

To: The Department of Water and Sanitation
Attention: Advocate M Ratshisusu
Email: RatshisusuM@dws.gov.za

28 October 2022

Dear Sir

PROCESS FOR ISSUING WATER USE LICENCES

1. I refer to our virtual meeting on 14 October 2022 in which we discussed some of the difficulties regarding the issuing of water use licences (“**WULs**”) issued by the Department of Water and Sanitation (“**Department**”) under the National Water Act, 36 of 1988 (“**NWA**”) that contain mistakes and/or unenforceable conditions. We proposed some possible solutions and you asked if we could record those in writing so that you can discuss them with your colleagues. We also asked you to ask your colleagues if they have any other suggestions about how this process could be streamlined; you kindly agreed to do that.
2. I have set out below the problem and the two possible solutions we considered.

The problem

3. It seems to be agreed between your colleagues on the one hand, and recipients of WULs (“**WUL Recipients**”) that are affiliated to BUSA through membership of associations on the other, that WULs are often issued subject to conditions that contain mistakes. These include:
 - 3.1. Typographical mistakes;
 - 3.2. References to operations; infrastructure or water uses that ought not to be regulated by the WUL in question (as a result of copying and pasting from other WULs previously issued by the Department); and
 - 3.3. Conditions that are unenforceable (these are collectively referred to as

“Erroneous Conditions”).

4. Currently, the only ways to resolve the Erroneous Conditions once a WUL is issued are either to lodge an appeal or to apply for an amendment. Both of these options take up a lot of time and resources of the Department and of the WUL Recipients.
5. BUSA members would therefore like to find a practical solution to prevent the issuing of WULs subject to Erroneous Conditions, which solution benefits both the Department and the WUL Recipients.

Possible Solutions

Issue a pre-WUL

6. One possible solution is to issue what we referred to in our discussion as a pre-WUL. A notice could be sent to a WUL Recipient containing a draft of a proposed WUL, inviting representations as to why it should (or should not) be issued subject to the proposed conditions. This would give WUL Recipients the opportunity to point out mistakes or unenforceable conditions and explain why they are wrong or unenforceable before the WUL is issued. Self-evidently, if WUL Recipients objected to conditions which they simply did not like, the Department could review the representations, elect to issue the WUL subject to the conditions it proposed. The WUL Recipient could then appeal against that decision (or apply for an amendment) as is currently the recourse which is available.
7. You expressed doubt about the lawfulness of this proposal, firstly, because the NWA does not provide for the issuing of a pre-WUL. I respectfully pointed out that the NWA also does not make provision for the issuing of a pre-directive under section 19(3) of the NWA or a pre-notice under section 53 of the NWA, yet these are both issued as a matter of course before directives are issued under section 19 or notices are issued under section 53. I believe that those pre-directives and pre-notices are mandated under the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”). As you know, PAJA requires, among others, that where a decision-maker intends taking administrative action (into which definition the issuing of a WUL falls), he or she must

give the person to be affected notice of the proposed administrative action.

8. In exactly the same way that conditions of a proposed directive or notice are contained in a pre-directive and a pre-notice, enabling the person affected by the proposed administrative action to make representations as to why the administrative action should not be taken, or its conditions should be varied, that opportunity could be afforded to a WUL Recipient in a pre-WUL.
9. Secondly, you expressed concern about the fact that a process for issuing WULs already exists in the NWA read with the Water Use Licence and Appeal Regulations (made in Government Notice R267 in Government Gazette 40713, dated 24 March 2017), referred to here as “WUL Legislation”. You expressed concern that PAJA applies only where the enabling legislation does not stipulate a procedure to be followed (section 3(5)) but the WUL Legislation does specify a process. Your view is that in those circumstances, the WUL Legislation should be followed.
10. However, PAJA specifies minimum requirements for a fair process that is to be followed where administrative action is to be taken. It includes:
 - 10.1. adequate notice of the nature and purpose of the proposed administrative action;
 - 10.2. a reasonable opportunity to make representations;
 - 10.3. a clear statement of the administrative action;
 - 10.4. adequate notice of any right of review or internal appeal, where applicable; and
 - 10.5. adequate notice of the right to request reasons (section 3(2)).
11. This is the default position and defines the minimum content of procedurally fair administrative action.
12. It is respectfully pointed out that the WUL Legislation does not provide a process which gives effect to a fair decision (as contemplated by PAJA) in that it does not provide for adequate notice of the decision or the opportunity to make representations before the administrative action is taken. It is therefore concluded that inclusion of a step not expressly provided for in the WUL Legislation, namely the

issuing of a pre-WUL would be compliant with PAJA and would not be in breach of the WUL Legislation, in exactly the same way that the issuing of pre-directives and pre-notices is compliant with PAJA and not be in breach of the WUL Legislation. It simply supplements the WUL legislation. Ideally, we would hope that the process would be recorded in a memorandum of understanding to ensure that both the regulator and the regulated have clear understandings of the process, time frames and the like.

13. This solution also has the advantage of being fairly quick to implement because it does not require a change to legislation. It could also be done with reference to a form which WUL Recipients could complete, ensuring that comments are fairly restricted and quite uniform, making them easy for Departmental officials to review.
14. The potential disadvantage of this option is that it provides grounds for an appeal by WUL Recipients if the comments made in response to the pre-WUL were overlooked or overruled. However, it would not be an additional appeal, only an additional ground of appeal; self-evidently WUL Recipients always have a right of appeal if dissatisfied with a WUL. It is also possible that the process could be challenged because there is no express mandate for it in WUL Legislation. However, it is unlikely that it would be challenged; it is no way diminishing any rights and if the same opportunity was given to all WUL Recipients, there could be no suggestion of unequal treatment.

Legislative Amendment

15. The other alternative is to amend the WUL Legislation to reflect an express requirement to issue a pre-WUL. This could be done in the Regulations, by simply inserting a new regulation with three sub-regulations, one that stipulates that a pre-WUL must be sent; another that requires WUL Recipients to respond to the pre-WUL within a stipulated period, in the prescribed form; and the third which requires the Department to review the comments and to make any necessary amendments to the WUL where it sees fit.
16. The disadvantage of this alternative is that it will be time consuming to implement – the proposed amendment must be gazetted and the public must have an opportunity to comment on it. The advantage is that this alternative is less likely to be challenged if legislated, although for reasons mentioned in paragraph 14, if the pre-WUL process

is implemented without amendment to the WUL Legislation, it is unlikely to be the subject of attack.

17. We welcome the opportunity to discuss these proposals further and any other which you or your colleagues may have.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Happy Khambule', written over a horizontal line.

Happy Khambule