

REPUBLIC OF SOUTH AFRICA

**Water Quality Management
Series**

**Managing the Water Quality
Effects of Settlements: -**

**LEGAL CONSIDERATIONS
FOR MANAGING POLLUTION
FROM SETTLEMENTS**



Department of Water Affairs and Forestry

OCTOBER 2001

Water Quality Management Series

MANAGING THE WATER QUALITY EFFECTS OF SETTLEMENTS:-

LEGAL CONSIDERATIONS FOR MANAGING POLLUTION FROM SETTLEMENTS

Department of Water Affairs and Forestry

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DOCUMENT INDEX

This document forms part of the Department of Water Affairs and Forestry's National Strategy for Managing the Water Quality Effects of Settlements. It represents one of the outputs of a project that was jointly funded by the Department of Water Affairs and Forestry and the Danish Government via their DANCED program.

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ACKNOWLEDGEMENTS

This series of reports is the result of a collaborative effort from a great many people. The inputs of these contributors are gratefully acknowledged. However, special mention must be made of the following:-

- The members of the Test Case Steering Committees in each of the Test Cases, who gave of their time freely to helping test the Strategy.
- Members of the Project Steering Committee.
- Danced staff involved with the project. In particular Ms Mapule Makoro, Dr Albert Welinder, and Ms Jackie Friedenthal
- Dr Morten Riemer, the Project Monitor.

Special mention must also be made of the members of the 9 Test Case Steering Committees, and of the 9 Regional Deputy Directors: Water Quality within the Department of Water Affairs and Forestry. These people are listed on the following two pages.

The financial contribution from Danced, and the Danish Government is also gratefully acknowledged.

The following consultants have contributed to the development of this series of reports.

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- John Charlton: Carl Bro
- Christian Sørensen: Carl Bro
- Charlotte Mathiassen: Carl Bro
- Gitte Jakobson: Carl Bro

Local Consultants

- Guy Pegram: Pegasus Strategic Resource Management
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- Geraldine Schoeman: Afrosearch
- Romy van Jaarsveld: Romy van Jaarsveld Consultants
- Hubert Thompson: Thompson and Thompson
- Seetella Makhetha: Makhetha Development Consultants.

The CD for the project was developed by ISIFUNDI IT Consultants.

Development of the community documents and the newsletters for the project was facilitated by Manyaka-Greyling-Meiring.

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PREFACE

Pollution from densely populated and poorly serviced settlements is perhaps one of South Africa's most *important*, but most *complex* water quality problems.

Important, because pollution in and from these settlements not only affects downstream users, but has its most significant impacts on the communities living in these settlements. Failing sanitation and waste removal systems create appalling living conditions in many settlements, and contribute to serious health problems in these communities. Pollution in and from these settlements is, therefore, not only a water quality issue, but has much wider implications for government's aims to provide a better life for all

Complex, because pollution in settlements is rooted in the socio-economic, political and institutional conditions in the settlement. The use, or misuse, of services together with the way in which the services are maintained by Local Authorities lies at the heart of the pollution problem in many settlements. This is further complicated by the legacy of South Africa's apartheid history. Solutions, therefore, lie in changing the way in which the services are supplied and used.

However, *sustainable* solutions to the problem lie not only in our ability to supply and use waste and sanitation services to best effect, but also in the longer-term capacity of local government to maintain these services. This is likely to be the biggest stumbling block to sustainable management of pollution from settlements. Local government in South Africa clearly has significant capacity problems, and misuse of services, for a variety of reasons, is endemic in many settlements across the country. More importantly, failing waste services contribute to poor living conditions, and hence to the misuse of the services. Non-payment for services also limits the capacity of the Local Authority to effectively maintain the services, which then leads to further failure of the services.

Strategies to manage pollution in settlements must take a broader view of both Local Authority capacity, and the socio-economic and political dynamics of the community in order to arrest this downward spiral. The Department of Water Affairs and Forestry, therefore, initiated a study of the links between pollution, community perceptions and local government capacity, to run in parallel with the Test Cases. A number of reports have been produced to support this study.

It is hoped that these reports provide compelling arguments to address this problem both by ensuring better planned and run services, but also by active intervention and assistance where there are clear and immediate threats to community health and the environment. This report forms part of this process.

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1 INTRODUCTION

The use, or misuse, of waste management services together with the way in which these services are provided and maintained lies at the heart of the pollution of the water resources in many settlements. The solution to this problem therefore lies in changing the way in which these services are provided, used and maintained. This also includes the measures relating to the planning, siting and layout of settlements.

Regulating the planning, siting and layout of settlement by way of legislation and exercising executive authority, as well as regulating services provision and pollution control could lie within the responsibility of any one of the three spheres of government and organs within it, depending on what functional areas should be addressed.

Providing, managing and maintaining the necessary waste management services is mainly the responsibility of the local sphere of government and the organs within this sphere. Protecting the quality of the water resources is the legislative responsibility of the national sphere of government with the executive authority mainly the Minister of Water Affairs and Forestry, the Department of Water Affairs and Forestry and the catchment management agencies¹ (still to be established). Solving the problem therefore requires a combined effort between all role players, including the organs of state in the three spheres of government, catchment management agencies and the inhabitants within these settlements.

The legislative environment underlying the interventions to address pollution from settlements is consequently very complex, and a range of Acts provide opportunities to intervene to ensure effective and sustainable management of pollution from settlements. This report outlines some of the most important of these legislative tools, and is intended to support the development of mechanisms DWAF or catchment management agencies could intervene to ensure management of pollution from settlements.

The reader can move directly to the relevant sections of the different Acts by clicking on the reference to the section in this document.

¹ In an area where a catchment management agency has not been established, or if established but not functional, all powers and duties of the agency vest in terms of section 72(1) of the National Water Act, 1998 (Act No. 36 of 1998) in the Minister of Water Affairs and Forestry.

2 CONSTITUTIONAL FRAMEWORK

2.1 CONSTITUTIONAL MANDATE

Everyone in South Africa has in terms of section 24(a) of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996) a constitutional right to an environment that is not harmful to his or her well-being. This right includes that the environment should be protected, for the benefit of the present and future generations. The protection of the environment should in terms of section 24(b)(iii) be done through reasonable legislative and other measures that, among others, secure ecologically sustainable development and use of natural resources (which include the water resources), while promoting justifiable economic and social development.

On the other hand, some of the objectives of local government in terms of section 152(1)(b) and (d) of the Constitution are to ensure the provision of services to communities in a sustainable manner and to promote a safe and healthy environment. Included in this is the constitutional right that everyone has in terms of sections 26(1) and 27(1)(b) to have access to sufficient water and adequate housing. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

Giving effect to these constitutional mandates depends on the effective exercising of the water resource management activities on the one hand and the sustainable provision of services on the other hand. The Dense Settlements project has shown that these two aspects are closely linked and must be managed together to realise the joint Constitutional Mandates of access to services, and the need for ecologically sustainable services.

2.2 A THREE-SPHERE GOVERNMENT AND THE PRINCIPLES OF CO-OPERATIVE GOVERNMENT

Government is in terms of section 40(1) of the Constitution constituted as national, provincial and local spheres of government. According to section 40(2) these spheres are distinctive, interdependent and interrelated. Each sphere contains the different organs of the state necessary for the government to fulfil its obligations.

Section 41(1) obliges all three spheres of government and all organs within each sphere to among others co-operate, consult with and assist and support each other, respect the responsibilities of the others, foster friendly relationships and exercise powers and perform functions in such a way as not to encroach on the integrity of another. Furthermore, the different spheres and organs may only exercise powers and perform functions conferred on them in terms of the Constitution (powers and functions may in terms of the Constitution be assigned, transferred or delegated from one organ or level to another). The organs involved in intergovernmental disputes must make every reasonable effort to settle the dispute and must exhaust all the remedies before it approaches a court to resolve the dispute.

Acts of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations. The establishment of catchment management agencies as well as the development of catchment management strategies in terms of the National Water Act, 1998 (Act No. 36 of 1998) could assist with achieving this related to water resource management and the provision of water

services related to the support of life and hygiene. The implementation of the White Paper on local government and the development of water services development plans by water services authorities in terms of the Water Services Act, 1997 (Act No 108 of 1997) could assist in achieving this related to the provision of water services to support life and personal hygiene.

2.3 LEGISLATIVE AUTHORITY OF THE DIFFERENT SPHERES

Legislative authority is the authority to make laws. Section 43 of the Constitution regulates the distribution of legislative authority between the three spheres of government as follows: "In the Republic, the legislative authority-

- (a) of the national sphere of government is vested in Parliament, as set out in section 44;
- (b) of the provincial sphere of government is vested in the provincial legislatures, as set out in section 104; and
- (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

2.3.1 Distribution of the legislative authority

2.3.1.1 The national sphere of government

In terms of section 42(1) of the Constitution Parliament consists of the National Assembly and the National Council of Provinces. The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.

Parliament (as the legislative organisation in the national sphere of government) has in terms of section 44(1)(a)(ii) the unlimited power to make laws (known as Acts) on all matters other than those listed in Schedule 5² to the Constitution. In respect of the matters listed in Schedule 5, it may in terms of section 44(2) legislate only in circumstances "when it is necessary-

- (a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;
- (d) to establish minimum standards required for the rendering of services; or
- (e) to prevent unreasonable action taken by a province which is prejudicial to the interests of another province or to the country as a whole."

The National Assembly has in terms of section 44(1)(a)(ii) the power to pass-

- in accordance with section 75, legislation regarding any matter not mentioned in the functional areas listed in Schedule 4 and 5 (i.e. those Bills dealing with functional areas that are not legislative functional areas of the provinces); and
- in accordance with section 76, legislation regarding the matters within the functional areas listed in Schedule 4 (the functional areas of concurrent national and provincial legislative competence) (i.e. those Bills dealing with functional areas that are legislative functional areas of the provinces).

The National Council of Provinces has in terms of section 44(1)(b)(ii) among others the power to pass, in accordance with section 76, legislation regarding any matter within the functional areas listed in Schedule 4 (the functional areas of concurrent national and provincial legislative competence).

² Schedule 5 lists the functional areas of exclusive provincial legislative competence.

The National Assembly or the National Council of Provinces may in terms of section 44(2) intervene, by passing legislation in accordance with section 76, with regard to a matter falling within a functional area listed in Schedule 5 (the functional areas of exclusive provincial legislative competence).

2.3.1.2 The provincial sphere of government

Each provincial legislature (as a legislative organisation in the provincial sphere of government) may in terms of section 104 of the Constitution make laws for its province³ (known as Ordinances) on any matter falling within Schedules 4 or 5 to the Constitution. The procedure to be followed for the functional areas listed in Schedule 4 and 5 are the same.

2.3.1.3 The local sphere of government

Each municipal council⁴ (as a legislative organisation in the local sphere of government) may in terms of section 156(2), read with (1), of the Constitution make by-laws on the matters listed in Part B of Schedules 4 and Part B of Schedule 5 to the Constitution.

2.3.2 The legislative competence relevant to water quality effects from settlements

The functional areas for which each specific sphere of government has legislative competence are set out in the Constitution of the Republic of 1996.

2.3.2.1 Exclusive national sphere of government competence

Parliament has in terms of section 44(1)(a)(ii), read with section 104(1)(b)(i) and (ii), of the Constitution the exclusive power to pass legislation with regard to any matter not listed in Schedules 4 and 5 to the Constitution. The following functional areas relevant to water quality effects from settlements are functional areas *not* listed in Schedules 4 and 5 and are therefore exclusive national sphere of government legislative competence:

- water resource management; and
- land affairs.

2.3.2.2 Concurrent national and provincial sphere of government competence

The following functional areas relevant to water quality effects from settlements are in terms of Schedule 4 to the Constitution concurrent national and provincial sphere of government legislative competence:

- environment;
- housing;
- nature conservation;
- pollution control;

³ Section 103(1) states that the Republic consists of nine provinces, namely: Eastern Cape, Free State, Gauteng, KwaZulu-Natal, Mpumalanga, Northern Cape, Northern Province, North West and Western Cape.

⁴ The local sphere of government consists in terms of section 151(1) of municipalities, which have been established for the whole of the territory of the Republic. The executive and legislative authority of a municipality is vested in terms of section 151(2) in its Municipal Council.

- regional planning and development;
- soil conservation;
- urban and rural development, and
- regulating the following local government matters to the extent set out in section 155(6)(a) and (7) of the Constitution:
 - building regulations;
 - municipal planning;
 - storm water management systems in built-up areas; and
 - water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

2.3.2.3 Exclusive provincial sphere of government competence

The following functional area relevant to water quality effects from settlements is in terms of Schedule 5 to the Constitution exclusive provincial sphere of government legislative competence:

- provincial planning; and
- regulating the following local government matters to the extent set out in section 155(6)(a) and (7):
 - cleansing;
 - control of public nuisances;
 - municipal roads; and
 - refuse removal, refuse dumps and solid waste disposal.

2.3.2.4 Local sphere of government competence

The following functional areas relevant to water quality effects from settlements are in terms of section 156(2), read with section 151(1) and Part B of Schedule 5 and Part B of Schedule 6 to the Constitution, local sphere of government legislative competence:

- air pollution;
- building regulations;
- municipal planning;
- storm water management systems in built-up areas;
- water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems;
- cemeteries;
- cleansing;
- control of public nuisances;
- municipal parks and recreation;
- municipal roads; and
- refuse removal, refuse dumps and solid waste disposal.

2.4 THE EXECUTIVE AUTHORITY

The executive authority is the authority to implement laws and to exercise the powers conferred by those laws.

2.4.1 Distribution of the executive authority

2.4.1.1 The national sphere of government

The President exercises in terms of section 85(2) of the Constitution, read with section 85(1), the executive authority of the Republic, together with the members of the Cabinet, by among others-

- implementing national legislation except where the Constitution or an Act of Parliament provides otherwise;
- developing and implementing national policy; and
- co-ordinate the functions of state departments and administrations.

2.4.1.2 The provincial sphere of government

The Premier of a Province exercises in terms of section 125(2) of the Constitution, read with section 125(1), the executive authority of that province, together with the members of the Executive Council of the Province, by among others-

- implementing provincial legislation in that province;
- implementing the national legislation within the functional areas listed in Schedule 4 or 5 except where the Constitution or an Act of Parliament provides otherwise;
- administering in that province, the national legislation outside the functional areas listed in Schedules 4 and 5, the administration of which has been assigned to the provincial executive in terms of an Act of Parliament;
- developing and implementing provincial policy; and
- co-ordinating the functions of the provincial administration and its departments.

2.4.1.3 The local sphere of government

According to section 151(1) of the Constitution the local sphere of government consists of municipalities. Municipalities have been established for the whole of the territory of the Republic⁵.

The objects of local government in terms of section 152(1) are to:

- provide democratic and accountable government for local communities;
- ensure the provision of services to communities in a sustainable manner;
- promote social and economic development; and
- promote a safe and healthy environment.

A municipality must strive, within its financial and administrative capacity, to achieve these objects.

⁵ See section 155 of the Constitution of 1996. The Local Government: Municipal Demarcation Act, 1998 (Act No. 27 of 1998), provides for criteria and procedures for the determination of the different municipal boundaries by an independent authority. See also the Local Government: Cross-Boundary Municipalities Act, 2000 (Act No. 29 of 2000). The necessary demarcation was done during 2000 and the boundaries were published in the different *Provincial Gazettes*.

A municipality must, in terms of section 153, structure and manage its administration and budgeting and planning processes in such a way as to give priority to the basic needs of the community.

The executive authority of a municipality is in terms of section 151(3) vested in its Municipal Council. Each Municipal Council has in terms of section 156(1)(a) executive authority in respect of, and has the right to administer the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5. See 2.3.2.4 for a list of these matters relevant to water quality effects from settlements.

Municipalities have in terms of section 151(3) the right to govern the local government affairs of its community. This may be done on its own initiative, but subject to national⁶ and provincial legislation as provided for in the Constitution⁷. The national and provincial governments may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions.

Municipalities are therefore responsible for providing services in a sustainable manner to communities within their areas of responsibility. As stated in the White Paper on Local Government (as part of the principles for services delivery), "Ongoing services provision depends on financial and organisation systems which support sustainability. Sustainability includes both financial viability and the environmentally sound and socially just use of resources." Effective planning of these services is therefore crucial to minimize the water quality effects from settlements.

2.4.2 The competence of the different executive authorities

The circumstances in which an executive authority can exercise the powers conferred on it by legislation are determined primarily, not by the Constitution itself, but by legislation.

A single law may vest different executive powers in different executive authorities from different spheres of government. For example, an Act of Parliament may vest certain executive powers in a Minister in the national sphere of government and others in the Members of the Executive Council of the Provinces of the provincial sphere and in Municipal Councils. Despite the fact that a law has been created in terms of the legislative competence of one sphere of government, the executive powers may be vested in the other spheres of government. The Development Facilitation Act, 1995 (Act No. 67 of 1995) is an example of this.

The provisions of the Constitution related to the distribution of legislative authority are not applicable to executive authority. If a validly enacted law vests executive powers in an organ of state from a particular sphere of government, then the powers so vested form part of the powers of that organ. This is so, even if the subject matter of those powers fall outside the legislative competence of that sphere. Similarly, the

⁶ See for example the following:

- the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998) which provides for the establishment of municipalities and their functions and powers and to regulate the internal systems, structures and office-bearers of municipalities; and
- the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000) which provides for the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of local communities, and ensure universal access to essential services that are affordable.

⁷ See for example section 155(2) and (3) of the Constitution.

laws related to conflicts of legislative authority do not apply to conflicts of executive authority.

2.5 INTERVENTION IN THE EXERCISING OF THE EXECUTIVE POWERS

Intervention in the exercising of the executive powers of the provincial and local spheres of government may take place in terms of the Constitution, while executive power of intervention are conferred by the terms of specific laws. See for example 5.5.

2.5.1 National supervision of provincial administration

When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may in terms of section 100 of the Constitution intervene by taking any appropriate steps to ensure fulfilment of that obligation. These steps may include-

- issuing a directive to the provincial executive, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; or
- assuming responsibility for the relevant obligation in that province to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of a service.

If the national executive intervenes a notice of the intervention must be tabled in the National Council of Provinces within 14 days after the intervention began and the intervention must end unless the Council approves it within 30 days after the intervention began. The Council must review the intervention regularly and make any appropriate recommendations to the national executive.

2.5.2 Provincial supervision of local government

When a municipality cannot or does not fulfil an executive obligation in terms of legislation, the relevant provincial executive may in terms of section 139 of the Constitution intervene by taking any appropriate steps to ensure fulfilment of that obligation. These steps may include-

- issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations; or
- assuming responsibility for the relevant obligation in that municipality to the extent necessary to maintain essential national standards or meet established minimum standards for the rendering of a service.

If a provincial executive intervenes in a municipality the intervention must end unless the Cabinet member responsible for local government affairs approves it within 14 days of the intervention.

A notice of the intervention must be tabled in the provincial legislature and in the National Council of Provinces within 14 days after the intervention began and the intervention must end unless the Council approves it within 30 days after the intervention began. The Council must review the intervention regularly and make any appropriate recommendations to the provincial executive.

2.5.3 Support and strengthen the capacity of municipalities

In terms of section 154(1) of the Constitution, the national government and provincial governments must, by legislative and other measures, support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

Draft national or provincial legislation that affects the status, institutions, powers or functions of local government, must be published for public comment before it is introduced in Parliament or a provincial legislature. This should be done in a manner that allows organised local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

2.6 FINANCIAL MATTERS

2.6.1 Revenue funds

2.6.1.1 National revenue fund

Section 213 of the Constitution states that there is a National Revenue Fund into which all money received by the national government must be paid, except money reasonably excluded by an Act of Parliament. Money may be withdrawn from the National Revenue Fund only-

- in terms of an appropriation by an Act of Parliament; or
- as a direct charge against the National Revenue Fund, when it is provided for in the Constitution or an Act of Parliament.

A province's equitable share of revenue raised nationally is a direct charge against the National Revenue Fund.

According to section 214 an Act of Parliament must 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 Act may only be enacted after the provincial governments, organised local government and the Financial and Fiscal Commission has been consulted, and any recommendations of the Commission have been considered, and must take into account-

- the national interest;
- any provision that must be made in respect of the national debt and other national obligations;
- the needs and interests of the national government, determined by objective criteria;
- the need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them;
- the fiscal capacity and efficiency of the provinces and municipalities;
- developmental and other needs of provinces, local government and municipalities;
- economic disparities within and among the provinces;
- obligations of the provinces and municipalities in terms of national legislation;

- the desirability of stable and predictable allocations of revenue shares; and
- the need for flexibility in responding to emergencies or other temporary needs, and other factors based on similar objective criteria.

The Intergovernmental Fiscal Relations Act, 1997 (Act No. 97 of 1997) promotes co-operation between the national, provincial and local spheres of government on fiscal, budgetary and financial matters. The Act prescribes a process for the determination of an equitable sharing and allocation of revenue raised nationally. See the different Division of Revenue Acts, which provides for the equitable division of revenue raised nationally among the national, provincial and local spheres of government⁸.

2.6.1.2 Provincial revenue funds

In terms of section 226 of the Constitution there is a Provincial Revenue Fund for each province into which all money received by the provincial government must be paid, except money reasonably excluded by an Act of Parliament. Money may be withdrawn from a Provincial Revenue Fund only-

- in terms of an appropriation by a provincial Act; or
- as a direct charge against the Provincial Revenue Fund, when it is provided for in the Constitution or a provincial Act.

Revenue allocated through a province to local government in that province is a direct charge against that province's Revenue Fund.

2.6.2 National, provincial and municipal budgets

National, provincial and municipal budgets and budgetary processes must in terms of section 215 of the Constitution promote transparency, accountability and the effective financial management of the economy, debt and the public sector. National legislation must prescribe-

- the form of national, provincial and municipal budgets;
- when national and provincial budgets must be tabled; and
- that budgets in each sphere of government must show the sources of revenue and the way in which proposed expenditure will comply with national legislation.

Budgets in each sphere of government must contain-

- estimates of revenue and expenditure, differentiating between capital and current expenditure;
- proposals for financing any anticipated deficit for the period to which they apply; and
- an indication of intentions regarding borrowing and other forms of public liability that will increase public debt during the ensuing year.

2.6.3 National sources of provincial and local government funding

In terms of section 227 of the Constitution local government and each province-

- is entitled to an equitable share of revenue raised nationally to enable it to provide basic services and perform the functions allocated to it; and

⁸ Act 28 of 1998 for the period 1 April 1998 to 31 March 1999, Act 30 of 1999 for 1 April 1999 to 31 March 2000 and Act 16 of 2000 for 1 April 2000 to 31 March 2001.

- may receive other allocations from national government revenue, either conditionally or unconditionally.

Additional revenue raised by provinces or municipalities may not be deducted from their share of revenue raised nationally, or from other allocations made to them out of national government revenue. Equally, there is no obligation on the national government to compensate provinces or municipalities that do not raise revenue commensurate with their fiscal capacity and tax base.

A province's equitable share of revenue raised nationally must be transferred to the province promptly and without deduction.

A province must provide for itself any resources that it requires, in terms of a provision of its provincial constitution that are additional to its requirements envisaged in the Constitution.

2.6.4 Municipal fiscal powers and functions in terms of the constitution

A municipality may in terms of section 229(1) of the Constitution impose the following:

- rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
- if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.

This power may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour and may be regulated by national legislation.

A province or a municipality may raise loans for capital or current expenditure. This must be done in accordance with reasonable conditions determined by national legislation. Loans for current expenditure may be raised only when necessary for bridging purposes during a fiscal year and must be repaid within twelve months.

3 THE LEGAL RELATIONSHIP BETWEEN THE DIFFERENT FUNCTIONAL AREAS

3.1 THE DIFFERENT FUNCTIONAL AREAS INVOLVED

3.1.1 Water resource management

Water resource management, which includes managing the water quality effects from settlements, is in terms of the Constitution an exclusive national sphere of government legislative competence.

According to the White Paper on a National Water Policy for South Africa, April 1997, South Africa's water resources should be used within their capacity to recover. Water use should be balanced with the protection of the resources in such a way that the resources are not degraded beyond the point of recovery.

The National Water Act of 1998 provides the necessary legislative framework for implementing the National Water Policy. This Act was passed in terms of the procedure as required in terms of section 75 of the Constitution (a Bill dealing with a functional area that is not a legislative functional area of the provinces).

The requirements for ensuring long-term utilisation of the water resources in terms of the policy necessitated a focus on the water resource itself by implementing resource-directed measures, combined with source-directed controls.

The purpose of the resource-directed measures is to set clear objectives for the desired level of protection for each significant water resource. These measures include the prescribing of a national water-resource classification system in terms of section 12. According to this system, the different water resources will be classified into different classes, each class representing a certain level of protection. For the higher levels of protection, the objectives will be strict, demanding a low risk of damage and the use of the resource with great caution. For the lower levels, the objectives will be less strict, resulting in a higher risk of damage to the water resources (see sections 12 to 18 of the National Water Act of 1998).

Source-directed controls focus on the sources of impacts from both point sources and non-point sources. These measures (which could be standards, management practices, best available technology, guidelines, procedures and agreements) (see Chapter 4 of the National Water Act of 1998) are aimed at what is done to the water resources and are therefore directed at managing and controlling the generation of waste at the source.

3.1.2 Planning, siting and layout of settlements

Certain functional areas related to the planning, siting and layout of settlements, for example environment, housing, pollution control, regional planning and development and urban and rural development are concurrent national and provincial sphere of government legislative competence, while others for example provincial planning are exclusive provincial legislative competence.

Various pieces of legislation have been promulgated by the appropriate legislatures to give effect to this. See 5.3.

3.1.3 Services provision as a local government function

A municipality has legislative and executive authority in respect of, and has the right to administer the matters dealing with the provision of waste management services. These services are, among others, water and sanitation services, domestic wastewater and sewage disposal systems, storm water management systems and refuse removal, refuse dumps and solid waste disposal. Services provision includes the planning, construction, operating, maintenance and usage of the services.

3.2 RECONCILING THE DIFFERENT FUNCTIONAL AREAS

If the provincial or local governments are exercising their legislative or executive powers and functions in a certain manner, or do not fulfil it, for example siting a settlement too near a sensitive water resource or providing services of a certain level, then there might be an unacceptable impact on the water resources. It is therefore sometimes necessary for the protection of the water resource to intervene by requiring the prohibition of the development of a settlement too near a water resource or services of a higher or even a lower level than envisaged by the provincial or local governments.

The intervention is not to regulate how the planning, siting and layout of settlements or the provision of waste management services should take place. It is to regulate those elements of planning, siting and layout of settlements and the provision of waste management services that might affect the quality of the water resources so as to ensure that the water resources will not get polluted.

4 THE STRATEGY

The strategy to manage water quality effects from settlements consists of a reactive and a proactive approach and the relevant legislation could be applied accordingly.

The reactive approach deals with those measures that could be taken by the regulators if water pollution has occurred or is likely to occur due to among others how a settlement is planned or sited, or how waste management services are provided, maintained or used in these settlements. The purpose of these measures is to eliminate the different sources or potential sources of water pollution or to remedy the effects of water pollution that has occurred.

The proactive approach on the other hand deals with those measures that should be taken by the regulators and service providers during the planning, siting and layout of settlements as well as while water management services are provided, maintained and used within these settlements. The purpose of these measures is to eliminate or reduce those situations that could cause pollution of a water resource.

These approaches are based on the following principles:

- The distinction between and distribution of legislative and executive powers between the three spheres of government as set out among others in sections 40(1), 44, 104 and 156 and Schedules 4 and 5 to the Constitution.
- The principles of co-operative government and intergovernmental relations as set out in section 41 of the Constitution recognise that service provision is a local government legislative function and water resource management a national government legislative function.
- The constitutional intervention in terms of section 139 of the Constitution by a Provincial government consists of assuming the waste management function of a specific municipality.
- The statutory power of executive intervention conferred by Acts of Parliament and provincial laws, for example sections 19 and 20 of the National Water Act of 1998, section 63 of the Water Services Act of 1997 and the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000).

4.1 THE REACTIVE APPROACH

If the water quality management officials of a regional office of the Department of Water Affairs and Forestry identify a water quality problem caused by an effect from a settlement, then the officials could approach the Municipality responsible for that settlement. Together they will draw up a problem tree to identify the different problems causing or likely to cause pollution of the water resource as well as the interventions to rectify that. These interventions could for example be the provision of a waste removal service or the implementation of an effective payment campaign. The officials of the regional office of the Department of Water Affairs and Forestry will then come to an agreement with the Municipality on when the Municipality will implement these interventions as well as the outcome thereof.

If the Municipality is not implementing the interventions or the outcome thereof is not as agreed to, then the officials of the regional office of the Department of Water Affairs and Forestry could do the following:

- If the situation falls within the wording “a person in control of land ... on which ... any other situation exists which causes ... pollution of a water resource” of section 19(1) of the National Water Act of 1998⁹, then the Municipality is, in

⁹ The wording “person in control of land ... on which ... any other situation exists which causes ...

terms of section 19(4) of the Act, directed to commence taking the interventions (or other interventions) to rectify the problem.

- If the situation does not fall within the wording “a person in control of land ... on which ... any other situation exists which causes ... pollution of a water resource” of section 19(1) of the National Water Act of 1998, then the Minister of Water Affairs and Forestry or the Director-General of the Department of Water Affairs and Forestry writes a letter to the responsible Member of the Executive Council of the Province as well as the Municipality asking the Municipality to commence taking the interventions (or other interventions) to rectify the problem.

If the Municipality does not comply with the directive or letter, then the matter is referred to the Directorate: Water Quality Management of the Department of Water Affairs and Forestry. This Directorate may then take the matter up with an interdepartmental committee dealing with water services provisions. This committee may then, in consultation with the Minister of Water Affairs and Forestry, the Minister of Finance and the Minister of Provincial and Local Government request the relevant Provincial executive to intervene in terms of section 139 of the Constitution. If, within a reasonable time after the request, the Provincial executive has not intervened or has failed to do so effectively, then the following could be done:

- If the matter deals with the provision of water services, then the Minister of Water Affairs and Forestry follows the procedure as set out in section 63(1) of the Water Services Act of 1997 and assumes in terms of section 63(2) the water services function.
- If the matter does not deal with the provision of water services, then the matter has to be dealt with under the provisions of the Local Government: Municipal Systems Act of 2000 or any relevant other legislation to work out a solution to resolve the matter.

However, in the case of an emergency where a substance pollutes a water resource, the regional offices of the Department of Water Affairs and Forestry may in terms of section 20 give a verbal directive to the person responsible for the pollution. The directive could include what measures to be taken to contain and minimise the effects caused by the substance and to clean up the area. If the person fails to comply, then the department may take the measures itself and recover the cost thereof from the person involved.

4.2 PROACTIVE APPROACH

It would be possible to intervene in terms of the National Water Act of 1998 by prescribing regulations or declaring certain activities associated with the planning, siting and layout of settlements and providing waste management services. However, due to various political, technical and administrative constraints this route will probably not be followed.

Guidelines will rather be developed by the Directorate: Water Quality of the Department of Water Affairs and Forestry for the provincial governments and municipalities to be taken into account during the planning, siting and layout of settlements, including the provision, maintenance and use of waste management services within these settlements.

pollution of a water resource” may not be wide enough to include all situations where Municipalities are involved. For example un-surveyed and -registered pieces of land or only for surveyed and registered pieces of land where water pollution occurs

5 LEGISLATIVE INSTRUMENTS

5.1 CO-OPERATIVE GOVERNMENT

The establishment of catchment management agencies in terms of section 78(1) of the National Water Act of 1998, as well as the development of a catchment management strategy in terms of section 8(1), could assist with achieving the principles of co-operative government relating to water quality effects from settlements. The structures of the provincial and local sphere of government as well as the regulators could be represented in the different organs of the catchment management agencies.

Catchment management agencies could assist in building capacity, developing guidelines and creating awareness of the problem under the officials of the provincial and local sphere of government and the inhabitants of the settlements. Aspects relating to the problem could also be addressed in establishing catchment management strategies.

5.2 INCORPORATING ASSOCIATED ASPECTS INTO WATER RESOURCES STRATEGIES

A national water resource strategy and catchment management strategies must, in terms of the National Water Act of 1998, be developed in a progressive and phased manner to help with the implementation of the National Water Policy. The strategies entail the following:

- The Minister of Water Affairs and Forestry must, after consultation with society-at-large, in terms of section 5 establish a national, water-resource strategy. This strategy will provide a framework for the protection, use, development, conservation, management and control of the water resources of South Africa as a whole. It also provides the framework within which water will be managed at regional and catchment level.
- Catchment management agencies must in terms of section 8 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.

These strategies are binding on all governmental authorities when exercising powers or performing duties under the National Water Act of 1998 and they must give effect to them. Giving effect to these strategies is not applicable when powers are exercised in terms of legislation other than the National Water Act of 1998.

These strategies could incorporate certain matters relating to the planning, siting and layout of settlements and the provision of waste management services that have to be taken into consideration when the necessary authorisations are given. See 5.5.2 .

5.3 PLANNING, SITING AND LAYOUT OF SETTLEMENTS

5.3.1 Establishment of settlements

Legislative requirements controlling the establishment of settlements are found mainly in provincial legislation and depends on the type of settlement to be established, i.e. whether the settlement is for example a formal or informal settlement or whether the settlement is established within an existing municipal area or not. The establishment of settlements in Gauteng is, among others, controlled in terms of the Town-planning and Township Ordinance of 1986 (Ordinance 15 of 1986) (Transvaal).

In principle, all (most) of the legislation controlling the establishment of settlements requires that the establishment of the settlement must be approved by the Province. In certain cases, compulsory consultation with organs of state having an interest in the establishment is a requirement before the approval is granted. These organs cannot veto the establishment in terms of these Ordinances. Their concerns are only considered when a decision is taken on the approval. In practice consultation with relevant role players usually also takes place when compulsory consultation is not a requirement.

5.3.2 Objectives to be met

Water quality objectives to be met during the planning, siting and layout of settlements could be set by the following:

5.3.2.1 Setting land development objectives

The purpose of the Development Facilitation Act of 1995 is to introduce extraordinary measures to facilitate and speed up the implementation of development and projects in relation to land. Each municipality, or if it cannot do it, the Member of the Executive Council of the Province responsible for local government, must in terms of section 27, set land development objectives (LDOs) for its area of jurisdiction. The performance of municipalities in achieving these objectives may be measured.

A Municipality or the Member of the Executive Council may require that environmental evaluations be carried out in order to assess the likely impact of any LDO upon the environment.

A land development application may not be approved if the application is inconsistent with any LDO. If LDOs have not been set, then that may not delay any land development application.

5.3.2.2 Setting of objectives as part of classifying water resources

The Minister of Water Affairs and Forestry must in terms of section 12(1) of the National Water Act of 1998 prescribe by regulation a system to classify the water resources. The system may among others-

- provide guidelines and procedures to determine the different classes of water resources; and
- in respect of each class of water resource, set out water uses for in-stream or land-based activities, which activities must be regulated or prohibited in order to protect the water resource.

The Minister must, in accordance with the classification system, in terms of section 13 determine the class and resource quality objectives of any significant water resources. The purpose of the resource quality objectives is to establish clear goals relating to the quality of each water resource.

When a power is exercised under the National Water Act of 1998, section 15 requires that effect must be given to the class of the water resource and the resource quality objectives. Giving effect to a class is not applicable when powers are exercised in terms of legislation other than the National Water Act of 1998.

5.4 PROVISION OF WASTE MANAGEMENT SERVICES

5.4.1 The developmental framework

The Local Government: Municipal Systems Act of 2000 assists with the following:

- giving effect to South Africa's vision of "developmental local government" as envisaged in the Local Government White Paper;
- elaborating the core principles, mechanisms and processes that are necessary to enable municipalities to move progressively towards the social and economic upliftment of communities, and ensure universal access to quality services that are affordable to all;
- establishing a simple and enabling framework for the core processes of planning, performance management, resource mobilisation and organisational change which underpin the notion of developmental local government. By linking these processes into a single, integrated cycle at local level, the complex, fragmented, top-down, over-regulated approaches of the past will probably be undone;
- creating a bottom-up process of driving development, improving performance and facilitating change. Municipalities are obliged to "put people first" in the way they run their administrations, and to constantly seek the best way of delivering services to all residents. Municipalities will be empowered to use a wide variety of mechanisms to restructure and deliver services.

The Local Government: Municipal Systems Act of 2000 seeks to establish the basic principles and mechanisms to give effect to our collective vision of "developmental government". Its focus is therefore primarily on the internal systems and administration of the municipality.

This system provides an important framework for integrating the more detailed sectoral planning requirements of various national Departments. By linking their sectoral planning requirements into the municipality's Integrated development Plan (IDP) and budgeting processes, line Departments will achieve better integration of initiatives and improved compliance. They will also benefit from the alignment of IDP sectoral strategies with municipal budgets and human resource deployment in terms of legal obligations.

According to the Local Government: Municipal Systems Act of 2000, municipal planning must be developmentally oriented to ensure that a municipality:

- pursues the objectives of local government;
- gives effect to their developmental duties; and
- assists in the progressive realisation of the fundamental rights (access to housing and water) contained in the Bill of Rights.

A municipal council must give priority to the basic needs of the community, promote the social and economic development of the community, and ensure that all residents and communities in the municipality have access to at least the minimum level of basic municipal services.

5.4.2 Single inclusive plan for development

Each municipal council must in terms of section 25 of the Local Government: Municipal Systems Act of 2000, within a prescribed time, adopt a single, inclusive plan for the development of the municipality (to be known as its IDP) which-

- links, integrates and co-ordinates plans, schemes and proposals for the development of the municipality;
- aligns the resources and capacity of the municipality for the implementation of the plan;
- forms the policy framework and general basis on which annual budgets must be based; and
- is compatible with national and provincial development planning requirements binding on the municipality in terms of legislation.

A municipal council must annually review and update its IDP.

Each municipal council must adopt a process set out in writing to guide the planning, drafting, adoption and review of its IDP.

A municipal council must give effect to its IDP and conduct its affairs in such a manner that it is consistent with its IDP.

5.4.3 Water services development plans

The Water Services Act of 1997 provides for a comprehensive legislative framework for the provision of water supply and sanitation services. The Act recognises that these services must be undertaken in a manner consistent with the broader goals of water resource management. The Act is infused with the spirit of co-operative governance with the emphasis on capacity building at all levels of government. It includes monitoring and intervention provisions and the role of the Department of Water Affairs and Forestry in the event of non-performance by provincial and local government.

Municipalities (referred to as water services authorities in the Act) must in terms of sections 12 to 15 prepare water services development plans (WSDPs) for their respective areas of jurisdiction. This should be done as part of the process of preparing the IDP in terms of the Local Government: Municipal Systems Act of 2000.

Water services include in terms of section 1 water supply services and sanitation services. A water supply service is the abstraction, conveyance, treatment and distribution of potable water and water intended to be converted to potable water. A sanitation service on the other hand is the collection, removal, purification and disposal of human excreta and domestic waste-water.

No substantial deviation from a WSDP is valid. If a deviation is required, then a new plan must be developed. New WSDPs must be prepared at least at intervals determined by the Minister of Water Affairs and Forestry.

5.4.4 Standards to be met when providing water supply services

The Minister of Water Affairs and Forestry may in terms of section 9(1) of the Water Services Act of 1997 prescribe compulsory national standards, which may differentiate between different users of water services and geographic areas, relating to among others-

- the provision of water services;
- the quality of water discharged into any water-services 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; and
- the construction and functioning of water services works and consumer installations.

Municipalities must comply with the standards prescribed.

5.5 MEASURES TO CONTROL WATER QUALITY EFFECTS FROM SETTLEMENTS

The National Water Act of 1998 provides various measures to control water quality effects from the different sectors. Some of them are described here.

5.5.1 Regulations

The Minister may in terms of section 26(1)(a) and (g) make regulations regarding among others the following-

- limiting or restricting the purpose, manner or extent of water use; and
- regulating or prohibiting any activity in order to protect a water resource.

5.5.2 Controlled activities

In terms of section 21(e), a water use includes engaging in a controlled activity. A controlled activity is in terms of section 38(1) an activity which the Minister has declared to be a controlled activity, if the Minister is satisfied that the activity is likely to impact detrimentally on a water resource.

A controlled activity may in terms of section 22(1) only be carried out if authorised, which could be by way of a licence or general authorisation. Conditions may in terms of section 29(1) be attached to the authorisation:

- relating to the protection of the water resources;
- specifying the waste treatment, pollution control equipment to be installed, maintained and operated; and
- the management practices to be followed to prevent the pollution of any water resource.

5.5.3 Financial assistance by the Minister

The Minister may, subject to a regulation made under section 62, in terms of section 61 give financial assistance to any person for the purposes of this Act, in the form of grants, loans or subsidies, which may be made subject to such conditions as the Minister may determine.

5.5.4 Prevention and remedying the effects of pollution

The owner of land, the person in control of land or the person who occupies or uses land on which an activity or process is or was performed or undertaken or a situation exists which causes, caused or is likely to cause pollution of a water resource must in terms of section 19(1) take all reasonable measures to prevent the pollution from occurring, continuing or recurring.

The catchment management agency concerned may in terms of section 19(3) direct the person who fails to take such measures, to take the necessary measures. If a person fails to comply, then the agency concerned may take the steps itself and recover the cost thereof from the person.