

Water resource management

Shared Rivers Initiative Phase II – Legal competence and regulation

A completed Water Research Commission (WRC) funded study has uncovered severe challenges in the legal competence and regulation of transboundary rivers.

Background

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

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

There is much that can be shared and learnt between South Africa and its neighbours. The Lowveld river basins, for example, are all shared between neighbouring states. Each river-sharing neighbour faces a similar set of needs and challenges in its attempts to balance social development

imperatives with management and decision-making within relevant institutions and between neighbours to ensure far and effective policy implementation.

Shared Rivers Initiative

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

During Phase 1 of the Shared Rivers Initiative AWARD undertook a preliminary assessment of the status of sustainability of the water resources of the Lowveld and the factors that constrain or contribute to this. The findings have been published as *The Shared Rivers Initiative Phase I: Towards the sustainability of freshwater systems in South Africa* (WRC Report No. TT 477/10).



Inkomati River

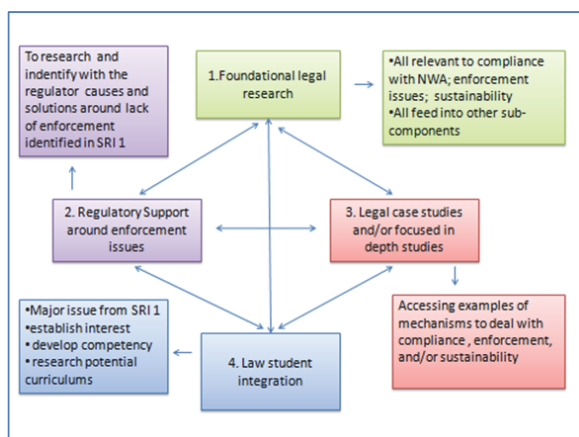


Figure 1: The four action areas of the legal component of the Shared Rives Initiative.

Phase 2 of the initiative narrowed the focus to the Inkomati Water Management Area with the objective of studying how to best support compliance with environmental water requirements within the evolving institutional environment.

This briefing note shares the findings of Phase 2 around legal practices and procedures for compliance with the NWA (with a focus on enforcement of lawful use). This legal component (Figure 1) of the project has four inter-related areas of activities all of which are related to compliance monitoring and enforcement issues under the NWA.

These are:

- To undertake foundational legal research around sustainability and enforcement issues related to water resources;
- To undertake a regulatory support project focusing on legal issues related to compliance monitoring and enforcement;
- To document legal case studies and/or focused in-depth studies that affect sustainability of water resources; and
- To develop professional interest and capacity in water law through the integration of law students in every aspect of the legal component.

Key findings

1 The NWA and non-compliance

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

This research documented that only a handful of court decisions directly touched on water management issues associated with the NWA. Consequently, a lot of uncertainty remains regarding what would constitute non-compliance with important components of the NWA, such as classification of water resources, the setting of resource quality objectives, the finalisation of verification and validation, compulsory licensing, and implementing measures to achieve Reserve determinations. Uncertainty also exists as to how one might prepare a court case which alleges non-compliance with respect to the various components of the NWA.

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

2 Understanding the difference between assignment and delegation of functions to CMAs

The establishment of catchment management agencies (CMAs) is an integral part of IWRM in South Africa, which seeks to decentralise water resource management. Assignment and delegation are the two main mechanisms by which powers are transferred from the Department of Water Affairs (DWA) to CMAs and each has very different legal implications in terms of responsibility and access to funds.

Generally, whereas delegation is more of a temporary transfer of responsibilities where the authority delegating retains a large measure of responsibility and control over the outcome of the process, assignment is seen as more of a permanent devolution of complete authority and responsibility for the exercise of a certain power or function. Thus the decision to use one over the other as means to transfer powers to CMAs has tremendous implications for practice.

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

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

3 Cooperative governance and the challenges for enforcement

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

Unfortunately, the stringent cooperative government obligations under the Constitution, specifically those that require avoidance of legal action, act as an obstacle for national and provincial government to hold municipalities accountable for violations of environmental law. It has thus required regulators to think 'out of the box' and creatively devise solutions to hold municipalities accountable, either through pressure or through legal instruments, such as the Public Finance Management Act.

As an example, the report presents a case study reviewing the criminal prosecution of a municipal manager in the Free State for the unlawful discharge of sewage waste as a means to overcome cooperative government obstacles that would otherwise prevent the NPA and DWA from pursuing criminal action against a municipality.

4 Shortcomings of the Water Tribunal

The Water Tribunal is an independent administrative tribunal that was established under section 146 of the NWA to hear appeals against several specified administrative decisions. Despite almost ten years since its inception, there is sparse literature reviewing the Tribunal's decisions, its effectiveness in carrying out its mandate and whether its mandate is adequate to enable it to appropriately fulfil its functions that are required by the NWA.

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

Given that many of the actions that the Water Tribunal is mandated to review under the NWA have not been implemented, the Tribunal is truly yet to be tested. When it is eventually confronted with difficult and complex actions and issues, including those around Reserve determinations and compulsory licensing, it is not clear whether the Tribunal is up to the task, as is evident from the many issues that this research has identified.

There is no doubt that the Water Tribunal can serve an essential and important function as an independent, efficient and specialised expert body, as many similar tribunals have done around the world and in South Africa (see e.g. the Competition Tribunal), and that it can play a critical role in the efficient administration of the NWA. But for this to happen, the NWA and the Water Tribunal's rules must be amended to address the shortcomings this research has identified.

Concluding remarks

The effective realisation of the policy goals underlying the creation of CMAs ultimately hinge on two fundamental steps:

- The establishment of CMAs and
- The transfer of additional responsibilities through either delegation or assignment.

Related to this is a confusion as to the legal nature of CMAs which creates ambiguity in the process of delegation and assignment in the NWA. It is asserted that CMAs, although governed by principles peculiar to corporate governance, should be understood as institutions incorporated within the institutional framework of DWA as opposed to outside of it.

To clarify uncertainty around the process of assignment and delegation, the NWA must provide guidelines similar to guidelines provided under the Municipal Systems Act for assignment and delegation. Guidelines would provide great clarity to the practical components of delegation and assignment, which are particularly important to the implementation of WRM.

Further reading:

To obtain the reports, *The Shared Rivers Initiative Phase II, parts 1, 2 and 3* (WRC Report No. **TT572/13** to **TT574/13**) contact Publications at Tel: (012) 330-0340; Fax: (012) 331-2565; Email: orders@wrc.org.za or Visit: www.wrc.org.za to download a free copy.