

Environmental & Sustainability Studies (ESS) 122

Lecture 6 Water Law and the Environment

Prof TP van Reenen, Faculty of Law

Dr Rich Knight,
Mr S Kasker



UNIVERSITY *of the*
WESTERN CAPE

A place of quality, a place to grow, from hope to action through knowledge

INTRODUCTION

- According to the National Water Resource Strategy:

- RSA is located in a predominantly semi-arid part of the world
- RSA has an average rainfall of 450 mm pa compared to the world average of 860 mm pa
- As a result RSA's water resources are scarce and limited.

Introduction 2

- Based on the aforesaid, SA relies primarily on surface water resources for urban, industrial and irrigation requirements (Dams)
- In 2004 the NWRS indicated that of the 19 Water Management Areas in SA, 10 were in deficit and
- By 2006 only 6 of WMAs were in surplus
- For this reason, the Department of Water Affairs released the Integrated Water Resource Planning for SA
- Aim: to address the water resource situation
- Purpose of report: Where water management areas are not currently facing water shortage most will be facing shortage in the absence of appropriate intervention

1 Brief History

- When the Dutch Ruled (1652 -1910)
- The common changed (decisions taken by the Supreme Court)
- From a position where the State was *dominus fluminis* (State had the right to allocate water)
- To one where riparian rights* were the dominant standard (a system for allocating water among those who possess land along its path)

1 (a) The Water Act 54 OF 1956

- The Water Act was enacted during apartheid, and did not replace the riparian rights system.
- This led to the majority of South African's (non-white people) being restricted in their access of water.
- The Act made a distinction between **private** and **public** water

Water Act Continues 1...

- **Private water:** ‘all water which rises and or falls naturally on any land or naturally drains or is led onto one or more pieces of land which are the subject of separate original grants, but is not capable of common use for irrigation purposes’.
- Thus, the owner on whose land private water was found had exclusive use and enjoyment of such water, provided, he does not pollute it.
- Also, the sale or disposal of private water was prohibited, provided, that the Ministry of Water Affairs grants a permit to do so.

Water Act Continues 2...

- **Public water:** ‘any water flowing or found in or derived from the bed of a public stream, whether visible or not’.
- **Public stream:** ‘a natural stream of water which flows in a known and defined channel, whether or not such a channel is dry during any period of the year and whether or not its conformation has been changed by artificial means, if the water therein is capable of common use for the irrigation on two or more pieces of land riparian thereto which are the subject of separate original grants or on one such piece of land and also on [state] land which is riparian to such stream, provided that a stream which fulfils the foregoing conditions in part only of its course shall be deemed to be a public stream as regards that part only’. *

Water Act Continues 3...

- The right to use of public water was divided into three categories:
 1. Agricultural purposes
 2. Industrial purposes
 3. Urban purposes

Water Act Continues 4...

- Only the riparian owner had the right to use the water resource with respect to agricultural and industrial purposes
- The riparian owner had the right to use all surplus water for the benefit of agricultural and industrial purposes
- The use of public water for industrial purposes was subject to a permit.
- However, public water could be used for any of the defined categories, provided that such usage was beneficial and did not amount to wastage.

Water Act Continues 5...

- Ground water: which is found underground could either be public or private.

- Until recent:
 1. Water law has been developed inappropriately
 2. Access to water rights has been to the detriment of the majority of the population
- Since SA 1994 however water law was reformed to address:
 1. Equitable access of water
 2. Gov. to exercise management control over water resources

<NATIONAL WATER ACT 36 OF 1998>

1 (b) The transition from the Water Act to a new water law

- Constitution

- S24: Environment.-Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and

- (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures...

Transition continues 1...

- The right to water is provided for in s27
- (1) Everyone has the right to have access to -
 - (a)
 - (b) sufficient food and water...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Transition continues 2...

- Further, water falls within the exclusive national legislative competence
- This reflects the national importance of water (the state is the custodian of the nation's water)
- Control body for Water: national Dept of Water Affairs and Forestry

Transition continues 2...

1. Govn. must be the custodian of water resources in order to effectively manage a critical strategic resource
2. All South Africans must have equal access to water
3. International dimensions of SA's water resources and the rights of neighbouring countries are recognised.

2 The National Water Act 36 of 1998

- s2: purpose of the Act is to ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account, which include the following factors:
 - (a) meeting the basic human needs of present and future generations
 - (b) Promoting equitable access to water
 - (c) Redressing the results of past racial and gender discrimination

NWA Continues... 1

- Act provides that national government is the public trustee of the nation's water resources
- Requires it 'to 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'.
- The Ministry of Water Affairs and Forestry is responsible to 'ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values'.

NWA Continues... 3

- The Act provides that a person wishing to use water must be licenced to do so, except in three situations-
- First exception: uses of water that are likely to have sufficiently insignificant impacts on water resources.
- Second exception: applies if the water use is a continuation of an existing lawful use.
- Third exception: water use permissible in terms of a general authorisation

NWA Continues... 4

VARIOUS INSTITUTIONS

- (a) Catchment Management Agencies: to decentralise management from the national Department to various management areas throughout the country.
- (b) Water User Associations: not designed to carry out water management functions but to 'operate at a restricted localised level, and are in effect co-operative associations of individuals water uses who wish to undertake water-related activities for their mutual benefit'.
- (c) Advisory Committees: performs primary functions

NWA Continues... 5

(d) Water Tribunal: handles dispute resolutions
: Appeals are heard by the HC

ENFORCEMENT

- The Act criminalises several activities including failure to comply with the conditions attached to permitted water uses and water pollution. Maximum penalty is a fine OR five years imprisonment.
- Compensation is offered by a court to any person who suffered loss resulting from non-compliance of the Act.

Water Pollution

- s115- to pollute as an offence
- s19- provides for the prevention and remediation of the effects of water pollution by imposing a duty on landowners or persons in control of land on which water pollution threats arise to take all reasonable measures to prevent any such pollution from occurring, continuing and reoccurring.

3. The Water Services Act 108 of 1997

- The Water Services Act works in tandem with the National Water Act
- Main objectives: (a) to provide for the right of access to basic water supply and the right to basic sanitation
- (b) to provide for the setting of national standards and norms in respect of water services
- Various institutions to give effect to these objectives: water services authorities, water services providers, water services intermediaries, water boards and water service committees (hence, legislative measures taken)

The Water Services Act Continues...1

- s3- everyone has the right to access to basic water supply and basic sanitation.
- This gives effect to the right contained in 27 of the Constitution
- Every water services institution is required to take reasonable measures to realise these rights.

4. The National Water Resource Strategy (NWRS)

- Revolves around three fundamental objectives of managing SA's water resources:
- 1 – To achieve equitable access to water
- 2 – To achieve sustainable use of water
- 3 – To achieve efficient and effective water use for optimum social and economic benefit

CONCLUSION

- As seen, the NWA is a comprehensive and ambitious instrument aimed:
 - at achieving effective, sustainable management of SA's water resources and
 - To ensure not only that all people have sufficient access to a scarce resource but also that there is enough water available to meet environmental needs.
- The Act relies on a considerable administrative endeavour which is not capable of being nor intended to be implemented immediately
- Thus, we will only be able to appreciate and reap the full benefits of the new legislation several years into the future.