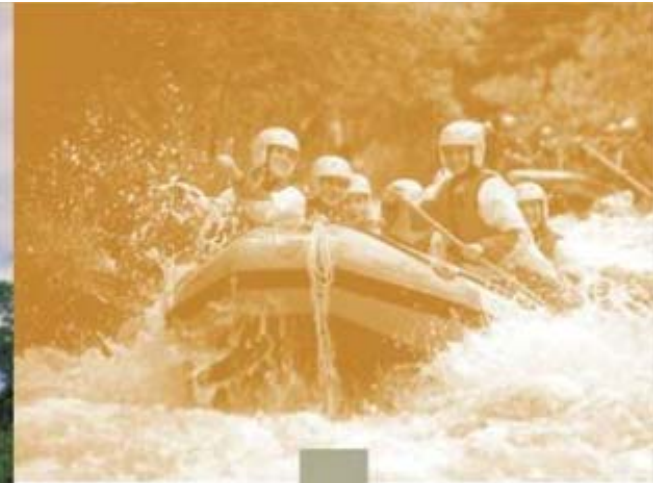




Legal Framework



water & forestry

Department:
Water Affairs & Forestry
REPUBLIC OF SOUTH AFRICA

water

LEGAL FRAMEWORK



- National Water Act Section 2 [Objectives]
- National Water Act Section 3(1)-(3)
- National Water Act Section 21(k)
- National Water Act Section 26(1) [Draft Regulations]
- Section 26(2)
- Section 26(4)



National Water Act Section 2 [Objectives]

- 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 and public safety; and
- Establishing representative institutions.



NWA Section 3(1)-(3)

(1) As the public trustee of the nation's water resources the National Government must ensure that 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 its constitutional mandate.

(2) Without limiting subsection 1, the Minister is ultimately responsible to ensure the water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

(3) The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic.

LEGAL FRAMEWORK



NWA Section 21(k)

(k) For the purpose of this act, water use includes using water for recreational purposes

LEGAL FRAMEWORK



NWA Section 26(1),(2) and (4) [Draft Regulations]

Limiting or restricting the purpose, manner or extent of water use



APPROPRIATE LEGISLATION

- The Constitution of South Africa (Act No. 108 of 1996)
- Environmental Conservation Act (Act No. 73 of 1989) [ECA];
- National Environmental Management Act (Act No. 107 of 1998) [NEMA];
- National Environmental Management: Protected Areas Act (Act No. 57 of 2003);
- National Environmental Management Act: Biodiversity Act (Act No.10 of 2004);
- Public Finance Management Act (Act No. 1 of 1999) [PFMA];
- National Heritage Resources Act (Act No. 25 of 1999);
- Broad-based Black Economic Empowerment Act (Act No. 53 of 2003);



APPROPRIATE LEGISLATION (Continued)

- Occupational Health and Safety Act (Act No. 85 of 1993);
- Communal Land Rights Acts (Act No. 11 of 2004);
- Restitution of Land Rights Act (Act No. 22 of 1994);
- State Land Disposal Act (Act No. of);
- Development Facilitation Act (Act No. 67 of 1995)(relevance);
- Intergovernmental Relations Framework Act (Act No. 13 of 2005)
- Local Government: Municipal Systems Act (Act No. 32 of 2000);



THE CONSTITUTION OF SOUTH AFRICA (ACT NO. 108 OF 1996)

Chapter 3 Section 40 & 41

(1) “All spheres of government and all organs of state within each sphere must –

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on matters of common interest;

(iv) co-ordinating their actions and legislation with one another.”



NATIONAL ENVIRONMENTAL MANAGEMENT ACT (ACT NO. 107 OF 1998)

- the participation of all interested and affected parties.
- that all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equal and effective participation.
- that decisions must take into account the interests, needs and values of all interested and affected parties.
- that community wellbeing and empowerment must be promoted through environmental education, raising environmental awareness, sharing knowledge and experience.
- that decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.

LEGAL FRAMEWORK



National Treasury defines a **PPP** as a *"contractual arrangement whereby a private party performs an institution's functions, and/or makes use of state property for its own commercial purposes. The private party assumes substantial financial, technical and operational risks associated with those functions or the use of state property. In return, the private party receives a benefit according to a pre-defined performance criteria."*

LEGAL FRAMEWORK



"State property" includes all *"moveable and immoveable property, belonging to the state as well as intellectual property rights vested in the state."*

LEGAL FRAMEWORK



Typical Tourism PPP products include:

- Accommodation;
- Food, beverage and retail;
- Activity-based tourism – including *"open vehicle safaris, hiking trails and commercialised hunting ..."*; and
- Heritage and culture – *"museums, interpretation and exhibition centres, and specialist cultural tour guiding operators."*

LEGAL FRAMEWORK



The PPP Toolkit states that:

"A co-management agreement does not itself constitute a PPP."
[National Treasury PPP Practice Note Number 01 of 2005 (page 5)]

Private or communal land being "voluntarily incorporated, through an agreement (possibly involving the dropping of fences), into a state-owned protected area" does not itself constitute a PPP. This is because it does not involve substantial risk transfer from the institution to a private party, nor does it always involve the use of state property by a private party for commercial purposes, nor does it always involve the private party obtaining a benefit by charging customers who use state property. Because of the neighbour-like relationship, a land incorporation and co-management agreement also cannot be achieved through competitive procurement."



The PPP Toolkit also states that:

"A co-management agreement may make provision for some division of revenue generated by a PPP."

Section 42 of the PAA provides for co-management of a protected area in which the *"management authority may enter into agreement with another organ of state, local community or individual or other party to co-manage the area and regulate human activities that affect the area."*

"A co-management agreement, could make provision for the revenue generated by a PPP on the state's portion of the co-managed land to be shared with the other parties to the co-management agreement because of their role in the success of the PPP."

LEGAL FRAMEWORK



"Public entities should also not be created if the institution's roles, resources and relationships can be managed within existing institutional structures and in terms of regular arm's-length contractual relations. Risk must not become blurred between parties, and remedies for an aggrieved party upon non-delivery by another party must be clear."
[Tourism PPP Toolkit, page 16].