

25 July 2022

## **COMMENTS ON THE REVISION OF REGULATIONS REGARDING THE PROCEDURAL REQUIREMENTS FOR WATER USE LICENCE APPLICATIONS AND AMENDMENTS**

### **INTRODUCTION**

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations, and sectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development, and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As a principal representative of business in South Africa, BUSA represents the views of its members in several national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC).

BUSA appreciates the opportunity to provide initial comments on the draft regulations before the formal public consultation process.

### **BUSA ISSUES OF CONCERN WITH THE DRAFT REGULATION**

BUSA very much welcomes the opportunity to comment on the draft regulation at this point in the review process. Due to the extremely tight deadline allocated for commenting, this preliminary submission includes only a high-level overview of the issues of concern. More detailed comments will be submitted when the regulations are formally published for public comment.

The initial issues of concern include the following:

1. *Chapter 1: Definitions:*
  - a. "Applicant" should rather say juristic person.
  - b. Recommended definition for "Cumulative impact" in relation to a water use, means the impact of a water use that in itself may not be significant, but may become significant when added to an existing and **(or)** potential impacts eventuating from similar or diverse water use activities or undertakings in the area.

- c. “Multiple water uses licence application” means a water use licence application with more than one water uses that are interlinked, provided the application belongs to one person and the water uses are exercised by that person. Clarity is required on the meaning as water uses may not be interlinked.
2. *Chapter 2, Regulation 3*: Challenges are introduced by viewing “electronic system downtime” as stopping the timer that may not be reasonable under all circumstances. There should be reasonable measures introduced to avoid the time frames being extended under all situations when the electronic system is down. This should not be an open-ended time period. There should be an option for “reasonable means” for submission of all applications in the event that the electronic system malfunctions, with an adjustment of the timeframes where manual systems are used. Closure of the process from 15 December to 5 January makes no provision or guidance should any licence application becomes urgent and needs to be resolved during this period.
3. *Chapter 3, Regulation 4(5)*: Clarity required on how lawful access to properties will be verified.
4. *Chapter 3, Regulation 4(6) and 4(7)*: The three-year period to start the water uses is a concern as some projects are run over a period with various initiation dates which maybe more than three years. In the context of mining, three years is not feasible because mining projects take a long time to get off the ground. The validity of the WUL must be linked to the project timeframes for a particular mining project. The regulation must propose a process for the water use licence holder to inform the department in instances when there are delays in the commencement of activities and the lapsing of the licence will be affected.
5. *Chapter 3, Regulation 5(3)*: Clarity required on how integrated reports will be decided upon and whether communication with various government departments has been conducted. Alignment with other departments is appreciated and supported.

For mining, the reports and processes that should be integrated are known and these should be highlighted upfront to avoid duplicate requirements. Integration between the requirement of these regulations and draft GN 704 should be sought, especially with regards to plans/reports required for WULAs that are already a requirement in terms of other legislation i.e., NEMA and its regulations, MPRDA. In line with the One Environmental System as envisaged for mining and related activities, DWS, DMRE and DFFE should coordinate their requirement for various reports into one report to avoid a situation where the same reports and studies are requested by different regulators.

6. *Chapter 3, Regulation 6(1)*: Applications should be done through the e-WULAAS system.

7. *Chapter 3, Regulation 6(3)*: The requirement to compile separate WUL for a project will create additional work for the operating site and may initiate different requirements on the same operating site. One WUL would be best with the department who has the majority uses as the authority.
8. *Chapter 3, Regulation 7*: Greater clarity is required on what constitutes a pre-application meeting and who must attend. The use of “the Department” is too vague and specific roles must be identified.
9. *Chapter 3, Regulation 7(7)*: The department officials must comply with all safety requirements of the applicant before entering the site.
10. *Chapter 3, Regulation 7(9)*: The timeline to receive the requested information requirements of 30 days after application is agreed. In both respects, the site visit or no site visit, the information request must be received using the e-WULAAS system.
11. *Chapter 3, Regulation 7(10)*: Change numbering to “sub-regulations 8 and 9”
12. *Chapter 3, Regulation 9(2)*: Clarification is required referring to dispensing with a requirement for a water use licence, what other authorisation would be agreed upon for use? Timeframes for when the application will be addressed and completed should be provided.
13. *Chapter 3, Regulation 9(3)*: Reference to “applicable department” is vague and further detail is required.
14. *Chapter 3, Regulation 10(1)*: Reference to sub-regulation 1(q) should be Regulation 7 “sub-regulations 8 and 9”
15. *Chapter 3, Regulation 10 (3)*: The required information as listed in the documented information request should not be adjusted after the fact and rejection given on something not asked for should be avoided.
16. *Chapter 4, Regulation 10(2)*: There should be an option that the responsible authority requests additional information if this is needed to avoid a situation whereby the application is rejected on the basis of insufficient information.
17. *Chapter 4, Regulation 10(4)*: Deeming a rejected application as final would be unfair on the applicant if the rejection were due to an error or omission by DWS to consider key information. An appeal mechanism to address administrative errors in the rejection of an application should be included. A decision should be reversed if the decision was due to

a clerical/administrative error and minor without involving a judicial process. The hierarchical appeal process should be reinstated and referenced here.

18. *Chapter 4: Regulation 11*: What options are provided if the department requires additional information. If this is not to be an option, then the department information request should be well defined to ensure no gaps for information are found. Timeframe should be included for the authorities to assess the water use licence application.
19. *Chapter 4: Regulation 11(4)*: The approach is supported but it would be more useful to specify in the regulation who the competent authorities are and the specific activity on which comments would be requested. Further, asking for “comments” does not clarify the actual requirements that the competent authority needs to deliver.
20. *Chapter 4, Regulation 11(5)*: Supporting documentation is often conducted by third party consultants who rely on the data/information provided to them by the main applicant. The consultant uses/relies on the disclaimer as an assurance that they processed information received from the applicant. Removing the disclaimer will have the potential of removing key reports from being assessed as part of a WUL application.
21. *Chapter 5, Regulation 12*: This new section of regulation dealing with transformation is highly problematic and unconstitutional in the way that it has been drafted. It is not the mandate of DWS to deal with transformation. The NWA only allows the authority to determine how water from the water resource will be allocated. It does not empower the authority to demand that an entity to whom a licence has been granted relinquishes its ‘shares’ to other persons.
22. *Chapter 5, Regulation 12(3)*: The structure of this sentence gives the impression that mining related activities and state-owned entities should be 100% black owned. This is not in line with the transformational target in terms of the mining charter. Proposed rewording is “Applications from mining and related industries (regulated by means of MPRDA), state- and state-owned entities, and/or 100 % black owned enterprises are exempted to comply with sub-regulation (4)”.
23. *Chapter 5, Regulation 13*: One aspect of compulsory licensing of water use in irrigation is the confirmation of the lawfulness of an existing allocation. The proposed regulation does not go far enough to address this challenge.
24. *Chapter 5, Regulation 13(1)*: In what circumstance would this be necessary? The NWA already requires all to comply and apply for a water use licence.

25. *Chapter 6, regulation 14(1)*: Clarity required on what would trigger an early renewal application. Would it not just be a renewal application? The timeframe given for submitting a renewal is rather long, why?
26. *Chapter 7, Regulation 15(1)*: Check references to subregulation 12 as it is not clear what regulation it applies to. Query: An amendment request cannot be defined as a request to correct items in a WUL just received that are incorrect. How would this be handled?
27. *Chapter 7, Regulation 15(4)*: This would be problematic if the responsible authority rejected an application in error and would be unfair on the applicant if there was no way to rectify the matter. An appeal mechanism to address administrative errors in the rejection of an application should be included.
28. *Chapter 8, Regulation 17(1)*: The proposed application fee of R15,000 for a WUL application is considered to be excessive and should be align with the fee structure charged by other departments performing similar functions. Costs are excessive given the public mandate that the department performs. The amounts furthermore have the potential to increase without being pegged. Costs should be retained to ensure affordability regardless of the applicant or thresholds be introduced depending on who the applicant is.
29. *Chapter 8, Regulation 17(1)*: This is the first time the “condonation for late application for a compulsory licensing process” is discussed in the regulations. This should be defined.
30. *Chapter 8, Regulation 18(1)*: “Deserving cases” needs to be clarified to ensure no unfairness is perceived on the side of the applicants.
31. *Chapter 8, Regulations 19(1)*: The Memorandum of Understanding between DWS and DFFE must be made available before comment can be made on this regulation. The DMRE should also be included in the MoU.
32. *Chapter 8, Regulations 19(3)*: The requirements for mining are stipulated in NEMA Financial Provision Regulations.
33. *Chapter 10, Regulation 22(2)*: Align references to public comment periods in these regulations with the other Acts, this includes how notice should be performed.
34. *Chapter 10, Regulation 23(1)*: Where appropriate and relevant, this should be integrated with the public participation process for environmental authorisation in terms of NEMA.
35. *Chapter 10, Regulation 23(3)(b)(vi)*: Only a court can pronounce on whether a claim is valid or not, so the landowner should be the land claimant. There is sufficient case law

which confirms that simply publishing a claim does not equal a “valid claim.” The correct Act for this provision is the Restitution of Land Rights Act, 1998 – s 11 (7) not in the NWA regulations. Regulation 11(7) provides for notice to be given to the Commission if the land is to be sold, developed etc. This section needs to be amended to address any application regarding the use of the land, which is simply a notice informing the Commission of the intent and only if the Commission thinks the application is an attempt to obstruct the passage of the claim can the Commission approach the court to prevent the application. This regulation should be deleted.

36. *Chapter 10, Regulation 24(1)*: This regulation is onerous. The claim must be declared valid by the court. This regulation should be deleted.
37. *Chapter 10, Regulation 25*: The register and the information of the person objecting to the licence must comply with the POPI Act.
38. *Chapter 10, Regulation 26(1c)*: Compliance to the POPI Act for register is to be noted.
39. *Annex H1*: Align surety and guarantee with NEMA Financial Provisioning regulations.

### **General Comments**

In addition to the comments above, general comments on the regulations include:

1. Timeframes: The timelines for the Department to process the application should be included in the regulations. For mining, the 90-day timeframe should also be geared towards the one environmental system in terms of streamlining and integration of licensing processes. The actual time to finalise an application is considerably longer than the 90-day goal. From the time of the initial engagement to submission of the final technical document, requires significant amount of time that is not reflected in the 90 days. A record should be maintained of the days which are excluded for reasons stated in the regulation.
2. Applicants who have submitted applications within the required timeframes should still be considered licensed under the previous licence with the same conditions while waiting a decision from DWS.
3. General comments: Review DWS draft GN704 which is to be published soon to ensure alignment.
4. There should be allowances or a different list of requirements for amendment applications for existing infrastructure or water uses.

## **CONCLUSION**

BUSA would appreciate consideration be given to these preliminary comments and will be available for any further discussion or clarity that may be required.



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