A STRATEGY FOR MONITORING AND ASSESSMENT TO SUPPORT WATER RESOURCES MANAGEMENT

APPENDIX 5

Implications of Recent Legislation (*Other Than National Water Act*) on Information Requirements

PRESENTATION BY LEGAL SERVICES ON IMPLICATIONS OF RECENT LEGISLATION (*OTHER THAN NATIONAL WATER ACT*) ON INFORMATION REQUIREMENTS:

INTRODUCTION

1 When dealing with this matter, we need to be able to identify our task, and determine the scope of our mandate. In other words, one should be able to understand why do we undertake this task. Our task emanates from chapter 14 of the National Water Act, 1998, which provides the Minister must:

- Establish national monitoring systems;
- Establish mechanisms to co-ordinate monitoring of water resources;
- Establish national information systems; and also provide for,
- Objectives of national information systems;
- Provision of information;
- Access to information;
- Regulations for monitoring, assessment and information

2 Section 3 (1) of the National Water Act, 1998 (the Act) provides that, "as the public trustee of the nations' water resources, the National Government, acting through the Minister, 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". Our task therefore is the creation of monitoring and information system (MAIS) for DWAF on water resources. This task is also mandated by the Water Services Act (WSA), 1997. Section 67 of WSA provides for the establishment of national information system; section 68 for the purpose of national information systems and section 69 for provision of information on water services institution.

3 In order to be able to discharge of our obligations in terms of these prescripts, we need to know the scope and ambits of the law within which our mandate should persist and or prevail. In this regard I shall take the opportunity to draw your attention on the implications that the recent legislation may have on DWAF and DWAF's information system relating to information and access to it. The Acts that will impact on DWAF's information will be addressed separately on the paragraphs below:

- The Constitution of the Republic of South Africa, 1996, Section 32 and 33
- Promotion of access to Information Act, 2000, Section 9, 11,37 and 44 of the Act; (the Act is not yet in operation, once regulations are drafted it may come into effect in June 2000).
- Promotion of Administrative Justice Act, 2000, Section 4(1) and Section 5 of the Act; (not yet in operation)
- Copyright Act, 1978 (as amended) Section 5 read with Section 21 of the Act;
- State Information Technology Agency Act, 1998, Section 6, 7 and 21 of the Act;
- Protection of Information Act, 1982, (as amended) Section 4.

4 Ownership of data and intellectual property developed in contract with DWAF as regards the consultants, and how does Copyright Act, 1978, affect DWAF's information system:

Section 21 (1) (a) of the Copyright Act, 1978, deals with ownership of copyright, and provides inter alia that, "ownership of any copyright conferred by Section 3 or 4 on any work shall vest in the author, or in the case of a work of joint authorship, in the co-authors of the work". Section 21(1)(d) provides that, "where a work is made in the course of authors employment by another person under a contract of service or apprenticeship, that other person shall be the owner of any copyright subsisting in the work". Section 21 (2) of the Act, provides further that, "ownership of any copyright conferred by section 5 (of the same Act) shall initially vest in the state, and not in the author". For our complete guidance we need to refer to Section 5(2) which stipulates that, "copyright shall be conferred by this section on every work which is eligible for copyright and which is made by or under the *direction* (employees) or control of the state". At this stage I would like to focus on the intellectual property rights developed in DWAF contracts with consultants. It is true that initially our consultant agreements either did not specify ownership, in which case ownership (*vest*) was with the consultant, or specifically gave ownership to consultant. It is also correct that a recent change to the standard consultant agreements (*contract*) gives DWAF copyrights (*ownership*).

Something about the copyright Act:

It should be noted that this Act has not changed the position as regards ownership of intellectual property from what it was especially in a relationship between consultant and DWAF. The position has however shifted as a result of amendments in standard contract, and therefore governed by law of contract. Clinically however, the Copyright Act has not introduced or effected any changes on the ownership of data. It does happen that data is purchased without giving ownership or copyright to DWAF, but giving entitlement for use only for the limited extent to which the data was acquired for. Under these circumstances, the Department cannot exchange, distribute or give out any data whatsoever without the prior consent of the party to which the information relates. The copyright status of such information therefore unless stated elsewhere to the contrary, vests with the sources of origin, in this case the consultant or independent contractor or whoever qualifies as the source of origin. If however data is collected by DWAF from its own monitoring programmes (system), it vests to the Department and may be used without any limitations whatsoever in any manner to the extent that it is permissible by law.

5 Who is the current custodians of SITA, and what is its implications on DWAF's information system relating to information and access to it:

In terms of Section 2 of the State Technology Agency Act n (the Act), SITA is a body corporate that is established by the Act. The Department of Public Service and Administration administer the Act, and the Act is the custodian of SITA. Section 21 of the Act creates inroads to DWAF's monitoring information system. This section provides that, "all intellectual property rights, in any product, service, item, method or any other thing of any nature vested in any participating department or organ of state relating to information technology or information systems will vest in the Agency".

Section 6 of the Act provides further that, "in regard to these services, it shall act as agent of South African Government". Section 7 of the Act sets out powers and functions of the Agency. In view of the foregoing, it will be noted that this Act is intended to centralise the availability and management of data to the Agency. Interestingly however is the realisation that Section 7 of the Act, which deals with the powers and functions of the Agency, does not include the right to dispose, exchange and or distribute information by the Agency. The essence of this realisation is that SITA's mandate at this stage revolves around information storage and technological advancement of information systems for the benefit of participating departments. What is not clear is the determination of disposal, exchange and or selling of information as ordinarily understood that relates to the participating Department.

6 What is the criterion if any is there to determine what data now submitted is confidential?

Confidential information is information belonging to a person which has a particular value and which is not generally available to and therefore known by other. [1] In this case, the courts' approach was that the requirements with which information must comply with to be protectable confidential information, is that it is secret. At the outset I must record that the courts apply this approach when determining trade secrets and unlawful competition. In our case, reference should be made to promotion of access to Information Act, 200, for guidance and more specifically section 37 and section 44 of the Act. These specific sections deal with mandatory protection of certain confidential information. The criteria to determine the principle of confidentiality in terms of Section 37 read with 44 of the Act is laid down below and formulated as follows:

- if the information in question constitute an action for breach of a duty of confidence owed to a third party in terms of an agreement; or
- if the record contains an opinion, advice, report or recommendation obtained or prepared or an account of a consultant, discussion that has occurred for the purpose of assisting to formulate a policy or take a decision in the exercise of power or performance of a duty conferred or imposed by law; or
- if the disclosure of the record or information could reasonably be expected to frustrate the deliberative process in a public body or between public bodies, the disclosure of the record could, by premature disclosure reasonably be expected to frustrate the success of that policy; ot
- if the record contains evaluative material, and the disclosure of the material would breach an express or implied promise which was made to the person who supplied the material, - these prescripts form the basis within which the guidelines for determining confidentiality can be founded.

7 Not withstanding the above, the object of the Promotion of Access to Information Act, in terms of section 9 is to give effect to the constitutional right to access to any information held by the State. This right is however subject to justifiable limitations, in a manner which balances that right with any other right and to promote transparency, accountability and effective governance. Section 11 provides that, a requester must be given access to record of the public is access to that record it not refused in terms of any ground for refusal contemplated above.

This means therefore that this Act compels the Government to make its information available to the requester to the extent that the request is justifiable and does not contradict the principle of confidentiality as enunciated above. In conclusion therefore, I would like to record that the application of this Act is not absolute, and that it must be consistent with other statutes, and that it is interest based.

Something about the Promotion of Administrative Justice Act:

8 The implication of DWAF's information system as relates to Promotion of Administrative Justice emanates from Section 5 (1) of the Act, which states that: any person whose rights have been *materially and adversely* affected must be given written reasons for the action. The Act also provides in terms of Section 4 (1) an option of whether or not to hold a public inquiry in order to give effect to the right to procedurally fair administrative action. The relationship between the Promotion of Access to Information Act, Promotion of Administrative Justice as regards DWAF's information systems and access to it, is reactive in nature. Whilst these Acts do not provide Carte Blanca compulsory disclosure of information, where rights have been affected, access to specific information affecting those rights should be provided pursuant thereto. The Act attempts to promote transparency and to eliminate tyranny. Access to information is further regulated in Section 4 by Protection of Information Act 1982 (as amended). This Act provides for the protection from disclosure of certain information. This means therefore that, in order to determine accessibility and confidentiality of certain information, reference should be made to section 4 of the Act. This section stipulates that, any person who has in his possession or under his control or at his disposal, any secret official code or password; or any document, model, article or information which has been entrusted in confidence to him by any person holding office under the government, discloses such information, that person shall be guilty of an offence. There is no doubt therefore that even if ones rights have been adversely affected by (any) administrative action there must be strict compliance with this Act before any information is disclosed.

9 On the question of transference of water management functions, such as storm water to local government:

In terms of schedule 4-part (b) of the Constitution, storm water management is part of the local government legislative competency. Therefore this function will in inevitably be exercised by local government institutions. At this stage I must point out that I am not aware of any requirements that DWAF should do in order to realise the exercise of this duty. I do know however that as the guardian of the nations' water resources we must ensure that institutions that are mandated with this task have the capacity to do so. In view thereof, I believe that it is the duty of the National Government to enact legislation in terms of Section 155 to see to the effective performance by municipalities of their functions in respect of matters listed in schedule 4 and 5 to ensure compliance therein. Section 125 of the Constitution provides that, the executive authority of a province is vested with the authority to implement all national legislation within the functional areas listed in schedule 4 and 5. There is no doubt therefore that storm water management function is not within the ambit of DWAF, and or any legislation administered by the Department.

I am also not aware of our present involvement if any, as regards this function, and therefore I am not able to concur with transference of any functions in this regard at this stage.

10 SOUTH AFRICA'S OBLIGATION TO PROVIDE INFORMATION TO OTHER COUNTRIES

1 The Protocol on Shared Water Course Systems in the Southern African Development Community (SADC) Region (hereafter referred to as "Protocol")

In terms of this Protocol parties to the Protocol (hereinafter referred to as Member States, must pursue and establish close co-operation with regard to the study and execution of all projects likely to have an effect on the regime of a shared water course system. The Protocol further states that Member States shall exchange available information and data regarding the hydrological, hydrogeological, water quality, meteorological and ecological conditions of such watercourse system. Member States must also without delay notify other potentially affected States (which include States not parties to the Protocol) and internationally organisations of any emergency originating within their respective territories. Members States may execute and implement emergency measures in their own countries in order to save life, to protect public health and safety or other equally important interests, provided that a formal declaration of urgency shall be communicated to the affected Member State.

The functions of the River Basin Management Institutions, established in terms of the Protocol) are amongst others the collecting analysing, storing, retrieving, disseminating, exchanging and utilising data relevant to the integrated development of the resources within the shared water course systems and the river basin management institutions can also assist Member State in the collecting and analysis of data within their respective states. The River Basin Management Institutions can design, conduct studies and research and surveys relating to environmentally sound development and management plans for shared watercourse systems. The River Basin Management Institutions can monitor the utilization of water for agriculture, domestic, industrial and navigational purposes, the establishment of hydro-electric power installations and generation of hydro-electric power.

South Africa did sign and ratify the Protocol, but some our neighbouring countries such as Mozambique did not ratify the Protocol. Normally States can only get rights and obligations in terms of a treaty if they ratify the treaty or if they consent thereto. The Protocol is in force.

The States are busy with the amendment of the Protocol in order to align it with the United Nations Convention on the Law of Non Navigational Use of International Watercourses (hereinafter referred to as the UN Convention). The article of the UN Convention on planned measures will be introduced in the Protocol.

2 **The UN Convention**

South Africa signed and ratified the UN Convention, but the UN Convention is not in operation as yet as most other neighbouring countries have not signed and ratified it.

Article 9 of the UN Convention that Water Course States shall on a regular basis exchange readily available date and information on the condition of the watercourse, in particular that of hydrological, meteorological, hydrogeological and geological nature and related to water quality as well as related forecasts. Watercourse States, which is requested by another water course state to provide information or data that is not readily available must employ its best effort to comply with the request, but may claim reasonable costs for the collecting and processing and processing of data. Watercourse States must employ their best efforts to collect and process data and information in a manner that facilitates its utilization by the other Watercourse State to which it is communicated.

In terms of Article 11 Water Course States must exchange information and consult with each other and where necessary negotiate possible effects of planned measures on the utilization of an international watercourse.

Before a Watercourse State implements or permits the implementation planned measures, which may have a significant adverse effect upon other Watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied with available technical date and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.

The UN Convention also states that a Watercourse State within whose territory an emergency originates must without delay and by the most expeditious means available, notify other potentially affected States and, where appropriate, competent international organisations.

3 Bilateral agreements

South Africa continuously concludes bilateral agreements with its neighbouring countries. Some of these agreements also provide for the exchange of information between the parties.

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APPENDIX 6

Information requirements, inadequacies, planned developments, issues, and recommendations