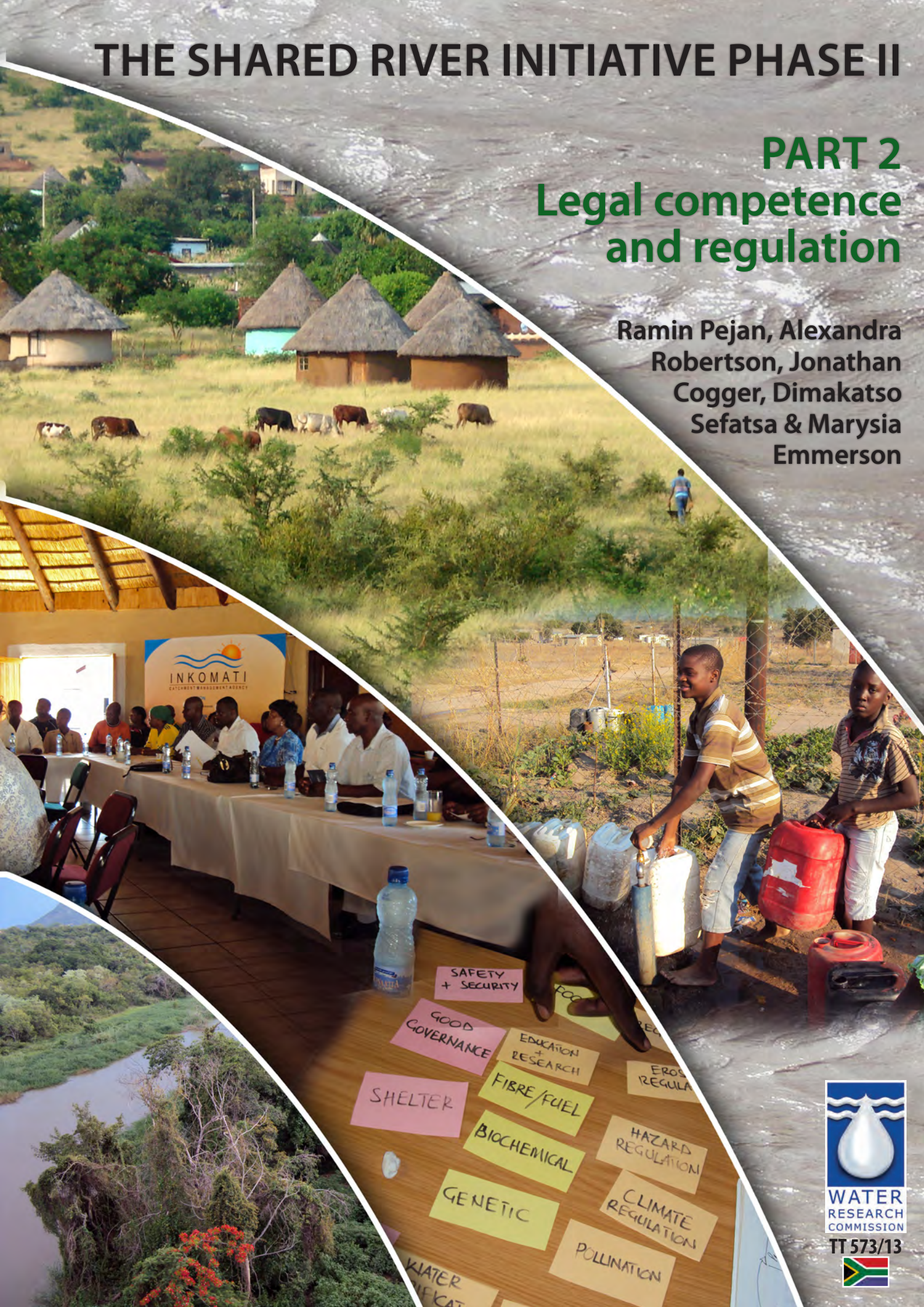
THE SHARED RIVER INITIATIVE PHASE II

PART 2
Legal competence and regulation

Ramin Pejan, Alexandra Robertson, Jonathan Cogger, Dimakatso Sefatsa & Marysia Emmerson



WATER RESEARCH COMMISSION
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Preface

Over the past decades, integrated water resource management (IWRM) has gained prominence as a powerful water management concept. It is an idea that promotes the equitable and sustainable management of a catchment by all who live and share its waters. The complexities of realising IWRM are emerging within the context of South Africa.

Emerging concerns regarding the sustainability of South Africa's water resources contend that despite world-acclaimed legislation, such as the National Water Act (NWA), the ecological condition of the country's river systems – a number of which are transboundary – continue to deteriorate.

On the one hand many recognise that at the very least, developments are taking longer than expected to take effect, and an 'implementation lag' is to be expected. On the other hand, with varying degrees of empathy or frustration, stakeholders express the view that government is unable, or even unwilling, to enforce legislation and water users, acting with impunity, take as much or pollute as they want.

There is much that can be shared and learnt between South Africa and its neighbours. The Lowveld river basins, for example, are all shared between neighbouring states. Each river-sharing neighbour faces a similar set of needs and challenges in its attempts to balance social development imperatives with management for resource sustainability. There is a clear need to harmonise management and decision-making within relevant institutions and between neighbours to ensure fair and effective policy implementation.

From these concerns has emerged an initiative known as the Shared Rivers Initiative (SRI), a transboundary project that aims to understand and effect change in the implementation of policies and legislations relevant to the wise use of the Lowveld river systems. The programme has been led by the Association for Water & Rural Development (AWARD) and is funded by the Water Research Commission (WRC).

Establishing the sustainability of Lowveld water resources

As part of Phase I of the Shared Rivers Initiative, AWARD undertook a preliminary assessment of the status of sustainability of the water resources of the Lowveld and the factors that constrain or contribute to this, in order to provide a grounding from which the project was able to design and implement real change. Investigations were carried out in six major river catchments (Levuvhu, Letaba, Olifants, Sabie-Sand, Crocodile and Komati), residing within the three Water Management Areas (WMAs), namely the Levuvhu/Letaba WMA, Olifants WMA and Inkomati WMA. The results of this study are captured in the report, *The Shared Rivers Initiative Phase I: Towards the sustainability of freshwater systems in South Africa* (WRC Report No. TT 477/10).

Phase 1 of the SRI raised some serious concerns. Of the Lowveld Rivers investigated, none met the Reserve requirements in terms of river flow. In fact, with the exception of the

Sabie River, the situation was found to be generally worse than when the NWA was promulgated in 1998. In many cases, water quality also seemed to have deteriorated. However, some signs of a welcome turn-around were evident, certainly in the Crocodile Catchment which falls in the Inkomati Water Management Area, where new Integrated Water Resource Management (IWRM) approaches driven by the Inkomati Catchment Management Agency and stakeholder partnerships were due to come online.

In the Phase 1 report the authors point out firstly that one does not 'implement the Reserve' but rather it is the collective plans for Integrated Water Resources Management (IWRM) that are together designed to achieve the desired outcomes, including equity and sustainability (through the Catchment Management Strategies, Pollard & du Toit 2008). Thus securing river systems is predicated on a 'bundle of strategies' that are collectively required to achieve sustainability. Furthermore, ensuring water in the river means bringing different stakeholders (e.g. agriculture, municipalities) along the river on board – each with their own planning frameworks driven by different factors (e.g. crop production and water supply). This also illustrates that time is needed to re-orientate users to a new unified goals of sustainability and equity and thus lags are to be expected. Moreover it highlights the importance of having a flexible and adaptive approach that embraces learning-by-doing. This moves water resources management into the world of complexity where multiple factors working at different scales render outcomes that are not always predictable.

That said, the Phase 1 report pointed to seven key areas where action is required to transform the degrading river systems. The key findings against which recommendations were made are:

1. A generally poor understanding of the Ecological Reserve and hence failure to change practices
2. The almost total lack of integration of water resources management and supply
3. Some degree of unlawfulness but more importantly, the weak regulation of unlawful use and poor legal literacy.
4. Some seemingly excessive lags in the implementation of the Reserve and emergence of sustainability discourse
5. Various examples of the emergence of, or lack of, self-organisation, leadership and feedback loops in adaptive action and management
6. Attendant dearth of skills, capacity, monitoring and legal literacy with some exceptions.
7. The importance of participatory and representative platforms for collective action: their functioning and contribution to IWRM

In May 2009 a working group convened to charter a way forward for a Phase 2 of the SRI. It was clear from the report that the vast geographic expanse of the study area, the scope and depth of issues at hand, and the need to include a basin-wise (international) perspective, that there was a need to focus the work in the second phase. The working group decided to limit the focus mainly to the Inkomati Water Management Area with the guiding focus of how to best support compliance with environmental water requirements within the evolving institutional environment.

Furthermore, the overarching theme of Phase 2 was that of sustainability and how it can be planned for and achieved over the coming decade. Based on this, Phase 2 was conceptualised as key themes suggested by Phase 1 that would support compliance with the EWRs. The operating assumption is that fundamental to addressing degrading systems is the recognition that the priorities for managing water have shifted where the concerns for sustainability and equity become paramount. Phase 1 pointed towards a situation where, if appropriately addressed, catchments can become units for sustainable water resource management that are both robust and responsive. Achieving this requires – at the outset – a 'shift in the discourse' such that sustainability and equity guide planning and implementation rather than being seen as simply a 'requirement of the Act'. The motivation for this is that, firstly, without adequate understanding of the concepts and language of sustainability (and the EWRs), there is unlikely to be meaningful progress in realizing its goals. This means that water managers and users need access to new concepts and reasoning associated with these new management priorities. Secondly, there is a strong need for learning associated with the use of new 'tools' that focus on the practicalities of achieving sustainability. In this case learning about the ecological Reserve and its provisions, is fundamental to building sustainability into water management practices. Thirdly, there is the requirement for a 'new shared discourse' for water management across all sectors. The challenge is to support institutions and multiple stakeholder platforms that can potentially develop and hold a collective discourse on sustainability and that realize adaptive management processes as crucial for managing in complex environments.

Given these challenges, Phase 2 set about by structuring the research process around three case studies each exploring different aspects of IWRM raised in Phase 1. The three cases form the basis for this report and are briefly introduced here, and dealt with in detail as Parts 1, 2 and 3 of this document.

Case 1: Collective action for improved water resources management

The research process of this case is to explore new ways of working by bringing stakeholders together to decide on collective actions that will halt the degradation of the lowveld rivers. The expectation in employing such an approach is that water users, with different stakes and views of how the resource should be managed, arrive at a strategic plan for protecting the resources of a specific catchment. Essentially this entails decentralisation and democratization of water management functions where various stakeholder groups are engaged in platforms for participation and decision making. These are commonly called multiple stakeholder platforms (MSPs). MSPs therefore give meaning to the decentralization process by providing spaces where stakeholders can be involved in processes of improving specific situations/conditions that adversely affect them.

The aim of this project action was to explore ways of moving beyond awareness raising to collective action which is defined as: ''the collective process of involving diverse stakeholders for resolving conflicts and advancing shared visions''. However as Phase 1 pointed out, planning forums and multiple stakeholder platforms in the lowveld are bedevilled by a sense of inaction and criticisms are levelled that "nothing ever happens". Almost always they lack a focus on sustainability (and specifically the Reserve).

This case completed a literature and policy review of collective action and drew on the key findings of the other cases in the project. The findings were used to develop a set of

guideline principles for collective action. These included the fundamental importance of activities for collective action such as setting a vision, integration of policy and legislation to support collective action, and the importance of meaning making and learning in collective action processes.

Case 2: Building regulatory competence for addressing unlawful water use

Phase I identified that there is inadequate compliance monitoring and enforcement around environmental and water laws with the consequent poor compliance with legal requirements such as the Reserve. Critical deficiencies in the water-use license applications were also highlighted. These shortcomings have contributed to the perception that the "regulator cannot regulate" and that the "regulator lacks teeth". AWARD has observed factors that contribute to this include a lack of legal competence both in the private and public sector as follows: building legal cases around sustainability, poor and underdeveloped enforcement protocols for ensuring legal compliance with instruments such as the Reserve and a failure to attract and expose legal students (future lawyers and judges) to the water sector.

It can be argued that the twin mechanisms of compliance monitoring and enforcement, are the most important mechanisms to ensure legal compliance. Legal provisions, such as those under the NWA, generally give a government entity the authority to conduct inspections and carry out investigations. They provide the authority to impose sanctions, in either the administrative, judicial, or criminal forum, and require the violator to come into compliance with the law. These regulatory powers play a significant role in deterring unlawful activities. Better understanding challenges and shortcomings faced by the regulator when undertaking compliance monitoring of and enforcing the NWA and other environmental laws and providing constructive recommendations to address those challenges is essential to ensuring sustainable water resources.

Through a collaborative and co-learning process with regulators, multiple stakeholder platforms and law students, this component of the project sought to identify factors that constrain compliance with environmental water requirements and to collectively seek solutions to enable a better regulatory environment.

Case 3: Benefit sharing: understanding the intention of the Reserve and the benefits that an ecosystems goods and services approach provides

Findings of Phase I clearly demonstrated a weak grasp of the Reserve such that almost all stakeholders perceive that the benefits of measures associated with sustainability (such as implementation of the Reserve) accrue to *other* stakeholders whilst *they* (i.e. their sector) carry all the risks. This poses a serious obstacle to fulfilling the intentions of sustainability and equity of water resources through stakeholder participation. People indicated that if they comply, it is because of a legal obligation rather than because it is regarded as beneficial to them or future generations.

Given the aforementioned tendency to perceive the Reserve as risks ("to me") and benefits ("to others"), the research process in this component set out to examine with stakeholders the benefits and risks associated with compliance (or non-compliance). This meant exploring benefit-sharing through a sound framework to help stakeholders understand the implications

of meeting (or not) the environmental water requirements. The guiding questions were: What are the implications of not meeting the Reserve? Or phrased another way: What are the benefits for society of being compliant? As researchers, the question also arose as to how best these can be communicated to affect the kind of changes needed? Under Case 3 the issue of boundaries became important because such questions can be asked at the scale of users in a catchment (upstream-downstream 'boundaries' or boundaries between sectors) and between sovereign nations (commonly referred to as transboundary or international issues).

This case sought to focus specifically on the development of a framework and method for exploring the risks and benefits of meeting the EWRs with a focus on the Sand and Crocodile rivers of the Lowveld. This meant developing a solid conceptual and methodological basis through bringing together appropriate skills and expertise drawn from a trans-disciplinary group of scholars and practitioners involved in different aspects of water-related work.

Although the proposed framework was developed in relation to the Ecological Reserve it is not limited to this aspect of resource management alone. The project suggests that the benefits and risks of a Reserve scenario are a component of the broader Classification process which will have a number of Reserve scenarios – at least one for each class. This work therefore has application at this level as well as at basin-scale planning, across international boundaries.

Experience from other transboundary basins suggests that it is important to scope out and understand the full range of issues specifically related to international agreements and co-operation that need to be considered. Such issues are of high priority in the Incomati Basin where, amongst other things, EWRs are being considered in the formalisation of comprehensive water-sharing agreement between three sovereign states of Mozambique, Swaziland and South Africa.

Conclusion

The work presented in this three-part report has the potential to contribute to our knowledge of the policy-science-management-practice interfaces by adopting an integrated approach that seeks to track a policy intent such as environmental water requirements through to outcomes. It seeks to deepen the discourse on environmental water requirements, compliance and what these mean for society – both at a national and international scale. It is built on the recognition that ensuring water for future generations is the basis for a healthy and thriving society. Ensuring both provisioning and regulating services through Reserve compliance provides for benefits that impact on health and at the same time the economy. Demonstrating where the distribution of benefits lie is an important component of understanding the links between environmental water requirements (designed for the benefit of society) and economic well-being.

Although the project concentrated on the rivers under the jurisdiction of the Inkomati Catchment Agency, its findings have a wider application at the national and international scale especially in the light of needing to address sustainability of freshwater systems. Such efforts however cannot be tackled without the involvement of stakeholders. An important

aspect of working within complex systems such as catchments is to identify the requisite simplicity and present this in a way that can be communicated to all concerned in a practical and tenable way. The impact is to be experienced as a shift in the language and discourse of water management towards more sustainable ways. By engaging all sectors through multiple stakeholder forums the intention is to gain recognition for integrated approaches and to emphasize the importance of sustainability in adaptive planning. To this end concept and competence development at all levels is central to implementing the recommendations set out in this report. The overarching aim of this report is therefore to provide the basis for shifting the discourse in water resources management towards more sustainable configurations.

Note on report format

This report is presented in three parts, each documenting the work done within the three cases summarised above. The decision to keep the work separate is based on the distinct nature of each of the case studies. It also recognises that legal research and referencing is different to the format used in scientific research. Presenting the report in three parts allows for the conservation of disparate methods and formats.

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The researchers would like to thank the Steering Committee of the WRC Project K5/1920 for the assistance and the constructive discussions during the duration of the project. They also thank the Water Resource Commission for the guidance and financial support of this project. The authors are also indebted to project partners and participants for their ongoing support and involvement – without their support, insight, comments and feedback this project would not have been possible. Additional edits to the report were done by Ariane Laporte-Bisquit. Finally, the motivated officials from the Department of Water Affairs and the Inkomati Catchment Management Agency are thanked in particular.

EXECUTIVE SUMMARY

Over the past decades, integrated water resource management (IWRM) has gained prominence as a powerful water management paradigm where, among other things, the decentralisation of water management along catchment boundaries and tradable formal or administrative entitlements, known variously as permits, licences, concessions or grants, play a prominent role. Along these lines, South Africa has undertaken a systematic shift in its water management system by adopting IWRM. The new system challenges the policies and values of the past by framing water resource management within the context of the principles of equity and sustainability, both reflected throughout the new Constitution of the Republic of South Africa of 1996 and rooted in the economic, social, environmental and political circumstances of the country.

As part of the reform process, South Africa enacted the National Water Act 36 of 1998, which sets forth a framework for implementing IWRM. The NWA has created several interdependent processes that must work in tandem to achieve sustainability and equity, such as classification of water resources, setting of Reserve (Basic Human Needs and Ecological Flow Requirements, the focus on this study is on the latter), a system of water use authorisations, and new institutions for managing water at a catchment level. To date, an array of legal issues have manifested associated with the implementation of the NWA, many of which have not been addressed by researchers or the court system. This project seeks to address some of these legal issues, primarily focusing on enforcement related activities.

This work forms one of three components that make up the larger Shared Rivers Initiative Phase 2 (SRI 2) and it emanates from the findings of Phase 1 of the Shared Rivers Initiative (SRI 1) undertaken by AWARD. SRI 1 sought to provide an assessment of the status of sustainability of the water resources of the six lowveld river systems using the Ecological Reserve as a benchmark for sustainability, and the factors that constrain or contribute to this, in order to provide a grounding from which the project is able to design and implement real change. SRI 1 found, among other things, that a major factor constraining compliance with the Ecological Reserve is the weak regulation of unlawful activities pursuant to the NWA. This weak regulation also led to a perception among water users in the lowveld rivers that the regulator cannot regulate. Moreover, phase 1 found a lack of competent lawyers working on environmental law issues, and more particularly water law issues, in the public sector, including government and non-governmental organizations. This project primarily addressed these factors, although by doing so, it also addressed additional related legal issues that were identified during the course of the project.

The legal component of SRI 2 had the following overarching objective:

> *To research and evaluate the application of legal practices and procedures for compliance with the NWA (with a focus on enforcement an unlawful use) and other legislation related to ensuring sustainability of water resources through a collaborative process with regulators, multiple stakeholder platforms, and law students*

The legal component had four inter-related areas of activity all of which are related to compliance monitoring and enforcement issues under the NWA:

i. To undertake **foundational legal research** around sustainability and enforcement issues related to water resources;

ii. To undertake a **regulatory support** project focusing on legal issues related to compliance monitoring and enforcement;

iii. To document a **legal case studies and/or focused in depth studies** that affect sustainability of water resources, with a focus on compliance, sustainability and/or enforcement; and

iv. To develop professional interest and capacity in water law through the **integration of law students** in every aspect of the legal component.

Each of the legal component's areas of activity were inter-related. In other words, each area of activity drew on or contributed to knowledge and research undertaken in another area of activity. For example, research undertaken in the foundational research area fed into the preparation of the legal case studies and the regulatory support activity. In some cases, issues that came out of the regulatory support area or the legal case studies resulted in additional foundational legal research being conducted. Finally, the law student integration aspect interacted with the other areas of activity primarily in two ways. First, students substantively contributed to the research process in the other three areas of activity through internship opportunities. Second, the other areas of research contributed to additional forms of student involvement, including feeding in issues for student activities during learning field-trips to Bushbuckridge and forming part of class assignments.

Moreover, as will be explained in Part 2 of the report, each substantive issue is related to compliance with and enforcement of the NWA. Although some of the research topics are more directly relevant than others, they each contribute to understanding the factors that enable or constrain enforcement.

Overall approach and methodology

As mentioned, SRI 2 seeks to address some of the major findings identified in SRI 1. Although SRI 2 is a broad program with different components (e.g. collective action and ecosystems, goods and services) that each draws from different doctrinal areas with particular methodologies and approaches to research, all of SRI 2's components share overarching themes.

First, SRI 2 is conceptually rooted in the principle of **sustainability**, one of the main principles underlying IWRM. In particular, SRI 2 focuses on how sustainability can be planned for and achieved over the coming decade. In South Africa, the principle of sustainability is primarily rooted in Section 24 and 27 of the Constitution. Section 24 establishes a fundamental right to an environment that is not harmful to a person's health or well-being, and requires the environment to be protected for the benefit of the present and future generations. The protection should be afforded through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

The legal component focuses its research under the broader umbrella of sustainability with special attention given to **compliance with the NWA** (a focus on enforcement and unlawful use under the NWA is also taken). A more comprehensive discussion of the definition and importance of compliance with the law, including its relation to enforcement and sustainability, is presented in chapter 4. However, suffice to say that without compliance with the law, the law becomes meaningless. And without adequate enforcement against non-compliant activities, compliance also becomes jeopardized. Within the context of the NWA – the main legislation that seeks to promote sustainability of South Africa's water resources – non-compliance with the law will directly lead to unsustainable management of the nation's water resources. Consequently, the link between compliance, enforcement and sustainability of the nation's water resources is not difficult to conceptualize

Second, from a methodological perspective, the overall SRI 2 research process is **participatory and collaborative**, where stakeholders are drawn into the research process, and often play a role in devising and implementing future action. The legal component also worked in a participatory and collaborative manner when conducting its research.

Third, the overall project is **trans-disciplinary** in nature. This is because the operationalisation of IWRM does not lie in one domain alone but draws on social, economic, political, ecological, and legal discourses and concepts. The trans-disciplinary theme is evident throughout the legal component.

In addition to these overarching themes between all the components of SRI 2, as explained in Chapter 2 of the report, the legal component utilised various other methodological orientations for its different areas of action. This included traditional legal research methodologies based on doctrinal approaches to legal research and socio-legal methodologies rooted in qualitative research methods. In particular, a socio-legal approach seeks to incorporate the sociological interest into the legal research process, including focusing on understanding how practitioners who implement various rules and laws understand and perceive the law and also how this perception influences their practice.

The NWA does not provide guidance on non-compliance

The dearth of legal cases stemming out of the NWA provides little guidance on what constitutes non-compliance with respect to key components of the NWA – such the classification of resources or the delivery of the Reserve – resulting in uncertainty as to how alleged non-compliance with NWA actions can be litigated in court.

As explained in chapter 3, this research documented that only a handful of court decisions directly touched on water management issues associated with the NWA. Nevertheless, because the principles behind IWRM in South Africa are primarily rooted in section 24 of the Constitution, such as equity and sustainability, court decisions applying and interpreting section 24 of the Constitution can help to inform on potential legal issues related to IWRM. As presented in appendix 1 to this report, this project documented court decisions that applied section 24 of the Constitution – such as the principles of sustainability and equity. It also documented the potential application of these court decisions to IWRM.

Nonetheless, although court decisions related to sustainability and equity are helpful to understand non-compliance with the NWA, there are few court decisions that directly touch on the NWA implementation issues. Consequently, a lot of uncertainty remains regarding what would constitute non-compliance with important components of the NWA, such as classification of water resources, the setting of resource quality objectives, the finalisation of verification and validation, compulsory licensing, and implementing measures to achieve Reserve determinations. Uncertainty also exists as to how one might prepare a court case which alleges non-compliance with respect to the various components of the NWA mentioned above.

The implementation of major NWA actions still remains to be executed, including many of those mentioned in the preceding paragraph. Given that these actions will affect how and when water can be used – some water users will be discontent with the outcome and will inevitably want to challenge these actions. It is thus important for stakeholders, including water users, legal practitioners and government, to critically explore what amounts to or may amount to non-compliance with respect to the implementation of these actions, how alleged non-compliance may be raised legally, and what existing court decisions may guide this process. Such an understanding will not only prevent frivolous claims and unreasonable expectations, but it will also help the regulator to take action and guide these processes within the ambit of the law.

There is a poor understanding of the difference between assignment and delegation of functions to CMAs

The establishment of CMAs is an integral part of IWRM in South Arica which seeks to decentralise water resource management. The water law and policy envision that CMAs are in a best position to manage water on a catchment scale, including facilitating participatory decision-making and information sharing between stakeholders. As explained in Chapter 3 and Appendix 3, assignment and delegation are the two main mechanisms by which powers are transferred from DWA to CMAs and each has very different legal implications in terms of responsibility and access to funds. Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function. Thus the decision to use one over the other as means to transfer powers to CMAs has tremendous implications in practice.

However, the NWA provides no guidance around how, when and which of the two should be used. As Appendix 3 explains, the research has demonstrated that within DWA there are conflicting viewpoints around the assignment and delegation of functions to the CMA and the role that the CMA should play in water management. This includes unfamiliarity with the distinction between these terms, disagreement about when and how functions should be assigned or delegated to CMA, disagreement as to the role of a fully functioning CMA, and a lack of knowledge as to the extent of powers that the NWA envisions assigning to the CMA. This lack of clarity is unfortunate and contributes to the delays in establishing and developing fully functioning CMAs as required by the NWA and the water policy underlying the NWA

The result is that despite that the NWA envisions CMAs will be assigned the majority of their functions and powers, particularly those powers they will undertake as a responsible authority under the NWA, the two CMAs that have been established are far from undertaking the amount of functions that the NWA envisions for them, and are often delegated powers that should have been assigned.

Regulators undertaking enforcement activities related to water resource protection must be provided substantially more support from within government departments, other government departments, and non-governmental organisations

As presented in chapter 4, this project reviewed the immense amount of challenges on the road leading to an acceptable level of enforcement in order to protect South Africa's water resources and to enable compliance with the NWA. The research demonstrated that the regulators themselves have a solid understanding of and agree on the main issues facing them. In many instances they have offered legitimate solutions to tackle these issues.

However, simply identifying the main issues is not enough. It is essential that we approach the problem in a way that places these issues within a systems approach – one that recognises the complexity of the situation. Without understanding the underlying causes for the issues that participants identified and how these affect each other, it will be difficult to devise solutions and take meaningful actions to improve enforcement. For example, chapter 4 and appendix 4 present a systems analysis that was undertaken as part of a workshop with regulators from various departments around an unlawful sand mining operation in Bushbuckridge.

Moreover, because of the fragmented nature of South Africa's environmental management legislation, multiple departments have a role to play in managing water resources, and often legislation overlaps with other legislation. For example, both NEMA and the NWA apply to instances of water resource pollution. This fragmented legislative landscape requires strong cooperative governance to overcome uncoordinated duplicative action. As chapter 4 and appendix 4 illustrate, the relevant government actors must act collectively, otherwise the entire environmental management framework will break down, and South Africa's natural resources and the public will suffer.

Municipalities are major violators of the NWA and cooperative government requirements make it difficult for the other spheres of government to hold them accountable.

Municipalities are critical to ensuring compliance with the NWA and ensuring the implementation of IWRM actions. On the one hand, they can be major violators through mismanagement of waste water treatment plants, approving unlawful developments, and abstracting water without authorisation. On the other hand, because they have environmental-related powers and responsibilities pursuant to the Constitution, municipalities can also be a major player in promoting compliance with environmental laws, including through enacting by-laws and providing support for provincial and national enforcement efforts.

Unfortunately, the stringent cooperative government obligations under the Constitution, specifically those that require avoidance of legal action, act as an obstacle for national and provincial government to hold municipalities accountable for violations of environmental law. It has thus required regulators to think out of the box and creatively devise solutions to hold municipalities accountable. For example, chapter 5 presents a case study reviewing the criminal prosecution of a municipal manager in the Free State for the unlawful discharge of sewage waste as a means to overcome cooperative government obstacles that would otherwise prevent the NPA and DWA from pursuing criminal action against a municipality.

The Water Tribunal's legal mandate under the NWA and the Water Tribunal's Rules need to be amended so as to address several shortcomings related to the Tribunal's functioning as an independent, efficient, and expert administrative tribunal.

The Water Tribunal is an independent administrative tribunal that was established under section 146 of the NWA to hear appeals against several specified administrative decisions set forth in section 148

of the NWA. Despite almost ten years since its inception, there is sparse literature reviewing the Tribunal's decisions, its effectiveness in carrying out its mandate and whether its mandate is adequate to enable it to appropriately fulfil its functions that are required by the NWA. Chapter 6 presents a critical assessment of the Tribunal's decisions and functioning through a combination of reviewing the Tribunal's decisions and interviewing individuals who have brought appeals before the Tribunal.

This research has shown several major shortcomings with the Water Tribunal, both in terms of its substantive case decisions and in terms of its functioning as a Tribunal. With respect to the former issue, the Tribunal has espouses several legally questionable decisions. For example, the Tribunal has ruled that a third party cannot access the Tribunal to challenge the issuance of a water use authorisation (e.g. to a mine) unless DWA has formally requested comments under the NWA. The authors believe that such a position is not only contrary to the intent of the NWA but also a violation of constitutional protections around the right to administrative justice. Chapter 6 reviews this and other issues in detail.

Given that many of the actions that the Water Tribunal is mandated to review under the NWA have not been implemented, the Tribunal is truly yet to be tested. When it is eventually confronted with difficult and complex actions and issues, including those around Reserve determinations and compulsory licensing, it is not clear whether the Tribunal is up to the task, as is evident from the many issues that this research has identified. There is no doubt that the Water Tribunal can serve an essential and important function as an independent, efficient and specialised expert body, as many similar tribunals have done around the world and in South Africa (see e.g. the Competition Tribunal), and that it can play a critical role in the efficient administration of the NWA. But for this to happen, the NWA and the Water Tribunal's rules must be amended to address the shortcomings this research has identified.

Law student curriculum must be reformed to promote better exposure of students to on the ground legal issues regarding environmental issues

The law student integration aspect of this project was arguably the most important element of the SRI 2 legal component, because it directly responded to SRI 1's findings of a shortage of qualified lawyers working on environmental issues in the public sector. As described in chapter 7, throughout the course of the project, it provided repeated opportunities to test various methods to help garner student interest in environmental issues, and water sustainability issues in particular, and to develop student competency, knowledge and expertise in these areas using methods to supplement in class learning. What became clear during the court of the project was that there a few opportunities for law students to engage with environmental issues, particularly around water resource management, outside of the classroom and for law students to work directly with the public sector on these issues, including non-profit research and advocacy organizations and with government.

Concluding remarks

Although the legal component of SRI 2 focused namely on legal issues related to enforcement of the NWA, several legal challenges related to operationalising IWRM presented themselves throughout the course of the project. What became increasingly apparent as the research team spoke with government regulators, other civil society organisations, legal practitioners, law students, and law professors was that a larger water law program is necessary to address the multitude of legal issues. Such a water law program could ideally be situated between various non-governmental organisations, within an academic institution, or within a partnership that includes members of civil society, government and academia. Ideally, a legal water program would not be limited only to research, but also to other activities, such as advocacy, litigation, community mobilisation and student competency building, so as to have a more comprehensive means to address problematic legal issues that are identified.

Although a water law program as envisioned above needs to be comprehensively developed by the various collaborators seeking to undertake it, the above research and action recommendations can serve as a starting point for developing such an initiative.

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LIST OF ABBREVIATIONS

AWARD	Association for Water and Rural Development
CARA	Conservation of Agriculture Resources Act
CMA	Catchment Management Agency
CME	Compliance Monitoring and Enforcement
CMS	Catchment Management Strategy
DEDET	Department of Economic Development, Environment and Tourism
DMR	Department of Mineral Resources
DoA	Department of Agriculture
DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
ICMA	Incomati Catchment Management Agency
INECE	International Network for Compliance Monitoring and Enforcement
IWRM	Integrated Water Resource Management
MPRDA	Mineral Petroleum Resources Development Act
NEMA	National Environmental Management Act
NPA	National Prosecuting Authority
NWA	National Water Act
NWRS	National Water Resource Strategy
PAJA	Promotion of Access to Justice Act
RDM	Resource Directed Measures
SAPS	South African Police Service
SDC	Source Directed Controls
SRI	Shared River Initiative
WRC	Water Resource Commission
WRM	Water Resource Management
WWTP	Waste Water Treatment Plant

1. Introduction and Objectives

This work forms one of three components that make up the larger Shared Rivers Initiative Phase 2 (SRI 2) and it emanates from the findings of Phase 1 of the Shared Rivers Initiative (SRI 1) undertaken by AWARD[1] SRI 1 undertook baseline research specifically to identify points of entry aimed at improving the sustainability of the lowveld rivers in South Africa.[2] More formally the aim of SRI 1 was to provide an assessment of the status of sustainability of the water resources of the six lowveld river systems, and the factors that constrain or contribute to this, in order to provide a grounding from which the project is able to design and implement real change. Analysis of results indicated that securing the Ecological Reserve (as a benchmark for sustainability) is predicated on a 'bundle of strategies that are collectively required to achieve sustainability. The Ecological Reserve essentially defines a dynamic quantity and quality of flow for a water resource.[3]

The Phase I research illustrated difficulties and successes with respect to the transformation to an integrated approach also known as integrated water resource management (IWRM). In summarising the major factors that contribute to sustainability AWARD pointed to the following issues and made key recommendations:

1. A generally poor understanding of the Reserve and hence failure to change practices.
2. The almost total lack of integration of water resources management and supply.
3. Some degree of unlawfulness but more importantly, the weak regulation of unlawful use pursuant to the National Water Act 36 of 1998 (NWA) and poor legal literacy.
4. The importance of participatory and representative platforms for collective action: their functioning and contribution to IWRM.
5. Some seemingly excessive lags in the implementation of the Reserve and emergence of sustainability discourse.
6. Various examples of the emergence of, or lack of, self-organisation, leadership and feedback loops in adaptive action and management.
7. Attendant dearth of skills, capacity, monitoring and legal literacy with some exceptions.[4]

AWARD indicated that it was able to undertake work to address some of the major challenges. It also proposed to do this in a way that tested new approaches and that provided learning for the sector as a whole (in other words the research would be strongly based in action-research and social learning approaches where appropriate). AWARD thus conceptualized a Phase 2 as three inter-related components designed to address the key issues underscored in the bulleted points above. These components are:

- action-research projects based in collaborative and collective action for supporting and implementing environmental water requirements;
- innovative ways to understand the benefits of the Reserve through elaborating the distribution of ecosystems goods and services; and

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[1] Sharon Pollard and Derick du Toit 'Towards the sustainability of freshwater systems in South Africa: An exploration of factors that enable and constrain meeting the ecological Reserve within the context of Integrated Water Resources Management in the catchments of the lowveld' (2011) WRC Report No. YY 477/10.

[2] Ibid.

[3] See DWAF, *National Water Resource Strategy* (2004) (NWRS), 57-9.

[4] Pollard and du Toit (2011), *op cit* note 1.

- research and evaluation of legal practices and procedures with a focus on competency development for regulation and enforcement.

This report reviews the activities and outcomes of the third component focusing on legal issues and enforcement. The legal component primarily addresses the third factor highlighted above. Although by doing so, it also addressed additional legal issues that were identified during the course of the project. Before continuing to the discussion of SRI 2 in more depth and the legal component, we provide a brief overview of water reform in South Africa in order to place the legal component within the larger context of water resource management.

1.1. Water reform in South Africa

Over the past decades, throughout much of the world water management has moved away from supply driven management, dominated by engineering and hydrological issues, toward demand driven solutions.[5] Along these lines, integrated water resource management has gained prominence as a powerful water management paradigm, where, among other things, the decentralisation of water management along catchment boundaries and tradable formal or administrative entitlements, known variously as permits, licences, concessions or grants play a prominent role.[6] This mirrors a shift in water management from common-law legal doctrines such as the Riparian Principle to one where water is a public resource that is regulated by the state and where the state acts as a public trustee of the nation's water resources.

South Africa has undertaken a systematic shift in its water management system by adopting IWRM. The new system challenges the policies and values of the past by framing water resource management within the context of the principles of equity and sustainability, both reflected throughout the new Constitution of the Republic of South Africa of 1996 and rooted in the economic, social, environmental and political circumstances of the country.[7] These principles are strongly transformative and aim to strike a balance between the use of resources for livelihoods and its protection for future generations, whilst promoting social equity, environmental sustainability and economic efficiency.[8]

The new water management framework has created multiple interdependent processes that must work in tandem to achieve sustainability and equity, such as classification of water resources, setting of the Reserve (Basic Human Needs and Ecological Flow Requirements – the focus of this study is on the latter), a system of water use authorisations, and new institutions for managing water at a catchment level.. Specifically, the NWA and the National Water Resource Strategy (NWRS) have established a framework for implementing IWRM, and it includes two complementary strategic areas, known as Resource Directed Measures (RDM) for protection of water resources and Source Directed Controls (SDC) for regulation of use.[9]

The RDM are directed at protecting the water resources base by setting objectives for the desired condition of resources, and collectively they comprise important management tools such as classification of the resources, setting an Ecological Reserve or ecological flow requirement, and establishing resource quality objectives.[10] These measures focus on the quality and quantity of the water resource itself. The SDC are measures to regulate water use to limit impacts to acceptable levels, as defined through RDM. These measures are primarily implemented through conditions on

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[5] Synne Movik, 'Return of the Leviathan? "*Hydropolitics in the developing world*" revisited' (2010). *Water Policy* 1–13.

[6] Ibid at 2.

[7] National Water Act 36 of 1998; Sharon Pollard and Derick du Toit 'Integrated water resources management in complex systems: how the catchment management strategies seek to achieve sustainability and equity in water resources in South Africa' (2008) 34(6) Water SA 671 (IWRM in complex systems).

[8] NWRS, *op cit* note 3 at 7; Pollard and du Toit, 'IWRM in complex systems, 671.

[9] NWRS, 56.

[10] Ibid at 57-9.

water use authorizations, and compliance monitoring and enforcement of those conditions.[11] The SDC cannot be undertaken without RDM and vice versa.[12]

To date, an array of legal issues have manifested associated with the implementation of the NWA, many of which have not been addressed by researchers or the court system. As discussed next, the legal component of SRI 2 seeks to address some of these legal issues, primarily focusing on legal issues emanating from compliance and enforcement activities related to SDC.

1.2. Study background and objectives

As mentioned, SRI 2 seeks to address some of the major findings identified in SRI 1. Although SRI 2 is a broad program with different components that each draws from different doctrinal areas with particular methodologies and approaches to research, all of SRI 2's components share overarching themes.

First, SRI 2 is conceptually rooted in the principle of **sustainability**, one of the main principles underlying IWRM. In particular, SRI 2 focuses on how sustainability can be planned for and achieved over the coming decade. In South Africa, the principle of sustainability is primarily rooted in Section 24 and 27 of the Constitution. Section 24 establishes a fundamental right to an environment that is not harmful to a person's health or well-being, and requires the environment to be protected for the benefit of the present and future generations.[13] The protection should be afforded through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.[14]

The legal component focuses its research under the broader umbrella of sustainability with special attention given to **compliance with the NWA** (and a focus on enforcement and unlawful use under the NWA). A more comprehensive discussion of the definition and importance of compliance with the law, including its relation to enforcement and sustainability, is presented in chapter 4. However, suffice to say that without compliance with the law, the law becomes meaningless. And without adequate enforcement against non-compliant activities, compliance also becomes jeopardized. Within the context of the NWA – the main legislation that seeks to promote sustainability of South Africa's water resources – non-compliance with the law will directly lead to unsustainable management of the nation's water resources. Consequently, the link between compliance, enforcement and sustainability of the nation's water resources is not difficult to conceptualize. For example, as SRI 1 demonstrated, weak regulatory practice, and more importantly, the perception of weak regulatory practice is a major factor constraining implementation of the Ecological Reserve, the benchmark for sustainability under the NWA.[15] In other words, "the Reserve cannot be achieved without a compliant or lawful catchment-based system".[16]

Second, from a methodological perspective, the overall SRI 2 research process is **participatory and collaborative**, where stakeholders are drawn into the research process, and often play a role in devising and implementing future action. Chapter 2 outlines in more detail how the legal component also worked in a participatory and collaborative manner when conducting its research.

Third, the overall project is **trans-disciplinary** in nature. The operationalisation of IWRM does not lie in one domain alone but draws on social, economic, political, ecological, and legal discourses and concepts.[17] The trans-disciplinary theme is evident throughout the legal component.

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[11] Ibid at 60.

[12] Ibid at 56; Pollard and du Toit 'IWRM in complex systems, *op cit* note 7, 675-76.

[13] Constitution of the Republic of South Africa of1996 section *24(a)*, (b).

[14] Ibid section 24*(a)*, *(b)*(iii). For a comprehensive discussion of section 24 see Michael Kidd, *Environmental Law: A South African Perspective* 2 ed (2011); Jan Glazewksi. *Environmental Law in South* Africa 2 ed (2005).

[15] See Pollard and du Toit (2011), *op cit* note 1 at 167-8.

[16] Ibid. at 167.

[17] Ibid.

Keeping in line with these three overarching themes, the legal component, which is the subject of this report, has the following overarching objective:

> To research, evaluate and address legal issues associated with enforcement of, and ultimately compliance with the National Water Act and other legislation related to ensuring sustainability of water resources through a collaborative process with regulators, multiple stakeholder platforms, and law students.

The four main sub-parts or categories of action of the legal component are discussed next.

1.3. The legal components four main areas of activity

The legal component has the following inter-related areas of activity outlined in Figure 1, all of which are related to compliance monitoring and enforcement issues under the NWA:

i. To undertake **foundational legal research** around sustainability and enforcement issues related to water resources;

ii. To undertake a **regulatory support** project focusing on legal issues related to compliance monitoring and enforcement;

iii. To document **legal case studies and/or focused in depth studies** that affect sustainability of water resources, with a focus on compliance, enforcement and/or sustainability; and

iv. To develop professional interest and capacity in water law through the **integration of law students** in every aspect of the legal component.

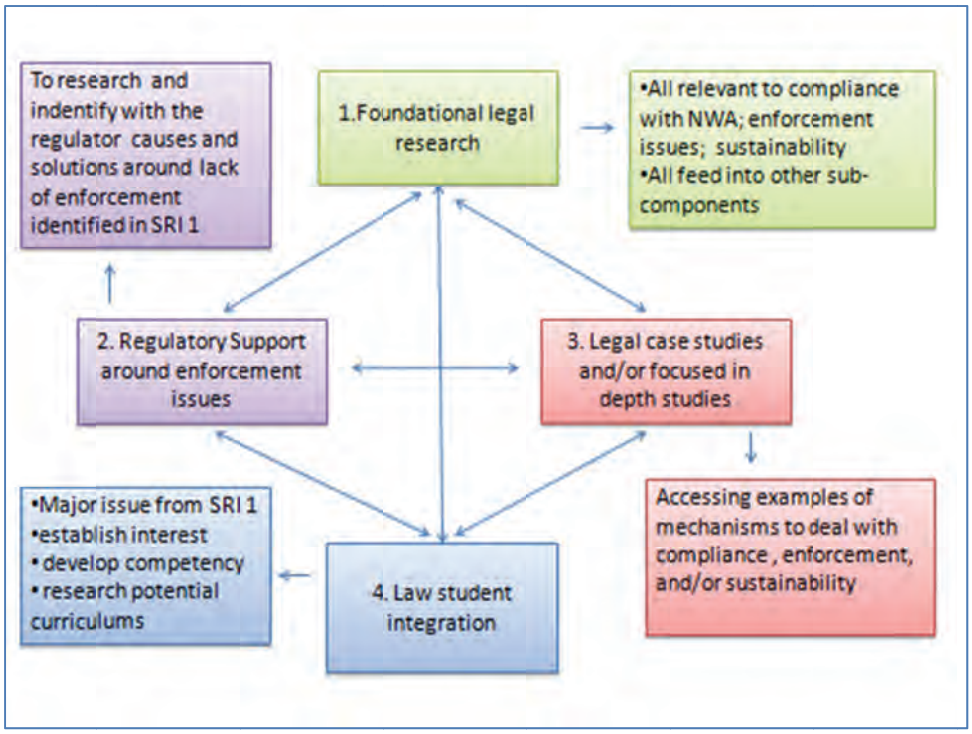

Figure 1. The four action areas of the legal component

As Figure 1 demonstrates, each of the legal component's areas of activity is inter-related. In other words, each area of activity draws on or contributes to knowledge and research undertaken in another area of activity. For example, research undertaken in the foundational legal research area will feed into the preparation of the legal case studies, focused in depth studies and the regulatory support project. In some case, issues that came out of the regulatory support project or the legal case studies resulted in additional foundational legal research being conducted. Finally, the law student component interacted with the other areas of activity primarily in two ways. First, students

substantively contributed to the research process in the other three areas of activity through internship opportunities. Second, the other areas of research contributed to other forms of student involvement, including feeding in issues for student activities during learning field-trips to Bushbuckridge and forming part of class assignments.

Moreover, as will be explained throughout the report when discussing the outputs of the four areas of activity, each substantive issue is related to enforcement of the NWA. Although some of the research topics are more directly relevant than others, they each contribute to understanding the factors that enable or constrain enforcement.

The remainder of the report will be devoted to discussing these various areas of activity in depth.

1.4. Structure of report

As background to the research, Chapter 2 provides an overview of the key methodological orientations and conceptual frameworks that informed the research. Chapters 3 summarises the foundational research, including its key findings. Chapter 4 reviews the regulatory support project related to CME. Chapter 5 presents a legal case study on criminal charging municipal managers as a strategic option to deal with municipal pollution of water resources. Chapter 6 presents an in-depth study of the Water Tribunal that includes empirical research. Chapter 7 reviews the law student integration aspect of the legal component. Chapter 8 concludes the report with an overview of findings, implications, and potential areas for future action.

2. Methodological and Theoretical Frameworks guiding the research

Although the legal component of SRI 2 has its own methodologies informed by the legal nature of the research, it is important to note that it, like the broader Shared Rivers Initiative, is strongly trans-disciplinary in nature. This means that the legal component does not only encompass traditional legal methods based on doctrinal approaches to legal research, but also adopts a social-science oriented approach based on qualitative research methods. This approach has often been coined socio-legal research.[18]

To better understand what socio-legal research entails, a short summary of the difference between traditional legal research and socio-legal research is necessary. Generally, traditional legal doctrinal research is often grounded in the notion that law is a highly-rationalised rule-based activity based on a system of rules, norms, and principles designed to guide legal analysis and justify decisions.[19] Traditional doctrinal legal analysis of law uses interpretive methods to examine cases, statutes and sources of law "in an attempt to seek out, discover, construct or reconstruct rules and principles".[20] According to Banaker and Travers, this "reliance on legal rules and principles turn much of law, legal reasoning and legal studies into a *formal* activity".[21]

Socio-legal research, as explained above, seeks to adopt a more social-science research orientation.[22] Thus, it seeks to incorporate the sociological interest in the general characteristics of social phenomena and a general knowledge of society into the legal arena.[23] This includes focusing on understanding how practitioners who are implementing various rules and laws understand and perceive the law and also how this perception influences their practice. As commentators have noted, "focusing the reflexive lenses of sociological analysis on the practice-based features of the law, can potentially enable us to uncover the institutional limits of the legal practice, in a way that traditional forms of legal studies cannot."[24] The benefit of adopting a socio-legal approach is rooted mainly in its inter-disciplinary nature. In particular, it seeks to transcend some of the theoretical and methodological limitations of undertaking traditional legal research and allows for a space to develop new forms of analysis.[25] This process is often transformative because it creates new forms of knowledge that would otherwise not be created if working directly within one discipline.[26] The challenge of course is that it requires the researcher to have a good knowledge of methodology and theory associated with different discourses.[27]

The importance of using socio legal methods to research legal issues associated with IWRM cannot be overstated. This is because the operationalisation of IWRM does not lie in one domain alone but draws on social, economic, political, ecological, and legal discourses and concepts.[28] To understand

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[18] See generally Reza Banaker and Max Travers, 'Introduction to Theory and Method in Socio-Legal Research' (Banaker and Travers 'Introduction') in R. Banaker and M. Travers (eds) *Theory and Method in Socio-Legal Research* 1 ed (2005) ix-xvi.

[19] See Reza Banaker and Max Travers, 'Law, Sociology, and Method' in, R. Banaker and M. Travers (eds) *Theory and Method in Socio-Legal Research* 1 ed (2005) 1-26.

[20] Ibid. at 5.

[21] Ibid.

[22] See Banaker and Travers, 'Introduction, *op cit* note 18.

[23] Banaker and Travers, *op cit* note 19.

[24] Ibid. p. 22.

[25] Ibid. at 7.

[26] Ibid.

[27] Ibid.

[28] See Pollard and du Toit, *op cit* note 1.

the challenges in operationalising IWRM researchers must move beyond a silo approach and engage with multiple disciplines and practitioners.

The legal-component utilised various methodological orientations for its different sub-components. This included traditional legal research methodologies based on doctrinal approaches to legal research and socio-legal methodologies rooted in qualitative research methods. Each is discussed broadly below; however a more detailed discussion of each sub-components methodology takes place in the various chapters below.

2.1. Traditional Legal Research

The legal sub-component, particularly in its foundational legal research, undertook various types of traditional legal analysis. As explained, this includes reviewing particular court cases or decisions, statutes, and other norms related to IWRM and interpreted and critically discussing them. Often times the legal research served as a foundation for the qualitative research aspects of the project.

2.2. Participatory and action research

Much of the legal sub-component sought to engage in participatory research methods where the researcher is typically sensitive to the perspectives of others and collaborates with participants to design and/or implement the study.[29] This can take the form of facilitating learning, reflections, and future action. As Patton as noted, "a number of approaches have emerged that involve inquiry within organizations aimed at learning, improvement, and development. ... These problem solving and learning-oriented processes often use qualitative inquiry and case study approaches to help a group of people reflect on ways of improving what they are doing or understand it in new ways".[30] However, because participatory research can be an extremely broad term, it must be defined appropriately within the context that it is taking place. In the legal sub-component, participatory methods were primarily used in the preparation of case studies. For example, in the municipal sewage case study presented in Chapter 5, the participants identified the need for the case study, defined objectives, provided comments and analysis, providing recommendations, and ultimately will use the case study to effectuate changes in practice.

Action research is a type of participatory research process that simultaneously supports action (change, improvement) and research (understanding, knowledge). People or organisations affected by the change are usually involved in the action research process.[31] Thus the idea is to support a co-learning and collaborative process where stakeholders are part of the research and learning rather than being seen as external to the research. Such a process is likely to bring about changed practice as the learning proceeds by engaging the people in the organisation in studying their own problems in order to solve those problems.[32]

Participants of action research contribute to the research by means of dialogue: they ask questions, interact, engage, review and critically reflect.[33] This means that the action research process is highly inclusive and respects the principles of participatory processes. An action research study, similar to many other qualitative research methods, can begin with imprecise research questions and the research design is refined as the inquiry proceeds. As one expert explains in action research, "[d]esign and data collection tend to be more informal, the people in the situation are often directly

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[29] See Michael Quinn Patton 'Qualitative research and evaluation methods' (2002) 175, *citing* William Foote Whyte, ed. *Action Research for the Twenty-First Century: Participation, Reflection, and Practice* (1989) Special Issue of *American Behavioral Scientist* 32 (5 May/June).

[30] Ibid. at 175.

[31] Bob Dick 'Grounded theory revisited. Occasional pieces: action research methodology' (2000) No 27 available at http://www.scu.edu.au/schools/gcm/ar/arm/op027.html, accessed on 30 January, 2012.

[32] See Patton, *op* cit note 29 at 221-22.

[33] Pollard and du Toit, *op cit* note 1 at 13.

involved in gathering the information and then studying themselves, and the results are used internally to attack specific problems within a program, organization, or community".[34]

The legal sub-component in engaging in the regulatory support project around compliance monitoring and enforcement undertook an action-research orientation. There, participants from relevant government departments identified issues and worked collectively to devise and implement solutions. The action portion of the research is not complete, as it will form part of the ongoing collective action sub-component of SRI 2.

2.3. Collective action and social learning

Collective action is defined as "the collective process of involving diverse stakeholders for resolving conflicts and advancing shared visions".[35] Engagements for collective action are characterized by face-to-face dialogue, mutual learning, and voluntary participation in working towards shared goals.[36] Here, the collective group of stakeholders constituted regulators from various government departments that played a role in enforcement activities related to the protection of water resources.

Social learning is inter-linked with collective action, because it enables the recognition of diverging norms, values, interests and constructions of reality among stakeholders working collectively; the premise being that differences need to be explicitly recognised rather than concealed in the collective action process.[37] If stakeholders have divergent understandings of the underlying problems and issues they face, they will not be able to formulate a collective response. As one commentator summarised:

> social learning includes a critical analysis of own values, interest, and constructions of reality (deconstruction), exposure to alternative ones (confrontation) and the construction of new ones (reconstruction). The aim is to encourage, promote, and develop social relationships and mutual respect (social Capital) so that a group can become more open to alternative ideas and with that more resilient and responsive to challenges both from within and from outside.[38]

Thus, social learning is an important mechanism to enable collective action. Both social learning and collective action approaches where used as part of the regulatory support project.

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[34] Patton at 221.

[35] B. Gray *Conditions Facilitating Inter-Organizational Collaboration* (1985)

[36] See Derick du Toit, 'Theme 1: Collective action and social learning for improved water resource management, Deliverable CA1 of SRI2 submitted to the Water Resource Commission, WRC Project K5/1920 (August 2011).

[37] See Pollard and du Toit, *op cit* note 1 at 16.

[38] Ibid, citing to Wals, AEJ (ed) *Social learning towards a sustainable world* (2007).

3. Foundational Legal Research

This chapter reviews foundational legal research undertaken as part of the legal component of SRI 2. As mentioned in Chapter 1, the foundational legal research is related in various degrees to compliance monitoring and enforcement issues and/or sustainability. Moreover, the foundational research directly fed into other project areas. For example, the research was integrated into the legal case studies, focused in-depth studies and the regulatory support project related to CME. In addition, law students played a significant role in researching and writing much of the foundational legal research discussed below, thus linking these areas of activity directly. Finally, the research team undertook one area of foundational research related to catchment management agencies as a result of an issue identified by participants in the regulatory support theme. Other areas of research were also identified by participants throughout the project; however, the research team did not have the resources to undertake this additional research.

The next section provides an overview of the foundational legal research topics, while the remainder of this chapter summarises the substantive research outputs.

3.1. Overview of the foundational legal research areas

The legal component undertook the following four areas of foundational legal research:

i. a review of major **court cases** in South Africa related to sustainability;

ii. a review and compilation of **enforcement provisions** in the NWA and other legislation in South Africa related to sustainability;

iii. a review of **Water Tribunal** decision under the NWA; and

iv. a critical analysis and discussion of **assignment and delegation** under the NWA as it relates to transferring powers to catchment management agencies;

Each of these areas of research is linked directly to compliance, enforcement and/or sustainability issues (see Figure 2).

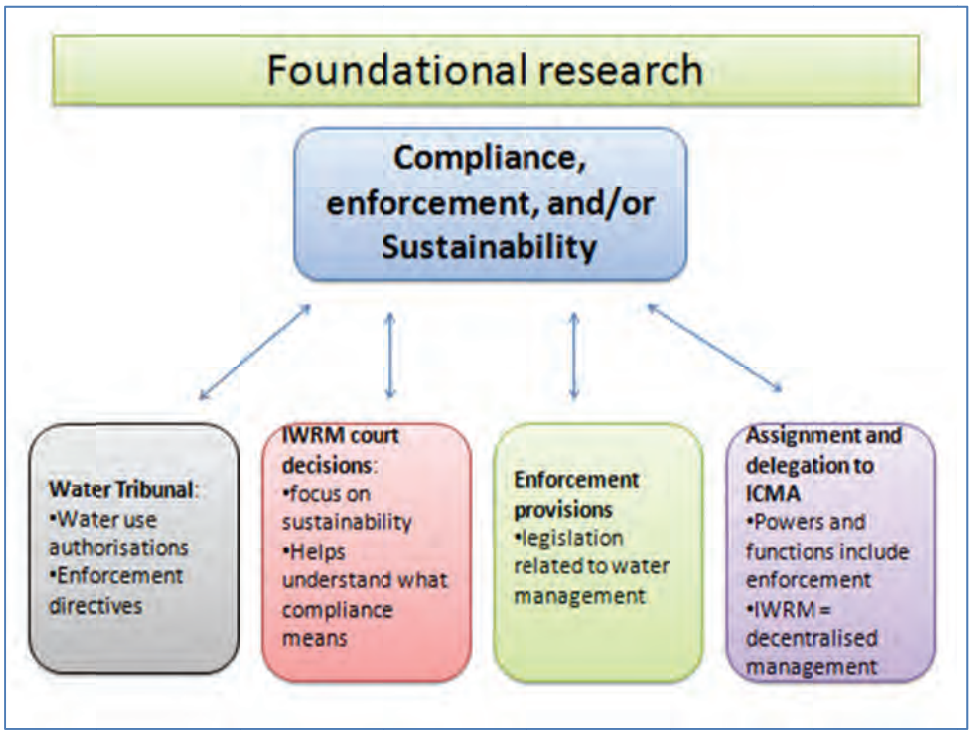

Figure 2. Foundational research relation to compliance, enforcement and sustainability

As Figure 2 demonstrates, a review of court cases related to sustainability provides an understanding of how courts have interpreted the principle of sustainability as enshrined under section 24 of the Constitution. The enforcement provisions compilation allows the reader to understand the full landscape of enforcement provision related to protecting and ensuring sustainability of water resources. The Water Tribunal adjudicates, among other things, appeals related to directives issued as part of the enforcement process and appeals challenging the issuance of water use authorisations. It thus serves as an integral aspect of the NWA related to both compliance with the NWA, enforcement and sustainability of water resources. The NWA envisions that the CMA will play the prominent role in managing water resources, including undertaking enforcement against unlawful use and authorising of water use licenses. Thus, confusion and misunderstanding around the process by which DWA transfers powers to a CMA through assignment and delegation can result in a major breakdown in operationalising IWRM. This will have a clear knockdown effect on compliance with the NWA, and thus sustainability.

The full results of the first two areas of research – court cases related to sustainability and the compilation of enforcement provisions – are presented as **Appendix 1 and 2** to this report respectively. This research is presented in table format. Nonetheless, a brief discussion of the research and the information contained in the tables are presented below A critical analysis of the Water Tribunal's decisions is presented as part of the Water Tribunal focused in-depth study in Chapter 6. Finally, the full results of the assignment and delegation issues related to CMAs is presented in **Appendix 3**, although the research is summarised below.

3.2. South Africa court cases related sustainability

The objective of this research was: *to review South African case law related to implementing Integrated Water Resource Management for use as a legal reference tool primarily geared towards non-legal practitioners.* In other words, IWRM sets the parameters through which cases should be filtered.

Prior to undertaking this research, the research team came across very little research that reviews South African case law with a critical eye towards IWRM and its implementation.[39] With respect to the water sector, research has focused on case law related to water service delivery and constitutional rights relevant to this.[40] Moreover, literature reviewing cases on the right to environment under section 24 of the Constitution (which espouses important principles such as sustainability and equity) has focused on its broader applicability to environmental resources (primarily through the environmental review process) or natural resources other than water.[41]

3.2.1. Findings

The implementation of major NWA actions still remains to be executed, including many of those mentioned in the preceding paragraph. Given that these actions will affect how and when water can be used – some water users will be discontent with the outcome and will inevitably want to challenge these actions. It is thus important for stakeholders, including water users, legal practitioners and government, to critically explore what amounts to or may amount to non-compliance with respect to the implementation of these actions, how alleged non-compliance may be raised legally, and what existing court decisions may guide this process. Such an understanding will not only prevent frivolous claims and unreasonable expectations, but it will also help the regulator to take action and guide these processes within the ambit of the law. Results

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[39] See however, Maritza Uys 'South African Water Law Issues' (2009) WRC Report No. K8/799.

[40] See e.g. Linda Jansen van Rensburg 'The right of access to adequate water [discussion of *Mazibuko v The City of Johannesburg* case no 13865/06] (2008) *Stell LR* 415; Patrick Bond & Jackie Dugard 'The case of Johannesburg Water: What really happened at the prepayment 'parish pump''(2008) 12 Law, Democracy and Development 1-28; Barrett, D., and V. Jaichand 'The right to water, privatized water and access to justice: Tackling United Kingdom water companies' practices in developing countries' (2007) 23 *SAJHR* 543-562.

[41] See Kidd, *op cit* note 14; Glazewski, *op cit* note 14; Loretta Ferris 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 *SAJHR*.

The case law research is presented as a compendium table in **Appendix 1**. It is important to remember that this table is primarily created for the benefit of non-legal practitioners. Thus the table and discussion seeks to evaluate cases in a manner that makes it accessible to non-legal stakeholders. Environmental legal practitioners will typically be familiar with this case law, although they too could benefit from such a compendium.

The table contains the following columns: **Case Name and Theme** (the legal citation for the case and the theme under which the case falls); **Area** (the geographical area); **Forum** (the court where the decision was made); **Authority** (the various laws, statutes, and regulations the court cites in the decision); **Facts** (a brief summary of the factual scenario behind the legal issues, including the legal claims raised); **Relevant Holding and Major Findings** (the Court's main decision in the case, and relevant other findings); **Comments and relation to IWRM** (comments on the case, including how the case might relate to IWRM issues); and **Cited** (various scholarly articles that cite the case).

This research documented that only a handful of court decisions directly touched on water management issues associated with the NWA. Nevertheless, because the principles behind IWRM in South Africa are primarily rooted in section 24 of the Constitution, such as equity and sustainability, court decisions applying and interpreting section 24 of the Constitution can help to inform on potential legal issues related to IWRM. Thus, the majority of decisions documented in Appendix 1 deal with section 24 of the Constitution – such as the principles of sustainability and equity. It also reviews the potential application of these court decisions to IWRM.

Nonetheless, although court decisions related to sustainability and equity are helpful to understand non-compliance with the NWA, there are few court decisions that directly touch on the NWA implementation issues – to the extent that the team found such cases they are included in appendix 1. Consequently, a lot of uncertainty remains regarding what would constitute non-compliance with important components of the NWA, such as classification of catchments, the setting of resource quality objectives, the finalisation of verification and validation, compulsory licensing, and implementing measures to achieve Reserve determinations.

3.2.2. Recommendations

- Case law is dynamic and court decisions are constantly creating new precedent. A compendium of case decisions focusing on IWRM issues (such as section 24 of the Constitution) that is accessible to non-legal practitioners should be maintained on an annual basis. Such a compendium can be prepared by academic institutions, research organisations, or non-profit organisations, and should be funded by the WRC.

A trans-disciplinary research document should be prepared that critically explores what might constitute non-compliance with major NWA actions. To the extent there have been or are court cases challenging NWA actions, these should also be documented, including researching and analysing why the parties brought the case, what they sought to achieve, how they formulated their legal arguments, and whether the case achieved the desired objectives. Such a document can provide guidance to water users, legal practitioners, and government decision-makers, by, among other things, preventing unreasonable expectations and promoting compliance with the law. This research will ideally be undertaken by a non-governmental research organisation and should be funded by the WRC.

3.3. A Compilation of enforcement provisions related to sustainability of water resources

The objective of this research was: *to create an accessible compendium of legislation and regulations governing enforcement of the NWA and other legislation related to the protection of water resources as a reference tool for legal and non-legal practitioners*. The table also served as a reference for the regulatory support project related to enforcement discussed in Chapter 4.

The enforcement provisions compendium is presented in **Appendix 2** in table format. The table contains the following columns: **Act/Section** (the statute in question and the relevant section); **Summary** (a summary of the relevant provision); **Who can take action** (who can initiate an enforcement action, whether criminal or administrative. This includes reference to when private

individuals can bring actions); **Potential Relief** (reviews the relief available should the enforcement provision be used); **Related legislation** (other legislation related to the provision in question); **Criminal** (whether criminal actions can be brought).

3.4. A compilation of Water Tribunal decisions

The objective of this research was to: r*eview the major decisions from the Water Tribunal so as to facilitate the preparation of a focused in-depth study reviewing and critically evaluating the state of the Water Tribunal and to serve as a reference tool for non-legal and legal practitioners.* Because the Water Tribunal legal case study presented in Chapter 6 addresses the emerging themes and issues from the Water Tribunal's decisions and key recommendations for future action, we do not include a discussion here.

3.5. The legal implications of assignment and delegation of functions to the CMAs

The full research report and its findings are presented in **Appendix 3** to this report. A brief summary, however, is presented here.

3.5.1. Background

The preamble of the NWA recognises the need 'for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to regional or catchment level so as to enable everyone to participate'. The creation of a new institutional framework that focuses on the catchment level for water resource management (WRM), namely through the creation of Catchment Management Agencies (CMAs), is central to determining the effectiveness of policy implementation of the NWA and the policy documents preceding it.[42] Thus, the water law and policy envision that the CMAs are in the best position to manage water on a catchment scale, including facilitating participatory decision-making and information sharing between stakeholders.

While the NWA has received international recognition for its comprehensive and innovative legislative design, pitfalls in institutional capacity and implementation of the NWA has sorely hampered the realisation of WRM at the catchment level.[43] In fact, the enactment of environmental legislation 'may lull the public into a false sense of security that the problems are being addressed, whereas there can be no realistic expectation of success without the adequate implementation of such legislation.'[44] One major implementation delay that is emblematic of the kind of failure which is having a significant impact on the effective implementation of the NWA has been the creation of fully functioning CMA. Despite that the NWA has been operational for thirteen years, the establishment of CMAs remains elusive with only 2 out of 19 established; however neither is fully functioning.

Contributing significantly to this delay is the NWA's lack of guidance as to the appropriateness and use of *delegation* or *assignment* to Catchment Management Agencies. Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function. This legal issue is important because assignment and delegation are the two main mechanisms by which powers are transferred from DWA to CMAs, and as fully explained in Appendix 3, each mechanism has very different implications in practice. Consequently, the decision to use one over the other as a means to transfer powers to CMAs has tremendous implications.

This research's objective is *to investigate the defining elements and distinctions between the legal terms 'delegation' and 'assignment' as referred to in the NWA, particularly as it related to the*

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[42]DWAF. White Paper on a National Water Policy for South Africa (1997) 30 (National Water Policy).

[43]Barbara Schreiner, Guy Pegram and Constatin von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) Development Bank of South Africa, Development Planning Division, Working Paper Series No.11; Pollard and du Toit, op cit note 1.

[44]Fuggle & Rabie (eds) Environmental Management in South Africa (1992) at 120.

functioning of CMAs, to understand how DWA perceives these mechanisms and how they are applying them in practice, and whether the incorrect application of these mechanisms in practice is contributing to the delays in establishing and promoting CMAs. This investigation and understanding would then allow the research team to determine what if any recommendations might help to address potential issues identified.

It should be noted that the most developed of the CMAs that have been established is the ICMA, with a fully functioning governing board, initial functions assigned, and the completion of catchment management strategy that had been gazetted for comment at the time of writing. Being the most advanced, the ICMA represents an ideal example of the kind of complexities that an established CMA would face in the delegation and assignment process. As such, this research concluded by referring to the delegation and assignment issues that the ICMA is facing as a case study.

3.5.2. Results

Through several discussions with DWA and the Incomati Catchment Management Agency (ICMA), AWARD has observed multiple, often conflicting viewpoints around the assignment and delegation of functions to the CMA and the role that the CMA should play in water management. This includes unfamiliarity with the distinction between these terms, disagreement about when and how functions should be assigned or delegated to CMA, disagreement as to the role of a fully functioning CMA, and a lack of knowledge as to the extent of powers that the NWA envisions assigning to the CMA. This lack of clarity is unfortunate and contributes significantly to the delays in establishing and developing fully functioning CMAs as required by the NWA and the water policy underlying the NWA. In addition, contributing to the overall confusion is that although the NWA expressly refers to both terms it fails to define either of them, leaving practitioners and administrators in the dark as to their application.

The result is that despite that the NWA envisions CMAs will be assigned the majority of their functions and powers, particularly those powers they will undertake as a responsible authority under the NWA, the two CMAs that have been established are far from undertaking the amount of functions that the NWA envisions for them, and are often delegated powers that should have been assigned. This was the case with the ICMA, as described in Appendix 3.

3.5.3. Recommendations

To clarify uncertainty around the process of assignment and delegation, the NWA must provide guidelines similar to guidelines provided under the Municipal Systems Act for assignment and delegation. Guidelines would provide great clarity to the practical components of delegation and assignment which are particularly important to implementation of WRM. We propose that since the NWA envisions an almost complete transfer of responsibilities around WRM to CMAs through assignment, this is to be preferred to delegation in the devolution process. Delegation does, however, have an important role in the progressive transfer of additional responsibilities to CMAs; but that role should be used as a stepping stone to eventual assignment.

3.6. Recommendations for further legal research

Although this report presented several areas of legal research, additional legal research issues associated with the implementation of IWRM are abundant. It is important that research organisations work closely with civil society organisations and government departments who work on the ground and are aware of legal issues pertaining to IWRM implementation to identify and determine research priorities. For example, some areas of research might include:

- The retrogressive applicability of the NWA;
- Determining what amounts to non-compliance with respect to major NWA actions, such as compulsory licensing and the Reserve;
- Devising a system of administrative penalties under the NWA drawing from foreign legal systems;
- Determining the implications of South Africa's transboundary water obligations in practice and what constitutes violations of those obligations;

- Determining whether transboundary water obligations can provide upstream users power to regulate how water is used downstream in other countries;
- Understanding the legal requirements for public participation with respect to major IWRM implementation actions;
- Determining legal mechanisms to hold municipalities accountable for violations of the NWA and other environmental legislation; and
- Understanding the legal obligations and liability of major public funders, such as the South African Development Bank, for funding illegal developments.

4. Regulatory support sub-theme related to compliance monitoring and enforcement

The regulatory support sub-theme sought to directly address the findings from SRI 1 that found inadequate monitoring and regulation in the lowveld rivers contributed to unlawful water use throughout the catchment.[45] This component of the project sought to work in a participatory manner with regulators to identify the major issues pertaining to inadequate compliance monitoring and enforcement (although as explained below, the focus was more on enforcement). Furthermore, it fed into a project under the collective action sub-theme of SRI 2, which explored whether a collective action approach could be used to solve regulation-based problems. In this sense it took a trans-disciplinary approach.

4.1. Objectives of the regulatory support sub-theme focusing on enforcement

The regulatory support sub-theme had the following objectives:

1. To collaboratively with regulators research and evaluate the application of legal practices and procedures for the enforcement of the National Water Act and other legislation related to ensuring sustainability of water resources so as to inform practice and policy; and
2. To determine if collective action is a valuable approach for solving regulation-based problems around water resources, using the practice of enforcement as a case study.

As mentioned, the second objective is linked to a priority case under the collective action component of SRI 2 and it will not be discussed in detail here. However, a brief discussion of the collective action project' methodology is discussed in section 2 below, including how it influenced the legal sub-theme's approach.

4.2. Methodology

As described in Figure 3, the regulatory support sub-theme undertook the following methodological approach:

1. Semi-structured discussions with individual regulators from different government departments, using a common set of questions;
2. Synthesis of issues and themes in a report;
3. Collaborative discussion and review process for the first research report with all participants;
4. Series of group workshops with all participants: collective action
5. Report reviewing issues, collective recommendations, and documenting process.

As Figure 3 illustrates, although the entire process is geared towards setting up collective action, the last two sets of activities specifically fall under the collective action component.

[45] See Pollard and du Toit, *op cit* note 1 at 128, 167.

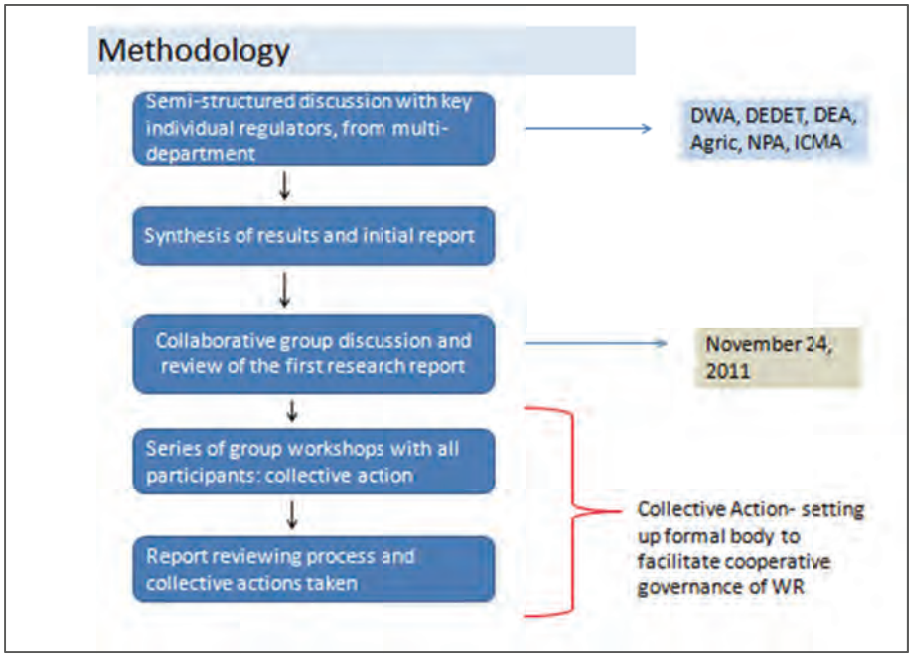

Figure 3. Methodology for the regulatory support activity area

This process has been collaborative and participatory, where the participating regulators identified problems and issues and came together in an initial workshop in November 2011 to identify solutions and drive the process forward. As mentioned, the collective action sub-component of SRI 2, including its methodological approach, linked into this regulatory support sub-theme and thus its methodology also applies to the regulatory support project. The questions asked in the interview phase also sought to enable the implementation of the collective action aspect of the sub-theme. In addition, AWARD structured its initial workshop held on 24 November 2011 around a social learning approach. In essence, in each of the collective action cases, including this one, stakeholder groups are confronted with a management problem and through social learning processes they are provided with a platform to address the issue. This is elaborated on below.

4.2.1. Methodology for participant interviews

During the semi-structured interviews, AWARD has asked the following questions in order to establish consistency throughout the interview process.

- What are your management priorities around enforcement?
- What are your personal management priorities for the work that you are doing?
- What would you say your biggest challenge in respect to enforcement is?
- Do you see a crisis of any kind associated with enforcement?
- What would say is the most desirable outcome for this activity/task?
- Who are the people/institutions you see as allies? Why?
- Who are in opposition to what you are trying to achieve. Why?
- Who would you like to see present in a work group to tackle this issue/task? Why?
- What resource person would you most require and why?
- What are your biggest frustrations in respect of this work?

These questions were designed so as to enable the social learning and collective action process. They sought to ascertain the perceptions and understandings of each participant; in other words they acted as a method for deconstruction of stakeholder understandings. The idea being that when the participants later met as a group they would be confronted with alternative perceptions or realities

held by other stakeholders in the collective. This confrontation is an integral step to move forward as a collective and to reconstruct new realities.

Accordingly, these questions were designed to be somewhat open-ended so that the research team did not influence or direct any of the responses. They also sought to facilitate discussion and allow for follow-up questions if there was adequate time. Although AWARD sought to interview participants individually, in some cases it conducted group interviews.

AWARD did not use tape recorders in any interviews. Many participants did not feel comfortable to have a recording because of the sensitive nature of some of the questions and responses. AWARD also believed that under the circumstances having a tape recorder might inhibit an open discussion. Thus, the notes for each interview are paraphrased responses that closely reflect the actual responses. To the extent possible, quotations were included in the notes. Notes are not presented in this report; however they are on file with AWARD.

4.2.2. Methodology for the initial collaborative workshop, 24 November 2011

The initial workshop (step 3 above) acted as the first step in confronting stakeholders that participated in the interview phase. It also sought to initiate the collective action process with the group of regulators. The main outputs of the 24 November 2011 workshop is discussed in section 7 below, however a more detailed summary is presented in **Appendix 5** to this report.

4.3. Placing enforcement within the regulatory context

Before having a more comprehensive discussion around the themes, issues, and findings emerging from this research, it is necessary to place enforcement within the broader framework of governance, regulation and compliance. Enforcement is not a process that occurs in a vacuum, but is a tool that is closely related to governance, the rule of law, norms, compliance, and regulation. Without defining and understanding this context adequately, any discussion around enforcement would be uninformed. Although a detailed discussion of these terms is beyond the scope of this report, these inter-related concepts are presented below.

4.3.1. Enforcement

The International Network for Compliance Monitoring and Enforcement (INECE) defines **enforcement** as "actions taken by the government against violators to compel compliance [with] the law."[46] Craigie et al. define enforcement as "the actions taken in response to detected non-compliance, including punishment of the violator, and/or actions taken to ensure that harm to the environment is halted and/or rehabilitated".[47]

Most scholars would agree, the process of enforcement allows government to impose civil or criminal sanctions through either the administrative or judicial forums.[48] In addition, within the environmental context, many statutes, like the NWA in South Africa, allow a particular government department to remedy environmental damage and to then to recover costs from those who are responsible for violating the provisions of that particular statute.

4.3.2. Governance

According to Zaelke et al., **governance** "describes the systems available for guiding human society to achieve its common purposes, including sustainable development. It includes the social institutions

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[46] International Network for Environmental Compliance and Enforcement (INECE) *Principles of Environmental Compliance and Enforcement Handbook* (2009) (INECE Handbook) § 2.6 p 8

[47] Frances Craigie, Phil Snijman & Melissa Fourie "Dissecting environmental compliance and enforcement" in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009) § 2.2.

[48] Ibid; INECE Handbook § 2.6 p 8.

that resolve conflicts and facilitate cooperation, where *institutions* are defined as the 'rules of the game' that define social practices, give us our roles, and guide us as we interact with others".[49]

Pollard et al. define governance as "a socio-political process to manage affairs; it thus describes the relationships between people and the rules and norms that are set up to guide these interactions."[50]

Within the environmental law context, Kotzé explains that **environmental governance** is "exceptionally broad and encompasses virtually everything that may influence the regulation of human conduct and its impact on the environment."[51]

Critically, governance should not be conflated with **government**, as governance does not require entities or organisations, but can occur through "other forms of social interaction involving a broader set of players"[52]. Nevertheless, although governance is a complex process, it is undeniable that governments, and formal laws established by governments, remain an important component of governance.[53]

4.3.3. Good governance, the rule of law, and compliance

Good governance is a term that various international organisations like the World Bank and the United Nations Development Programme have coined. It generally refers to several characteristics within a governance system, such as openness, participation, accountability, transparency, and predictability.[54]

Moreover, as Zaelke et al. explain, good governance depends on the **rule of law**, which is characterised as "referring to States where conduct is governed by a set of rules that are applied predictably, efficiently, and fairly by independent institutions to all members of society, including those who govern".[55] After canvassing much of the literature around the rule of law, they explain that "[a]ccepted and promoted by many international organizations, the rule of law is generally defined to include independent, efficient, and accessible judicial and legal systems, with a government that applies fair and equitable laws equally, consistently, coherently, and prospectively to all its citizens."[56]

Adequate enforcement mechanisms are an integral part of the rule of law. As the European Commission has noted, "an effective executive that is capable of enforcing the law and establishing

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[49] Durwood Zaelke, Matthew Stilwell & Oran Young "What Reason Demands: Making Law Work for Sustainable Development" in Durwood Zaelke, Donald Kaniaru, & Eva Kružíková (eds) *Making Law Work, (Volumes I and II) - Environmental Compliance & Sustainable Development* 1 ed (2005) 38. Closely related with governance is the concept of norms. Social order is often "based on a common set of social norms, which are beliefs and values that influence human behavior". Ibid. One can think of norms as internal and external, where external norms can "trigger social sanctions for behavior that violates norms or reward for behavior that is consistent with them" (Ibid.). Norm research and how it affects behavior is well-developed, and readers are referred to the some literature on this topic. See e.g. Cass R. Sunstein, 'Social Norms and Social Roles', (1996) 6 Colum. L. Rev. 903; Richard McAdams "The Origins, Development, and Regulations of Norms" (1997) 96 Mich. L. Rev. 338.

[50] Sharon Pollard et al. *Sustainability Indicators in Communal Wetlands and their Catchments: Lessons from Craigieburn Wetland, Mpumalanga* (2009) Report to WRC, K5/1709 § 2.2.1 p 50.

[51] Louis Kotzé, "Environmental governance" in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009), § 3 p 108.

[52] Zaelke, Stilwell & Young, *op cit* note 49 at 38; Pollard et al., *op cit* note 50 at § 2.2.1 p 50.

[53] Zaelke, Stilwell & Young at 40.

[54] Ibid; Pollard et al § 2.2.1 p 50.

[55] Zaelke, Stilwell & Young at 40-1

[56] Ibid at 44.

the social and economic conditions necessary for life in society, and that is itself subject to the law" is a necessary component of ensuring the rule of law.[57]

This leads to the term **compliance**, which can be thought of as an indivisible part of the rule of law.[58] This is because without compliance with laws, the law has no meaning.[59] According to Craigie et al., in the legal and regulatory context, "the state of 'compliance' describes an ideal situation in which all members of a legal community adhere to the legal standards and requirements applicable to that community's activities."[60] It is generally argued that for governance systems to become effective, compliance with legal mechanisms must play a central role, which turn requires "strengthening the foundation of the rule of law and good governance" principles.[61] Zaelke, Stilwell & Young explain the detrimental impacts of non-compliance with the rule of law, particularly as it relates to sustainable development:

> Without the rule of law and compliance to promote social stability and legal certainty, firms are less willing to make the investments and assume the risk that form the basis of market economy development. Furthermore, lack of compliance with the rule of law encourages high rates of corruption, with further devastating consequences on the confidence of economic actors. This lack of investment, in turn, can slow economic growth and deprive governments of resources needed to invest in education, social safety nets, and sound important than in the field of environment and sustainable development.[62]

The next section introduces some of the theoretical thinking around compliance.

4.3.4. Theories of Compliance

Scholars have developed two general theories of compliance – rationalist and normative theory – both of which focus on understanding the motivation to comply from the perspective of those who are regulated. Trying to understand the behaviour motivation of actors falling under a compliance regime will ideally shed light on various ways to structure a regulatory regime to ensure maximum compliance.

The **rationalist theories** broadly focus on **deterrence** and **enforcement** as a means to ensure compliance through changing the actor's calculation of costs and benefits.[63] Rationalist theory is rooted in the idea that an actor is a rational being who acts to maximise their economic self-interest.[64] According to INECE, rationalist theory argues that:

> regulated actors follow the logic of consequence. Put simply, everyone acts to maximize their own self-interest. If it is "cheaper" to violate an environmental requirement, then regulated actors will do so. Therefore, rationalists argue that policies must "deter" this

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[57] European Commission *Draft Handbook on Promoting Good Governance in EC Development and Co-operation*, available at http://ec.europa.eu/europeaid/what/governance/documents/handbook_2004.pdf at 57, accessed on 20 February 2012.

[58] Zaelke, Stilwell & Young, *op cit* note 49 at 45.

[59] Ibid

[60] Craigie, Snijman & Fourie, *op cit* note 47 at § 2.1 p 42.

[61] Zaelke, Stilwell & Young, *op cit* note 49 at 40.

[62] Ibid at 46-7.

[63] Craigie, Snijman & Fourie, *op cit* note 47 at § 2.1 pp 42-3; see generally Robert Kagan "Regulators and Regulatory Processes" in Austin Sarat (ed) *The Blackwell Companion to Law and Society* (2004).

[64] Craigie, Snijman & Fourie at § 2.1 p 43.

> behaviour by raising the "costs" of non-compliance. Accordingly, they advocate deterrence-based enforcement.[65]

Rational theorist argue that for a regulatory regime to have a deterrent effect, actors must believe that they will be caught, that there will be a swift, certain and appropriate response, and the punishment will be severe enough to tilt the costs of non-compliance greater than the benefits.[66] In other words, "it conceives of regulations as authoritative legal norms whose violation demands punishment".[67] Thus, compliance monitoring and enforcement play a significant role in promoting compliance from the rationalist perspective.

On the opposite spectrum, **normative theory** argues broadly that cooperation and compliance assistance are the main mechanisms to promote compliance.[68] INECE explains that normative theory:

> posits that regulated actors follow the logic of appropriateness and often act in good faith. Compliance occurs (or does not occur) largely because of the regulated actor's "capacity" (*e.g.* knowledge of the rules, and financial and technological ability to comply) and "commitment" (*e.g.* perception that the rule is fair). Accordingly, these theories call for more compliance promotion in the form of assistance, incentives, and other activities.[69]

In reality, the compliance context within a particular country will likely be a blend of rationalist and normative theoretical perspectives, and the approaches to promote compliance will incorporate tools that are catered to aspects of both theories.[70] As Kagan explains, regulatory agencies typically claim to "strive for a flexible enforcement style: legalistic and punitive when needed, but accommodative and helpful in others, depending on the reliability of the regulated enterprise and the seriousness of the risks or harms created by particular violations".[71] This is the case in South Africa.[72]

It is important to note that both theories make reference to "regulatory agencies" and "regulated actors" and both theories recommended several regulatory approaches to promote compliance among regulated actors. To better understand the various regulatory approaches it is first necessary to discuss the concept of regulation.

4.3.5. Regulation

Schreiner et al. provide various definitions of **regulation** extracted from a comprehensive literature review and refer to Picciotto and Campbell (2002) and Vincent Jones (2002).[73] According to Picciotto, regulation, at its most general level, "refers to the means by which any activity, person, organism or institution is guided to behave in a regular fashion, or according to rule".[74] Vincent-Jones defines regulation as "the systematic exercise of control for the pursuit of public purposes (social as well as economic) through the linking of law to policy instruments of force, wealth and information and

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[65] INECE Handbook, *op cit* note 46 at § 2.7 p 8.

[66] Ibid. Gary Becker 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* at 169; Craigie, Snijman & Fourie, *op cit* note 47 § 2.1 p 43.

[67] Kagan, *op cit* note 63 § 'The Dilemmas of Regulatory Enforcement'.

[68] Ibid; Craigie, Snijman & Fourie, *op cit* note 47 at § 2.1.2 pp 43-4.

[69] INECE Handbook, *op cit* note 46 at § 2.7 p 8.

[70] Ibid at § 2.7 p 8; Craigie, Snijman & Fourie at § 2.1.2 p 44.

[71] Kagan, op cit note 63 § 'The Dilemmas of Regulatory Enforcement'.

[72] Craigie, Snijman & Fourie at § 2.3 pp 45-7.

[73] Barbara Schreiner et al 'Survey of Approaches to Water Resource Regulation' (2009) Report to WRC, 1001472 § 2.1 p 16, citing to Sol Piccioto and David Campbell (eds) New Directions in Regulatory Theory 1 ed (2002) 1.

[74] Picciotto and Campbell at 1.

persuasion."[75] Kagan provides that the conventional definition of regulation is "reserved for bodies of law that are elaborated through the promulgation of administrative rules and enforced by specialized government agencies."[76]

Although regulation is generally thought to take place through government action, there is an increasing consensus that regulation takes place in the public sphere and involves a range of actors.[77] Experts have made a distinction between the formal regulation of government and the informal regulation of other actors, such as civil society groups[78]. Enforcement, falls squarely within the formal regulation category and can be considered one type of regulatory instrument.

Various experts have identified essential elements of a **formal regulatory framework**. Craigie et al. refer to an environmental policy and regulatory framework or 'regulatory cycle' that includes five incremental components: problem identification and strategy development, the promulgation of legislation, compliance promotion and awareness-raising, compliance monitoring, and enforcement where non-compliance is detected.[79]

According to Schreiner et al., the following four elements make up a formal regulatory framework:

> [T]he **policy**, which sets the high level objectives, aims and approaches; the **legislation** which translates the policy into legal requirements and obligations; the **instruments** for implementing the legislation; and the **organisations** that create the policy and the legislation and develop and use the instruments. Without all four of these elements being in place, the regulatory framework will be insufficient to achieve its objectives.[80]

INECE also refers to a comprehensive environmental management cycle that includes environmental compliance and enforcement. INECE explains that the cycle:

> involves community recognition of certain environmental problems and governmental acceptance of the need to address these problems. From there it often leads to government establishing specific environmental goals to address these problems and selecting a management approach or approaches to reach those goals. When developing mandatory requirements, government must consider the legal basis for these requirements and establish compliance and enforcement programs to ensure that the regulated community adheres to these requirements. Once implementation begins, evaluations and adjustments must be made to continually update and improve the programs.[81]

What can be ascertained from the above definitions is that a formal regulatory framework typically involves identifying a problem, creating a policy to address the problem, adopting a legal framework that includes institution building, and developing various regulatory instruments to ensure compliance

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[75] Peter Vincent-Jones 'Values and Purpose in Government: Central-local Relations in Regulatory Perspective' (2002) 29 Journal of Law and Society 37.

[76] Kagan, op cit note 63 § 'Varieties of Regulation'.

[77] Schreiner et al, op cit note 73 § 2.1 p 16.

[78] Ibid. Schreiner cautions that "while the focus of this research is on formal regulation by the state, it is important not to ignore the informal regulatory mechanisms, firstly, because of their power to regulate human behavior, and secondly, because of the need for alignment between the objectives of the formal regulatory system and the informal systems for the former to work effectively." Ibid. In the context of water resource regulations, she advises a need for "significant education and awareness creation around some of the water resources challenges, in order for regulation to be most effective". Ibid.

[79] Craigie, Snijman & Fourie, op cit note 47 § 2.4 pp 47-8.

[80] Schreiner et al., *op cit* note 73 § 2.3 p 19.

[81] INECE Handbook, *op cit* note 46 § 2.2 p 3.

with the law that can draw from a range of possibilities, which can include compliance monitoring and enforcement.

The next section discusses the range of regulatory instruments or approaches available, thus helping to place enforcement with the broader context of regulation.

4.3.6. Regulatory instruments to promote compliance

Policy makers, practitioners and experts have developed and implemented many types of regulatory instruments and approaches to promote compliance with laws. The literature on this topic is abundant, and a comprehensive discussion of various regulatory instruments is beyond the scope of this report.[82] However, a brief overview of the major types of instruments that are being used will shed light on the role that enforcement plays within the broader regulatory framework.

Craigie et al. categorise three main approaches: command and control mechanism, incentive-based measures, and voluntary compliance measures.[83] INECE also sets forth three approaches: market-based approaches, mandatory approaches, and voluntary approaches.[84] Schreiner et al. have identified six categories of regulatory instruments: command and control, economic instruments, market instruments, participatory planning, information as regulation, and voluntary instruments such as negotiated agreements and community based policing.[85]

This section will briefly review three main categories: command and control, incentive based measures, and voluntary instruments. Because the focus of this research is on enforcement of the NWA, more time will be spent discussing a command and control approach to alternative instruments.

4.3.6.1. Command and control

The approach directly relevant to enforcement as focused on in this project is the command and control or mandatory approach, which typically involves direct regulation through laws and regulations that set standards, such as licensing requirements or pollution discharge limits, require monitoring and enforcement, and create penalties for non-compliance, usually through administrative and criminal sanctions. Schreiner et al. explain:

> Under the command and control approach to regulation, government prescribes specific guidelines or standards that regulated parties must agree with. There are various forms that such guidelines or standards can take, such as prohibitions on certain activities, licensing of regulated activities, setting of product or technical production standards, and setting of performance standards.[86]

This approach is very much aligned with the rationalist theory described above, and it is largely based on the principle of deterrence. Scholars have proposed both **specific and general deterrence objectives**. The first focuses on targeting a specific individual or firm and deterring it from harming the environment, while the latter is focused on deterring individuals or firms who are not specifically targeted from undertaking unlawful activities based on the belief that they will be caught.[87] Thus, for an effective command and control approach, there needs to be a wide public perception that a violator will be caught and penalised for non-compliance.

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[82] See generally Schreiner et al., *op cit* note 73 § 5; Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009); Kagan, *op cit* note 63.

[83] Craigie, Snijman & Fourie, *op cit* note 47 § 3.

[84] INECE Handbook, *op cit* note 46 § 4 p 15.

[85] Schreiner et al, *op cit* note 73 § 5 p 46.

[86] Ibid § 5.1 p 48.

[87] Mark A. Cohen 'Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement' (2000) 30 *ELR* 10245.

The command and control approach is not without criticism. According to Schreiner et al., such approaches "can be inflexible and stifle innovation, are vulnerable to evasion, costly to implement and provoke enforcement difficulties".[88] Within the developing world context, there has been criticism that because there is such an immediate requirement for basic water and other resources, environmental standards and regulations take a back seat to other priorities.[89] Moreover, it has been argued that under great pressure, developing countries import highly developed standards without the means to achieve or regulate them.[90]

There is abundant literature on command and control approaches, including trying to understand when and why regulators take a more cooperative enforcement approach versus a more severe approach.[91] Many experts agree, however, that an effective command and control approach adopts a method that incorporates cooperative attempts to resolve violations before stepping up to more punitive methods.[92] Although cooperation, such as negotiated compromises, may be ideal to punishment, such an approach will require regulators to still have the ability to deal harshly with instances where cooperation does not work.[93] In other words, a regulator can move up a "pyramid of sanctions" culminating in criminal prosecution.[94]

As described in section 5, the NWA allows for a command and control structure, through the use of compliance monitoring, administrative action to address non-compliance (primarily through directives), and the potential for sanctions, both civil and criminal.

4.3.6.2. Incentive-based measures

Incentive-based measures generally encompass what some experts have categorised separately as market-based and economic-based instruments.[95] Generally, they include a range of instruments that "seek to encourage compliance with state objectives and standards through motivation and reward, as opposed to direct regulation".[96] Moreover, incentives are not always positive, in that they encourage behaviour, but also can take the form of a disincentive that discourage a specific behaviour.[97] For example, New York City recently attempted to penalize the use of non-fuel efficient taxicabs by decreasing the amount by which taxicab owners could lease such vehicles compared to more fuel-efficient models.

Incentives can take the form of changing the dynamics of the market or the economics involved to influence decision-making. For example, in a free market scenario, a potential water user may not see the benefits of conserving water. However, if the dynamics of the market are changed, such as through a direct subsidy or a chance to trade an unused amount of water for monetary gain, then a water user may conserve more water.

As Patterson explains:

> some markets fail to value, or accurately value, various goods and services. This in turn results in these goods and services being accorded insufficient consideration in everyday market activities.

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[88] Schreiner et al, *op cit* note 73 § 5.1 p 48.

[89] Ibid § 5.1 p 49.

[90] Ibid.

[91] See e.g. Peter May & Soeren Winter 'Reconsidering styles of regulatory enforcement: Patterns in Danish agro-environmental inspection' (2000) 22 *Law and Policy* 145; Kagan, *op cit* note 63.

[92] See e.g. Kagan; Ian Ayres & John Braithwaite *Responsive Regulations* (2002)

[93] Kagan, § 'The Dilemmas of Regulatory Enforcement', citing to Ayres & Braithwaite.

[94] Ibid.

[95] Schreiner et al, *op cit* note 73 § 5.2 p 51.

[96] Alexander Patterson 'Incentive-based measures' in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009) § 2 p 298.

[97] Ibid.§ 2.1 pp 298-300

> Where this occurs, there is a strong rationale for some form of state intervention to influence and encourage individuals, industry and organisations operating in the market to practise more efficient resource use and/or mitigate the various externalities caused by their activities.[98]

Some examples of incentive measures include:

- Tax benefits or penalties
- Water pricing
- Cap and trade
- Subsidies
- Fast track permitting processes
- Reduced reporting requirements
- Mandatory labelling

Readers are referred to literature on this topic for a more comprehensive discussion of these measures.[99]

4.3.6.3. Voluntary Instruments

Voluntary instruments refer to a range of approaches that are not required by law, but instead seek to encourage individuals and entities to undertake action voluntarily. Within the context of environmental regulations, Lehmann defines voluntary measures as "an array of measures that firms voluntarily undertake, in the sense that the measures are not required by law, in order to reduce the harmful environmental impacts of their business".[100]

According to Lehmann, there has been an increase in the use of voluntary approaches because more formal regulatory instruments have been costly and inadequate to deal with non-compliance and because private firms have integrated social responsibility efforts as a way to govern their decisions and actions.[101]

Khanna identifies four categories of voluntary regulation: "(i) environmental agreements negotiated between regulators and industry; (ii) public programs (administered by regulators or third parties) that individual firms are invited to join; (iii) public disclosure initiatives that collect and disseminate information on participants' environmental performance; and (iv) unilateral commitments made by firms".[102]

INECE describes a range of measures, including "public education, technical assistance, and the promotion of environmental leadership by industry and non-governmental organizations."[103]

4.3.6.4. The relation between regulatory approaches

In reality, it is likely that a regulator will use a mix of various approaches to address the regulation of water resources. However, as Figure 4 illustrates, it should be noted that without a strong command and control system in place that meets unlawful uses or activities with swift action and strong

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[98] Ibid §2 p 299

[99] Ibid; Schreiner et al., op cit note 73; INECE Handbook, op cit note 46; UNEP The Use of Economic Instruments in Environmental Policy: Opportunities and Challenges (2004); GWP Integrated Water Resources Management. Global Water Partnership. Technical Advisory Committee (TAC). (2000) Available at www.gwpforum.org, accessed on 20 February 2012.

[100] Karin Lehmann 'Voluntary compliance measures' in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009) § 1 p 269.

[101] Ibid § 2 p 271-2.

[102] Schreiner et al., *op cit* note 73, §5.5, pp 58-9; citing to M. Khanna 'Economic Analysis of Non-Mandatory Approaches to Environmental Protection' (2001) 15 Journal of Economic Surveys 291–324.

[103] INECE Handbook, *op cit* note 46 § 4.2.1 p 15.

penalties, it is unlikely that alternative approaches, such as voluntary measures will work.[104] This is because if there are no repercussions for acting illegally, users will most likely not see any reason to change their behaviour.

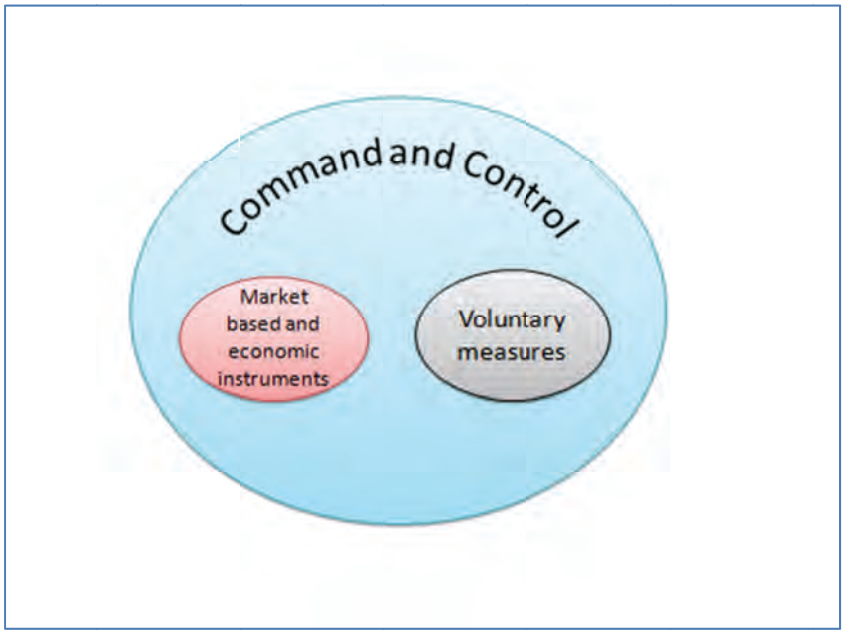

Figure 4. The relation between regulatory approaches

4.4. The legal basis for enforcement related to protecting water resources in South Africa

As mentioned throughout this report, the Constitution of the Republic of South Africa of 1996 is arguably the leading driver of transformation in South Africa, including around environmental matters. Not only does the Constitution establish clear substantive rights that are directly related to protecting and promoting sustainability in the environment, including water resources, it also allocates the responsibility to oversee environmental regulation among national, provincial, and local government. This responsibility also encompasses compliance monitoring and enforcement activities related to managing and protecting environmental resources. In addition to the Constitution, the national government has promulgated various legislation and regulations related to protecting and managing water resources. This includes, for example the National Water Act, the Mineral and Petroleum Resources Development Act (MPRDA), Act 28 of 2002, and the National Environmental Management Act (NEMA), Act 107 of 1998. These specify provisions that allow government to monitor and enforce against violations of these Acts.

This chapter does not present a comprehensive discussion of the legal basis for enforcement related to the protection of water resources, and readers are referred to the extensive literature covering this topic and to **Appendix 2** to this report.[105] A brief summary of the main aspects of the legal framework is presented below.

4.4.1. Constitution

The Constitutional mandate related to water resource management is primarily rooted in Section 24 and 27 of the Constitution. Section 24 establishes a fundamental right to an environment that is not harmful to his or her health or well-being, and requires the environment to be protected for the benefit of the present and future generations (Section *24(a)* and (b) of the Constitution). The

[104] Kagan, *op cit* note 63 § 'The Dilemmas of Regulatory Enforcement', citing to Ayres & Braithwaite.

[105] See e.g. Hubert Thompson *Water law: a practical approach to resource management and the provision of services* 1 ed (2006); Kidd, *op cit* note 14; Robyn Stein, 'Water law in a democratic South Africa: a country case study examining the introduction of a public rights system' (2005) 83 *Tex L Rev* 2167.

protection should be afforded through reasonable legislative and other measures that secure ecologically sustainable development and use of the water resources, while promoting justifiable economic and social development (Section 24*(a)* and *(b)*(iii) of the Constitution).[106]

Every person also has a fundamental right of access to sufficient water. The right to water is indirectly linked to the sustainable management of water resources, because in order to ensure sufficient and clean water in the long term, the resource must be managed sustainably. Section 27 places the obligation on government to take reasonable legislative and other measures to progressively realise to ensure sufficient water. In the absence of available resources, the failure of the State to fulfil its obligations should not be a violation. Should resources become available, it will be difficult for the State to justify its failure to devote those resources to the fulfilment of its obligations. As more resources become available, more should be done.[107]

In addition to substantive rights, the Constitution allocates responsibility to govern specific areas of the environment between national, provincial, and local government.[108] National government has exclusive legislative competence and executive authority over the following functional areas: mining, fresh water resources, national parks, national botanical gardens and marine resources.[109] With respect to fresh water resources, the task to regulate the legislative framework governing water resources has been given to DWA and CMAs (to the extent that these have been established and allocated functions).

The legislative mandate and executive authority around regulating the environment, pollution control, and nature conservation, however, is a task that is shared concurrently between national and provincial government.[110] Thus the task to monitor and enforce against violations of NEMA falls to the Department of Environmental Affairs and their provincial counterparts.

The Constitution also allows for local government to pass laws and regulate around many environmental issues, subject to national and provincial oversight[111], including air pollution, storm water management systems, water services, sanitation services, control of public nuisances, solid waste disposal, and municipal planning.[112]

This vertical allocation of responsibilities to manage natural resources between three levels of government can cause major challenges around integrated environmental management, including water resources. In addition, within each sphere of government, different departments have overlapping competencies around environmental management issues. These overlapping mandates can lead to what experts refer to as **fragmentation.**[113] Nel and Kotzé explain:

> Environmental governance is fragmented horizontally as mandates are vested in separate, autonomous line functioning organs of states and vertically with environmental governance mandates

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[106] For a comprehensive discussion of Section 24, see Kidd, ibid; Glazewski *op cit* note 14.

[107] Other substantive and procedural rights related to the protection of water resources and enforcement include equal protection and benefit of the law (Section 9(1)); non-discrimination (Section 9(3)); privacy (Section 14); access to information (Section 32); just administrative actions (Section 33); and disputes that could be resolved by the application of the law decided in fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum (Section 34).

[108] See Constitution, sections 44 and 85, and Schedules 4 and 5.

[109] Frances Craigie, Phil Snijman & Melissa Fourie "Environmental compliance and enforcement institutions" in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009) § 2 p 67-9.

[110] Ibid. For national concurrent competence (see s 44 (read with Schedule 4) and s 85 of the Constitution) and for provincial concurrent competence (see s 104 (read with Schedule 4) and s 125 of the Constitution).

[111] See s 155(7) read with Schedule 4 (part B) and Schedule 5 (part B) of the Constitution

[112] Section 156 read with Schedule 4 (part B) and Schedule 5 (part B) of the Constitution.

[113] Johan Nel & Louis Kotzé, 'Environmental management: An introduction' in Hennie Strydom and Nick King (eds), *Environmental Management in South Africa* 2 ed (2009) § 1.4.1.1 p 18.

> shared between the national, provincial and local spheres of government. Fragmented structures result in disjointed decision processes that culminate in un-coordinated and often duplicated governance efforts and instruments such as policies, legislation, processes, authorisations, requests for information, and tools.[114]

Fragmentation can occur on three grounds: institutional, legislative, and inter-sectoral.[115]

The Constitution, to address the negative impacts of fragmentation, requires a high level of **cooperative governance** between vertically and horizontally overlapping mandates.[116] Section 40 recognises that the three spheres of government (local, provincial, and national) are interdependent and interrelated. Section 40(2) further recognises that all levels must adhere to the principles of cooperative government and intergovernmental relations set out in Chapter 3 of the Constitution, and that all spheres must conduct their activities within the parameters set out by this Chapter.

Section 41(1)(f) is relevant in this regard, and requires all spheres of government to, among other things, co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another[117]. All of these requirements have important implications on how various spheres of government coordinate their regulatory actions around the environment, including water resources.[118] As will be discussed in Section 7 below, the lack of cooperative government is a major theme participants in this research have raised related enforcement and water resources.

4.4.2. Administrative measures related to enforcement and water resource management

South Africa has promulgated various framework legislations that provide for administrative measures to deal with non-compliance with environmental laws. This includes the NWA, NEMA, the MPRDA, the Conservation of Agricultural Resources Act (CARA), Act 43 of 1983. In addition, administrative measures related to enforcement are subject to the Promotion of Administrative Justice Act (PAJA), Act 3 of 2000.[119] A detailed overview of enforcement provisions within these acts was conducted as part of the foundational research for this project discussed in Chapter 3, and a compendium of enforcement provisions presented in **Appendix 2**. Readers are also referred to literature on this topic.[120]

4.5. A preliminary assessment of the state of enforcement against violations of the NWA in South Africa

DWA gave a presentation to the Parliamentary Portfolio Committee on Water and Environmental Affairs (PPC WEA) on August 11, 2010, where it outlined the status of the compliance monitoring and enforcement (CME) under the NWA. At that time, a CME unit (also known as the Blue Scorpions) had been set up and was compromised of 20 staff with 30% located in the National Office focusing on

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[114] Ibid.

[115] Ibid.

[116] Ibid § 1.4.1.1 p 19-21.

[117] The last requirement, to avoid legal proceedings against one another, is addressed in one of the legal sub-project's case studies that focuses on criminal enforcement as an option to regulate the unlawful discharge of sewage waste by municipalities.

[118] The legislature has passed the Intergovernmental Framework Relation Act 13 of 2005, as a means to facilitate cooperative government and resolve inter-governmental disputes. See discussion in Chapter 5 below.

[119] See Kidd, op cit note 14 for a detailed discussion of PAJA within the environmental law context.

[120] See e.g. Thompson, op cit note 105.

enforcement, and 70% deployed in the Regional Offices that would focus on compliance monitoring.[121]

DWA outlined various challenges facing the CME unit, including aligning regional and national functions as well as role clarification, drawing up requisite capability requirements, and moving from fragmented regulatory functions to consolidated functions. In addition, DWA noted that no enforcement action could be taken against farmers until the verification process was complete. DWA outlined some efforts in place to address these challenges.[122]

According to DWA, as of June 2010, the CME unit had issued 264 pre-directives for illegal water usage by mines, the agricultural sector, Water Service Authorities (WSA), the industrial sector and other sectors. For the same period, 97 directives were issued, 7 cases were taken to the Water Tribunal and there were 23 criminal cases against illegal water users. DWA also explained that the highest illegal usage of water was for irrigation. For example, DWA estimated that 180 million cubic metres of water was used illegally in the Upper Vaal catchment per year.[123]

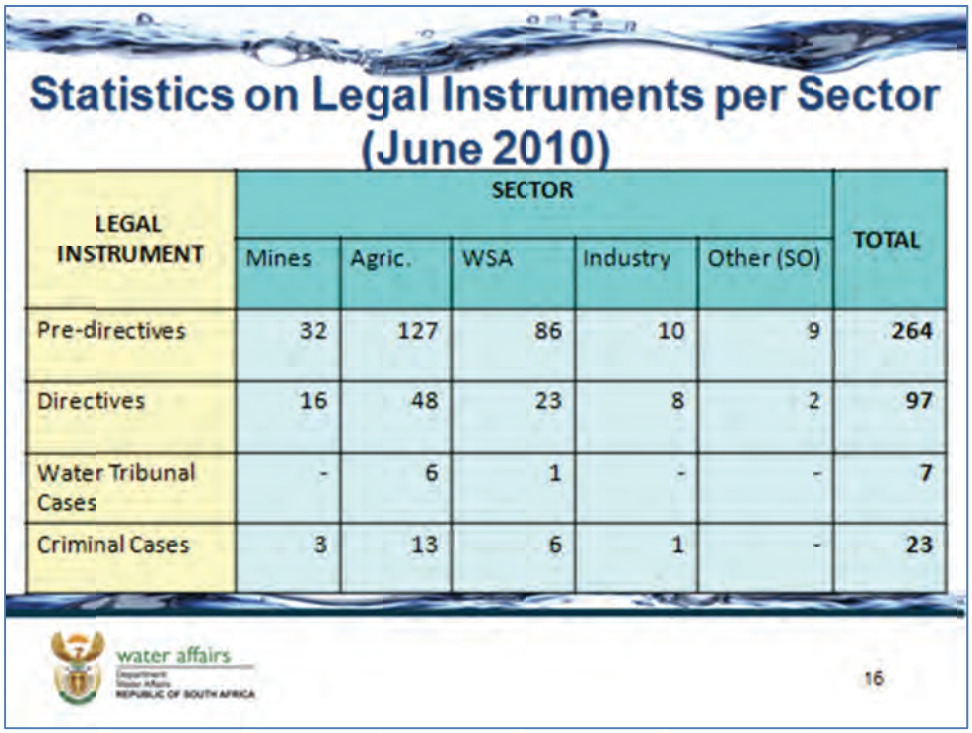

Table 1 – Statistics of DWA enforcement actions taken as of June 2010 (DWA 2010)

DWA explained that many mines were operating without water licences and regulation of those mines was restricted to those operating but waiting for water licences. DWA made clear that stronger cooperation was needed with the Department of Mineral Resources (DMR), and that the CME unit was taking a tough stance and instituting legal action against mines.

DWA also raised the issue of dealing with municipalities who violated the NWA. It stated that if commitments and undertakings by the municipalities were not honoured, DWA would move to the next step, including pursuing criminal prosecutions. One participant in this project has informed AWARD that the Blue Scorpions have pursued nine criminal cases against municipalities in the Free State, and DWA is bringing other cases in Mpumalanga.

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[121] Parliamentary Portfolio Committee: Water and Environmental Affairs (PPCWEA) Official minutes from DWA presentation on CME Unit by Mr. Helgard Muller, Acting Chief Director: Regulations (11 August 2010).

[122] Ibid.

[123] Ibid.

Kotzé has also outlined several major challenges facing environmental enforcement in South Africa.[124] Although his analysis is around environmental enforcement generally, the issues he raises are relevant to enforcement of the NWA. He sets forth three major challenge areas relevant to the South African context: legislative and institutional fragmentation; over-bureaucratisation of the human element of governance; and capacity constraints.[125]

In terms of legislative fragmentation, Kotzé refers to the variety of laws that overlap around environmental governance, including NEMA and its related legislation, NWA, and the MPRDA. The result is a non-integrated environmental regulatory framework that has tremendous implications on enforcement.[126] As Kotzé explains, the "partial reliance on silo-based and media-specific regulation has clearly undermined the entrenchment of holistic and integrated compliance and enforcement efforts in South Africa."[127] In addition, he also refers to institutional fragmentation where various actors from different institutions are responsible for enforcement of environmental related violations, including DWA, DMR, and Environmental Affairs.[128] Kotzé provides that "although attempts have been made through NEMA to harmonise environmental compliance and enforcement in South Africa, these efforts have been only partially successful, since key sectors, most notably mining, water, forestry, agriculture and heritage, remain subject to distinct governance regimes and institutions".[129]

The over-bureaucratisation of the human element of governance is also a major challenge facing enforcement in South Africa. According to Kotzé, this challenge has various elements.[130] The recognition of the "human element" in governance means that the manner in which laws are implemented by individuals can contribute significantly to implementation and compliance inefficiencies. Issues arise from the manner in which public officials wield power, which often lead to an abuse of their positions. This can lead to many problems, including the practice of 'turf protection' which Kotzé describes as "as a situation where 'a bureaucracy sets an exaggerated value on the maintenance of the institutional scheme of which it is the guardian, while the individual member of the bureaucracy magnifies his/her own function within it and is jealous of any encroachments by other functionaries'"[131]

Capacity constraints refer to the lack of financial and human resources necessary to adequately implement legislation and policy.[132] Some issues include the lack of confidence and competence to make decisions, the high turnover rate of personal resulting in the loss of institutional memory and adequately experience staff, the lack of staff and financial resources.[133] Lack of capacity may also result in inadequate consultation and communication between government departments and within government departments.[134]

As the next section indicates, participants in this research raised many of these issues.

4.6. A summary of issues participants identified during interviews

The research team completed 17 interviews with regulators from the following government departments: Department of Water Affairs (national and regional), Mpumalanga Department of Economic Development, Environment and Tourism (DEDET), Department of Agriculture (DoA),

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[124] Kotzé, op cit note 51 §5 pp 109-17.

[125] Ibid.

[126] Ibid §5.2.4 pp 112-14.

[127] Ibid §5.2.4 p 112.

[128] Ibid §5.2.4 p 114.

[129] Ibid.

[130] Ibid §5.4 pp 114-16.

[131] Ibid p 115.

[132] Ibid §5.5 pp 116-17.

[133] Ibid.

[134] Ibid.

Incomati Catchment Management Agency (ICMA) and the National Prosecuting Authority (NPA). A list of those interviewed was provided as part of deliverable L3 of the legal component.

In addition to the above participants, the research team attempted to include participants from the Department of Environmental Affairs, the Department of Mineral Resources, and the South African Police Service. This has proven somewhat difficult. After AWARD made several unsuccessful attempts to get DMR to participate in the research over the course of 2010, DWA regional office was able to organise a meeting with DMR Mpumalanga regional manager in Witbank on 30 September 2011. At that meeting, the regional manager told AWARD that AWARD would need to write a letter to the Minister of Mineral Resources requesting DMR to participate in the research. AWARD decided that such a request would unlikely result in DMR's participation. After several attempt AWARD was able to meet with the national Department of Environmental Affairs Green Scorpion Unit on 30 November 2011; however, at that point it was too late to include them in the legal sub-component. The Green Scorpions will likely be involved in the collective action sub-component. Finally, the main challenge with respect to SAPS is that there is no unit or individual responsible for environmental crimes. Thus it is difficult to find an appropriate participant who can represent the SAPS.

The remainder of this section will review major themes participants have identified. They include challenges to adequate enforcement, the most desirable outcome for enforcement, priorities around enforcement, those who are allies to adequate enforcement, those who are in opposition to adequate enforcement and a discussion of NWA design defects.

Unless quotations are included, the text reflects paraphrased responses from notes taken during the interviews. Because the project team did not want to use tape recorders (see discussion in Section I), only a few quotations are reflected in the interview notes. Moreover, duplicate responses are not included to the extent that they overlap. For example, many participants raised the theme of lack of coordination, and the discussion below is an amalgamation of multiple responses around that issue. In other words, the analysis does not seek to weigh the issues in terms of importance or number of participants who identified the issues. Although such an analysis would be useful, it is beyond the scope of this report.

4.6.1. Challenges to adequate enforcement

Figure 5 presents a summary of the main issues participants identified, where the top rows represent the major problems that stakeholders identified, while the bottom row represents some proposed solutions identified.

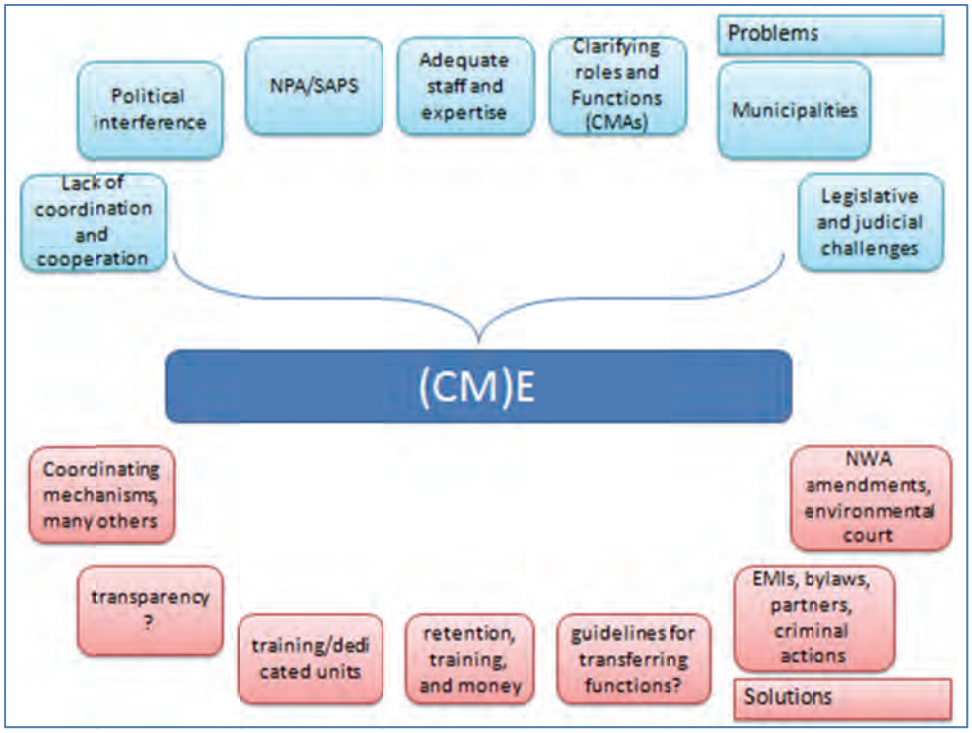

Figure 5. Summary of problems and solutions related to enforcement identified by participants

Each of these and others are summarised below.

4.6.1.1. Cooperative Government and fragmentation

- *Better coordination with the NPA early on in investigations.* If a case comes early enough, then a lot of issues can be timely addressed. There is a difference between looking at a case from a prosecutor's point of view and from an inspector's point of view. An inspector may be looking at it from a compliance point of view which is not enough to bring a criminal case because the standard of proof is much higher. Also, there is some information that is critical to preparing a good case. The following real life example was given: A municipality is pumping sewage into rivers and also another person operating a butchery/slaughter house along the river and releases some waste into river too. In this case, water sampling immediately is necessary to show linking the pollution to the root cause. If you wait 10 days, there could be intervening activities or things, **so time is of the essence. If DWA engages with the NPA early, the NPA will tell DWA these things.** In this particular case there were no immediate samples, so the NPA could not prosecute.
- *Lack of coordination between departments around enforcement.* There is little coordination between agencies, particularly DWA, DEA, Agriculture, and DMR. Although there is some level informal coordination between some agencies, for the most part, each is doing its own thing. The following are some specific issues under this theme:
  - "Almost everything we enforce involves water affairs"
  - *Consolidation of departments.* There is a need to consolidate DMR, DEA, and DWA into one group.
  - *Overlapping legislation.* Many participants discussed this issue. For example, Agriculture mentioned there is tremendous overlap between NWA and CARA around wetlands, dams, disturbance of virgin soils, and development in flood zones and buffer areas.

- *Lack of communication around investigations.* Participants gave many examples of a lack of communication around violations that implicate multiple departments and require coordinated action.
- *Need for regular meetings between departments.* This was offered as a solution to coordination issues.
- *Need for more formal channels of communication.* Relations often fall back on personal contacts. For example, one participant mentioned he has a friend who works in national treasury in the division of water. This would be a connection he would not have if it was not his friend, although it is critical to his enforcement functions.
- *Strong informal network in absence of formal channels.* One participant from DWA said there have been 23 joint operations with other enforcement agencies, unofficially and without MOUs. "We cannot wait to formalise these things".

- *Coordination with DWA.*
  - *Red Tape/internal structure.* Participants identified as a problem that DWA is not dealing with one person at DWA. Once a case is reported to DWA from another department, for DWA to take any action they must go through a chain of red tape before they can get involved. This causes significant delays and often can jeopardise investigations where one department is relying on water sampling expertise from DWA to build case.
    - One participant from DWA expressed concern about needing to get national approval before proceeding with criminal cases.
  - *Internal structure.* It was suggested that the Director of CME in regional office should report to the CME national office, not the regional director.
- *The need for MOAs/MOUs between departments*. This would help because they are working informally, and often in silence.
  - A MOU would go a long way to identify overarching legislation and overlapping mandates. It would also help clarify what role each agency will play around authorisations and enforcement where there is overlapping mandates.
  - The example of **virgin soils** was given by Agriculture. In one case, an inspector from Agriculture gave a stop work order until the individual had a water use license and a NEMA authorisation. However, DEA said no authorisation was necessary, without consulting Agriculture, effectively undermining the order. In the end, DEA acknowledged that the decision was erroneous.
  - Another example was given where Agriculture and DEA came up with separate lists of invasive plants without coordination.
- *Need for coordinating body/individual, or a high level intergovernmental forum.* Many participants recommended that a body or individual serve to coordinate between the major departments (DEA, DoA, DWA, DMR) to identify overarching legislation and mandates, and to come up with protocols to handle issues that implicate overlapping mandates.
- *Flaw in the authorisation process.* Basically, the authorisation process is not coordinated between various departments, leading to violations. Often times a person will get an environmental authorisation under NEMA that is conditional, e.g.it requires the person to get NWA authorization. However, DEA does not inform the people that they need other authorizations before they can proceed, nor does it inform other agencies that an activity has been authorized that needs further authorizations. People are under the belief that the environmental authorisation is a green light. Unfortunately, these activities often proceed without enforcement because there is a lack of authorization.
- *Department of Mineral Resources does not cooperate.* Participants gave several examples around issues with DMR:

- They issue mining rights and ignore water affairs.
- A misalignment between MPRDA and NWA priorities. “They are pitting job creation against environmental protection.” “Let’s not pollute the environment for the sake of our economy”.
- Political interference is high around mining. “We get a call saying to back off”. Sometimes you get politicians ground breaking mines that do not have EIAs, setting a terrible example.
- “We have not relation with DMR”
- “They are totally disengaged and never return our calls”

- *Need for joint prosecutions.* Some participants recommended that an environmental advocate or lawyer to represents multiple agencies to sit in the middle and coordinate prosecutions.
  - One participant gave the example where he had prepared an affidavit listing out all of the violations against an alleged perpetrator under NEMA, NWA, and CARA and handed it over to the prosecutor. Even the prosecutor agreed with the affidavit and the alleged violations, and was willing to proceed, but two relevant departments did not come to the table and he could not proceed, thus stalling the case.
- *Public works.* One participant mentioned that this department has a huge environmental impact because they build roads without any thought to the environment.
- *OLLI as an example of coordination.* The Olifants, Letaba, Levuvhu, Inkomati water and environmental oversight forum has been suggested as an ideal type of forum to better coordinate governmental action, particularly overlapping mandates and enforcement issues.
- *A lack of familiarity with overlapping laws.* One participant from Agriculture gave an example that there was a lack of NEMA understanding among Agriculture staff. There needs to be more communication between Agric and DEA to understand the new NEMA regulations and to clarify issues around their applicability and their overlap between their respective mandates.

4.6.1.2. Adequate staff

- *Not enough CME in DWA Regional offices.* In Mpumalanga, there are currently two CME inspectors, and two trainees. “This is completely inadequate”.
- *Failure to occupy open posts that are funded.*
  - Most post are empty and not being filled.
  - The process is long and takes time.
  - The OSD system is too rigid, and sets out minimum criteria for posts that exclude otherwise qualified personnel. An example was given of a trainee who had a national certificate, but not a BA, but in the opinion of the interviewee the trainee was fully qualified. The failure of the system is driving competent people away and frustrating current employees into the private sector where pay is more substantial and the workload is manageable
- *Retention.* Many agreed that their needs to be better salary packages and better incentive systems. A large proportion of staff leave to private sector, particularly mining.

4.6.1.3. Lack of Expertise

- *Technical staff.* The need for technicians for monitoring to support investigators
- *Legal staff.*
  - Lack of legal support around many issues, including gathering evidence, understanding laws, and preparing cases.

- One participant said that there are few good water advocates in the country and that if violators get them on their side they will win their cases. “Technically Water Affairs can’t win”

- *Criminal investigators.* We don’t have these.
  - *Hiring ex-prosecutors.* This has been suggested as a means to help CME start criminal cases. For example MOUs can be created to give them special delegations to start criminal cases.
- *Environmental scientist*
- *Surveying technicians*
- *Experts for legal cases*

4.6.1.4. Prosecutorial capacity and will

- *Lack of prosecutions.* Many participants said that there are very few prosecutions coming through the NPA around NWA violations.
- *Environmental crimes secondary to other crimes.* Up until recently, the NPA did not take environmental crimes seriously, and it was given a secondary status to other crimes, such as murder, rape, and robbery.
- *Unfamiliarity with environmental laws.* Almost all participants agreed that generally lawyers are inexperienced around environmental law, including the NWA. Prosecutors do not feel that they know enough about environmental law to undertake adequate prosecutions. Often the prosecutors have to be coached on the statutory rules and regulations in order to present a complete case.
- *Lack of training around NWA.* Although there is training through the Justice College around environmental laws, there is a lack of focus on NWA issues. This area can be improved greatly. “There is a big challenge with local prosecutors around their knowledge of the NWA.” “NPA does not understand the laws, the training is weak”. “There is a lot of room for growth” “One week course is not enough” “Rather have one week modules on specific issues, e.g. water”
  - *Regional workshop.* Participants identified this as very important.
  - *Training should also incorporate on-the-ground exposure.* Field visits, seeing unlawful use, etc…
- *Apprehensive to take cases:* Prosecutors are scared to take cases that implicate environmental laws because they are unfamiliar with the law.
- *Poor communication.* Examples were given where prosecutors made decisions around cases without consulting the department client.
- *Rotation of senior attorneys in the NPA*. Unit directors are rotated after several months, thus preventing continuity.
- *Example of a criminal case gone wrong* (provided by multiple participants). A farmer had built multiple dams on his property thus effecting downstream users. There were two charges: 1) a failure to comply with a directive; and 2) an unlawful section 21 water use. The case was eventually referred to the local prosecutor who had no knowledge of the NWA. Without any consultation, the local prosecutor settled the first charge with the farmer for R500. DWA heard only from hearsay or word of mouth, as the local prosecutor did not inform DWA. At this time, DWA approached the NPA national office responsible for Mpumalanga and got them involved. Thankfully, the local prosecutor had not settled the illegal water use charge, and after consultation with the NPA and DWA, the local prosecutor has agreed to prosecute.

4.6.1.5. Justice System

- *No Justice.* “There is no justice done in any cases I have touched”.

- *Need for an Environmental Court*. Many participants were dismayed that the environmental court has been delayed or stalled, and it was an almost unanimous belief that his court is necessary.
    - *Important initiative.* "This is an important initiative and it will greatly help enforcement". "Court is necessary". "Regular courts are full" "Environmental court might help with political interference"
    - *Various reasons given for its delay.*
        - *Lack of guidelines:* Justice said at last minute that the Court needs guidelines before it can proceed.
        - *Inadequate docket:* Justice has allegedly said that there are inadequate cases or dockets to justify the creation of the court.

4.6.1.6. SAPS

- *Lack of police powers in DWA.* DWA does not have police powers, so the docket in criminal cases is handled by SAPS. This requires inspectors to work with the police, "but police do not do anything as such". DWA inspectors need full EMI powers.
- *Lack of expertise around environmental crimes in SAPS.* There is a capacity issue with the police and to expect them to have environmental expertise is too much. "There needs to be a dedicated forum" or unit.
    - A lot of work to convince SAPs to bring criminal cases because they do not yet understand that NWA violations are criminal.
    - There is a lack of understanding around the NWA and environmental laws generally.
- *Training around NWA.* There have been isolated workshops from Regional office, but there should be many more.
- *SAPS do not take environmental crimes seriously.* Other crimes hold much more importance to SAPS, such as murder, rape, and theft. SAPS is not prioritising environmental crimes. "I don't know whether [environmental crimes'] are an irritation".

4.6.1.7. Irrigations boards

- *High amount of unlawful use.*
    - Needs to be a focus on Irrigation boards because they do not feel that they are subject to the NWA, but the previous water laws.
    - And this is difficult to deal with because of missing records, and investigators feel intimidated.
    - Difficult to take action against without verification process complete.

4.6.1.8. Delays in the authorisation process

- *Licensing delays impacts enforcement.* Delays in authorisation creates a lot of secondary issues around enforcement.

4.6.1.9. Missing records

- *1956 Act.* There are many records missing of authorisation for users under the previous water act (historical records). This has proved to be very difficult in terms of enforcing violations of the NWA because there are no records to monitor use or to verify existing lawful users.

4.6.1.10. Mentality of impunity

- *You can get away with unlawful use.* Some participants referred to a perception that the regulator will not enforce against unlawful water use, or that enforcement will result in a slap on the wrist. People know that if they engage in unlawful water use they probably will not

get caught. This mentality must be changed, otherwise illegal water use will continue without repercussion.

4.6.1.11. Political Interference

- *Investigations stopped.* "We cannot open criminal cases because of political interference. Cases get stopped from above".
- *Particularly around mining.* Where high level politicians are involved, it is difficult for inspectors to take action.

4.6.1.12. CMA issues

- *Transfer of staff from DWA.* This is an issue and taking too long. From a participant within DWA: "This has become a very personal issue. CMA is new and established in only some regions. But there is insecurity around moving staff over"
- *Delay in transferring functions.*
    - There is a lot of hesitation from DWA side to transfer functions through assignment or delegation, which results in a CMA that is not fulfilling its intended mandate under the NWA.
    - Some participants do not think CMA can issue licenses and also enforce against unlawful use. Section 19 enforcement is not seen as a problem.
    - There is disagreement within DWA over what functions should and should not be transferred.
- *Assignment v. Delegation.* Few people understand the distinction between assignment and delegation, or understand the extent of CMA powers under the NWA.

4.6.1.13. Municipalities

- *Common perception that municipalities are the biggest transgressors.* "Municipalities are the biggest transgressors". "If we can start with them we can go a long way". "I don't see any other bigger transgressors".
- *Effect of unlawful use on water quantity, not just quality.* A looming crisis is manifesting around water quantity, not just quality, as a result unlawful municipal water use. Some concern that DWA is granting licenses without understanding the big picture around sustainability. One participant gave the example that there are seven illegal municipal water works in Bushbuckridge Municipality.
- *Ambiguity around whether municipalities can be criminally prosecuted*. Although most participants identified municipalities as a major violator of the NWA, there is a lot of disagreement as to whether the cooperative government principles in the Constitution and other laws allow for national and provincial government to bring civil and/or criminal law suits against municipalities.
- *Untouchable.* At least one participant said that municipalities are untouchable for political reasons.
- *Can play a bigger role around environmental protection.* Municipalities have a mandate to address waste management and air quality, but very few of them know it and/or fulfil it.
- *Lack of information.* It is very difficult to get information from municipalities. "We write to the Mayor, but at the end of the day we do not get a response."
    - You find that they change the land use without telling us.
- *Need more dedicated environmental officers.* This can help them comply with the law better, and also help enforce against environmental violations within their jurisdiction.
    - *Trained EMIs.* It would be helpful if municipalities had trained EMIs.

- *Not engaged*. Examples were given were departments held workshops, but only one or two representatives from the municipality would attend, if you were lucky.

4.6.2. Priorities around enforcement

- *A formal body, unit, or individual to coordinate integrated actions between departments.* As already mentioned, many participants said that a formal unit or an individual should sit between the major departments undertaking environmental enforcement to facilitate coordinated action. This would help with information sharing, coordinating inspections, enforcement actions, and prosecutions, and help with overall planning and communication.
- *Development of protocols and procedures around enforcement.* Some participants mentioned the need to develop and refine procedures around tasks relevant to enforcement.
- *Training*
    - *Training for investigators in relevant fields:* E.g. mining, local municipalities, agriculture. "We need specialist and defined roles"
    - *Training of prosecutors and SAPS*. There has been some informal regional trainings, and when there is a case, DWA helps the prosecutors, but this needs to expand greatly.
- *Alternatives to enforcement.* The exploration of alternatives to the directive route, such as the use of incentives.
    - *NWA section 53* is also being explored more. This would allow DWA to rectify an unlawful use and then seek compensation.
    - Regulators must start to engage in *awareness raising programmes*. The perception that it is for their benefit to comply must be spread.
    - *Offset programmes:* These are often the best alternative for mitigation.
    - *Understanding all the tools that NWA provides:* Many participants explained that they are still trying to learn about the options available under the NWA and how far they can be taken.
    - *Asset forfeiture as a tool.* One participant raised this as a potential tool that can be used.
- *Building confidence.* This refers to changing perceptions regulators have around confidence in the regulatory process. One participant explained that regulators are still in the mindset of NOT taking people to court because they do not think they will win or they think it is too difficult. If regulators start to see heavy fines are being given by courts, it may change the perception of the overall regulatory strategy. "It will make regulators realise they can bring cases to court and succeed".
- *Getting more staff.* All participants across the board mentioned the need to have more staff (see discussion under challenges).
    - *Legal staff:* "we need to strengthen our legal staff, particularly around enforcement"
    - *More staff in DWA regional offices:* only two regions have CME structures in place.
- *Expanding into other institutions.* CMA, local government, Chamber of Mines – how do we use them? "self-regulations can play a key role"
- *Buy-in from top management.* "**the oomph is not there**". The dynamics very high up needs to change.
- *Communication with public.* This is not there in DWA around CME. CME would like to see a media office within DWA dedicated to CME issues.
- *Creating public awareness of environmental laws.*

- One participant said that a lot of emerging farmers in particular are unaware of legislative requirements.
- A need to make difficult laws more accessible to non-lawyers and formally un-educated people

- *Prevent crisis:* Participants talked about the need to accelerate efforts to prevent crisis. "**I have made serious commitments and I am embarrassed because I cannot meet them".**
- *Focus on mining.* This is based on the outcry on acid mine drainage and the national assessment question from parliament which asked how many mines are operating without a license, which showed that 50% of unlicensed mines are operating in Mpumalanga. Target is to inspect 40 mines by March 2012.
- *More criminal cases.* Increase the number of cases brought by DWA.
- *Capacity*
  - How to better retain staff, using incentives and other means.
  - A need to streamline the hiring process to fill the many vacant posts.

4.6.3. The most desirable outcomes for enforcement

- *Changing* behaviour. You cannot do what you want but need to use water properly or face the consequences. There needs to be a change in attitude, practice and thinking.
  - *Traffic as an example.* One participant gave traffic fines as an example. People are all aware of traffic violations.
- *Compliance.*
  - Overall it is very dangerous to put in a figure. "Ideal is to have very little water pollution into water resources"
  - "Get a compliant society"
- *Self-regulation*: how can we promote this?
- *Sustainable Development:* "**We can achieve this because the legislation is good. We need to change the perception around sustainability. We need to promote a green economy".**
- *Flexibility*: sometimes a letter may suffice to get compliance.
- *Restoring respect for the environment*

4.6.4. Allies to enforcement

- *Other departments*
  - *All departments:* "Except maybe education".
  - *Environment*: NEMA pollution control and NWA are overlapping mandate.
  - *Agriculture:* "Agriculture needs to be an important ally".
  - *Mining:* If they can be greener in their action. Overall not a great relation, but integral.
  - *SAPS:* see discussion above.
  - *ICMA:* see discussion above.
- *Communities.* They are in the best position to know what is going on in the rivers and the land. "They can serve as a watchdog"
- *Trade Associations.* Chamber of mines, SALGA, AgriSA. They feel the brunt from their users. Sometimes there needs to be negotiations. One participant gave the example in Vele, DWA

was approached and asked to make a license condition easier because compliance was nearly impossible. CME can make recommendations based on these interactions.

- *Research organisations*. There needs to be more work done with them, like the CSIR, AWARD.
- *Wetland Forums*. They can inform us of degradation of wetlands.

4.6.5. Opposition to enforcement

- Politicians. High level politicians or politically appointed executive. If we can get their support then we will see compliance. Overall there is a lot of confusion created by politicians, and it cascades down to officials.
- **"***Greenies***"**: One participant expressed uncertainty as to the agenda of "greenies". The participant questioned whether it was a good or bad relationship, as they seemed to be creating an "us against them" relationship.
- *NGOs if they do not seek to consult and cooperate before taking further action*. They should primarily serve as a watchdog organisation, but they do not always consult with CME, and often first go to the media. "In some instances, they are completely undermining our work".
- *DMR* – see generally the discussion above.
- *Organised Agriculture.* With any change in management, there is a fear that it will threaten livelihoods.
- *Municipalities.* See generally discussion above.
- *Traditional Authorities.* They can be difficult to work with on communal land.
- *Authorisation process within DWA*. "people have gotten impatient and decided to continue and the Department is supposed to ensure compliance with regulatory tools. So you have a bit of conflict here".
    - *Separate institutions for authorisation and enforcement*? One participant recommended this as a solution.

4.6.6. NWA issues

- *Groundwater.* The link between groundwater and enforcement is unclear. An example was given of a farmer who was using groundwater for irrigation that led to a number of sinkholes. DWA made an application to stop the farming but lost, and now DWA was looking to have the farmer for unlawful water use.
- *Wetlands*. The definition of wetlands is unclear in the NWA. DWA has issued guidelines, but these have questionable statutory force.
- *Fines.*
    - Generally a lack of clarity around when fines can be sought, and how much. There needs to be clear administrative fines associated with violations of the NWA.
    - Whole system of fines needs to be revisited. R150 fine for late registration. There needs to be a redrafting of the regulations around these issues, and until this is done, we cannot do anything.
- *Section 53.* Although this allows DWA to take action to redress unlawful water use where the user is not acting, it causes problems if there is a pending license application that soon gets granted thereafter. For example, DWA will remove a borehole only to have the application approved and the borehole replaced again. It seems inefficient. [note: should there be a means to exclude a user from applying for a permit for select period of time if DWA has taken action against them under section 53.

- *Section 33 (existing lawful use).* At least one participant said that sometimes when DWA gives notices under section 53(1), users say DWA cannot initiate charges because the verification process is incomplete. This needs to be clarified.
- *Burden of proof.* It is on DWA to show unlawfulness, but at least one participant said it should be on users to prove that it is lawful.

4.6.7. Some concluding remarks about the interview phase

Overall, participants provided a vast amount of issues and information regarding compliance monitoring and enforcement. Many of these issues are well known to researchers, such as issues around enforcement and fragmentation (see discussion in section 3 of this Chapter), competency, and capacity, while others are emerging issues, such as the roles and responsibilities of CMAs within the enforcement process, or the most mutually beneficial relationship between civil society organisations and government regulators.

Interestingly, participants offered no shortage of solutions to many of the problems, most of which if implemented earnestly would solve the issue at hand.

From an outside observers' point of view, the research process was at times frustrating. This is because it is apparent that there are many competent and hard-working regulators who simply are overworked and overwhelmed by the scale of the problem. What's more, regulators have a clear sense of what they think are problems and solutions, and much of what participants from one department identified as issues and priorities are in line with what participants from other departments identified. This begs the question: *If there is so much agreement, why can't these individual come together and tackle these issues as a collective?* Answering this is essential, and the collective action component of SRI 2 is devoted to understanding this difficult issue. The next section overviews the first workshop held as part of the collective action component focusing on enforcement, and it seeks to begin the process of addressing this question.

4.7. Reflections on the24 November 2011 workshop

The 24 November workshop was held in DWA regional offices in Nelspruit. The workshop was conducted keeping in mind the social learning model, in that it was first and foremost an opportunity mirror back and review how participants had responded individually during the interview phase. Participants were confronted with other stakeholder perceptions around the challenges to enforcement, obstacles, allies, and priorities moving ahead. Participants engaged a several activities designed to deconstruct the issues in order to set the stage for potential collective action. A summary of activities are discussed below. A full summary of the workshop is presented in **Appendix 4.**

4.7.1. Workshop participants and expectations prior to the workshop

Stakeholders from several government departments who are involved in enforcement activities related to water resource management attended the 24 November workshop, including from DWA head office (CME), DWA regional office, Mpumalanga (CME), DEDET, DoA, and the ICMA. Not all the participants in the interview phase were able to attend, although representatives from their respective departments did attend. In addition to government, one participant worked at Sembcorp, a private corporation that provides water services on behalf of Mbombela Local Municipality. AWARD had four team members present. Representatives from the NPA who participated in the first phase of the project could not attend.

Prior to the workshop, AWARD contacted various participants to ask them what they would like to achieve considering that their colleagues from various sister departments engaged in enforcement activities would be present. The main theme that all participants raised was to have a tangible outcome addressing inter-departmental cooperation and coordination around overlapping enforcement mandates.

4.7.2. Activities during the workshop

The main activities in the workshop revolved around group exercises. First, participants were asked to each present an example of a case where enforcement was problematic. Cases were then

compared and discussed. In addition, AWARD introduced the idea of systems thinking to help understand the underlying causes for the issues that come up related to enforcement. To take lack of coordination as an example, AWARD explained that we could not think of lack of coordination in isolation, but need to think of how it is connected with other issues. In other words, linking the lack of coordination to poor enforcement ignores that it is not a direct cause and effect relationship. Without understanding the system as a whole, there will be no meaningful actions to address the problem.

The remaining group exercises sought to have participants delve into understanding the root causes for lack of cooperative government and to thus start the process of collectively planning action. Participants undertook the "5 whys" activity, focusing on cooperative government. Participants had to start by asking themselves why there was a lack of cooperative governance, and then to continue to ask why for each additional reason that they came up with. Finally participants were asked to devise solutions addressing the issues they identified.

The workshop closed with the group collectively trying to formulate some action plans to address the lack of cooperative government issues they identified, including appointing individual stakeholders to take a lead with respect to specific actions.

4.7.3. AWARD's reflections on the workshop

This section reviews AWARD's reflections on the workshop, both in terms of substantive issues and procedural issues.

4.7.3.1. Common themes from the case examples

The main theme that participants raised throughout the workshop was around the lack of cooperative governance. For example, in all of the case studies that the stakeholders presented, the common issue was a lack of cooperative governance, often in term of a lack of coordination. This was not always between departments, but also within departments – as in the case of the case study presented by DWA where the department issued a directive without taking into account the input from the inspectors – and between spheres of government, where the local municipality was often identified as obstructing adequate enforcement.

This is also consistent with participants' expectations for the workshop. Representatives from all the stakeholder groups identified that they would like to see some sort of solution to address poor cooperative governance from the workshop.

In addition to cooperative governance issues, participants gave many examples of incompetence. This included an example given by DoA where the junior inspector failed to ascertain that having a water use authorisation for one use does not mean other section 21 uses are legal. In addition, DWA head office gave the example of issuing a directive without issuing a pre-directive.

Participants also identified problems with the NPA. In an example DEDET raised, the NPA did not have a good understanding of environmental laws, and it also undermined DEDET by settling the case against DEDET's wishes. DWA regional also provided an example of the NPA having little competency around environmental laws and settling a case for very little money without consulting with DWA.

4.7.3.2. Participant's expectations

In general, it is clear from participants' comments prior to the workshop that they had very high expectations. Expectations ranged from having a signed memorandum of agreement between environmental affairs and DWA to having working procedures. Not enough information exists, however, to explain why the participants' had such high expectations. It is possible that AWARD did not manage expectations adequately when organising the workshop or that it did not clearly explain the purpose of the workshop during the course of the project. It is also possible that participants' are frustrated and want to see urgent change. Having a potential platform where colleagues from other departments attend could provide that opportunity.

It was unlikely that one workshop would result in these kinds of initiatives, but AWARD hoped that a process for collective action might begin to address the cooperative governance issue. Although the workshop's outcomes did not reach the level of results that participants' expected, a level of collective

action and forward movement took place. It remains to be seen whether this small momentum will continue.

It is also interesting to note that no stakeholder groups mentioned the need to improve coordination with the CMA prior to the workshop. This is potentially very problematic. As mentioned many times throughout this report (see e.g. chapter 3), the CMA is integral to the management of water in South Africa, and enforcement of the NWA is a key function that the NWA envisions the CMA eventually undertaking. The fact that no stakeholders, particularly DWA, mentioned the CMA prior to the workshop indicates a lack of understanding of the water management framework envisioned within the NWA and NWRS. The ICMA in this instance did not help its cause either as not members from the ICMA who work in enforcement attended the workshop. It is precisely in these kinds of forums where the ICMA must assert itself as a major stakeholder around enforcement of the NWA

Also related to the previous comments, DWA and DEDET did not make any mention of DoA prior to the workshop. Like the ICMA, DoA is integral to cooperative enforcement around water issues because of the importance of protecting wetlands for agriculture.

4.7.3.3. Importance of leadership

For the collective to tackle the issue of lack of cooperation, one or more of the partners would need to act as a leader to steer the effort. It is uncertain whether a clear leader emerged from this process. At one point, participants suggested that AWARD take the lead to address the two possibilities for action that emerged from the workshop. Although, on some levels, AWARD can help to facilitate this process and provide assistance, the collective themselves must lead the way. It is interesting to note, that the ICMA took the lead to explore the option of linking CME to the parliamentary portfolio committee process. This is surprising, because as mentioned, none of the participants from other government departments specifically identified the ICMA as a partner when sharing their expectations.

As mentioned above and in Chapter 3, we believe that the ICMA is the best suited to take the lead in coordinating this effort. The water management regime in South Africa recognises catchments as the unit by which water should be managed. By creating CMAs, the NWA recognises it potential ability to concentrate on the integrated factors specific to a catchment in the co-ordination, development, and implementation of a catchment management strategy.[135] Moreover, as the NWRS and National Water Policy recognise, CMAs will play the key role in establishing co-operative relationships with the wide range of stakeholders in a catchment necessary to effectively implement WRM.[136] In doing so, CMAs will also have greater access to information in their water management areas.

All of these positive elements apply to enforcement issues, and consequently position the ICMA to spearhead the coordination of enforcement efforts between departments. It also will allow the departments an ideal platform to showcase their enforcement efforts to stakeholders in the catchment so that the perception of the absent enforcer observed in SRI 1 will dissipate.[137] Likewise, the ICMA is also ideally situated to tap into stakeholder information regarding unlawful water use.

4.8. Key recommendations and future actions

This chapter has demonstrated that the immense amount of challenges on the road leading to an acceptable level of enforcement in order to protect South Africa's water resources and to enable compliance with the NWA. The regulators themselves have a solid understanding of and agree on the main issues facing them. In many instances they have offered legitimate solutions to tackle these issues.

Nevertheless, it is essential that we approach the problem in a way that places these issues within a systems approach – one that recognises the complexity of the situation.[138] Without understanding

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[135]NWA, Ch. 2; see also Pollard and du Toit *IWRM in Complex Systems*, *op cit* note 7.

[136]See NWRS, *op cit* note 3 at 11, 36.

[137] Pollard and du Toit 2011, *op cit* note 1.

[138] See discussion in section 6, chapter 5.

the underlying causes for the issues that participants identified and how these affect each other, it will be difficult to devise solutions and take meaningful actions.[139] For example, it is not sufficient that lack of prosecutorial will and competence leads to inadequate enforcement, without understanding the root causes of that issue, and how it might relate to other factors that affect enforcement, such as cooperative government or political interference. Thus, efforts should be made to have government regulators undertake a systems analysis related to the main issues that they believe impact on adequate enforcement. This will allow for more meaningful interventions. As an initial example, Appendix 4 summarises a systems analysis that was undertaken as part of the 24 November 2011 workshop related to a case of inadequate enforcement and sand mining in Bushbuckridge.

Moreover, the 24 November 2011 workshop demonstrated that the regulatory enforcement after a short group meeting was able to agree on at least some initial collective action. This highlights the need to continue implementing and testing a collective action approach.

What seemed to stand out most among participants in the research and from the 24 November workshop was the need to create a forum for various departments to coordinate actions and discuss problems and issues related to enforcement. It is unclear whether such a forum needs to be created as a new entity or whether it can be folded into an existing inter-departmental process

In addition, AWARD and the stakeholders who have participated in this project must make a concerted effort to prioritise enforcement issues among senior level policy makers who ultimately will make major management decisions. This can be done, for example, by creating inter-departmental CME forums where senior level policy makers are required to attend.

As mentioned in section 7.3.3 above, we believe that the ICMA must take the lead in a meaningful way to resolve these important water management issues. In particular, this not only entail more recognition of the ICMA as the appropriate organ of state to spearhead this process, but it also requires that the ICMA assert itself more whenever opportunities arise. This may include taking the lead to set up an inter-departmental CME forum for each water management area.

Finally, non-governmental organisation should work more collaboratively with government regulators who often need additional support to fulfil their mandates. For example, one mechanism is to undertake joint research efforts around difficult legal issues through the preparation of case studies and research papers.

[139] See Pollard & du Toit, *IWRM in complex systems*, *op cit* note 7.

5. Case Study: A critical reflection of the criminal prosecution of municipal managers as a means to address the unlawful discharge of sewage using an example from Matjhabeng Municipality

5.1. Introduction

The idea for this case study came about during an interview with Nigel Adams, Director: Compliance Monitoring and Enforcement at the Department of Water Affairs, also known as the Blue Scorpions. AWARD was interviewing him as part of the SRI 2 legal project it is undertaking on behalf of the WRC.

During the interview, Nigel mentioned the need for case studies to reflect on the relatively nascent CME Unit so that lessons learned and experiences are not forgotten in the medium- and long-term. Nigel suggested a potential study to look at the criminal case that the National Prosecuting Authority had brought with the help of DWA and the South African Police Service against the former Municipal Manager of Matjhabeng Municipality in the Free State for the unlawful discharge of sewage from the Odendaalsrus wastewater treatment plant (hereinafter the "Odendaalsrus case"). Nigel believed that this would serve as a good case study because it was the first criminal case of its kind and the benefits in light of the costs associated with it were unclear.

Because the SRI 2 legal project planned to also undertake case studies associated with compliance monitoring and enforcement issues under the National Water Act, it was possible for AWARD to undertake Nigel's suggestion. Nigel and the legal team sketched out an initial list of participants and also agreed on a series of common questions that we would ask each participant.

5.1.1. Objectives of the case study

The objective of the study was jointly developed during a discussion with representatives from DWA head office's CME Unit and Officer Izak Fick from the South African Police Service (SAPS), the lead investigator in the Odendaalsrus case.[140]

The participants agreed on the following objective:

To prepare a case study to document and critically reflect on the criminal case brought against the former municipal manager in Matjhabeng Municipality for the unlawful discharge of sewage from the Odendaalsrus wastewater treatment plant to be used as:

1) a learning tool for the Department of Water Affairs to reflect on this case and to inform the development of future enforcement strategies;
2) a document to demonstrate the complexities and seriousness of the problem surrounding unlawful municipal sewage discharge; and
3) a guiding research document for relevant stakeholders, including SALGA, parliament, SAPS, NPA, other government departments, and others.

It is important to note that the case study does not focus on the legal details of the criminal case, such as the legal arguments made by both sides or procedural decisions, including motions and evidentiary concerns; instead it seeks to understand the benefits and drawbacks of these kinds of criminal cases as means to deal with a very difficult problem that persists throughout South Africa.

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[140] 30 November 2011 discussion with Nigel Adams, Innocent Mashatja, David Thabana (DWA CME) and Warrant Officer Izak Fick (SAPS) at DWA's offices in Pretoria (notes on file) (hereinafter" 30 November group discussion").

5.1.2. Methodology

AWARD sought to develop the case study using a participatory research orientation where the researcher is typically sensitive to the perspectives of others and collaborates with participants to design and/or implement the study.[141] This can take the form of facilitating learning, reflections, and future action. As Patton noted, "a number of approaches have emerged that involve inquiry within organizations aimed at learning, improvement, and development. ... These problem solving and learning-oriented processes often use qualitative inquiry and case study approaches to help a group of people reflect on ways of improving what they are doing or understand it in new ways".[142] Thus the idea is to support a co-learning and collaborative process where stakeholders are part of the research and learning rather than being seen as external to the research. Such a process is likely to bring about changed practice as the learning proceeds by engaging the people in the organisation in studying their own problems in order to solve those problems.[143]

As a result, the participants and AWARD's legal team collectively developed the case study, and the idea was proposed by DWA head office. The participants identified the objectives, engaged in interviews, and commented on drafts. Importantly, many of the recommendations for future actions are based on actions that participants identified.

The case study conducted the following interviews: 1) Nigel Adams, Innocent Mashatja, and David Thaban from the Compliance, Monitoring and Enforcement Unit in DWA's head office (group interview, 30 November 2011, Pretoria; 2) Officer Izak Fick from the South Africa Police Service (30 November 2011, Pretoria); and 3) Advocate Antoinette Ferreira, Senior Advocate, Director of Public Prosecutions: Free State National Prosecuting Authority (e-mail responses, 20 December 2011, and 18 January 2012). In addition, the research team sought to get the South African Local Government Association (SALGA) to participate in the case study as a voice for the local government perspective. However, at the time of writing, SALGA had still not responded as to whether it would participate. Except for Advocate Ferreira who responded by e-mail, interviews were not tape-recorded so as to create a more informal setting. Therefore, the following summaries of the DWA head office and SAPS's interviews reflect notes taken by the research team.

Each participant or group of participants was asked the following questions:

Q. What were your desired outcomes and objectives in bringing the criminal case against the municipal manager in Matjhabeng?
Q. What has gone well?
Q. What has not gone well?
Q. What would you have done differently?
Q. What lessons have you learned?
Q. Who were your biggest allies?
Q. Who was in opposition to what you are doing?
Q. Do you think that you will achieve your desired outcomes and objectives?

Responses from each individual or group is summarised in Section IV by topic.

5.1.3. Roadmap

The case study first reviews the factual context and background leading to the criminal case. In doing so it gives some background around Matjhabeng Municipality and the issue of unlawful sewage pollution generally in South Africa. Section 3 provides a short summary of the legal context surrounding the case, focusing on the obstacles that the cooperative government framework imposes on national government to pursue administrative and criminal actions against municipalities, another sphere of government. Section 4 summarises the interviews from each participants, while Section 5 undertakes critical reflection. The case study concludes by proposing some recommendations for future action.

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[141] See Patton, *op cit* note 29 at 175.

[142] Ibid at 175.

[143] Ibid at 221-22.

5.2. Factual context and background

The following factual background provides a brief summary of the Matjhabeng Municipality and focuses on its Odendaalsrus waste water treatment plant (WWTP), including the circumstances that led the NPA, in conjunction with DWA and SAPS, to pursue a criminal action against the municipal manager.

5.2.1. Municipality

Matjhabeng Municipality is situated in the Free State Province. It came into existence on 5 December 2000, and is the result of the amalgamation of six local councils incorporating the city of Welkom and the towns of Odendaalsrus, Virginia, Henneman, Allanridge and Ventersburg, with a combined population of more than 500 000 people. The Municipal Council consists of 72 Councillors with full time municipal management consisting of an Executive Mayor supported by a Mayoral Committee.[144]

5.2.2. Waste Water Treatment Plants and Green Drop Status

The Matjhabeng Local Municipality has the following eleven WWTPs: Allanridge, Henneman, Phomolong, Virginia, Kutlwanong, Mbabane, Ventersburg, Thabong, Theronia, Witpan, and Odendaalsrus. All have performed unsatisfactorily during the Green Drop assessments resulting in an overall low Green Drop score of 14.2%[145], and Cumulative Risk Rate[146] of 85% for the municipality.[147]

The risk profiles of all plants have deteriorated to the extent that as of 2011 ten out of the eleven plants are in a critical state posing a serious threat to not only the public, but also the environment.[148]

The following are a summary of major findings regarding Matjhabeng Municipality's WWTWs from the 2011 Green Drop Report[149]:

i. Seven out of the eleven wastewater treatment plants do not meet effluent quality standards, with two plants reaching only 18% compliance. A further two plants cannot be monitored as they have been decommissioned for refurbishment. The absence of flow monitoring exacerbates the situation as the contamination load to the surrounding natural environment cannot be measured or controlled.

ii. According to management at each plant, none of the WWTWs had plans in place to expand or refurbish their collector or treatment infrastructure. Two plants are currently under refurbishment, one of which was damaged because of flooding. The sustainability of such investment is disputed, as the infrastructure is likely to be compromised by the lack of competency within the institution itself.

iii. None of the plants could present any evidence of design capacity or flow logging, and thus the credibility of any data provided is suspect.

iv. Extraneous flows such as that from storm water to sewer, industrial effluent, vacuum tankers, and illegal connections are unregulated. This not only compounds previous problems, but also affects possible revenue enhancement.

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[144] RSA-Overseas.com, at http://www.rsa-overseas.com/about-sa/matjhabeng.htm, accessed 13 February 2012.

[145] Department of Water Affairs, Green Drop Report (2011) 96.

[146] Ibid at 1-2. A Cumulative Risk Rate (CRR) percentage deviation is used throughout the Green Drop Reports to indicate that variance of a CRR value before it reaches its maximum CRR value. The higher the CRR percentage deviation value, the closer the CRR risk is to the maximum value it can obtain.

Example 1: a 95% CRR percentage deviation value means the plant has only 5% space remaining before the system will reach its maximum critical state (100%).

[147] Ibid at 75.

[148] Ibid at 96.Thabong, the only WWTP that has yet to reach 'critical risk' status, is 0.4% away from falling within the 'high risk' threshold.

[149] Ibid at 98-9.

v. Finally, the absence of a risk-based approach and adoption of integrated asset management principles result in infrastructure not being valued and maintained to extend its useful lifespan. According to the report, this is bound to place an additional burden on the municipal budget when premature replacements will have to be done to ensure an acceptable service level.

Whilst performance levels were low on all aspects of the Municipality's WWTPs which were assessed, the Green Drop report found the deficiency at senior technical management level is the most concerning.[150]

In summary, Matjhabeng Municipality has some of the worst sewage treatment plants in South Africa, which results in a systematic violation of the National Water Act.

5.2.3. Pollution from the Odendaalsrus WWTP

Sewage from the town of Odendaalsrus is drained by two WWTPs, Kutlwanong in the east, and Odendaalsrus in the north.[151]In the 2009 Green Drop Report only eight out of the twenty Free State Municipalities participated in the certification program. The Matjhabeng Municipality was one of the twelve municipalities that did not take part in the program.[152] Since then although the Municipality has taken part in the certification programme, the Odendaalsrus WWTW, owing to "the plant flooding" and being "under rehabilitation" has scored a green drop rating of zero and a disturbing maximum risk rating of one hundred percent.[153]

The Odendaalsrus WWTP was out of commission since June 2004 and in need of upgrading.[154] In and around 2005, the Municipality enlisted the services of a civil engineer who drew up plans. The Municipality advertised a tender for the upgrading of the Odendaalsrus plant in December 2005.[155] A site inspection was also conducted at that time.

The Municipality hired Illiso Consultants to compile a tender evaluation report on behalf of the Municipality.[156] The consultants recommended that Pro Care Civils (Pty) Ltd be awared the tender since it was the only firm with a Construction Industry Development Board (CIDB) classifications, which was indicated as a prerequisite in the tender document.[157]

Despite this recommendation, on 20 April 2006, the Tender Adjudication Committee recommended the tender to Jotina Plumbing /J Cooks JV ("Jotina Plumbing").[158] On 24 April 2006, the Corporate Executive Manager: Engineering Services, informed the Acting Municipal Manager in writing that the recommendation of the Tender Adjudication Committee is of great concern since the appointed form was not competent to do the work, particularly in the absence of the CIDB classification of the contractor.[159] Nevertheless, on 26 April 2006, the acting Municipal Manager awarded the contract to Jotina Plumbing.[160]

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[150] Ibid at 97.

[151] Department of Water Affairs and Forestry, *Briefing on Sewage Infrastructure in Matjhabeng Local Municipality to be Visited on 27 may 2008*, REF: 21/10/2/1/1116/2/7/C251/D1/4, 2.

[152] Department of Water Affairs, *Green Drop Report* (2009) 20

[153] Green Drop Report (2011), *op cit* note 145 at 97

[154] Excerpt from interview with Izak Fick, SAPS investigating officer, held on 29 November 2011 notes on file. See also Matjhabeng criminal case charge sheet (Charge Sheet), provided to AWARD by Advocate Ferreira by e-mail on 6 February 2012. The charge sheet is a public document as it has been filed with the court.

[155] Charge sheet at 2.

[156] Ibid.

[157] Ibid.

[158] Ibid; Fick Interview, 29/11/11; 30th November Group Discussion.

[159] Charge sheet, *op cit* note 154 at 3; Fick Interview 29/11/11.

[160] Ibid.

Despite the Municipal Manager's actions, the Corporate Executive Manager: Engineering Services on 5 May 2006 informed the Municipal Manager in writing that the tender was awarded against the recommendation made by the evaluation committee and that it is of great concern.[161] In addition, Illiso Consultants also informed the Municipal Manager on 19 May 2006 that the appointed contractor has no prior experience in the construction of waste water treatment plants.

The existing WWTP was decommissioned when the upgrading started, and the flow was diverted to two neighbouring ponds.[162] From the ponds the water then flowed into a neighbouring wetland and finally into the Losdoring Spruit. [163] According to one source, the contractor proceeded to demolish portions of the existing plant before the plans for the new project had even been approved.[164] On 2 April 2007, the contractor was requested to withdraw from the site and consequently failed to complete the contract.[165] Sewage continues to flow through the ponds and wetland and into the Losdoring Spruit on a continuing and ongoing basis.[166]

Whilst the neighbouring wetland acted as a temporary natural filter, diminishing the effects of the pollution and aiding in the decomposition process, because nothing has been done since the plant was decommissioned, the ground in the wetland has become saturated and could no longer provide a reprieve.[167]

5.2.4. Criminal investigation and action

On the 22 of January 2009 the National Prosecuting Authority initiated a legal process to prosecute the municipal managers overseeing the Odendaalsrus WWTP with regard to non-compliance with conditions of the National water Act.[168] This decision to prosecute was the culmination of a lengthy process described below.

The first criminal docket in the matter was registered on the 27 September 2004 by a Mr Koos Davel, and related to the Welkom WWTP. Later in April 2006 another complaint was registered by a farmer, Johan Terblanche, and incorporated into the first docket.[169] Terblanche's attorney referred him to Advocate Antoinette Ferreira at the NPA who, at the time, was a prosecutor at the Welkom Regional court, who assisted him with the legislation involved and in turn referred him to open a case docket with SAPS.[170] Whilst the situation at the Odendaalsrus WWTP did not directly affect Terblanche himself, he told one newspaper that as chairperson of Northern Free State Ecocare, he felt he was obliged to stand up when others would not, or felt they could not,[171] and as such opened another docket against the Odendaalsrus WWTW. This docket was registered on 25 April 2007.[172]

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[161] Charge sheet at 3.

[162] Department of Water Affairs and Forestry: *Briefing Notes on Sewage Infrastructure in Matjhabeng Local Municipality to be Visited on 27 May 2008*, REF: 21/10/2/1/11/16/2/7/C251/D1/4, p. 2.

[163] Ibid.

[164] Volksblad: *ECO Disaster Looms*, 11 November 2007, available at http://www.volksblad.com/Xarchive/Vista/Eco-disaster-looms-20100616, accessed on 13 February 2012.

[165] Charge sheet, *op cit* note 154 at 3-4.

[166] Ibid; DWAF 27 May 2008 briefing notes, *op cit* note 162.

[167] Charge sheet, *op cit* note 154 at 3-4.

[168] Department of Water affairs and Forestry: *Update of Matjhabeng Directive*, REF: 16/2/7/C404/D1/4, p2

[169] As per Email Interview with Advocate Ferreira and Officer Fick (31 Jan. 2012) on file.

[170] Ibid.

[171] Carte Blanche, *Water Crisis*, 8 February 2009, available at www.puresa.co.za/SAWater/CarteBlanche.aspx, accessed on 13 February 2012.

[172] Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

Officer Fick began to investigate the Odendaalsrus docket filed with SAPS, and during the process he took down the statements of the farmers near Odendaalsrus WWTP.[173] Officer Fick also contacted Advocate Ferreira for guidance in the investigation.[174]

In and around May 2007, Advocate Ferreira put Officer Fick in contact with Nigel Adams from DWA so as to help him with the technical aspects of his investigation. Advocate Ferreira met Mr Adams at the first Environmental Meeting in Cape Town during 2006 where they realised they have mutual interest in water cases, and that their respective departments needed to co-operate on the issue.[175]

Officer Fick proceeded to investigate the Odendaalsrus docket in conjunction with DWA and the NPA. This involved collecting water samples, gathering the necessary documentation, and gathering other evidence relevant to the criminal case.[176] The water samples were taken on 31 of August 2007 by SAPS in conjunction with DWA.[177] Water samples were taken of the immediate effluent from the WWTP into the spruit. Further samples were taken downstream.[178]

The purpose of the samples was to ascertain the extent of the pollution to the spruit, and based on the information the samples provided, there was some agreement between DWA, SAPS, and the NPA to pursue the criminal action in court.[179] There were discussions as to whether action should be taken against the Tender Adjudication Committee and/or the Municipal Manager for allowing a contractor who did not possess the necessary qualifications to proceed with the refurbishment contract. Although initially the Tender Adjudication Committee members were charted together with the municipal managers – as they were also responsible for awarding the tender to the alleged incompetent contractor – it was ultimately decided that because the final decision to appoint a contractor lay with the municipal manager as the accounting officer in all respects, it should be the municipal manager who is held accountable for the decision which directly added to the pollution, and as such action should be taken against him in his personal capacity.[180] This decision was also influenced by the obstacles rooted in cooperative government requirements that prevented the NPA to prosecute the Municipality itself.[181] This issue is briefly discussed in Section III which deals with the legal context surrounding cooperative government.

The NPA received the docket on 18 August 2008. After investigations were finalised, the subpoenas were issued and the first court date was on 18 August 2009.[182] The NPA has charged several Municipal Managers who served in their respective positions during the period from when the tender was awarded until when the criminal case was initiated.[183] The charge sheet includes the following charges: 1) pollution of water resources under the National Water Act (section 151(1)(i)); non-compliance with a directive (discussed below) served pursuant to the NWA (section 151(1)(d)); and various violations of the Municipal Finance Management Act, Act 56 of 2003 (MFMA), including section 173(1)(a)(i) and (iii).[184]

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[173] Ibid.

[174] Ibid.

[175] Ibid.

[176] Fick Interview, 30 Nov. 2011.

[177] Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

[178] Ibid.

[179] Ibid.

[180] Ibid; Advocate Ferreira e-mail, 6 Feb. 2012.

[181] Advocate Ferreira and Officer Fick e-mail, 31 Jan. 2012.

[182] Ibid.

[183] Charge sheet, *op cit* note 154 at 2.

[184] Ibid at 4-6.

At the time of writing, the defendants have yet to plead and the criminal action has still not gone to trial due to several adjournments requested by the lawyers involved and due to other unforeseen circumstances.

5.2.5. Administrative Action

DWAs regional office in the Free State initiated administrative actions concerning the Odendaalsrus WWTP subsequent to registration of the criminal cases. It remained independent from the criminal action.[185]

5.2.5.1. Pre Directive

On the 31 October 2007, DWA regional office Free State sent a notice of intention to issue a directive in terms of Section 53(1) of the National Water Act[186] to the Matjhabeng Municipality.[187] The notice requested that the Municipality provide DWA with action plans detailing how they intended to prevent further pollution to the Losdoring Spruit by effluent from the Odendaalsrus WWTW, as well as supporting documentation on the expenditure for the upgrading of the facility. The Municipality was afforded until 7 November 2007, in accordance with Section 3 of the Promotion of Administrative Justice Act, 2000 (PAJA), to make representations to DWA as to the existence of compelling reasons why further action should not be taken.[188]

5.2.5.2. Directive

The Municipality failed to make representations or provide the information requested by the Minister in the pre-directive within the prescribed time period. Thus on the 27 May 2008 DWA issued a directive to the Matjhabeng Local Municipality.

The directive related to the contravention of the provisions of Chapter 4 of the NWA, specifically section 22,[189] as investigations revealed that the Municipality was allowing untreated, or at best, inadequately treated water containing sewage, to be disposed of a manner not approved of, and such a way that water resources within the Municipality were detrimentally impacted.[190]

The Municipality was directed to:

- provide DWA with a detailed Action Plan, focusing particularly on municipal infrastructure, and addressing the areas of noncompliance that fall within the municipality's responsibility;
- specify the financial breakdown in the Action Plan according to the actions required;

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[185] Ibid.

[186] *S53(1) A responsible authority may, by notice in writing to a person who contravenes-*

(a) any provision of this Chapter;

(b) a requirement set or directive given by the responsible authority under this chapter; or

(c) a condition which applies to any authority to use water, direct that person, or the owner of the property in relation to which the contravention occurs, to take any action specified in the notice to rectify the contravention, within the time (being not less than two working days) specified in the notice or any other longer time allowed by the responsible authority

[187] Department of Water Affairs and Forestry, Directive in Terms of Section 53(1) of the National Water Act, Act No 36 of 1998, Ref: 16/2/7/C251/D1/4, pp1-2

[188] Ibid.

[189] S22 (2) A person who uses water as contemplated in subsection (1)— (c) in the case of the discharge or disposal of waste or water containing waste contemplated in section 2 l(j), (g), (h) or (j). must comply with any applicable waste standards or management practices prescribed under section 26(I)(h) and (i). unless the conditions of the relevant authorisation provide otherwise.

[190] Department of Water Affairs and Forestry: Directive in Terms of Section 53(1) of the National Water Act, Act No 36 of 1998, REF: 16/2/7/C251/D1/4, p1

- set short, medium and long term goals specifying the timeframes for the specific actions to be completed; and
- address the lack of human resources to sustain waste management in accordance with the requested action plan.[191]

The Municipality submitted the Action Plan to DWAF on the 26 June 2008 as requested by the directive.[192] The Action Plan, however, failed to address the requirements as set out by the department in the directive. In order to remedy this, DWA provided the Municipality with a template, addressing all requirements as set out by the department, which they were required to report monthly on.[193]

At the time of writing, there have been several complaints against the Municipality since the criminal charge laid due to the continual ponds overflowing at Witpan, another WWTP.[194] DWA conducted follow up site inspections during January 2012 and water samples were taken and sent to the lab for analysis.[195] The lab report reveals that the Odendaalsrus treatment plant is still not operating, sewage from the surrounding residential areas is not being treated at all the entire area is flooded with sewage which eventually goes to water resources.[196] Although Municipality submitted their rectification plant, the lab report indicates that they are failing to implement it.[197]

5.3. Legal context related to cooperative government

As mentioned, the decision to criminally prosecute the Municipal Manger in lieu of the Municipality was due to the legal requirements related to cooperative government in South Africa. The legal context has created a situation where it is extremely difficult, if not impossible, for one sphere of government to bring a judicial action against another sphere or against another department within the same sphere of government. Although, it is beyond the scope of this case study to present an in depth overview of the cooperative government requirements in South African law, a good understanding of this legal context, particularly as it relates to the protection of water resources, is essential to appreciate the peculiarities of this criminal case. It also highlights the potential need to revisit the stringent procedures in place to resolve disputes between and within spheres of government.

5.3.1. Powers and duties of the different spheres of government related to pollution control

The Constitution states that "government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated".[198] The promotion of local government to a position of equal importance to that of national and provincial government was a novel concept of the 1996 Constitution. This new position of equal partner is entrenched in the 'principles of co-operative government and intergovernmental relations' under chapter three of the Constitution which provides that all spheres of government have a duty to:

- Preserve the peace, national unity and the indivisibility of the Republic;
- Provide effective, transparent, accountable and coherent government for the Republic as a whole;

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[191] Ibid.

[192] Department of Water Affairs and Forestry: Report on Progress Made After Directive to Matjhabeng Local Municipality, REF: 21/14/D3/L4/6/8/1, p1

[193] Ibid,

[194] E-mail from Innocent Mashatja to AWARD, 12 November 2012, on file.

[195] Ibid.

[196] Ibid.

[197] Ibid.

[198] S 40(1)

- Respect the constitutional status, institutions, powers and functions of government in the other spheres;
- Not assume any power or function except those conferred on them in terms of the Constitution;
- Exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- Co-operate with one another in mutual trust and good faith by fostering friendly relations; assisting and supporting one another; informing one another of, and consulting one another on, matters of common interest; co-ordinating their actions and legislation with one another; adhering to agreed procedures; and avoiding legal proceedings against one another.[199]

Whilst each sphere remains autonomous, and separate from the other two, they are also connected and rely on each other to both fulfil their Constitutional mandates, and not to encroach on the duties of the other spheres.[200] Thus the system requires an appropriate balance between autonomy and supervision.[201] In this way the Constitution moves away from a competitive form of federalism where executive and legislative powers are assigned exclusively to either the national or regional government, and towards a co-operative form of federalism where each sphere of government is allocated both legislative and executive powers concurrently and operates under a system of shared responsibilities.[202] It is generally provincial and local government who take responsibility for implementing national and provincial laws where executive responsibilities are concerned.[203] Even in areas of concurrent competence, where national government has full authority to execute laws, it usually refrains from doing so.[204] This has the advantage of allowing the uniform rules of the country to be adapted by local authorities to best fit local implementation of these rules. In other words laws and policies that were made centrally can be moulted to best be executed at regional level.[205]

'Environment' and 'pollution control' fall under functional areas of concurrent national and provincial legislative competence.[206] Municipalities, however, also have executive authority in respect of local government matters listed in Part B of Schedule 4, and Part B of Schedule 5, which includes water services, sanitation services and sewage disposal systems. According to the Local Municipal Structures Act,[207] sewage disposal falls within the functions and powers of a district municipality.[208] This Act further stipulates that both the district municipality and the local municipalities, within the area of that district municipality, must co-operate with one another by assisting and supporting each other in the fulfilment of their obligations.[209]

Section 152 of Constitution sets out that the objectives of local government are, to among other things, to ensure the provision of services to communities in a sustainable manner,[210] and to promote

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[199] S 41(1)

[200] Nico Steytler & Jaap de Visser *Local Government Law in South Africa* (2007) 16-16.

[201] Anel Du Plessis 'Local Environmental Governance" and the Role of Local Government in Realising Section 24 of the South African Constitution' (2010) 21 *Stell LR* 265 at 274.

[202] Iain Currie & Johan De Waal Johan *The New Constitutional and Administrative Law Volume 1. Constitutional Law* (2001) 119.

[203] Du Plessis, *op cit* note 201 at 266.

[204] Currie and De Waal, *op cit* note 202 at 121.

[205] Ibid at 120.

[206] Schedule 4, part A, of the Constitution

[207] Act No. 117 of 1998

[208] S 84(1)(d)

[209] S 88(1)

[210] S152(1)(b)

of a safe and healthy environment.[211] It is the responsibility of both national and provincial governments to "support and strengthen" municipalities to enable them to manage their own affairs and fulfil their obligations.[212]

Should a municipality be unable to fulfil its functions, the Constitution allows for intervention from the provincial government. This intervention can extend to the relevant province to assume the municipality's obligations to maintain essential national standards or meet established minimum standards, should the municipality fail in its obligation to do so.[213]

According to section 139(5) of the Constitution, if a municipality, owing to a crisis of financial affairs, breaches its obligation to provide basic services (such as sewage disposal), a recovery plan must be imposed by the relevant provincial authority. This recovery plan must aim to rehabilitate the municipality to the extent that is it able to meet its obligations to provide basic services. The provision also requires the provincial executive to assume responsibility for the recovery plan should the municipality be unable, or fail to implement the plan.[214] Should the provincial executive fail to correctly exercise its powers in relation to the provisions above, it is the duty of the national executive to intervene.[215] This is supported by section 155 which provides both national and provincial governments with the legislative and executive authority to see to it that municipalities perform their functions effectively.[216]

In addition to the Constitutional requirements set forth above, the Municipal System's Act,[217] requires municipalities to exercise their legislative and executive authority within the parameters of co-operative government as set out by section 41 of the Constitution.[218] Furthermore, the act sets out objectives that municipalities and local government must seek to fulfil in order to obtain effective co-operative governance:

- The development of common approaches for local government as a distinct sphere of government;
- Enhancing co-operation. mutual assistance and sharing of resources among municipalities;
- Finding solutions for problems relating to local government generally; and
- Facilitating compliance with the principles of co-operative government and intergovernmental relations.

5.3.2. The obligation to avoid legal proceedings

Arguably the most contentious principle of co-operative government as laid out by the Constitution is the obligation for spheres of government, and the bodies that they comprise of, to avoid legal proceedings against one another.[219] Support of the principle of cooperative governance and the obligation of government bodies to avoid legal proceedings is continuously emphasised in case law. In the *First Certification* case,[220] the Constitutional Court confirmed that the division of powers amongst the spheres of government supports a co-operative, rather than competitive, system of

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[211] Ibid s 152 (d)

[212] S154(1)

[213] S 139(1)(b)(i), See also Section 105(1) of the Municipal Systems Act.

[214] S 139(1)(b)

[215] S 100(1)

[216] S 155(7)

[217] Act 32 of 2002

[218] Ibid s 3(1)

[219] S 41(1)(h)(vi)

[220] 1996 (10) BCLR 1253 (CC)

federalism.[221] As such intergovernmental disputes should not be settled judicially, but rather at a political level via appropriate mechanisms that negate the need for legal proceedings.[222]

Section 41 (4) of the Constitution reaffirms the importance of the duty to avoid legal proceedings. It confirms upon courts the power to refer a matter before it back to the organs of state involved if the court feels that the possible alternatives to legal action have not been exhausted. Courts take this matter seriously and "on a number of occasions have refused to entertain a matter because the parties have not complied with this obligation".[223] This was, for example, the result in *Premier of the Western Cape Province v George Municipality*.[224]

In that case, the Premier of the Western Cape had printed posters containing invitations to the opening of a new facility at a provincial hospital in George. Shortly before the event, provincial government approached the George Municipality requesting authorisation to display the posters in the town. Owing to a policy in place forbidding the display of political posters outside of the official election period, the municipality refused the provincial government's request. The Premier applied to have this decision set aside.[225] In denying the Premier's application, the court was not satisfied that the Premier had exhausted all other remedies before seeking legal action[226] and it therefore referred the matter back to the parties involved.[227] The court raised the issue that in circumstances where government is involved in litigation it is paid for by public funds. In the event of an intergovernmental dispute, public funds are used to cover the costs of litigation for both the prosecution and the defence. This is against the interest of the public, on behalf of which, government bodies are required to act[228]. Furthermore it could be equated to an abuse of public funds.

The High Court Judgment of *Blue Mountain Properties 39 (Pty) Limited v Occupiers of Saratoga Avenue and Another* (currently awaiting Constitutional Court Judgment),[229] is another example of court's reaction to a government body's failure to take reasonable measure to avoid legal proceedings regarding an intergovernmental dispute. There, the Applicant, a private landowner, sought the eviction of occupants from its property. The occupants claimed protection from eviction under the Prevention of Illegal Eviction from Unlawful Occupation of Land Act,[230] until such time as the City of Johannesburg Metropolitan Municipality (the City) provided them with adequate temporary accommodation. [231] The City contended that it was not responsible for providing housing and that the occupiers were obliged to join the Provincial Government to proceedings.[232]

The court found the joinder to be a violation of the principle of co-operative government. It set out the principles according to section 41 of the Constitution, placing emphasis on, and confirming, the

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[221] Ibid para 287.

[222] Ibid para 291.

[223] Steytler & de Visser, op cit note 200 at 16-30. With reference to: *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 (CC) at para 41, which states parties should" try and resolve their dispute amicably"; *Uthekela District Municipality and Others v President of the Republic of South Africa and Others* 2002 (11) BCLR 1220 (CC) para 19, which stated that all alternative remedies should be exhausted before court is approached to resolve the dispute; and *In re Minister of Health and Others v Treatment Action Campaign* 2002 (1) BCLR 1028 (CC) amongst others.

[224] Unreported judgement of the Cape High Court, case no. 8030/2003 as per Chapter 16

[225] Ibid at 30.

[226] S 41(3)

[227] S 41(4)

[228] Local government law in SA, op cit note 200 at 16-30.

[229] (2006/11442) [2010] ZAGPJHC 3 (4 February 2010)

[230] Act 19 of 1998

[231] *Blue Moonlight Properties*, supra note 233 para 1.

[232] Ibid para 37, with full justification at para 51.

obligation of government bodies to avoid legal proceedings amongst one another.[233] The court held that the City had not taken reasonable measures to resolve the dispute before joining provincial government. As a result the court dismissed the application for joinder.

5.3.3. Intergovernmental Relations Framework Act

The object of the Intergovernmental Relations Framework Act (IGFRA)[234] is to provide (within the principles of co-operative government as set out by Chapter 3 of the Constitution) a framework for national government, provincial government and local governments, and all organs of state within those governments, to facilitate co-ordination in the implementation of policy and legislation. [235]

Section 35 of IGRFA recommends implementation protocols to coordinate government action. It states:

> Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of state in different governments, those organs of state must co-ordinate their actions in such a manner as may be appropriate or required in the circumstances, and may do so by entering into an implementation protocol

Some of the aims of an implementation protocol are to: identify challenges, describe the roles and responsibilities of parties involved with regards to policy implementation, determine the resources available; and provide for dispute-settlement procedures and mechanisms should disputes arise in the implementation of the protocol.[236] IGFRA also provides for instances where such a protocol "must be considered",[237] these include three instances relevant to this paper: firstly, where an implementation protocol will materially assist the national government or a provincial government in complying with its constitutional obligations to support the local sphere of government or to build capacity in that sphere;[238] secondly where an implementation protocol will materially assist the organs of state participating in the provision of a service in a specific area to co-ordinate their actions in that area;[239] and finally where an organ of state to which primary responsibility for the implementation of the policy, the exercise of the statutory power, the performance of the statutory function or the provision of the service has been assigned lacks the necessary capacity.[240]

The constitutional duty to avoid intergovernmental disputes is also enshrined in Chapter four of the Act ('Settlement of intergovernmental disputes'), and places a positive duty on all organs of state to make every reasonable effort to firstly, avoid intergovernmental disputes when exercising their powers or performing their respective statutory functions;[241] and secondly, if such a dispute should arise – to settle it without resorting to judicial proceedings.[242]

IGFRA lays down certain criteria before an organ of state can resort to judicial proceedings to resolve a dispute against another organ of state. The Act forbids any organ of state from instituting legal proceedings unless all efforts, made in good faith, to settle the dispute outside of court, including

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[233] Ibid paras 76-82.

[234] Act No. 13, 2005.

[235] S 4

[236] S 35(3)(a-i)

[237] S 35(2)

[238] S 35(2)(b)

[239] S 35(2)(c)

[240] S 35(2)(d)

[241] IGRFA s 40(1)(a)

[242] Ibid, s 40(1)(b)

direct negotiations, have been made;[243] and that the dispute has been declared a 'formal intergovernmental dispute' in terms of section 41.[244]

An organ of state may unilaterally declare a formal intergovernmental dispute with another organ of state or government by notifying the other party in writing. However, before declaring a formal dispute, the organ of state making such a declaration, must in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.[245] Once a formal dispute is declared, the parties involved are required to meet, either by their own accord or by order of a Minister or local MEC if local government is involved,[246]to determine the nature of the dispute including the issues that are in dispute, and those that are not.[247] In addition, the parties must agree on appropriate mechanisms or procedures that would be required to settle the dispute.[248] It is only when all of the above efforts to settle the dispute are unsuccessful, that an organ of state may resort to judicial action.

5.3.4. Municipal manager liability

As mentioned, the Odendaalsrus criminal case was brought against several municipal managers spanning the period of alleged illegal activity. This is motivated in large part because the municipal manager plays a critical role as the accounting officer for a municipality.

According to the Municipal Structures Act,[249] a municipal manager is the head of administration and also the accounting officer for the municipality,[250] and as such the person holding this position is to be held accountable for the overall performance of the administration of the municipality.[251]

Support for the personal prosecution of a municipal manager can also be found in the Municipal Finance Management Act,[252] which also recognises the municipal manager as the accounting officer of a municipality and allows for liability for "fruitless and wasteful expenditure". This includes any expenditure that was made in vain, and would have been avoided had reasonable care been exercised.[253]

Section 173 holds municipal manager criminally liable if he or she, among other things, "deliberately or in a grossly negligent way contravenes or fails to comply with a provision of section 62 [of the MFMA] ... or fails to take reasonable steps to prevent unauthorised, irregular or fruitless and wasteful expenditure".[254]

Section 62 of the MFMA recognises that the municipal manager is responsible for managing the financial administration of the municipality, and "must for this purpose take all reasonable steps to ensure that (a) that the resources of the municipality are used effectively, efficiently and economically ... [and] (d) that unauthorised, irregular or fruitless and wasteful expenditure and other losses are prevented".[255]

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[243] S 41(2)

[244] S 45(1)

[245] S 41

[246] S 42 (3) & (4)

[247] S 42(1)(a)(i) &(ii)

[248] S 42(1)(c)

[249] Act 117 of 1998

[250] S 82

[251] Section 51(i) of the Local Government Municipal Systems Act 32 of 2000

[252] Act No 56 of 2003

[253] Ibid s 1.

[254] Ibid, s 173(1)(a)(i) and (iii).

[255] Ibid, ss 62(1)(a) and (d).

5.4. Summary of interviews

The responses to the questions listed under Section I above are summarised below by topic. Information has been taken from the following interviews, all of which are on file: Nigel Adams, Innocent Mashatja, and David Thaban from the Compliance, Monitoring and Enforcement Unit in DWA's head office (group interview, 30 November 2011, Pretoria and e-mail, 12 February 2012); 2) Officer Izak Fick from the South Africa Police Service (30 November 2011, Pretoria); and 3) Advocate Antoinette Ferreira, Senior Advocate, Director of Public Prosecutions: Free State National Prosecuting Authority (e-mail responses, 20 December 2011, 18 January 2012, and 6 February 2012); 4) Advocate Ferreira and Officer Fick (e-mail responses, 30 January 2012).

5.4.1. Desired objectives and outcomes

DWA head office responded that it had four main objectives and outcomes from the criminal action: 1) to have compliance with the NWA; 2) to have improved service delivery; 3) to entrench the Bill of Rights so as to ensure the rights of the people around the environment; and 4) to create precedent so as to make future cases easier.

Officer Fick was seeking 1) to set an example so as to act as a deterrent for future violations; 2) to get the correct and competent people to work on municipal projects in the future; 3) to have the WWTW up and running so that there is no pollution; and 4) to protect our children, the future generations.

Advocate Ferreira sought 1) to have the waste water treatment plant become fully operational and to ensure that the full-scale pollution of the pan and rivers would cease; 2) to bring to book those people in positions of power who make the decisions that impact on society as a whole and which impact on the environment; 3) to demonstrate to municipal managers that there will be repercussions to the decisions that they make and to hold them accountable; and 4) to ensure that municipalities consider the environment in their decision-making.

5.4.2. What has gone well?

DWA head office believes that the cooperation between SAPS, the NPA, and DWA as demonstrated by this case actually moving to the court proceedings stage has gone well. Furthermore, the investigation was professional and well-conducted in light of the fact that they were dealing with highly political defendants and a politically sensitive situation. Finally, DWA head office noted the good cooperation from SALGA.

Officer Fick mentioned that having no political pressure on or interference with his investigation was helpful. Furthermore, he noted that the municipal manager was cooperating initially until he retained legal counsel by providing statements and agreeing to meet. Finally, he noted that DWA gave good back-up and assistance by providing air photos, samples, and expertise.

Advocate Ferreira noted the cooperation between DWA, SAPS, and the NPA and the initial awareness raised for this critical issue in the media. However, she mentioned that since the "problem persists, I cannot with a clear conscience state that anything went well."

5.4.3. What has not gone well?

DWA mentioned the following had not gone well: 1) We've opened a case with criminal charges, but sewage is still being dumped; 2) there has been some political interference which required the DWA to proceed with caution; 3) a delay in court proceedings that has caused a loss of momentum and energy and a loss of media attention; 4) the high human resource costs, which may not justify the potential outcome.

Officer Fick complained of time delays due to the court proceedings and that despite the investigation and action, the continued discharge of sewage from the plant was a negative outcome.

Advocate Ferreira complained of the legal proceedings taking too long because "the lawyers have managed to drag out this case for such a long time" and they "are allowed to postpone the matter with flimsy excuses". The result is that "justice is not being done", the pollution from the plant persists. She further stated that initially, the police were "at a loss as to how to investigate" the case

because it was the first case of this type that they had come across and they still do not have the requisite technical knowledge to investigate such matters. Finally, Advocate Ferreira expressed her frustration that as mentioned in open court "the municipality will carry the legal costs of the managers (who are not even in the employ of the municipality any more)". She explained that this "will come out of the taxpayer's pocket" and "defeats the purpose of punishment for those who do not carry their own legal costs".

5.4.4. What would you have done differently?

DWA head office would like to have seen the administrative actions leading up to the criminal case being handled by head office because they felt that they would have been more removed from the municipality, and consequently more independent and objective.

Officer Fick would not have changed anything.

Advocate Ferreira mentioned that she has considered "approaching the High Court for an interdict ordering the municipality to fix the water works and stop the pollution". However, she acknowledged that with the "facts of our peculiar case ... there was no other way to handle the matter".

5.4.5. Lessons learned

DWA head office has learned that the directive must be well-designed and well-written, and that the administrative process must be followed to the T. In this connection, DWA head office expressed the need for a team of internal legal experts to advise them. DWA head office also mentioned that moving forward, the process by which municipalities hire staff for wastewater treatment plants must be changed to so that DWA should play a role in the hiring process. Finally, head office would like to have a mandate to appoint its own contractor to fix the situation at the treatment plant; it was head office's contention that it is the Department's position that it cannot do this.

Officer Fick indicated that he has learned that the investigation needs to understand the origins of the problem; in this case the reason for the sewage discharge. He explained that one cannot expect change without doing so.

Advocate Ferreira made several proposals as a result of her experience in prosecuting this case. It is worth quoting her exact language.

> "I think it is prudent that those departments in government responsible for our healthy drinking water should host an Indaba and attempt to find solutions to this ever increasing problem. Projections are that we will have no fresh water by 2015 in our rivers. I think it will be a good idea to start an 'adopt a sewage works programme' whereby systematically all sewage works are upgraded (and especially those where major problems exists in order of priority). It is important that there must be some type of watchdog to ensure that the allocated budgets are indeed used to upgrade the plants instead of buying office furniture and new cars."

5.4.6. Will the desired outcomes or objectives be achieved through this criminal case?

DWA head office responded that they case will partly achieve the desired objective and outcomes to the extent it will show that the CME unit has teeth.

Officer Fick said no. He mentioned that it would give satisfaction if a conviction was achieved and serve as an example for other municipalities. However, he said that "nothing is coming to solutions" and that he has not faith in the system.

Advocate Ferreira said that the outcome of the case will not solve the existing problem because it will not fix the wastewater treatment plant. She further explained that "this problem exists in hundreds of municipalities country-wide. The sewage works are all outdated and need to be upgraded otherwise they will continue to pump raw sewage into the nearest water resources." However, she

acknowledged that some justice would be done if the accused were punished severely for their actions.

5.4.7. Allies?

DWA head office made it clear that institutions were not allies in this case, but individuals within those institutions. In this case it was Officer Fick and Advocate Ferreira. They also reiterated that the public can be a good ally and act as watchdogs. In this case farmers served as a watchdog. Nigel Adams also mentioned that his experience is that allies are typically formed through personal connections and networking, and not through formal channels, such as inter-department committees.

Officer Fick said that the NPA and DWA were allies.

Advocate Ferreira mentioned that Nigel Adams from DWA was her biggest ally and was always willing to assist and respond quickly, and that Officer Fick served as a dedicated investigator who was a key person.

5.4.8. Obstructers?

DWA head office said that municipalities, including in this case, are not cooperating and arrogant. He also mentioned politicians on the provincial level often to do not listen to the Department and maintain their own views. Finally, he explained that people are scared to get involved in these cases because of the political consequences. "It is potentially career suicide."

Officer Fick cited municipalities as being obstructive. He also questioned why other departments, such as Environmental Affairs are not involved in water resource cases.

Advocate Ferreira said that the Municipality itself "was not forthcoming with requested information and since a lot of our witnesses are employed by the municipality there is a degree of fear that if they testify it might have implications for their future employment". She also mentioned that the biggest obstructers "must be lawyers who have no conscience … and frustrate the legal process by fighting all the side issues and not the merits of the case". In general, she expressed a high level of discontent with the legal process, which she described as a "very slow turning wheel".

5.5. Discussion

Although the pool of individuals interviewed was relatively small for this case study, various themes and issues emerge after reviewing the facts and representations made by participants. This section seeks to identify some of the more salient themes and issues as a means to reflect on the process surrounding the criminal case.

5.5.1. Similar and divergent perceptions

There are some similarities and differences between the representatives from the various departments interviewed. Looking at common responses and divergent responses helps highlight the extent to which the various participant stakeholders have aligned and divergent perceptions of the Matjhabeng criminal case. In other words, are the major players on the same page in terms of what they are seeking and how they have evaluated the case? A more difficult question is to then understand why or why not.

The following discussion seeks to highlight key commonalities and differences in the participants' perceptions. Wherever possible, it seeks to discuss the significance of these trends.

5.5.1.1. Desired Outcome

With respect to desired outcomes or objectives, the NPA and SAPS both mentioned setting an example for other municipalities. DWA similarly mentioned the objective of ensuring compliance with the NWA. We believe that these statement overlap because it rests on the well-established theory that open enforcement will lead to deterrence of unlawful activity and compliance with the law.[256]

[256] See Barbara Schreiner et al., *op cit* note 73; Mark A. Cohen 'Empirical Research on the Deterrent Effect of Environmental Monitoring and Enforcement' (2000) 30 *ELR* 10245.

We believe that having a similar perception of the role of the criminal case within the broader concept of compliance implies a good understanding of the long-term strategic purpose of the lawsuit.

In addition, all participants mentioned the importance of protecting the environment. In the case of DWA, they mentioned the need to meet the environmental rights enshrined in the Constitution, while Officer Fick discussed protecting future generations, an aspect of sustainable development. Advocate Ferreira discussed the need to consider the environment in the decision-making process. The stress on the importance of protecting the environment is extremely positive; sustainability of natural resources is indeed a key tenet of South Africa's constitutional framework and it must motivate government action.

Advocate Ferreira was the only person to state that one of her objectives is to hold accountable those who make bad decisions that impact society and the environment. Although this might seem like an obvious purpose of bringing a criminal law suit against an individual decision-maker, the absence of identifying this as a desired objective within DWA and SAPS should be discussed internally.

5.5.1.2. What has gone well and not well?

All participants mentioned that the cooperation between the NPA, SAPS, and DWA was a positive element in this case. What is notable though is that DWA head office believes that the cooperation is not between departments as such, but between individuals in departments. Moreover, these individuals are not connected through formal departmental channels, but through personal connections. Indeed, Officer Fick contacted Nigel because Advocate Ferreira introduced them, and Officer Fick contacted Advocate Ferreira through a private citizen's lawyer. Advocate Ferreira seems to agree with DWA head office on this point, as she mentioned individuals within various departments as her allies, rather than the departments themselves. Cooperation between departments in these actions seem to be the exception rather than the norm[257]; this is probably why DWA head office identified as a positive the fact that this case had proceeded to court. This supports the need to create better channels of communication between departments that have overlapping mandates over natural resources so that departments are not connected by virtue of personal connections, but by well-established official or formal channels of communication.[258]

All participants have agreed have agreed that the delay in court proceedings has had a significant impact on meeting their objectives. DWA and the NPA both alluded to the loss of media attention as a result of the delay. Naturally, Advocate Ferreira was more vocal about the role of lawyers and the legal process in causing the delay. Although it is not the role of this case study to propose sweeping changes to the judicial process, the delay in this case is a prominent theme that has had negative impacts and can serve as a basis for further discussion on judicial reform in this regard.

Only Advocate Ferreira spoke strongly to the overall lack of police support, competence and will with regard to investigating environmental cases. She mentioned that this investigation was steered by a devoted officer within SAPS, and would likely have not happened had Officer Fick not been involved. She expressed frustration around this issue and highlighted the need to have environmental officers play a more prominent role in taking the lead in criminal investigations. This issue has been raised repeatedly in other contexts through AWARD's SRI legal project.

Officer Fick has a different perception of the role of political pressure in this case from DWA head office and Advocate Ferreira. Officer Fick said that he did not experience any political pressure when conducting his investigation. In contrast DWA head office complained that political pressure made the investigation difficult, and creating a perception that supporting the case might result in "career suicide". Advocate Ferreira complained that fear of repercussion from the municipality caused witnesses to fear testifying in court. Moreover, she implied a lack of "political will from the powers that be" to support address environmental crimes. Notwithstanding Officer Fick's representations, the reference to political pressure with respect to municipal actions is troubling and has stifling

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[257] AWARD, 'Regulatory support focusing on enforcement: progress report', Draft unpublished report prepared for the Water Resource Commission, Project K5/1920 (12 Aug. 2011), on file.

[258] Ibid.

consequences for independent investigations of wrongdoing; a strategy must be developed to tackle this issue.

5.5.1.3. Things done differently

Although there were many negative statements about what has not gone well during the investigation and criminal prosecution, the participants did not offer many suggestions or thoughts around what should or could have been done differently. Advocate Ferreira mentioned that this case presented peculiar facts that resulted in "no other way to handle the matter than we have done". There may be several reasons for the overall lack of discussion around what could have been done differently despite the many negative perceptions surrounding the criminal case. It may reflect a general lack of reflexivity by the practitioners around their actions; in other words, the participants have not created the space to critically evaluate their practice. This could be caused by feelings of disempowerment where the participants feel overwhelmed by the situation at hand. It also might be explained by a manifestation of fatigue; there simply is too much on the table at one time to truly allow practitioners the time and space to reflect. Whatever the reason for the lack of reflexivity, it is important that the participants recognise the need to create a reflexive practice and develop the means to incorporate reflexivity into their practice.

5.5.1.4. Have the objective been met?

All participants agreed that the criminal case would not solve the sewage pollution emanating from the water treatment plant. Indeed, the only two outcomes that the participants identified were that a conviction would result in some sense of justice and that it would demonstrate that the regulator has teeth.

This implies a lack of belief that the criminal case will have any impact with regard to solving the environmental problem of pollution. In our opinion, the participants should strongly evaluate whether the benefits achieved in this case are acceptable in light of the costs.

5.5.1.5. Allies and obstructers

All participants agreed that the Municipality was the biggest obstructer to progress in this case. Advocate Ferreira, however, provided more detail by explaining that the municipality was not forthcoming with information requested and that witnesses employed by the municipality feared implications for their job security if they cooperated. It is no surprise that the participants in this case did not feel that the Municipality was their ally as they are engaged in an adversarial process against them. However, the deeply held negative perceptions held by the participants about municipalities are troubling against the backdrop of the principles of cooperative government espoused in the Constitution. Obviously, the problems associated with municipalities is far bigger than the criminal case at issue here; however, it seems that until the larger issues associated with municipalities are resolved, the principles of cooperative government will fail to be met.

5.5.2. Extreme comments and constructive comments

Some participants have noted what we call extreme comments. These are comments that are striking in the candour or depart deeply from what other participants have said. We believe that these comments are important because they can spur important dialogue and discussion, and often lead to thinking "outside of the box" about how to address a difficult issue. Moreover, the participants provided many constructive comments about the case. These are also important because they provide a space for reflection to re-evaluate the strategy that has been taken.

DWA head office made an interesting statement that head office should have handled this municipal administrative action rather than the regional office. It is not clear whether this statement would apply to all investigations against municipalities. Nonetheless, DWA head office raises an important issue, and perhaps a policy should be discussed whereby politically sensitive cases should be handled by head office rather than regional office.

Officer Fick also indicated that he had learned that the investigation needs to understand the origins of the problem; in this case negligence and alleged wrongdoing by the municipality. He explained that you cannot expect change without doing that. This raises an important point around systems

thinking and complexity theory. Systems approaches call for a holistic understanding of real-world issues such as the management of water asserting that such issues do not fall within the domain of single disciplines. Rather the 'real world' reflects the interaction between multiple socio-economic, political and environmental drivers and hence a need to understand socio-environmental systems. Flowing from this, complexity theory holds that socio-environmental systems are inherently complex and dynamic , as opposed to linear ones (like a car engine), where outcomes are predictable. Instead, because of the complex interaction of socio-economic, ecological and political factors which operate differently at different scales (temporal and spatial) the outcomes are often unpredictable.259 For example, some five years ago few would have predicted the increased demand on local water resources due to the international scale impacts of the 2008 economic crises which, due to job losses, forced people back into rural areas and put an unpredicted strain on the water resources. Nonetheless by striving to see the system holistically, with all systems as sub-systems of bigger systems to which they relate260, one has a better sense of potential outcomes. In other words, one must manage a system keeping in mind its complex characteristics. The implication of adopting such an approach is discussed in more detail in our recommendations under section VI.

Advocate Ferreira also made some extreme comments and provided many constructive suggestions. Her suggestions for future action were quoted in full above, and include a DWA hosted indaba to tackle the problem of municipal sewage pollution, a systematic programme to upgrade sewage works, perhaps similar to Working for Water or Working for Wetlands, and to create a public watchdog with regard to municipal spending. These are all important suggestions that DWA and government should seriously consider.

Advocate Ferreira also mentioned her discomfort around the fact that the municipality is paying for the legal costs associated with the municipal manager's defence in the criminal lawsuit. Her main criticism was with the fact that the public was essentially paying for the costs emanating from the pollution of water resources caused by the municipality. In other words, by having the public pay for the criminal law suit, the *polluter pays* principle espoused in NEMA is turned on its head, that essentially requires that the polluter pay for the costs of preventing and controlling pollution, not the public. The polluter pays principle is encapsulated in NEMA section 2 (p) which states that "the costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment".

Certainly, it seems unjust to the public to have the municipality pay for the legal costs associated with a municipal manager who is being tried in his or her personal capacity.

5.6. Concluding recommendations

Although this case study was undertaken on a relatively small scale, the participants were able to identify interesting issues and it created a space for reflection that may not otherwise have taken place. It highlights the need for additional case studies as a tool to reflect on difficult enforcement related cases brought pursuant to the NWA and to plan future strategies and action. For example, efforts should be made to document cases where national and provincial government have been hindered by cooperative government obligations to hold municipalities and other government departments accountable for violations of environmental laws. Particular emphasis should be given to cases where government has been able to circumvent stringent cooperative government obligations, as was the case here, through creative enforcement strategies.

In addition, with respect to this particular case study, it would be ideal to have a larger net of participants, such as regional DWA Free State, the Matjibeng Municipality, the defendants, the public, including the farmers who filed the initial criminal complaint. It will also be beneficial to revisit the case once the criminal process is complete.

Moreover, as we suggested above, building on Officer Fick's comments, we believe that systems approach rooted in complexity theory is necessary to truly evaluate effective actions and strategies to

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[259] See Sharon Pollard and Derick du Toit 'IWRM in complex systems', *op cit* note 7.

[260] Ibid.

deal with difficult enforcement issues like the one at hand. Given this thinking, there has been a gradual recognition for the need to manage things differently such as through a process of strategic adaptive management that fundamentally embraces learning by doing.[261] Learning is taken to be a social process where engagement, communication and dialogue provide the basis for reflecting on and responding to system feedbacks – such as the influx of people in the above example – in a way that is open to change and that encourages creative and innovative responses to an ever evolving context.[262] SAM integrates research, planning, management, and monitoring in repeated cycles of learning that seek to improve on, and active, objectives.[263] The Inkomati Catchment Management Agency (ICMA) in developing its catchment management strategy and the Kruger National Park (KNP) have each utilized SAM, and their efforts provide a valuable window into how to manage complex systems.[264]

The issue raised by Advocate Ferreira regarding the polluter pays principle being flouted by the Municipality's decision to cover the costs of the municipal manager's criminal law suit is a serious one. We suggest that this issue be addressed urgently. It also begs the larger question: will not any enforcement action against the municipality, regardless of who the defendant might be, implicate the polluter pays principle? If that is the case, perhaps new strategies must be developed, such as for example a system for penalising municipalities by limiting their ability to access allocated budgets. The issue itself must be addressed by government with consultation from civil society.

Finally, and perhaps most important, it is clear from the participant's representations and the facts in this case that the only reason this case has proceeded forward is due to the informal connections between the individuals involved from the various departments. A formal forum to foster coordination and cooperation in these kinds of cases must be created so that administrative and criminal actions are not based on happen chance but a clear and well-established system.

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[261] Ibid; Harry Biggs & Kevin Rogers, 'An adaptive system to link science, monitoring and management in practice' in: JT du Toit, KH Rogers and HC Biggs (eds), *The Kruger Experience: Ecology and Management of Savanna Heterogeneity* (2003).

[262] Sharon Pollard & Derick du Toit, 'Recognizing heterogeneity and variability as key characteristics of savannah systems: The use of Strategic Adaptive Management as an approach to river management within the Kruger National Park, South Africa' (2007) UNEP/GEF Project No. GF/ 2713-03-4679.

[263] Ibid.

[264] Ibid; Pollard & du Toit, *IWRM in complex systems*, *op cit* note 7; ICMA, The Incomati Catchment Management Strategy (ICMS) (2010).

6. Focused in-depth study: A critical assessment of the South African Water Tribunal

6.1. Introduction and methodology

The Water Tribunal is an independent administrative tribunal that was established under section 146 of the National Water Act 36 of 1998 to hear appeals against several specified administrative decisions pursuant to the NWA.[265] Despite almost ten years since its inception, there is sparse literature reviewing the Tribunal's decisions, its effectiveness in carrying out its mandate and whether its mandate is adequate to enable it to appropriately fulfil its functions as an administrative tribunal pursuant to the NWA.[266] Because the decisions of the Tribunal have a significant impact on the way the NWA is implemented, it is therefore unacceptable that there has been no review or monitoring of the Tribunal, its decisions and its mandate. Moreover, due to the significant delays in implementing the NWA, the Tribunal has yet to make decisions regarding other important appeals to NWA actions like compulsory licensing. It must be determined if the Tribunal is up for the task; if the Tribunal is not, it is safe to assume that there will be a major breakdown in the implementation of the NWA.

This paper seeks to address the following objectives: 1) to extrapolate emerging themes and issues related to the Tribunal; 2) to critically assess the Tribunal's mandate and its functioning; 3) to determine the accessibility of decisions and documents presented to the Tribunal; and 4) to provide recommendations and future research needs. Section 2 discusses the legal nature of the Water Tribunal. In doing so, it also addresses the issue of whether the jurisdiction of the Tribunal is overly narrow and whether it should be amended to be brought in line with the Promotion of Administrative Justice Act[267] (PAJA). Section 3 reviews issues emerging from the Tribunal's decisions, while Section 4 presents emerging themes from interviews conducted with parties who have appeared before the Tribunal. The paper concludes by providing some parting recommendations.

The research process consisted of two steps. First, the research team undertook a comprehensive legal review of Water Tribunal decisions that were available on the Tribunal Registrar's web page. Second, the research team conducted 13 interviews with 16 individuals who have appeared before the Tribunal, including lawyers, advocates, and unrepresented appellants. By discussing the experiences of those who have had first-hand experience litigating before the Tribunal, the study has sought to enrich the research outputs and to provide insight into the Tribunal's practice.

6.2. An overview of administrative appeal bodies

Administrative appeal bodies are common throughout the world and take many forms. However, most of these bodies can be described as quasi-judicial adjudicatory bodies that are not courts, but in many ways resemble courts.[268] Although both courts and appeal bodies, which include tribunals, can reconsider the decision of administrative authorities as a higher level body, courts in South Africa and much of the world are limited to judicial review functions, while tribunals can undertake what has been termed merits review.[269] This distinction, although in many ways not a clear one, is critical to understanding the difference between administrative appeal bodies from courts.

6.2.1. Judicial review versus merits appeals

According to Hoexter, appeals are established to challenge the merits of a particular decision. In other words, the person or body who is making a decision will step into the shoes of the original

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[265] NWA, s 148 (The mandate of the Water Tribunal is set forth in Chapter 15 of the NWA.)

[266] See e.g. Maritza Uys 'South African Water Law Issues' (report to the Water Research Commission June 2009)

[267] 3 of 2000.

[268] Peter Cane, 'Judicial review and merits review: comparing administrative adjudication by courts and tribunals', in Susan Rose-Ackerman and Peter L Lindseth (ed.) *Comparative Administrative Law* (2011) pp. 426-448.

[269] See e.g. Cora Hoexter, *Administrative Law in South Africa* (2007), 65

decision-maker and decide the matter from scratch.[270] It thus focuses on the correctness of the decision itself. Judicial review, by contrast, focuses on the way a decision was reached, which lawyers often refer to as the legality or procedural regularity of the decision.[271] In addition, the remedies or options available to courts versus tribunals after reconsidering the administrative decisions are different – whereas courts typically are limited to setting the decision aside or sending back to the decision maker for reconsideration consistent with the court's decision, an administrative body can typically substitute its decision for that of the decision maker.[272]

Although the distinction between judicial review and merits appeals initially appears clear, in reality, separation between the two is less than apparent. Some scholars argue that the distinction should be abandoned.[273] Other, like Cane, argues that the basic distinctions articulated above are problematic and the boundaries between review and appeal are in fact porous.[274] For example, he sees a very porous boundary between deciding a matter on substance versus procedure. As Cane explains, "for instance, the rule that a decision-maker must not take account of irrelevant considerations in one sense concerns decision-making procedure, but in another is of direct relevance to the substance of the decision".[275] Indeed, Cane sees merits review as a kind of "enhanced judicial review".[276] Nonetheless, a comprehensive discussion of the differences between judicial review and appeals is beyond the scope of this study.

6.2.2. Categories of appeal bodies

Hoexter identifies five categories of appeal bodies in South Africa, all of which vary widely in their independence, powers, and procedures. First are internal appeals from the decision of an official to a superior departmental official or to the Minister concerned.[277] Secondly, she refers to a national control body where an administrative system operates under the overall supervision of such a body. Thirdly are administrative tribunals specially created to hear administrative appeals, such as licensing boards. Hoexter comments that these tribunals "exert a degree of independence and begin to resemble a proper system of administrative courts".[278] Finally, she refers to special courts presided over by judges with the help of expert lay assessors, giving the example of the Competition Court which hears appeals from the Competition Tribunal.[279]

The Water Tribunal fits under the third category espoused by Hoexter: an administrative tribunal.

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[270] Ibid.

[271] Ibid.

[272] See Peter Cane, Judicial Review in the Age of Tribunals in *Forsyth, Elliott, Jhaveri, Ramsden & Hill (eds) Effective Judicial Review: A Cornerstone of Good Governance* (2010) 490, 501. An important reason for preventing courts from undertaking merits review has often been rooted in separation of power arguments. As Hoexter states, "The separation of powers makes it undesirable for courts of law to exercise the political function of pronouncing on the merits of administrative matters. As is often in the cases, the courts' interference could easily amount to usurping the functions legitimately entrusted to administrators by the legislature" Hoexter, op cit note – at 66, citing to Lawrence Baxter *Administrative Law* (1984) 263-7.

[273] Many scholars argue that the distinction between review and appeal should be abandoned. See e.g. Cora Hoexter 'Judicial policy revisited: transformative adjudication in administrative law' (2008) *SAJHR* 281, 296-98 (arguing that the distinction between judicial review and appeal can only be sustained in very limited circumstances. In most cases, "any ground of review whose establishment depends on a value judgment or any degree of judicial estimation will inevitably draw the reviewing court into the merits".)

[274] Peter Cane, Merits Review and Judicial Review-The AAT as Trojan Horse (2002) 28 Fed. LR 213-44.

[275] Ibid at 222.

[276] Cane, Judicial Review in the Age of Tribunals, *op cit* note 272 at 495.

[277] Hoexter, *op cit* note 269 at 67.

[278] Ibid.

[279] Ibid.

6.2.3. Common characteristics of administrative tribunals

Armstrong, after undertaking a comprehensive literature review related to administrative appeal bodies, identifies several common characteristics typical of such bodies.[280] She summarises her findings as follows:

> Firstly, they should have the ability to make final, legally enforceable decisions. Secondly, they should be independent from any departmental branch of government. Thirdly, the nature of the hearings conducted in tribunals should be both public and of a judicial nature, while not necessarily subject to the stringent formalities of a court of law. Fourthly, tribunal members should be in possession of specific expertise, in the field of operation of the tribunal as well as judicial expertise. Fifthly, there should be a duty on tribunals to give clear reasons for their decisions, and lastly that there should be a right of appeal to a higher court on disputes regarding points of law.[281]

These characteristics often provide various advantages to courts of law. For example, according to Hoexter, administrative appeals have two main advantages over courts that are limited to judicial review. First, she contends that appeals to tribunals will often be the best judges of administrative decisions because they have specialist expertise in the relevant area of decision.[282] Secondly, she provides that administrative appeals are often cheaper and speedier than courts of law, although she cautions that this may not be the case in South Africa.[283] Armstrong adds that Tribunal are often more informal than courts and that claimants can participate easier in the proceedings compared to courts. She explains that this is due to the presence of lay members in addition to lawyers on tribunals and to the oral nature of proceedings.[284]

As explained in the following section, the Water Tribunal, at least in theory, meets the various characteristics of Tribunals articulated by experts. It is independent, specialised, less costly and speedier than court, and informal. The Tribunal can give legal enforceable decisions and it is required to provide clear reasons for its decisions. Unfortunately, although the Tribunal has been theoretically set up to meet these characteristics and to provide an advantage to courts, in reality the Tribunal has often failed along many of these criteria.

6.3. The legal nature of the Water Tribunal

It is evident that the Water Tribunal is an administrative tribunal created by the NWA as a means to review certain administrative actions made under the Act. Its members are not all trained lawyers and some have specialised knowledge in water resource management, there are no rules of precedent, it retains independence from DWA or the responsible authority making the decision, and there are no evidentiary limitations, such as those related to hearsay. The legal nature of the Tribunal is explored in more detail below.

6.3.1. Composition, jurisdiction and mandate

The Tribunal should ideally be composed of members who bring a multi-disciplinary background to the table and must have knowledge in law, engineering, water resource management or related

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[280] See Gillian Claire Armstrong, Administrative Justice and Tribunals in South Africa: a Commonwealth Comparison, (2011) Thesis presented in partial fulfilment of the requirements for the degree Master of Laws at the University of Stellenbosch, available at http://scholar.sun.ac.za, accessed on 2 March 2012, 53-75.

[281] Ibid, citing to Farmer *Tribunals and Government* (1974); Govender "Administrative Appeals Tribunals" in Corder (ed) *Comparing Administrative Justice Across the Commonwealth* (2007) 77; Peter Cane *Administrative Law* 4ed (2004) 390.

[282] Hoexter, *op cit note 269* at 66.

[283] Ibid.

[284] Armstrong, op cite note 280 at 65-66.

fields.[285] It must consist of a chairperson, a deputy chairperson, and as many additional members that the Minister deems necessary.[286] All members are appointed by the Minister on the recommendation of the Judicial Service Commission and/or the Water Research Commission.[287] According to 1999 amendments to the NWA, the Judicial Service Commission must recommend at least two persons qualified in law for appointment as chairperson of the Tribunal.[288] The Water Research Commission, on the other hand, must recommend persons qualified in water resource management, engineering or related fields of knowledge for appointment as deputy chairperson and additional members of the Tribunal.[289]

The Tribunal has jurisdiction in all the provinces of South Africa and it may conduct hearing anywhere it deems necessary.[290] The Tribunal's mobility allows accessibility to appellants who might not be able to travel to Pretoria to attend hearings.

As mentioned, the Water Tribunal's mandate stems from Chapter 15 of the NWA. Section 148(1) of the NWA outlines 13 administrative actions that are appealable to the Tribunal. These include decisions around license applications, directives, claims around cost-recovery, the publication of a preliminary water allocation schedule related to compulsory licensing, and suspension of licenses. Section 148(1) is an exhaustive[291] list, however, and consequently restricts the ability of the Tribunal to review actions that are not listed but that might otherwise clearly fall within the nature of administrative actions reviewable by the Tribunal.

6.3.2. Procedure, standard of review, investigation powers, and appeals to High Court

Schedule 6 of the NWA outlines the procedures for lodging and governing appeals before the Tribunal; although these have been supplemented by the 2005 Water Tribunal Rules issued by the Chairperson of the Water Tribunal.[292] Unfortunately, because the Rules do not repeal any aspect of Schedule 6 in the NWA, one has to read both the Rules and the NWA to determine correct practice.[293] To provide a brief overview, an appeal must be lodged within 30 days of publication of the decision in the *Gazette*, notice of the decision to the appellant, or reasons for the decision being given, whichever occurs last.[294] The relevant government body whose action is at issue must within a reasonable time send a record for the action, although no time period is specified for this to take place. The rules are also silent with respect to pre-hearing motions. A more comprehensive discussion of the Tribunal's Rules takes place in section IV below.

An appeal suspends all administrative actions pending the outcome of the appeal, except for a directive issued under the Act.[295] However, the Minister has the ability to remove a suspension, presumably upon request.[296] The exception for directives prevents appellants from using the Tribunal as a stall tactic against undertaking potentially important measures to rectify unlawful water uses or activities that might cause environmental harm.

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[285] NWA, s 146(4)

[286] Ibid, s 146(3).

[287] Ibid, s 146(5).

[288] Ibid, s 146(6)(a).

[289] Ibid, s 146(6)(b).

[290] Ibid, s 146(2).

[291] See *Oorsprong Boere Trust 904/90 v Crocodile River Major Irrigation Board and Others*, WT: 19/11/2007

[292] See DWAF, Water Tribunal Rules, (GG 28060 of 23 September 2005).

[293] In fact, the rules and the NWA often overlap word for word.

[294] NWA, s 148(3).

[295] S 148(2).

[296] S 148(2)(b)

Appeals before the Tribunal must take the form of a rehearing.[297] As discussed in Section 3, the Tribunal has provided different interpretations of what this means, creating some level of confusion. In particular, as explained in Section 3, the Tribunal has incorrectly limited the scope in which the Tribunal can reconsider administrative decisions pursuant to the rehearing standard.

Generally, the rehearing standard is a type of expanded *de novo* standard where the Tribunal is allowed to substitute its decision for that of the administrative agency and to gather new evidence that was not necessarily before the administrator when it took the relevant action.[298] Hoexter refers to such a rehearing standard as a wide appeal standard (as opposed to a narrow appeal where a tribunal would be limited to the evidence that the initial decision-maker had at the time of the decision).[299] The expanded rehearing or wide appeal standard provides the Tribunal with significantly more power than courts, who typically are confined to judicially review administrative decisions with the record that was before the administrator at the time of the action, whereas the Tribunal can also decide on the merits of a case. As Hoexter makes clear that "bodies exercising wide jurisdiction can properly exercise review powers" and that such bodies can "review the decision as well as pronounce on its merits".[300]

The dangers of an expansive rehearing standard are apparent, and most obviously stem from the ability of either side to present new evidence that was not before the relevant body taking administrative action. However, at the same time, the ability to present new evidence also allows parties to raise issues around procedural regularity in the appeal that were not raised before the decision-maker.[301]

The Water Tribunal is not bound by its own precedent, although it does often refer to its earlier decisions when discussing an issue that it has already addressed, sometimes even cutting and pasting the exact language from previous decisions.

The NWA and the Tribunal Rules also provide the Water Tribunal with expansive subpoena powers for gathering evidence and requesting testimony.[302] However, neither the NWA nor the Tribunal Rules discuss any rules of evidence that might apply to evidence presented to the Tribunal, such as hearsay or authentication of documents. In only one case, *Nel v. The Department of Water Affairs*[303], has the Tribunal provided some insight as to how it deals with evidentiary issues. There, the Tribunal relying on the primary evidence rule did not accept into evidence a letter that was a copy of an audited document because the original letter existed and the appellant's advocate could not furnish an acceptable reason for not producing the original.[304] However, the only reason this evidentiary issue was discussed was because the respondent's lawyer raised it as an issue.[305]

Any party to a matter can appeal a decision of the Water Tribunal on a question of law to the High Court.[306] The NWA states that such an appeal must be prosecuted as if it were an appeal from a Magistrate's Court to a High Court.[307] . It is unclear whether this means that the Magistrate Court Act should apply to such appeals.[308] Adding to the confusion is the notable absence of any mention as to

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[297] Schedule 6, section 6(3).

[298] Water Tribunal Rules, s 7; NWA, schedule 6, s 6(3).

[299] Hoexter, *Administrative Law in South Africa*, op cit note 269 at 68.

[300] Ibid.

[301] Ibid.

[302] Water Tribunal Rules, s 12; NWA, schedule 6, s 7.

[303] WT 25/05/2009 (28th June 2010).

[304] Ibid. paras 29-36.

[305] Ibid. para 36.

[306] NWA s 149(1).

[307] S 149(4).

[308] Act 32 of 1944.

whether review applications of Tribunal decisions can be brought before the High Court. However, the absence of this is not critical as decision by DWA or the responsible authority would be subject to PAJA and/or common law legality principle, so there would exist a right to initiate review applications in High Court. This issue was also raised in the recent High Court judgment in *Goede Wellington Boerdery (Pty) Ltd v. Makhanya & Another.*[309]

6.3.3. Scope of Actions that can be reviewed by the Water Tribunal

As mentioned, the grounds under which the Water Tribunal can review or rehear an action of the DWA are set out in Section 148(1) of the NWA. The Tribunal has found section 148(1) to be a *numerus clausus*[310], and as such, the Tribunal may only review an action if it falls under one of the 13 categories listed in that section. As the Tribunal has been limited to review only those items under section 148(1), it is worth quoting this section in its entirety[311]. Pursuant to the Tribunal's interpretation of section 148(1), we find it necessary to ask whether the list is too narrow, and if it is, whether it is necessary that this be amended.

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[309] 56628/2010 (19 Aug. 2011)

[310] Latin for "a closed number" meaning, in this context, that the Tribunal may only adjudicate on matters if they fall under one of the grounds enumerated in section 148(1)(a)-(m) and no others.

[311] S 148. (1) There is an appeal to the Water Tribunal —

(a) against a directive issued by a catchment management agency under section 19(3) or 20(4)(d), by the recipient thereof;

(b) against a claim by a catchment management agency for the recovery of costs under section 19(5) or 20(7) by the person affected thereby;

(c) against the apportionment by a catchment management agency of a liability for costs under section 19(8) or 20(9), by a person affected thereby;

(d) against a decision of a water management institution on the temporary transfer of a water use authorisation under section 25(I), by a person affected thereby;

(e) against a decision of a responsible authority on the verification of a water use under section 35 by a person affected thereby ;

(f) against a decision of a responsible authority on an application for a licence under section 41, or on any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection against the application;

(g) against a preliminary allocation schedule published by a responsible authority under section 46(1), by any interested person;

(h) against the amendment of a condition of a licence by a responsible authority on review under section 49(2), by any person affected thereby;

(i) against a decision of a responsible authority on an adjudication of claims made under section 51 (1), by any person affected thereby;

(j) against a directive issued by a responsible authority under section 53(I), by the recipient thereof

(k) against a claim by a water management institution for the recovery of costs under section 53(2)(a), by the person against whom the claim is made;

(l) against a decision by a responsible authority on the suspension, withdrawal or reinstatement of an entitlement under section 54, or on the surrender of a licence under section 55, by the person entitled to use water or by the licensee; and

(m) against a declaration made by, directive given by or costs claimed by the Minister in respect of a dam with a safety risk under section 118(3) or (4).

6.3.3.1. Is the list in Section 148 exhaustive of all of the possible administrative actions that DWA can undertake pursuant to the NWA?

To determine whether the list in Section 148(1) does not encompass the entirety of possible administrative actions under the NWA, it is necessary to establish whether or not it takes into account all possible administrative actions under the NWA. However, in order to answer this question, it is first necessary to present a well-accepted definition of what constitutes administrative action. One useful and legally enforceable definition is contained in PAJA. [312]

PAJA was enacted to give effect to Section 33 of the Constitution, which gives everyone the right to administrative action that is lawful, reasonable and procedurally fair. Section 1 of PAJA defines administrative action as:

> *"any decision taken, or any failure to take a decision by*
>
> *(a) an organ of state, when*
>
> *(i) exercising a power in terms of the Constitution or a provincial constitution; or*
>
> *(ii) exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public power or performing a public function in terms of an empowering provision,*
>
> *which adversely affects the rights of any person and which has a direct, external legal effect.[313]"*

Furthermore, section 1(v) of PAJA defines "decision" as:

> *Any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to—*
>
> *(a) making, suspending, revoking or refusing to make an order, award or determination;*
>
> *(b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;*
>
> *(c) issuing, suspending, revoking or refusing to issue a license, authority or other instrument;*
>
> *(d) imposing a condition or restriction;*
>
> *(e) making a declaration, demand or requirement;*
>
> *(f) retaining, or refusing to deliver up, an article; or*
>
> *(g) doing or refusing to do any other act or things of an administrative nature, and a reference to a failure to take a decision must be construed accordingly.*

PAJA then defines a list of exceptions to administrative action.[314]

We believe that all of the 13 actions listed under Section 148(a-m) of the NWA fall firmly within the PAJA definition of administrative action above. They are all decisions made under the NWA that are administrative in nature, they all can potentially adversely affect the rights of any person and they

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[312] For a more detailed discussion of PAJA, see Yvonne Burns and Michael Kidd, 'Administrative law and implementation of environmental law' in Hennie Strydom and Nick King (eds.), *Environmental Management in South Africa* 2 ed (2009).

[313] PAJA s 1(i).

[314] Ibid s 1(aa)-(ii).

have direct, external legal effect. Moreover, none of the section 148 actions fall under the list of exceptions that PAJA outlines.

However, and quite significantly, section 148 does not mention the failure to take a decision as to any of the 13 actions listed. The Tribunal has also made it clear that it will not consider appeals where there has been a failure to make a decision as to the actions listed under Section 148. This has been most with respect to appeals that challenge the failure of DWA make a decision on a license application. In *Marius Els v DWA*[315] the Tribunal refused to hear a matter on the grounds that it lacked jurisdiction as no decision had been made by the DWA. This matter involved a water licence, the validity of which had fallen away due to a period of non-use. The Tribunal held that in order for it to have jurisdiction to adjudicate on the matter, in accordance with section 148(1)(f), there had to be a decision made by the DWA. In this situation, the Tribunal reasoned that since there had been no formal application to the responsible authority, there could be no formal decision, in which case section 41 and consequently section 148(1)(f) could not apply.[316]

In *Ncandu River Dam Consortium (Pty) Ltd and Ncandu River Dam Properties (Pty) Ltd v The Minister of Water Affairs and Forestry & Others*[317] (Ncandu) the appeal failed for similar reasons. The first respondent had applied for an impoundment licence while the second appellant had applied for an abstraction licence in respect of the Ncandu River.[318] The DWA had failed to reach a decision on the applications. As a result, the appellants attempted to apply to the Tribunal to get an order to force the DWA to reach a decision. The Tribunal held (in accordance with arguments put forward by the DWA)[319] that the existence of a decision was necessary to confer jurisdiction in terms of Section 148(1)(f)[320]. In the event of an absence of decision, such as this, the Tribunal again held that it did not have the requisite jurisdiction to decide on the matter, and accordingly it could not compel the DWA to give an answer. The Tribunal made it clear that in situations such as this the appellant should approach the High Court in terms of [PAJA] or in terms of its inherent jurisdiction for a mandamus.[321] It is interesting that in all three of these cases the Tribunal raised the issue of Jurisdiction *mero motu,* and dealt with the issue as a point *in limine*[322323]

From these cases it is clear that the current interpretation of Section 148 restricts the Tribunal from adjudicating on a failure to take administrative actions as required under the NWA. This raises the question as to how many other situations might arise where the Tribunal is not able to hear appeals because of the narrow scope of its mandate under Section 148. This further begs the question why some technical matters would be reserved for hearing by the Tribunal and others relegated to the already overloaded Courts when a specialist Tribunal already exists. Thus, one needs to ask whether Section 148 should be amended to take into account other administrative actions that may arise under the NWA. The following section seeks to answer this question.

6.3.3.2. Section 148 should be amended to include a catch all provision

As mentioned, the Tribunal's expansive rehearing mandate allows it to undertake a judicial review function. With this in mind, we believe that the Tribunal should at least review administrative actions taken under the NWA consistent with how PAJA defines administrative actions. Without being able to

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[315] WT 15/06/2007

[316] Ibid paras 5.7 – 5.10.

[317] WT 18/08/2008

[318] Ibid para 3.

[319] Ibid para 4.2.

[320] Ibid para 5.

[321] Ibid para 5

[322] *in limine* is a hearing on a specific legal point, which takes place before the actual case referred can be heard.

[323] *Ncandu* Para 2.1; *Els* Para 2.1; *Jacobus* Para 4.

do so, the Tribunal is not reviewing matters that should fall clearly within its powers as an administrative tribunal.[324]

There are three major differences between hearing a Water related matter in a court and hearing it at the Tribunal that support expanding the Tribunal jurisdiction. The first is that administrative action challenged in a court may only be reviewed by such court pursuant to the grounds of review in PAJA or common law[325], and would not benefit from the broader rehearing standard utilized by the Tribunal which, as explained above, allows for review for procedural regularity and a review of the merits of a decision.[326] The second, already raised above, is that the High Court may not have the immediate benefit of the skills and experience of the specialized members of the Tribunal. The third major difference is that from the perspective of an applicant, the Water Tribunal is far more accessible due its informality and the lower costs involved.[327]

There are additional reasons that support expanding the scope of section 148(1). Consolidating the administrative actions taken under the NWA to the Tribunal would help take some of the load off the already overloaded courts, as many disputes will likely be resolved without further appeal or review to the High Court. Moreover, it would make it easier for applicants if all NWA related appeals go through the same procedure. Furthermore, although the jurisdiction of the Water Tribunal would be expanded, it would not preclude appellants and applicants from approaching the High Court if they chose to do so. This could still be done under PAJA or under the inherent jurisdiction of the Courts, as long as they have exhausted all internal remedies provided in any other law, which in this case means that they would have to at least first bring an appeal before the Tribunal.[328]

Some arguments can also be made against expanding section 148(1). Although the Tribunal is not overloaded or under stress at the time of writing, the judges on the Tribunal currently only operate on a part time basis and are required to travel country wide to adjudicate on issues wherever they arise. It is therefore possible that with increased jurisdiction the tribunal itself may become overloaded without additional resources.

After weighing the pros and cons of expanding section 148(1), we suggest that section 148(1) should be amended to be a non-exhaustive list and to include a failure to undertake administrative actions so as to bring it in line with PAJA. Section 148(1) should be amended to say: "There is an appeal to the Water Tribunal, including, but not limited to the following..."

6.3.3.3. Should the Tribunal's mandate be expanded even more than how administrative action is defined under PAJA?

There are various sections where DWA or other responsible authority take important actions under the NWA which are currently not appealable to the Tribunal. For example, two such potential actions are the classification of significant resources and the setting of Resource Quality Objectives in terms of Chapter 3 of the NWA. To take the classification of water resources as an example, this is an extensive and complex process involving the balancing of the need to protect and sustain the resource with the need to develop and use the resource.[329] One of the first classifications of this

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[324] *In Oorsprong Boere Trust*, supra note 291, para 5, the Tribunal states that it is not a court nor a tribunal as contemplated by PAJA insofar as it was not established for the purposes of reviewing administrative actions and it was not established in terms of PAJA. We would disagree to the extent that the Tribunal in Oorsprong is saying that section 148(1) actions are not administrative.

[325] See e.g. Cora Hoexter 'Administrative Action in the Courts' (2006) *Acta Juridica* 303; Iain Currie 'What difference does the Promotion of Administrative Justice Act make to administrative law? (2006) *Acta Juridica* 325.

[326] See Hoexter, Administrative Law in South Africa, *op cit* note 269 at 67.

[327] See discussion in section 6.2.

[328] See PAJA s 7(2)(*a*).

[329] Part 2 of Chapter 3 of the NWA.

nature, the classification of significant water resources in the Olifants Water Management Area,[330] is in the process of being finalised. Should a challenge to the classification arise, which is possible, if not probable, the matter would have to go before the High Court. Indeed, even if the NWA is amended to expand the scope of section 148 to be more in line with how administrative action is defined under PAJA, such an expanded definition might not cover the classification process. This is because the classification process will likely affect the rights of the public rather the rights of an individual. PAJA does not consider action that adversely affects the rights of the public as administrative action.[331]

This means that the adjudication process would not benefit from the expertise of the specialist serving on the Water Tribunal, and the accessibility that the Tribunal offers for potential appellants. In the Court system such assistance would have to involve inviting *amici*[332] or appointing assessors. Moreover, the Court's review would not assess the merits of the decision, unlike the broad rehearing standard applicable to the Tribunal.[333]

It is difficult to determine whether section 148 should be expanded to include a review of actions that affect the public, like those mentioned above. However, it is hoped that such a discussion will take place, including a comprehensive analysis of the benefits and drawbacks of such an expansion.

6.4. Major issues and themes emerging from the decisions

Generally, there are five substantive categories of cases that the Tribunal has been deciding until now. Although this is hardly the full extent of actions contemplated under section 148 of the NWA, it is understandable considering delayed implementation of many aspects of the NWA.[334] The major categories of decisions are where 1) appellants challenge directives; 2) applicants or third-parties challenge license application decisions; 3) the Tribunal has dismissed an appeal for lack of jurisdiction; 4) where the Tribunal reviews declarations around existing lawful water use; and 5) where an appellant is seeking condonation for late-filing.

However, prior to discussing the substantive issues arising out of the Tribunal's decisions, it is beneficial to identify challenges the research team faced trying to access decisions and supporting documents from the Tribunal's Registrar. First, all of the Tribunal's decisions are supposed to be available through the Registrar's website; however, it is not possible to determine how up-to-date and accurate the website is. For example, it came to our attention through informal conversations with one of the Tribunal's judges and our own research that there were approximately at least ten missing cases, primarily concerning some the Tribunal's earlier decisions in 2003 and 2004. At the time of writing, we had made repeated unsuccessful attempts to the Registrar to get hold of these missing cases. Another problem that was encountered was that not all of the cases on the website at

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[330] DWA 'Classification of significant water resources in the Olifants Water Management Area; Background Information Document' accessed on 26/01/2012 available at http://www.dwa.gov.za/rdm/WRCS/doc/Olifants/OlifantsClassificationBID.pdf.

[331] PAJA, s (1)(i)*(ii)*.

[332] *amicus curiae* literally translated from Latin, means "friend of the court". It refers to someone who has no relevance to any particular side in a case, and is not party to the case. Instead, they volunteer information regarding a point of law or something else relevant to the case that they feel may help the court in deciding a matter related to it.

[333] However, note that many legal scholars argue that the distinction between review and appeal should be abandoned. See e.g. Cora Hoexter 'Judicial policy revisited: transformative adjudication in administrative law' (2008) *SAJHR* 281, 296-98 (arguing that the distinction between judicial review and appeal can only be sustained in very limited circumstances. In most cases, "any ground of review whose establishment depends on a value judgment or any degree of judicial estimation will inevitably draw the reviewing court into the merits".).

[334] See Schreiner, Pegram & von der Heyden, *op cit* note 3; Pollard & du Toit, *op cit* note 1.

present are complete. For example page 3 of the *Els* decision[335] is not included in the online version of the case[336].

In addition, the Water Tribunal's website only included decisions, and it did not include supporting documents or heads of argument. The lack of supporting documents makes it difficult to analyse the evidence that the Tribunal relied on in reaching a particular decision, including providing insight into how the Tribunal deals with rules of evidence and credibility issues around documents.

Finally, there are a few minor issues related to information conveyed in the various decisions. Many of the decisions are undated. The case number that is listed on the decisions is the date that an appeal was filed in a particular case, not the decision date. So for example, WT W23/02/2009 means that an appeal was filed on 23 February, 2009. Furthermore, many of the decisions are unsigned on the web site.

The following discussion draws from themes that we have identified from the entire pool of cases.

6.4.1. Standard of review

Various Water Tribunal decisions have sought to elaborate on the rehearing standard provided in the NWA. Oddly, in only a handful of cases do the Tribunal actually expressly refer to the rehearing standard that governs its appeals according to the NWA and expand on its meaning. A review of the various discussions around the rehearing standard helps to provide some understanding of whether the Tribunal itself understands the broad scope of the rehearing standard that it should apply when reconsidering administrative decisions. If the Tribunal is espousing an incorrect or inconsistent interpretation then the Tribunal is not adequately reconsidering the administrative decisions that appear before it.

In some decisions, the Water Tribunal does not refer to any standard of review and simply makes a decision. This was the case in *J. Baldie and Sons v. Department of Water Affairs and Forestry*[337], *Normandien Farms (Pty) Ltd. V. Department of Water Affairs and Forestry*[338], and *Dries Alberts v. the Director General: Department of Water Affairs and Forestry*[339], the former a challenge to a license authorisation decision and the latter a challenge to a directive. This is problematic because the public cannot evaluate whether the Tribunal has applied the rehearing standard correctly.

In a few cases, the Water Tribunal has expressly referred to its rehearing standard. Unfortunately, the Tribunal has given inconsistent meaning to this standard across its cases, implying that the Tribunal itself does not have a cohesive understanding of its mandate. For example, in *Neethling v. Department of Water Affairs and Forestry*[340] and *Kobus Crouse Trust v. Department of Water Affairs and Forestry*[341] the Tribunal has correctly stated that a rehearing constitutes a *de novo* standard of review[342]. In *Goede Wellington Boerdery (Pty.) Ltd. V. Department of Water Affairs and Forestry*[343], a decision overruled in the High Court on other grounds, the Tribunal again correctly implied that a rehearing would require it to consider the water use application from scratch. It stated that a rehearing "effectively meant that the Tribunal was, in law, as obliged to take the factors set out in

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[335] Supra note 315.

[336] The whole case is only six pages long, so this is a substantial part of the decision.

[337] 21/12/2006 (undated decision).

[338] WT 26/09/2007 (10th Dec. 2008).

[339] WT 10/08/2005 (undated decision).

[340] WT 21/06/2006 (undated decision).

[341] WT 28/02/2006 (28th Nov. 2008). See also *Nel v. The Department of Water Affairs*, WT 25/05/2009 (28th June 2010).

[342] *Neetling* para 5; *Kobus Crouse Trust* para 5.

[343] WT W23/02/2009 (24th, May 2010). See exact same language in *Sweetnam v. Department of Water Affairs and Forestry*, WT 23/02/09 (9th July 2009).

section 27(1) of the NWA into account as the respondent was when it considered the application."[344] In other words, the Tribunal is not evaluating DWAF's decision in that case, but making its own decision on the license application. The *de novo* standard has found support in the recent High Court decision G*uguletto Family Trust v. Chief Director, Water Use, Department of Water Affairs and Forestry and others*[345], which the court interpreted as requiring the Tribunal as "obliged to … make a fresh re-consideration of the merits on whatever evidence was before it."[346]

In other cases, the Tribunal has clarified, again appropriately, that a rehearing standard allows it to consider newly presented evidence. In *Silver Charm Investments 114 (Pty) Ltd. V. Department of Water Affairs & Forestry and Another*[347], the Tribunal compared itself to Tax Court and stated that it was "obliged to hear and receive evidence which came to light after the fact of the application and the decision because the appeal was, in law, a rehearing of the matter".[348] Therefore, its review was not based on the record before the administrator when he or she made a decision.

Unfortunately, although the Tribunal has correctly identified (in some cases at least) that the rehearing standard allows it to undertake *de novo* review, step into the shoes of the administrator, and hear new evidence, in a series of recent cases it has severely limited its scope of review by expressly stating that it cannot reconsider whether DWA or the responsible authority complied with PAJA. In other words, it cannot reconsider the procedural regularity of the decision, but is limited only to merits review. For example, in *Guguletto Family Trust*, the Tribunal stated that:

> In the light of the fact that the Water Tribunal exercises original or wider appeal powers when it hears appeals, an enquiry into whether or not the respondent, as the responsible authority, complied with PAJA when it decided on the appellant's application does not arise before the Tribunal because it is on its part, obliged as of law to observe the provisions of PAJA in the course of its business.[349]

As explained, this interpretation is incorrect, as a wide-appeal allows for the Tribunal to reconsider the legality or procedural regulatory of a decision in addition to the merits.[350] Thus, the Tribunal can without any doubt enquire into whether the respondent complied with PAJA, which is the statute that has been enacted to guide review of administrative action.

Not only is the Tribunal's limitation on its rehearing standard incorrect, the Tribunal's position is also at odds with its earlier decisions. The Tribunal in several cases has undertaken review for procedural regularity under the rehearing standard; although the grounds of review are articulated differently across these cases. In *Stapelberg Broers v. The Director-General Department Water Affairs and Forestry*[351] the Tribunal considered the appeal on the grounds that the respondent failed to apply his mind, including that he failed to follow correct administrative procedures. The Tribunal in *Klingernberg O.H. v. The Director General Department of Water Affairs and Forestry*[352] considered whether the Chief Director exercised his discretion properly, including whether the decision was made arbitrarily, wantonly, or carelessly and whether the responsible authority applied its mind to the

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[344] Ibid para 14.

[345] A566/10 (25th Oct. 2011).

[346] Ibid para 13.

[347] WT 07/08/2008 (undated decision).

[348] Ibid at 5.

[349] *Guguletto Family Trust v the Department of Water Affairs and Forestry*, WT 16/07/2009 (decision 18th May, 2010) para.16.

[350] See Hoexter, op cit note269 at 67; Michael Kidd 'Fairness floating down the stream? The Water Tribunal and Administrative Justice' (unpublished draft 2011) 6.

[351] WT 10/S2 (undated decision).

[352] WT5/K1 (undated decision)

matter.[353] In *Moddex Trust* and *Louw,* the Water Tribunal based its review directly in section 33 of the Constitution.[354] In these cases, the Tribunal also does not refer to the rehearing standard, but clearly undertakes a review function.

Finally, there are even other grounds of review that the Tribunal has articulated as part of applying the rehearing standard.[355]

The Tribunal's lack of consistency with respect to articulating a coherent explanation of how it approaches appeals under the rehearing standard is problematic because it, among other things, creates confusion for appellants seeking to challenge administrative action. In addition, the Tribunals refusal to evaluate the procedural regularity of the decision at issue severely curtails its broad appeal powers provided to it under the NWA.

6.4.2. Applying the factors under section 27(1) of the NWA

Section 27(1) of the NWA requires the responsible authority to take into account a list of relevant factors when issuing a water use license. Two categories of decisions present potential issues in terms of how the Water Tribunal has applied section 27(1). The first is category of decisions involve appeals as to whether the responsible authority properly complied with the requirements of section 27(1)(b), which requires the Responsible Authority to consider the need to redress the results of past racial and gender discrimination when issuing water licenses. There are two issues that present themselves: 1) whether the apparent singling out of section 27(1)(b) to deny applications without considering other factors is appropriate; and 2) whether the use of the Transformation Charter for Agriculture issued by the Minister of trade and Industry in terms of section 12 of the B-BBEE Act 53 of 2003 (AgriBEE Charter) appropriately serves as a yardstick for determining compliance with this factor when DWA considers a water use application related to agriculture use. The second category of appeals involve decisions where the Tribunal has refused to consider how the responsible authority has applied particular factors under section 27(1) because the responsible authority is relying on an official departmental document to inform its position. In such cases, the Tribunal has refused to hear appeals because it believes it is being asked to evaluate whether the official document is lawful— an exercise that the Tribunal believes is beyond its section 148 mandate.

6.4.2.1. The application of section 27(1)(b)

With respect to the first issue, the Water Tribunal has consistently expressed that if an applicant does not comply with section 27(1)(b), then the applicant should not be granted a water use license.[356] Put differently, non-compliance with this single factor is sufficient to deny the application. In *Goede Wellington*[357] the Tribunal formulated the issue to be decided as "whether or not the granting of the relevant license would satisfy the transformation factors as contemplated by section 27(1)(b) of the NWA", and indeed denied the appeal on this ground.[358]

In our opinion, section 27 presents a typical balancing test, where the agency must weigh all the factors together, and not give any factor more importance than another. Most importantly, the

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[353] Ibid para 3-4. See also *Rabe K H H (Estate) v. The Director General Department of Water Affairs and Forestry*, WT8/R1 (undated decision) ; *O.T. Beneke Reiieivo Boardery (Pty) Ltd.*, WT/B1(undated decision); *A.F.C. Cloete v. Director General Department of Water Affairs and Forestry*, WT2/C1 (undated decision).

[354] *Moddex Trust v. Director General Department of Water Affairs and Forestry*, WT 16/M3 (undated decision); *Louw v. Director-General Department of Water Affairs and Forestry*, WT 12/L2/01 (undated decision).

[355] See e.g. Normandein Farms (evidence not inherently improbable)

[356] See *Guguletto Family* Trust, *op cit* note 350; *Silver Charm Investments 114 (Pty) Ltd.*, supra note 356; *Nel*, supra note 285; *Sweetnam*, supra note 343; *Norsand Holdings (Pty) Ltd. V. The Department of Water Affairs and Forestry and Another*, WT 26/082008 (23rd April 2009).

[357] Supra note 343.

[358] Ibid paras 4.2., 20

absence of meeting one factor should not necessarily result in the denial of a water use application.[359] The High Court through a somewhat convoluted and undeveloped decision in *Goede Wellington*[360] and in *Guguletto Family Trust*[361] came to a similar conclusion. In *Goede Wellington, w*ithout unfortunately citing to any case law, the Court found that DWA:

> mistakenly misinterpreted Section 27(1) of the ACT and in so doing committed an error of law . . . and that the Tribunal adjudicated the appeal as if the factor provided for in Section 27(1)(b) of the Act is a prerequisite for the granting of a water license, and that it accordingly did not consider all relevant factors as required by Section 27(1) of the Act.[362]

There was no love lost between the High Court in *Goede Wellington* and the Water Tribunal, as the court effectively endorsed a statement from appellant that "the decisions of the Chief Director and the Tribunal in this matter display an alarming degree of ineptitude, a lack of appreciation of what is required and a lack of judgment, rationality, and common sense. The Tribunal in particular has shown serious incompetence."[363]

Similarly, the High Court in *Guguletto Family Trust* also found that there "was no legal basis for the Tribunal's ultimate conclusion that transformation factors are the focal point in the determination of a license application in terms of the NWA."[364] The Court found that the Tribunal should take into consideration all the factors and balance them "without attaching undue weight to anyone with a view to serving the object of the Act."[365]

With respect to the second issue, whether or not the AgriBEE Charter is an appropriate test for DWA to determine compliance with the transformation factor, the Tribunal has repeatedly accepted DWA's use of this Charter in agricultural water use cases, and in one case it has applied this Charter on its own accord despite DWA not applying it to the license application.[366] However, it has only elaborated on why it believes AgriBEE is appropriate in the *Nel* decision. There, the Tribunal, relying on *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and others*[367], found that DWA's use of the AgriBEE Charter as yardstick for determining compliance with the transformation factor was legitimate.[368] The Tribunal, citing *Bato Star*, stated that "the manner in which transformation is to be achieved is, to a significant extent, left to the discretion of the decision-maker."[369]

The High Court in *Guguletto Family Trust*, however, has indicated that the Tribunal has given too much weight to the AgriBEE Charter, and that its reliance on the Charter over other factors was

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[359] See Kidd 'Fairness floating down the stream? *Op cit* note 350 at 11-15. Professor Kidd, relying on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, 2004 (4) SA 490 (CC), argues that the Tribunal has incorrectly used section 27(1)(b) by using this factor alone to deny water use applications, although he acknowledges that *Bato Star* allows for some special recognition to be given to transformation factors. As he explains, "Consequently, in my opinion, the NWA does require transformation to be accorded special attention (and rightly so), but it provides no authority for treating transformation as a solitary factor in terms of which an application may stand or fall".

[360] Ibid.

[361] Supra note 345.

[362] Ibid para 9.2.

[363] Ibid para 71.4.

[364] *Gugulleto Family Trust* [High Court decision], supra note 345, para. 22.

[365] Ibid.

[366] *See Guguletto Family Trust,* supra note 350 paras. 26-7.

[367] *2004(4) SA 490 CC*

[368] *Nel,* supra note 303 paras. 39-40.

[369] Ibid.

misplaced.[370] The High Court stated that the Charter should essentially serve as a guideline for good practice, and is not a mandatory legal requirement. The Court stated that:

> Nothing in section 12 of the BEE Act compels any organ of state to comply with or enforce the provisions of the Charter. While the Minister is permitted to formulate a code of good practice in terms of section 9 of the BEE Act, there is nothing on record indicating that such has been done, what the provisions of any code may be, why the code might bind the appellant and the impact of such a code on the right of the appellant to obtain a water use license.[371]

The Court suggested that the Charter might only serve to add substance to an analysis of the transformation factor under Section 27 of the NWA. It remains to be seen how the Tribunal will use the Charter in light of the recent *Guguletto* decision.[372]

Overall, it appears that the Water Tribunal is not applying section 27 with an eye towards the broader strategic framework of the NWA. Section 2 of the NWA states that the purpose of the Act is to ensure that, among other things, the nations water resources are managed and used taking into account various factors, including, promoting equitable access to water, redressing the results of past racial and gender discrimination, promoting the efficient, sustainable and beneficial use of water in the public interest, facilitating social and economic development, and ensuring the protection of the environment. In some situations, license applications that do not address past discrimination beyond providing employment, may heavily promote the efficient, sustainable, and beneficial use of water, and/or facilitate social and economic development. In such situations, where there is available water in a catchment, the NWA suggests that neither DWA nor the Water Tribunal should dogmatically deny an application.

Indeed, in a November 2006 strategic document around water allocation reform, DWA seems to assert as much.[373] It presents a relatively sophisticated approach to evaluating license applications against the transformation factors; one that the Water Tribunal should adopt. In that document, DWA recognised that the process of redressing past discrimination and promoting equity requires a careful balancing act.[374] Moreover, the weight that DWA envisions placing on equity issues depends largely on the amount of water available in a particular catchment. In other words, it depends on context. The strategic document outlines three different water scenarios that would each have different implications on how DWA reviews license applications: 1) where allocable water is sufficient to meet the demands of the applicant and other users for the foreseeable future; 2) where the application may exceed the allocable water; and 3) catchment that have been prioritised for compulsorily licensing.[375] Promoting equity naturally plays a more significant role as one moves into a more water-stressed catchment, and may ultimately require compulsory licensing, the main tool within the NWA that is supposed to address equity issues.[376] Unfortunately, the Water Tribunal's decisions around section 27, and DWA's decision for that matter, fail to grasp DWA's own strategic approach to dealing with equity issues.

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[370] *Guguletto Family Trust* [High Court decision], supra note 345, paras. 21-22.

[371] Ibid para 21.

[372] See Kidd, *op cit* note 350 at 17-18 (Professor Kidd concludes that it is not appropriate to apply AgriBEE directly to licence applications since it has no legal force).

[373] DWA, *A Strategy for Water Allocation Reform in South Africa* (2006).

[374] Ibid at 4.

[375] Ibid s 3.

[376] See NWRS, *op cit* note 3 at 68, 118

6.4.2.2. Using lack of jurisdiction as an excuse not to evaluate DWA application of section 27(1) factors

In *Barend Jacobus and Anna Catherina Fourie NO v DWAF;*[377] DWA denied a license application relying on the catchment area's Internal Strategic Perspective (ISP)[378] which had earmarked use of certain volume of water for resource poor farmers. Instead of approaching this case as a clear appeal challenging DWA's decision to deny a water use authorisation, the Tribunal framed the issue presented for appeal on its own accord as whether the Tribunal "in terms of its appeal jurisdiction, had the power to declare as invalid or unlawful the contents of an [ISP]".[379] The Tribunal decided that it did not have jurisdiction to do so under Section 148 of the NWA and dismissed the case.[380] We believe the Tribunal's decision was incorrect.

In our view, the question before the Tribunal was whether it was appropriate in this circumstance to deny a water use license because DWA had earmarked water for future use by poor farmers under the relevant ISP, not whether the ISP was lawful? This question presented both factual and legal issues. For example, although this factor might be a relevant consideration in some circumstances, in other cases it might not be. As the respondent argued here, there were no water use applications from poor farmers, and it was not appropriate for DWA to deny the application for some sort of speculative future use. On a question of law, the Tribunal might have asked whether DWA could issue a conditional license that would allow DWA to amend its authorisation under section 49(2)*(b)* of the NWA which allows for this "if it is necessary or desirable to accommodate demands brought about by changes in socio-economic circumstances, and it is in the public interest to meet those demands".

The Tribunal's decision might also lead to the absurd result that if DWA takes official positions on how it will evaluate license applications in an official document like an ISP, the Water Tribunal will continue to assert that it does not have jurisdiction to review the decision because the appellant is asking the Tribunal to declare an official document unlawful. In other words, DWA can continue to hide behind official documents that direct it on how to evaluate section 27 factors and thus avoid having the Tribunal reconsider its decisions on license applications.

It is remarkable that the Water Tribunal chose not to hear this case on jurisdictional grounds.

6.4.3. Locus standi

The issue of locus standi before the Tribunal has proven a contentious one as the Tribunal has taken a narrow view of who has standing to challenge license decisions before it. The relevant provisions of the NWA at issue are section 148(1)(f) and section 41(4).

Section 148(1)(f) states that there can be an appeal to the Water Tribunal "against a decision of a responsible authority on an application for a license under section 41, or on any other application to which section 41 applies, by the applicant or by any other person who has timeously lodged a written objection against the application." Section 41(4) states, among other things, that a responsible authority **may** require an applicant to give notice in newspaper and other media inviting written objections to the granting of the requested license by the applicant.

The Tribunal has on multiple occasions read these two provisions in a manner that does not consider a party to be an "objector" under section 148(1)(f) unless DWA has specifically invited comments on a license application pursuant to section 41(4) of the NWA. Essentially, if DWA has not invited comments, an objector's hands are tied when it comes to challenging license decisions before the Tribunal, no matter how many objections, letters, comments or efforts he or she has made to participate in the license application decisions.

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[377] WT 25/05/2006

[378] The Tribunal defines an ISP is an official document of the DWA which, inter alia, allows the respondent to earmark certain quantity of water for use by resource poor farmers for irrigation, among others. Ibid, para. 4.

[379] Ibid, para. 4.

[380] Ibid, paras. 23-28.

It is only necessary to discuss one case to illustrate the Tribunal's reasoning, as the Tribunal has dealt with all of these cases similarly. In *Carolyn Nicola Shear v. DWAF and others*[381], a truly low point in the Tribunal's brief history, the Tribunal refused to recognise the *locus standi* of the Appellant for the reasons described above. This case is particularly troubling because DWA had asked the license applicant to place an advertisement in the local newspaper outlining the application and inviting comments, but without specifying a time period for this to take place.[382] In any event, the applicant never complied with DWA's request. Nonetheless, the third party appellant caught wind of the application through a community meeting and subsequently submitted multiple written objections.[383] The Court inexplicably ruled that because DWA did not specify a time period for notice inviting comments nor enforce against its requirement that the applicant request comments, it could not find that there was a request for written objections under section 41 of the NWA.[384]

Despite this ruling, the Water Tribunal acknowledged that its holding would amount to a legal absurdity. It stated that:

> The plain grammatical meaning of section 148(1)(f) of the NWA leads to an absurdity insofar as it would mean that where no public notice was required by the responsible authority or where such notice was required but was not complied with and enforced, a party who would otherwise have objected to the application could thereby be disenfranchised.[385]

Nevertheless, the Tribunal maintained the appellant lacked *locus standi*.[386] Since *Shear*, the Water Tribunal has issued additional decisions on this issue with the same outcome and analysis, all of which have been appealed to the High Court.[387]

It is also interesting and quite disconcerting to note how DWA's position has changed on this issue over time. In *Shear*, DWA did not contend lack of *locus standi* on the part of the appellant. However, in the recent *Escarpment Environmental Protection Group* decision, DWA very firmly opposed *locus standi*, arguing that the appellants unilaterally lodged objections without being prompted to, and the Constitution is irrelevant to the issue.[388]

6.4.4. Interpreting the NWA

There are a number of decisions where the Tribunal has clearly taken on a role of interpreting law as part of its rehearing mandate. These clarifications are helpful, because the NWA, like other legislation, is subject to interpretation and the Tribunal's decisions here crystallise meaning.

In *Champagne Falls (Pty) Ltd v. Department of Water Affairs and Forestry*[389], DWAF had issued a directive to Champagne Falls to remove an afforestation scheme it had planted allegedly to prevent landslide and erosion problems. DWAF argued that this afforestation should be licensed as it

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[381] WT 19/02/2009(30th Nov. 2010); see also *Gideon Anderson T/A Zonnebloem Boerdery v Department of Water and Environmental Affairs and Another (Pty) Ltd*, WT 24/02/2010 (20th Aug. 2010)

[382] Ibid. at 13.5.

[383] Ibid. at 13.6-7.

[384] Ibid at 21.

[385] Ibid at 13.10

[386] See Kidd, op cit note 350. Kidd argues that the Tribunal decision here ignores the requirements of procedural fairness and misinterprets the provisions of the NWA. Indeed, Kidd argues that nothing in section 148(1)(f) ties the word objection to the formal process of written comments sought by DWA under section 41. If a party submits written objections timeously, then they will satisfy the requirements of section 148.

[387] See *Escarpment Environmental Protection Group and Another v. Department of Water Affairs and Another*, WT 03/06/2010 (21st July 2011) (*Escarpment 1); Escarpment Environmental Protection Group and Another v. Department of Water Affairs and Another*, WT 24/11/2009 (22nd July 2011) (*Escarpment 2)*.

[388] *Escarpment 2 at 11.2.*

[389] WT 28/08/2006 (17th Nov. 2009).

consumed a lot of water and covered a vast area. The Tribunal stated that there was no evidence that the afforestation had been established for a commercial purpose despite the large extent of the plantation area. Thus, the Tribunal gave "commercial" a narrow definition that focuses only on intent.

In *the Jarrett Pech Trust v DWAF*[390] the Tribunal referred to section 2(1)(x) of the National Forest Act to help define a forest for purposes of the NWA, and found that this definition would include a "plantation". This case also demonstrates that the Tribunal will look to other environmental legislation to help interpret the NWA.

In *J D Barnard v DWAF WT02/04/2007,* DWAF had issued a directive against Barnard that required him to stop drawing water from a canal, including his lawful allocated use, because he had exceeded his allocation. The Tribunal set aside the directive because it found that taking away Barnard's lawful allocation was excessive. The Tribunal stated that a blanket prohibition against the use of the water would be contrary to the spirit of section 53 (1) of the NWA.

In *Nel*, the Tribunal interpreted the word "same resource" contained under section 25(2) of the NWA which deals with the transfer of water use.[391] It determined that the same resource did not mean the same catchment area.[392]

6.5. Major themes emerging from interviews

This section reviews major themes that emerged from interviews with parties who have appeared before the Water Tribunal. The project team conducted 13 interviews with a total of 16 individuals. Some interviews were group interviews and there was one follow-up interview. Participants included non-legal persons who challenged water use licenses as third-party objectors, lawyers, and advocates. All interviewees had appeared before the Water Tribunal on at least one occasion. The project team identified approximately five additional participants; however, they did not ultimately make themselves available for interviews despite repeated attempts from the project team. Some of the participants worked together on the same case and/or were adversaries on the same case. For example, the project team interviewed the instructing attorney, advocate, opposing attorney, and the third-party objector who appeared before the Tribunal on two separate matters. In this sense, some participants had common issues or perhaps influenced each other's perceptions of the Tribunal.

The team identified potential participants through the names of lawyers and advocates listed on Water Tribunal decisions (if they were listed) and through word of mouth from other participants. The team also approached the Registrar to provide contact information for certain lawyers or advocates who the team could not find contact information for.

During the interview phase, the following questions were asked of each participant:

- What was the nature of the case argued before the Tribunal?
- What went right and what went wrong during the process?
- Where then any frustrations during the process?
- What lessons did you learn?
- Overall, were you satisfied with the functionality of the Tribunal?
- From your experience, is there any aspect of the NWA that should be amended, both in terms of the jurisdiction of the Water Tribunal and/or in terms of the Act itself?
- Do you think the WT plays an important role in administering the NWA?
- Did you appeal the decision you received? Why or why not?

The following provides a summary of the themes identified in the interviews. The analysis does not seek to weigh the issues in terms of importance or number of participants who identified the issues. Thus, the analysis does not reference the number of participants who identified the same issue.

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[390] WT 21/09/2006 (undated decision).

[391] Supra note 303.

[392] Ibid para 20.

6.5.1. Water Tribunal Rules

By far the most repeated criticism of the Tribunal was that its Rules were inadequate and poorly drafted.[393] There are a number of specific issues identified in this category.

6.5.1.1. Lack of timeframes

Almost all participants agreed that the fact that the Rules do not specify timeframes can and often does create significant delay in the progress of an appeal. One area in which the lack of timeframes is considered particularly problematic is that there are no timeframes governing when DWA needs to submit the Record of the administrative action.[394] There also are no timeframes governing response papers, the time in which a matter must be heard, or any notices, such as a notice of intent to oppose. One participant explained that papers filed with the Registrar effectively disappear into a "dark deep hole" where you hear nothing in response for long periods of time.

Another participant gave the example where DWA filed a notice of intent to oppose the appeal 6 months after she had lodged the appeal without any repercussion. Another advocate mentioned that it is his experience that DWA will not give notice of opposition, thus creating uncertainty and unfairness to the attorney representing the appellant. In comparison, the Magistrates Court and the High Court Rules require the defendant to enter a notice of intention to defend within 10 days of service of the summons[395].

The Water Tribunal Rules do set down timeframes for the commencement of an appeal[396], the commencement of an application for determination of compensation[397], notification of the sitting[398] and application for and decision on a deferment.[399] The Rules also provide that once requested to do so, the Tribunal must within a reasonable time give reasons for its decision.[400] These are the only timeframes set out in the rules, there are no timeframes regarding procedure or filing of documents.

This is completely different to the procedure in the courts where the Court Rules set down time limits for each step in the application and appeal process. As a result most attorneys and advocates are used to having very clearly defined limits and time schedules. Therefore confusion often arises when dealing with Water Tribunal matters. Another aspect that adds to the delay is that attorneys and

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[393] For a comprehensive critique and discussion of the Water Tribunal Rules, see Garyn Rapson, "A critical analysis of the South African Water Tribunal rules, Draft research report submitted for assessment to the University of the Witwatersrand in completion of an LLM in environmental law (2010).

[394] Schedule 6, section 5 (3) of the NWA states "A responsible authority or a catchment management agency against whose decision or offer an appeal or application is lodged must within a reasonable time—

(a) send to the Tribunal all documents relating to the matter, together with the reasons for its decision; and

(b) allow the appellant or applicant and every party opposing the appeal or application to make copies of the documents and reasons."

[395] Magistrates Court Rule 5; Uniform Rules of Court, Rule 19(1). The notice of appeal or notice of application as per rule 3 of the Water Tribunal rules, which the relevant authority receives when the appeal/application is lodged, seems to serve the same purpose as the summons.

[396] 30 days are given to commence an appeal after publication of the decision in the gazette, notice of the decision being sent to the appellant; or reasons for the decision being given.
Whichever occurs last. (Water Tribunal Rules s 4(1)]

[397] 6 months are given to commence an application for the determination of compensation [Water Tribunal Rules s 4(2)]

[398] An officer must notify all the affected parties of a scheduled sitting at least 21 days before that sitting. [Water Tribunal Rules s 5(2)]

[399] A request for deferment must reach the chairperson at least 10 days before the scheduled sitting. [Water Tribunal Rules s 6(1)]

Notice of a deferment must be given within 3 days of deciding on the deferment. [Water Tribunal Rules s 6(3)]

[400] [Water Tribunal Rules s 15(2)]

advocates who do not deal solely with water issues will often delay procedural steps required for water tribunal matters while more urgent steps in the court process for other matters are addressed.

The individuals interviewed all seemed to share the opinion that the Water Tribunal was intended to be a quick, informal way of resolving issues to do with the administrative decisions of the NWA. There also seems to be the perception that the tribunal is meant to be accessible to lay people who cannot afford representation. It appears that the lack of guidelines and time limits which could be interpreted as informality are slowing down the process and confusing the parties to the disputes. One participant voiced the opinion that the Tribunal took longer, and was slower than the courts, thus defeating the intended efficiency of the Tribunal.

6.5.1.2. Lack of interim rulings

Participants identified the Rules' silence on interim motions as a serious drawback. For example, there are no mechanisms to make any interim procedural motions, such as motions to compel filing of the record, motions to strike delayed responses, and so on. As a result all issues need to be dealt with in the main hearing. Another participant explained that he had no recourse to the Tribunal if a party failed to suspend the activities that where authorized by the licence being challenged, which is required when a water use authorization is challenged.

Both the Competition and National Consumer Tribunals are empowered to make interim rulings and grant interim relief.[401] This begs the question whether there is any reason for the fact that the Water Tribunal doesn't allow for interim rulings.

6.5.1.3. Rules are vague as to evidence

The Rules do not provide guidance as to when and how to submit evidence before the Tribunal. One participant added that it is unclear when you are supposed to admit evidence, and whether you are to use written or oral evidence.

Section 7(2) of the Rules provides that the Tribunal may receive written and/or oral evidence. However, the evidence section of the Water Tribunal Rules addresses only the subpoena of witnesses and witness evidence. It does not mention evidence on affidavit, or how evidence is to be admitted by the parties. It appears that the other tribunal rules are similarly sparse on guidance as to the admission of evidence.

6.5.1.4. No cost award

The Rules do not allow for the award of costs for frivolous lawsuits. Some participants were worried that the lack of cost orders allows for frivolous appeals by third parties who object to the water use license. For example, one advocate mentioned that his clients had won most of the challenges to their water use authorisation at great costs, but with no opportunity to recover their expenses.

In the event of an appeal regarding the issuing of a water licence, that licence is suspended[402]. This can be hugely problematic for large companies such as mines who have to cease operations. One participant raised the issue that in some cases the suspension of the water licence can actually be detrimental to the environment as the functioning of pollution control dams also has to be suspended. According to the NWA, the company should be able to apply to the Minister to have the suspension of the licence rescinded, but the interviewees who tried received no reply from the Minister.

The result of this is that overzealous applicants can challenge a license, and without the case having any real merits, the licence can be suspended. The lack of cost orders means that applicants such as

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[401] See Rule 3(2)(a) of the National Consumer Tribunal Rules; Rule 28 of the Competition Tribunal Rules.

[402] 148 (2) An appeal under subsection (1)—

(a) does not suspend a directive given under section 19(3), 20(4) (d) or 53(l); and

(b) suspends any other relevant decision, direction, requirement, limitation, prohibition or allocation pending the disposal of the appeal, unless the Minister directs otherwise.

this face no repercussions for shutting down operations of said companies for the sake of frivolous claims.

Although the Water Tribunal is not a court, and therefore it may not be suitable that it is empowered to order costs, it should be noted that both the Competition Tribunal and the National Consumer Tribunal are empowered to make costs orders[403]. The Consumer Tribunal is even empowered to order punitive costs in the event of frivolous or veracious applications.[404] We do not at this point recommend that the Water Tribunal should have the power to award cost damages; however we believe this issue should be explored with some caution. Many of the third-party objections deal with authorisation to major corporations who often have access to a large team of high-powered corporate lawyers which would result in an extremely large cost award in the event such damages are awarded. Moreover, the threat of a potential cost damages may stifle legitimate appeals because of the risks involved causing a chilling effect in third-party challenges to license authorisations.

6.5.1.5. Style guidelines

Two participants mentioned that there seemed to be confusion regarding when to submit information in the form of an affidavit, a submission, or in the form of a statement. They also seemed to have encountered problems with the Registrar when trying to clear up the confusion. When they did get an answer it would later be changed, or the DWA would use a different form or a hybrid form and the reply would have to be amended accordingly.

The Water Tribunal Rules do include templates for the Notice of Appeal, a Subpoena and the Application for the determination of compensation. It appears that for any other, or any additional information, the form of the submission is not specified and it is unclear whether you have to submit a formal notice. In addition there is no indication of the general rules governing style, such as page limits, font, content and other information necessary.

6.5.2. Administration and Registrar

There were several complaints about communication issues between the Registrar and parties. Most common was the complaint that the Registrar failed to circulate papers filed with it or had lost papers. For example, one lawyer explained that the Registrar presented her with an affidavit from the Respondent only at the Tribunal hearing. According to the lawyer, the Registrar did not provide any reason failing to circulate the affidavit prior to the hearing.

Participants also complained of not being able to access the Registrar, including having trouble filing papers with it. One participant gave an example of sending a messenger to file papers with the Registrar only to find that the Registrar's office had locked the doors during business hours. The messenger claimed that the Registrar's office had seen him coming with a large pile of papers and had run to lock the door.

One participant complained that the Registrar was unfamiliar with the NWA and the Water Tribunal Rules and it was difficult to get responses to enquiries. For example, the attorney had called the Registrar on several occasions to get clarification on procedure and rules; however the Registrar was unable to provide responses. Moreover, the Registrar requires all enquiries to be in writing, which can cause huge delays when trying to urgently clarify small issues of procedure.

Some participants also complained about a lack of communication around important dates. For example, the date of appeals will be set without contacting the parties, thus often resulting in adjournments because a certain date will not work for one party. This also has the effect of eliminating potential dates for other matters where parties are available, thus causing delay. Other participant commented that the hearing had been cancelled without any notification to the parties. Thus all the parties appeared for no reason.

It is interesting to note that the Registrar for the Water Tribunal is neither mentioned in the Water Tribunal Rules nor the NWA. This is in stark contrast to other tribunals such as the National Consumer

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[403] See Rule 58 of the Competition Tribunal Rules, and Rule 25 of the Consumer Tribunal Rules

[404] Rule 25(7) of the Consumer Tribunal Rules.

Tribunal and the Competition Tribunal where the Registrars responsibilities are to an extent enumerated in the Tribunals' respective rules. For example, in the Competition Tribunal Rules, the appointment of the Registrar[405], the Registrars duties with regards to filing documents[406], the set down of matters[407], the record of the hearing[408] as well as numerous other roles and duties are mentioned[409].

6.5.3. Accessibility

Overall the participants thought that the Tribunal was accessible. However, the two non-lawyers who were interviewed expressed a different view. Although they stated that it was relatively cheap to get a decision by the Tribunal, they believed that for rural communities the cost of going to the tribunal is still out of reach. This is because in their opinion although you can appear without a legal representative, it is extremely hard to be successful without one. This is compounded by the fact that some of the bigger water use applicants have access to the best legal representation. The non-lawyers felt that that there should be provision made for *pro bono* lawyers to assist rural communities with their matters before the Tribunal.

6.5.4. Cooperation from DWA

A major source of frustration for all participants involves access to the record and other relevant state documents from DWA. Most participants felt that DWA does not provide any information to appellants and delays significantly in submitting the record for the appeal to the Tribunal and the parties. Others complained that DWA does not provide them with a notice of intent to object, thus leaving them in the dark as to whether the appeal will be opposed.

This may be partly as a result of the lack of time limits, and the fact that it seems that the DWA cannot be compelled to comply with procedure. However, it is worth noting at this stage that although the DWA may seem at fault here, we understand that the entire legal department of the DWA consists only of two people. Faced with these capacity constraints, it is little wonder that non-compulsory procedures fall through the cracks.

6.5.5. Competency of members

With a few exceptions, most participants felt that the members were competent, well-prepared, have adequate expertise to handle the cases before the Tribunal, and understand legal arguments.[410] Participants mostly agreed that the members were professional and handled hearings in an appropriate manner. Many participants agreed that the Chairperson was fair and appropriately conducted hearings.

A few participants, however, did express some concern as to the competency of the members. One participant was concerned that the panel was dominated by engineers and not lawyers. He stated that the Tribunal consisted of two lawyers only, and one without any experience. He thought this was inadequate and resulted in legal concepts not being appropriately grasped by the Tribunal. He mentioned that if the one experienced legal mind was not at a hearing, the entire process would come to a halt.

Another participant had concerns around how the Minister appointed members to the Tribunal. He believed that the way members are appointed should be better clarified. Finally, one advocate

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[405] Rule 5 of the Competition Tribunal Rules.

[406] Rule 8 of the Competition Tribunal Rules.

[407] Rule 51(2) & (3) of the Competition Tribunal Rules.

[408] Rule 57 of the Competition Tribunal Rules.

[409] For more examples see Rules 4(2); 9(2); 13(3); 14(2); 25(1)&(2)(b); 29(3)-(7); 30(2)&(3); 31(4); 33(1); 35(1); 37(3); 38(6); 41(1); 46(4)(a); 53(3); 54(2); and 58(2)(e)

[410] At the time the interviews were conducted the Water Tribunal comprised five part-time members: Chairperson: Mr Lepono Joshua Lekale; Deputy Chairperson: Dr Wendy Singo; Additional Members: Mr Adolph Slindokuhle Hadebe; Mr Atwell Sibusiso Makhanya; and Mr Hubert Thompson.

mentioned that in the cases she was involved in, only one member presided. Although he was an attorney and could deal with legal arguments, she felt that the case was going to raise complex technical questions regarding financial planning and environmental impacts. She was concerned that the member's training and expertise would not qualify him to address those types of issues adequately and was not certain whether the Tribunal included other members who could be brought in at later stages, whether experts would be used, or other approaches taken.

Finally, two participants expressed a belief that the Tribunal was biased towards DWA. However, this was solely based on the results of the decision, and on no tangible evidence.

6.5.6. Suggested amendments to the NWA

There were several suggestions around amending the NWA to improve the Tribunal's functioning.

In line with the discussion in Section 6.4.1 above, many participants expressed the need for the NWA to clarify the "rehearing" standard governing Water Tribunal appeals. There was confusion as to whether it was appropriate for the Tribunal to substitute its own decision in a rehearing or whether the Water Tribunal could undertake judicial review of DWA decisions. Some noted that allowing new evidence under a rehearing standard can be unfair to either party. In particular, new information might be presented to the Tribunal that was not before DWA when it made its decision. Others thought allowing new evidence was good because it allows for the Tribunal to make additional investigation where necessary.

Some participants thought that the Tribunal's mandate was limited and should be more in line with PAJA. Specifically, the list of actions reviewable by the tribunal in Section 148 should be a non-exhaustive list.

At least one participant argued that the Tribunal should be a PAJA Tribunal. This point warrants some additional discussion. As mentioned above, we argue that the Tribunal's mandate should be expanded so that it is in line with how PAJA defines administrative action. In addition, we clearly state that the rehearing mandate of the Tribunal allows it so reconsider whether DWA or the responsible authority complied with PAJA or common law legality when making its decisions. However, doing this does not mean that the Tribunal would become a PAJA Tribunal. In order for that to happen, the Water Tribunal would also need to meet the definition of a "tribunal" under PAJA, which it defines as "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act".[411] Because the NWA does not (at least expressly) establish the Water Tribunal for the purpose of reviewing administrative actions made pursuant to the NWA in terms of PAJA, it is unlikely that the Water Tribunal can be considered a Tribunal under PAJA.[412] The Water Tribunal takes a similar position.[413]

But what would be the implications and added benefits or drawbacks should the Water Tribunal act as a PAJA Tribunal? In terms of implications, the High Court would likely be precluded from judicially reviewing the Water Tribunal's decisions, since PAJA allows for any person to institute proceedings in a court or a tribunal for the judicial review of an administrative action.[414] If the Water Tribunal has an equal position as the High Court to undertake judicial review under PAJA, appealing the Tribunal's decisions to the High Court under such circumstances would implicate the doctrine of *res judicata*.[415]

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[411] PAJA s 1(xiii).

[412] Although, one could argue that because the Tribunal can apply a wide appeal standard, it can evaluate administrative action pursuant to PAJA.

[413] *Oorsprong Boere Trust,* supra note 291 at 6.

[414] PAJA s 6(1).

[415] The requisites for the exception res judicata are stated by LH Hoffmann & DT Zeffertt *The South African Law of Evidence* 4 ed (1988) 337 as follows:

"*… that a prior final judgement had been given in proceedings involving (a) the same subject matter, (b) based on the same res or thing, (c) between the same parties, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to proceed against the other on the same cause, for the same relief, can be met by the exception res judicata."*

As to benefits, the argument can be made that having two different layers of administrative action, as is the case now, is inefficient and creates unneeded bureaucracy, and causes unnecessary expense and delay to an appellant should the appellant want to seek judicial review of the administrative decision.[416] Moreover, the chairman of the Tribunal is appointed by recommendation of the Judicial Service Commission, the same way that judges are appointed. Thus, the Tribunal will theoretically be qualified to undertake judicial review. PAJA also presumably has additional good reasons to allow a specific statute to create a PAJA Tribunal to serve a judicial review function in lieu of a High Court.

There was some disagreement between participants as to the procedure required to petition the Minister to remove the suspension of a water use authorization pending an appeal, and whether this part of the NWA should be amended. One participant noted that this provision needs to be clarified. He gave an example where he petitioned the Minister to remove the suspension of his client's water use authorization; however, the Minister never responded. Thus, the NWA, because so much is at stake, should require a quick decision by the Minister when receiving such applications. Another attorney suggested that because of the high costs associated with suspended water use, an appellant challenging the license should have to demonstrate that the license should be suspended. Thus there should be a presumption against suspension. Some participants highlighted the importance of having a suspension provision. For example, one advocate noted that because the Act then permits the licence holder to have the suspension lifted upon a proper showing to the Minister, a balance is struck among the competing interests at stake.

It seemed as though all the participants who had raised the issue of *locus standi*, or who had been party to a matter where the issue was raised, thought that the interpretation of the *locus standi* provision had been incorrect. The suggested amendments to the section ranged. The suggestions were that the section 148(1)(f) in the Act be clarified, and that it be amended to be brought in line with the right to administrative action[417] and the principle of public participation. Two participants voiced the opinion that the objector should be allowed to object (have *locus standi*) whether invited to or not. An additional issue in this regard was that the Tribunal would not hear the *locus standi* issue separate from the main case. Therefore it was possible that the applicant would prepare the main issues of the trial and brief counsel only to be turned away on *locus standi* grounds. This is an expensive waste of time and money which could be resolved if interim rulings were allowed.

Finally, as mentioned, *stare decisis* does not feature in the Tribunal's mandate. Some participants noted that this makes legal certainty a huge problem as the Water Tribunal is never bound and there is effectively no precedent.

6.5.7. Does the Tribunal play an important role in administering the NWA?

With a few exceptions the participants agreed that the Tribunal is an essential component of the NWA and that it can serve a critical role. It can provide informal, efficient, inexpensive, and fast dispute resolution which improves access to just that would otherwise be unavailable as a practical matter to many individuals through the formal court system. All participants, however, agreed that the Tribunal needs considerable improvement.

6.6. Conclusions and recommendations

Based on the review of the Tribunal's decisions and the interviews conducted with individuals who have appeared before the Tribunal, a number of recommendations can be provided.

First, we recommend that section 148 of the NWA be amended, so that the list of actions reviewable by the Tribunal is not exhaustive allowing the Tribunal to expand its scope of review of administrative actions under the NWA consistent with how PAJA has defined administrative actions. For example, this can be done by inserting the phrase "including, but not limited to" under section 148(1). In

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[416] *Guguletto Family Trust v the Department of Water Affairs and Forestry*, supra note 350, paras 16-17 (stating that because it is undertaking a rehearing, its decision-making is another level of administrative action that is itself subject to PAJA).

[417] Section 33 of the Constitution

addition, the Tribunal must be able to review the failure to act by DWA, particularly around license applications.

With respect to the Tribunal's composition, the NWA in theory strikes an appropriate balance by envisioning the Tribunal consists of legal and technical experts, typical of administrative tribunals.[418] However, it is not clear whether the requirement that only the Chairman must be a qualified lawyer is sufficient to ensure that legal expertise of the Tribunal. This is particularly pertinent because the NWA does not provide guidance as to how many members and which members must be present to conduct a hearing. Having one member present may be insufficient, especially if that member is not legally trained and has to adjudicate on questions of law as was the case in *Goede Wellington*.[419] The NWA or the Water Tribunal rules should be amended to address these issues.

It is clear from the interviews that the Tribunal's rules are completely inadequate with respect to multiple issues. Most importantly, the rules need to set clear timeframes for parties to make submissions, the administrative record to be finalised and distributed, and for decisions to be made. The rules need to give guidance as to evidentiary requirements and style for submissions. Furthermore, the rules should allow for interim relief to address disputes that arise as to any of the above. In addition, the issue of costs should be explored, although with caution, as this might have a chilling effect on challenges to water use license decisions by third-parties. It is also clear that clear parameters for the Tribunal's rehearing standard need to be provided. At present the numerous different interpretations of the standard are creating unnecessary confusion.

The issue of whether an appeal should suspend an authorisation is also contentious. We believe that the suspension of license plays a vital public interest role. However, it is clear that the NWA provides no guidance to the Minister once he or she is petitioned to remove a suspension. At the very least, the NWA should be amended to clarify the process to appeal a suspension to the Minister under section 148(2), setting guidelines for the Minister to make such a decision with appropriate timelines. Another option is to allow the Water Tribunal to consider the suspension issue if one party raises it, which it currently does not.

In terms of substantive aspects of the NWA, we strongly urge that the NWA be amended to make mandatory a request for comments from potential third-parties that might be aggrieved by the authorization of a water use. Whether or not the Courts will uphold the Water Tribunal's decision on the *locus standi* issue, it seems contrary to the spirit of the NWA and PAJA that DWA has discretion to invite comments on a water use applications that often have a significant impact on the community.

Finally, it has become clear from the interviews that the Registrar is not functioning appropriately. There are major issues in terms of communication, administration, and organisation. These complaints about the Registrar must not be taken lightly, as it can have serious implications on the efficient running of the Water Tribunal. DWA should take a serious look at reforming the operation of the Registrar.

The vast majority of actions listed under section 148 of the NWA remain unimplemented. In other words, the Tribunal is truly yet to be tested. When it is eventually confronted with difficult and complex actions and issues, including those around Reserve determinations, classification of resources, and compulsory licensing, it is not clear whether the Tribunal is up to the task. DWA must act urgently to address the shortcoming surrounding the Tribunal. The Water Tribunal can serve an essential and important function, and it can play a critical role in the efficient administration of the NWA. To delay important reforms will jeopardize this important mechanism from realizing its true potential.

This case study has a relatively small empirical pool and by no means conclusive. However, despite the size of the study, many potentially critical issues have been raised. This paper provides a good starting point for additional research into the Water Tribunal and the amendments suggested. We propose that the Tribunal decisions be constantly reviewed, and issues such as the ones raised here are addressed in order to ensure that the Tribunal claim its role at the forefront of the administration

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[418] For further discussion see Kidd, *op cit* note 350 at 22.

[419] Ibid.

of the NWA. We also suggest a larger empirical study that incorporates more people who have appeared before the Tribunal, and current and former Tribunal judges. In addition to the review, comparisons to other similar administrative and environmental Tribunals worldwide would no doubt enrich future research and provide valuable information for reviewing the rules and streamlining the functionality of the Tribunal.

7. Law student integration

7.1. Introduction and objective

The law school integration sub-theme sought to develop professional interest and capacity in water law through the **involvement of law students** in every aspect of the legal component. As mentioned in chapter, stakeholders that participated in SRI 1 noted a lack of lawyers with expertise around natural resource management issues on the ground who are working in the public sector. Related to this, civil society organisations seeking to challenge unlawful uses of water resources that also have the capacity to do so are few and far between. The result is that a huge gap exists between the enactment of water resource-related law and implementation of those laws (Pollard & du Toit 2010).

As a result, the legal component of SRI 2 placed great emphasis on integrated law students into all substantive areas of activity within the project so that law students would get exposed and involved to on-the ground legal issues related to sustainability and water resources. In addition, it sought to explore how law school curriculums could better incorporate water resource management issues. The objective of this aspect of the project was:

To research and implement various approaches that incorporate on-the-ground legal issues related to water resource sustainability into law school curriculums, through a collaborative process between AWARD, government departments, legal practitioners, and law schools, so that law students can:

- get exposed to and gain interest in water resource sustainability issues;
- identify potential careers in the public sector around environmental law; and
- help shape law school curriculums to better incorporate environmental issues

7.2. Overarching approach and method

This sub-component takes the following methodological approach (see Figure 6):

1) Scoping of potential law school collaborator(s);

2) Development of a law school collaboration strategy through a collective effort between AWARD, the law school collaborator(s), legal practitioners and other stakeholders; and

3) Implementation of collaboration strategy where possible.

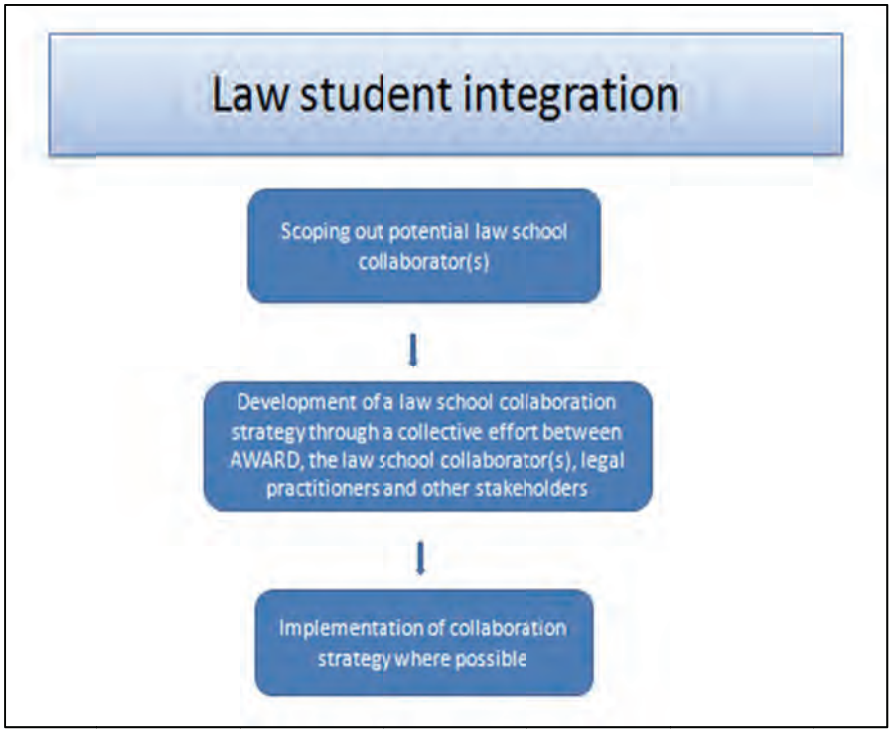

Figure 6. Law student integration methodology

The remainder of the chapter reviews the main outputs of the above activities.

7.3. Collaborative partner and development of a collaboration strategy

AWARD has worked with Wits Law School as a collaborative partner for two main reasons. Firstly, AWARD is based on Wits Rural Facility, a research facility belonging to Wits University. This provides an important link with Wits University and serves as potential resource for the law school. Secondly, Wits law school has two energetic environmental professors who are committed to getting students involved with civil society and exposed to on-the-ground environmental issues. Professor Tracy Humby, in particular has put a lot of time and effort to foster a meaningful collaboration with AWARD. From the perspective of the School of Law, the collaboration is invaluable in providing a space for students to experience the outworking of the law in practical contexts. It also ties in with the School's Bram Fischer programme in that it seeks to promote a greater understanding of the meaning and effectiveness of human rights and the rights to the environment and access to sufficient water in particular.

AWARD and Wits Law School held a joint multi-stakeholder workshop at Wits Rural Facility from November 25-26, 2010. The purpose of the workshop was twofold. Firstly, it sought to review, discuss, and get feedback on AWARD's legal research agenda and to brainstorm issues for future legal research, including legal research that can help regulators fulfill their mandates. Secondly, the workshop sought to discuss various initiatives through which AWARD could integrate its research agenda into the School of Law's curriculum in the short and long term.

The workshop was attended by representatives from the following government departments: 1) Department of Water Affairs (DWA) Mpumalanga Regional Office, CME Unit; DWA head office, legal services; and the Inkomati Catchment Management Agency (ICMA). The University of Witwatersrand sent representatives from the Law School, Mandela Institute, and the Centre for Applied Legal Studies (CALS). Six law students also attended the workshop.

After the workshop, AWARD and Professor Humby drafted a final legal strategy for law school collaboration that was submitted as the SRI Legal deliverable L1 in March 2011. The final strategy proposed the following six collaborative efforts:

Initiative 1: AWARD Internship Programme 2011

Initiative 2: Extension of current internship programme to a more permanent opportunity involving AWARD and/or government/government agencies

Initiative 3: Educational field-trips to Wits Rural Facility for Undergraduate Students

Initiative 4: Photographic exhibition and talks for general student body for week of World Water Day (21 – 25 March 2011)

Initiative 5: Integration of AWARD work into research required for degree purposes or into guest lecture opportunities

Initiative 6: Seminar/conference on water resource management issues

7.4. Summary of actions taken

The three main areas of activity included internships for students, guest lectureship, and a student field trip. Each is discussed below.

7.4.1. Internships

Whenever possible, the legal component sought interns to undertake substantive research associated with the project. AWARD hosted a total of 6 interns over the course of the project, and at times, interns continued to work on the project remotely from Johannesburg or came up for multiple periods. For example, Alexandra Robertson worked remotely on preparing the Water Tribunal case study by conducting interviews in Pretoria and Johannesburg, and also worked at AWARD during January 2012 on writing the case study. AWARD also hired one intern full-time after completion of her internship; she is currently working as a researcher for AWARD.

Substantively, interns helped prepare both legal case studies and all of the foundational research. Interns also participated on several occasions in interviews associated with the regulatory support sub-theme.

The main challenge around hosting interns the ability to plan and organise student trips and internships for full time students. There are few opportunities for students to intern at AWARD during the school year because it is too far away from Johannesburg. Moreover, when there are opportunities, they are often too short to truly get a substantial working experience. In addition, it is more difficult to find masters students to participate as internships because a large proportion of them are working full time while studying. Thus, only one intern was a masters student.

Generally, the internships provided a valuable opportunity for law students to gain a solid understanding of environmental law and water law, get exposure to on-the ground issues and develop their legal skills. Even students who managed to come for two weeks benefited tremendously from their internship. All of the interns provided positive feedback about their experience and acknowledged that they gained valuable skills and knowledge to supplement their in class learning.

7.4.2. Student field trip

One of the collaborative opportunities agreed upon was to organize educational field-trips to Wits Rural Facility for undergraduate law students. The first such field trip took place from July 20 – 23 during the university's July study break where AWARD hosted 12 law students from Wits University Law School.

The design of the field trip was aimed at exposing undergraduate law students to situations that require application of the human rights and statutory law in real South African contexts. The programme consisted of a mix of site visits, interviews with community members and leaders, group tasks, role plays and simulations, presentations, lectures, guest speakers and reflection sessions. On most occasions students were given a platform to express themselves with a strong focus on student activity and report back.

Further the learning process was designed around opportunities for critical thinking and self-directed learning within the context of environmental/water management and the law. Students were therefore presented with cases where laws might be applied to enhance natural resources

management, resolve resource conflicts and address issues of sustainability and equity in resource allocation. Students were familiarised with environmental management concepts and instruments as well as some of the challenges facing rural development.

A central theme was that of sustainability and the deliberation of solutions in respect of it. Given that most students had not yet attended an environmental law course (the course is only offered to fourth year students in the second semester of their final year), the program was designed to act as a high-level introduction rather than a comprehensive training.

Figure 7. Law students on a field trip

Figure 8. Law students on a field trip

Overall, based on student reflections, the field-trip constituted a rich, multi-dimensional learning experience. The activities constituting the research design required different forms of pro-active engagement on the part of the students as well as critical reflection. It is clear from student evaluations that these activities engendered, in the first instance, learning about themselves (the lack of confidence in their own writing, for instance) and the opportunities available for future work as legal professionals. This certainly relates positively to one of the key objectives of the legal programme under SRI 2. Secondly, the students acquired a better understanding of the roles of different institutions and stakeholders in water resources management, and the need for them to work together in a manner that was accountable, transparent and co-operative. This was mirrored in a seemingly new understanding of the complex, inter-related and fragile nature of the environment.

Finally, students learned a lot about the law: Not only concepts associated with water resources management legislation such as the notion of the 'catchment' or the 'Reserve' but also about the complexities of implementation – the linkages between environmental law and human rights, administrative and constitutional law but also, and perhaps more importantly, the linkages between effective implementation and political, social and economic dynamics

For all of the above reasons, it is essential that similar student field trips be incorporated into legal environmental curriculums.

7.4.3. Guest lecturing

Professor Humby invited Derick and Ramin from AWARD to give a guest lecture on social-legal research to her master's level environmental law class. This was a great opportunity and allowed Ramin and Derick to share insights on social science research methods and the added-value that they bring to legal research.

7.5. Key recommendations

The student integration was arguably the most important element of the SRI 2 legal component. Throughout the course of the project, it provided repeated opportunities to test various methods to help garner student interest in environmental issues, and water sustainability issues in particular, and to develop student competency, knowledge and expertise in these areas to supplement in class learning.

A one year project is insufficient to address the main issue that spurred the student integration effort: the lack of competent lawyers working on water and environmental law issues in the public sector. Law schools must work with civil society organizations and government to reform their curriculums so as to establish a long-term program that seeks to institutionalize out-of-classroom learning related to environmental law issues. Out of classroom learning can include field trips in partnership with non-profit organisations or government, expanded internship programs, externship programs where students gain credit for working with organisations or government, and research projects on behalf of public sector clients. In addition, these out of classroom experiences create opportunities for critical thinking and self-directed learning within the context of environmental/water management and the law. For example, as part of a student field trip, students can undertake role playing simulations where they need to argue difficult and complex positions that have no clear answer. Students can also work with research organisations, like AWARD, to apply new ways of research, such as action research, that are seldom taught as part of the law school curriculum.

Law students, civil society organisations, and government must do more to expose students to public interest careers in the environmental law field. This includes setting up public interest career fairs and more opportunities for work-study externships.

8. An overview of findings and potential areas for future action

8.1. Introduction

This project focused on researching, evaluating and addressing the legal issues related to compliance with – and focusing on enforcement – the National Water Act and other legislation related to ensuring sustainability of South Africa's water resources. As the NWA is the main legislation that governs sustainability of South Africa's water resources, compliance with this law is essential for ensuring sustainability. Collaborating with law students, regulators and stakeholders, the research took a multi-pronged research approach, which included legal research, the preparation of case studies and focused in-depth studies, on the ground research, and the facilitation of platforms for collective action. Consequently, very different findings and recommendations come out of the various aspects of the legal project.

In this final chapter, we summarise the major findings, and provide recommendations for future action and research.

8.2. Synthesis of key findings and recommendations

8.2.1. The dearth of legal cases stemming out of the NWA provides little guidance on what constitutes non-compliance with respect to key components of the NWA – such as the classification of resources or the delivery of the Reserve – resulting in uncertainty as to how alleged non-compliance with NWA actions can be litigated in court

As explained in chapter 3, this research documented that only a handful of court decisions directly touched on water management issues associated with the NWA. Nevertheless, because the principles behind IWRM in South Africa are primarily rooted in section 24 of the Constitution, such as equity and sustainability, court decisions applying and interpreting section 24 of the Constitution can help to inform on potential legal issues related to IWRM. As presented in appendix 1 to this report, this project documented court decisions that dealt with section 24 of the Constitution – such as the principles of sustainability and equity. It also reviewed the potential application of these court decisions to IWRM.

Nonetheless, although court decisions related to sustainability and equity are helpful to understand non-compliance with the NWA, there are few court decisions that directly touch on the NWA implementation issues. Consequently, a lot of uncertainty remains regarding what would constitute non-compliance with important components of the NWA, such as classification of catchments, the setting of resource quality objectives, the finalisation of verification and validation, compulsory licensing, and implementing measures to achieve Reserve determinations.

The implementation of major NWA actions still remains to be executed, including many of those mentioned in the preceding paragraph. Given that these actions will affect how and when water can be used – some water users will be discontent with the outcome and will inevitably want to challenge these actions. It is thus important for stakeholders, including water users, legal practitioners and government, to critically explore what amounts to or may amount to non-compliance with respect to the implementation of these actions, how alleged non-compliance may be raised legally, and what existing court decisions may guide this process. Such an understanding will not only prevent frivolous claims and unreasonable expectations, but it will also help the regulator to take action and guide these processes within the ambit of the law.

Recommendations

- Case law is dynamic and court decisions are constantly creating new precedent. A compendium of case decisions focusing on IWRM issues (such as section 24 of the Constitution) that is accessible to non-legal practitioners should be maintained on an annual basis. Such a compendium can be prepared by academic institutions, research organisations, or non-profit organisations, and should be funded by the WRC.

- A trans-disciplinary research document should be prepared that critically explores what might constitute non-compliance with major NWA actions. To the extent there have been or are court cases challenging NWA actions, these should also be documented, including researching and analysing why the parties brought the case, what they sought to achieve, how they formulated their legal arguments, and whether the case achieved the desired objectives. Such a document can provide guidance to water users, legal practitioners, and government decision-makers, by, among other things, preventing unreasonable expectations and promoting compliance with the law. This research will ideally be undertaken by a non-governmental research organisation and should be funded by the WRC

8.2.2. There is a poor understanding of the difference between assignment and delegation of functions to CMAs

The establishment of CMAs is an integral part of IWRM in South Arica which seeks to decentralise water resource management. The water law and policy envision that CMAs are in a best position to manage water on a catchment scale, including facilitating participatory decision-making and information sharing between stakeholders. As explained in Chapter 3 and Appendix 3, assignment and delegation are the two main mechanisms by which powers are transferred from DWA to CMAs and each has very different legal implications in terms of responsibility and access to funds. Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function. Thus the decision to use one over the other as means to transfer powers to CMAs has tremendous implications in practice.

However, the NWA provides no guidance around how, when and which of the two should be used. As Appendix 3 explains, the research has demonstrated that within DWA there are conflicting viewpoints around the assignment and delegation of functions to the CMA and the role that the CMA should play in water management. This includes unfamiliarity with the distinction between these terms, disagreement about when and how functions should be assigned or delegated to CMA, disagreement as to the role of a fully functioning CMA, and a lack of knowledge as to the extent of powers that the NWA envisions assigning to the CMA. This lack of clarity contributes to the delays in establishing and developing fully functioning CMAs as required by the NWA and the water policy underlying the NWA.

The result is that despite that the NWA envisions CMAs will be assigned the majority of their functions and powers, particularly those powers they will undertake as a responsible authority under the NWA, the two CMAs that have been established are far from undertaking the amount of functions that the NWA envisions for them, and are often delegated powers that should have been assigned.

Recommendation

- To clarify uncertainty around the process of assignment and delegation, the NWA must provide guidelines similar to guidelines provided under the Municipal Systems Act for assignment and delegation. Guidelines would provide great clarity to the practical components of delegation and assignment which are particularly important to implementation of WRM. We propose that since the NWA envisions an almost complete transfer of responsibilities around WRM to CMAs through assignment, this is to be preferred to delegation in the devolution process. Delegation does, however, have an important role in the progressive transfer of additional responsibilities to CMAs; but that role should be used as a stepping stone to eventual assignment.

8.2.3. Regulators undertaking enforcement activities related to water resource protection must be provided substantially more support from within government departments, other government departments, and non-governmental organisations

As presented in chapter 4, this project reviewed the immense amount of challenges on the road leading to an acceptable level of enforcement in order to protect South Africa's water resources and to enable compliance with the NWA. The research demonstrated that the regulators themselves have

a solid understanding of and agree on the main issues facing them. In many instances they have offered legitimate solutions to tackle these issues.

However, simply identifying the main issues is not enough. It is essential that we approach the problem in a way that places these issues within a systems approach – one that recognises the complexity of the situation. Without understanding the underlying causes for the issues that participants identified and how these affect each other, it will be difficult to devise solutions and take meaningful actions to improve enforcement. For example, chapter 4 and appendix 4 present a systems analysis that was undertaken as part of a workshop with regulators from various departments around an unlawful sand mining operation in Bushbuckridge.

Moreover, because of the fragmented nature of South Africa's environmental management legislation, multiple departments have a role to play in managing water resources, and often legislation overlaps with other legislation. For example, both NEMA and the NWA apply to instances of water resource pollution. This fragmented legislative landscape requires strong cooperative governance to overcome uncoordinated duplicative action. As chapter 4 and appendix 4 illustrate, the relevant government actors must act collectively, otherwise the entire environmental management framework will break down, and South Africa's natural resources and the public will suffer.

This fragmented situation is encapsulated in Figure 9.

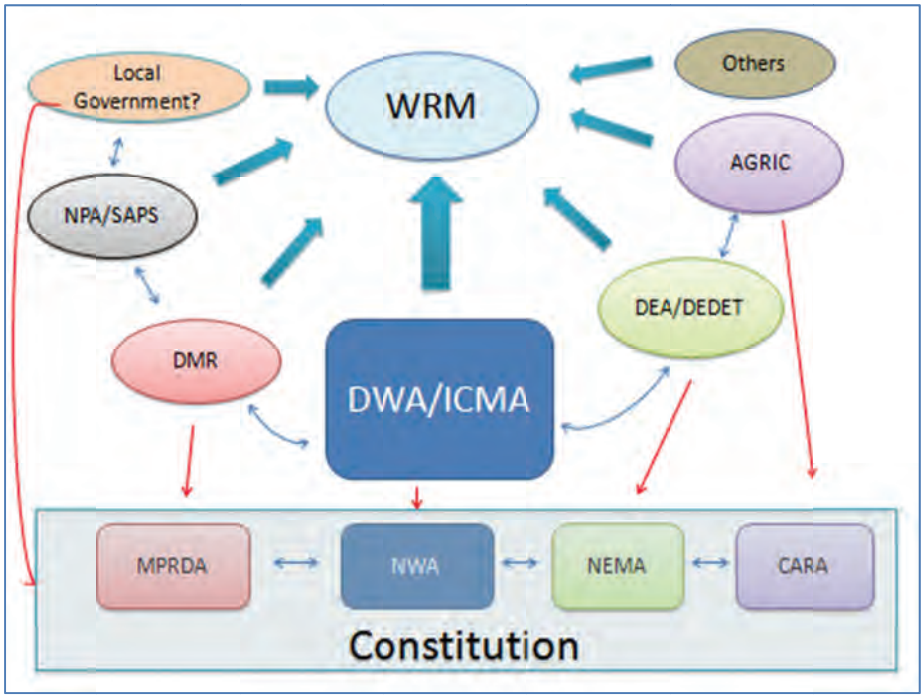

Figure 9. Potential for fragmentation in South Africa's environmental management regime

Recommendations

- Efforts should be made to have government regulators undertake a systems analysis related to the main issues that they believe impact on adequate enforcement. This will allow more meaningful interventions.
- The project highlighted the need to continue implementing and testing a collective action approach. Platforms must be created to facilitate collective action, such as an independent CME forum. A formal forum can foster coordination and cooperation around enforcement.
- Enforcement issues need to be prioritised among senior level policy makers who ultimately will make major management decisions. This can be done, for example, by creating inter-departmental CME forums where senior level policy makers are required to attend.
- CMAs should take the lead in a meaningful way to coordinate enforcement efforts between departments. This may including taking the lead to set up an inter-department CME forum for

each water management area described above. For example, as described in appendix 4, the Incomati Catchment Management Agency (ICMA) during the legal project has expressed interest to lead the process to establish a CME forum in its water management area.

- Non-governmental organisation should work more collaboratively with government regulators who often need additional support to fulfil their mandates. For example, one mechanism is to undertake joint research efforts around difficult legal issues through the preparation of case studies and research papers.

8.2.4. Municipalities are major violators of the NWA and cooperative government requirements make it difficult for the other spheres of government to hold them accountable

Municipalities are critical to ensuring compliance with the NWA and ensuring the implementation of IWRM actions. On the one hand, they can be major violators through mismanagement of waste water treatment plants, approving unlawful developments, and abstracting water without authorisation. On the other hand, because they have environmental-related powers and responsibilities pursuant to the Constitution, municipalities can also be a major player in promoting compliance with environmental laws, including through enacting by-laws and providing support for provincial and national enforcement efforts.

Unfortunately, the stringent cooperative government obligations under the Constitution, specifically those that require avoidance of legal action, act as an obstacle for national and provincial government to hold municipalities accountable for violations of environmental law. It has thus required regulators to think out of the box and creatively devise solutions to hold municipalities accountable. For example, chapter 5 presents a case study reviewing the criminal prosecution of a municipal manager in the Free State for the unlawful discharge of sewage waste as a means to overcome cooperative government obstacles that would otherwise prevent the NPA and DWA from pursuing criminal action against a municipality.

Recommendations

- Efforts should be made to document cases where national and provincial government have been hindered by cooperative government obligations to hold municipalities and other government departments, like the Department of Public Works, accountable for violations of environmental laws. Particular emphasis should be given to cases where government has been able to circumvent stringent cooperative government obligations through creative enforcement strategies.
- The issue was presented that any enforcement action against the municipality or any of its employees, such as municipal managers, implicates the polluter pays principle because the costs for the litigation is often covered by the municipality and thus ultimately borne out of taxpayer money. As such new strategies must be developed, such as a system for penalising municipalities by limiting their ability to access allocated budgets. The issue itself must be addressed by government with consultation from civil society.

8.2.5. The Water Tribunal's legal mandate under the NWA and the Water Tribunal's Rules need to be amended so as to address several shortcomings related to the Tribunal's functioning as an independent, efficient, and expert administrative tribunal

The Water Tribunal is an independent administrative tribunal that was established under section 146 of the NWA to hear appeals against several specified administrative decisions set forth in section 148 of the NWA. Despite almost ten years since its inception, there is sparse literature reviewing the Tribunal's decisions, its effectiveness in carrying out its mandate and whether its mandate is adequate to enable it to appropriately fulfil its functions that are required by the NWA. Chapter 6 presents a critical assessment of the Tribunal's decisions and functioning through a combination of reviewing the Tribunal's decisions and interviewing individuals who have brought appeals before the Tribunal.

This research has shown several major shortcomings with the Water Tribunal, both in terms of its substantive case decisions and in terms of its functioning as a Tribunal. With respect to the former issue, the Tribunal has espoused several legally questionable decisions. For example, the Tribunal has ruled that a third party cannot access the Tribunal to challenge the issuance of a water use authorisation (e.g. to a mine) unless DWA has formally requested comments under the NWA. The authors believe that such a position is not only contrary to the intent of the NWA but also a violation of constitutional protections around the right to administrative justice. Chapter 6 reviews this and other issues in detail.

With respect to the latter issues, the following were identified:

- For reasons explained more fully in chapter 6, we demonstrate that the Tribunal's mandate under the NWA is narrower that what Promotion of Administrative Justice Act 3 of 2000 (PAJA) would allow in terms of the review of administrative actions under the NWA. The result is that the Tribunal is not reviewing matters that should fall clearly within its powers as an administrative tribunal, such as the failure of DWA to make a decision on a water use authorization application.
- In addition the research demonstrated that the Tribunal's rules are completely inadequate. The rules are necessary to provide guidance around the appeal process, such as time frames for submitting documents or procedures for bringing interim motions (e.g. motions to compel the production of documents).
- The research identified issues pertaining to the functioning of the Tribunal's Registrar, the office that has been created to, among other things, facilitate communication between the Tribunal and those who bring appeals before it. Most common was the complaint that the Registrar failed to circulate papers filed with it or had lost papers and that people could not access the Registrar, including to ask questions or to file papers.
- Section 148(2)(b) of the NWA requires the suspension of a water use authorisation pending the outcome of an appeal to it before the Tribunal. It also allows the Minister to remove such a suspension upon request. However, the NWA does not provide guidance to the Minister to remove a suspension if she or he is petitioned to do so, such as timeframes for making this decision or what factors the Minister must consider in making a decision. The result is that petitions to the Minister can take months.
- Questions were also raised during the research regarding the manner in which judges are selected for the Tribunal and whether there is enough legal expertise on the Tribunal.

Given that many of the actions that the Water Tribunal is mandated to review under the NWA have not been implemented, the Tribunal is truly yet to be tested. When it is eventually confronted with difficult and complex actions and issues, including those around Reserve determinations, classification of resources, and compulsory licensing, it is not clear whether the Tribunal is up to the task, as is evident from the many issues that this research has identified. There is no doubt that the Water Tribunal can serve an essential and important function as an efficient and expert body, as many similar tribunals have done around the world and in South Africa (see e.g. the Competition Tribunal), and that it can play a critical role in the efficient administration of the NWA. But for this to happen, the NWA and the Water Tribunal's rules must be amended to address the shortcomings this research has identified.

Recommendations

The research presented in Chapter 6 identified several shortcomings with respect to the operation of the Water Tribunal, many of which are summarised in the preceding paragraphs. Many of these shortcomings have bearing on NWA amendments, including the following:

- As chapter 6 explains, we suggest that section 148(1) of the NWA should be amended so as to bring it in line with PAJA. This would entail that the list of actions reviewable by the Tribunal under section 148(1) be changed to a non-exhaustive list of actions and to include a failure to undertake administrative actions. Thus, section 148(1) should be amended to say: "There is an appeal to the Water Tribunal, including, but not limited to the following…"

- With respect to the Tribunal's composition, section 146(4) of NWA states that "members of the Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge" but it does not specifyhow many judges should be legal or technical experts, and how many judges must be on the panel to hear cases (i.e. not all judges are required to sit for each case before the Tribunal). As questions were raised during the research regarding the legal competence of the Tribunal, the NWA or the Tribunal Rules should be amended to provide guidance as to how many members must be legal or technical experts and how many of each category must be present during an appeal.
- The Tribunal's Rules need to be reformulated to address a number of inadequacies. Most importantly, the Rules need to set clear timeframes for parties to make submissions, the administrative record to be finalised and distributed and for decisions to be made. The Rules need to give guidance as to evidentiary requirements and style for submissions. Furthermore, the Rules should allow for interim relief to address disputes that arise as to any of the above. In addition, the issue of costs should be explored, although with caution, as this might have a chilling effect on challenges to water use license decisions by third-parties. Clear parameters for the Tribunal's rehearing standard also need to be provided.
- The NWA should be amended to clarify the process to remove a suspension of a water use authorisation to the Minister under section 148(2)*(b)* during the course of a Water Tribunal appeal. Guidelines should set time frame for the Minister to make a decision and provide a list of factors that the Minister must consider. Another option is to allow the Water Tribunal to consider the suspension issue if one party raises it, which it currently does not.
- In terms of substantive aspects of the NWA, we strongly urge that the NWA be amended to make mandatory a request for comments from potential third-parties that might be aggrieved by the authorization of a water use. Whether or not the Courts will uphold the Water Tribunal's decision on the *locus standi* issue, it seems contrary to the spirit of the NWA and PAJA that DWA has discretion to invite comments on a water use applications that often have a significant impact on the community.
- The research has highlighted that the Tribunal's Registrar is not functioning appropriately. There are major issues in terms of communication, administration, and organisation. These complaints about the Registrar must not be taken lightly, as it can have serious implications for the efficient running of the Water Tribunal. DWA should seriously consider reforming the operation of the Registrar.

8.2.6. Law student curriculum must be reformed to promote better exposure of students to on the ground legal issues regarding environmental issues

The law student integration aspect of this project was arguably the most important element of the SRI 2 legal component, because it directly responded to SRI 1's findings of a shortage of qualified lawyers working on environmental issues in the public sector. As described in chapter 7, throughout the course of the project, it provided repeated opportunities to test various methods to help garner student interest in environmental issues, and water sustainability issues in particular, and to develop student competency, knowledge and expertise in these areas using methods to supplement in class learning. What became clear during the court of the project was that there a few opportunities for law students to engage with environmental issues, particularly around water resource management, outside of the classroom and for law students to work directly with the public sector on these issues, including non-profit research and advocacy organizations and with government.

Recommendations

- A one year project is insufficient to adequately address the main issue that spurred the student integration effort: the lack of competent lawyers working on water and environmental law issues in the public sector. Law schools must work with civil society organizations and government to reform their curriculums so as to establish a long-term program that seeks to institutionalize out-of-classroom learning related to environmental law issues. Out of classroom learning can include field trips in partnership with non-profit

organisations or government, expanded internship programs, externship programs where students gain credit for working with organisations or government, and research projects on behalf of public sector clients. In addition, these out of classroom experiences create opportunities for critical thinking and self-directed learning within the context of environmental/water management and the law. For example, as part of a student field trip, students can undertake role playing simulations where they need to argue difficult and complex positions that have no clear answer. Students can also work with research organisations, like AWARD, to apply new ways of research, such as action research, that are seldom taught as part of the law school curriculum.

- Law students, civil society organisations, and government must do more to expose students to public interest careers in the environmental law field. This includes setting up public interest career fairs and more opportunities for work-study externships.

8.3. Concluding remarks

Although the legal component of SRI 2 focused namely on legal issues related to enforcement of the NWA, several legal challenges related to operationalising IWRM presented themselves throughout the course of the project. What became increasingly apparent as the research team spoke with government regulators, other civil society organisations, legal practitioners, law students, and law professors was that a larger water law program is necessary to address the multitude of legal issues. Such a water law program could ideally be situated between various non-governmental organisations, within an academic institution, or within a partnership that includes members of civil society, government and academia. Ideally, a legal water program would not be limited only to research, but also to other activities, such as advocacy, litigation, community mobilisation and student competency building, so as to have a more comprehensive means to address problematic legal issues that are identified.

Although a water law program as envisioned above needs to be comprehensively developed by the various collaborators seeking to undertake it, the above research and action recommendations can serve as a starting point for developing such an initiative.

9. Appendix 1: Case Law compendium

Case Name and Theme	Area	Forum	Authority	Facts	Relevant Holding and Major Findings	Comments	Cited
Right to Environment Enquiries							
Fuel Retailers Association of Southern Africa v DG Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province (CCT 67/06, 7 June 2007). **[the meaning of sustainable development in s. 24, status of s. 24, precautionary principle]**	Mpum	CC	**ECA** s22(1), s21(1), s36 s26 **NEMA** s1, s2, s23, s24 **PAJA** s6(2) **Town Planning and Townships Ordinance** Sched 7, s56, **Constitution** s24, **GN R1183** 10(2)(i)	Challenge of environmental authorisation for filling station on basis that all social, economic and environmental concerns not taken into account.	Holding-[***Sustainable development is the key tenant of the right to environment, involving a balance between protecting the environment and development. Authorisation set aside and reconsideration of environmental authorisation ordered, which must consider economic, social and environmental sustainability***]. The State has a duty to consider cumulative impacts on activities that could potentially have a negative environmental impact. Court holds that 'unlimited development is detrimental to the environment and development cannot continue on a deteriorating environmental base.' The Court identified the realisation of the right to environment as an important facet to the enjoyment of multiple other integral rights. Court re-iterated the judiciary's responsibility to ensure that sustainability is considered by environmental authorities prior to developments. The Court held that the "precautionary approach is especially important in the light of section 24(7)(b) of NEMA which requires the cumulative impact of a development on the environmental and socio-economic conditions to be investigated and addressed".	The links between the environment and development are evident in the judgment. The Courts discussion on what is considered ecologically sustainable gives the concept a practical application. The failure of the Courts to consider the rights to water as part of the judgment in this matter is surprising and disappointing. Although the environmental protection of water as an important resources confirmed as present and future uses of water resources must be evaluated and considered before any development is approved, as irreparable damage is viewed as unacceptable. **How might this relate to IWRM?** Sustainable development is a key tenet of IWRM. Although this case focuses more on pollution impacts, rather than over-extraction, it nevertheless requires consideration of cumulative impact of development activities. This is relevant to delivering the Reserve, as it reinforces that water abstraction does not occur in isolation, but within a basin-wide resource. However, as Ferris (2008) makes clear, the question remains against applying sustainable development within the context of alleviating poverty. This presents a potential conflict between municipalities ensuring basic water supply services and delivering the ecological reserve.	Ferris 2008 (While the court clarified that sustainable development requires integrating the often contesting demand of economic development, social development and environmental protection, the question remains: how do we interpret sustainable development in a country which faces large scale poverty and where such a clear and unequivocal need for economic and social development is present?
BP Southern Africa (Pty) Ltd v MEC For Agriculture, Conservation, Environment And Land Affairs 2004 (5) SA 124 (W) **[meaning of sustainable**	Gau	WLD	**ECA** s1, 21(1) ,22(1) s 23(2)s26, 28, **NEMA** s1,s2, s24, 50(2) **DFA** s2, s3*(c)* **Constitution** s7(2),s8,s24,	Review of Provincial Department decision to refuse an application for the development of a filling station	Holding-[***Sustainable development is the fundamental building block around which environmental legal norms are shaped, dep't decision upheld***]. 'The right to environment is equal to the constitutionally protected rights surrounding the freedom of trade, occupation and property, these rights had to be balanced against one another in any situation in which all of them came into play. 'By	Economic and environmental implications are of paramount concern with regard to approval of any development and an integral part of the environmental responsibility in South Africa. The court weighed environmental considerations against developmental considerations in the	Kidd 2006 (good decision);

development, status of section 24]			s28,s39 **EIA Filling Stations Guideline** s2(1) **GN R1183** 3(1)*(a)*,s4-11		elevating the environment to a fundamental justifiable human right, South Africa has irreversibly embarked on the road which will lead to the goal of attaining a protected environment by an integrated approach which takes into consideration inter alia socio economic concerns and principles.'	application of the EIA process. It gave special reference to the application of the risk-averse approach and it afforded much weight to the potential for resource contamination. Economic concerns will no longer prescribe developmental approval and socio-economic factors must be applied to all prospective developments. The goal and result must be the protection of the environment	
MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another 2005 (2) 17 SCA **[sustainable development; status of s. 24]**	Gau	SCA	**ECA** s21, s22, s26,35,36(2) **NEMA** 1(c)(ii), s2, s3,s4 **PAJA** 6(2)(f)(ii),s3s5,s36 **Constitution** s24, **DFA** 3(c)(iv)	MEC brought appeal to review High Court's decision that he lacked authority to authorise the construction of filling stations	Holding-[***NEMA's principles are the guiding values of environmental protection and management; the s2 principles must be interpreted and applied to all prospective developments. MEC's decision to refuse application deemed lawful and challenge successful***]. Sustainable development is the cornerstone of s2, placing an obligation on the state to evaluate the social, economic and environmental impacts of potentially harmful activities. Court affirmed the inclusion of the consideration of socio-economic factors in the Departments mandate concerning authorisation to build filling station on the grounds that would be potentially harmful to the environment. 'At the heart of s2 is the principle of 'sustainable development' requiring organs to evaluate the 'social, economic and environmental impacts'	The Court recognized the inter-connection between the three avenues of enquiry. The fact that all organs of state are required recognise social, economic and environmental impacts of activities means that the context of sustainable development contained in s2 is a cross-cutting principle that must be applied to any activity which involves the environment. S2 of NEMA is based on the overarching s24 right to environment, meaning that s2 helps inform the definition and contextual application of s24. The Court directly links s2 and s24 extending constitutional protect to the foundational principles in s2. **How is this decision relevant to IWRM?** This case stands for the more general principle that no activity should take place without considering the impacts to the Reserve. By recognising social and economic impacts as part of the environmental evaluation, it also sets the legal foundation for recognizing that economic and social benefits from protecting and ensuring sustainability of water resources should also be evaluated.	Kidd 2006 (good decision);
Hichange Investments (Pty)Ltd v Cape Produce Co (Pty)Ltd t/a Pelts Products, and Others 2004 (2) SA 393 (E)	ECape	ECD	**APPA** s6(3) s13, s28(1) 28(4),s9,s10 **ECA** s21	Emission of effluent into atmosphere by tannery exceeding national limit. Directive issued by DEAT not complied with.	Holding-[***The possibility of 'significant pollution' places a legal obligation on the responsible party to institute reasonable steps to eliminate or mitigate the environmental damage. Held that the first respondent should be ordered to investigate,***	However, impacts of well-being not confined to instances where there is a direct impact on a person; a threat to the environment also classified as negatively impacting well-being. The	Kidd 2006; Ferris 2009;

[health and well-being; activities that trigger environmental review]			**NEMA** s24,s28(1),s28(5),s28(12), s28(13), 32(2), 12(4) s32, s132(2) **Constitution** s24, s7		***evaluate and assess the impact of its activities and to report thereon***]. Well-being has a direct relationship with physical discomfort, giving the term a working classification. Performance of a listed activity and the possibility of 'significant pollution' confirmed as the two instances that trigger EIA requirement. 'The Court has a particular duty to ensure that effective relief be granted for infringement of environmental rights for without effective remedies, the values and rights entrenched in the Constitution cannot be upheld or enhanced.'	case hints at quite a wide interpretation of the meaning of well-being, which furthermore broadens the s24 right to environment. The High Court (albeit indirectly) endorsed the idea that the environment itself may have an intrinsic value to people, stating that a sense of place is important to an individual. The concepts of health and well-being interpreted with regard to the level of pollution needed to be considered 'significant' pollution. The more that cases such as this are investigated which develop the meaning of health and well-being the more definable s24 can become. **How does health and well-being related to water management issues and IWRM?** Understanding the scope of health and wellbeing is more relevant to water quality issues, which are also relevant to delivering the Reserve. An interesting question is whether health and well-being can serve as a basis for challenging delivering the Reserve.	
Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others 1999 (2) SA 709 (SCA) **[sustainable development; inter-generational equity; applicability of s. 24]**	Gau	SCA	**Minerals Act** s9,s39 **Companies Act** 30(1), **Constitution** s24	Mining company held Coal rights close to a river and granted mining licence by DMR. I&AP's have not afforded any rights to consultation and comment.	Holding-[***S24 right is a fundamental justiciable human right and environmental impacts must be given consideration in all administrative processes***]. The Court states that possible wetland destruction and water pollution of paramount concern for present and future generations to enjoy the right to environment and the department must seriously consider these possibilities before approving potentially harmful developments. Legal and administrative areas must adapt to the heightened need for environmental integration and cater to the needs for environmental processes. 'In the current constitutional dispensation the right to a clean environment must enjoy recognition equal to that which is accorded to other rights.'	Confirmed the right of I&AP's to be notified and given opportunity to object when mining rights are issued. The spirit and application of Sustainable development must be applied throughout mining right process, in all aspects that could possible affect the environment, e.g. required participation processes. It is evident that the court links the statutory requirement of performing an EIA and the s24 constitutional right to environment. Proper completion of an EIA results is the achievement of sustainable development and is therefore a vehicle through which s24 is achieved. Judgement held as one of the most encouraging substantive developments in environmental jurisprudence. Interesting no mention	Kidd 2006 (good case - first beacon of light); Ferris 2009, in Paterson

						of NWA **IWRM?** This case is a good first case that sets the foundation for the Reserve, and highlights the importance of the right to environment within the broader framework of the Bill of Rights.	
Minister of Public Works and Others v. Kyalami Ridge Environmental Association and Another 2001 (3) SA 1151 (CC) **[inter-relation of rights, conflict of rights?]**	Gau	CC	**Constitution** 23(2)(b),s24 s26,38(c),s85 **ECA** s21, s22 **NEMA**s2(4), s7,13,15,s16 **Civil Protection Act** s1,s6,s8 **DFA**s3,s4,s23,s31 s32,s33 s37,s55,s61	Emergency transit camp established. Residents claim camp would lead to substantial environmental damage and in contravention of Town Planning Ordinance	Holding-[***Relief to victims of natural disasters is an essential role of government and failing to do so would amount to a dereliction of duties, decision to establish camp upheld***]. The risk to water resources in the area real, yet development approved on the basis that it is a temporary structure; gravity of situation as well as urgency of the housing crisis major factors in superseding environmental concerns. The Courts interpretation of NEMA focused on the lack of environmental consideration and flawed management plans surrounding the impact and construction of the development; the Court however failed to mention the provisions of co-operative governance and fair-decision-making which are equally important requirements in NEMA (Kidd 2006). The Government held not to be acting arbitrarily and contrary to the rule of law. Although *Kyalami* presented a situation where the Court could expand on conflicts between constitutional rights and conflicts inherent within the principles of sustainable development, the Court balked at this opportunity (Ferris 2008).	Court's textual interpretation of s2 of NEMA does not reflect sustainable development as the cornerstone of environmental management. The various interpretations of s2 in this case are fundamentally defective, yet arguably the most inconsistent is the interpretation applying to activities that 'will' significantly affect the environment, not those that may do so. The court seems to have ulterior motives in this case, purposefully misreading the NEMA to guarantee that its decision catered to the flood victims. **How is the relevant to IWRM?** This case may be problematic, because it can potentially set up a show down or conflict between water as a basic human need v. maintaining the ecological integrity of the resource, particularly within the context of municipal water services.	Ferris 2008 (The *Kyalami Ridge* case missed an opportunity to assess sustainable development against the background of the competing interests inherent in the concept itself); Kidd 2006 (court got it plain wrong)

City of Cape Town v Maccsand (Pty) Ltd and Others 2010 (6) SA 63 **[s. 24 and mining; effect of s. 24 on interpreting legislation; cooperative governance]**	WCpe	High Court	**MPRDA** s2 s5,s23,s25, s27,s39,s48 **NEMA**s24,s2,5(4), 23,37,38 **LUPO** s9(2), s11,s18,s19 **Constitution** s24,s40,44(1),s156 (1)	Sand mining operation occurring with no prior permission of land owner and non-compliance with land use laws. No NEMA EIA only MPRDA mining permit approved.	Holding-[***Mining activities may not be carried out unless authorisation granted under land use and environmental legislation. Interdict granted and NEMA EIA and LUPO authorization must be performed***]. It is the applicant's responsibility to avoid duplication. The Court states that unlawful mining poses a direct threat to the public and require strict regulation to ensure environmental impacts are considered. Co-ordination between departments vital in order to come to equitable outcome, especially when multiple departments are involved. 'DMR entrusted with s24 right to environment in relation to all mining and prospecting activities.' "**Environmental protection is enshrined as a right in the Constitution. Hence, this Court must interpret legislation to give as much tangible protection to this right as the language of the applicable statute can reasonably bear".**	Mining Rights do not trump environmental obligations and EIA authorisation under any other law does not absolve obtaining an authorisation under NEMA. Accepting environmental authorisation under other law as NEMA authorisation does not complete the approval process, unless competent authority empowered to issue the NEMA authorisation in accordance with the act. The judgment is a powerful indicator of the Courts position on the mining sectors autonomy, recognizing that mining cause's grave ecological degradation and identifying the need for cross-departmental regulation affords environmental authorisations a more comprehensive safeguarding process, with greater checks and balances. NEMA EIA acknowledged as principle environmental tool. This will also be relevant to getting water-use authorizations. **Relevance to IWRM?** Mining is a key problem to ensuring a sustainable and equitable resource. This recognizes that water resource impacts must be considered during the mining process, and that DWA is the primary regulator that must do this.	
Harmony Gold Mining Co Ltd v Regional Director: Free State, Department Water Affairs and Forestry [2006] SCA 65 [also discussed below] **[linking NWA interpretation to section 24 constitution, polluter pays principle]**	FState	SCA	**NEMA** s28(1),(2),(6) **NWA** s1(3) s2, 19(1), s19(2), s19(3),s19(5),s21,s 21(j) **Constitution** s24 **GN. R. 991 PAJA** s6(2)(a)(i), (d), (e), (f)(ii), (h),(i)	Harmony Gold challenged a directive that required it to pump groundwater out of defunct mines that it did not own, but that were connected to its mine through underground tunnels. DWAF's reason for including Harmony Gold as part of the clean-up effort was that they would benefit monetarily from the clean up and that should the	Holding-[***The responsibility of water pollution is not to be restricted to one's own land and is regarded as a collective responsibility. Directive holding Harmony responsible and liable for extracting excess ground water upheld***] 'Reasonable measures' regarding anti-pollution measures must involve collaboration between all involved parties for the attainment of a common goal. If one's own land is a part of the pollution causing activity and would contribute to the overall ecological and economic damage, then the land and by implication the owner have a shared responsibility towards initiating preventative measures, in this case with specific relation to water management and protection in not only the designated mining zone but	The intention to apply a wide birth of the application regarding section 19 of the NWA is clearly demonstrated, broadening the sections applicability ensures that all contributory parties can be held accountable. Spreading environmental responsibility allows for a more comprehensive attempt towards water pollution, going beyond the normal direct link of polluter responsibility. What is notable is that this case deals with protecting the quality of water yet right to water is not discussed, instead focus is on right to	

				groundwater reach Harmony Gold's mine through underground tunnels, the amount of pollution released into the environment would increase significantly, thus making Harmony Gold a contributing polluter.	also all directly affected surrounding areas. Links section 19 NWA to section 24 of constitution: "**The task of construing s 19 [NWA] must commence with reference to s 24 of the Constitution. It confers the right to an environment which is not harmful to one's health and to environmental protection by reasonable legislative and other measures that, among other things, prevent pollution and ecological degradation."** **"The situation we have here is one where the various mines concerned have been required to join forces in continuing with a dewatering process already physically under way but insufficiently funded. I cannot see that it is outside the scope of 'reasonable measures' to require this collaboration and to require the companies concerned to share the expense of it. That is what the directive in issue demanded and in my view the first respondent was empowered by s 19(3) (read with s 19(1)) so to demand".**	environment. **IWRM:** This is the only case that specifically links a provision of the NWA to the right to environment. Although it focuses on pollution control and not sustainability planning, such as ensuring the Reserve, it is nevertheless relevant to both.	
Minister of Health and Welfare v. Woodcarb 1996 (3) SA 155 (N) **[health and well-being]**	WCpe	High Court	**APPA** S9,s10, s11, 12,s13 **Interim** Constitution s7(4)(b)(iv), s29, **Common law** Interdict	Harmful emissions released without requisite registration certificate.	Holding-[***The court granted the interdict and held that the emissions from Woodcarb violated section 29 of the Interim Constitution, a right to the environment that is not detrimental to health and well-being]***	Although the concepts to health and well-being are not adequately interpreted the judgment is one of the first that raises health and well-being, and explicitly implicates the constitutional environmental right. The Court also stated that is within the Minister's mandate and public responsibility to bring such actions borne out of complaints of activities detrimental to the health and environment. **IWRM:** See discussion of Hichange.	Ferris 2009, Chapter 6 in Patterson and Kotze (Environmental Compliance and Enforcement in South Africa, Legal Perspectives)
Section 24 and public participation							
Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another 2005 (3) SA 156 (C)	WCpe	CPD	**ECA** s21(1), 22(2), s22(3),s35(3)s36(1), s36(2) **NEMA** S2, S24 **Constitution** s24 **PAJA** 3(2)(*a*) s6(2)(c)	Construction of PBMR nuclear power station, I&AP's not given opportunity to comment on final EIA report NGO brought application to set aside DG decision to approve development.	Holding-[***The public is entitled participatory comment on every stage of the EIA process, including the final scoping report. Directors' decision ruled as defective and set aside***]. Public participation is intrinsically linked to exercising the section 24 constitutional right to the environment. Court reiterated the close nexus between just administrative action and the participation of interested and affected parties during all stages of environmental decision-making by authorities. What	The case provided clarity with regard to the public participation process. Just Environmental decision–making is reliant on public participation; the court re-affirmed the courts obligation to ensure the requisite public involvement is catered for and enforced. Public participation is one of the pillars of the constitution and is fundamentally interconnected within	du Plessis 2008;

			s7(2)(*a*)-(*b*),7(2)(*c*) s8(1)(*c*)(i)		is important is the level of information need to fulfil obligation was noted as 'access to relevant material and information in order to make meaningful representation", was not opened to the public. The matter was remitted to the respondent with directions to afford the applicant and other interested parties an opportunity of addressing further written submissions to him.	the s24 right to environment. **IWRM:** Participation is a key tenet of IWRM, and it will be necessary along many IWRM actions, such as the CMS, water use authorization, compulsory licensing, and others. Also, although not yet happened, aspects of the NWA may conflict with section 24 participation requirements, particularly around participating in water use application decisions as a third party.	
Bengwenyama Minerals Pty Ltd and others v Genorah Resources Pty Ltd and others 2010 CC 26	Limpo	CC	**MPRDA** s3,s10, s16 17(1)(a), s39(2),41(1),s54, s96,s103 **Constitution** 1(a),1(d) 9(2) 24, 25 25(4)-(7)s27(1)(b), s33,s195 **PAJA**s7(1),s7(2), s3,s5,s8	Lawfulness of approving a prospecting right on the land of another without consent	Holding-[***The granting and execution of prospecting rights is an invasion of a property owner's rights***]. The purpose of consultation with landowners, required by the Act, was to provide the information necessary to make an informed decision on how to respond to the application. The granting and execution of prospecting rights is a grave invasion of a property owner's rights which is constitutionally protected and deserves protection. "Granting and execution of a prospecting right represents "a grave and considerable invasion of the use and enjoyment of the land on which the prospecting is to happen" making consultation an essential part of the process, without which the authorisation becomes invalid and must be dismissed.	The judgment sends a strong message that the culture of non-compliance and lack of accountability by mining companies is over will no longer be tolerated. Judgment leaves many questions still to be answered, not least of them being why both the High Court and the Supreme Court of Appeal refused to address the obvious injustice that had occurred in this case. The case unearths the reality of mining applications and the power that political connections have within the DMR. There were blatant transgression and blatant failures by the DMR to recognise and follow legislator principles, e.g. s104 of MPRDA. The Judgment called for amendments to the MPRDA as certain principles seem unconstitutional.	CER media release 2010 (http://cer.org.za/news/media-release/)

Common Law Remedies							
Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills 1963 [based on summary of decision, unable to find the decision]	NCape	High Court	**Common law** Nuisance, Right to Enjoy Property	Factory effluent discharged into a stream causing water pollution and land damage	Holding-[***If an activity has caused, is causing, or possibly could damage the property or ecology of the area in way that interferes with a person's right to enjoy and use their property, then an infringement of the person property right exists.]*** Pollution of a public stream stopped through the use of the common law remedy of interdict against the producer of the effluent from discharging the waste into a public stream. The common law principle of nuisance effectively creates a defendable right; consequently an interdict halted the discharge of effluent into the stream flow that was causing ecological degradation. This investigation requires a factual enquiry and the outcome will depend on the facts of each specific case.	The use of neighbor law (nuisance) successfully used to stop damaging activities causing water pollution on the Complainants property. The test can be regarded as rather flexible, if either intention or neglect of responsibility are present than a defendable right exists. This flexibility does not just apply to the factors needed to seek relief through this common law mechanism, but also relate to the actual effect on the land, this would be satisfied by **the mere possibility of harm**, showing the common law's intention to contain a **precautionary ideology** with regard to environmental pollution and/or degradation. Common law remedies are still applicable yet, at present legislative tools such as a NEMA are the prime enforcement mechanisms, common law can serve a complimentary capacity. It will be interesting to see whether common law remedies can move beyond pollution issues (i.e. section 19 of the NWA) and also address water use issues, such as over-extraction, interfering with the reserve, etc… **IWRM:** This case is relevant to the extent the water pollution issues play a role in maintaining a sustainable water resources	Glazewski 2005 (has an entire section on common law remedies, and cites Rainbow Chicken and other cases around water pollution, however he does not discuss these cases. Also, all of the cases cited are over 40 years old)

Mostert and Another v The State (338/09) 2010 (2) SA 586 (SCA)	Gau	SCA	**NWA** s1,s2, s3, s4, s98(2-5), s151(1)(a) 151(1)(e) 151(1)(j)), s151(1)(g) **Common Law** Fraud, Theft **Water Act of 56** s6(1), s71(1),s79(1)	Unauthorized abstraction of water from a river, DWA brought common law theft and fraud charge in addition to NWA violations.	Holding-[***Statutory and common law charges are not mutually exclusive and must be filed in conjunction with one another***]. The court however dismissed the theft claim stating that water is incapable of being stolen out of a river as it belongs to no one and is regulated by the state as the custodian. Since the enactment of the NWA of 1998 a person cannot be convicted for the Common Law charge of theft of a water resource as it is common property.	Allowing the charges to be tried side by side give the prosecution more options with regard to netting perpetrators. The court's decision not to find theft does not make much sense.	
Activist Jurisprudence							
PetroProps (Pty) Ltd v Barlow and Another 2006 (5) SA 160 (W)		WLD	**ECA** s22, s35 s36 **Constitution** s10,s15 16(1), s18,s19 s24, 34(1)(c), s36	Application for an interdict to prevent a public campaign against the construction of a fuel service station on an ecologically sensitive wetland. Petro Props alleged that the campaign is harassing it and interfering with its right to enjoy its property.	Holding-[***Court found in favour of Respondents and application consequently dismissed with costs***]. The Court recognized the interest and motivation of private citizens in acting on behalf and in the interest the environment to be selfless and in the common good. Although this case implicated an environmental impact, the case focused on the relation between the right to property and the right to freedom of expression, and found that Barlow's activities had no direct causal impact on petro props's profits. The court found that limiting this kind of expression would have a chilling effect on citizen activism. It stated: Moreover, it is relevant to repeat that, unlike the position in the *Laugh it Off* case, the present application does not involve a direct relationship between the act of expression and the allegation of prospective harm. In this case, there is the crucial mediating fact that it is public opinion that may influence, in the first place, the decisions of Sasol and, only in consequence of that eventuality, may it have financial implications for the applicant. 65 In other words, it is difficult to conclude that a	The judgment inadvertently empowers the public to stand up for offences that negatively impact the environment without fear of unsubstantiated persecution. This ruling allows concerned citizens to openly comment and criticize developers if the activity poses a threat to the environment even if they did not participate in the administrative process. Although this judgment implicated the right to environment, it did not substantiate on it, a missed opportunity perhaps, but limited its discussion of that right within the discussion of the freedom of expression.	Du Plessis 2008;

					successful campaign in the field of public opinion could be held to be vexatious, *contra bonos mores* or actionable. It is likewise difficult to conclude that Petro Props has shown that its rights outweigh the rights of expression, viewed in the light of the manner in which those rights have been exercised by Ms Barlow and the Association in this case. Most importantly, the court found that the right to environment (s24) and the right to freedom of expression was not limited under the Limitation Clause, because Barlow did not participate in the administrative procedures in place under the EAC. Thus, simply because they did not provide comments, and object with the timeframes requires by that act, does not limit their ability to access their constitutional rights. "It follows that sections 35 and 36 of the ECA do not operate as exclusionary limitations of the right to freedom of expression in section 16(1) of the Constitution."		
Wraypex Pty Ltd v Barnes and others 30729/05 (6 December 2010)	Gau	NGHC	**ECA** s22 **NEMA** s2 s16, s24 s31(4), **Constitution** s16, s38	Defamation case initiated by developers against activists for opposition against construction of golf estate	Holding-[***The Property rights of developers do not supersede constitutionally guaranteed rights, e.g. freedom of expression, claim for damages and defamation summarily dismissed***]. Due to the vexatious nature of the litigant's case the Court did not take kindly to the intention of the Applicant to use the Court system a weapon in achieving its goal of non-interference, discouraging public participation.	The ruling is regarded as the test case for **SLAPP** suits (Strategic Litigation Against Public Participants). Decision reaffirms the right and responsibility of ordinary citizens to stand up for their environment. Setting a notable precedent and re-affirming the favourable support given to activist jurisprudence. The relationship between s24 and s16 not sufficiently expanded on, yet clear is the inter-connection between these rights in relation to the realization of an enforceable environmental right, as one cannot actively participate in environmental issues without the right to freedom of speech. This case will hopefully go a long way to deter developers and companies from engaging in litigation for the pure effect initiating a deterrence to protest and criticize.	CER media release 2010 (http://cer.org.za/news/media-release/)(The case is a message to all developers to think twice before threatening civil society organisations, communities and activists who are exercising their Constitutional rights to participate in environmental governance.)

Interpreting NWA							
Mostert and Another v The State (338/09) 2010 (2) SA 586 (SCA)	Gau	SCA	**NWA** s1,s2, s3, s4, s98(2-5), s151(1)(a) 151(1)(e) 151(1)(j)), s151(1)(g) **Common Law** Fraud, Theft **Water Act of 56** s6(1), s71(1),s79(1)	Appellants argued that because they were functioning under the Irrigation Board created by the 1956 Act that had not yet been transformed into a Water User Association under the 1998 Act, the 1998 Act did not apply to them.	Holding: [***1998 Act still applies***] "Thus, although an irrigation board might continue to exist and operate with the various duties and obligations it had under the 1956 Act despite the coming into operation of the 1998 Act, it does so by reason of the provisions of the latter which clearly apply within the irrigation district of each such an irrigation board and regulates the use of water. Accordingly, anyone who commits an offence envisaged by s151 of the 1998 Act may be charged under that Act, even if the offence is committed within the irrigation district of an irrigation board established under the 1956 Act which continues to exist and operate by reason of s 98 of the 1998 Act."	This is in important point that prevents a loophole that many potential unlawful users could argue.	
Harmony Gold (See above discussion)							

10. Appendix 2: Enforcement provisions table

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
NEMA						
NEMA Section 28 Directives	Section 28 of NEMA contemplates a duty of care to take "reasonable measures" to prevent, minimize and rectify any significant pollution or degradation of the environment.[420] This duty of care applies to "every person", not just those with Environmental Authorizations. The list of "reasonable measures" includes the investigation, assessment and evaluation of impact on the environment; the containment or prevention of movement of pollutants; the elimination of the sources of pollution; and the remediation of the effects of pollution.	-Regulator -Individual (after 30 days' notice to regulator)	If a person causing significant pollution or degradation fails to take "reasonable measures" then the Director-General (DG) or the Head of the provincial Department (HoD) may direct the polluter to take a number of steps including: investigating, evaluating, assessing and reporting the impact of specific activities and taking "reasonable measures" before a certain date.[421] In keeping with PAJA, this process would include an initial warning, in the form of a Pre-Directive and an opportunity for the person to make representations before a Directive is issued.[422]This requirement may be dispensed with if urgency requires it to be.[423] The consequence of a failure to comply with such a Directive is that the DG or the HoD may then step in to take the "reasonable measures" to remedy the situation[424] and recover the costs involved[425]. If a DG or HoD has not issued a Directive to take certain steps discussed above, any person can give 30 days' notice to the DG or HoD and then apply to a court for an order directing the DG or HoD to take those steps.	*(a)* investigate, assess and evaluate the impact on the environment; *(b)* inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment; (c) cease, modify or control any act, activity or process causing the pollution or degradation; *(d)* contain or prevent the movement of pollutants or the causant of degradation; (e) eliminate any source of the pollution or degradation; or (f) remedy the effects of the pollution or degradation.	PAJA 7(1)	
NEMA Section 31L	An EMI can issue a Compliance Notice if s/he has	Regulator	If, after an inspection, a Compliance Notice is to	Compliance with applicable NEMA	PAJA 7(2)(a)	Y if non-

[420] S. 28(1). It is worth noting that in s. 28(2) NEMA specifies that this duty of care extends to owners of land or premises, persons in control of land or premises, and persons who have a right to use the land or premises.

[421] s. 28(4) NEMA. Note that it is somewhat irrelevant that the section specifies that the DG or HoD issues the directive; in practice, these powers are delegated down to lower officials and currently, it is the EMIs who are issuing them.

[422] s. 28(4) of NEMA, in keeping with s. 3 of PAJA

[423] s. 3(4) PAJA

[424] s. 28(7) of NEMA

[425] s. 28(8) of NEMA. In line with the persons on whom the duty of care rests, s. 28(8) of NEMA allows the DG or the HoD to recover costs from any or all of the following persons: any person who is or was responsible for, or who directly or indirectly contributed to the actual or potential pollution or degradation; the owner of the land at the time when the actual or potential pollution or degradation occurred, or that owner's successor in title; the person in control of the land or any person who has or had a right to use the land at the time when the activity or the process is or was performed or undertaken or the situation came about; or any person who negligently failed to prevent the activity or the process being performed or undertaken or the situation from coming about: provided that such person failed to take the measures required of him or her under section 28(1).

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
Compliance Notices	reasonable grounds for believing that a person has not complied with a provision of the law over which the EMIs have jurisdiction or with a term or condition of a permit/authorization/other instrument.[426] Thus a Compliance Notice is useful for enforcing the requirements for: authorisations when the activity is a listed one; compliance with the conditions of those authorisations; and compliance with provisions of NEMA and SEMAs.		be issued, the matter is referred to a Grade 1 EMI to issue it, as EMIs with Grades 2-5 do not have the power to. [427] A Pre-Compliance Notice will first be issued, as advanced warning must be given of the intention to issue a Compliance Notice and an opportunity must be provided for the affected person to make representations[428]. A Pre-Compliance Notice can be dispensed with if the EMI has reason to believe that the issuing of a Pre-Compliance Notice will cause a delay resulting in significant and irreversible harm to the environment[429]. In that case, a Compliance Notice is issued right away. Reasons for dispensing with the Pre-Compliance Notice must be given in the Compliance Notice[430]. A Compliance Notice is then issued setting out: details of the conduct constituting non-compliance; any steps the person must take and the period within which those steps must be taken; anything which the person may not do; the period during which the person may not do it; and the procedure to be followed in lodging an objection to the Compliance Notice with the Minister or MEC, as the case may be.[431] An EMI may, on good cause shown vary a Compliance Notice and extend the period within which the person must comply with the notice.[432]	provisions		compliance with Compliance Notice

[426] S. 31L(1) of NEMA

[427] EMIs are ranked from 1 to 5 based on expertise and levels of seniority. Grade 1 EMIs are the highest ranked and are mandated to exercise all the powers given to EMIs under NEMA. Grade 2, 3, and 4 EMIs include powers of inspection, investigation and enforcement.

[428] s. 3(2)(i)(ii) PAJA and s. 8(2) GN R494 in GG 28869 of 2 June 2006 in terms of NEMA

[429] s. 3(4) of PAJA and s. 8(3)(a) GN R494 in GG 28869 of 2 June 2006 in terms of NEMA

[430] s. 8(3)(b) GN R494 in GG 28869 of 2 June 2006 in terms of NEMA

[431] s. 31L(2)

[432] This is in keeping with s. 3 PAJA and provided for in s. 31L(3)

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
			An objection to a Compliance Notice may be lodged within 30 days with the Minister or MEC and a suspension of the Compliance Notice in the meantime can also be applied for.[433] The Compliance Notice is then confirmed, modified or cancelled[434]. In keeping with PAJA, an affected person may seek judicial review in a court of the decision to issue a Compliance Notice. [435] In contrast to a Directive issued under s. 28 of NEMA, but similar to a s. 31A ECA Directive, failure to comply with a Compliance Notice is an offence. The EMI must report the failure to the Minister or MEC and s/he may: revoke the authorization/permit/other instrument which is the subject of the Compliance Notice; take any necessary steps and recover the costs from the person who failed to comply; and report the matter to a Director of Prosecution Services for criminal prosecution.			
ECA						
Section 31A Directives	Section 31A of the ECA states that a Directive may be issued against any person who performs an activity or fails to perform an activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected. Section 31A Directives are used to enforce compliance with authorizations issued under ECA. In the past, they were also used to enforce the general duty of care before s. 28 NEMA came in.	Regulator	The relevant actor is the Minister, competent authority, local authority or government institution, as the case may be. S/he or it may, in writing, direct a person to cease an activity or take steps within a specified time period to eliminate, reduce or prevent the damage, danger or detrimental effect. [436] A Pre-Directive must be issued whereby the intent to issue a Directive is expressed.[437] An	Compliance with ECA		Yes, if non-compliance with directive

[433] s.31L(5), s.31M NEMA

[434] s. 31M(2)

[435] s. 7(2)(a) PAJA

[436] s. 31A(1)(2) ECA. Note that it is somewhat irrelevant that the section specifies that Minister, competent authority, local authority or government institution issues the directive; in practice, these powers are delegated down to lower officials and it is currently the EMIs who are issuing them.

[437] S. 3(2)(i) PAJA

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
			opportunity is given to the person to furnish reasons stipulating why the Department should not issue a Directive[438]. Note that a Pre-Directive can be dispensed with if the situation is urgent[439]. A Directive is issued to cease activity or take necessary steps to eliminate, reduce or prevent the damage, danger or detrimental effect.[440] If the damage is not rehabilitated, the Minister, competent authority, local authority or government institution can take steps to rehabilitate and recover the costs from the perpetrator.[441] An internal appeal may be sought to the Minister or Competent Authority[442]. Judicial review of s. 31A Directives is codified in the ECA. The person has 30 days in which to request written reasons of the decision and reasons must be furnished within 30 days.[443]The person then has 30 days to seek judicial review of the decision in Supreme Court.[444] A failure to comply with a Directive issued under s. 31A of the ECA is an offence punishable by a fine or a maximum of three months imprisonment. Thus, a failure to comply can result in the matter being referred to a Director of Prosecution for a criminal prosecution.[445]			

[438] s. 3(2)(ii) PAJA

[439] s. 3(4) of PAJA

[440] s. 31A(1) ECA

[441] s. 31A(3)(4) ECA

[442] s. 35(3) ECA

[443] s. 36(1) ECA

[444] s. 36(2) ECA

[445] s. 29(3) ECA

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
			If the accused is convicted, an order may be made to repair the damage.[446] If the damage is not repaired, the state can take necessary steps to repair the damage and recover the cost from the convicted person.[447]			
NWA						
NWA Section 19 - Pollution Control	The NWA requires that an owner of land, a person in control of land or a person who occupies or uses the land on which - *(a)* any activity or process is or was performed or undertaken; or *(b)* any other situation exists, which causes, has caused or is likely to cause pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.	CMA/Regulator	A catchment management agency may direct any person who fails to take the measures required under this section to *(a)* commence taking specific measures before a given date; *(b)* diligently continue with those measures; and *(c)* complete them before a given date. Should a person fail to comply, or comply inadequately with a directive given by the CMA, the CMA may take the measures it considers necessary to remedy the situation. Section 19 allows for the CMA to recover costs as a result of any action from a wide array of potentially responsible parties or parties that benefited from the pollution.	A CMA can require a polluter to The measures referred to in subsection (1) may include measures to - *(a)* cease, modify or control any act or process causing the pollution; *(b)* comply with any prescribed waste standard or management practice; *(c)* contain or prevent the movement of pollutants; *(d)* eliminate any source of the pollution; *(e)* remedy the effects of the pollution; and *(f)* remedy the effects of any disturbance to the bed and banks of a watercourse.	PAJA, NWA section 151 (offences), NWA section 155 (interdicts)	Yes, subject to NWA section 155
NWA Section 20 - emergency Incidents	This sections deals with emergency incidents, which includes any incident or accident in which a substance - *(a)* pollutes or has the potential to pollute a water resource; or *(b)* has, or is likely to have, a detrimental effect on a water resource. A "responsible person" includes any person who *(a)* is responsible for the incident; *(b)* owns the substance involved in the incident; or*(c)* was in control of the substance involved in the incident at the time of the incident.	CMA/regulator	The responsible person must as soon as reasonably possible report the incident to either DWA, SAPS, or the relevant CMA. The CMA may issue a verbal or written directive for the responsible party to take any measures it deems necessary to address the situation within a specific time frame. Should the responsible party not be able to comply with the directive or if there is inadequate time to issue a directive, the CMA may take the measures it considers necessary to (i) contain and minimise the effects of the incident; (ii) undertake clean-up procedures; and (iii) remedy the effects of the incident.	Emergency clean-up, and compensate the CMA should CMA undertake clean-up.	PAJA, NWA section 151 (offences), NWA section 155 (interdicts)	Yes (see NWA section 155)

[446] s. 29(7) ECA

[447] s. 29(8) ECA

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
			Section 20 provides broad cost recovery measures.			
NWA Section 53-54, Violations of water use authorizations	These sections deal with addressing violations associated with water use authorizations or illegal water use under section 21. Section 53 provides broad powers to the responsible authority to remedy contraventions of illegal water use or water use authorizations. Section 54 allows the responsible authority to suspend or withdraw entitlements to use water.	Regulator (Responsible Authority)	Section 53 allows the responsible authority to give notice by writing to any person who contravenes any provision of Chapter 4 (water use authorization), a requirement set or directive given under Chapter 4, or a condition which applies to any water use authorization. The notice can direct a person or an owner of the property in relation to the contravention to take any action specified in the notice to rectify the contravention within the time frame specified (at least more than 2 working days). If the action is not taken, the responsible authority may carry out any works or take any action necessary to rectify the situation and recover costs associated with such action, or apply to a competent court for relief. Section 54 allows the responsible authority to suspend or withdraw entitlements to use water if the person fails to comply with any condition of entitlement, to comply with the NWA, or to pay a charge required for water use. The suspension is for a time period specified by the responsible authority or until the responsible authority is satisfied that the person concerned has rectified the failure which led to the suspension. Section 54 requires the responsible authority to give notice and to first direct the person concerned to rectify the situation before suspended or withdrawing the entitlement. The person concerned must also be given an opportunity to make representations with a reasonable period on the proposed suspension or withdrawal.	Compliance with section 21 water use authorizations, or suspension and/or withdrawal of water use entitlement.	PAJA, NWA section 151 (offences), NWA section 155 (interdicts)	Yes (see NWA section 155)
NWA Section 118 - Dam Safety	Section 118 allows the Minister of Water Affairs to take measures to address dams with a safety risk.	Minister of Water Affairs	The owner of a dam must provide the Minister with information that allows the Minister to access the dam's safety risk.	Specific repairs or alterations to the dams which are necessary to protect the public, property or the resource quality from a risk	PAJA, NWA section 151 (offences), NWA	Yes (see NWA section 155)

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
	A dam is defined as any existing or proposed structure which is capable of containing, storing or impounding water (including temporary impoundment or storage), whether that water contains any substance or not. A dam with a safety risk is defined as a dam 1) which can contain, store or dam more than 50 000 cubic metres of water, whether that water contains any substance or not, and which has a wall of a vertical height of more than five metres, measured as the vertical difference between the lowest downstream ground elevation on the outside of the dam wall and the non-overspill crest level or the general top level of the dam wall; 2) belonging to a category of dams declared by the Minister that poses a safety risk; and 3) specified by the Minister to pose a safety risk.		The Minister may declare a specific dam to be a safety risk, and declare the owner of the dame to undertake, at the owner's cost, and within a period specified by the Minister, any specific repairs or alterations to the dam which are necessary to protect the public, property or the resource quality from a risk of failure to the dam. If the owner fails to comply with the directive, the Minister can undertake the repairs and alterations and recover costs from the owner.	of failure to the dam.	section 155 (interdicts)	
NWA Section 151 - Offences	Section 151 lists out 13 offences under the NWA, with associated penalties. It provides for fines and criminal charges.	Minister or Water Management Institution	Any person who contravenes any of the offences listed in section 151 is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment and, in the case of a second or subsequent conviction, to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment	In the case of a conviction under section 151, section 152 allows Courts to award damages (on top of fines) to any person who has suffered harm or loss as a result of the offence, without additional pleadings, at the written request of the person who suffered harm or at the Courts own act in the presence of the convicted person. Section 152 also allows the court to award damages for any damage caused to the water resource, without separate pleadings, at the written request of the Minister or at the Courts own act in the presence of the convicted person.		yes
NWA Section 155 - Interdicts and other High Court Orders	Allows the Minister or the water management institution concerned to apply to the High Court for an interdict or any other appropriate order against any person who has contravened any provision of the NWA.	Minister or relevant water management institution	See discussion on Interdicts, below	Discontinuation of illegal activity and remedying adverse effects of the illegal activity		
Conservation of Agricultural Resources Act (CARA) [448]						
CARA Section 7	The DoA is tasked with monitoring and enforcing	Regulator	In accordance with the Promotion of	The performance or cessation of	PAJA	Yes

[448] Act No. 43 of 1983

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
	compliance CARA. CARA provides for the conservation of natural agricultural resources by maintaining the production potential of land, by combating and preventing erosion and weakening or destruction of the water sources, and by the protection of vegetation and combating of weeds and invader plants. CARA section 7 provides that the executive officer may issue a Directive to a land user to perform or not to perform any specified act if this is essential in order to achieve the objects of CARA.[449]	(Executive Officer)	Administrative Justice Act (PAJA)[450], a written warning that a Directive will be issued should be provided in the form of a Pre-Directive[451]. An opportunity should also be provided to make representations.[452] This requirement can be dispensed with if urgency requires it to be.[453] A Directive may provide requirements to be complied with in the manner and within the time period specified.[454] An appeal may be lodged with the Director General against a Directive.[455] Judicial review of the decision to issue a Directive may also be sought[456]. Any Directive is binding[457] and to refuse or fail to comply with a Directive is an offence.[458] If a Directive is not complied with, the matter may be forwarded to the South African Police Service (SAPS) for prosecution. Such an offence carries a penalty of a maximum of R5000 and/or a maximum of 2 years imprisonment[459]. A second such offence carries a penalty of a maximum of	performance of any specified act that is related to the conservation of natural agricultural resources		

[449] s. 7(1) CARA

[450] Act 3 of 2000

[451] s. 3(2)(i) PAJA

[452] s. 3(2)(ii) PAJA

[453] s. 3(4) PAJA

[454] s. 7(2) CARA

[455] s. 21 CARA

[456] s. 6 PAJA

[457] s. 7(4)(a) CARA

[458] s. 7(6)(b) CARA

[459] s. 23(1)(a) CARA

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
			R10 000 and/or a maximum of 4 years imprisonment.[460]			
Interdict						
Interdict	Interdicts are a remedy for present and future conduct. Theoretically, they can be used to put a stop to harmful activity and often at an early stage, allowing proactive intervention and prevention. However, the test to be met is a stringent one, making them more difficult to obtain in practice.		Generally, to obtain an interdict, the applicant must show: a reasonable apprehension of the infringement of a right; that there is no suitable alternative remedy; and that the balance of convenience favours granting an interdict over not granting one.[461]			
Mineral Petroleum and Resources Development Act of 2002 (MPRDA)						
MPRDA Sections 91 and 92	These sections deal with inspections pursuant to warrant and routine inspections respectively. Section 91 gives broad powers subject to a warrant from the local Magistrates Court to, among other things, inspect, gather information, take samples, and seize any evidence for the purposes of a criminal prosecution. Section 92 deals with routine inspections, and allows for the inspection during office hours of a mining area of any activities, processes or operations being carried out.	Authorised Persons.	Section 91 requires a warrant. Section 92 inspections do not require a warrant, but must take place during office hours.	Can lead to an offence under section 98, and a suspension or termination of mining license under section 93.	MPRDA Sections 93, 98, and 99	Can lead to criminal case
MPRDA Section 93 Orders, Suspension, Instructions	This section allows for an authorised person to order the holder of a relevant right permit or permission, or person carrying out the activities under the permit, to take immediate rectifying steps to address any non-compliance or suspected non-compliance with the MPRDA or other law or to suspend or terminate the relevant operations.	Authorised person subject to confirmation of the Director-General	Director-General has 60 days to either confirm or set aside the Order	Rectification of non-compliance, suspension or termination of activity	Section 92, 98, and 99	yes
MPRDA Section 98- Offences	A person has committed an offence if it is in non-compliance with any provision of the MPRDA, including with any directive, notice, suspension, order, instruction or condition or if the person submits inaccurate, incorrect, or misleading information as required under the Act.	Regulator		See Penalties under section 99	Section 92, 92, 99	yes

[460] s. 23(1)(b) CARA

[461] NB this is merely an outline of the general test which will have been interpreted further in case law

Act/Section	Summary	Who Can Take Action	Procedure	Potential Relief	Related Legislation	Criminal
MPRDA Section 99- Penalties	This lists various penalties for specific offences, ranging from R10,000 fine to R500,000 fine, as well as prison terms up to ten years.					Yes

11. Appendix 3: Legal issues arising out of the Assignment and delegation of functions to catchment management agencies

11.1 Introduction

The preamble of the National Water Act 36 of 1998 (NWA) recognises the need 'for the integrated management of all aspects of water resources and, where appropriate, the delegation of management functions to regional or catchment level so as to enable everyone to participate'.[462] The creation of a new institutional framework that focuses on the catchment level for water resource management (WRM), namely through the creation of Catchment Management Agencies (CMAs), is central to determining the effectiveness of policy implementation of the NWA and the policy documents preceding it.[463]

While the NWA has received international recognition for its comprehensive and innovative legislative design, pitfalls in institutional capacity and implementation of the NWA has sorely hampered the realisation of WRM at the catchment level.[464] In fact, the enactment of environmental legislation 'may lull the public into a false sense of security that the problems are being addressed, whereas there can be no realistic expectation of success without the adequate implementation of such legislation.'[465] One major implementation delay that is emblematic of the kind of failure which is having a significant impact on the effective implementation of the NWA has been the creation of fully functioning CMA. Despite that the NWA has been operational for thirteen years, the establishment of CMAs remains elusive with only 2 out of 19 established[466]; however neither is fully functioning.

We assert that contributing significantly to this delay is the NWA's lack of guidance as to the appropriateness and use of *delegation* or *assignment* to Catchment Management Agencies. Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function. Thus the decision to use one over the other as means to transfer powers to CMAs has tremendous implications in practice.

This paper seeks to investigate the defining elements and distinctions between the legal terms 'delegation' and 'assignment' as referred to in the NWA, particularly as it related to the functioning of CMAs, and the implications this has on WRM at the catchment level. While the NWA expressly refers to both terms it fails to define either of them, leaving practitioners and administrators in the dark as to their application.

The authors have through several discussions with the Department of Water Affairs (DWA) and the Incomati Catchment Management Agency (ICMA), and through the review of official public documents, observed multiple, often conflicting viewpoints around the assignment and delegation of functions to the CMA and the role that the CMA should play in water management. This includes unfamiliarity with the distinction between these terms, disagreement about when and how functions should be assigned or delegated to CMA, disagreement as to the role of a fully functioning CMA, and a lack of knowledge as to the extent of powers that the NWA envisions assigning to the CMA. This lack of clarity is unfortunate and contributes to the delays in establishing and developing fully functioning CMAs as required by the NWA and the water policy underlying the NWA.

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[462] For a review of the NWA, Robyn Stein, 'Water law in a democratic South Africa: a country case study examining the introduction of a public rights system' (2005) 83 *Tex L Rev* 2167; see Ramin Pejan, 'The Right to Water: The Road to Justiciability' (2004) 36 Geo. Wash. Int'l L Rev. 1192; Hubert Thompson *Water law: a practical approach to resource management and the provision of services* 1 ed (2006).

[463] DWAF. *White Paper on a National Water Policy for South Africa* (1997) 30 (National Water Policy).

[464] Barbara Schreiner, Guy Pegram & Constatin von der Heyden 'Reality check on water resources management: Are we doing the right things in the best possible way?' (2009) Development Bank of South Africa, Development Planning Division, Working Paper Series No.; Sharon Pollard & Derick du Toit 'Towards the sustainability of freshwater systems in South Africa: An exploration of factors that enable and constrain meeting the ecological Reserve within the context of Integrated Water Resources Management in the catchments of the lowveld' (2011) WRC Report No. YY 477/10.

[465] R. F. Fuggle &, Marinus André Rabie (eds) *Environmental Management in South Africa* (1992) at 120.

[466] AWARD ddiscussions with DWA and the Incomati Catchment Management Agency.

To clarify some of these issues, this paper seeks to explore references to the terms in other areas of the law as a way to fully conceptualise the appropriateness of when to 'delegate' and when to 'assign'. Primary reference will be made to section 99, 126, and 156 of the Constitution of the Republic of South Africa, 1996 (Constitution), which provides the foundation for the assignment of powers and functions between spheres of government. Thereafter, an attempt will be made to understand the meaning of delegation and assignment in the Municipal Systems Act 32 of 2000, which has promulgated draft guidelines for the application of delegation and assignment to municipalities.[467]

Although this paper draws from other laws to understand the distinction between assignment and delegation in the NWA, due regard will be paid to the meaning that these terms have within the context that they have been developed. Nevertheless, considering the lack of guidelines around delegation and assignment in the NWA and the establishment of CMAs which fall outside the spheres of government[468], it is a beneficial exercise to explore their development in other areas so as to facilitate an understanding of this issue specific to the NWA.

While the ultimate purpose of this paper is geared towards understanding the implications for delegation and assignment specific to the NWA, one can appreciate that other complex issues flow from such a discussion. These include: (1) issues related to the timing of delegation or assignment; (2) issues around dispute resolution and whether CMAs are subject to the tenets of co-operative government; (3) issues around financial allocations as a result of delegated or assigned powers; and (4) the need to amend the language of the NWA to make the distinction between these terms more clear. Each will be explored; however, we emphasise that the discussion is intended to create dialogue, and not represent final conclusions.

Finally, it should be noted that the most developed of the CMAs that have been established is the ICMA, with a fully functioning governing board, initial functions assigned, and at the time of writing the completion of a non-gazetted catchment management strategy. Being the most advanced, the ICMA represents an ideal example of the kind of complexities that an established CMA would face in the delegation and assignment process. As such, this paper concludes by referring to the delegation and assignment issues that the ICMA is facing as a case study of the issues presented throughout the paper.

11.2 Catchment management as a new water management paradigm in South Africa

According to the *White paper on a National Water Policy for South Africa* (National Water Policy) a key function of DWA, formerly the Department of Water Affairs and Forestry (DWAF), will be 'to promote the establishment, and support the functioning of Catchment Management Agencies as and where conditions permit.'[469] The functioning and ultimate success of CMAs is governed by the principles underlying *Integrated Catchment Management* (ICM) which provides for the devolution and decentralisation of water management.[470] To give effect to the decentralised management of water resources, the National Water Resource Strategy (NWRS), a NWA mandated document, divides South Africa into 19 Water Management Areas (WMAs) each of which will be managed by a single CMA that represents the interests of different water users at the catchment level.[471] A WMA is thus the unit of management under the NWA and will typically represent a catchment area or river system.[472] A CMA manages water resources within the bounds of a WMA in accordance with a catchment management

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[467] The Assignment and Delegation Guidelines in GN 636 GG 27518 of 22 April 2005 ('*Assignment and Delegation Guidelines*').

[468] The nature of CMAs will be explained in more detail under section II. An attempt will be made to explain the how the peculiar design of CMAs, which fall outside the normal structures of government, has complicated the application of public law principles of delegation and assignment in the context of the NWA.

[469] National Water Policy, *op cit* note 2 at30.

[470] Julia Brown & Phil Woodhouse 'Pioneering Redistributive Regulatory Reform: A Study of implementation of a Catchment Management Agency for the Inkomati Water Management Area, South Africa' in Martin Minogue et al (ed) *Regulatory governance in developing countries* (2006) 227.

[471] See DWAF, *National Water Resource* Strategy (2004), ss 1.4, 2.1 pp 11, 15. At the time of writing, DWA was revisiting this number and seeking to decrease it to under 10.

[472] See NWA, s 1(1)(xxv).

strategy (CMS) that must be aligned with the NWRS. In effect, the task of the CMA is to ensure that water resources within its specific WMA is protected, used, developed, conserved, managed and controlled.[473]

From a legal perspective, a CMA is a statutory institutional body established by section 77 of the NWA. It is a legal entity with a separate identity from DWA, and it is managed and controlled by governing board appointed by the Minister. The participatory function of a CMA means that the governing board should represent a balance between the interests of existing and potential water users, local and provincial government and environmental interest groups.[474] This balance will theoretically help the CMA achieve its mandate to strive towards achieving co-operation and consensus in managing water resources under its control.[475] Each CMA should also be developmental in nature, working progressively towards the implementation of their specific catchment management strategy in the WMA they are responsible for.[476]

While the Minister is presently responsible for a WMA where no CMA has yet to be established,[477] the NWA foresees the role of DWA, which acts on behalf of the Minister, will eventually shift towards concentrating on regulatory oversight, national policy and strategic issues, institutional support, co-ordination, and auditing.[478] Therefore, what is anticipated is a shift, over time, in the framework of implementation and realisation of WRM from DWA to CMAs, but under the over-arching regulatory function of DWA.

11.3 Delving into the legal nature of CMAs: are they subject to cooperative government?

Whether one can assert that a CMA is subject to the requirements of co-operative governance or falls outside these requirements turns on how one defines the legal nature of a CMA (i.e. is it an organ of state that falls within the national executive). The significance of applying cooperative government principles to the CMA within the context of understanding assignment and delegation relates to how disputes between the CMA and DWA will be resolved, including disputes around how, what, and when powers and functions are or are not delegated or assigned.

It is the peculiar design of CMAs, that hedge between performing vital public functions with regards to water management in the NWA and its corporate legal identity, which makes the application of public law principles of delegation and assignment a challenging issue. However, what needs to be stressed in any attempt to understand the nature of CMAs is its alignment with DWA and not a disengagement from DWA as an independent corporate identity. Thus, as we elaborate below, in the structure of government as provided for in the Constitution, it is our view that CMAs are organs of state which are extensions of DWA, thus making them a body within national government.

A close analysis of the term 'responsible authority' (of which definitional clarity is vital to the effective implementation of the NWA) helps to resolve this issue. With reference to section 1(1) of the NWA, a responsible authority is either a CMA or the Minister. Where the Minister retains a power or function, she or he is the responsible authority; whereas, if the Minister has assigned such power or function to a CMA, then that CMA is deemed to be the responsible authority.[479] However, while the Minister, acting with the authority of the national executive, falls into the spheres of government as set out in the Constitution, a CMA acting, primarily through its governing board, in the same capacity and undertaking the same exact functions as the Minister is merely an organ of state, but falling outside the spheres of government.[480]

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[473] Ibid, s 8(1).
[474] Ibid, s 81(1).
[475] Ibid, s 79(4)(b).
[476] National Water Policy, *op cit* note 2 at 30.
[477] NWA, s 72(2).
[478] See NWRS s 3.5.2.2 p 92; also ibid, ss 72-77.
[479] Section 1(1) of NWA therefore defines the responsible authority as: (a) if that power or duty has been assigned by the Ministers to a catchment management agency, that catchment management agency; or (b) if that power or duty has not been assigned, the Minister.
[480] An organ of state is defined in section 239 of the Constitution as including national, provincial and local departments of state or administration, and 'any other functionary or institution' which is 'exercising a public power or performing a public function' in terms of the Constitution, a provincial constitution of any legislation.

While this distinction between Minister and CMA may seem slight, it is one that has tremendous implications in practice. For example, this distinction has prompted at least one legal scholar to conclude that CMAs are not subject to the principles of cooperative government and intergovernmental relations as set out in section 41(1) of the Constitution.[481] According to this view, because a CMA does not fall into a sphere of government, it would not be subject to Constitutional protections and mechanisms that are meant to facilitate integrated environmental management and that seek to prevent fragmentation in governance.[482] Cooperative government requirements would apply both to how a CMA conducts its affairs with other governmental spheres and how governmental spheres conduct their affairs with the CMA.

We, however, do not agree with such a conclusion, and firmly believe that a CMA falls within the ambit of cooperative government. In light of the National Water Policy's and the NWA's overall objective of establishing CMAs for every WMA and the progressive devolution of responsibilities from DWA, it would be inconceivable to imagine that CMAs were not intended to be an extension of DWA's institutional framework. To hold otherwise would mean that CMAs, as corporate legal entities, would be responsible for implementing a large volume of the NWA as de facto government actors not subject to cooperative governance requirements, such as the obligation to avoid litigation with other spheres of government. This would create a particularly incongruous result where, as is the case now, DWA retains some functions as the responsible authority while CMAs, where established, have taken on other functions as responsible authority. In other words, where a Minister retains responsibility for a WMA in which a CMA has not been established or performs the functions in the NWA which have not been assigned to an established CMA, there is no doubt that the Minister is bound to conduct its activities in the spirit of cooperative government. Yet a CMA undertaking the same functions would not.

The provisions governing intergovernmental disputes as provided for in the Constitution and Intergovernmental Relations Framework Act 13 of 2005 (IGRFA)[483] are too important to let formalistic legal reasoning blind the needs of purposive and common-sense interpretation. It is understandable that a private entity or a corporation performing public functions, for example municipal services, as a result of a procurement process should not be party to an intergovernmental dispute.[484] However, a statutory entity established to perform vital aspects of such legislation and that for all practical purposes undertakes the same role as a government department cannot be excluded from the tenets of cooperative government. Considering the fundamental role that CMAs play in the overall framework of WRM, we should avoid complexity and absurd results at all costs. This approach does not sacrifice flexibility at the altar of established governmental structures, but rather calls for consistency in application and clarity in implementation.

In sum, it is our suggestion that while CMAs are organs of state created for a specific statutory purpose, they should be seen as extensions of DWA rather than separate statutory bodies removed from the role of government. Such an understanding of the nature of CMAs is consistent with the role that they play in managing fundamental aspects of IWRM. This interpretation also sheds clarity on the peculiar relationship between public law principles of delegation and assignment within the context of CMAs.

11.4 Powers and functions of a CMA

Prior to discussing the legal implications between assignment and delegation in the NWA, this section presents an overview of the powers and functions of a CMA.

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[481] Thompson, *op* cit note 1 at 623.

[482] See e.g. Louis Kotzé, "Environmental governance" in Alexander Patterson & Louis Kotzé (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* 1 ed (2009), s 3 p 108. (discussing fragmentation in environmental governance).

[483] The legislature has passed the IGFRA as a means to facilitate cooperative government and resolve inter-governmental disputes. The purpose of IGFRA is to "establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith".

[484] Nico Steytler and Jaap de Visser *Local Government Law of South Africa* (2007) at 16-32.

11.4.1. CMA's initial powers and functions

As stated above, the ultimate purpose of establishing the CMA is to progressively delegate and/or assign WRM to the regional or catchment level as a way to involve catchment specific communities and water users, within the framework of the NWRS.[485] Section 80 of the NWA provides that a CMA will have initial functions by virtue of its establishment. In other words, these functions will be exercised by a CMA without them being delegated or assigned by the Minister. These functions include:

- To investigate and advise interested persons on the protection, use, development, conservation, management and control of the water resources in its water management area;
- To develop a catchment management strategy;
- To co-ordinate the related activities of water users and of the water management institutions within its water management area;
- To promote the co-ordination of its implementation with the implementation of any applicable development plan established in terms of the Water Services Act 108 of 1997; and
- To promote community participation in the protection, use, development, conservation, management and control of the water resources in its water management area.

Furthermore, as a Water Management Institution, a CMA has certain powers, duties, functions and responsibilities in the NWA. These include, for example, certain powers related to levying water use charges,[486] expropriating property and servitudes[487], powers related to the transfer of water use authorisations[488], and requirements around making information on water management available to the public.[489]

11.4.2. Powers and functions where the NWA expressly mentions the CMA

A related issue to the initial functions provided for in section 80 is the legal status of the sections in the NWA which specifically refer to CMAs. This occurs in section 19 (prevention and remedying effects of pollution) and section 20 (control of emergency incidents) of the NWA.[490] The express reference to CMAs rather than 'responsible authority' in these sections causes confusion as to the precise nature of these powers and functions. A literal legalistic approach would regard these powers and functions as those that a CMA has as an initial function. However, to conclude that section 19 and 20 are initial functions would be out of place with overall scheme of progressively developing the capacity of CMAs to deal with functions that require both human and financial capacity. Taking into account the extent of the powers and nature of the functions intended to be performed in both section 19 and 20 of the NWA, one would expect that these sections would be subject to progressive assignment, akin to section 73(1)(a). It is submitted that such confusion should be cleared up through legislative changes to the NWA.

11.4.3. Additional powers and functions of CMAs

The NWA envisages that additional powers and functions may be transferred to CMAs through assignment and/or delegation. The Minister is tasked with the role of establishing CMAs and progressively delegating and/or assigning his or her powers to water management institutions. The Minister retains the ultimate responsibility for WRM, thereby obliging her to 'fulfil the functions of a CMA in a WMA where no CMA is established, or where such an agency has been established but is not functional.'[491]

Section 63 of the NWA provides that the Minister may delegate a power or a duty vested in her to a water management institution, except the power to make a regulation, to authorise; to authorise a water management institution to expropriate under section 64(1); to appoint a member of a governing board of a CMA or; to appoint a member of a Water Tribunal.[492] Section 63 provides that

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[485] NWA, chap 7.
[486] NWA ss 57(1)(a)(i) and (b) read with s 57(2), ss 58 read with s 1(5), s 60(2)
[487] Ibid, ss 64(1), 65(2) &128
[488] Ibid, ss 25(1) & (3)
[489] Ibid, s 145(1)
[490] See specifically ss 19(3), (4), (5), (6) & (8) and ss 20(3)(c), (4)(d), (6)(b), (7) & (9).
[491] NWA, s 72(2).
[492] Ibid, ss 63(1)(c) & (2).

a delegation be in writing and subject to conditions. Its silence as to whether agreement must be met raises interesting issues around the nature of delegation envisioned in the NWA and its relationship to assignment, which are discussed in section IV below.

Section 73 of the NWA provides for the assignment to a CMA, for two sets of powers and functions, namely: a power or a duty of a responsible authority[493]; and any power or duty listed in Schedule 3.[494] Such assignment can be subject to limitation in terms of area of application and conditions for exercise of assigned powers or functions.[495] Subsection 73(3) obliges the Minister, before an assignment is made, to consider the capacity of the CMA to administer such powers and function and the desirability of such action.[496] Tables 1 and 2 provide for the assignment of a responsible authority and Schedule 3 respectively. As is evident, the NWA envisions that the vast majority of powers and functions be assigned to CMAs, rather than delegated.

Table 2 – responsible authority

Section:	***Contents of section[497]:***
s 33(1) and (3) – verifying water use.	Declaring a water use an existing lawful water use on application.
s 33(2) and (3) – verifying water use.	Declaring a water use an existing lawful water use on own initiative.
s 35(1) – verifying water use.	Requiring from a person claiming an entitlement to water to apply for a verification of the lawfulness or extent of that use.
s 35(3)(a) – verifying water use.	Requiring from a person who has applied for the verification of the lawfulness or extent of a water use to provide further information.
s 35(3)(b) – verifying water use.	Conducting investigation into the veracity and the lawfulness of a water use that is to be verified.
s 35(3)(c) – verifying water use.	Inviting written comments from a person who has an interest in the verification of a water use.
s 35(3)(d) – verifying water use.	Affording a person who has applied for the verification of the lawfulness or extent of a water use to make presentations on the application.
s 35(6) – verifying water use.	Condoning a late application for verifying a use.
s 26(1)(c) – registering water use.	Registering an existing water use if so required.
s 29(1)(b)(vi) – registering water use.	Registering a water use permissible in terms of a general authorisation if so required in terms of general authorisation.
s 34(2) – registering water use.	Requiring the registration of an existing lawful water use.
s 41(2)(a) – evaluating applications for water use.	Requiring from a person applying for a license to provide additional information, an assessment of the likely effect of the resource quality and an independent review of the assessment by a person acceptable to the responsible authority.
s 41(3) – evaluating applications for water use.	Directing in writing that the assessment must comply with the requirements contained in the regulations dealing with environmental impact assessment.
s 41(4) – evaluating applications for water use.	Giving notice of the application and inviting objections against the application
s 39(1) – authorisation of water use.	Authorising persons to use water in terms of a general authorisation.
s 40 and s 41– authorisation of water	Issuing an individual license to use water.

[493] Ibid, s 73(1)(a).
[494] Ibid, s 73(1)(b).
[495] Ibid, s 73(2).
[496] Ibid. s 73(3).
[497] See Thompson, *op cit* note 1 at 626-629.

use.	
s 43– authorisation of water use.	Issuing a notice to start the compulsory licensing procedure.
s 44– authorisation of water use.	Condoning a late application for a license as part of a compulsory licensing procedure.
s 45(1) and (2) – authorisation of water use.	Preparing a proposed allocation schedule as part of the compulsory licensing procedure.
s 45(4) – authorisation of water use.	Publishing a proposed allocation schedule as part of the compulsory licensing procedure.
s 46 (1) – authorisation of water use.	Preparing and publishing a preliminary allocation schedule as part of the compulsory licensing procedure.
s 46(2) – authorisation of water use.	Amending a preliminary allocation schedule as directed in writing by the Water Tribunal.
s 47(1)(b) – authorisation of water use.	Publishing a notice in the Government Gazette stating that a preliminary allocation schedule has become final.
s 47(2) – authorisation of water use.	Issuing licenses according to a final allocation schedule.
s 42– authorisation of water use.	Notifying persons once a decision on individual and compulsory license application has been reached.
s 22(10) – authorisation of water use.	Entering into negotiations with the claimant and offering an allocation of water instead of compensation after the Water Tribunal has decided that compensation is payable.
s 22(4) – promoting single licence requirements with other organs of state.	Promoting arrangements with other organs of state to combine the different licence requirements into a single licence requirement in the interests of co-operative government.
s 22(1)(c) and 3– promoting single licence requirements with other organs of state.	Relieving a person from the requirement to obtain a licence for water use.
s 29 – setting conditions for water use.	Attaching conditions to a general authorisation or licence.
s 22(2)(e) – setting conditions for water use.	Directing a person in writing to return any seepage, run-off or water containing waste which emanates from a water use to a water resource other than the resource from which the water has been taken.
s 30(1) – requiring the provision of security.	Requiring from an applicant for a licence to give security in respect of an obligation or potential obligation arising from a licence to be issued if it is necessary for the protection of water resources or property.
s 30(3) – requiring the provision of security.	Determining the type, extent and duration of the security required.
s 30(5) – requiring the provision of security.	Requiring that, if the security is in the form of an insurance policy, the responsible authority may be jointly insured under or be a beneficiary of the insurance policy.
s 30(6) – requiring the provision of security.	Amend or discharge security given.
s 49(1) – reviewing and amending authorised water uses.	Reviewing a licence.
s 49(2), (3) and (5) – reviewing and amending authorised water uses.	Amending the conditions of a licence.
s 28 (3) and (4) – reviewing and amending authorised water uses.	Extending the period of a licence.

s 50(1) and (3) – reviewing and amending authorised water uses.	Amending or substituting a licence condition if the licensee or successor-in-title has consented to or requested the amendment or substitution, to reflect one or more successors-in-title as new licensees or to change the description of the property to which the licence applies.
s 50(2) and (3) – reviewing and amending authorised water uses.	Requiring the licensee to obtain the written consent of an affected person before amending or substituting a licence or to make a formal application for the amendment or substitution.
s 51(1) – reviewing and amending authorised water uses.	Adjudicating upon conflicting claims between a licensee and a successor-in-title, or between different successors-in-title, in respect of claims for the amendment or substitution of licence conditions.
s 51(2)(b) – reviewing and amending authorised water uses.	Being informed of the succession, for the substitution of the name of the licensee, for the remainder of the term.
s 52(1), (2)(a), (3) and (4) – reviewing and amending authorised water uses.	Dealing with an application for the renewal or amendment of the licence before the expiry date of a licence.
s 53(1), (2)(b) and (3) – taking action to rectify a contravention.	Directing in writing that a person, or owner of the property in relation to which the contravention occurred, take the action specified in the notice to rectify the contravention.
s 53(2) – taking action to rectify a contravention.	Carrying out the works and taking action necessary to rectify the contravention and recover the reasonable costs from the person on whom the notice was served or applying to a competent court for the appropriate relief.
s 54(1) – taking action to rectify a contravention.	Suspending or withdrawing an entitlement to water if a person fails to comply with any condition of the authorisation or to pay a charge.
s 54(5) – taking action to rectify a contravention.	Reinstating a withdrawn entitlement to water.
s 55(1) – taking action to rectify a contravention.	Accepting and cancelling a surrendered licence.
s 55(2) – taking action to rectify a contravention.	Refunding a charge or part of a charge paid in respect of a licence surrendered.

Table 3 – Schedule 3 Assignments

Items and Sections:	***Contents of section[498]:***
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To manage and monitor permitted water use within the WMA
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To conserve and protect the water resources and resources quality within the WMA.
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	Subject to the provisions of the NWA, to develop and operate a waterworks in furtherance of the CMS
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	To do any necessary to implement CMS within the WMA
Item 2 of schedule 3 – protection of water resources and implementation of CMS.	By notice to a person taking water, and after having given that person a reasonable opportunity to be heard, to limit the taking of water in terms of Schedule 1.
Item 3 of Schedule 3	To make rules to regulate the different water uses in the area.
Item 4 of Schedule 3	To require the establishment of management systems
Item 5 of Schedule 3	To require alterations to waterworks.
Item 6 of Schedule 3	To control, limit or prohibit the use of water during water shortages.

Section IV below will begin to flesh out the legal distinctions between assignment and delegation, and present various challenges and issues around these tasks.

11.5 Delegation versus assignment

This section presents a comprehensive discussion of the legal implications between delegation and assignment. Because of the lack of guidance from the NWA, the meaning of the terms delegation and assignment will be explored drawing from other legal contexts.

11.5.1. Delegation

In the public law setting, delegation refers to the transfer of powers conferred from a functionary to another functionary in order to facilitate the exercise of powers by the transferee.[499] More specifically, delegation is 'a revocable act by which an organ of state transfers a power or function, vested in it by legislation, to another organ of state.'[500] The basis for public law delegation is found in section 238 of the Constitution. Section 238(a) of the Constitution provides that an executive organ of state in any sphere of government may delegate a power or function to any other executive organ of state. Despite its paramount application in any functioning system of government, the Constitution neither defines delegation nor distinguishes it with assignment, necessitating a study of its scope and application in other areas to provide clarity as to its proposed application in the NWA. Fortunately, this is not a hard task as the concept has been developed to vast degree both in the common law and by the courts in South Africa's post-Apartheid dispensation.[501] The problem, however, lies in its interaction with assignment, discussed in section IV *(d)*.

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[498] See Thompson, *op cit* note 1 at 629-30.
[499] WA Joubert (ed) *LAWSA* vol 20, part 2 (2000) at para 179.
[500] Joanna Amy Eastwood 'Managing the relationship between the national government and the provinces. A discussion of provincial environmental initiatives with reference to section 24 of NEMA' (unpublished LLM dissertation) at 21.
[501] See Cora Hoexter, *Administrative Law in South Africa* (2007) at 232.

A number of elements define the facets of delegation, namely: the delegation must be authorised, either expressly or implicitly, with regards to legislation under which such power or function is to be performed; the *delegans* retains the ultimate authority for the transferred power or function; the delegated authority is exercised on behalf of the *delegans*; the *delegans* may, accordingly, intervene in the exercise of such delegated authority by revoking or amending the conditions or issuing instructions for exercise of the act; the financial risks and obligation remains with the *delegans* upon delegation; conditions can be attached to a specific delegation and the exercise of such power is, arguably, constrained by the principles of co-operative governance and; the delegation is a temporary transfer of powers and functions.[502]

11.5.2. Assignment

The public law understanding of assignment is, at most, vague and still in its infancy. This makes fleshing out the meaning and distinction between delegation and assignment in the NWA a particularly relevant topic.

The Constitution expressly provides for the assignment of certain powers between spheres of government in section 99 (national to municipal) and section 126 (provincial to municipal). These sections respectively provide for the assignment of an executive statutory power or function from a Cabinet Member, which is to be exercised or performed in terms of legislation, to a Municipal Council and from a Member of the Executive Council (MEC) to a Municipal Council. These assignments: require an agreement between the relevant Cabinet Member or MEC and the Municipal Council; must be consistent with the Act in terms of which the relevant power or function is exercised or performed and; takes effect upon proclamation in the gazette by the President or Premier, as the case may be. The provision for assignment in the Constitution, however, lacks any guidance as to the application of the assignment principle in practice. Therefore, a workable definition must come from elsewhere.

According to the *Assignment and Delegation Guidelines* under the Municipal Systems Act, 'assignment' is defined as the 'permanent transfer of the authority role in relation to a function from national or provincial government to local government.'[503] This definition clearly accords with the vertical arrangement between spheres of government and does not apply to other cases, such as an assignment from DWA to the CMA at issue here.[504]

A definition of assignment that would apply more broadly can be drawn from the housing sector. There, the Department of Human Settlements (DHS) has defined assignment as 'a permanent transfer of the function, which includes the transfer of the authority role – and this includes the right to receive directly the funds and the assets necessary to perform the function.'[505]

Common elements can be extracted from these definitions. First, when an assignment process is finalised, an assignee acts in its own name when it exercises powers or performs functions in terms of an assigned power.[506] Second, assignments are permanent and irrevocable. Third, an assignment is a complete transfer of powers and functions. This means that once the power or function has been assigned, it is no longer possible for the assigning functionary to issue individual instructions as to how the function is to be performed or the power exercised. Fourth, once an assignment has taken place, the role of the assigning functionary shifts towards regulating and supervising the way in which the assignment is implemented. Such a role prohibits the intervention of the assigning functionary, which prevents the transfer of authority to the assignee from becoming meaningless and disallows the issuing of individual instructions. This prohibition consistent with the Constitution's attempt to distinguish the application of delegation and assignment.[507] Lastly, an

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[502] Steytler & de Visser, *op cit* note 23 at 5-47.
[503] *Assignment and Delegation Guidelines*, op cit note 6 at item 1. The 'authority role' is defined to mean 'the role exercised by the sphere of government with responsibility for ensuring that a particular function is exercised competently and which involves responsibility in relation to the function for administration, planning, revenue raising through grant funding, taxes or user fees, policy development, supply related legislation, appointment of service providers, monitoring service provision and intervening in the case of poor performance and ownership of fixed assets associated with the function.'
[504] See Eastwood, *op cit* note 39 at 22-27.
[505] DHS, *Accreditation Framework for Municipalities to Administer National Housing Programmes: Managing the incremental delegation of housing functions to local government* (2011) at 2.
[506] *Assignment and Delegation Guidelines*, items 2(a)(i)-(ii) & (b)(ii)-(iii).
[507] Steytler & de Visser, *op cit* note 23 at 5-49.

assignment of a function is accompanied by the financial risks and obligations of an assigned power. Implicit in this is that an assignment of power will be accompanied by such funding as would be necessary to fulfill the function assigned. Such a view is aligned with the principle in the *Assignment and Delegation Guidelines* which holds that finance follows function.[508]

11.5.3. The principle of institutional subsidiarity

Confusion as to the ambit and application of delegation and assignment in the NWA is a serious obstacle inhibiting the realisation of WRM at the catchment level. It is our opinion that the way that the NWA has been drafted provides inappropriately allows the Minister with broad discretion to delegate or assign any of the powers it has as a responsible authority. The Minister does not seem to be required to assign or delegate the powers and functions to the CMA either where the CMA can act as responsible authority or where the NWA specifically refers to the CMA to undertake a function (see e.g. section 19 of the NWA), but has considerable discretion to undertake one of three actions: 1) to maintain those powers within DWA; 2) to delegate some or all such powers to the CMA under section 63; 3) or to assign some or all such powers to CMAs under section 73.

This presents a major problem in the implementation of the NWA because although the NWA envisions the decentralised management of water resources at the catchment level, the Minister can act in a manner that thwarts the clear intent of the Act. As we urge below, the principle of institutional subsidiarity, in addition to the clear intent of the NWA to decentralise water management, suggest that the Minister should heavily weigh its actions toward the third option, that of assignment.

The subsidiarity principle is a conceptual term that exists in many disciplines, including in the fields of legal reasoning and institutional organisation.[509] In essence, its overall objective remains the same, namely to recognise a preference for the small. The 'small' may be in the form of local government in preference to national or provincial government or the family unit compared to the state in the provision of care. Legal experts refer to section 156(4) of the Constitution as the foundational basis for the principle of subsidiarity in South Africa.[510] Section 156(4) states:

> The national government and provincial governments must assign to a municipality, by agreement, and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if – (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.

Although this section is designed for the assignment of additional functions and powers between spheres of government, its inclusion in the Constitution arguably represents the recognition of the principle of subsidiarity's fundamental purpose in shaping the division of institutional powers and functions generally.

At a general level, the principle of subsidiarity has an automatic preference for the exercise of public power at a level as close as possible to the citizenry.[511] Du Plessis explains that institutional subsidiarity refers to the process of identification and empowerment of an appropriate subordinate institutional actor to perform a certain function. He remarks that the principle 'constrains any more encompassing or superordinate institution (or body or community) to refrain from taking for its account matters which a more particular, subordinate institution (or body or community) can appropriately dispose of, irrespective of whether the latter is an organ of state or civil society.'[512] The rationale for subsidiarity lies primarily in the efficiency argument of locating the implementation of legislation or policy with those closest to resources and the people affected by these results.[513] By

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[508] Assignment and Delegation Guidelines, *op cit* note 6 at item 9.

[509] See Jaap de Visser 'Institutional Subsidiarity in the South African Constitution' (2010) *Stell LR* 1; Lourens du Plessis '"Subsidiarity": What's in the name for constitutional interpretation and adjudication?' (2006) *Stell LR* 207. The former is hallmarked by the *Ferreira* case which in essence provided that in constitutional cases; there should be a preference for lower-levels norms of greater particularity over higher-level norms of greater abstraction. See *Ferreira v Levin NO* 1996 (1) SA 984 (CC).

[510] de Visser, Ibid.

[511] Ibid.

[512] du Plessis, *op cit* note 48 at 209.

[513] de Visser, *op cit* note 48 at 93

locating the functions of power at decentralised power points scattered across the country, developmental objectives of the state can more effectively be achieved. A further related basis for subsidiarity lies in democratic participation. Decentralised institutions gives those with a material interest in the outcome of decisions a chance to participate in and hopefully influence the end result.[514]

The principle of subsidiarity accords with the institutional framework of CMAs in a number of ways. First, by allocating the management of water resources at a catchment level, the NWA has recognised river systems as ecological and functional management units, responsible for the overall management for an entire river basin.[515] Managing water at the catchment level allows a CMA to concentrate on the integrated factors specific to a catchment in the co-ordination, development, and implementation of a catchment management strategy.[516] Thus, catchment management, premised on the decentralisation of powers and functions, is logically better suited for the effective and efficient implementation of WRM.[517]

Second, CMAs also have greater access to information with regards to their specific WMA and various stakeholders' interests, thereby improving the quality of decision-making process and increasing the chances of successful implementation. A CMA's active involvement in the management of water related issues in its catchment and the broad spectrum of stakeholders that make-up its board means that it would have greater access to stakeholders' information and knowledge.[518] Access to information invariably aids achieving the delicate balance between interdependent environmental, social and economic factors.[519]

Last, by virtue of the participatory elements of CMAs functioning, which strives to achieve an equitable balance between various stakeholders, having a subordinate institution in which the various stakeholders can represent their interests is vital to the credibility of outcomes produced.[520] By necessity, this requires a platform of reasonable proximity to the interested persons so that all can be heard. Otherwise, the results would be grossly skewed towards those who have access to the resources to make the long journey to the place where decisions are taken. Section 80 (a) and (e) of the NWA facilitates this participation obligation by requiring a CMA as part of its functions to promote community participation in and investigate interested person on the protection, use, development, conservation, management and control of the water resources in its WMA. Furthermore, section 9 of the NWA requires that a CMS enable the public to participate in managing the water resources within its WMA.

The NWRS and National Water Policy also recognise CMAs as decentralised institutions, will play the key role in establishing co-operative relationships with the wide range of stakeholders in a catchment necessary to effectively implement WRM.[521] The NWRS states:

> These agencies will be responsible, among other things, for ensuring that there is consonance between their water-related plans and programmes and the plans and programmes of all other role players in the catchments they manage. The agencies will therefore have to establish co-operative relationships with a range of stakeholders, including other water management institutions, water services

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[514] ibid.

[515] See National Water Policy, o*p cit* note 2.

[516] NWA, chap 2.

[517] See de Visser *Op cit* note 48 at 102.

[518] See e.g. NWA, s 81, which requires that a governing board must "achieve a balance among the interests of water users, potential water users, local and provincial government, and environmental interest groups. In addition to governing boards, CMAs are accompanied by non-statutory catchment management forums that consist of stakeholder representatives from specific catchments. For an in depth discussion of the various participatory mechanisms at a CMAs disposal, see e.g. Burt J, Du Toit D and Neves D, 'Tensions of participation in WRM in South Africa: a national review' AWARD document, (undated), available at http://www.award.org.za/file_uploads/File/Inkomati_case_study_from_PRP_.pdf, accessed on Aug. 24, 2011.

[519] A counter-argument against such efficiency and functionality strands is that at times a superordinate institution may have greater access to civil expertise by virtue of greater budgets, thereby making larger units better placed to make decisions than small institutions hamstrung in terms of financial and human capacity. See de Visser, *op cit* note 48 at 103.

[520] *Doctors for Life International v The Speaker of the National Assembly and Others* 2006 416 (CC) at para 116.

[521] See NWRS, *op cit* note 10 at 11; The National Water Policy, *op cit* note 2 at 36.

> institutions, provincial and local government authorities, communities, water users ranging from large industries to individual irrigators, and other interested parties.[522]

Furthermore, Principle 23 of the National Water Policy recognises that managing water at the catchment or regional level will "enable interested parties to participate". This aligns with one of the main tenets supporting institutional subsidiarity: the people who are to participate in deliberative process around the allocation of public goods should be those who have a significant interest in their distribution.[523]

In sum, there are cogent reasons rooted in the principle of subsidiarity for the establishment and progressive development of CMAs in the overall quest for IWRM. Indeed, the NWA has been drafted with such an overall intent. As we urge below, such recognition of the role of CMAs ought to direct the Minister towards the goal of assigning rather than delegating the CMA the vast majority of functions that the NWA in fact envisions CMAs to undertake.

11.6 Critical discussion of delegation and assignment in the NWA

As described in section III above, it is apparent that the NWA clearly envisions the vast majority of CMA functions to be assigned rather than delegated. This also accords with the principle of subsidiarity discussed above. Unfortunately, however, the vagueness of these principles within the NWA creates a situation where there will be inconsistency and disagreement as to when and how this assignment is to be implemented in practice.

DWA has issued a *Guide Series* on the establishment of CMAs that sheds some light on how it envisions the process of assignment and delegation will unfold.[524] It is worthwhile to describe DWA's approach before continuing. The *Guide Series* present the general legal distinction between assignment and delegation and refers to the relevant sections of the NWA where these principles are presented.[525] The *Guide Series* then proceed to discuss what potential functions and powers a CMA can be assigned or delegated under the Act.[526] Finally, the *Guide Series* suggest two approaches to delegating and/or assigning CMAs powers and duties, both of which would take place in a progressive or phased manner: 1) to delegate and assign according to proven ability and capacity; and 2) to progressively delegate and assign according to a plan developed jointly between the CMA and DWAF.[527]

Under the first option, the *Guide Series* explains that a CMA will only receive additional powers and duties once it can demonstrate that "it is effectively carrying out its initial functions", that "it has the capacity to carry out the additional functions sought" and that "a CMA may also need to show that the additional functions sought are necessary to enable it to effectively implement its Catchment Management Strategy."[528] The *Series* further explain that the first approach is preferable in WMAs with "relatively low management capacity or financial potential". The *Guide Series* describes the second approach as more pro-active, and is preferable in WMAs "with relatively good management capacity and proven income-generating capacity."[529]

The *Guide Series*, although shedding some light on how DWA envisions delegation and assignment to play out under the NWA, raises more question and problems than answers. These include the following inter-related problems: 1) the level of agreement and consultation necessary to assign and delegate functions; 2) the seemingly interchangeable use of the terms assignment and delegation; and 3) the discretionary nature of the decision made by the Minister in section 73(3) of the NWA. Each is discussed in turn.

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[522] Ibid.
[523] de Visser *Op cit* note 48 at 93.
[524] See DWAF 'CMA and WUA Guides Series, Guide 1: establishing a catchment management agency' (undated), (*Guide Series, Guide 1)* and DWAF 'Guide 2: Catchment Management Agency as an Organisation Guide 2 (undated) (*Guide Series, Guide 2*).
[525] *Guide Series: Guide* 2, s 2.
[526] Ibid, s 2.4.
[527] Ibid.
[528] Ibid.
[529] Ibid.

11.6.1. Level of consultation

The NWA is unclear as to whether agreement is needed in the process of assignment as compared to delegation. Section 73 of the NWA which deals with assignment allows for, at most, consultation with the CMA,[530] which does not necessarily mean that consensus must be reached. The *Guide Series* recommends that "a proposal to assign or delegate additional powers or duties to a CMA should preferably be initiated jointly by DWAF and the CMA concerned".[531] Sections 99 and 126 of the Constitution, however, clearly provide for agreement to be reached between assignor and assignee.[532] Yet, as discussed above, because of the peculiar legal nature of CMAs, the Constitutional provisions that govern assignment between spheres of government do not on their face apply to an assignment from DWA to a CMA, even if a CMA is seen to be an extension of DWA. Nonetheless, we believe that although sections 99 and 126 of the Constitution is limited to assignment between spheres of government, there is no logical reason to exclude the assignment process as envisioned in the Constitution to the assignment process required under the NWA. The purpose for assignment and the circumstances under which assignment take place under sections 99 and 126 of the Constitution is conceptually no different than what is envisioned under the NWA around devolving management to the catchment level. Indeed, because there is absolutely no guidance on how and when the assignment process should work under the NWA, it is imperative that one looks to the Constitution for normative guidance on this matter.[533]

One might assert that in practice, despite not being required to by the NWA, the Minister is unlikely to delegate a power or a function without some level of consultation, albeit at an informal level; and the *Guide Series* suggest that this is the case. Despite this, it is recommended, first, that section 73 of NWA, which lacks basis for agreement, should be read in line with section 99 and 126 of the Constitution. Or this section should be amended to require agreement with the CMA. Second, due to the inter-connectedness between delegation and assignment in the process of the progressively establishment and building of the institutional capacity of CMAs (i.e. delegation will lead to assignment over time), section 63 of the NWA should be read or amended so as to include consultation but not necessarily agreement. This position is taken because delegation is merely a temporary transfer of responsibilities compared to assignment which inevitably involves the full allocation of authority.[534] This position is further supported by the principles of co-operative government which, among other things, require organs of state 'to co-operate with one another in mutual trust and good faith.'[535]

11.6.2. Conflation of assignment and delegation

The discussion of what level of agreement or consultation is necessary for assignment and delegation cannot be resolved without addressing what appears to be an increasing trend within DWA to muddle these distinct legal concepts. The manner that DWA has framed the process of establishing and developing CMAs couples delegation and assignment into one box.[536] For example, *Guide Series 2* when discussing the first option of transferring power to a CMA presents the option as 'Delegate and assign according to proven ability and capacity' and follows this heading with a short discussion.[537] However, it does not discuss, *inter alia,* what powers it would assign rather than delegate, much less why or how it would decide to use one over the other.[538]

This conflation has no basis in the NWA, which, as described in section 3 above, clearly separates the application of the terms. Muddling these terms in application also fails to recognise the

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[530] Consultation is at the discretion of the Minister, and may or may not take place.
[531] *Guide Series: Guide 2*, *op cit* note 63 , s 2.4.
[532] This is compared to section 63 of the NWA where neither agreement nor consultation is provided for.
[533] Such an assertion is consistent with South Africa's ultimate commitment to Constitutional Supremacy. Accordingly, in any interpretative exercise consistency with Constitutional provisions has to be met. See section 39(2) of the Constitution.
[534] Our suggestion is in spite of the fact that section 238 of the Constitution, which deals with delegation, similarly lacks a consultation element.
[535] Constitution, s 41(h).
[536] *Guide Series 1, op cit* note 63, s 5.1.3, and *Guide Series 2*, ss 2.1.3 to 2.1.5.
[537] *Guide Series 2, s 2.1.4.*
[538] Ibid.

very real consequences that result from using one over the other.[539] As discussed, the distinction between delegation and assignment is one of degree, facets of which fall on the extent and nature of transfer of powers and functions. Whereas assignment is the complete and permanent transfer of assigned powers, delegation is merely the temporary reallocation of a power or function with fundamentally different consequences for the relationship between assignor and assignee. For example, assignment divests the Minister of the authority for the day-to-day implementation of a function so assigned, thereby making a CMA accountable for the risks it undertakes in the exercise of powers or performance of function upon assignment. The temporary nature of delegation coupled with the recognition that ultimately those responsibilities will be subject to full assignment, means that delegation ought to be used as a joining mechanism in capacitating CMAs for future devolution.

Moreover, the muddling of these two doctrines undermines the efficiency arguments used to substantiate the subsidiarity principle. One would expect that if the Minister insistently uses delegation as a guide for assignment, absent of the intention of using delegation to evaluate the capacity of a CMA to undertake such tasks, that such an approach would undermine the legislative basis for CMAs. It is clear from section 73(4) of the NWA that the Minister *must* promote CMAs through the assignment of powers and functions. Thus, if the authority for the exercise of powers and performance of functions is retained by the Minister using delegation, the capacity of CMAs would never be able to be fully developed as envisioned by the NWA. If a CMA has the requisite capacity for further assignment, the Minister should not default in relinquishing his or her authority for those powers or functions or continue to give that power to CMAs through delegation.[540]

Consequently, we recommend that assignment is to be preferred to delegation when the capacity and desirability requirements are met, and that when delegation and assignment are used in conjunction, delegation ought to be used a means to an ends. In making this last point, although we acknowledge that DWA's approaches in the *CMA and WUA Guide Series* have some basis[541], it cannot be over-stated that in no way should delegation and assignment be used interchangeably or arbitrarily. Delegation can play a fundamental role in testing and assessing the capabilities of CMAs to undertake more responsibilities in WRM, and despite its legal distinction to assignment, should not be overlooked in the progressive development of CMAs institutional capacity. This view accords with item 35 of the *Assignment and Delegation Guidelines* which provides that delegation should only be preferred when assignment is not appropriate.[542] It also accords with the *Guide Series*' intention to progressively develop CMAs.

We further propose that, considering the vast differences in responsibility between the powers and functions of a CMA as 'responsible authority' compared to schedule 3 of the NWA, delegation in the process of evaluating the capacities of CMAs should be used more with regards to the former. This is because the powers and functions of a responsible authority have greater depth, which by implication entails that such responsibilities are essential for the realisation of the NWA. The Minister should err of the side of caution when deciding whether or not to relinquish full authority over such responsibilities, but not use caution as an excuse for avoiding the eventual assignment of these powers. Such a view would also hold that CMAs would have to be more patient until they have been assigned responsible authority powers.

11.6.3. Discretionary nature of Minister's decision to assign

According to O'Regan in *Dawood and Others v The Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*[543] discretion:

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[539] Furthermore, such an approach is contrary to similar attempts made in the Constitution to keep the application of assignment and delegation distinct and separate in practical implementation.

[540] One can only speculate as to why the Minister would fail to assign when a CMA is capable enough for further assignment, but one would assume that if any reason existed it would be financial. In other words, a fear that once an assignment had taken place, DWA would have to reallocate funds for the performance of those functions and powers. In light of the pressures that executive departments face in meeting highly ambitious goals with limited human and financial resources, faced with the option of reallocating funds to another institution, this could restrain the Minister in taking the plunge, as it were.

[541] *Guide Series 2*, *op cit* note 63 at 7.

[542] *Op cit* note 6.

[543] 2000 (3) SA 936 (CC) at para 53.

> plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.

The Minister's decision in section 73(1) of the NWA is clearly discretionary, to be exercised taking into consideration the capacity and desirability to assign more responsibilities to a CMA. The presence of the word 'may' rather than a peremptory word 'must' is indicative of imposing a discretionary directive on the Minister. Although the NWA provides no guidance as to how and when assignment should take place, as mentioned above, the Minister's must be cognisant of the over-arching mandate in subsection 73(4) to promote CMAs through assignment. This raises the question as to whether or not it would be appropriate for the NWA to be amended to issue some guidance as to when and how the Minister should exercise such discretion. Providing guidelines would not be contrary to the board discretionary power conferred to the Minister as similar guidance has been provided for the assignment and delegation in the Municipal Systems Act. Furthermore, imposing some constraints on the Minister exercise of power would not usurp the Minister's discretion in this area. Notwithstanding this, if any such imposition did unduly limit the Minister's discretionary role in particularised circumstances, this would amount to a fettering of his or her responsibilities and therefore be reviewable in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[544]

A possible option for guidelines can be found in item 19(1) of the Assignment and Delegation Guidelines to the Municipal Systems Act. It is worth quoting in full:

'19. Criteria for Decision Making

(1) In considering whether responsibility for a function should be transferred to local government, the administrator must have regard to the following factors:

(a) any legislation or policy that relates to the function and any indication in existing or draft legislation that the function is suitable for transfer:

(b) any technical, operational or financial factors specific to the function that make the function suitable for transfer;

(c) the capacity of a municipality or municipalities, as the case may be, to receive and exercise the function;

(d) a comparative assessment of the capacity or potential capacity of the administrator's department and the municipality or municipalities to undertake the function, which shall favour transfer If both entitles have the same capacity;

(e) the extent to which transfer would allow for greater accountability to the individuals who are intended to benefit from the exercise of the function;

(f) the extent to which the function requires a single authority across a whole province or across the Republic, as the case may be;

(g) the extent to which there would be any benefit in terms of cost or efficiency in managing the function broadly across a whole province or across the Republic, as the case may be, because-

(i) a high-level of technical and managerial expertise is required;

(ii) the provision of the service or function requires substantial crossing of municipal boundaries or large-scale bulk infrastructure; or

(iii) this is appropriate in terms of any other factor which the administrator reasonably considers relevant;

(h) the implications for inter-governmental fiscal arrangements; and

(i) the transfer costs relating to staff, assets and professional or expert advice.'

It is suggested that undertaking a similar feat would go a long way in resolving many the confusing aspects between delegation and assignment evident in the NWA. It would also decrease the chances of disputes between the Minister and certain CMAs arising from the scope and application of section 73 of the NWA.

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[544] PAJA, s 6(f)(ii).

11.7 The example of the Inkomati Catchment Management Agency

After reviewing the legal nature of CMAs, the distinction between assignment and delegation, and potential emerging issues around the transfer of powers and functions to CMAs, it is beneficial to briefly use the ICMA as a case study to illustrate how some of these issues are unfolding on the ground. This discussion draws from interviews the authors conducted with various representatives from the ICMA and DWA, and documents that the ICMA has provided to the authors.

The ICMA was established in 2004 and at the time it was the first CMA in South Africa.[545] It is also listed as a national public entity in Schedule 3A(a) of the Public Finance Management Act 29 of 1999. Apart from its initial functions pursuant to section 80 of the NWA that the ICMA obtained upon establishment, the Minister of Water and Environmental Affairs delegated certain powers and duties to the ICMA on 17 December 2011.[546] The initial delegation document highlights several issues around transferring powers and functions to the ICMA.

First, the delegation document explains that by virtue of its establishment, the ICMA has initial functions set out in section 80 of the NWA as well as other functions, such as those included in sections 19 and 20 of the NWA. As explained above, sections 19 and 20 refer expressly to the CMA to undertake the functions set out in those respective sections, and it is unclear on its face whether these should be treated as initial functions akin to those set out in section 80 or whether these should also be delegated and/or assigned progressively. The Minister has clarified her understanding of these powers to be akin to initial functions; however she does not explain how she came to this conclusion.

Second, the initial delegation document does not assign any powers or functions to the ICMA, but only delegates them. This includes the powers and functions under Schedule 3, which as explained above, the NWA clearly foresees as inherent functions of the CMAs. Although, the delegation of Schedule 3 powers instead of assignment is not in and of itself flawed; as we discuss above, such a delegation should be done with a clear eye towards the eventual assignment of these functions. The Minister is silent in this regard, and it is unknown whether she delegated these functions with an eye toward assignment.

Finally, notably absent from this initial delegation documents are powers and functions of a responsible authority, such as the powers to authorise water use, the powers to verify, existing water uses, and the power to enforce against unlawful water use. These are significant powers that, as we have expressed above, the NWA foresees being assigned to the ICMA. One can only speculate as to why the Minister has excluded all of these functions from the initial delegation document; however a major theme that several water managers within DWA have expressed to AWARD is that the ICMA cannot undertake water management functions around authorising water use while also undertaking enforcement activities against unlawful water use, whether they be unauthorised or in violation of permit conditions. The analogy that is often used is that the ICMA cannot be a referee and a player at the same time because it will result in the lack of impartiality. Others within DWA disagree and believe that the ICMA can undertake both these functions with time. Although we cannot comment on the validity of these concerns around the ICMA undertaking both enforcement and authorisation functions, the NWA clearly envisions that the CMA can do both – as DWA has been doing up to now.

In summary, the issue of fleshing out the distinctions between delegation and assignment of functions is not just a theoretical exercise, but a very real concern on the ground.

11.8 Concluding remarks

The effective realisation of the policy goals underlying the creation of CMAs ultimately hinge on two fundamental steps; 1) the establishment of CMAs and 2) the transfer of additional responsibilities through either delegation or assignment. Related to this, is a confusion as to the legal nature of CMAs which creates ambiguity in the process of delegation and assignment in the NWA. We assert that

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[545] See GN 397 GG 26185 of 26 March 2004.

[546] *See* Delegation of powers and duties to the Inkomati Catchment Management Agency in terms of the National Water Act, 1998, 17th Dec. 2010 (initial delegation document), provided to AWARD by the ICMA.

CMAs, although governed by principles peculiar to corporate governance, should be understood as institutions incorporated within the institutional framework of DWA as opposed to outside of it.

Due to lack of explanation of the distinction between delegation and assignment in the NWA and a palpable lack of academic literature on the subject, this paper sought to gain insight into this distinction from other areas of the law. Primary reference was made to the Constitution and to the Municipal Systems Act, which provide greater clarity as to the differences between the terms that practitioners dealing with the NWA should embrace. As is clear from these other sources, the primary difference between assignment and delegation is the degree of devolution of authority. Since the NWA envisions an almost complete transfer of responsibilities around WRM to CMAs through assignment, assignment is to be preferred to delegation in the devolution process. Delegation does, however, have an important role in the progressive transfer of additional responsibilities to CMAs, and in fact has independent application in section 63 of the NWA; but that role should be used as a stepping stone to eventual assignment.

To clarify uncertainty around the process of assignment and delegation, the NWA must provide guidelines similar to guidelines provided under the Municipal Systems Act for assignment and delegation. Guidelines would provide great clarity to the practical components of delegation and assignment which are particularly important to the implementation of WRM.