

National Water Amendment Bill published for comment

Background

The National Water Amendment Bill was published for public comment on 17 November 2023. The due date for written submissions is 16 January 2024.

Objectives of the Bill

The objectives of the Bill include:

- Ensuring equitable water allocation and optimizing the use of water in support of the guiding principles of National Water Act;
- Prohibiting the undesirable consequences of private water trading;
- Providing for the review period of the national water resource strategy to be increased to 10 years;
- To further provide for the protection of water source areas;
- To further provide for the transfer of water use authorisations;
- To provide for the reallocation of water;
- Repealing the right to declare an existing lawful water use;
- To further regulate the governance matters of water user associations and their membership thereof;
- To provide for the transformation of water user associations.

Concerns from an agricultural point of view

Agbiz is still in the process of studying the provisions of the Bill in detail and preparing draft comments, which we will send to members for their input. However, even at first glance there seems to be quite a few concerning provisions contained in the Bill.

Prohibition of water trading: The issue of the transfer of water rights was the subject of a recent Constitutional Court judgement.¹ The question before the court was whether a water use entitlement, obtained in terms of the National Water Act may be transferred to a third party and, if so, whether a fee may be charged for the transfer. The Constitutional court found that the National Water Act allows for the transfer of water use entitlements and that parties may also charge fees for transferring the rights. It seems that the Bill intends to nullify that interpretation by amending the Act to specifically state that a water entitlement may be surrendered in order to facilitate a licence application for water from the same resource on other land belonging to the same owner, but that such water use cannot be traded in any way and that such water must be surrendered to the national government. Water for irrigation may be transferred, on application, to other land belonging to the same owner for a maximum of 24 months, but conditions may apply.

Review of water licences: The Bill also provides that a water use licence may not be granted within water source areas which are threatened or vulnerable to agriculture and that water licences granted for agriculture in such areas will be reviewed.

32-meter set-back: The Bill further provides for a 32-meter set-back to be established in areas declared by the Minister as regulated activities in terms of section 21 of the Act. Water use licences may not be issued for any ploughing activity unless the 32-meter set-back has been established. The Minister may also prescribe further restrictions relating to other threats that may be faced by water source areas.

Re-allocation of water between sectors: The Bill provides for the reallocation of water between sectors, provinces and catchments by the Minister after consultation with the affected water sectors.

Prioritisation of redress in issuing water licences: The Bill proposes a new subclause 27(3) which will provide that the redress of past racial and gender discrimination must be prioritised when issuing a licence or general authorisation. A certain volume of water will have to be set aside for this purpose. This negates the Appeal court judgement in the so-called Goede Wellington case² where the court found that transformation or redress was only one of a number of relevant factors applicable in the granting or transfer of water licences and could not be elevated as the only consideration or the paramount consideration in licence allocations.

Existing lawful use: The Bill will amend section 34, which deals with existing lawful use, by inserting two new subclauses, that provide that the regulating authority may insert new conditions or obligations necessary to protect the water resource and the environment. The Bill also provides that

¹ *Minister of Water and Sanitation and Others v Lotter N.O. and Others; Minister of Water and Sanitation and Others v Wiid and Others; Minister of Water and Sanitation v South African Association for Water Users Associations* [2023] ZACC 09

² *Makhanya v Goede Wellington Boerdery Pty Ltd (230/2012)* [2012] ZASCA 205

a responsible authority may curtail a volume of water which becomes available as a result of the failure by water users to exercise the full existing lawful use volume for any period specified by the Minister.

Water user associations: The Bill provides that the constitution of a water user association must in future contain a clause detailing a strategy to achieve racial and gender transformation in all the components of the association.

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