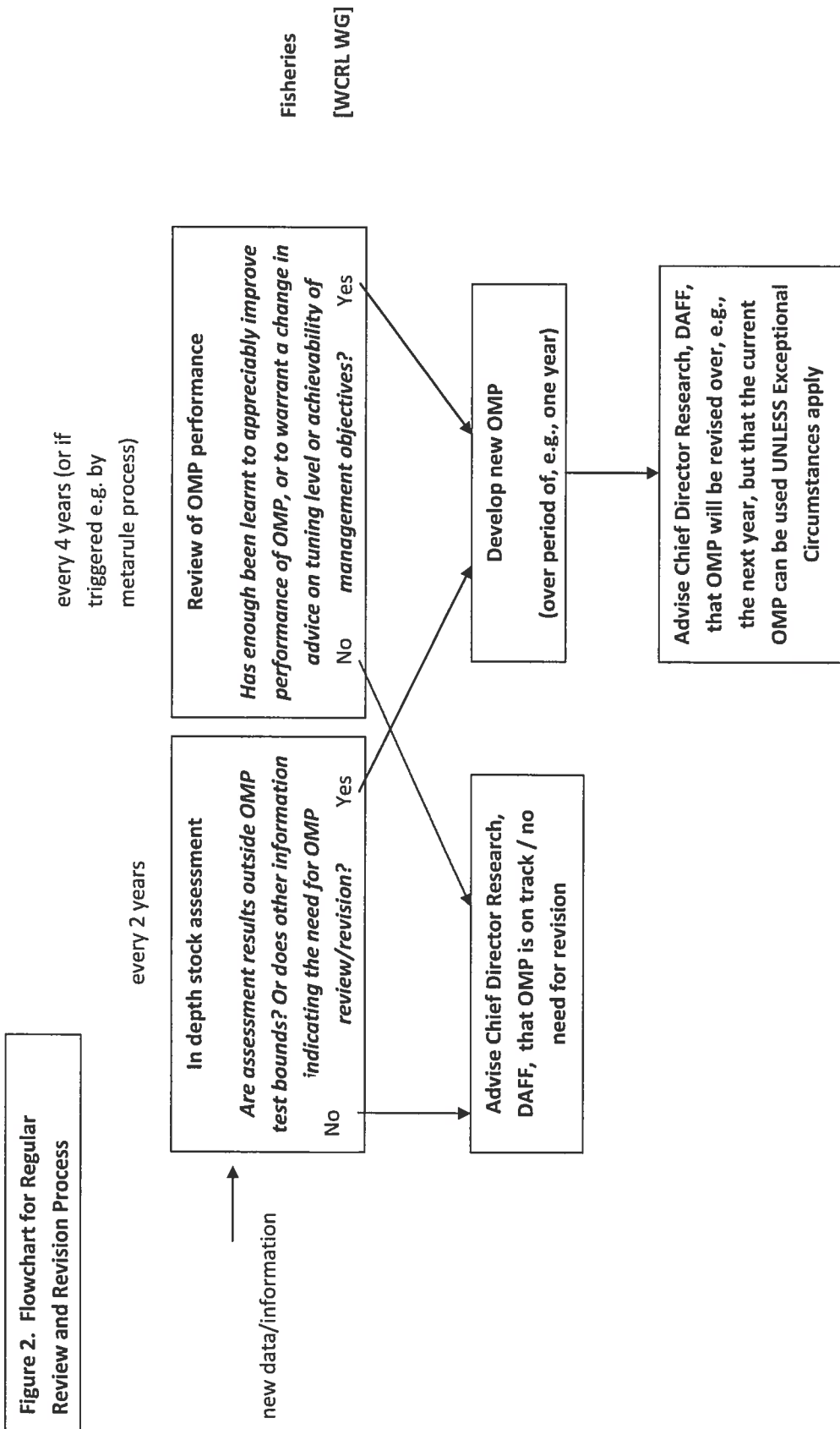
In any year, IF the WG concludes that there is no need to commence a review/revision of the OMP, the WG will:

- Report to the Chief Director Research, DAFF that a review/revision of the OMP is not yet required.

The Chief Director Research, DAFF will:

- Review the report from the WG.
- Decide whether to initiate the review/revision process.





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