

REPUBLIC OF SOUTH AFRICA

---

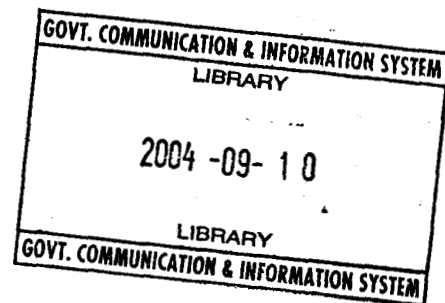
# WATER SERVICES AMENDMENT BILL

---

*(As introduced in the National Assembly as a section 75 Bill; explanatory summary of Bill  
published in Government Gazette No 26704 of 20 August 2004)  
(The English text is the official text of the Bill)*

---

(MINISTER OF WATER AFFAIRS AND FORESTRY)



[B 17—2004]

ISBN 0 621 34858 9

No. of copies printed ..... 1 800

**GENERAL EXPLANATORY NOTE:**

- [                    ] Words in bold type in square brackets indicate omissions from existing enactments.
- Words underlined with a solid line indicate insertions in existing enactments.
- 
- 

## **BILL**

**To amend the Water Services Act, 1997, so as to enable water boards to perform activities outside the borders of South Africa; and to provide for matters connected therewith.**

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 30 of Act 108 of 1997**

1. Section 30 of the Water Services Act, 1997, is hereby amended by the addition of the following subsections:

“(3) The Minister must, in consultation with the Minister of Finance, the Minister of Trade and Industry and the Minister of Public Enterprises and by notice in the *Gazette*, determine—

(a) the nature of the activities that a water board may perform outside the borders of the Republic;

(b) the countries in which such activities may be performed; and

(c) the maximum amount of capital that a water board may take out of the Republic when an activity contemplated in subsection (4) is performed.

(4) The Minister may, in consultation with the Minister of Finance, authorise a water board to perform an activity outside the borders of the Republic.”

**Short title**

2. This Act is called the Water Services Amendment Act, 2004.

**MEMORANDUM ON THE OBJECTS OF THE WATER SERVICES  
AMENDMENT BILL, 2004**

1. When a water board is established in terms of section 28 of the Water Services Act, 1997 (Act No. 108 of 1997) (hereinafter referred to as "the Act"), a service area for that water board is determined. This service area is understood to mean a service area within the Republic of South Africa. As a water board is a statutory body, it only has the powers conferred upon it by statute. Should a water board therefore wish to operate outside the borders of the Republic of South Africa, it lacks the statutory authority to do so. Initially there was some uncertainty about the legal position in this regard, but it has subsequently been clarified by a number of legal opinions by senior counsel.

2. Umgeni Water has, however, in good faith been operating extraterritorially for some time. Rand Water has also shown a keen interest to operate outside the borders of the Republic of South Africa. An urgent need, has therefore, arisen to create statutory authority to enable water boards to operate extraterritorially. It is conceived as important to enable parastatals to make their contribution to NEPAD, also in the form of expertise and capacity building.

3. The proposed amendment to section 30 of the Act provides for two phases in the process to authorise extraterritorial activities of water boards.

3.1 The first phase consists of a publication by notice in the *Gazette* of the parameters within which an approval to operate extraterritorially may be granted.

3.1.1 The determination of these parameters occurs on the initiative of the Minister of Water Affairs and Forestry, but in consultation with the Minister of Trade and Industry, the Minister of Finance and the Minister of Public Enterprise.

3.1.2 The parameters are determined by a fixation of the nature of the permissible activities, the permissible countries and the maximum permissible amount of money to be taken out of the country.

3.2 The second phase consists of the Minister of Water Affairs and Forestry in consultation with the Minister of Finance to consider an application by a Water Board to operate extraterritorially. As the assessment of financial risk is a major factor during this phase, the concurrence of the Minister of Finance is deemed essential.

4. When the said two Ministers consider an application by a water board, they are also bound by the existing provisions of the Act.

## **5. FINANCIAL IMPLICATIONS FOR STATE**

None.

## **6. CONSULTATION**

### **6.1 GOVERNMENT DEPARTMENTS.**

6.1.1 Department of Trade and Industry  
Department of Finance (National Treasury)  
Department of Public Enterprise  
Consultation with the said three Departments led directly to the inclusion of these three Ministers in the Bill when the parameters within which approval for extraterritorial activities of water boards may be granted, are determined. It further led to the inclusion of the requirement that the concurrence of the Minister of Finance is essential before the Minister of Water Affairs and Forestry can approve an application for extraterritorial activity by a water board.

6.1.2 Department of Foreign Affairs.

This Government Department had no objection to the concept of water boards operating outside the borders of the Republic.

### **6.2 WATER BOARDS**

Although all water boards were invited to comment right from the start, only the two water boards which currently are undertaking extraterritorial activities, eventually offered the following substantial comments.

## 6.2.1 Umgeni Water.

6.2.1.1 *The Bill should grant powers to operate extraterritorially directly to water boards without the intervention of Cabinet Ministers. As water boards are statutory bodies whose primary function is to provide water services within the Republic, the control of the said Ministers are deemed essential and was retained in the Bill.*

6.2.1.2 *The Bill should provide that water boards may perform activities anywhere in the Republic. Section 28(1)(c) of the Water Services Act of 1997 already provides that the Minister of Water Affairs and Forestry may determine or change the service area of a water board within the Republic.*

6.2.1.3 *As Umgeni water has already concluded agreements with clients in other countries, the Bill should be given retrospective effect. This concept was not thought to be in line with sound legal philosophy.*

## 6.2.2 Rand Water.

6.2.2.1 *The Bill curtails a water board's discretion to enter into new business. The discretion of more entities than a water board is essential when operations abroad are undertaken.*

6.2.2.2 *Having to apply to the Minister of Water Affairs and Forestry may take too long for a successful bid for new business. Although this concern is valid, it does not justify the exclusion of governmental control when money and expertise are taken out of the country by a statutory body.*

6.2.2.3 *The criteria for approval of an application do not appear in the Bill. The Bill provides for the determination of criteria by four Ministers. Furthermore the Water Services Act of 1997 itself contains mandatory criteria in sections 30 and 42.*

6.2.2.4 *If a country outside the Republic finances the intended activities it should not be necessary to obtain the Ministers' approval. As financing is not the only controversial facet of operations abroad, Government control remains necessary.*

6.2.2.5 *Section 54(2) of the Public Finance Management Act of 1999 already requires approval of certain public entity transactions by the treasury. The Bill duplicates this process. The process described in the Bill goes much further than the mere consideration of financial implications.*

### 6.3 SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION (SALGA).

6.3.1 *The Bill may be in conflict with the institutional reform process in the water services sector. This is mere speculation as the real outcome of the reform process is not yet known.*

6.3.2 *Accountability of water boards to municipalities will be undermined by the Bill. Municipalities may suffer losses as a result of water boards' activities abroad. It is for this reason amongst others, that the discretion of four Cabinet Ministers are involved in the decision taking process.*

6.3.3 *The Bill does not provide for consultation with SALGA. This fact does not prohibit any of the Ministers to consult with SALGA when all the*

facts of a particular application are assembled in order to come to a sound decision.

6.3.4 *No provision is made for retrospective application of the Bill. See paragraph 6.2.1.3 above.*

6.3.5 *The Bill does not set criteria for the Ministers when taking a decision. See paragraph 6.2.2.3 above.*

To be completed by Department.

## **7. PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Water Affairs and Forestry are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.