

30 July 2026

Ms N. Bavuma
Committee Secretary
Parliamentary Committee on Water and Sanitation
Parliament Street
CAPE TOWN
8000

By e-mail: PCWS@parliament.gov.za

Dear Ms Bavuma

COMMENTARY ON THE NATIONAL WATER AMENDMENT BILL (B1-2026)

1. We refer to the National Water Amendment Bill, B1-2026 ("the Bill"), introduced in the National Assembly in terms of section 75 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The Bill proposes to amend the National Water Act, 36 of 1998 ("the principal Act" or "NWA") in several material respects.¹ Interested persons have been invited to comment on and make representations to the portfolio committee on water and sanitation on or before 30 July 2026.
2. This submission is submitted in response to that invitation. It constitutes the submissions of AfriForum NPC ("AfriForum"), a non-profit company with registration number 2005/042861/08, registered as such in terms of the Company Laws of the Republic of South Africa with its principal place of business at AfriForum Building, corner Union and DF Malan Streets, Kloofsig, Centurion, Gauteng.
3. AfriForum makes these submissions in line with its stated purpose and objectives in its memorandum of incorporation, which is to, inter alia, protect and promote the constitutional rights of the citizens of the Republic of South Africa.
4. The Bill is introduced against a backdrop of significant institutional and operational challenges in the water sector, including deteriorating water and wastewater infrastructure, persistent concerns regarding water quality and non-revenue water, and delays in the processing of water-use licence applications and existing lawful water-use verifications.
5. This submission adopts an initial narrative and thematic approach, situating the Bill within the broader institutional and operational realities of the water services sector, and thereafter a clause-by-clause approach.

¹ Government Gazette No. 53490 of 01 October 2025.

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Registration number: 2005/042861/08 • **NGO number:** 054 - 590

THEMATIC OVERVIEW

6. Before turning to a clause-by-clause analysis, AfriForum wishes to situate its concerns within seven cross-cutting themes that recur throughout the Bill. These themes inform the specific submissions made below and, in AfriForum's respectful submission, ought to guide the Portfolio Committee's consideration of the Bill as a whole.

Security of tenure and the constitutional property clause

7. Water use entitlements granted, recognised or continued under the NWA are not bare administrative privileges. They are rights of significant patrimonial value, frequently pledged as security for finance, capitalised into the value of agricultural land, and relied upon for long-term investment in irrigation infrastructure, orchards, mining operations and forestry plantations. Although water itself vests in the public and is held by the state as public trustee, the *use right* attaching to a licence or existing lawful use is properly regarded as property for purposes of section 25 of the Constitution once granted.
8. Several clauses of the Bill, most notably clauses 7, 9, 10, 17 and 19, have the cumulative effect of narrowing or extinguishing existing entitlements without compensation and, in some instances, without procedural safeguards.
9. AfriForum does not, as a matter of principle, oppose the equitable reallocation of water resources or the protection of strategic water source areas. It does, however, submit that where the state deprives a person of a valuable use right in the pursuit of these legitimate objectives, section 25(1) requires that the deprivation not be arbitrary, and, where the deprivation is of such a character and degree that it amounts in substance to expropriation, section 25(2) requires just and equitable compensation. The Bill, as introduced, does not grapple with this distinction at all.

Redress, equality and the requirements of section 9 of the Constitution

10. AfriForum accepts that equitable access to water is a legitimate national objective.
11. AfriForum objects, however, to the mandatory race-based transformation and redress requirements introduced by clauses 12, 13 and 28. These provisions delegate the substance of the regime to the unfettered discretion of the Minister of Water and Sanitation ("the Minister"). They further operate to the prejudice of existing lawful users who bear no personal responsibility for historical patterns of access. AfriForum submits that the relevant provisions should be deleted or substantially redrafted.

Legislative certainty, the rule of law and executive discretion

12. The Bill concentrates significant unfettered discretionary power in the Minister. The Minister is empowered to:
 - 12.1 Reallocate water between sectors, provinces or catchments "in the public interest" without defined criteria, volume limits or compensation (section 25A (clause 11));

- 12.2 Curtail an existing lawful water use entitlement for any period the Minister specifies (section 34A (clause 19));
 - 12.3 Determine criteria for membership of water user associations by Gazette notice (section 92(1)(d) (clause 27)); and
 - 12.4 Prescribe matters of real substance by regulation under sections 20A(5), 20B(1) and 20C(2), all lacking appropriate parliamentary oversight.
13. AfriForum respectfully recommends that, wherever the Bill confers a discretionary power of this character, the Committee require the insertion of proper lawful constraints on the exercise of the Ministerial power. Specific instances are dealt with under the relevant clauses below.

Existing water-use licences and transitional protection

14. The Bill must further be considered against the Department's stated intention to phase out previous water entitlements and make unused water available for reallocation. The Department has itself recognised that the existing lawful water-use regime permits existing lawful users to continue using water, while identifying the absence of a limited timeframe for such use as a concern.
15. AfriForum does not dispute the need to ensure that scarce water resources are efficiently and equitably utilised. However, the deliberate alteration of the legal position of existing lawful users must account for persons who have obtained and relied upon existing water-use entitlements and who have made substantial investments and entered into long-term commercial arrangements on that basis.
16. The Bill accordingly raises concerns regarding legal certainty. This is particularly so where the proposed "use-it-or-lose-it" mechanism is intended to free water for reallocation. The Bill does not sufficiently distinguish between the deliberate hoarding or non-use of water and legitimate circumstances in which an authorised user is unable to utilise the full extent of an entitlement. Existing lawful users should not be exposed to the loss or curtailment of their entitlements without adequate transitional protection and consideration of the circumstances giving rise to non-use.

Existing lawful water-use rights

17. The repeal of section 33 (clause 17) removes the mechanism by which a person may have an existing lawful water use formally declared, notwithstanding that the verification and validation process contemplated under the principal Act remains, in respect of a substantial number of water users, incomplete more than two decades after the principal Act came into force, a delay attributable to the Department's own administrative capacity, not to any default on the part of the water user.

18. AfriForum submits that no person should be deprived of the ability to have a pre-existing claim recognised on account of the state's own delay in processing that claim, and that a transitional or savings provision is required.

Freedom of association within water user associations

19. The Bill materially alters the character of water user associations, which the principal Act itself describes as voluntary co-operative associations of individual water users established for their mutual benefit. For example:
- 19.1 Clause 35, read with the proposed insertion of item 7(3A) of Schedule 5, deems every authorised water user in an association's area of operation to be a member of that association, without an opt-out mechanism.
 - 19.2 Clause 27 empowers the Minister to determine membership criteria.
 - 19.3 Clause 28 compels associations to adopt the model constitution and to pursue a mandatory transformation strategy "in all components" of the association.
20. Taken together, these provisions risk converting bodies that are, in law, voluntary associations into *de facto* organs of state, engaging the right to freedom of association, including the negative right not to associate, protected under section 18 of the Constitution, without the safeguards ordinarily attached to the exercise of public power.

Current ineffectiveness of the Water Tribunal

21. AfriForum is concerned that the Water Tribunal is not presently functioning as an effective and expeditious mechanism for resolving disputes under the NWA. Appeals have remained unheard or unresolved for extended periods, resulting in a backlog and undermining the availability of an effective remedy to persons affected by decisions taken under the Act.
22. This concern is particularly significant in the context of the Bill. The Bill proposes to confer materially greater powers upon the executive, including powers to reallocate water, curtail existing lawful water use and regulate the surrender of water-use entitlements. The rationality of these powers cannot be considered independently from the availability of an effective mechanism through which affected persons may challenge their exercise.
23. AfriForum accordingly submits that the proper functioning of the Water Tribunal is an essential component of the water regulatory framework. It would be inappropriate to expand the powers and obligations under the NWA while the specialist statutory appeal mechanism remains subject to unresolved institutional and procedural deficiencies.
24. These seven themes recur, in varying combinations, throughout the clause-by-clause commentary which follows.

CLAUSE-BY-CLAUSE COMMENTARY

Clauses 3, 5 and 6 – Extension of review periods (sections 5, 15A and 18A)

25. AfriForum has no principled objection to extending the review period for the national water resource strategy from five to ten years, nor to the introduction of a ten-year review cycle for the classification of water resources and for the Reserve, provided that two safeguards are observed.
26. First, because the Reserve includes the basic human needs component protecting the constitutional right of access to sufficient water under section 27(1)(b), AfriForum recommends that the Bill expressly provide that the basic human needs component should be reviewed *more frequently* than every ten years. Especially where evidence indicates it is no longer being met.
27. Second, AfriForum notes that each of these review powers is framed as permissive (“may be reviewed”) rather than obligatory. Given the poor governance history of the water sector, this amendment risks reviews not occurring at all. AfriForum recommends the word “may” be replaced with “must” in each instance, subject to the maximum period specified.

Clause 7 – Insertion of Chapter 3A (protection of strategic water source areas)

28. The proposed sections 20B, 20C and 20D prohibit the responsible authority from issuing water use licences for open cast and underground mining, forestry plantations and agricultural activities respectively, within strategic water source areas meeting the stipulated risk criteria.
29. Read with new section 98(8), an existing entitlement holder may continue with an existing entitlement only *until* the relevant area is identified and declared as a strategic water source area.
30. The Bill nowhere provides for compensation to a person whose existing, lawfully obtained entitlement is rendered valueless in this manner, nor does it provide an individualised hearing to the affected user before the area in which that user operates is declared.
31. AfriForum submits that this framework raises serious concerns under section 25(1) of the Constitution. In particular, the Bill does not provide sufficient safeguards to ensure that the substantial interference with existing lawful interests is not arbitrary, disproportionate or otherwise constitutionally impermissible.

Clause 9 – Amendment of section 22 (deletion of subsections (6) to (10))

32. Subsections 22(6) to (10) of the Act established the only statutory compensation mechanism available to an applicant under the compulsory licensing process in terms of section 43. As such, any person who has applied for a licence in terms of section 43 in respect of an existing lawful water use as contemplated in section 32, and whose application has been refused or who has been granted a licence for a lesser use than the

existing lawful water use, resulting in severe prejudice to the economic viability of an undertaking in respect of which the water was beneficially used, may, subject to subsections (7) and (8), claim compensation for any financial loss suffered in consequence.

33. The deletion of these subsections leaves the affected applicants without any redress in the form of compensation. Despite that, the compulsory licensing process in terms of section 43 remains.
34. An existing lawful user whose entitlement is refused or reduced through the compulsory licensing process after the intended amendment of Clause 9 commences will have no statutory right to compensation, no forum with jurisdiction to award it, and no mechanism to negotiate an alternative allocation. Read together with Clause 11 (the Minister's power to reallocate without compensation) and Clause 19 (use-it-or-lose-it curtailment by the Minister), Clause 9 is part of a pattern in the Bill of progressively removing compensation protections from entitlement holders, engaging section 25 of the Constitution directly.

Clause 10 – Amendment of section 25 (transfer of water use authorisations and prohibition of water trading)

35. The proposed amendments herein must be understood against its immediate legislative background. In *Minister of Water and Sanitation and Others v Lotter N.O. and Others (CCT 387/21) [2023] ZACC 09*, the Constitutional Court confirmed that private water trading — agreeing on a fee for the surrender of a water use entitlement under section 25 — remains lawful under the existing Act.
36. This Bill is a direct legislative response, prohibiting by statute what the Constitutional Court found permissible. It removes that statutory mechanism without providing any transitional or compensatory framework for affected existing arrangements or patrimonial interests
37. Accordingly, this proposed amendment in its current form falls prey to judicial scrutiny.

Clause 11 – Insertion of section 25A (reallocation of water by the Minister)

38. This proposed insertion confers on the Minister a broad power to reallocate water between water sectors, provinces or catchments “*in the public interest*”, subject only to prior consultation (not consent) with the affected sector, province or catchment management agency, and consideration of the factors in section 27(1).
39. “*Public interest*” is undefined, no maximum volume or proportion of reallocation is specified, no compensation is provided for a sector or catchment whose allocation is thereby reduced, and no right of appeal to the Water Tribunal is expressly extended to a reallocation decision. This concentrates water allocation authority in a single political office bearer. For users in agriculture, mining and forestry who have structured long-term investments around stable entitlements, the prospect of uncircumscribed Ministerial

reallocation authority, without the prospects of compensation, creates fundamental commercial uncertainty, and severe divestment consequences.

Clauses 12, 13 and 14 – Amendment of sections 26 and 27, and insertion of section 27A (redress criteria and fit and proper person)

40. These proposed amendments are addressed together, as they form a single redress and licensing framework.
41. Under the existing section 27(1), the need to redress the results of past racial and gender discrimination is one of eleven listed factors which the responsible authority must consider together with all other relevant circumstances when deciding whether to issue a licence or general authorisation. Clause 13 materially alters this framework. It removes redress from the list of factors in section 27(1) and inserts a separate subsection requiring the responsible authority to advance racial and gender redress whenever it makes an authorisation decision. It further permits the responsible authority to set aside a volume of water for this purpose.
42. The effect is to elevate redress from one consideration within a multi-factor balancing exercise to a freestanding mandatory statutory imperative that may become decisive in individual licensing decisions. AfriForum accepts that appropriately designed remedial measures may legitimately advance equitable water allocation. The Bill does not, however, explain how this new duty must be reconciled with the remaining section 27 considerations, including existing lawful uses, efficient and beneficial use, socioeconomic consequences, effects on other water users and investments already made. Nor does it establish statutory thresholds, weighting criteria, proportionality safeguards, review periods or a sunset mechanism. Instead, clause 12 leaves the criteria substantially to regulations prescribed by the Minister.
43. AfriForum objects to these proposed amendments, which delegate a race-based water set-aside regime substantially to executive discretion without legislative criteria, proportionality safeguards or a sunset mechanism.
44. As to the proposed amendment in section 27A, AfriForum supports a "fit and proper person" test in principle.

Clause 15 – Amendment of section 29 (deletion of subsection (2))

45. The deletion of section 29(2) reinforces the concern raised under clause 10. The Bill should not simultaneously remove the statutory recognition of compensation arrangements and prohibit private arrangements concerning surrendered entitlements without providing transitional provisions for existing agreements, pending applications and investments made in reliance upon the existing statutory framework.

Clause 16 and Clause 17 – Amendment of section 32 and repeal of section 33 (existing lawful water use)

46. The repeal of section 33 removes the statutory mechanism by which a person may apply to have an existing lawful water use declared, without any transitional provision for claims that remain unresolved through the Department's own delay.
47. In its current form, this proposed amendment creates a serious risk that pending claims will be left without a statutory mechanism for their determination.

Clause 18 – Amendment of section 34

48. AfriForum has no objection in principle to empowering a responsible authority to impose new conditions necessary to protect water resources and the environment when verifying an existing lawful water use, provided that this power is exercised on a rational and individualised basis rather than as a means of generally curtailing the substance of the underlying entitlement.

Clause 19 – Insertion of section 34A (curtailment of water and replacement of existing lawful water use)

49. AfriForum objects to the proposed section 34A in its entirety and recommends its deletion.
50. The so-called "*use-it-or-lose-it*" principle is, in the form proposed, a mechanism for unfettered Ministerial reallocation disguised as a water conservation measure. It empowers the responsible authority, by written notice, to curtail the volume of water available as a result of a failure by water users to exercise the full existing lawful use volume, for any period specified by the Minister. The provision does not prescribe a minimum period of non-use, require consideration of the reasons for non-use, or establish clear criteria governing the extent of any curtailment.
51. The user whose entitlement is curtailed is accorded no right of prior notice, no opportunity to explain the reasons for non-use, and no right to be heard. The clause furthermore makes no distinction between voluntary non-use and non-use caused by drought, flooding or infrastructure failure. These are all circumstances entirely outside the user's control. An entitlement holder who cannot exercise a licence during a prolonged drought may return to find that the volume of the existing lawful water use has been curtailed without having been afforded an opportunity to explain the circumstances of the non-use.
52. Read with Clause 11 (new section 25A), which allows the Minister to reallocate water between sectors without compensation, the combined effect of this proposed amendment is that a water use entitlement may be reduced or stripped away entirely.

Clause 20 – Amendment of section 37 (Hydraulic fracturing - controlled activities)

53. AfriForum objects to this proposed amendment. By classifying hydraulic fracturing as a controlled activity under section 37, the Bill leaves open the possibility that hydraulic fracturing licences may be granted at the discretion of the responsible authority. AfriForum's position is that hydraulic fracturing should not be licensed at all.
54. Hydraulic fracturing poses presents potentially severe and, in certain circumstances, irreversible risks to groundwater resources, aquifer integrity, and surface water quality. These risks are particularly concerning in South Africa, where water scarcity is acute, where many communities depend on groundwater for basic needs, and where the capacity to monitor and remediate subsurface contamination is limited. A discretionary licensing regime does not adequately protect against these risks.

Clause 22 – Amendment of section 52 (extension of licence validity pending renewal)

55. AfriForum supports this amendment in principle, as it addresses the real difficulty faced by licence holders whose renewal applications remain pending at the point of expiry through no fault of their own.

Clause 27 – Amendment of section 92 (establishment of water user associations)

56. The proposed amendment vests the Minister with an unfettered power to determine, by unilateral Gazette notice, who may belong to a water user association. No criteria constrain the Minister's discretion, no consultation with affected associations is required, no parliamentary oversight applies, and no right of appeal exists. This raises serious constitutional concerns.
57. Water user associations are voluntary co-operative bodies. A power to dictate their membership by executive notice, on any basis the Minister chooses, violates the right to freedom of association under section 18 of the Constitution and is precisely the kind of uncircumscribed Ministerial power that the rule of law prohibits.

Clause 28 – Amendment of section 93 (constitution of water user associations)

58. The amendment from "may" to "must" in section 93(1) removes the flexibility of a water user association to depart from the Schedule 5 model constitution where local circumstances require, which sits uneasily with the voluntary, bottom-up character of these associations described in Chapter 8.
59. The proposed amendment in section 93(2A) requires every association's constitution to detail a strategy to achieve transformation with regard to racial and gender representation "*in all components*" of the association.
60. AfriForum does not accept that a mandatory transformation strategy should be imposed in the absence of statutory criteria governing the nature, extent, implementation and review of the obligation, including the exercise of the ministerial power to that effect.

Clause 31 – Amendment of section 118 (dam safety)

61. AfriForum notes that the obligation to ensure dam safety falls on the owner “at the owner's cost”, which may be a significant burden for the owner of a small farm dam of limited means, and recommends that the Department consider a proportionate cost-sharing or support mechanism for resource-constrained owners of small, low-risk dams, distinct from commercial dam operators.

Clause 32 – Amendment of section 148 (non-suspension of directives on appeal)

62. AfriForum notes that this proposed amendment extends the list of directives which are not automatically suspended by the noting of an appeal to include the new dam safety directive under section 118(3)(d).
63. AfriForum's general submission is that, where a decision may take immediate effect notwithstanding an appeal, the affected person should at minimum retain an effective and expeditious right to seek interim relief from the appropriate forum.

Clause 33 – Amendment of section 151 (offences and penalties)

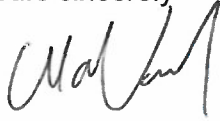
64. AfriForum supports firm enforcement of the NWA and does not object, in principle, to an increase in the maximum penalties available for serious contraventions.

CONCLUSION

65. AfriForum supports the objectives of ensuring water security, equitable access to water and the sustainable management and protection of South Africa's water resources.
66. AfriForum's concern is not with these objectives, but with the means by which the Bill seeks to achieve them. In its present form, the Bill confers extensive discretionary powers on the executive, materially interferes with existing lawful water-use interests, removes existing statutory protections, and introduces measures which raise serious concerns regarding legality, administrative fairness, constitutional property rights, equality and freedom of association.
67. These concerns are particularly significant in circumstances where existing water users have relied upon the legal framework governing water use for substantial periods, invested in reliance upon existing entitlements, and remain affected by unresolved administrative processes within the Department.
68. AfriForum accordingly submits that the Bill, in its present form, does not yet strike an appropriate balance between the legitimate public interest in the equitable and sustainable management of water resources and the constitutional protection of individual rights, legal certainty and accountable government.

69. AfriForum remains committed to constructive engagement and respectfully requests that this submission be placed on record before the Portfolio Committee on Water and Sanitation.

Yours sincerely



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