DEVELOPING A STRATEGY FOR EFFICIENT ENVIRONMENTAL AUTHORISATION OF ACTIVITIES AFFECTING WETLANDS IN SOUTH AFRICA: TOWARDS A WISE-USE APPROACH[1]

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SUMMARY

South Africa is a party to the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (also referred to as the Ramsar Convention). Article 3(1) of the Ramsar Convention makes provision for the wise use of wetlands, which is defined as the "maintenance of the ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development". The Conference of the Parties has agreed on inherent weaknesses that could lead to the hampering of wise use. These weaknesses include, but are not limited to, authorities working in isolation; and the lack of communication between public and private sectors or technical personnel (environmental impact assessment specialists).Within the enabling provisions of South Africa's EIA regulations, reference is made to "water source", "water resource", "wetland" and "ecosystem". All these terms are read to include a wetland. However, whereas the terms "water source", "water resource" and "wetland" are defined in the National Water Act 36 of 1998 (NWA), an "ecosystem" is defined in the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), and "water source" is defined in the Conservation of Agricultural Resources Act 43 of 1983 (CARA). Furthermore, the administration of the NWA is with the Department of Water and Sanitation, while NEMBA is with the Department of Environment, Forestry and Fisheries, and CARA is with the Department of Agriculture, Land Reform and Rural Development. This multiplicity, combined with the application of the various specific environmental management acts (SEMAs), complicates the manner in which an EIA application is considered. This is so in that the national environmental framework casts the net wide in identifying the competent authority, but also in its effect on wise use decision making on activities pertaining to wetlands. In light of the aforementioned, this article aims to address the shortfalls and make recommendations that promote wise use.

[1] Adapted from Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* (Unpublished thesis, CPUT) 2018.

1 BACKGROUND

The Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971 (also referred to as the Ramsar Convention) was the first international agreement promulgated to address the conservation of wetlands. The Ramsar Convention aims to make provision for a framework of international cooperation for the wise use and conservation of wetlands and its related resources. Parties to the Ramsar Convention desired to "stem the progressive encroachment on and the loss of wetlands now and in the future" and to "combin[e] far-sighted national policies with coordinated international action".[2] The Ramsar Convention was entered into by South Africa on 21 December 1975 without any reservations deposited to the Secretary-General.[3] Thus, South Africa is bound to the provisions of the Ramsar Convention.

Central to promoting wetlands protection and conservation is the enabling provision, article 3(1) of the Ramsar Convention, which makes provision for the wise use of wetlands – interpreted to mean the sustainable use of the resource.[4] Sustainable use, within this context, is subject to each party's interpretation of sustainable development. Promoting wise use in the light of environmental impact assessment legislation, the Ramsar administration advised that "[g]iven the ecological sensitivity of wetlands, Parties should ensure wherever possible that under that relevant legislation: Environmental considerations concerning wetlands are integrated into planning decisions in a clear and transparent manner."[5]

Within the enabling provisions of South Africa's Environmental Impact Assessment (EIA) regulations, reference is made to a "water source", "water resource", "wetland" and "ecosystem".[6] All these terms are read to include a wetland. It is equally important to indicate that the word "environment" is read to include a wetland,[7] and this author has previously recommended a legislative amendment for the inclusion of the words "wetland environment"

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2 Preamble of the Ramsar Convention.

3 Ramsar Convention Secretariat "South Africa" (undated) https://www.ramsar.org/wetland/south-africa (accessed 2020-03-01).

4 Birnie and Boyle *International Law and the Environment* (2009) 674; De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 47; and Sands *Principles of International Environmental Law* (2003) 604.

5 Ramsar Convention Secretariat "Laws and Institutions: Reviewing Laws and Institutions to Promote the Conservation and Wise Use of Wetlands" (2010) https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-03.pdf (accessed 2020-03-01) 39.

6 GN R327 in *GG* 40772 of 2017-04-07; GN R325 in *GG* 40772 of 2017-04-07; GN R324 in *GG* 40772 of 2017-04-07.

7 In terms of s 1 of the National Environmental Management Act 107 of 1998 (NEMA), the word "environment" means "the surroundings within which humans exist and that are made up of–

(i) the land, water and atmosphere of the earth;

(ii) microorganisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing".

specifically.[8] Thus, on the face of it, the EIA regulations regulate this domain by way of reference to the aforementioned terms. The terms "water source", "water resource" and "wetland" are defined in the National Water Act (NWA);[9] an "ecosystem" is defined in the National Environmental Management: Biodiversity Act (NEMBA);[10] and "water source" is defined in the Conservation of Agricultural Resources Act (CARA).[11] Wetlands falling within protected areas (National Environmental Management: Protected Areas Act 57 of 2003) and those forming part of heritage sites (World Heritage Convention Act 49 of 1999) are excluded from this article due to the nature of the protection afforded here. The administration of the NWA is by the Department of Water and Sanitation (DWS); that of NEMBA by the Department of Environment, Forestry and Fisheries (DEFF); and CARA is administered by the Department of Agriculture, Land Reform and Rural Development (DALRRD). Within each department is a competent authority, charged with the power of granting or refusing environmental authorisations. This multiplicity, combined with the application of the various SEMAs (NWA, NEMBA and CARA), make it troublesome to identify the competent authority for granting or refusing environmental authorisations for wetlands, but more so for the way in which decision-making is made. Therefore, before development or any activity in and around a wetland may commence, the competent authority is required, within the specified time, either to grant or refuse the activities, along with reasons.

The World Wildlife Fund (WWF) submitted a list of activities and events that constitute causes for the disappearance of wetlands. These include, but are not limited to: the conversion of wetlands for commercial development, drainage schemes, extraction of minerals and peat, overfishing, tourism, siltation, pesticide discharges from intensive agriculture, toxic pollutants from industrial waste, and the construction of dams and dikes.[12] These activities may only occur subject to a competent authority granting environmental authorisation to an applicant.[13]

However, which department is the decision-making body on granting or refusing environmental authorisation for EIA applications affecting wetlands is unclear, as is the manner in which they are considered.

2 VALUE OF WETLANDS FOR PROMOTING FUNDAMENTAL HUMAN RIGHTS

Wetlands provide an array of important functions to both the natural environment and humans. Falkenmark and Rockström have stated that wetlands function as the "kidneys of a landscape"; they improve water

8 Lemine *South Africa's Response in Fulfilling Her Obligations* 4.

9 S 1 of 36 of 1998.

10 S 1 of 10 of 2004.

11 S 1 of 43 of 1983.

12 World Wildlife Fund "Half of the World's Wetlands Have Disappeared Since 1900. Development and Conversion Continue to Pose Major Threats to Wetlands, Despite their Value and Importance" 2 February 2018 https://wwf.panda.org/?322330/Half-of-the-worlds-wetlands-have-disappeared-since-1900 (accessed 2019-11-12) 1.

13 S 24 of NEMA.

quality through the absorption and sedimentation of certain pollutants and nutrients.[14] They function as a natural filter by trapping nutrients, sediments, and bacteria. By doing so, they improve water quality.[15] The nutrients thus trapped by a wetland allow the growth of various plants, which in turn attract various creatures by providing shelter and food.[16] Contrary to the belief that wetlands are water-producing resources, they are in fact water-consuming, as they facilitate groundwater recharge during flood season.[17] This function is crucial in areas surrounded by spaces used for domestic, agricultural and other purposes.[18] In the context of climate-change complications, wetlands also provide a vital service by acting as a carbon sink, contributing greatly towards reducing carbon emissions.[19]

Wetlands fulfil human needs by providing a source of grazing and reeds for the construction of huts.[20] If there is a failure to recognise these valuable functions of wetlands, constitutionally recognised socio-economic rights entrenched in sections 26 (housing) and 27 (water and food security) of the Constitution of the Republic of South Africa, 1996 (the Constitution) will arguably be diminished. Both these sections oblige the State to "take reasonable legislative and other measures within its available resources, to achieve the progressive realisation" of these rights.[21] The interpretation of "available resource" cannot be limited to financial measures. It is submitted that wetlands qualify; their value should be viewed through their availability as an "available resource" that must be protected for the benefits they provide for humans and the natural environment. Stated plainly, wetlands are a resource that could, if not protected, be damaged irreversibly. If the State fails to protect and conserve the resource while it is available, this will put further pressure on the State to engineer for the natural services provided by wetlands. The environmental-law clause found in section 24 of the Constitution guarantees that everyone has a right to an environment that is not harmful to their health and well-being;[22] and to have it protected through reasonable legislative measures.[23] These legislative measures must be well supported by policies and programmes implemented by the executive.[24] Put differently, strategies to inform wetland legislative and policy measures are required.

The primary role player in wetland protection and conservation, from a legislative perspective, is the State – and more narrowly, for purposes of this research, the competent authority.

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14 Falkenmark and Rockstrὂm *Balancing Water for Human and Nature* (2005) 15

15 Wepener, Malherbe and Smit "Water Resources in South Africa" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 363.

16 Falkenmark and Rockstrὂm *Balancing Water for Human and Nature* 14.

17 Falkenmark and Rockstrὂm *Balancing Water for Human and Nature* 16.

18 Turpie "Environmental Management Resources Economics" in Strydom and King (eds) *Environmental Management in South Africa* (2009) 45.

19 *Ibid*.

20 Day "Rivers and Wetlands" in Strydom and King (eds) *Environmental Management in South Africa* (2009) 842–843.

21 Ss 26(2) and 27(2) of the Constitution of the Republic of South Africa, 1996.

22 S 24(*a*).

23 S 24(*b*).

24 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) 42.

3 COMPETENT AUTHORITY

In terms of the national environmental framework Act, NEMA, a competent authority,

> "in respect of a listed activity or specified activity, means the organ of state charged by this Act with evaluating the environmental impact of that activity and, where appropriate, with granting or refusing an environmental authorisation in respect of that activity."[25]

Central to the definition is an "organ of state" which, according to the Constitution, is "any department of state or administration; or functionary or institution".[26] At this point of the investigation, the scope for identifying the competent authority has not been sufficiently narrowed as the competent authority could be referring to any of the environmental-matter ministries by way of the "organ of state", thus casting the net wide. In the case of *Van Huyssteen NO v Minister of Environmental Affairs and Tourism*,[27] albeit that the main issue was about access to information as it relates to rezoning, the court had to decide for the first time on development in terms of the environmental impact in the context of the enabling provisions of the Ramsar Convention and Environmental Conservation Act 73 of 1989. The court confirmed the obligation of the State, in this case, to protect the Langebaan Lagoon, "which is part of a sensitive ecosystem of international importance."[28] The court therefore temporarily declined the application for development of the steel mill pending, amongst other things, the board's investigation of the environmental impact on the said wetland[29] The court further considered whether the harm is irreparable and whether there will be any alternative remedy.[30] However, "irreparable harm" was not applied to or in reference to the wetland.[31] In this instance, the then-Department of Environmental Affairs and Tourism was arguably identified as the competent authority. Worth mentioning here is that this case was decided when environmental legislation, including NEMA, was either in its infancy or non-existent.

Section 24C of NEMA is titled "Procedure for Identifying Competent Authority". NEMA unequivocally states that the Minister (defined as "the Minister responsible for environmental matters"), or the MEC with the concurrence of the Minister, must identify the competent authority who will be responsible for granting environmental authorisations in respect of the said activities.[32] Section 24C(2) in peremptory terms and as a general rule indicates that the Minister is the competent authority for the duty set out in section 24C(1), especially with matters relating to international environmental commitments or relations, or where the footprint traverses international boundaries or falls within the boundaries of more than one

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25 S 1 of the National Environmental Management Act 107 of 1998.
26 S 239 of the Constitution.
27 1995 (9) BCLR 1191 (C) 1191 C and D.
28 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1198E.
29 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1206E
30 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1217D.
31 *Van Huyssteen NO v Minister of Environmental Affairs and Tourism supra* 1217E.
32 S 24C(1) of NEMA.

province.[33] The exception to the rule is created by section 24C(2)(*d*), where it is indicated that the competent authority may be: (i) a national department; (ii) a provincial department responsible for environmental affairs or organ of state; or a (iii) statutory body. Furthermore, section 42(1) of NEMA empowers the Minister to delegate his or her power or duty in terms of NEMA or any specific environmental management Act. This further complicates the investigation as the competent authority of DEFF, for example, could be the national office or provincial office of the said department.

In *City of Cape Town v Really Useful Investments 219 (Pty) Ltd*,[34] the court quoted the principle enunciated in the *Maccsand*[35] case, which appears to address part of the central issue of this research by stating:

> "Where [environmental] authorization for a specified activity is required under any number of laws or by-laws, the developer must obtain authorization under each piece of legislation, albeit the repository of power is the same entity under the various legal instruments concerned."[36]

The abovementioned position is arguably modelled on section 24(4)(*a*)(i) of NEMA, which requires the "coordination and cooperation between organs of state in the consideration of assessments where an activity falls under the jurisdiction of more than one organ of state". This article highlights that the environmental assessment practitioner must in reality submit an application to each department concerned. The consequence is that each department, within its set timeframe, provides its individual environmental authorisation. This approach negates the achievement of integrated decision making. Being cognisant of the nature and complexity of the administration of wetlands, it is unclear where the competency of one competent authority commences and another ends. This is counterproductive for implementing clarity and transparency in the provision of environmental authorisation for activities pertaining to wetlands.

4 ENVIRONMENTAL AUTHORISATION

Section 24(1) of NEMA makes provision for the acquisition of environmental authorisation where:

> "potential consequences for or impacts on the environment of listed activities or specified activities must be considered, investigated, assessed and reported on to the competent authority or the Minister … except in respect of those activities that may commence without having to obtain an environmental authorisation."

The tool for which environmental authorisation is required is referred to as an EIA. An EIA is described as "a systematic process of identifying, assessing and reporting environmental impacts associated with an activity is

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33 S 24C(2)(*c*)of NEMA.

34 (21106/2014) [2018] ZAWCHC 6; [2018] 2 All SA 65 (WCC).

35 *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

36 *Macssand supra* par 64.

provided and includes a basic assessment and scoping and environmental impact assessment".[37]

In relation to the specified activities, section 24H of NEMA empowers a registered environmental assessment practitioner (EAP) to be appointed by the applicant (developer) to manage the application process.[38] NEMA defines an EAP as "[t]he individual responsible for the planning, management, coordination or review of environmental impact assessments" The EAP subsequently submits the application to the correct competent authority.[39] Although this competent authority, at this point, according to the *Maccsand* case quoted in *City of Cape Town v Really Useful Investment* case and section 24(4)(*a*)(i), is every department concerned. The consequence is that this approach promotes silo-working networks, which goes against the grain of wise use, as discussed elsewhere in greater detail.

To give effect to section 24 of NEMA, three EIA regulations were passed to identify or list specific activities for which environmental authorisation is required; and to identify their competent authorities. Briefly, activities in Listing Notice 1 are smaller scale activities, the impacts of which are reasonably known and can be easily managed.[40] For activities in Listing Notice 2, scoping and EIA is required; here activities are considered to be higher risk activities that are likely to have significant impacts on the environment that cannot be easily predicted.[41] Listing Notice 3 relates to activities requiring basic assessment and which are undertaken in specific geographical areas.[42] As to which listing must be consulted, an "ecosystem" is only marked in EIA Listing Notice 3.[43] However, a "wetland" and a "watercourse" are marked in EIA Listing Notices 1 and 2.[44] There are no guidelines categorising these "distinct" systems. This creates legal uncertainty, and where the law is not certain, arguably, implementation becomes problematic.

The EIA listings identify a "wetland", "watercourse" (both defined in the NWA) and "ecosystem" (defined in NEMBA), but not a "water source" (defined in CARA), although the latter is read in CARA to include a wetland. Again, the administration of these water bodies, albeit essentially the same thing, are managed by different environmental-matter departments and different environmental management Acts. This complicates and endangers the protection and conservation of wetlands. The hypothesis is that where legislation is not aligned, an opportunity emerges for disintegration in wetland (environmental) management, which impedes the wise use of wetlands.

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37 GN R326 in *GG* 40772 of 2017-04-07.

38 Oosthuizen *et al* "National Environmental Management Act 107 of 1998 (NEMA)" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 168.

39 *Ibid*.

40 GN R327 in *GG* 40772 of 2017-04-07.

41 GN R325 in *GG* 40772 of 2017-04-07.

42 GN R324 in *GG* 40772 of 2017-04-07.

43 *Ibid*.

44 GN R327 in *GG* 40772 of 2017-04-07; GN R325 in *GG* 40772 of 2017-04-07.

5 WISE USE OF WETLANDS AND SUSTAINABLE DEVELOPMENT

The wise use of wetlands is defined as the "maintenance of the ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development".[45] The "ecosystem approach" is however defined as a "strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".[46] NEMBA defines an ecosystem to mean "a dynamic complex of animal, plant and micro-organism communities and their non-living environment interacting as a functional unit".[47] A wetland falls within the concept of an ecosystem.

An ecosystem approach could be considered through a particular lens, integrating conservation and sustainable use through management[48] – for example, an administrator within an environmental-matter department must grant environmental authorisation.

The administrator is obliged to promote "wise use" within the context of sustainable development. The concept of sustainable development can be traced back to the Stockholm Conference of 1972. Section 1 of NEMA provides that sustainable development means "the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations". Sands, without providing a definition for sustainable development, identifies elements that comprise the legal concept:

- "The need to take into consideration the needs of present and future generations;
- The acceptance, on environmental protection grounds, of limits placed upon the use and exploitation of natural resources;
- The need to integrate all aspects of the environment and development; and
- The need to interpret and apply rules of international law in an integrated and systematic manner."[49]

It has been submitted that the wise use of specific wetlands is an integral part of sustainable development.[50] Considering the above, it is evident that wise use within the sustainable development framework requires the promotion of integrated environmental management aspects for the benefit of present and future generations, and that a "silo approach" to addressing environmental issues cannot exist within this realm.

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45 Birnie and Boyle *International Law & the Environment* 674.

46 Paterson "Biological Diversity" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 524.

47 S 1 of NEMBA.

48 Paterson in Strydom and King (eds) *Environmental Management in South Africa* 524.

49 Sands *Principles of International Environmental Law* (2003) 253.

50 De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 49.

6 INTEGRATED ENVIRONMENTAL MANAGEMENT

Chapter 5 of NEMA is titled "Integrated Environmental Management" (IEM) and houses the entire section 24 and related provisions of environmental authorisations and EIA. Furthermore, NEMA's stated purpose is

> "to provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by the organ of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith."

The embodiment of cooperative environmental governance is articulated by Du Plessis who avers that "South Africa's policy and legislation have served to strengthen cooperative governance, especially with regard to environmental matters."[51]

This research shines a light on section 24L, which makes provision for the "Alignment of environmental authorisation". Section 24(L)(1) provides:

> "[a] competent authority empowered…to issue an environmental authorisation and any other authority empowered under a specific environmental management Act may agree to issue an integrated environmental authorisation".

This provision promotes integration between departments for the issuing of environmental authorisations, which appears to address the administrative issue with which this article is concerned. The shortfall in section 24(L)(1) is its failure to create an obligation to issue an integrated environmental authorisation (IEA); this is evident by the inclusion of the word "may". Furthermore, NEMA fails to define IEA or provide guidelines to assist departments in engaging with IEAs. Should the departments choose to issue an IEA, section 24(L)(2)(*a*) prescribes that cognisance must be given to enabling provisions of NEMA, other law or SEMA. To implement the purpose of NEMA would arguably make an IEA compulsory. This would fulfil the Ramsar administration's recommendation to integrate decisions in a clear and transparent manner, which also has the effect of promoting cooperative environmental governance, as envisaged in NEMA's preamble. "Other law" could be read to include the Constitution.

Chapter 3 of the Constitution makes provision for the broad principles of cooperative government in terms of section 41(1)(*h*), which provides:

> "All spheres of government and all organs of state within each sphere must–
> (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;
> (v) adhering to agreed procedures."

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[51] Du Plessis "Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" 2008 23 *SAPR/PL* 87 87.

Du Plessis submits that despite this constitutional and legislative imperative, turf wars, unwillingness of officials, and fragmentation sometimes frustrate this ideal of cooperative environmental governance.[52] Cooperative environmental governance refers to the various spheres of government (national, provincial and local) mandated to perform functions relating to the environment.[53]

Section 2 of NEMA provides for a set of sustainable development principles. Section 2(4)(*r*) describes a wetland as a "sensitive, vulnerable, highly dynamic and stressed ecosystem". It continues by providing that specific attention is required in the management and planning procedures of these systems. To provide clearly defined and/or identified attention to wetlands as required could arguably be interpreted to mean that a "coherent and consolidated" approach is required, and certainly not a framework that creates legal uncertainty or vagueness. The Ramsar administration requires the implementation of EIA into planning-law mechanisms.[54] Planning-law mechanisms are extensive within our current framework; however, the focus here is on EIAs, as provided for in NEMA. The inclusion of EIAs as a planning tool within the scope of wetland protection is vital. It is submitted that EIAs control development through environmental planning, the aim of which is sustainable development.[55]

In the current framework, without legal intervention, one provincial environmental-matter department might refuse a development application while another provincial environmental-matter office might grant it, thus arguably leading to friction between government departments. Furthermore, the non-prescriptive nature of an IEA, in terms of section 24(L)(1), is a missed opportunity for promoting the objectives of cooperative environmental governance.

7 ANALYSIS

Permissible activities impacting wetlands are managed by a competent authority by way of environmental authorisation, as the activities may not commence without such authorisation. The power of permitting and managing the activities and, in the bigger scheme of things, protecting wetlands, sits with the competent authority.

The use of the words "ecosystem", "water source", "water resource" and "wetland" within legislation and the EIA regulations themselves creates uncertainty, as they are all read to protect one resource, for example. Irrespective of its expression, the series of benefits provided by this resource are vital to the natural environment and humankind.

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52 Du Plessis 2008 *SAPR/PL* 87.

53 Nel and Alberts "Environmental Management and Environmental Law in South Africa: An Introduction" in Strydom and King (eds) *Environmental Management in South Africa* (2018) 44.

54 Ramsar Convention Secretariat https://www.ramsar.org/sites/default/files/documents/pdf/lib/hbk4-03.pdf 36–37.

55 So "Environmental Law of Korea in Nicholas, Robinson, Burleson and Lin-Heng Lye (eds) *Comparative Environmental Law and Regulation* (2019) §§34:16.

This resource is not regulated by one piece of legislation; or managed by one environmental-matter department; but, in each case, by three. Practically, this multiplicity could result in lack of accountability, conflict, loss of resource, poor coordination and governance issues, to mention a few. These problems hinder adherence to the constitutional principle of cooperative government, and lead to the abrogation of the concept of IEM under which environmental authorisation falls. Similarly, IEM does not suggest that only one department should be the competent authority. On the contrary, it is arguably indicative, by way of linking the constitutional provision of cooperative government and IEM, that environmental authorisation should be pursued as a joint venture. This idea is supported by section 24(2)(*a*)(i), and the more so by section 2(4)(*l*) of NEMA, which provides that "there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment". This section is coined a sustainable development principle. The hypothesis is therefore that coordination of legislation, policies or regulations would bolster the management of wetlands by the different departments.

Note again that "environment" is read to include wetlands.[56] Thus, the concept of cooperative government, cooperative environmental governance, the purpose of NEMA and the legislative framework does not suggest that there should be only one competent authority. Rather, innovative mechanisms should be explored in promoting IEM for wetland authorisations, from the commencement stage (application) to the final decision (outcome).

South African planning law must be lauded for incorporating wetland considerations within the body of planning law (EIA), which is a concern raised by the Ramsar administration. However, inclusion does not necessarily constitute compliance if the said provisions are inconsistent with the purpose for which they were created. It is clear that for EIAs pertaining to wetlands, there are some inconsistencies and uncoordinated efforts that lead to decisions being problematic. The adequacy of this tool (EIAs) in its current form abrogates spirit of Ramsar which instructs contracting parties to coordinate planning mechanisms that bolster the sustainable use of wetlands.[57] Key in the submission is the word "coordinate.

8 RECOMMENDATION

The wise-use approach calls for a strategy of integration of matter within the context of sustainable development. In application, such an approach encompasses integration of the management of land, water and living resources on the one hand, balanced with social, environmental and economic consideration through planning, implementation and decision-making on the other hand. This calls for a multifaceted strategy for addressing the process of considering applications for activities for authorisation. The ecosystem approach is represented in this that the DALRRD's administers the issue of land, the DWS administers water, and

[56] Lemine *South Africa's Response in Fulfilling Her Obligations* 4.

[57] Art 5.

DEFF, living resources. However, failure to integrate processes and decision-making could have devasting effects on the future of the environment and South Africa.

8 1 Strategies

8 1 1 Environmental management

The ecosystem approach is representative of the various aspects that constitute a wetland as they relate to the various environmental departments' mandates in line with those individual aspects (land, water and living resources). Supporting the 2030 Agenda for Sustainable Development (UNSDG), to which South Africa subscribes and reports, the Ramsar administration calls for "increased integration and synergies across multilateral agendas".[58] Note that the legislation pertaining to wetlands as administered by various environmental departments is not the primary concern. This article raises the concern that implementation is stifled by legal uncertainty and vagueness created by our current legal framework, with specific reference to the lack of integration or wise use. Yet, environmental authorisation for wetlands is only one aspect raised. Administrative bodies must be pulled together by plausible strategies to overcome many other uncertainties that perpetuate the failure to promote wise use. Where the law is uncertain, space for abuse is created.

8 1 2 The Constitution

The Constitution's promotion of environmental conservation and protection does not in any way prevent or abrogate policy development. Instead, the promotion of environmental (wetland) conservation and protection places a positive obligation on the State to enact legislative measures that will bolster sustainable development.

8 1 3 NEMA and the EIA regulations

To implement IEM and wise use properly, section 24(L)(1) must be amended to read that IEA is mandatory with activities triggering different departments. Such an amendment would arguably promote departmental integration for other environmental media. Furthermore, the lack of a clear definition of IEA and guidelines for implementing an IEA should be addressed. Environmental authorisation for activities pertaining to wetlands should be modelled on agreed guidelines by the competent authorities.

In the spirit of the UNSDGs, section 41 of the Constitution and IEM, and keeping in mind the benefits provided by wetlands, it is recommended that the EIA regulations be amended. The amendment should identify DEFF, the DWS and the DALRRD as the competent authority. As prescribed in section

[58] Ramsar Convention Secretariat "Scaling Up Wetlands Conservation, Wise Use and Restoration to Achieve the Sustainable Development Goals" (July 2018) https://medwet.org/wp-content/uploads/2018/07/wetlands sdgs e.pdf (accessed 2020-02-29) 2.

24(2)(*a*)(i), the EAP would submit the application to each department. From this point onward, a policy directive could guide the way these departments consult and decide together as a single competent authority and submit an IEA. This would promote section 41(1)(*h*)(i)-(v) of the Constitution. Where an EAP (specialist) fails to include a department, then that application must be resubmitted, and any process that commenced must start *de novo*. For purposes of brevity, examples of conflict resolution mechanisms are not discussed here. It should be noted that NEMA and EIA regulations are time bound for decision-making, and this must be taken into consideration when drafting the policy directive. The recommendation as it relates to time period could be extended to ensure proper engagement, decision-making and conflict resolution in the interests of preventing the extinction of the valuable wetlands resource. Departments do not have to meet physically but could engage with each other and make decisions on other media platforms (such as Microsoft Teams or Zoom). Such platforms create an exciting opportunity for departmental integration on different levels. Matters relating to monitoring and evaluation – for example, after granting the authorisation – can be addressed here too, in order to eliminate duplication.

Interestingly, in January 2020, the Minister of Environment, Forestry and Fisheries published Schedules in a notice that set out "minimum criteria for reporting of identified environmental themes when applying for environmental authorisation".[59] This notice applies specifically to impacts on terrestrial animal species, along with levels of sensitivity (very high/high/medium/low). In terms of the National Biodiversity Assessment Report 2018 (NBAR), out of the 135 inland wetlands, 83 fall within the "critically endangered" category.[60] Nothing prevents the Minister from considering and publishing a similar notice for wetlands, based on the research contained in the NBAR by the South African National Biodiversity Institute.

In order to bolster integration further, research suggests that stakeholders of wetland management and wise use are not limited to environmental-matter departments but include local and scholarly communities.[61]

9 CLOSING REMARKS

This research has looked into the area merely through a single lens. Other legal obligations having a direct bearing on or incidental to the law and wetlands may be stifled by the way sectoral environmental legislation regulates and aims to govern wetlands. This research may serve as a tool to address issues pertaining to wetland EIA authorisation where sectors cut

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59 GN R655 in *GG* 42946 of 2020-01-10. Procedures to be followed for the assessment and minimum criteria for reporting of identified environmental themes in terms of section 24(5)(*a*) and (*h*) of the National Environmental Management Act, 1998, when applying for environmental authorisation.

60 South African Biodiversity Institute "National Biodiversity Assessment 2018: The Status of South Africa's Ecosystems and Biodiversity" (2019) 104.

61 Sugiura "'Wise Use' in Watarase-yusuichi: Creating New Value through the Integration of Stakeholders" 2019 7 *International Journal of Social Science Studies* 93 93.

across each other and sectoral legislation and management intersect. Perhaps the future will see only one department of environmental matters.

Currently, there is no national policy or SEMA for wetlands as there is for the coast, biodiversity, protected areas and water, to mention a few. Within such a policy, there should be a specific section dedicated to the environmental authorisation submission process as it relates to activities around wetlands.