

Water Use in Agriculture and the Law



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Background: Water situation in SA

- 1 Total amount of water available as mean annual run-off in rivers is approximately 49 km³/year.
- 2 With a population of 49,3 million in July 2009, SA has just crossed the boundary from a "water stressed" country to "water scarce" country (less than 1 000 m³/year *per capita*).
- 3 Surface runoff is further highly variable and erratic within seasons, between seasons and between the different geographical areas.
- 4 The quality of the available water is deteriorating at an alarming rate.
- 5 The need for poverty alleviation and economic development continuously put more pressure on the water resources.

Background: Water situation in SA

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Total storage created amounts to 65% of total mean annual runoff (for dams of more than 1 million m³ capacity each).

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Most urban and industrial development have been established in locations remote from large watercourses.

8

Large-scale transfers of water across catchments have been implemented.

9

The need to manage water resources properly is evident, and applicable laws were needed.

History of water law in SA



1652: The Dutch brought with them

- The Roman-Dutch principles in water law as used in the Netherlands;
- The State was *dominus fluminis* with regard to flowing water – it has the absolute right to grant that water to whomsoever it chose.



Towards the end of the 19th century and first half of the 20th century:

- The common use of riparian owners got recognised by the courts over time, and water became a private commodity based on land ownership;
- The principle of *public* and *private water* was introduced;
- The distinction was made between *normal flow* and *surplus water*;
- The focus was on irrigation use.

History of water law in SA



The Water Act, 1956:

- The principle of *public* and *private water* was refined, but was sometimes difficult to define.
- Brought back *dominus fluminis*, which was introduced in Government Water Control Areas (more than a hundred have been proclaimed);
- Riparian rights were watered down;
- Apart from irrigation, the use of water for industrial and domestic purposes was properly defined;
- Better control over water quality was obtained.

History of water law in SA



The Dublin Principles, adopted by the UN in Dublin, Ireland in 1992:

Principle 1: Fresh water is a finite and vulnerable resource, essential to sustain life, development and the environment.

Principle 2: Water development and management should be based on a participatory approach, involving users, planners and policy-makers at all levels.

Principle 3: Women play a central part in the provision, management and safeguarding of water.

Principle 4: Water has an economic value in all its competing uses and should be recognized as an economic good.

*The emphasis on the **economic value** of water rather than water as a **universal right** has been contested in many circles. Our NWA of six years later has adopted a compromise between the two viewpoints.*

The National Water Act (NWA)



National Water Act (Act 36 of 1998):

Most of the NWA has been introduced on 1 October 1998, but certain critical sections were only introduced one year later.

● The purpose of the Act (section 2) is to ensure that the nation's water resources are **protected, used, developed, conserved, managed and controlled** in ways which take into account the following:

- Meeting the basic needs of present and future generations
- Promoting equitable access to water
- Redressing the results of past racial and gender discrimination

The National Water Act (NWA)

- Promoting the efficient, sustainable and beneficial use of water in the public interest
- Facilitating social and economic development
- Providing for growing demand for water use
- Protecting aquatic and associated ecosystems and their biological diversity
- Reducing and preventing pollution and degradation of water resources
- Meeting international obligations
- Promoting dam safety, and
- Managing floods and droughts.

Water use

National Water Act (Act 36 of 1998), Chapter 4: Use of Water

Water use

- 21.** For the purposes of this Act, water use includes -
- (a)* taking water from a water resource;
 - (b)* storing water;
 - (c)* impeding or diverting the flow of water in a watercourse;
 - (e)* engaging in a controlled activity...
 - (f)* discharging waste or water containing waste into a water resource...
 - (g)* disposing of waste in a manner which may detrimentally impact on a water resource;
 - (h)* disposing in any manner of water which contains waste from, or which has been heated...
 - (i)* altering the bed, banks, course or characteristics of a watercourse;...

Water use

Water use needs firstly to be addressed in terms of the NWA, with reference to some of the other acts that are involved.



Key aspects:

- The different water uses (section 21).
- Permissible water use (section 22).
- Registration of water use (section 26)
- Verification of existing lawful use (section 35).
- Transfer of water use entitlements (section 25).
- Licence applications and reasons for decisions (sections 40 to 42)
- Safety of dams (sections 117 to 123)
- Appeals against decisions (section 148)

Water uses

21(a) Taking water from a water resource

- A water resource includes among others **river, stream, dam, weir, lake, pan, spring, aquifer, wetland or any surface run-off.**
- Canals, pipelines or off-channel dams having no catchments (for example balancing dams or municipal reservoirs) are not water resources, but **the water must have been taken from a water resource in the first place**, and that taking of water from the water resource should be authorised through the NWA.

Water uses

21(a) Taking water from a water resource (continued)

- In the case of the taking of water from a water resource, the "water use" takes place at the point where the water is taken from the resource and not where it is utilised for a specific purpose, like irrigation or an industry.

21(b) Storing water

- All storage facilities should be authorised in terms of:
 - Storage (s 21(b) of the NWA)
 - Protection of watercourses (s 21(c) and (i) of NWA)
 - Dam Safety (s 117 to 123 of NWA)
 - Regulations 544, 545 and 546 of 2010 of the **National Environmental Management Act** (Act 107 of 1998 as amended in 2008)

Water uses

21(c) Impeding or diverting the flow of water in a watercourse

'**Impeding the flow**' means the temporary or permanent **obstruction or hindrance** to the flow of water in a watercourse by structures built or placed in a watercourse.

'**Diverting the flow**' means a temporary or permanent structure causing the flow of water in a watercourse to be **rerouted** for any purpose.

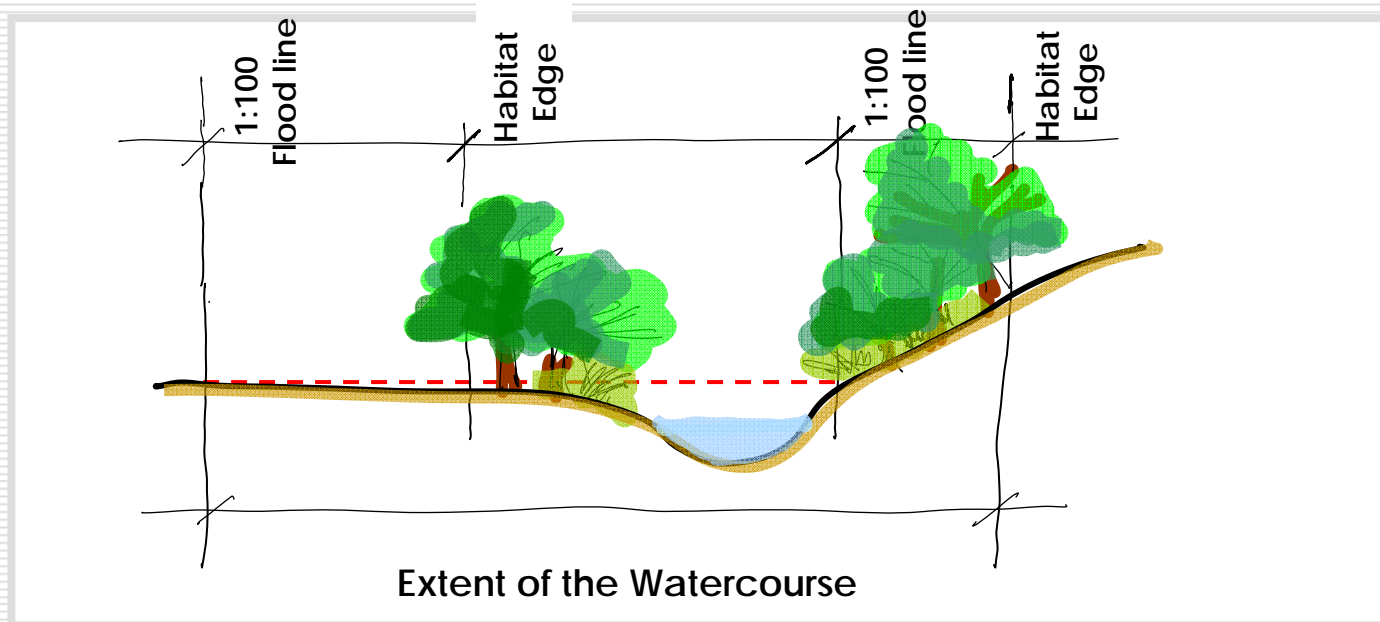
21(i) Altering the bed, banks, course or characteristics of a watercourse

Any change affecting the **resource quality** of the watercourse (i.e. the area within the riparian habitat or 1:100 year flood line, whichever is the greatest).

Water uses

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Water uses

Defining section 21(e) water uses in agriculture:

21(e) Engaging in a controlled activity identified as such in section 37(1):

S 37(1)(a) Irrigation of any land with waste or water containing waste generated through any industrial activity or by a waterwork;

Irrigation on land making use of effluent from an industrial activity (such as food processing, abattoirs, washing and packaging of fruit and vegetables, etc.) or from a waterwork, containing biological waste only and which is fit to be used for irrigation, is considered a controlled activity.

Water uses

Defining section 21(e) water uses in agriculture (continued):

NB: Intensive feedlots, dairies, piggeries, chicken farming, etc. are mostly not regarded as industrial activities, and if not, they are subject to control in terms of the section 6(2)(n) of the **Conservation of Agricultural Resources Act (Act 43 of 1983) (CARA)**.

Abstract from **section 6 of CARA**:

"6. Control measures

- (1) In order to achieve the objects of this Act the Minister may prescribe control measures which shall be complied with by land users to whom they apply.
- (2) Such control measures may relate to -
 - (n) **the protection of water sources against pollution on account of farming practices;**"

Water uses

Defining section 21(e) water uses in agriculture (continued):

S 37(1)(c) A power generation activity which alters the flow regime of a water resource;

Definition of 'Flow regime of a river':

"The flow regime of a river is the characteristic pattern of the quantity of flow, timing, rate of change of hydrologic conditions, and variability across time scales of hours, days, seasons, years, and multiple years".

("The Natural Flow Regime" by Poff et al, 1997)

Water uses

Defining section 21(e) water uses in agriculture (continued):

Licence conditions will be set to ensure that

- Releases always allow for the Reserve and downstream water users' lawful needs;
- To enable the proper monitoring and control of the power generation activity; and
- Paying the applicable tariffs and charges, where relevant.

Permissible use of water

Permissible water use

22. (1) A person may only use water -

(a) without a licence -



(i) if that water use is permissible under **Schedule 1**;

(ii) if that water use is permissible as a continuation of an



existing lawful use; or

(iii) if that water use is permissible in terms of a **general authorisation** issued under section 39;



(b) if the water use is authorised by a **licence** under this Act; or



(c) ...

Permissible use of water



Schedule 1

Take water for reasonable domestic use in the person's household, for small gardening not for commercial purposes and for watering of animals grazing on the land.



Existing lawful use (ELU)

A water use that was lawfully exercised in the two years from **1 October 1997** to **30 September 1999**, subject to the conditions under which it was lawfully exercised.

Under certain circumstances, water uses that do not qualify may be 'declared' as existing lawful use as described in section 33 of the NWA.

Permissible use of water



General authorization

In certain areas, specific relatively small uses are generally authorized, meaning that while staying within the limitations provided, a licence is not necessary.



Licence

In the absence of any of the previous three types of authorization, water may not be used without a licence issued under Chapter 4 of the NWA.

Registration of water use

Registration is the process of the water user officially notifying the Department of a water use, and of the amount used (section 26(1)(c) of the NWA).

BUT

A registration certificate is not proof of an entitlement or an authorisation to use water. Only a letter confirming the verification (s 35) could be used as proof of an existing lawful water use.

Verification of Existing Lawful Use

- Existing lawful use (which is an entitlement) may need to be verified according to section 35 of the NWA.
- Verification takes place in two steps, namely:
 - **Did the water use actually take place during the qualifying period (1 Oct 1997 to 30 Sept 1999)?**
(Satellite imagery or similar means should be provided as proof)
 - **Was it lawful at that time, according to relevant legislation?**
(Where applicable, works permits or other documentation should be provided as proof)

How to verify an existing lawful use

- A water user may be required by the responsible authority to apply for verification of the lawfulness and extent of an existing water use (s 35).
- The application should be submitted at the relevant Water Affairs Regional Office.
- The Department may require the applicant, at the applicant's expense, to obtain and provide the necessary information, in order to take a decision.

Transfer of water use entitlements

To transfer a water use *from one property to another*:

- Temporary transfers - section 25 (1).
 - Transfers for up to two years could be applied for at the relevant WUA or Regional Office.

- Permanent transfers - section 25 (2):
 - An entitlement to use water may be surrendered in order to facilitate a particular licence application.
 - An application for a licence should simultaneously be submitted by the proposed new taker of the water at the relevant Water Affairs regional office.
 - The surrender only becomes effective if and when such application for a licence by the proposed taker is granted.

Procedure for a water use licence application

- A person who wishes to obtain a licence to use water, must apply at the relevant Regional Office of the Department of Water Affairs.
- The applicant may be required to give notice of the application in local media to allow objections against the application if any other person feel that they will be adversely affected if a licence is approved.
- A specific process in accordance with Chapter 4 of the NWA must be followed in considering the licence application and in taking a decision.
- The applicant or any objector may appeal against the decision to the Water Tribunal.

