

This second article in a series of two about water use according to the National Water Act is to clarify some of the most common issues that irrigation designers and producers encounter, especially regarding the transfer of water use entitlements.

WATER USES

Two of the most common water uses that are exercised in agriculture, namely “taking of water from a water resource” and “storing water” have been discussed in detail in the first part of this series of articles. The following three uses also occur in agriculture from time-to-time:

- **Discharging waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit (section 21(f) of the National Water Act (NWA)):**

This water use entails the discharge of wastewater directly or indirectly into a water resource. Common examples of this water use is water containing waste which is released into a river or dam at a discharge point from factories, food processing plants, run-off from feedlots or treated wastewater from treatment plants. Waste discharged into a municipal sewer is not part of this water use, and does not need separate authorisation.

- **Impeding or diverting the flow of water in a watercourse (section 21(c) of the NWA):**

Causing an obstruction to the flow of water in a watercourse or diverting some or all of the flow from a watercourse are water uses which may require a license.

In order to find out whether a license is needed, the relevant regional office must be contacted. Any diverted water must eventually be returned to the watercourse, otherwise it is regarded as a section 21(a) water use for which a license must also be acquired. This activity is normally performed to enable mining or the construction of roads, bridges or pipelines across or within in a watercourse.



- **Altering the bed, banks, course or characteristics of a watercourse (section 21 (i) of the NWA):**

This water use refers to physical changes that are made to a watercourse, or to any of its characteristics, like in the case of construction and infrastructure development near or across a river. Sand and peat mining are other common examples of this water use. Further, any activity within a radius of 500 meters from the boundaries of a wetland also requires a license for this water use. The specific factors that must be assessed before a license is considered for this use are, amongst others, the expected changes to the water quality, the flow regime, the biota and the riparian habitat as a result of the activity. A watercourse is defined as the area limited by either the outer edge of the riparian habitat or the 1:100 year flood line, whichever is the greatest.

REGISTRATION OF AN EXISTING WATER USE

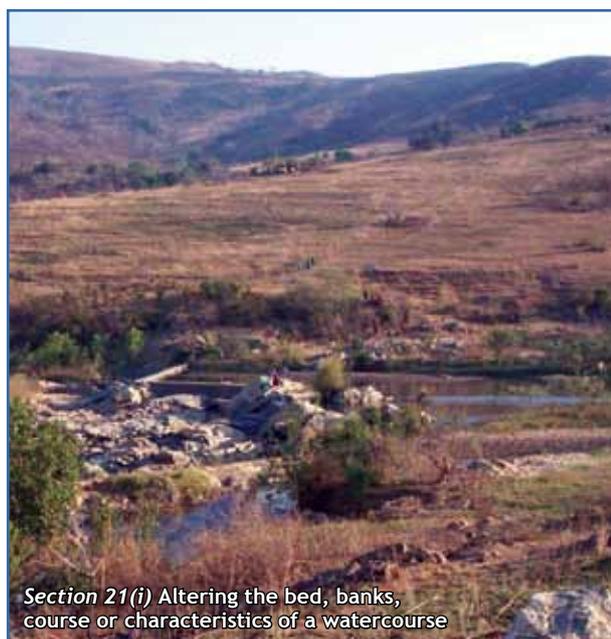
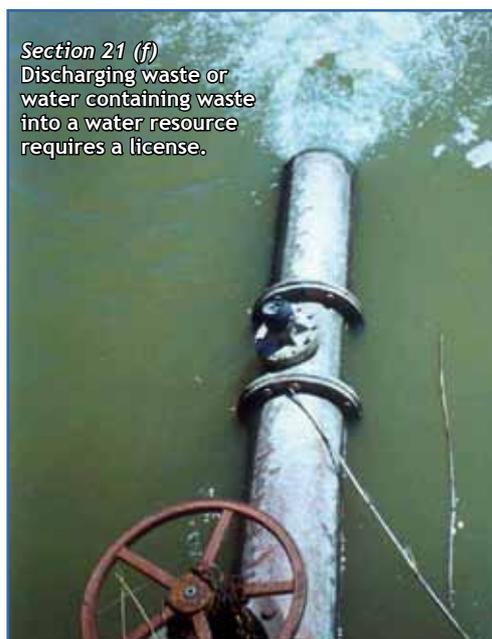
Section 26(1)(c) of the NWA

Except for water used according to Schedule 1, all existing lawful water use or in some cases water used under the General Authorisation as described in the previous article, are since 2001 supposed to be registered with the Department by completing the relevant registration forms. Registration is the process by which the water user officially notifies the Department of a water use. A registration certificate is then issued. But, what is important to remember, is that a registration certificate issued by the Department is not proof of an entitlement or an authorisation to use water - it is merely an acknowledgement that you have notified the Department of your water use. Only after verification has positively confirmed the existing water use, can it be regarded as an entitlement.

VERIFICATION OF EXISTING LAWFUL USE

Section 35 of the NWA

The majority of lawful entitlements that are applicable to irrigation water uses, even 12 years after the NWA has been promulgated, are still exercised as existing lawful use. As stated above, the only way that you could provide proof of an existing lawful use, is by verifying it according to section 35 of the National Water Act. Verification takes place by addressing the two crucial questions for existing lawful use, namely:





1. **Did the water use actually take place during the qualifying period: namely 1 Oct 1997 to 30 Sept 1999?**

Satellite imagery or any other relevant means could be provided as proof.

2. **Was it lawful at that time, according to relevant legislation?**

Where relevant, works permits or other authorisation from the previous Water Act could be provided as proof.

Water users who want to verify an existing lawful use, can at any stage apply for verification as prescribed in section 35 of the NWA. The application should be submitted at the relevant DWA regional office. The Department may require the applicant, at the applicant's expense, to obtain and provide all necessary information, in order to take a decision on the application to verify a use.

TRANSFER OF WATER USE ENTITLEMENTS

Section 25 of the NWA

Transfer in this context means the transfer of water from one property to another. A license is necessary even if the two properties belong to the same person. In case of the change of ownership of a property with a water use entitlement, the new owner however does not need to apply for a new license, but only needs to inform the Department of the change of ownership, as long as the water is to be used for the same purpose as it was used previously.

An entitlement could under certain conditions be transferred to another property on a *temporary basis (for a maximum period of two years)* according to section 25 (1), for which a license is not necessary, but the relevant regional office should be approached for authorisation.

The process to follow in case of a proposed *permanent transfer* is described in section 25 (2) of the NWA, which specifies that an entitlement to use water may be surrendered in writing by the present holder of the entitlement in order to facilitate a particular license application from another person. An application for a license should be submitted by the proposed new user of the water at the relevant Water Affairs regional office. The said written surrender only becomes effective if and when such application for a license is granted. If a license is not granted, the seller retains the water use entitlement even if he/she have received the money. The same rule applies where a water user wants to transfer an entitlement from one of his own properties to another one of his own properties.

CASE STUDY 1:

The following case occurred recently: Five years ago, a farmer paid a substantial amount of money to buy a water use entitlement from a neighbour without realising that he needs a license before he could transfer the water use to his own property. Now, five years later, after the farmer from which he has bought the water has sold his farm and left the area, the farmer who has bought the entitlement now has a nasty problem.



CASE STUDY 1 (CONTINUED)

Because of the fact that a license has never been issued for the transfer of the entitlement, *the water could only be lawfully used on the original property*. The problem is that the farmer has paid for a water use entitlement which he now does not have, and he needs to go through a lengthy licensing process, with no guarantee that he will eventually get a license for the transfer. The moral of the story is: please understand that the transfer only takes place when the license for the transfer is signed. Even with an interim temporary transfer (as described above) you should remember that you are not sure that the license will eventually be issued.

Numerous problems occur where proposed new users struggle to get licenses approved for the transfers of water use entitlements. They should remember that together with all the other normal requirements, the BBBEE (Broad-based Black Economic Empowerment) requirements are applicable even when both properties belong to the same person.

PROCEDURE FOR A WATER USE LICENSE APPLICATION

Section 41 of the NWA

A person who wishes to obtain a license to use water, must apply to the relevant regional office of the Department. Additional information may be required from the applicant before a decision is taken. The applicant may also be required to give notice of the application in the media to allow objections against the application if any other person feels that they may be adversely affected. A specific process in accordance with Chapter 4 of the NWA will be followed by the Minister in considering the license application and in taking a decision. The applicant or anybody who lodged a written objection may appeal to the Water Tribunal against the decision of the Minister and even after such an appeal, if an appellant is not satisfied with the Water Tribunal's judgment, he/she may further appeal to the High Court.

CASE STUDY 2:

A person in the Kwazulu-Natal Midlands wanted to extend his dairy, for which he needs to extend the area of his pastures under irrigation. Since the regional office in Durban told him that no additional water is available from the stream running through his farm, his only choice is to buy a water use entitlement in the vicinity. He found that his neighbour, who claims that his taking of water qualifies as existing lawful use, is willing to sell. How did he go about this? And what were the requirements that he needed to comply with before a new license for the taking of water was issued to him?

When applying for the license for the taking of the additional amount of water, at the regional office in Durban, the Department told the farmer that for the water to be transferred to his property, he needs to follow the section 25(2) process. He firstly needs a letter of surrender from the existing entitlement holder. But since the existing entitlement is claimed to be an existing lawful use, he must also apply for verification with the regional office: that is to verify that the water use is in fact a lawful entitlement.



CASE STUDY 2 (CONTINUED)

In order to supply the office with the necessary information to verify the use, he needed to appoint and pay a competent consultant with the necessary experience. After the verification has been approved in the regional office, he was requested to motivate the factors given in section 27(1) of the NWA, in order to support his application for the additional water.

One factor to consider according to section 27(1)(b) before a license could be issued, is “the need to redress the results of past racial and gender discrimination”. Apart from his motivation towards the other factors, he was requested in a letter from the Department to supply stronger motivation that, if the license is approved, his taking of additional water will adequately give effect to this specific requirement. After a number of discussions, he undertook to make 30% of this additional water available to historically disadvantaged individuals, in the form of a binding agreement with a trust with some of his farm workers as beneficiaries. The license was eventually approved, with conditions addressing the continuous compliance with this agreement. The license was issued for 20 years.

**This article concludes the two part series on water uses and water transfers.
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