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##### INSTITUTIONAL AND LEGISLATIVE CHARACTERISTICS OF THE SOUTH AFRICAN WATER SECTOR

##### KM-02-KT01

##### THE SOUTH AFRICA LEGISLATIVE FRAMEWORK

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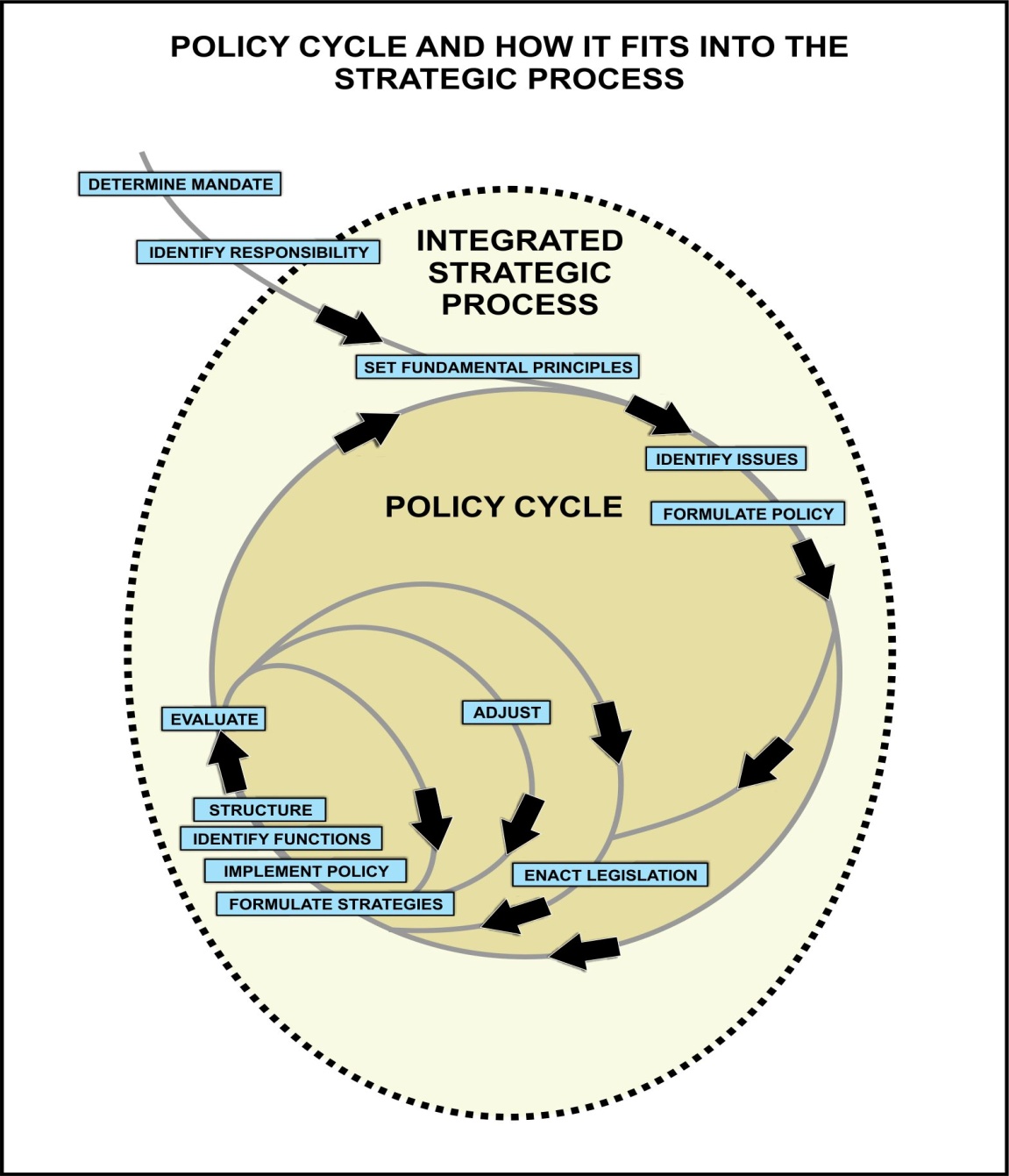
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# The role of law to implement policy

The law could be analysed from various perspectives. The law could for example be used as a mechanism to implement policies and strategies of the Government.[[1]](#footnote-2) A functional perspective is then given to the law.

According to the Constitutional Court, Government formulates policy and gives effect to the policy by securing the enactment of legislation. Thereafter a process of implementing and administering the policy is done by developing strategies and programmes, and then by applying legislation and other measures to these.[[2]](#footnote-3) This is part of the policy process.



Policy is a statement of intent, usually presented as a formal statement such as a white paper. It is based on certain acceptable principles and societal values and forms the basis for a plan that could contribute to the achievement of certain set objectives. A strategy on the other hand is the course of action adopted to implement the policies.

Policies therefore provide the reasoning as to **why** something should be done and the strategies **the manner** to achieve that. If the law is used to implement policies and strategies, the law stipulates **what** should be done, **by whom**, **how**, **when** and **under what circumstances** as well as what **should not be done**, to achieve set objectives. Policies and strategies are not legally enforceable while the law is.[[3]](#footnote-4)

While implementing the policies and strategies, all the actions of the State must be lawful.[[4]](#footnote-5) The Constitutional Court held that a public power could be exercised only if it is clearly sourced in the law.[[5]](#footnote-6)

Using the law to implement, for example, the government’s policies and strategies relating to water resource management is founded in the National Water Act 36 of 1998 (NWA). This Act is an enabling law, which empowers and enables the Minister of Water and Sanitation to act as public trustee of the South African water resources to ensure that the water and water resources are protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner.[[6]](#footnote-7) This should be done for the benefit of all persons in accordance with the constitutional mandate relating to water. The Minister should ensure that the necessary policies and strategies will be developed and implemented to give effect thereto and for that purpose the Minister has a wide discretion.

These strategies are the course of action to implement the policies and are not part of the law. It is not the same as the National Water Resource Strategy as contemplated in section 5 of the NWA and the catchment management strategies as contemplated in section 8 of the NWA. Although the strategies as contemplated in the NWA contain elements of strategies, they should rather be seen as plans and procedures to implement the policies.

The Water Services Act 108 of 1997, on the other hand, assists with the achievement of efficient and effective water use for optimum social and economic benefit for communities. It creates a framework to align key sector policies of all the sector departments dealing with the provision of water services so as to ensure that all citizens have access to basic water supply and sanitation.

Powers are the competencies given by law to an organisation that may be exercised to fulfil the reason why the organisation has been established. Duties on the other hand are the obligations imposed on the organisation in terms of the law which the organisation must perform to achieve a certain set objective or purpose. Functions are merely the tasks, activities and actions necessary to exercise the powers and to perform the duties.

Only once all the relevant functions have been identified and grouped, could the necessary structure follow from that.

# Water law reform

Meaningful access to clean water and sanitation is fundamental to human health and well-being. The development imperatives of international conferences and conventions have the potential of offering clear direction of the characterisation of water as a basic right. In the 1990s strong water-related arguments obtained a place in international declarations. The 1992 Dublin Statement on Water and Sustainable Development International Conference on Water and The Environment, Dublin, Ireland 1992, for example, advocates the following four principles:

water must be managed in a holistic way, taking interactions among users and environmental impacts into account;

water must be valued as an economic good and managed as a resource necessary to meet basic human rights;

institutional arrangements must be reformed so that stakeholders are fully involved in all aspects of policy formulation and implementation. This means that management must be devolved to the lowest appropriate level, with enhanced roles of non-governmental organisations (NGOs), community groups and the private sector; and

women must play a central part in the provision, management and safeguarding of water.

The Minister of Water Affairs and Forestry, as it was known then, in May 1994 initiated a process to review all the water-related legislation. This was due to the social, political and democratic reform in South Africa during the last decade of the 20th century, the water-related issues experienced, international declarations and the prominence given to fundamental human rights and environment-related matters during the second half of the 20th century, as well as the demands of the Constitution of the Republic of South Africa of 1996 and because the water legislation was inadequate to give effect to these. This resulted in a set of products after four years of hard work and wide consultation.

The first real outcome of this process was the ‘Fundamental Principles and Objectives for the New Water Law in South Africa’ which was approved by the Cabinet in November 1996. The principles and objectives deal with the following:[[7]](#footnote-8)

Legal aspects of water (Principles 1, 2, 3 and 4);

The water cycle (Principles 5 and 6);

Water resource management priorities (Principles 7, 8, 9, 10, 11 and 12);

Water resource management approaches (Principles 12, 13, 14, 15, 16, 17, 18, 19 and 20); and

Water Institutions (Principles 22, 23 and 24); and

Water Services (Principles 25, 26, 27 and 28).

The following three fundamental objectives for managing the water resources arise from these principles and objectives:

to achieve equitable access to water, that is equity of access to water services, to the use of water resources and to the benefits from the use of water resources;

to achieve sustainable use of water by making progressive adjustments to water use with the objective of striking a balance between water availability and legitimate water requirements, and by implementing measures to protect the water resources; and

to achieve efficient and effective water use for optimum social and economic benefit.

These principles and objectives guided an intensive programme involving the Minister, political leaders, officials from the Department of Water Affairs and other organs of state, organised user groups and South Africans from all walks of life in a process of consultation, research and synthesis to develop the water resource management policy. This process was assisted by the support and involvement of officials and experts from other countries and from international organisations. This lead to the publishing of the National Water Policy (NWP), outlining the direction to be given to the development of the water law and water management systems which should take South Africa into the 21st century. The NWA was thereafter drafted and enacted in 1998 based on these principles and objectives and to give effect to the NWP. The WSA was also drafted during the same time as the NWP. It was enacted in 1997.

# Legal systems that form the foundations of the South African water law

## The common law principles on which the South African water law is build

### The Roman law

The Roman law was originally a primitive system regulating the legal relationship within a small farming community along the Tiber River in Europe more than 3000 years ago. This system had its origins in the customs of the community which the majority of them felt committed to. This system later developed into one of the best legal systems.

*Aqua profluens* or *flumina* (flowing or running water), irrespective of flow conditions such as perenniality and whether it was a seasonal river or not, and water in lakes and ponds were *res publicae* or *communis* (goods that belong to the state or the community). The water was *res omnium communes*, natural resources falling outside the legal commerce and which are available to all people.

Flowing or running water was available for usage by the whole world (therefore not only the citizens of Rome), according to the principles of justice and equity. If the water was subject to heavy and competitive uses, the State intervened to regulate the peaceful common use of the resource concerned. Numerous rules applicable to the use of the water were scattered throughout the full spectrum of the law.

No one could own the flowing or running water, except if a part of the water was appropriated, such as a bucket of water or fish caught. The appropriated part could be owned.

Surface water, other than flowing and running water and water in lakes and ponds, was probably *res singulorum* or *res privatae* and was regarded like any other private property.

Underground water was also private water and could be used by the owner of the land despite the fact that it could cut off the supply to his neighbour, except if it was a source of flowing and running water or water in lakes and ponds.

### The Roman Dutch law

Roman law was almost forgotten until its revival in the 12th century in Italy. Gradually Roman law was absorbed into the primitive Germanic law of Western Europe. This also happened with the law in the Netherlands, to form the Roman Dutch law. It was this hybrid bloom that was introduced to South Africa.

The authors of the Roman Dutch law did not teach us much about the water law in the Netherlands, although one can gather certain guidelines from their books.

The Roman law on water was substantially applied in the Netherlands. The law therefore also made a distinction between private and public water with the control over public water vested in the State.

## Period before codification of the water law in South Africa

### The Dutch administration in the Cape of Good Hope

The Dutch East India Company applied the *dominus fluminus* (the State is the owner of the water flowing in a river) principle to the streams of the Table Mountain Valley. Later this principle was also applied to other perennial rivers in parts to which the Company's sphere of influence was extended as the Cape Colony increased in size.

The first *Placcaet* which dealt with water was published on 10 April 1655. It prohibited the pollution of certain of the Table Mountain Valley streams which were used for drinking purposes. A later *Placcaet* was issued on 16 December 1661 forbidding the use of the water for irrigation to the prejudice of the Company’s mill and other activities. During the succeeding century there were constantly recurring *Placcaets* prohibiting interference with the furrows and watercourses of the Table Mountain Valley.

The Kompanjie’s general policy was to grant leases of farming land for limited periods and to retain its inherent ownership of the soil. It also granted small areas of land in freehold to certain favoured individuals.

In the outlying districts water rights were regulated by *landdroste* and *heemraden*. They were appointed to hold inquiries, apportion water and settle disputes between owners of properties abutting streams.

### The British occupation

The final occupation of the Cape of Good Hope by the British took place in 1806. Thereafter organisational and administrative reform took place. A new system of land tenure was introduced in 1813. Every lessee obtained ownership of the land he or she was occupying on the condition that an annual quitrent was paid to the Government.

In the English law the principle applied that the natural rights as pertaining to the land belong to the owner of the land, and this principle soon superseded the principles of the Dutch Government.

The Dutch principle of *dominus fluminus* struggled for survival against the English principle that the owner of land abutting a river had a proprietary right to have the water flow down to him in its natural state for his use for ordinary purposes, subject to similar use by others upstream of him. An upstream owner, again, must use the water in such a way as to cause no material injury to the owners downstream from him. This right was by virtue of the ownership of the land.

In 1830 the opinion was still expressed that the State was *dominus fluminus* in the case *De Wet v Cloete*, but in 1856 in the case *Retief v Louw* it appears that it was not the case anymore.

###### Distinction between private and public water and rights to that

It took the water law long to lay down the criteria for a public stream. Water found in a public stream was public water. All other water was private water.

In 1856 in the case *Retief v Louw* it was propounded that the use of the water was common to the riparian owners and a system of the proportionate sharing of the use of perennial streams by riparian owners was applied.

In 1867 in *Erasmus v De Wet* the court recognised the principle that the owner over whose land a stream flowed, could claim the water for himself. The court probably had a private stream in mind. In 1876 in *Mouton v Van der Merwe* this rule was again applied but the court made it clear that it applied only to water rising on private land. *Struben v Meyer* confirmed this principle. In 1880 the court in *Van Breda v Siberbauer* qualified the principle that a person may deal as he chooses with water rising on his own land only if that water is not a source of a public stream.

Private water on the other hand was the exclusive property of the owner on whose land it rose and he was entitled to use, alienate and dispose of it, except if it was subject to the ancient custom law.

## The codification of the water law

The Transvaal took the first step of codification with Law 11 of 1894 to provide substantial legal rules for the use of public water. The Cape Colony took the next step with Law 40 of 1899, which created water courts with jurisdiction to decide all disputes and claims as to water rights. These courts were given power to grant servitudes for irrigation and to adjudicate apportionment.

The real codification of our water law related to irrigation and the use of streams started in the Cape Colony. Act 32 of 1906 effected a complete codification of the existing water law, both in so far as it was derived from the courts and from previous legislations.

In Natal and the Orange Free State the common law remained as the law, as no comprehensive water legislation was placed on their Statute Books.

The Irrigation and Conservation of Waters Act 8 of 1912 was a compromise between the northern and the southern provinces of the Union. It was based on the Cape Act of 1906 but its provisions were modified to embrace northern conditions.

The characteristics of a public stream were changed by substituting ‘general common use’ with ‘common use for irrigation’. It further introduced the distinction between ‘normal flow’ and ‘surplus water’.

## The provisions of the repealed Water Act

The Irrigation and Conservation of Waters Act 8 of 1912 became inadequate to cope with the social and industrial progress of the Union and was replaced by the Water Act 54 of 1956. Most of the principles of the Irrigation and Conservation of Waters Act were re-enacted, but industrial use was given a more rightful place. Structures were also created enabling non-riparian landowners to obtain rights to water. The State also got more powers over private rights to public and private water. These powers have been widely expanded in subsequent amendments.

The provisions of the Water Act dealing with water rights were based on the following two cornerstones:

The first was the distinction between two categories of water, namely private and public water. In addition, public water consisted of normal flow and/or surplus water. The rights a person had to use each of the different categories of water were determined differently. Therefore, to be able to determine the right to use certain water, the water concerned should have been categorized first.

The second cornerstone was that the rights to use water were determined differently in an area not declared as a Government water control area from an area declared as such.

* In an area not declared a Government water control area, the owners of riparian land had the right to share public water for irrigation and urban purposes. Furthermore, the owners of the land on which private water was found, had the sole and exclusive use and enjoyment of that water.
* In an area declared a Government water control area, the right to the use of public water vested in the Minister of Water Affairs. Declaring an area a government water control area did not affect the rights to private water.

### Forms of water

#### The category public water

Public water was defined in terms of section 1 as any water flowing or found in or derived from the bed of a public stream, whether visible or not. The water need not have to be visible. The gist of this definition is therefore a public stream.

A public stream was defined as a natural stream of water which flows in a known and defined channel if the water therein was capable of common use for irrigation on two or more pieces of land riparian thereto which were the subject of separate original grants.

A stream should therefore comply with the following requirements to be a public stream:

There should be a defined and known channel in which the water flowed. The banks of the channel and the water in the channel need not be visible and the flow in the stream need not be perennial.

The stream should flow through or past at least two pieces of land which were the subject of separate original grants. Subsequent consolidation or subdivision of the grant did not play a role in determining the form of the water.

The water in the stream should be capable of common use for irrigation on at least two original pieces of riparian land. In determining whether a stream was capable of common use for irrigation all the surrounding circumstances and the nature and degree of use which was necessary for the type of farming on the land through which the stream flowed, should be taken into consideration. It was not necessary that irrigation actually had taken place, only the possibility had to exist.

Normal flow

The normal flow of a public stream was defined in terms of section 1 as the quantity of public water actually and visibly flowing in that public stream which, under a system of direct irrigation from that stream, whether by furrows or otherwise, but without the aid of storage, could have been used beneficially for irrigation of land riparian to such a stream. Furthermore, it was deemed that a public stream had no normal flow unless a portion of the actual and visible flow was derived from springs, seepage of any kind, including return seepage from irrigated land, melting snow, the steady drainage of swamps, vleis, natural or indigenous forests.

The water had to comply with the following requirements to be normal flow:

There should be actual flow and the water had to move in the channel. The flow should be visible, although “the flow [need not to be] visible at all points to the human eye.”

The flow should be capable of being lead or pumped directly onto land by means of furrows or pipes. If the water could only be used after it had been stored, the water was not normal flow.

The flow should be capable of beneficial use for irrigation on at least one piece of land. It did not matter if the land was an original grant, a consolidation of grants or subdivision of a grant.

A portion of the actual flow should be derived from a reasonably permanent natural source of water such as a spring, seepage, melting snow or the steady drainage of a swamp, vlei or forest.

In practice the normal flow was usually the quantity of water in the stream during the three or four months immediately preceding the rainy season, known as the bottleneck period, taking into consideration certainty of supply for the crops concerned. For permanent crops, like citrus and other fruits, the certainty could be 90% and higher, while for cash crops and wheat the certainty could be as low as 60%. A figure of 70% was usually used if the specific circumstances did not require another figure. The higher the certainty, the smaller was the normal flow.

A 70% certainty means that an irrigator could on average expect to abstract his or her share of the full normal flow during 7 out of 10 years. The remaining 3 years need not be total failures, but the usage should be curtailed to some degree.

The normal flow of a stream was established only in relation to a specific point or reach in that stream.

Surplus water

The surplus water of a public stream was defined in terms of section 1 as that water flowing or found in the stream which was not the normal flow.

Surplus water was that water over and above the normal flow. If there was no normal flow in the stream, then all the water in that stream was surplus water.

Surplus water was often stated to be the same as flood water and, although this technically was not entirely correct, it nevertheless gave a fair indication of its nature.

#### The category private water

Private water was defined in terms of section 1 as all the water which had risen or fall naturally on any land or naturally drained or was lead on to one or more pieces of land which were the subject of separate grants, but was not capable of common use for irrigation purposes. Furthermore, whenever an owner of land obtained, by artificial means, a supply of water on his own land, which is not derived from a public stream, such water was deemed to be private water.

Private water therefore included

spring water;

rain water, surface water and drainage water before it joined a public stream;

water flowing or found in or derived from a stream that was not a public stream;

groundwater which was not flowing or found in, or derived from, the bed of a public stream, after it was abstracted; and

public water that left a public stream naturally, for example, water that was discharged from the river onto a level area due to the river banks that disappeared or water overflowing the banks of a public stream during a flood.

#### Sources of a public stream and tributaries

Some streams have their origin in mountainous regions and vleis, fountains and marshes sometimes also feed them. They could have been

a private stream, and thereby not a *de jure* source of the main stream;

together with the main stream a public stream, and thereby a *de jure* source of the main stream; or

a public stream in its own right and therefore a tributary of the main stream.

It depends upon the topographical situation and surrounding circumstances in the area which it was. Each case should therefore be decided on its own merits.

### Utilization of water

#### Private water

**Outside an area declared subterranean government water control area**

With some exceptions, the sole and exclusive use and enjoyment of private water vested in terms of section 5 in the owner of the land on which the water is found. The person therefore does not have to take the needs of other persons into consideration.

A downstream owner could have acquired a right to a reasonable share of private water rising on upstream land flowing down to his land in a known and defined channel, if he used the water beneficially for a period of not less than 30 years. The person could only have claimed a reasonable share of the water if the upstream owner took the water.

**Inside an area declared a subterranean government water control area**

The Minister could by notice in the *Government Gazette* have declared an area defined in the notice as a subterranean Government water control area and could have amended or repealed the notice. The Minister could only do this if he was of the opinion that it was desirable in the public interest that the abstraction, use, supply or distribution of subterranean water in the area was to be controlled. (See sections 27 to 32F of the Act.)

In a subterranean Government water control area the right to the use and the control of subterranean water vested in the Minister. No person could have abstracted any quantity of subterranean water and used it inside or outside the subterranean Government water control area except by virtue of the **acknowledgement of existing use**, a **permission** or an **allocation**.

#### Public water outside an area declared government water control area

The most important users of public water outside an area declared a government water control area were the owners of land whereon or along any portion of any boundary whereof a public stream exists, and any sub-division of such land. The right and the extent of the right that each owner had to the water depended on whether the water was normal flow or surplus water.

No person could in terms of section 9B have constructed a water work on a separate piece of land if more than 250 000 cubic meters of public water were impounded or stored, even if the dam was outside the channel of a public stream, or 110 liters of water per second were being abstracted from a public stream, except under the authority of a permit issued by the Minister and on the conditions specified in that permit. The permit could also have included conditions related to the operation of the water work.

Every riparian owner was in terms of section 9 entitled to the reasonable use of such a share as may have been lawfully acquired by him from any person and of his share as determined under the Act of the **normal flow** of a public stream to which his land was riparian. The owner could have used the water for agricultural and urban purposes on his land. A Water Court took the following factors as contemplated in section 52 into consideration when determining each riparian owner’s share of the normal flow:

The comparative extent of irrigable land on the respective pieces of land which formed the subject of original grants, together with the nature of the soil which was irrigated and the quantity of water required to irrigate one unit of land.

A greater area of irrigable land on an original piece of riparian land that could be irrigated if the total quantity of normal flow was allocated to that piece of land was not taken into account, the so-called “Pietersburg principle”. The bigger areas of irrigable land were restricted to a specific size and this principle therefore favoured the pieces of land with less irrigable land.

All the natural sources of water on each piece of land, other than those derived from the public stream concerned, for example, fountains and water from other public streams. The land which could be irrigated with this water, was not taken into account when the normal flow was allocated.

The quantity of water which could reasonably be used for agricultural purposes were divided between the riparian owners concerned, according to the quantity of water flowing in the stream. This meant that each riparian owner received a *pro rata* share of the normal stream and not a definite quantity of water which ensured that all the riparian owners received water in times of scarcity.

Every riparian owner was in terms of section 10 entitled to use as much of the **surplus water** of a public stream to which his land was riparian, as he could have beneficially used for domestic purposes, for the watering of his stock, and for agricultural and urban purposes. He was not compelled to share the water with other owners, except when a downstream owner was entitled to the water in terms of an agreement.

#### Rights granted by the Water Court

If a person was not entitled to use the public water in question or wanted to use more public water than entitled to, or public water on non-riparian land or on land that did not qualify for public water, the person should in terms of section 11 have got the permission of the Water Court to use that water.

#### Utilisation of public water within an area declared a government water control area

It could under certain circumstances have been necessary to allocate rights to public water in a specific area differently from the principles as discussed above. For that reason the Minister could by notice in the *Government Gazette* have declared an area defined in the notice to be a Government water control area and could have amended or repealed the notice. This could have been done for two different types of reasons (see section 59(1) of the Act.)

A right allocated to a property or person within a Government water control area could not have been used on any other property or by any other person, except with the permission of the Minister.

The right to the use of private water was not affected in a Government water control area.

Areas where no government water work where involved

Firstly, an area could have been declared to be a Government water control area if the abstraction, utilisation, supply or distribution of the water from any public stream in that area should have been controlled in the public interest. The surface water was therefore not regulated by a government water works.

The right to the use and the control of water in all the public streams in a Government water control area vested in the Minister. (See section 62 of the Act.)

No person could have abstracted, impounded or stored any quantity of the water in a public stream or use it on any land inside or outside a Government water control area except by virtue of a **provisional right**, a **permission** (there are three types) or an **allocation**.

A **provisional right** entailed that an owner of a piece of land could continue abstracting, impounding, storing and using the quantity of public water that was actually used during the period of 12 months which immediately preceded the declaration of the area for irrigation purposes on that piece of land, whether it was lawful or not. This could have been done until the allocation for the area was made. This right was only applicable to irrigation. If a municipality or an industrialist in terms of a Water Court order wanted to continue with its abstraction, permission from the Minister was required.

The **first type of permission** could have been granted until the allocation for the area was made. This permission allowed a person to abstract, impound or store a quantity of public water in the area and to use the water for irrigation. The permission could have been given for a particular piece of land or in the *Government Gazette* to a particular category of land or to all the land in the area. The permission prescribed the maximum quantity of public water to be used, abstracted, impounded and stored during a particular period and contained also certain conditions. The Minister could have amended or withdrawn this permission.

The **second type of permission** could have been granted before and after the allocation for the area was made. This permission allowed a person to abstract, impound or store a quantity of public water and to use the water on a piece of land for the purposes as specified in the notice. The water could have been used on a piece of land in the area for any purpose and outside the area only for urban and industrial purposes.

The **third type of permission** could have been granted only after the allocation for the area was made. This permission allowed a category of persons or all persons within the area to irrigate an area in addition to the area which could have been irrigated by virtue of the final allocation. This permission could have been given subject to the conditions and in accordance to the basis as determined by the Minister. One of the conditions could have been that an amount of money had to be paid to the State for this permission.

An **allocation** for each piece of land in the area was determined by the Minister and was published in the *Government Gazette* as final entitlements. These entitlements were based on field surveys and water source analyses. An allocation for each piece of land consisted of an area which could have been irrigated, the quantity of water which was adequate for the annual irrigation of one hectare, the quantity of water which could have been used annually for irrigation and the conditions on which the allocation was made. The Minister was only obliged to recognise existing irrigation that was lawfully done during the qualifying period.

Areas where water was supplied from a Government water work

Secondly, an area could have been declared a Government water control area where the area comprised of every piece of land which or a portion whereof is affected or was likely to be affected by a Government water work constructed or in the course of construction or intended to be constructed. In this case water could have been supplied from the Government water work. The water could have been supplied and distributed by way of canals or by way of releases into the river. (See section 63 of the Act.)

The Minister had to determine for each separately registered property the extent or the maximum extent of the land in the area which could have been irrigated by means of water from the water work, or the extent or the maximum extent of the land belonging to any owner of land in the area which could have been irrigated. Existing rights which were exercised beneficially were left intact. The quantity of water which could have been supplied annually in respect of each hectare of land was also determined. This determination was made known by notice in the *Government Gazette*.

The Minister could also in terms of section 56(3) at any time for such period and on such terms and conditions as he may deemed fit, supply water by a Government water works to any person for any use. The person may supply or distribute the water to another approved by the Minister.

#### Use of water for industrial purposes

If public water was used for industrial purposes, certain control measures applied.

Any form of water (public and private water)

A person should not in terms of section 12 have used more than 150 cubic metres of water (public water, private water, groundwater, water from unconventional resources and sea water) for industrial purposes per day in operation of a specific undertaking without a permit issued by the Minister. The water should have been used in accordance with the conditions subject to which the permit was issued. The Minister could have exempted a person from the requirement to obtain a permit.

Public water

A person could only have used public water for industrial purposes with the permission of a Water Court or a permit issued by the Minister. Permission was not needed by

a local authority or body constituted under law which had the right to control and supply water within its area of jurisdiction;

a person to whom water was supplied from a government waterworks or by a local authority or body;

a person who used water in pursuance of a permission from the Minister within an area declared a government water control area; and

a person who had used the water before 13 July 1956.

#### Disposing of effluent

A person who used water (public water, private water, groundwater, water from unconventional resources and sea water) for industrial purposes had to in terms of section 21 purify or treat the water used and any effluent produced by that use until it complied with the requirements prescribed by the Minister. A General and Special Effluent Standards were promulgated in 1962 and were reviewed in 1984.

After the water and effluent were purified or treated, it had to be discharged into the public stream or sea at the place where the water that was used was abstracted or such other place as the Minister indicated.

#### Removing of water found underground in mining areas

The owner of a mine could in terms of section 12B have removed from the mining area water found underground if the owner was of the opinion that it was necessary for the continuation of the mining operations. The owner of the mine who had removed water could

have used the water in the operations of the mine or for domestic purposes connected therewith, unless the Minister directed otherwise; or

under a permit from the Minister and subject to the conditions of the permit, have used the water for any other purpose than in the operations of that mine or for domestic purposes, sold it or gave the water to another person or disposed of it.

If the removal of the water could have adversely affected a person, the Minister could include conditions in the permit relating to the payment of compensation by the mine owner concerned calculated on a basis or determined in a manner specified in the permit.

The Minister could by notice in writing to the owner of a mine, have directed that the water removed from the mine and which was not used in the operations of that mine or for domestic purposes connected with the mine, be disposed of in the manner specified in the direction.

# Legislative principles and requirements pertaining to water resource management

## The National Water Act

### Fundamental principles

The **purpose** of the National Water Act is in terms of section 2 is to ensure that the nation’s water resources are protected, used, developed, conserved, managed and controlled in ways which take into account amongst other factors-

meeting the basic human needs of present and future generations;

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;

providing for growing demand for water use;

protecting aquatic and associated ecosystems and their biological diversity;

reducing and preventing pollution and degradation of water resources;

meeting international obligations;

promoting dam safety;

managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

Section 3 of the Act requires that the National Government, as the **public trustee** of the nation’s water resource and acting through the Minister of Water and Sanitation, must ensure that the water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with the constitutional mandate. To do this, the Minister must not only ensure the equitable distribution of water to all South Africans, but must also protect the water resources for future generations. This requires both the protection of the water resources from over exploitation as well as the quality of the resources.

The Act came into operation on the 1 October 1998. It creates the legislative framework for implementing the National Water Policy. Due to time, manpower, funding and technical know-how constraints, the Department follows a phased process to implement the Policy. This is done within a stable and transparent institutional, administrative and financial framework. Transitional arrangements and strategies are formulated to develop the necessary measures required by the Act. Stability is also needed so that people operating under the old Water Law requirements could predict the effects of the new approach on their activities.

### Resource directed measures

The resource directed measures required by Chapter 3 (sections 12 to 18) of the NWA to protect the water resources will be implemented by the following steps:

###### Step 1 (Resource classification system):

The Minister prescribed by regulation a system to classify the different water resources of the country. The system provides guidelines and procedures to determine the different classes of water resources. It further also, in respect of each class of water resource, establishes procedures for determining the Reserve. It establishes procedures which are designed to satisfy the water quality requirements of water users as far as is reasonably possible, without significantly altering the natural quality characteristics of the resource.

The classification system is set out in Government Notice R810 in the *Government Gazette* 33541 of 17 September 2010. Water resources should be classified in three classes:

**Class I** water resource which is minimally used and in which the configuration of the ecological categories of the water resources within a catchment results in an overall condition of that water resource that is minimally altered from its pre-development condition;

**Class II** water resource which is moderately used and in which the configuration of ecological categories of the water resources within a catchment results in an overall condition of that water resource that is moderately altered from its pre-development condition; and

**Class III** water resource which is heavily used and in which the configuration of ecological categories of the water resources within a catchment results in an overall condition of that water resource that is significantly altered from its pre-development condition.

The procedure to determine the different classes must comprise of 7 steps.

###### Step 2 (Determination of the Class and Resource Quality Objectives of the water resources)

The Minister must in accordance with the prescribed system by notice in the *Government Gazette* determine the class and resource quality objectives of those water resources or a part thereof that are considered to be significant. The Minister may make a preliminary determination of the class and resource quality objectives of a water resource or part thereof.

The purpose of the resource quality objectives is to establish clear goals relating to the quality of the relevant water resource. In determining the resource quality objectives a balance must be sought between the need to protect and sustain water resources on the one hand, and the need to develop and use them on the other hand.

The Minister, the Director-General of the Department of Water Affairs, an organ of State and a water management institution, when exercising any power or performing any duty under the NWA, must give effect to any determination of a class of a water resource and the resource quality objectives as determined and any requirement for complying with the resource quality objectives.

The procedure for determining resource quality objectives comprises of the 6 steps.

###### Step 3 (Determination of the Reserve)

The Minister must by notice in the *Government Gazette* determine the Reserve of a water resource or a part thereof after the class of that water resource has been determined. The Minister may make a preliminary determination of the Reserve.

The procedure for determining the Reserve comprises of 8 steps.

The Minister, an organ of State and a water management institution, when exercising any power or performing any duty under the NWA, must give effect to the Reserve.

### Source-directed controls

Source-directed controls should be implemented by incorporating conditions into authorisations to use water and regulations on the use of water. It could also be incorporated into the measures of other organs of state than the Department of Water and Sanitation that regulate activities and land uses that may impact on the water resource.

The conditions should be developed so that effect is given to the resource-directed measures. The cumulative impact of all the water uses from a specific water resource should not exceed the limits of utilisation appropriate to the class of that water resource. Progressive implementation over time as licences are issued will therefore facilitate the achievement of the objectives of the resource-directed measures applicable to a specific water resource or part of the water resource.

Water uses that were undertaken legally when the NWA commenced could be continued with subject to the conditions and obligations attached to that use until it is replaced with a licence. These conditions and obligations may not always meet the requirements of the resource-directed measures and source-directed controls. It might be necessary to implement the compulsory licensing procedure to ensure that these requirements are met.

### Pollution prevention

#### Legal duty to prevent and remedy the effects of pollution

There is a legal duty in terms of section 19 on the owner of land, a person in control of land or a person who occupies or uses the land on which an activity or process is or was performed or undertaken or any other situation exists, which causes, has caused or is likely to cause pollution of the water resources to take all reasonable measures to prevent any pollution from occurring, continuing or recurring.

A catchment management agency may direct any person who fails to take these measures to commence taking specific measures before a given date, diligently continue with those measures and complete them before a given date.

Should a person fail to comply, or comply inadequately with a directive, the catchment management agency may take the measures it considers necessary to remedy the situation. The catchment management agency may also recover all costs incurred as a result of this jointly and severally from, among others, the person responsible for the pollution, the owner of the land or a person who failed to prevent the pollution.

#### Control of emergency incidents

If there is an incident or accident in which a substance pollutes or has the potential to pollute a water resource or has a detrimental effect on a water resource, the person responsible for the incident or who owns the substance involved in the incident or was in control of the substance must in terms of section 20 firstly report the incident to the Catchment Management Agency and South Africa Police Services or Fire department. The person must also take all reasonable measures to contain and minimise the effects of the incident, undertake cleanup procedures and remedy the effects of the incident, including verbally or written directions from the Catchment Management Agency.

Should a person fail to comply, or comply inadequately with a directive, the catchment management agency may take the measures it considers necessary to remedy the situation. The catchment management agency may also recover all costs incurred from the persons responsible for the incident.

## The Water Services Act

### The object of the Act

The Water Services Act 108 of 1997 was promulgated to provide for-

the rights of access to basic water supply and basic sanitation;

the setting of national standards and of norms and standards for tariffs;

water services development plans;

a regulatory framework for water services institutions and water services intermediaries;

the establishment and disestablishment of water boards and water services committees and their powers and duties;

the monitoring of water services and intervention by the Minister of Water and Sanitation or by the relevant Province;

financial assistance to water services institutions;

certain general powers of the Minister; and

the gathering of information in a national information system and the distribution of that information.

The main objects of Act are in terms of section 2 to provide for-

the right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well-being;

the setting of national standards and norms and standards for tariffs in respect of water services;

the preparation and adoption of water services development plans by water services authorities;

a regulatory framework for water services institutions and water services intermediaries;

the establishment and disestablishment of water boards and water services committees and their duties and powers;

the monitoring of water services and intervention by the Minister or by the relevant Province;

financial assistance to water services institutions;

the gathering of information in a national information system and the distribution of that information;

the accountability of water services providers; and

the promotion of effective water resource management and conservation.

### Rights to and conditions for provision of water services

#### Right of access to basic water services

A person has in terms of section 3 of the Water Services Act a right of access to basic water supply and basic sanitation. The right is subject to the limitations contained in the WSA. Access to a water resource is only a small element of access to water services. For sustainable access to water services in the long term, equipment, technical and management skills are also needed to install, operate, maintain and use the necessary infrastructure to provide the services, and for that, financial resources are needed.

Water services institutions must take reasonable measures to realise these rights, while the water services authorities must provide for measures to realise these rights in their water services development plans (WSDPs), which should be incorporated into the IDPs. The measures could vary, depending on the local circumstances and the ability of the organisation concerned to realise the right.

Basic water supply is in terms of section 1 the minimum standard prescribed by regulation of abstraction, conveyance, treatment and distribution of potable water for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.

The prescribed minimum standard for basic water supply services (regulation 3 in Government Notice R509 in *Government Gazette* 22355 dated 8 June 2001) is-

the provision of appropriate education in respect of effective water use; and

a minimum quantity of potable water of 25 litres per person per day or 6 kilolitres per household per month-

* at a minimum flow rate of not less than 10 litres per minute;
* within 200 metre of a household; and
* with such effectiveness that consumers are not without supply for more than seven full days in any year.

Basic sanitation is in terms of section 1 the prescribed minimum standard by regulation of services necessary for the safe, hygienic and adequate collection, removal, disposal or purification of human excreta, domestic waste water and sewage from households, including informal households.

The prescribed minimum standard for basic sanitation services (regulation 2 in Government Notice R509 in *Government Gazette* 22355 dated 8 June 2001) is-

the provision of appropriate health and hygiene education; and

a toilet which is safe, reliable, environmentally sound, easy to keep clean, provides privacy and protection against the weather, well ventilated, keeps smells to a minimum and prevents the entry and exit of flies and other disease-carrying pests.

#### The level of the water services to be provided

Compulsory national standards

The Minister of Water and Sanitation may in terms of section 9 prescribe by regulations compulsory national standards relating to-

the provision of water services;

the quality of water taken from or discharged into any water service or water resource system;

the effective and sustainable use of water resources for water services;

the nature, operation, sustainability, operational efficiency and economic viability of water services;

requirements for persons who install and operate water services works; and

the construction and functioning of water services works and consumer installations.

The standards should therefore include-

norms and standards for a minimum basic level of water services;

a requirement for the proportionate provision of water services relative to other services; and

requirements relating to sustainability (financial, social, technical and environmental).

The purpose of these standards is to protect the interest of consumers by ensuring that certain minimum standards are met.

Water services institutions must comply with the prescribed standards.

Regulations prescribing compulsory national standards were published in Government Notice R509 in *Government Gazette* 22355 dated 8 June 2001.

Norms and standards for tariffs

The Minister of Water and Sanitation may in terms of section 10 prescribe by regulations norms and standards in respect of tariffs for water services. The norms and standards may-

differentiate on an equitable basis between-

* different users of water services;
* different types of water services; and
* different geographic areas, taking into account the socio-economic and physical attributes of each area;

place limitations on surplus or profit;

place limitations on the use of income generated by the recovery of charges; and

provide for tariffs to be used to promote or achieve water conservation.

Water services institutions are responsible for setting their own tariffs for the provision of water services. A tariff that is substantially different from any prescribed norms and standards may not be used.

The different policies dealing with the provision of water services require that the very poor be given access to a free basic level of service.

Regulations prescribing norms and standards in respect of tariffs for water services were published in Government Notice R652 in *Government Gazette* 22472 dated 20 July 2001. These regulations took effect on 1 July 2003.

#### Conditions for provision of water services

Water services must in terms of section 4 be provided in terms of the conditions set by the water services provider concerned. These conditions must be in accordance with the conditions for the provision of water services contained in by-laws made by the water services authority having jurisdiction in the area in question and provide for-

the technical conditions of existing or proposed extensions of supply;

the determination and structure of tariffs;

the conditions for payment;

the circumstances under which water services may be limited or discontinued;

procedures for limiting or discontinuing water services, which must-

* be fair and equitable;
* provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless other consumers would be prejudiced, or there is an emergency situation or the consumer has interfered with a limited or discontinued service; and
* not result in a person being denied access to basic water services for non-payment, where that person proves, to the satisfaction of the relevant water services authority, that he or she is unable to pay for basic services; and

measures to promote water conservation and demand management.

These conditions must be accessible to the public.

A person who uses water services that is provided by a water services provider does so subject to the applicable condition set by that water services provider.

If a water services institution is unable to meet the requirements of all its existing consumers, it must give preference to the provision of basic water supply and basic sanitation to them. Provision of water services for basic needs is therefore the highest priority. This ensures the equity principle in that users must at least all enjoy a basic level of services before some are provided with or have access to higher levels of services.

Where one water services institution provides water services to another water services institution, the first mentioned may not limit or discontinue the services for reasons of non-payment, unless it has given written notice to the other organisation, the member of the Executive Council responsible for local government in the relevant province and the Minister of Water and Sanitation. The notice must be given at least 30 days before the intention to limit water services or 60 days before the intention to discontinue the services.

#### Measures to conserve water

The Minister of Water and Sanitation may prescribe measures to be taken by water services institutions to conserve water. Regulations prescribing measures to be taken by water services institutions to conserve water were published in Government Notice R509 in *Government Gazette* 22355 dated 8 June 2001.

#### Access to water services and using water for industrial use

Services from sources other than from nominated water services providers

A person may only in terms of section 6 use water services from a source other than from a water services provider nominated by the water services authority having jurisdiction in the area in question with the written approval of that water services authority. If the person has used the water services on 19 December 1997, the person may continue to use that water services for a period of 60 days after the relevant water services authority has requested the person to apply for the approval.

If a person applied for an approval to use a water services after being requested to do so, the person may continue with that water services until the application for approval is granted in writing. After the granting of the approval the conditions of the approval will apply to that use. If the application is not approved, the person may continue with that use until the expiry of a reasonable period determined by the water services authority.

Obtaining water for industrial use and disposing of the effluent

A person may only in terms of section 7 obtain water for industrial use from a source other than the distribution system of a water services provider nominated by the water services authority having jurisdiction in the area in question with the written approval of that water services authority. Furthermore, a person may not dispose of industrial effluent in a manner other than a manner approved by the water services provider nominated by the water services authority having jurisdiction in the area in question. If the person has obtained water for industrial use or disposed of such industrial effluent on 19 December 1997, the person may continue to obtain that water or dispose of that effluent for a period of 60 days after the water services authority concerned has requested the person to apply for the approval.

If a person has applied for an approval to obtain water for industrial use or to dispose of industrial effluent after being requested to do so, the person may continue with obtaining that water or disposing of that effluent until the application for approval is granted in writing. After the granting of the approval the conditions of the approval will apply to that obtaining of water or disposing of effluent. If the application is not approved, the person may continue with that obtaining or disposal until the expiry of a reasonable period determined by the water services authority.

Industrial use is the use of water for mining, manufacturing, generating electricity, land-based transport, construction or any related purpose.

### The role of water services authorities

Water services authorities are the established municipalities responsible for ensuring access to water services. There can be only one water services authority for a specific area and the boundaries of the water services authorities areas cannot overlap. A water services authority is the municipality that has executive authority to provide water services within its area of jurisdiction in terms of the Municipal Structures Act 117 of 1998 or the ministerial authorisation made in terms of the Act. Water services authorities are therefore metropolitan municipalities, district municipalities and authorised local municipalities.

Water services authorities have the following responsibilities and duties in terms of the WSA:

###### Provide access to water services

Each water services authority has the duty to all consumers or potential consumers in its area of jurisdiction to progressively ensure efficient, affordable, economical and sustainable access to water services. This responsibility relates to all people living within their area of jurisdiction, including people living on private land (for example farm dwellers) and should at least include basic water services. Wherever practical and sustainable, water services authorities are expected to plan for, provide and facilitate higher levels of services where viable, the so-called stepping up the water ladder. Water services authorities have the right but not an obligation to provide industrial water to and/or accept industrial wastewater from industries within their area of jurisdiction.

This duty to ensure efficient, affordable, economical and sustainable access to water services is subject to the

availability of resources;

need for an equitable allocation of resources to all consumers and potential consumers within the authority’s area of jurisdiction;

need to regulate access to water services in an equitable way;

duty of consumers to pay reasonable charges, which must be in accordance with any prescribed norms and standards for tariffs for water services;

duty to conserve water resources;

nature, topography, zoning and situation of the land in question; and

right of the relevant water services authority to limit or discontinue the provision of water services if there is a failure to comply with reasonable conditions set for the provision of such services.

A water services authority may not unreasonably refuse or fail to give access to water services to consumers or potential consumers in its area of jurisdiction.

As some water services authorities are not at present in a position to fulfil this duty, these authorities may adopt a progressive and phased approach of improving access to water services. They, for example, could in their water services development plan (WSDP) target priority programmes in the first two years of a five year plan, such as education, promotion and awareness creation followed with a program of infrastructure development from the third year. Ensuring access to the water services should be sustainable in the long term.

The duty is not to provide water services but to ensure access to water services. By providing access to water services, water services could be ensured. As the provision of water services is a function of the water services providers, it does not mean that a water services authority must be a water services provider to ensure fulfilment of this duty. The water services authority may appoint or conclude a contract with another person to undertake some or all of the functions associated with this duty.

In ensuring access to water services, a water services authority must take into account

alternative ways of providing access to water services;

the need for regional efficiency;

the need to achieve benefit of scale;

the need for low costs;

the requirements of equity; and

the availability of resources from neighbouring water services authorities.

In emergency situations a water services authority must take reasonable steps to provide basic water supply and basic sanitation services to any person within its area of jurisdiction and may do so at the cost of that authority.

A water services authority may impose reasonable limitations on the use of water services.

###### Water services development plans

A water services authority must prepare a Water Service Development Plan at intervals determined by the Minister of Water and Sanitation in consultation with the Minister of Co-operative Government and Traditional Affairs. See later for more detail.

###### Monitor performance

A water services authority must in terms of section 27 monitor the performance of the water services providers within its area of jurisdiction to ensure that-

the prescribed standards and norms for tariffs are complied with;

the conditions set by the water services authority are met;

the additional standards set by the water services authority, for water services intermediaries are complied with; and

contracts are adhered to.

###### Make by-laws

Water services authorities must in terms of section 21 make by-laws which contain conditions for the provision of water services. The by-laws must provide for at least-

the standard of the services;

the technical conditions of supply, including quality standards, units or standards of measurement, the verification of meters, acceptable limits of error and procedures for the arbitration of disputes relating to the measurement of water services provided;

the installation, alteration, operation, protection and inspection of water services works and consumer installations;

the determination and structure of tariffs in accordance with the prescribed norms and standards;

the payment and collection of money due for the water services;

the circumstances under which water services may be limited or discontinued and the procedure for such limitation or discontinuation; and

the prevention of unlawful connections to water services works and the unlawful or wasteful use of water.

The conditions may-

place limits on the areas to which water services will be provided according to the nature, topography, zoning and situation of the land in question;

provide for the limitation or discontinuation of water services where a consumer fails to meet his or her obligations to the water services provider, including-

* a failure to pay for services; or
* a failure to meet other conditions for the provision of services;

place an obligation on a payment defaulter to-

* pay a higher deposit;
* pay a reconnection fee after disconnection of water services;

require a payment defaulter to pay a higher tariff for water services, where that defaulter gains access to water services through a communal water services works and the provision thereof cannot be disconnected or limited without other consumers being prejudiced;

provide for the general limitation or discontinuation of water services where-

* national disasters cause disruptions in the provision of services; or
* sufficient water is not available for any other reason; and

include an option to retain limited access to at least basic water supply or basic sanitation for a consumer whose water services are to be discontinued.

The conditions under which water services are provided must be accessible to consumers and potential consumers.

A water services authority which provides water for industrial use or controls a system through which industrial effluent is disposed of, must make by-laws providing for at least-

the standards of service;

the technical conditions of water provision and waste disposal;

the determination and structure of tariffs;

the payment and collection of money due; and

the circumstances under which the water provision and waste disposal may be limited or prohibited.

The Minister of Water and Sanitation may provide model by-laws to be used as a guide for water services authorities.

###### Intervention in the affairs of water services authorities

If a water services authority does not effectively perform a function imposed on it, the Minister of Water and Sanitation in terms of section 63 may request the member of the Executive Council responsible for local government in the relevant province to intervene. If the member of the Executive Council has unjustifiably failed to intervene or has intervened but has failed to do so effectively within a reasonable time after the request, the Minister may assume responsibility for that function to the extent necessary to-

maintain essential national standards;

meet established minimum standards for providing services; or

prevent the member of the Executive Council or delegate concerned from taking unreasonable action that is prejudicial to the interests of another province or the country as a whole.

After assuming responsibility for a function the Minister may issue a directive to the water services authority to perform that function effectively. If the water services authority fails to comply with the directive, the Minister may intervene by taking appropriate steps to facilitate the performance of that function, including giving financial, managerial and technical advice and assistance. The Minister may intervene on notice to the water services authority, by taking over that function.

The Minister may utilise all financial and other resources available to that water services authority relating to that function. The Minister may appoint a water services institution to perform that function or any part thereof.

### Providing water services

When a water services provider or water services intermediary undertakes a water use, such as “taking water from a water resource”, “storing water” or “discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit” as contemplated in the NWA, that water use must be authorised by the responsible authority. If the water services institution provides water services, the organisation is a water services provider for the purpose of the WSA and must obtain the approval of the water services authority having jurisdiction in that area to operate as a water services provider.

#### Providing water services by water services providers

A water services provider is in terms of section1 a person who provides water services to consumers or to another water services institution. Water services providers are the organisations that assume the operational responsibility for providing water and/or sanitation services. A water services authority undertaking these services is a water services provider. A water services intermediary is not a water services provider.

Water services consist in terms of section 1 of water supply services and sanitation services. Water supply services are the abstraction, conveyance, treatment and distribution of potable water, water intended to be converted to potable water or water for commercial use but not water for industrial use, while sanitation services is the collection, removal, disposal or purification of human excreta, domestic waste water, sewage and effluent resulting from the use of water for commercial purposes.

A consumer is any end user who receives water services from a water services institution, including an end user in an informal settlement.

Water services providers may also provide services or functions which are not the provision of water services, for example provision of resources, assistance, education and information that is necessary to ensure efficient, affordable, economical and sustainable access to water services.

A water services provider could be a public or a private sector services provider.

A water services authority is not necessarily the water services provider within the area where the water services authority has jurisdiction. A water services authority has only the duty to progressively ensure efficient, affordable, economical and sustainable access to water services. There is no duty or obligation on a water services authority to provide water services to consumers or to perform the functions of a water services provider. The water services authority only has the responsibility to ensure that these functions take place within its area of jurisdiction, and could, to ensure fulfilment of this responsibility, make use of water services providers or appoint or conclude contracts with water services providers to undertake some or all the components of that function. Where a water services authority performs some components or all the functions of a water services provider, the water services authority is a water services provider for the functions performed. When performing the functions, the water services authority must manage and account separately for those functions.

A water services authority may act as a water services provider outside its area of jurisdiction, if contracted to do so by the water services authority for the area in question.

All water services providers that provide water services to or on behalf water services authorities must do so in terms of a service delivery agreement with the water services authority. Where water services providers purchase water from, sell water to or accept waste water from another water services institution, it should take place in terms of a contract.

###### Approval to operate as a provider

A person may not in terms of section 22 operate as a water services provider without the written approval of the water services authority having jurisdiction in the area in question. The approval may be granted subject to conditions but it must be for a limited period.

A person who on 19 December 1997 was acting as a water services provider without approval from the water services authority having jurisdiction in the area, may continue to do so until the expiry of a reasonable notice. The notice may not be for longer than one year and is given by the water services authority. The water services authority may require that the water services provider must enter into a contract with the water services authority or that the continuation will be subject to approval for a limited period and be granted subject to conditions.

###### Contracts and joint ventures with providers

Instead of performing the functions of a water services provider, a water services authority may in terms of section 19 enter into a written contract with a water services provider or form a joint venture with another water services institution to provide water services.

A contract with a private sector water services provider may only be entered into after the water services authority has considered all known public sector water services providers which are willing and able to perform the relevant functions.

If a water services authority appoints a water services provider, the water services authority must comply with the Local Government: Municipal Systems Act 32 of 2000, the WSA and Municipal Financial Management Act. A due process should be followed. In each case the process must be administratively fair and transparent taking into consideration the complexity, monetary value of the services and the duration of the contract. The water services authority must enter into a contract with the water services provider which meets the legislated requirements and which is subject to national oversight.

Before entering into or renewing such a contract or joint venture at cost and without profit the water services authority must publicly disclose its intention to do so. The water services provider must also disclose and provide information on any other interests it may have, which are ancillary to or associated with the relevant water services authority and any rate of return on investment it will or may gain by entering into such a contract or joint venture.

As soon as a contract or joint venture agreement has been concluded, the water services authority must supply a copy thereof to the member of the Executive Council responsible for local government in the relevant province and to the Minister of Water and Sanitation.

The Minister may provide model contracts to be used as a guide for contracts between water services authorities and water services providers.

The Minister of Water and Sanitation published regulations in Government Notice R980 in *Government Gazette* 23636 dated 19 July 2002 regarding water services provider contracts.

The Minister of Water and Sanitation may issue guidelines to water services institutions on performing their functions in terms of the WSA.

The Minister of Water and Sanitation and the member of the Executive Council responsible for local government in the relevant province must monitor the performance of a water services institution in order to ensure compliance with-

the applicable prescribed national standards;

the prescribed norms and standards for tariffs; and

the applicable adopted water services development plans (WSDPs), policy statements and business plans.

A water services institution must furnish such information as may be required by the Minister of Water and Sanitation after consultation with the Minister of Cooperative Governance and Traditional Affairs. It must also allow the Minister of Water and Sanitation access to its books, records and physical assets to the extent necessary for the Minister of Water and Sanitation to carry out the monitoring functions.

#### Water boards providing water services

The Minister of Water and Sanitation may in terms of section 28 by notice in the *Government Gazette* establish a water board, give the water board a name or approve a change of the water board’s name and determine or change the service area of the water board.

Water boards provide water services within their service areas. These services are for example to-

supply bulk potable water to water services providers in order for them to distribute the water to the consumers for household purposes;

collect human excreta, domestic waste water, sewage and effluent resulting from the use of water from a water services provider in order for the water board to purify and dispose of it;

act as a water services provider to consumers;

supply water to water users for other purposes than household purposes such as industrial use;

collect waste water from big water users in order for the water board to purify and dispose of it;

provide other services such as management services; and

provide water resource management functions to water resource management organisations.

The primary activity of a water board is to provide water services to other water services institutions within its service area. Other activities that a water board may do include-

providing management services, training and other support services to water services institutions, in order to promote co-operation in the provision of water services;

supplying untreated or non-potable water to end users who do not use the water for household purposes;

providing catchment management services to or on behalf of other authorities;

with the written approval of the water services authority having jurisdiction in the area

* supplying water directly for industrial use;
* accepting industrial effluent; and
* acting as a water services provider to consumers;

providing water services in a joint venture with water services authorities; and

performing water conservation functions.

#### Providing water services by water services intermediaries

A water services intermediary is in terms of section 1 a person who is obliged to provide water services to another in terms of a contract where the obligation to provide water services is incidental to the main object of the contract. The word contract should be understood in a wide sense, to include legal instruments creating rights and obligations between the intermediary and the user. The main purpose is not the provision of water services or else the organisation is a water services provider.

Water services intermediaries include

farmers, mining companies and recreational resorts, as the owners of these provide water services to their employees, the employees’ families and residents in terms of their employment or resident agreements, which could be incorporated into the agreement explicitly or by implication; and

a company owning land where the different share holders of the company each has the right to develop a specific area on the land for his or her exclusive use and the company is obliged to provide water services to the different pieces of land.

If a water services intermediary also provides water services to other persons, for example a nearby holiday resort in terms of a water services contract, the water services intermediary is a water services provider for the purpose of water supply to the nearby holiday resort. The water services intermediary should then comply with the provisions applicable to water services providers for the provision of water to the nearby holiday resort.

A water services authority may in terms of section 24 in its by-laws require the registration of water services intermediaries or classes of such intermediaries within its area of jurisdiction. The services provided by the water services intermediaries may be regulated in terms of the municipal by-laws.

The quality, quantity and sustainability of water services provided by a water services intermediary must meet the minimum standards prescribed by the Minister of Water and Sanitation and any additional minimum standards prescribed by the relevant water services authority.

A water services intermediary may not charge for water services at a tariff which does not comply with any norms and standards prescribed and any additional norms and standards set by the relevant water services authority.

If a water services intermediary fails to perform its functions effectively, the water services authority having jurisdiction in the area may direct the water services intermediary to rectify its failure. The direction must set out the nature of the failure and the steps which must be taken to rectify the failure. It should also specify the period within which the steps should be taken, which must be reasonable.

If the water services intermediary fails to rectify the failure within the specified period, the water services authority may take over the relevant functions of the water services intermediary. The functions may only be taken over after the water services authority has given the water services intermediary a reasonable opportunity to make written submissions and afforded the water services intermediary a hearing on any submissions received. The water services authority is not required to follow this procedure in an emergency situation.

If a water services authority takes over a function of a water services intermediary, the water services authority may-

exercise all relevant powers and perform all relevant duties on behalf of the water services intermediary to the exclusion of the water services intermediary; and

use the infrastructure of the water services intermediary to the extent necessary to perform functions.

A water services authority may appoint another water services institution to act on its behalf in performing the functions of the water services intermediary whose functions have been taken over. As soon as a water services intermediary is in a position to resume its functions effectively, the water services authority must stop exercising the powers and performing the duties on the intermediary’s behalf.

## The Environmental Management Act

**Principles**

Section 2 of the National Environmental Management Act 107 of 1998 sets out principles that should apply to the actions of all organs of state that may significantly affect the environment and among others-

shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in the Bill of Rights of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

serve as the general framework within which environmental management and implementation plans must be formulated;

serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of any statutory provision concerning the protection of the environment;

guide the interpretation, administration and implementation any law concerned with the protection or management of the environment.

Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.

Development must be socially, environmentally and economically sustainable.

Sustainable development requires the consideration of all relevant factors including:

* That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
* that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
* that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
* that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;
* that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
* that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
* that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
* that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

Environmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.

Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.

Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.

Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.

The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.

Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.

Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.

The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment.

Actual or potential conflicts of interest between organs of state should be resolved through conflict resolution procedures.

Global and international responsibilities relating to the environment must be discharged in the national interest.

The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.

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.

The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.

Sensitive, vulnerable, highly dynamic or stressed ecosystems, such as coastal shores, estuaries, wetlands, and similar systems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure.

The purpose of the Act is in terms of section 23 to promote the application of appropriate environmental management tools in order to ensure the integrated environmental management of activities. The general objective of integrated environmental management is to-

promote the integration of the principles of environmental management into the making of all decisions which may have a significant effect on the environment;

identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and cultural heritage, the risks and consequences and alternatives and options for mitigation of activities, with a view to minimising negative impacts, maximising benefits, and promoting compliance with the principles of environmental management;

ensure that the effects of activities on the environment receive adequate consideration before actions are taken in connection with them;

ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment;

ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment; and

identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management.

**Duty of care**

There is a legal duty in terms of section 28 on the person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

The Director-General of the Department of Environmental Affairs may, after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who is causing, has caused or may cause significant pollution or degradation of the environment to cease any activity, operation or undertaking and commence measures to rectify the matter.

Should a person fail to comply or inadequately comply with a directive, the Director-general of the Department of Environmental Affairs may take reasonable measures to remedy the situation. The cost may also be recovered from, among others, the person responsible for the pollution.

**Environmental assessment authorisations**

In order to give effect to the general objectives of integrated environmental management, the Minister of Environmental Affairs or a Member of the Executive Council of a province responsible for environmental affairs may in terms of section 24 identify activities which may not commence without environmental authorisation from a competent authority.

The potential impact on the environment of listed activities must be considered, investigated, assessed and reported on to a competent authority with granting the relevant environmental authorisation. Every environmental authorisation must in terms of section 24E specify the property or site of the activity and as a minimum ensure that-

a dequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity; and

provision is made for the transfer of rights and obligations when there is a change of ownership in the property.

The Minister, and every MEC with the concurrence of the Minister, may in terms of section 24(5) make regulations to give effect this.

No person may in terms of section 24F commence an activity listed unless the competent authority has granted an environmental authorisation for the activity. Furthermore, no person may continue an existing activity listed if an application for an environmental authorisation is refused. It is an offence to contravene these.

## The Public Finance Management Act and Division of Revenue Acts

Section 214(1) of the Constitution of the Republic of South Africa requires an Act of Parliament to provide for—

the equitable division of revenue raised nationally among the national, provincial and local spheres of government;

the determination of each province’s equitable share of the provincial share of that revenue; and

any other allocations to provinces, local government or municipalities from the national government’s share of that revenue, and any conditions on which those allocations may be made.

The Money Bills Amendment Procedure and Related Matters Act 9 of 2009 provides for a procedure to amend money Bills before Parliament and for norms and standards for amending money Bills before provincial legislatures.

The Minister of Finance must in terms of section 7(1) table the national annual budget in the National Assembly as set out in section 27 of the Public Finance Management Act 1 of 1999 and at the same time submits the Appropriation Bill of the different spheres of government. This Bills is known as the Division of Revenue Bill and once accepted, it becomes the Division of Revenue Act for that year.

The Division of Revenue Bill must specify-

the share of each sphere of government of the revenue raised nationally for the relevant financial year;

each province's share of the provincial share of that revenue; and

any other allocations to the provinces, local government or municipalities from the national government's share of that revenue, and any conditions on which those allocations are or must be made.

Therefore, a Division of Revenue Act provides for the equitable division of revenue raised nationally among the national, provincial and local spheres of government for a specific financial year, the determination of each province’s equitable share and allocations to provinces, local government and municipalities from national government’s equitable share and the responsibilities of all three spheres pursuant to such division and allocations; and to provide for matters connected therewith.

## The National Disaster Management Act

The National Disaster Management Act 57 of 2002 was promulgated to provide for-

an integrated and co-ordinated disaster management policy that focuses on preventing or reducing the risk of disasters, mitigating the severity of disasters, emergency preparedness, rapid and effective response to disasters and post-disaster recovery and rehabilitation; and

the establishment and functioning of national, provincial and municipal disaster management centres.

A “disaster means a progressive or sudden, widespread or localised, natural or human-caused occurrence which-

causes or threatens to cause death, injury or disease, damage to property, infrastructure or the environment or significant disruption of the life of a community; and

is of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects using only their own resources.

## The Spatial Planning and Land Use Management Act

The Spatial Planning and Land Use Management Act 16 of 2013 was promulgated to-

provide a framework for spatial planning and land use management in the Republic;

specify the relationship between the spatial planning and the land use management system and other kinds of planning;’

provide for the inclusive, developmental, equitable and efficient spatial planning at the different spheres of government;

provide a framework for the monitoring, coordination and review of the spatial planning and land use management system;

provide a framework for policies, principles, norms and standards for spatial development planning and land use management;

address past spatial and regulatory imbalances;

promote greater consistency and uniformity in the application procedures and decision-making by authorities responsible for land use decisions and development applications;

provide for the establishment, functions and operations of Municipal Planning Tribunals; and

provide for the facilitation and enforcement of land use and development measures.

## The Conservation of Agriculture Resources Act

Commercial crop production involves planting and harvesting, which disturb the land surface and remove the natural vegetation cover. Fertilizer and pesticide application also increases the possibility of contamination of the water resources. There are therefore the following sources of water pollution from agricultural activities:

sediment yields;

phosphorus export;

bacterial contamination; and

pesticide export.

The Conservation of Agricultural Resources Act 43 of 1983 was in terms of section 3 promulgated “to provide for the conservation of natural resources … by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of the water resources, and by the protection of the vegetation and the combating of weeds and invader plants.”

The Minister prescribed a number of control measures in terms of section 6 of the Act to be complied with by the land owners. See Government Notice R1048 in Government Gazette 9238 dated 25 May 1984.

These measures relate to the cultivation of virgin soil and of land with a slope, the protection of cultivated land against erosion through the action of water as well as wind, the prevention of water-logging and salination of irrigated land, the utilisation and protection of vleis, marshes, water sponges and water resources, the regulating of the flow pattern of run-off water, the utilisation and protection of veld, the restoration and control of weeds and invader plants, and the reclamation of eroded, disturbed or denuded land.

The Minister may in terms of section 11 out of moneys appropriated by Parliament, perform or cause to be performed on or in respect of any land, any act in relation to prescribed control measures which he or she may deem necessary in order to achieve the objects of the Act. The costs of the performance of any act or such part of those costs as the Minister may determine, are repayable by the owner of the land on or in respect of which the act was performed.

The executive officer of the Department of Agriculture may in terms of section 7 by means of a directive order a land user to comply with a particular control measure, which is binding on him or her, on or with regard to the land specified in such directive, or if it is in the opinion of the executive officer essential in order to achieve the objects of the Act, to perform or not to perform any other specified act on or with regard to such land.

A land user and his or her successor in title must in terms of section 12 maintain the soil conservation works on the land at his or her own expense in a manner which, in the opinion of the executive officer, will ensure the continued efficiency thereof. The land user and his or her successor in title must also maintain the state of affairs arising on land after an act has been performed thereon or in respect thereof, in order to achieve the objects of the Act in such a manner as in the opinion of the executive officer of the Department of Agriculture will obviate the necessity of a repetition of the act.

# Strategies and plans assisting the facilitation of water resource management

The law requires that various strategies and plans should be developed in a progressive and phased manner to facilitate the proper management of water resources. The strategies and plans should be developed with the input and consultation of the relevant stakeholders. These strategies and plans should be formally reviewed from time to time to suit changing circumstances.

These strategies and plans provide a framework and information about the ways in which in which the water resources should be protected, used, developed, conserved, managed and controlled as a whole as well as at regional and catchment level.

These strategies and plans are binding on the organs of state and should be given effect to when exercising powers or performing duties under the relevant Acts.

## The National Water Resources Strategy

### Legislative framework

The Minister, after consultation with society at large, established a **national water resource strategy** by a notice in the *Government Gazette*. This strategy provides for a framework for the protection, use, development, conservation, management and control of the water resources of the country as a whole. It also provides the framework within which water will be managed at regional and catchment level.

The strategy must in terms of section 6(1)(a) set out the strategies, objectives, plans, guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources within the framework of existing relevant government policies in order to achieve-

the purpose of the National Water Act; and

the compulsory national standards prescribed under the Water Services Act.

The strategy must in terms of section 6(1)-

contain estimates of present and future water requirements;

state the total quantity of water available within each water management area;

state water management area surpluses or deficits;

provide for inter-catchment water transfers between management areas with surplus water and water management areas in deficit; and

stipulate principles relating to water conservation and water demand management.

The strategy must provide for-

the requirements of the Reserve and identify, where appropriate, water resources from which particular requirements have to be met;

international rights and obligations;

actions to be taken to meet projected future water needs; and

water use of strategic importance.

The strategy must state the objectives in respect of water quality to be achieved through the classification system for water resources.

The strategy must establish water management areas and must determine their boundaries.

The strategy must contain objectives for the establishment of institutions to undertake water resource management and determine the inter-relationship between institutions involved in water resource management.

### The content of the latest published strategy

The strategic themes are the means towards achieving the objectives of the National Water Resources Strategy. They address South Africa’s economic and development priorities as well as the challenges that could impede the achievement of Vision 2030. The National Water Act requires the National Water Resource Strategy to “… set out the strategies, objectives, plans guidelines and procedures of the Minister and institutional arrangements relating to the protection, use, development, conservation, management and control of water resources.” The strategic themes address these issues and respond to national priorities. These themes are:

**Theme 1: Water resources planning, development and infrastructure Management**

To ensure well maintained and properly operated water supply infrastructure is available to meet the social, environmental and economic water use requirements of South Africa.

**Theme 2: Water resource protection**

To ensure that South Africa's aquatic ecosystems are protected effectively at different and appropriate levels, and that decisions concerning levels of protection take transparent and just account of environmental, social and economic well-being.

**Theme 3: Equitable water allocation**

To allocate water so that historically disadvantaged and poor South Africans enjoy access to water for productive economic purposes, or reap the benefits from water use to prosper socially and economically.

**Theme 4: Water conservation and water demand management**

To achieve significant water savings by all sectors through the implementation of appropriate water conservation and water demand management measures to meet the social and economic needs of South Africa both now and in the future.

**Theme 5: Regulation**

To improve the ability of the DWA to regulate the water sector in order to achieve the objectives of government, protect the resource and the consumer and ensure the sustainability of water institutions.

**Theme 6: Managing water resources for climate change**

To plan and respond to a changing climate and its impact on the environment, water resources and the quality of life.

**Theme 7: International cooperation and trans-boundary water**

To advance the African agenda and to shape the global water agenda while ensuring that in South Africa, Integrated Water Resources Management (IWRM) is implemented in a manner that conforms to international water protocols and treaties as well as the legislative framework governing water management.

## The Catchment management Strategies

### Legislative framework

Catchment management agencies will develop **catchment management strategies** for the water resources within their management areas. These strategies must be in harmony with the national water resource strategy and should among others set out the objectives and plans of the catchment management agencies for the protection, use, development, conservation, management and control of the water resources. In the process of developing the strategy, the catchment management agencies must seek co-operation and agreement on water-related matters from the various stakeholders.

A catchment management strategy must in terms of section 9-

set out the strategies, objectives, plans, guidelines and procedures of the CMA for the protection, use, development, conservation, management and control of water resources within its water management area;

contain water allocation plans containing principles for allocating water; and

set out the institutions to be established.

The strategy must enable the public to participate in managing the water resources within its water management area.

A catchment management strategy should not be in conflict with the National Water Resources Strategy and must-

take notice of any relevant national or regional plans prepared in terms of any other law;

take into account the class of water resource and resource quality objectives, the requirements of the Reserve and, where applicable, international obligations;

take into account the geology, demography, land use, climate, vegetation and waterworks within its water management area; and

take into account the needs and expectations of existing and potential water users.

### Latest editions

Only two catchment management agencies have been established and are functional, namely Inkomati-Usuthu and the Breede-Gouritz. Catchment management strategies have been developed only for the Inkomati and Breede Catchments.

As forerunners to the strategy catchment strategies, internal strategies, reconciliation strategies and all town strategies were developed for most of the catchments, containing some of the matters to be included in the catchment management strategies. Although not legally binding, they guide water allocation decisions.

## Water Services Development Plans

The Water Services Development Plan (WSDP) is an instrument of planning in the water services sector. The purpose of the WSDP is to assist water services authorities to carry out their mandate effectively. The requirement that water services authorities regularly update their plans and report annually on progress against their plans will assist local communities and the Department of Water Affairs to assess how well water services authorities are performing relative to their stated intentions and their capacity.

A municipality that is not a water services authority is not required to develop a WSDP. Where a district municipality is not a water services authority, the district should develop a “water sector plan” addressing the district-wide issues arising from the local WSDPs and include this in the district’s integrated development plan (IDP). Where district municipalities have district management areas, the district must develop a WSDP for these areas. Where a local municipality is not a water services authority, the local municipality should summarise the implications of the district level WSDP for its own area in a “water sector plan” and include it in its IDP.

A water services authority must prepare a new draft WSDP at intervals determined by the Minister of Water and Sanitation in consultation with the Minister of Provincial and Local Government. This should form part of the process of preparing an IDP in terms of the Local Government: Municipal Systems Act 32 of 2000. This will ensure that the planning and provision of water services are addressed in an integrated way which acknowledges the linkages to other services and infrastructure programmes in the area. For example, water supply and sewer networks impact on roads and effective waste management is often closely linked to good sanitation. The cost implication to consumers of the full basic services must also be considered carefully. This could ensure that feasible plans are in place to provide access to at least basic water supply and sanitation services.

The water services authority must take reasonable steps to bring its draft WSDP to the notice of its consumers, potential consumers, industrial users and water services institutions within its area of jurisdiction. It must also invite public comment thereon to be submitted within a reasonable time. Copies of the draft WSDP must be sent to the Minister of Water and Sanitation, the member of the Executive Council responsible for local government in the relevant province and all neighbouring water services authorities. A copy of the draft WSDP, a copy of its summary, all written comments and a report on all comments, other than written comments, must be available for inspection at the offices of the water services authority and obtainable against payment of a nominal fee.

Thereafter the water services authority considers all comments received, improves and adopts the WSDP whereafter it becomes the WSDP for that authority. If requested, a water services authority must report on the extent to which a specific comment has been taken into account or, if a comment was not taken into account, provide reasons therefore.

The water services authority supplies a copy of the WSDP to the Minister of Water and Sanitation, the Minister of Cooperative Governance and Traditional Affairs, the member of the Executive Council responsible for local government in the relevant province and all neighbouring water services authorities. A copy of the development plan should also be available for inspection at the offices of the water services authority and is obtainable against payment of a nominal fee.

The WSDP must contain details-

of the physical attributes of the area to which it applies;

of the size and distribution of the population within the area to which it applies;

of a time frame for the plan, including the implementation programme for the following five years;

of existing water services;

of existing industrial water use within the area of jurisdiction of the relevant water services authority;

of existing industrial effluent disposed of within the area of jurisdiction of the relevant water services authority;

of the number and location of persons within the area who are not being provided with a basic water supply and basic sanitation;

regarding the future provision of water services and water for industrial use and the future disposal of industrial effluent, including-

* the water services providers which will provide the services;
* the contracts and proposed contracts with the water services providers which will provide the services;
* the proposed infrastructure necessary;
* the water sources to be used and the quantity of water to be obtained from and discharged into each source;
* the estimated capital and operating costs of the water services and the financial arrangements for funding the services, including the tariff structures;
* the water services institutions that will assist the water services authority to provide the services;
* the operation, maintenance, repair and replacement of existing and future infrastructure;

of the number and location of persons to whom water services cannot be provided within the next five years, setting out-

* the reasons therefore; and
* the time frame within which it may reasonably be expected that a basic water supply and basic sanitation will be provided to those persons; and

of existing and proposed water conservation, recycling and environmental protection measures.

A substantial deviation from an adopted WSDP is not valid unless it is embodied in a new WSDP adopted in accordance with the process set out above.

All water services authorities must within four months after the end of each financial year report on the implementation of its WSDP during that financial year. A water services authority must include a water services audit in its annual report on the implementation of its WSDP. The audit must contain details of the previous financial year and, if available, comparative figures for the preceding two financial years of-

the water services provided, including at least

* the quantity of water used by each user sector;
* the quantity of water provided to the water services institution by another water services institution;
* the quantity of effluent received at sewage treatment plants; and
* the quantity of effluent not discharged to sewage treatment plants and approved for use by the water services institution;

the levels of services rendered, including at least-

* the number of user connections in each user sector;
* the number of households provided with water through communal water services works;
* the number of consumers connected to a water reticulation system where pressures rise above 900 kilopascal at the consumer connection;
* the number of households provided with sanitation services through consumer installations connected to the sewerage system;
* the number of households with access to basic sanitation services;
* the number of new water supply connections made; and
* the number of new sanitation connections made;

the numbers provided in compliance with the above expressed as a percentage of the total number of connections or households;

cost recovery, including at least-

* the tariff structures for each user sector;
* the income collected expressed as a percentage of total costs for water services provided; and
* unrecovered charges expressed as a percentage of total costs for water services provided;

meter installation and meter testing, including at least-

* the number of new meters installed at consumer installations; and
* the number of meters tested and the number of meters replaced expressed as a percentage of the total number of meters installed at consumer connections;

the water quality sampling programme, the results of the comparison and any occurrence reported in compliance with the suitable programme for sampling the quality of potable water provided by the authority;

water conservation and demand management, including at least-

* the results of the water balance as required;
* the total quantity of water unaccounted for;
* the demand management activities undertaken; and
* the progress made in the installation of water efficient devices.

The report must be given to the Minister of Water and Sanitation, the Minister of Cooperative Governance and Traditional Affairs, the member of the Executive Council responsible for local government in the relevant province and all the organisations representing municipalities having jurisdiction in the area of the water services authority.

The water services authority must publicise a summary of its report. Furthermore, a copy of the report and of its summary is available for inspection at the offices of the water services authority and obtainable against payment of a nominal fee.

Water services development plans have been developed and approved for most water services authorities.

# Water uses, including validation and verification

## What is a water use?

Section 21 of the NWA defines 11 activities, each a water use. These are:

taking water from a water resource;

storing water;

impeding or diverting the flow of a watercourse;

engaging in stream flow reduction activities, i.e.

* using land for afforestation which has been or is being established for commercial purposes; or
* an activity which has been declared a stream flow reduction activity by the Minister, if the activity is likely to reduce the availability of water in a watercourse to the Reserve, to meet international obligations or to other water users significantly;

engaging in control activities, i.e.

* irrigating of any land with waste or water containing waste generated through any industrial activity or by a waterwork;
* an activity aimed the modification of atmospheric precipitation;
* a power generation activity which alters the flow regime of a water resource;
* intentional recharging of an aquifer with waste or water containing waste; or
* an activity which has been declared a controlled activity by the Minster, if the activity is likely to impact detrimentally on a water resource;

discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit;

disposing of waste in a manner which may detrimentally impact on a water resource;

disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process;

altering the bed, banks, course or characteristics of a watercourse;

removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or for the safety of people; and

using water for recreational purposes.

The Minister declared the “the exploration and or production of onshore naturally occurring hydrocarbons that requires stimulation, including but not limited to hydraulic fracturing and or underground gasification, to extract, and any activity incidental thereto that may impact detrimentally on the water resource” a controlled activity, which is therefore also a water use. See Government Notice 999 in *Government Gazette* 39299 of 16 October 2015.

A water use therefore includes consumptive and non-consumptive use of water, whether for commercial or non-commercial purposes, temporary or permanent, for basic needs or in an emergency situation. It is not restricted to the taking or storing of water. It includes also the transportation and purification of waste by the water resources, removing ground water for carrying out activities, altering courses of rivers, using water for recreation and activities that impact on the bio-diversity of the water resources.

## When is a water use permissible or authorised?

A person may in terms of section 22(1) only undertake a water use if it is:

permissible under Schedule 1 to the NWA;

permissible as a continuation of an existing lawful water use as contemplated in section 32;

permissible in terms of a general authorisation issued under section 39;

authorised by an individual licence issued in terms of section 40; or

authorised by licence issuing due to a process to issue compulsory licences in terms of section 47(2).

The Responsible authority may in terms of section 22(3) dispense with the requirement for a licence for water use if it is satisfied that the purpose of the NWA will be met by the grant of licence, permit or authorisation under any other law. Further, in the interest of co-operative governance, a responsible authority may in terms of section 22(4) promote arrangements with other organs of state to combine their respective licence requirements into a single licence requirement.

The effect is that, if an envisaged water use is not permissible under Schedule 1, does not fall within the scope of an existing lawful water use or issued general authorisation, a licence is required to undertake that use.

If a general authorisation is revoked or has lapsed without substituting it with a new one, and a person using water authorised by that general authorisation wants to carry on with that use, the person should obtain the necessary licence for that.

A licence issued pursuant to an application due to the compulsory licensing procedure replaces an existing lawful water use. If a person has not applied for a licence, the person may not carry on undertaking the existing lawful water use.

A person who uses water must in terms of section 22(2) use that water subject to all the conditions of the relevant authorization. The water may not be wasted and any seepage and run-off which emanates from that use must be returned to the water resource from which the water was taken, unless the responsible authority directs otherwise or the relevant authorisation provides otherwise.

A licence may in terms of section 24 only be granted to use water found underground on land not owned by the applicant if the owner of the land consents or if there is a good reason to do so.

### Authorised by Schedule 1 of the Act

According to Schedule 1 a person may, subject to the provisions of the NWA-

take water for reasonable domestic use in that person’s household, directly from any water resource to which that person has lawful access;

take water for use on land owned or occupied by that person from any water resource which is situated on or forms a boundary of that land, if the use is not excessive in relation to the capacity of the water resource and the needs of other users, for-

* reasonable domestic use;
* small gardening not for commercial purposes; and
* the watering of animals (excluding feedlots) which graze on that land within the grazing capacity of that land;

store and use run-off water from a roof;

in emergency situations, take water from any water resource for human consumption or firefighting;

for recreational purposes-

* use the water or the water surface of a water resource to which that person has lawful access; or
* portage any boat or canoe on any land adjacent to a watercourse in order to continue boating on that watercourse; and

discharge into a canal, sea outfall or other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit-

waste or water containing waste; or

run-off water, including stormwater from any residential, recreational, commercial or industrial site.

These entitlements do not override any other law, ordinance, bylaw or regulation, and is subject to any limitation or prohibition thereunder.

If a local authority wants to take water for the domestic use of a community, then it would not be a use of water under Schedule 1 and must therefore be authorised by a licence or a general authorisation (if it is not the continuation of an existing lawful water use).

### Existing lawful water use

An existing lawful water use is in terms of section 32 a water use which has taken place at any time during 1 October 1996 to 30 September 1998 (a period of two years immediately before the NWA commences) and which was authorised by or under any law which was then in force.

Whether a water use qualifies as an existing use or not, will be determined using the law repealed by the NWA (see Chapter 3.4 above).

A person may in terms of section 33 apply to a responsible authority to have a water use which was not exercised at the date on which the NWA commenced to be declared as an existing water use. A responsible authority may only make a declaration if it is satisfied that the water use:

took place more than two years before 1 October 1998 (the date of commencement of the NWA) and was discontinued for good reason; or

had not yet taken place at any time before the date of commencement of the NWA but would have been lawful had it so taken place and steps towards effecting the use had been taken in good faith before the date of commencement of the National Water Act.

A person, or that person’s successor-in-title, may in terms of section 34 continue with an existing lawful water use, subject to:

any existing conditions or obligations attaching to that use;

its replacement by a licence in terms of the NWA;

any other limitation or prohibition by or under the NWA.

### Authorisation by way of general authorisations

A responsible authority may in terms of section 39 by notice in the *Government Gazette* authorise all or any category of persons to use water either:

generally;

in relation to a specific water resource; or

within an area specified in the notice.

The general authorisation must specify the date on which the authorisation comes into force. It may also state the date on which the authorisation lapses.

An authorisation to use water in terms of a general authorisation does not replace or limit the right to use water which a person may otherwise have under the NWA or an instrument issued under the NWA. Therefore, even if a general authorisation has been issued, a person may still continue with a water use permissible as a continuation of an existing lawful water use, authorised by way of a licence or permissible under Schedule 1.

Various general authorisations were already published authorising the use of water. They are-

in Government Notice 538 in *Government Gazette* 40243 dated 2 September 2016, which deals with-

* taking water from a water resource;
* storing water;

in Government Notice 665 in *Government Gazette* 36820 dated 6 September 2013, which deals with

* engaging in the irrigation of land with waste or water containing waste generated through any industrial activity or by a waterworks;
* discharging waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit;
* disposing of waste in a manner which may detrimentally impact on a water resource; and
* disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process;
* removing, discharging or disposing of water found underground if it is necessary for the efficient continuation of an activity or the safety of people; and

in Government Notice 509 in *Government Gazette* 40243 dated 26 August 2016, which deals with-

* impeding and diverting the flow of water in a watercourse; and
* altering the bed, banks or characteristics of a watercourse.

### Process to authorise the use of water by way of licences

Under the previous water legislation various authorisation procedures were followed to apply for and to issue authorisations. The approach is now to follow the same or similar procedure for applying and authorising the 11 water uses. Application could be made for multiple water uses through the execution of a single process, resulting in the issuing of a single licence for these water uses.

The objectives set and plans developed in terms of legislation and the provision of servitudes, regulations and zoning of land should be taken into consideration when applying for a licence.

The application should take into consideration the resource-directed measures (Class, Resource-quality objectives and the Reserve of the water resources).

The application for a licence is evaluated in a staged process to determine whether it should be authorised or not, consists of three integrated components, namely-

a procedure to generate sufficient information regarding the assessment of potential impacts in terms of quantity and quality that would facilitate the estimation of potential impacts on the use against the resource requirements;

a procedure to evaluate the application in order to reach a decision regarding whether to authorise the water use or not; and

a procedure for the administration of the application for a licence to use water.

###### Authorisation by way of individual licences

A person who wants to use water which is not an existing lawful use, authorised in terms of a general authorization or permissible under Schedule 1, needs a licence for that. An application for the licence is made to the relevant responsible authority.

After a responsible authority has reached a decision on an application for a licence, it must promptly notify the applicant and other relevant persons.

###### Authorisation by way of issuing of compulsory licences

A responsible authority may issue a general invitation to persons to apply for licences, if it is desirable that the use of water within a specific geographical area be licensed to-

achieve a fair allocation of water from a water resource-

* which is under water stress; or
* when it is necessary to review prevailing water use to achieve equity in allocations;

promote beneficial use of the water in the public interest;

facilitate efficient management of the water resources; or

protect the water resource quality.

This process should also be followed to achieve the necessary water law reform envisaged in section 25(8) of the Constitution, namely that the state should not be impeded from taking legislative and other measures to achieve water reform, in order to redress the results of past racial discrimination.

The responsible authority must prepare an allocation schedule specifying how water from the water resource will be allocated. After public participation, a final schedule is approved and licences are then issued in accordance with the schedule.

###### Provisions dealing with individual and compulsory licences

Assessment to determine the effect on the water resource

A responsible authority may require from an applicant, at the applicant’s expense, to provide an assessment by a competent person of the likely effects of the proposed licence on the resource quality. The responsible authority may conduct its own investigation on the likely effects on the protection, use, development, conservation, management and control of the water resource.

Essential requirements of licences

A licence must specify-

the water use or uses for which it is issued;

the property or area in respect of which it is issued;

the person to whom it is issued;

the conditions subject to which it is issued;

the licence period, which may not exceed forty years; and

the review periods during which the licence may be reviewed, which must be at intervals of not more than five years.

Review and amendment of licences

A responsible authority may review a licence only at the time periods stipulated in the licence. On review a responsible authority may amend the conditions, excluding the licence period. This may only be done if-

it is necessary or desirable to prevent deterioration of the quality of the water resource;

there is insufficient water in the water resource to accommodate all authorised water uses;

it is necessary or desirable to accommodate demands brought about by changes in socio‑economic circumstances.

This may only be done if the conditions of the other licences have also been amended in an equitable manner through a general review process.

If the amendment of a licence condition severely prejudices the economic viability of any undertaking in respect of which the licence was issued, the licensee may claim from the Water Tribunal compensation for the financial loss suffered.

Claiming compensation

The NWA addresses the obligation to pay compensation when entitlements are curtailed from the impact on the undertaking concerned, and not from the perspective of the curtailment of the entitlement. A person may claim compensation if the following results in severe prejudice to the economic viability of the undertaking concerned (even if the curtailment of the entitlement concerned is not significant):

if an application for a licence as part of the compulsory licensing procedure was made in respect of an existing lawful water use where the water concerned was beneficially used, and-

* the application has been refused; or
* a licence for a lesser use than the existing lawful water use was granted; or

if a licence was issued and the conditions of the licence were amended on review of the licence.

The amount of compensation should be determined by disregarding any reduction in an entitlement (even if the reduction of the entitlement concerned is significant) made in order to-

provide for the Reserve;

rectify an over-allocation of water use from the water resource in question; or

rectify an unfair or disproportionate water use.

If a curtailment of an entitlement results in no severe prejudice of the economic viability of the undertaking concerned, no compensation is payable, even if the curtailment is significant or an entitlement is taken away completely.

A claim for compensation must be lodged with the Water Tribunal within six months of the relevant decision. After the Water Tribunal has decided that compensation is payable and determined the amount of compensation, the responsible authority may enter into negotiations with the claimant. Within 30 days after the decision of the Water Tribunal, the responsible authority may offer an allocation of water instead of compensation.

## Verification of existing water uses

The provision of the NWA dealing with the verification of existing water uses are aimed at verifying the water uses which are exercised by users who claim that they have the right to do so, but whose right to do so is in doubt for being illegal or excessive or against the authorisation. This would typically be where a person exercises a water use and the responsible authority doubts the lawfulness of the use in that either no authority exists or more water is used than authorised, or the terms or conditions of the entitlement were contravened. If a person is requested to apply for the verification of a water use, it initiates an investigation into the source of the authorisation or the water use so that a determination could be made to the lawfulness and extent of the water use. The initiative to institute this procedure lies with the responsible authority.

These provisions allow the responsible authority to verify an existing water use and not an existing lawful water use. It could be that an existing lawful water use is not even applicable as the authority of the water use could be a licence. But, if an existing lawful water use is applicable, the determination limits the extent of the existing lawful water use.

A responsible authority may in terms of section 35(1) in order to verify the lawfulness or extent of an existing water use by written notice require a person claiming an entitlement to that water use to apply for the verification of that use. The notice must inform the person concerned that any right to continue with the water use may lapse if an application is not made on or before the specified date.

A responsible authority may require the applicant to obtain and provide information at the applicant’s expense. The responsible authority may also conduct its own investigation into the veracity and the lawfulness of the water use.

The responsible authority determines in terms of section 35(4) the extent and lawfulness of a water use pursuant to an application. The responsible authority either confirms the use as lawful and exercised within its limits, or that it is lawful but exercised excessively or beyond the terms of the authorisation or that it is unlawful.

1. See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169). In *Elder v Burris* 6 Hump Tenn R 366 it is stated that “[a]ll laws are, or ought to be, an adaptation of principles of action to the State ....”. [↑](#footnote-ref-2)
2. *Grootboom* (n 1). [↑](#footnote-ref-3)
3. See also *Strategic Framework for Water services*, DWAF, dated September 2003, at 3 regarding the role that policies, strategies and legislation play and the need to align policies, legislation and strategies. [↑](#footnote-ref-4)
4. Section 1(c) of the Constitution of the Republic of South Africa 108 of 1996. [↑](#footnote-ref-5)
5. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007(1) SA 343 (CC). [↑](#footnote-ref-6)
6. Section 3(1) of the NWA. [↑](#footnote-ref-7)
7. Appendix 1 to the *White Paper on a National Water Policy for South Africa* by the Department of Water Affairs and Forestry dated April 1997. [↑](#footnote-ref-8)