

Overview of Conflict Settlement Approaches

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Why Conflict Management?

- * Water is a limited and scarce resource in South Africa.
- * Economic and industrial development, population growth and climate change = Increased demand for water
- * Decisions about water use rights are already contentious – and will definitely become even more contentious in the foreseeable future

The Current System

- * Significant changes in the legislative and administrative framework that governs water usage
- * In practice retained the same basic model for dealing with water disputes:
- * A lawyer driven, confrontational model, based on adversarial litigation
 - * Water Appeals Tribunal
 - * Review / Appeal by High Court
 - * Provision for mediation in sect 150, but rarely used

Conflict Management Values

Current VALUES (Adversarial, rights-based)

- We are right, they are wrong
- Disputes are mostly unjustified and a distraction
- If we engage, we show weakness
- Our mandate demands strong action
- Compromise and settlement undermines our authority
- The Lawyers must deal with it

Problems with Current System

- * Water Appeals Tribunal
 - * It is non-functioning
 - * It is not an independent institution
- * Access
 - * The poor, disadvantaged and unrepresented cannot afford to compete on equal footing.
- * Rights vs Interests
 - * Parties are required to frame issues to fit into narrow legal definitions. The result is that *the political, economic, social and environmental values and interests* underlying the issue are not addressed
- * Complex disputes
 - * Environmental disputes are often complex multi-party disputes, with a range of competing interests, overlapping jurisdiction, etc
- * Time consuming, costly process (direct as well as indirect costs)
- * Reactive process – trying to address conflict that is already out of control
- * Non-functioning, inaccessible system = Break down of Rule of Law, Lawlessness, Self-help.

The Functional needs of Water User

- * Protection of Rights and Interests under the Law
- * Accessible system
- * “Justice” - Fair Outcomes
 - * Substantive Justice
 - * Procedural Justice
 - * Independence
- * Predictability
- * Speed (time)

The Functional needs of Government

- * Rule of Law - Basic Infrastructure for Governance
- * Legitimacy
- * Framework for Economic Development
- * Efficiency
 - * Improved case management
 - * Improved processes
 - * Administrative consistency
- * Policy Requirements
 - * Socio-political considerations
 - * Environmental Management Principles set out in NWA and NEMA

Strategic Conflict Management




Strategic Conflict Management

Audit & Analysis

- Understanding the sources our of conflict and dispute
- If we have been involved in conflict, do we learn from it?
- Implementing information systems:
 - Accurate information about conflict in our operations
 - Data for on-going objective analysis of our conflict and its costs


Strategic Conflict Management



Development

- If we understand where conflict comes from, how do we apply that knowledge?
- We need to:
 - Change the attitudes and conduct that cause/escalate conflict
 - Change the business processes that cause conflict and dispute
 - Improve staff skills so they can better manage conflict


Strategic Conflict Management



Management

- Do we pro-actively manage our environment to prevent disputes?
- Some of the systems we can implement include:
 - Effective identification systems
 - Early intervention
 - Early evaluation of fault and risk
 - Neutral handling
- Do we make effective use of IT Systems to channel and manage conflict?

Strategic Conflict Management



Resolution

Do we resolve our disputes effectively and efficiently?

- Interest based analysis of conflict
- Effective use of mediation
- Consider tailor-made dispute resolution mechanisms
- Selective use of litigation
- Effective structuring of relationship with lawyers
- Ownership and accountability with regard to the litigation process

Conflict Management Values

Sustainability, Humanising, Ubuntu, Interdependence)

- We (and not the Lawyers) are responsible for dealing with conflict
- Stakeholders are (constitutionally) entitled to differ from us
- We are not always right
- Collaboration and engagement builds trust
- Engagement is a sign of strength and confidence
- Agreed outcomes are stronger than enforced ones
- Agreed outcomes are usually quicker and less costly
- Litigation is an important tool, but when justified / as last resort
- Frequent conflicts and disputes may be a sign that our system is broken

Development required within DWA

- * Dispute Analysis

- * Improve the Department's understanding of the nature and dynamics of the conflicts that it encounters
- * Based on this analysis, develop strategies for preventing, resolving and managing these kinds of dispute

- * Dispute Prevention Activities

- * Develop the culture within the DWA
 - * Change the conflict Management Values
- * Fair decision making processes
 - * All decision subjected to a participative process
 - * New Zealand example

Development required within DWA

- * Early warning systems
 - * Capable of identifying issues and potential disputes. Issues can then be dealt with in a controlled environment, and escalation can (in most cases) be prevented
- * Advise and Referral services
 - * Advise: aimed at helping the parties to better communicate and negotiate directly
 - * Referral: accessing dispute resolution services such as mediation

Development required within DWA

- * Dispute review

- * Internal Review: Assessing DWS's conduct, the strength of its position, and underlying interest
- * Planning review: What procedure is best suited for resolving the dispute?
 - * Facilitative processes
 - * Adjudicative processes

Dispute Resolution Institutions

- * Trust & Principle of Independence
 - * Mediator / arbitrator / judge
 - * Process decisions (e.g. who gets appointed)
- * Specialised Environmental Courts
 - * Facilitative and adjudicative processes
 - * efficiency and speed in the disposal of cases,
 - * harnessing expertise relevant to the specialized field,
 - * reducing the costs of dispute resolution,
 - * uniformity of decision-making,
 - * visibility for the subject area
 - * integrating related issues and remedies
 - * increasing public participation and confidence

Dispute Resolution Institutions

- * In the short term:
 - * Water Appeals Tribunal
 - * Resurrect the Institution
 - * Improve independence and operational mode
 - * Develop Independent facilitative processes
 - * NEMA Chapter 4 Model
 - * Start working on the culture

Developments in DWS

* NATIONAL WATER POLICY REVIEW (2014)

Policy Positions

Reaffirming the 1997 White Paper's position that *appropriate mechanisms will be created to make sure that there is procedural fairness in all allocation decisions and the development of appropriate dispute resolution mechanisms will make sure that the new system meets all the requirements of administrative justice.*

In line with best practices, the process of speedily, cheaply and transparently resolving difference or disagreements will be mediation.

The Minister may appoint an independent panel, based on the conditions that he/she deems necessary, to advise on a dispute/s.

Where mediation does not resolve the matter, parties may refer the matter to arbitration.

Failure to resolve an appeal through this mechanism may proceed to adjudication in a court of law.

Conclusion

- * No silver bullet, but multi-tiered approach
- * Starts with a change in Values

	Being	Doing
Individuals	<i>Values</i> <i>Attitudes</i> <i>Perceptions</i>	<i>Skills</i> <i>Plans</i> <i>Actions</i>
Groups	<i>Shared values</i> <i>Myths</i> <i>Covenants</i>	<i>Structures</i> <i>Policies</i> <i>Processes</i>