

DEPARTMENT OF ENERGY

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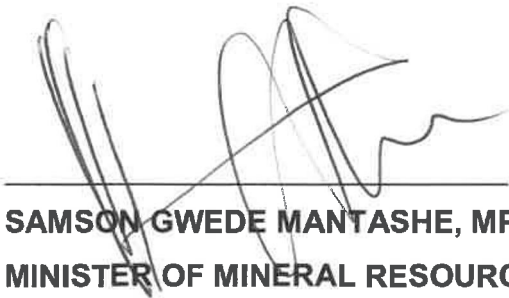
10 JANUARY 2020

PETROLEUM PRODUCTS ACT, 1977

**PUBLICATION OF DRAFT GUIDELINES TO APPLICANTS FOR NEW TO INDUSTRY
SITE AND RETAIL LICENCES FOR PUBLIC COMMENT**

I, Samson Gwede Mantashe, the Minister of Mineral Resources and Energy hereby invite interested persons to submit written comments on the proposed Guidelines to Applicants for New to Industry Site and Retail Licences, within 60 days, to the Director-General, Department of Energy, Private Bag X96, Pretoria 0001; Matimba House 192 Visagie Street, Pretoria; or email shaun.kraut@energy.gov.za (for attention Directorate: Legal Services).

Kindly provide the name, address, telephone number, fax number and email address of the person or organisation submitting the comments. Comments received after the closing date may not be considered.


A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over a horizontal line.**SAMSON GWEDE MANTASHE, MP****MINISTER OF MINERAL RESOURCES AND ENERGY**

04/12/2019



energy

Department:
Energy

REPUBLIC OF SOUTH AFRICA

DRAFT GUIDELINES TO APPLICANTS FOR NEW TO INDUSTRY SITE AND RETAIL LICENCES

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1. BACKGROUND

- 1.1 Pursuant to Judgments in **Nine Nine Ninety Nine Projects (Pty) Ltd and Another v Minister: Department of Energy and Others** (A543/12) [2014] ZAGPPHC 335 and **Quick Serve Petrol Station (Pty) Ltd and another v the Minister of Energy and the Controller of Petroleum Products** 2017 JDR 1337 (GP), the Minister was directed to reconsider the respective applicants' licence applications, with such reconsideration to include formulating guidelines to the applicants or informing the applicants of the criteria by which their licence applications will be evaluated.
- 1.2 The criteria for the evaluation of applications for site and retail licences, together with all the information that must be provided by an applicant, are set out in the legislation and regulations below. The Controller will cause the applications to be investigated and additional relevant information may be obtained during such investigation. The applicants will have a further opportunity to respond to objections received by interested and affected parties, findings by the Controller of the investigation and any such additional information obtained from third parties that are additional to the licence application documentation lodged with the Controller. The Controller will then decide the applications.
- 1.3 Due to the fluid nature of the applications it is virtually impossible to pre-determine exactly what information would be required in each specific instance where an application is received. Each site and retail licence application is basically unique and only after same has been received will it be possible to evaluate the application(s). Should extra information be required, the Controller can request such further information. However, given the aforesaid judgments and uncertainty among applicants on the criteria considered in determining applications for new site and retail licences, these guidelines have been developed. They are intended to elucidate upon the applicable legislation and regulations but these guidelines are not intended to be binding and enforceable.

2. APPLICABLE LEGISLATION AND REGULATIONS

2.1 The Petroleum Products Act 120 of 1977 as amended (*"the PPA"*)

2.1.1. The long title describes the objectives of *the PPA* as follows:

"To provide for measures in the saving of petroleum products and an economy in the cost of distribution thereof, and for the maintenance and control of a price therefor, for the furnishing of certain information regarding petroleum products, and for the rendering of services of a particular kind, or services of a particular standard, in connection with petroleum products; to provide for the licensing of persons involved in the manufacturing and sale of certain petroleum products; to promote the transformation of the South African petroleum and liquid fuels industry; to provide for the promulgation of regulations relating to such licences; and to provide for matters incidental thereto."

2.1.2 In terms of applicable provisions of section 2A(4) of *the PPA* any person who has to apply for a licence in terms of subsection (1) must-

"...(b) in the case of a site licence be the owner of the property concerned or in the case of publicly owned land have the written permission of the owner;

(c) in the case of retail and wholesale licences be the owner of the business concerned;"

2.1.3 In terms of section 2B(1), the Controller of Petroleum Products must issue licences in accordance with the provisions of *the PPA*. Section 2B(2) states that –

"(2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:

(a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;

(b) facilitating an environment conducive to efficient and commercially justifiable investment;

(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;

(d) ensuring countrywide availability of petroleum products at competitive prices; and

(e) promoting access to affordable petroleum products by low-income consumers for household use."

2.1.4 Section 2C(1) of *the PPA* on Transformation of South African petroleum and liquid fuels industry provides that -

"(1) In considering licence applications in terms of this Act, the Controller of Petroleum Products shall-

(a) promote the advancement of historically disadvantaged South Africans; and

(b) give effect to the Charter."

2.1.5 Section 2E of *the PPA* provides for the Minister to prescribe by regulation a system as envisaged in subsection (3) for the allocation of site and their corresponding retail licences by which the Controller of Petroleum Products shall be bound. Such a system-

- (a) must intend to transform the retail sector into one that has the optimum number of efficient sites;
- (b) must intend to achieve an equilibrium amongst all participants in the petroleum products industry within the constraints of this Act;
- (c) must be based on the objectives referred to in section 2B (2) and 2C;
- (d) must promote efficient investment in the retail sector and the productive use of retail facilities and may in this regard-
- (i) limit the total number of site and corresponding retail licences in any period;
 - (ii) link the total number of site and corresponding retail licences in any period, to the total mass or volume of prescribed petroleum products sold by licensed retailers; and
 - (iii) use any other appropriate means;
- (e) must allow licensed wholesalers to trade with each other any contractual rights and obligations they may have, to supply licensed retailers with prescribed petroleum products;
- (f) [Para. (f) deleted by s. 4 (c) of Act 2 of 2005.]
- (g) may link the issuing of a new site licence and the corresponding retail licence to the termination or transfer of ownership of one or more existing site licences and the corresponding retail licences;
- (h) may link the issuing of a new retail licence to the transfer from a licensed wholesaler of contractual rights enjoyed by that wholesaler in respect of one or more licensed retailers, to another licensed wholesaler.

2.2 The Regulations Regarding Petroleum Products Site and Retail Licences published under Government Notice R.286 in GG 28665 of 27 March 2006 as amended by Government Notice R.1061 in GG 35984 of 19 December 2012 (*"the Regulations"*)

2.2.1 Regulation 6 deals with the evaluation of a site licence application and states that –

"(1) In evaluating an application for any site licence, the Controller must, subject to subregulation (2), verify that-

- (a) the information and the documents submitted with the application form are true and correct; and*
- (b) the notice contemplated in regulation 4(1) was published.*

(2) In the case of an application for a site licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-

- (a) there is a need for a site; and*
- (b) the site will promote the licensing objectives stipulated in sections 2B(2) of the Act."*

2.2.2 Regulation 18 deals with the evaluation of a retail licence application and states that –

- “ (1) In evaluating an application for any retail licence, the Controller must, subject to subregulation (2), verify that-*
- (a) the information and the documents submitted with the application form are true and correct; and*
 - (b) the notice contemplated in regulation 16(1) was published.*
- (2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-*
- (a) the retailing business is economically viable; and*
 - (b) the retailing business will promote licensing objectives stipulated in section 2B(2) of the Act.*
- (3) In determining the economic viability contemplated in subregulation (2)(a), the Controller must be satisfied that the net present value has been correctly calculated and is positive.”*

2.3 Documents and information to be submitted in terms of the Regulations

2.3.1 Regulation 3 read with regulation 13(1) of the Regulations set out the documents that must be lodged with a new site licence application:

1	Motivation for the approval of the site licence.
2	A certified copy of the applicant's identity document if the applicant is a natural person and, in the case of a non- South African citizen, permanent residence permit or employment permit and proof of residence in South Africa, or proof of domicile in South Africa, as the case may be. OR A certified copy of the business entity's registration documents, if the applicant is a corporate entity or a trust.
3	A certified copy of the land-use zoning certificate issued by a competent authority or person, authorizing retailing activity ^{1&2} .
4	A certified copy of the Environmental Authorisation of the environmental authorities, permitting retailing operations on the site ³ .
5	A certified copy of, in the case of- (a) an owner, the title deed to the land on which the site is located; OR (b) publicly owned land, the written permission of the landowner.

¹ In exceptional cases, where a land-use zoning certificate cannot be attained then an excerpt or other proof that the site has been zoned may be accepted.

² If the property is tribal land, then the Controller may accept a letter from the tribal authority as proof thereof.

³ In instances where the combined storage capacity does not exceed 80m³, a letter from the environmental authorities (which accordance with the apposite environmental legislation, as amended from time to time) will be sufficient.

6	The permission by the National Roads Authority to develop the site, if the site allows or is intended to allow access by vehicles to a national road.
7	If necessary, the original or certified copy of a declaration by the applicant giving reasons why any attachment required is not provided.

2.3.2 Regulation 15 read with regulation 25(1) of *the Regulations* set out the documents that must be lodged with a new retail licence application:

1	Motivation for the retailing activity.
2	A certified copy of the applicant's identity document, if the applicant is a natural person and, in the case of a non- South African citizen, permanent residence permit or employment permit and proof of residence in South Africa, or proof of domicile in South Africa, as the case may be. OR A certified copy of the business entity's registration documents, if the applicant is a corporate entity or a trust.
3	In the case of an application made by a natural person claiming to be a historically disadvantaged South African, a declaration by that person to that effect.
4	The net present value calculation including- <ul style="list-style-type: none"> • The result of the net present value calculation, and • All data and assumptions used in the calculation of the net present value. <i>This should be for a period of five years.</i>
5	A declaration by the applicant stating that the applicant is not owned in any way by a licensed wholesaler.
6	In the case of an application made by a juristic person, a declaration on the extent of ownership of the business by historically disadvantaged South Africans as defined in the Charter.
7	In the case of retail business owned by a licensed wholesaler for training purposes, declaration by the licensed wholesaler stating that the licensed retailing activity will be used for training purposes.
8	If necessary, the original or certified copy of a declaration by the applicant giving reasons why any attachment required is not provided.

2.3.3 In addition to proof of publication of the applications that must be submitted to the Controller, in terms of Regulation 35 of *the Regulations*, the following additional information is required to accompany an application⁴:

	Original or certified copies of notice of the applications (site and retail) published in a prominent manner in at least two of the most popular newspapers circulating in the area of the proposed activity in two official languages one of which must be English (Regulations 4 and 16).
1	Copy of business plan linked to the objectives in terms of section 2B(2) of <i>the PPA</i>
2	Certified copies of all members' identity documents for Close Corporation or Shareholders/Directors for a Company
3	Certified copies of Share certificates, Share register and Shareholder's agreement (if applicable)
4	Certified copies of Memorandum of Incorporation (if applicable)
5	Certified copy of a loan agreement (if applicable)
6	Copy of a Franchise Agreement or Supply Agreement with a licensed petroleum wholesaler
7	Traffic count and report including assumptions on interception rate ⁵ .
8	Declarations under oath by the applicants stating that they will comply with <i>the PPA</i> , and applicable Regulations
9	Certified declarations by an Accounting Officer or Legal Representative stating the percentage (%) of Historically Disadvantaged South Africans (HDSA) in the entity.
10	Number of employees as indicated in Table 1 below.

Table 1 - Number of employees

	African Female(s)	African Male(s)	Coloured Female(s)	Coloured Male(s)	Indian Female(s)	Indian Male(s)	White Female(s)	White Male(s)	Disabled Individual(s)
Forecourt									
Admin									

⁴ In addition to the listed documentation and/or information, the Controller may request additional information from a licence applicant that may be necessary to enable the Controller to decide upon a licence application.

⁵ It is recommended that the traffic count include a narrated report which supports the need for the filling station.

3. FACTORS TO BE CONSIDERED IN DETERMINING NEED FOR A NEW SITE

3.1 The number of existing service stations and proximity to the proposed site

3.1.1 The legislative framework intends to transform the retail sector into one that has the optimum number of efficient sites and seeks to promote efficient investment in the retail sector and the productive use of retail facilities. In this context the Applicant must establish that there is a need for a further filling station.

3.1.2 The Controller, as a minimum, will consider all existing licensed sites-

- (a) in an urban area, within a five (5) kilometre radius of the proposed site; or
- (b) in a rural area or on a national road, within a twenty five (25) kilometre radius of the proposed site.

3.2 Petroleum Products Volumes pumped by competitor sites (Period to be determined, Growth or declining volumes), Design / Storage capacity of existing sites and impact on existing sites

3.2.1 All sites contemplated in 3.1.2 (a) and (b) shall be considered competitor sites. The Controller will consider fuel volumes pumped at these sites over the previous three year period to be used as a benchmark to ascertain whether an additional filling station will promote the objectives contained in the Act. Fuel volumes shall be verified with oil companies, and such information shall be treated as confidential.

3.2.2 Fuel volumes must evince growth in demand. Any decline in fuel volumes will militate against the approval of a new site. The application must provide substantial evidence to support need in these circumstances.

3.2.3 The Controller will further consider the design or storage capacity of existing sites to establish whether these sites can cater for additional demand. The Controller must ensure optimal and productive use of existing capacity.

3.2.4 the Controller will consider the probable impact the proposed site will have on existing licensed sites.

3.3 Location of site: Road infrastructure, feeder roads, and access points to the proposed site

3.3.1 The Controller will consider the extent to which the location of the proposed site increases access to and availability of petroleum products to consumers.

3.3.2 This factor must be balanced against the impact on existing sites and the objective of *facilitating an environment conducive to efficient and commercially justifiable investment*

3.4 Feasibility studies and Traffic Counts: Serviced and subserviced traffic flows

- 3.4.1 The Controller will consider expert reports on feasibility of the proposed site, taking into account traffic counts.
- 3.4.2 Historic traffic counts may be vital in demonstrating growth.
- 3.4.3 Traffic counts should be accompanied by a report compiled by a registered engineer with relevant expertise in the field. The report must include all assumptions on interception rate⁶, including traffic volumes (transient or local); location and layout, convenience, facilities and services offered; and competitor density.
- 3.4.4 All assumptions and projected volumes will be noted. The Applicant must demonstrate that the retailing business is economically viable. In determining economic viability, the Controller must be satisfied that the **net present value** (*a generally accepted method used to determine economic viability by considering future streams of revenues and costs of a business activity discounted into equivalent present values*) has been correctly calculated and is positive. The NPV must only pertain to the forecourt and actual costs associated with the retailing activity. The convenience store and associated facilities must be excluded in the calculation.

3.5 New markets, Attraction points and Developments:

- 3.5.1 It is vital for the Controller to assess the extent and nature of the applicant's targeted market.
- 3.5.2 An Applicant must substantiate any new demand and market for petroleum products in the area. Timelines for proposed developments to be realised must not exceed 2 years from date of application. It must be noted that a number of external factors play a role in determining traffic generated by a specific development, including nature of land uses in the area, the road network, access to public transport and socio-economic conditions prevailing in the area.
- 3.5.3 In this regard an applicant may provide: Municipal plans for new or proposed development in the area (Residential or Commercial); Developer confirmation of recent realised developments; or proposed timeline of developments⁷.

3.6 Employment opportunities and the development of small businesses in the petroleum sector

- 3.6.1 The Controller will consider the extent to which the proposed site will create employment opportunities and promote small business development.

⁶ A realistic interception rate must be utilised when calculating projected volumes. Should the interception rate exceed 3% a detailed motivation is required.

⁷ It would be beneficial for an applicant to demonstrate that the proposed growth will be realised.

- 3.6.2 While these are critical considerations, this must be balanced against the impact on existing sites and the objective of *facilitating an environment conducive to efficient and commercially justifiable investment*.

3.7 Transformation of the sector

- 3.7.1 The Controller, in considering licence applications, must *promote the advancement of historically disadvantaged South Africans; and give effect to the Charter*.
- 3.7.2 The Charter aims to ensure a sustainable presence, ownership or control by historically disadvantaged South Africans in all facets of the liquid fuels industry.