THE EFFICACY OF SECTION 2(4)(l) OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT IN THE CONTEXT OF COOPERATIVE ENVIRONMENTAL GOVERNANCE[1]

1 Introduction

Wetlands are regulated by a plethora of specific environmental management Acts (SEMAs). The mandate of these Acts sits within various environmental affairs departments. Thus, the same resource is regulated and managed by a series of different legislation and environmental administrators. The National Environmental Management Act 107 of 1998 (NEMA) is the national environmental framework Act and stresses in its purpose the need for cooperative environmental governance (CEG) which, arguably, raises no concern for the way wetlands are currently regulated and managed, as long as this is done in a manner that promotes CEG. Section 2 of NEMA sets out a series of sustainable development principles that all organs of state must apply in all matters relating to the environment; "environment" is read throughout to include wetlands. Section 2(4)(*l*) is dubbed the "co-operative governance principle" and mandates the "intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment". With this in mind, this note, by way of a document analysis, seeks to ascertain whether legislation and policies and action relating to the wetlands regulation and management are in fact coordinated. The presented findings indicate that coordination is lacking, which consequently adversely affects the management, conservation and protection of wetlands in South Africa. The recommendations aim to bring about law reform to improve coordination that bolsters wetlands management as well as their conservation and protection, while simultaneously promoting the objectives of section 41 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

2 Sustainable development framework for wetlands

> "Wetlands contribute to all 17 SDGs (sustainable development goals) …Their conservation, wise use, and restoration represents a cost-effective investment." (Ramsar Secretariat (2018) Scaling up Wetland Conservation, Wise Use and Restoration to Achieve the Sustainable Development Goals https://www.ramsar.org/sites/default/files/documents/library/wetlands_sdgs_e.pdf (accessed 2020-09))

[1] This contribution forms part of an objective in Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* (unpublished thesis, CPUT) 2018.

The concept and evolution of sustainable development can be traced to the Stockholm Conference of 1972. Sustainable development is encapsulated within South Africa's Constitution in section 24(*b*), which states that everyone has the right:

> "to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that– … (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The word "environment" must be read throughout this note to include wetlands, as envisaged in NEMA, although it has been recommended that NEMA be amended to make specific reference to "wetland environment". The reason for the aforementioned is that within certain jurisdictions, wetlands enjoy higher standards of protection by virtue of specific inclusion in their constitutions. These jurisdictions include Switzerland (Art 78), Brazil (Art 20 (III), 21(XIX), and 231(2)) and Uganda (Ch 15, s 237(2)(*b*)) (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* (1999) 163–164).

Among other prompts, the constitutional mandate of promoting sustainable development led to the promulgation of NEMA. NEMA is the national environmental framework of South Africa, or the constitution of South Africa's environmental law. NEMA defines sustainable development as "the integration of social, economic and environmental factors into planning, implementation and decision-making to ensure that development serves present and future generations" (s 1).

Section 2 of NEMA makes provision for 18 key principles of sustainable development that must be adhered to by all organs of state in fulfilment of their duty to protect natural resources (which includes wetlands). These principles are not merely a wish list (Kidd *Environmental Law* 2ed (2011) 38), but serve as guidelines that must be observed by organs of state when performing or taking actions where the protection of the environment is concerned (Glazewski *Environmental Law in South Africa* (2020) par 7.2.2). Furthermore, they share features common to internationally accepted principles (Kidd *Environmental Law* (2008) 34). Reference to these principles feature prominently in NEMA regarding key plans, programmes and impact assessments of activities in the environment (Glazewski *Environmental Law in South Africa* par 7.2.4). Determining whether South Africa meets every sustainable development objective/principle is not the purpose of this note, as that would cast the net too broad; and not all the principles would be relevant or applicable. Rather, this note focuses on the following sustainable development principle of NEMA:

> "There must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment." (s 2 (4)(*l*))

Section 2(4)(*l*), dubbed the "co-operative governance principle", specifically mandates the coordination of policies and legislation and action relating to the (wetland) environment (Oosthuizen, Van der Linde and Basson "National Environmental Management Act (NEMA)" in Strydom and King *Environmental Management in South Africa* 3ed (2018) 144). The hypothesis is that if legislation and policies are not coordinated, then action

flowing from this failure is uncoordinated too, which abrogates the principle of sustainable development (Lemine *South Africa's Response in Fulfilling Her Obligations to Meet the Legal Measures of Wetland Conservation and Wise Use* 54).

With specific reference to sustainability and wetlands, article 3 of the Convention on Wetlands of International Importance Especially as Waterfowl Habitat of 1971 (referred to as the Ramsar Convention) requires signatories to formulate and implement their planning to promote wise use of wetlands within their jurisdiction. "Wise use of wetlands" is defined as "the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development" (Birnie and Boyle *International Law and the Environment* (2009) 674). The concept of "wise use" was introduced for the first time in 1987 by the conference of parties (Ramsar Convention Secretariat "Wise Use of Wetlands: Concepts and Approaches for the Wise Use of Wetlands" in *Ramsar Handbooks* 4ed vol 1 (2010) 9) and was first interpreted at the conference adopted by the contracting parties in the year that the World Commission on Environment and Development's Report was published (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* 47). Coincidentally, this was the same report that "coined" the term "sustainable development" (Birnie and Boyle *International Law and the Environment* 49). Wise use equates to the "maintenance of an ecosystem benefits/services to ensure long term maintenance of biodiversity as well as human well-being and poverty alleviation" (Ramsar Convention Secretariat *Ramsar Handbooks* 9). At the Regina Conference in 1987, wise use of wetlands was interpreted to mean: "their sustainable utilization (inter- and intragenerational principles) for the benefit of human kind in a way compatible with the maintenance of the natural properties of the ecosystem" (Birnie and Boyle *International Law and the Environment* 49).

De Klemm and Shine submit that the interpretation of the concept of wise use includes:

- sustainable use of wetlands for the benefit of mankind in a way that is compatible with maintaining the natural properties of the ecosystem;
- human use of a wetland so that it may yield the greatest continuous benefit to the present generation while maintaining its potential to meet the needs and aspirations of future generations; and
- recognizing that natural properties of the ecosystem include the physical, biological or chemical elements, such as soil, water, flora, fauna and nutrients, as well as the interactions between these elements (De Klemm and Shine *Wetlands, Water and the Law: Using Law to Advance Wetland Conservation and Wise Use* 47).

At the Kampala Conference in 2005, it was stipulated that "the maintenance of their (wetlands) ecological character [could be] achieved through the implementation of ecosystem approaches, within the context of sustainable development" (Birnie and Boyle *International Law and the Environment* 674).

It is thus clear that the accepted interpretation of wise use instructs contracting parties, which includes South Africa, to fit the mould of sustainable development. This is confirmed by the Ramsar administration's view that holds that the interpretation of wise use is in line with the objectives of sustainable development (Ramsar Convention Secretariat *Ramsar Handbooks* 10). One such objective is expressed in section 2(4)(*l*) of NEMA. Again, section 2(4)(*l*) is indicative of a cooperative approach to environmental management.

3 The cooperative approach

Section 7(2) of the Constitution mandates the State to respect, protect, promote and fulfil the rights contained in the Bill of Rights, in terms of which protection and conservation of the wetlands are fundamental – based on the valuable benefits they offer, as discussed below. Thus, state environmental affairs departments must act together for the improvement of the wetland environment. In Chapter 3 of the Constitution, the principles of cooperative government are set out. In this regard, section 41(1)(*h*) of the Constitution 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."

The intricate relationship between section 41(1)(*h*)(i)–(v) of the Constitution and wetland conservation is strengthened by section 2(4)(*l*) of NEMA, which demonstrates that various environmental affairs departments with a wetland management mandate must coordinate and communicate their actions, legislation and procedures with one another. Together, they inform the constitutional imperative of cooperative governance. It is submitted that if one factor listed in section 41(1)(*h*) is lacking, it has a domino effect on the others and ultimately adversely affects cooperative governance.

Intergovernmental coordination and the constitutionally entrenched principle of cooperative government are synonymous according to De Villiers ("Intergovernmental Relations in South Africa" 1997 12(1) *SA Public Law* 197). Du Plessis ("Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures" 2008 23(1) *SA Public Law* 87) submits that "South Africa's policy and legislation have served to strengthen cooperative governance, especially with regard to environmental matters". This further emphasises the realisation of the obligation placed upon the State to cooperate with matters pertaining to the environment. The legislation applicable to this note, more specifically to wetland conservation, is administered by various state environmental departments. The intricacies of the wetland legislative framework and administration, with respect to cooperative governance, is discussed later.

It has been submitted that the following factors hamper governance: fragmented and uncoordinated legislation, policies, processes and authorisation; disjointed decision-making processes; overlap and duplication of governance effort; inability to monitor the implementation of policies and legislation holistically; and governmental discord (Nel and Kotzé "Environmental Management: An Introduction" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 18–19).

Relevant to this research is the notion of cooperative environmental governance (CEG), as cited by Du Plessis (2008 *SA Public Law* 87). CEG refers to the various organs of state and spheres of government mandated to perform functions relating to the environment (Bosman, Kotzé and Du Plessis "The Failure of the Constitution to Ensure Integrated Environmental Management From a Co-Operative Governance Perspective" 2004 19 *SA Public Law* 412). Here, governance focus is on matters relating to the environment, as opposed to governance in the broad sense. 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 (Du Plessis 2008 *SA Public Law* 87).

Section 2(4)(*l*) as discussed stresses not only the need for cooperative environmental governance but for harmonisation of three elements: legislation, policies and actions related to wetland management. If legislation is consolidated or unified, then the achievement of harmonisation or alignment will be adequate. NEMA stresses the need for cooperative environmental governance in its stated purpose:

> "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."

NEMA makes provision for mechanisms that promote cooperative environmental governance. Examples include environmental management plans (EMPs) and environmental implementation plans (EIPs) (Nel and Alberts "Environmental Management and Environmental Law in South Africa" in Strydom and King *Environmental Management in South Africa* 3ed (2018) 43). The primary purpose of these mechanisms is to "co-ordinate and harmonise environmental policies, plans and programmes" (Nel and Alberts in Strydom and King *Environmental Management in South Africa* 3ed (2018) 43). The wording is unclear as to whether, or the manner in which, uncoordinated legislation and policies are addressed within these mechanisms – in other words, whether amendments are made within uncoordinated legislation and regulation. This uncertainty is confirmed by the ensuing sections of NEMA, which make provision for the content of an EIP and EMP respectively; submission and scrutiny and adoption of the aforementioned; and compliance.

The NEMA- albeit a national framework act- enables the promulgation of specific environmental acts. Furthermore, it has been submitted that "framework legislation has the potential to enhance cooperative governance

between ministries" (Van der Linde "National Environmental Management Act 107 of 1998" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 194). In this regard, wetland conservation, protection and management are, principally, the job of the Departments of: Water and Sanitation (DWS); Environment, Forestry and Fisheries (DEFF); and Agriculture, Land Reform and Rural Development (DALRRD).

4 The realisation of cooperative environmental governance for promoting wetland and human rights protection

Section 24(*a*) of the Constitution specifically provides everyone with a right to an environment that is not harmful to their health and well-being. It has been stated that the notion of well-being refers to the idea of "sense of place" (Kidd *Environmental Law* (2011) 23). Reference was specifically made to the threat of damage to the natural environment and the author makes direct reference to the St Lucia Ramsar Site (wetland of international importance) (Kidd *Environmental Law* (2011) 23). This further indicates the importance of wetland conservation. Section 24(*b*) of the Constitution requires, among other things, that the environment be protected by legislation and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecological sustainable development. Reading section 24(*b*)(i)–(iii) in the context of cooperative governance notions gives a sense of how to realise CEG.

The combination of the principle of cooperative governance and section 24 creates an enforceable right for right-holders to use to bolster wetland conservation and protection. In the landmark constitutional case of *Government of the Republic of South Africa v Grootboom* (2001 (1) SA 46 (CC)), the Constitutional Court per Yacoob J held that "reasonable legislative and other measures" means that if government passes legislation pertaining to wetlands, this does not in itself constitute constitutional compliance for purposes of section 24(*b*) (par 42). Flowing from legislation must be well-directed policies and programmes, and these must be reasonable both in their conception and implementation (par 42). In other words, the legislative framework for wetlands cannot merely sit dormant in various state departments; it must be effective when conceived, and the state departments should implement them holistically – not in a disjointed and incoherent manner. Section 24 was not intended to create disjunction, since cooperative governance is a constitutional imperative. Failure of the environmental government departments to realise this right may have an adverse effect on other fundamental human rights.

In the Constitutional Court case of *Glenister v President of the Republic of South Africa* (2011 (3) SA 437 (CC)), it has been confirmed that incorporated international agreements become a source of rights and obligations. At a domestic level, this means that members of the public may enforce their right to have wetlands protected so that they may enjoy the benefits provided thereby; and the State is obliged to act in a manner that promotes wetland conservation, which includes the coordination and harmonisation of policies, legislation and actions relating to the environment. The benefits

offered by wetlands for humans are extensive (including as they do, food, shelter, water and aesthetics among others); if not conserved and if these benefits are foregone, it will have an adverse effect on corresponding socio-economic rights. It is against this backdrop that the Bill of Rights comprises several other clauses that are apposite to environmental concerns. These include socio-economic rights like the right to access health care, food, water and social security (Glazewski *Environmental Law in South Africa* par 5.1.1). Thus, if the State fails in its duty to conserve wetlands, then the socio-economic rights that the present generations enjoy will be diminished. Liebenberg (*Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 83) submits that the duty of the State to promote and protect the rights of its citizens (whether these be social, cultural or political rights) requires a positive action by the State. Inherent in NEMA are sustainable development principles that make direct and indirect reference to promoting socio-economic rights through protecting the environment, as envisaged in section 2(4)(*a*)–(*k*).

A series of SEMAs has been promulgated to give effect to NEMA. These Acts aim to regulate specific environmental sectors, and the administrative powers in relation to these are in the hands of various environmental departments. However, wetlands are regulated by SEMAs and therefore the administration and management of activities are the responsibility of various environmental departments having a duty of care for the environment as part of their mandate.

A duty of care for the environment is an internationally accepted principle and is legislated in section 28 of NEMA. The duty is elevated for wetlands by the principle set out in section 2(4)(*r*) of NEMA, which provides that "sensitive, vulnerable, highly stressed ecosystems, such as … wetlands require specific attention in management and planning procedures". Thus, the SEMAs regulating wetlands must be well coordinated. However, Paterson ("Biodiversity, Genetic Modification and the Law" in Glazewski *Environmental Law in South Africa* par 16.3.5) states that "South Africa lacks a dedicated wetland protection Act" and "a private member's wetlands Bill was tabled … but has not seen the light of day"; Booys (*An Assessment of the Adequacy of the Present Legal Regime for the Conservation of Wetlands and Estuaries in South Africa* (mini-thesis submitted in partial fulfilment of the requirements for the LLM Degree, University of the Western Cape 2012) 4) refers to "domestic legislation being un-coordinated and haphazardous"; and Kidd (*Environmental Law* (2011) 136) has said that "singling out wetlands for conservation has not been achieved by our legislation and this is, in my opinion, an opportunity missed". Nevertheless, Kidd has submitted that South Africa's legislative framework, which aims to conserve wetlands, "appears to be sufficiently comprehensive" (*Environmental Law* (2011) 137). Kidd does not provide a detailed explanation for this.

5 Specific environmental management Acts for wetlands: pitfalls and prospects

This passage provides a brief exploration of certain – but not all – SEMAs relevant to wetlands regulation. The exploration focuses on pitfalls existing

within SEMAs that exacerbate poor wetland management but also points to the prospective good. The SEMAs explored include the National Water Act 36 of 1998 (NWA), the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA), the Conservation of Agricultural Resources Act 43 of 1983 (CARA) and the National Climate Change Response White Paper of 2011.

5 1 National Water Act 36 of 1998

The National Water Act 36 of 1998 (NWA), as stated in its preamble, aims for water resource management to achieve the sustainable use of water, while recognising the need for integrated management of all aspects of water resources (which includes wetlands as stated in the definition), and while protecting the quality of water resources. The NWA is the mandate of the Department of Water and Sanitation (DWS).

Section 2 of the NWA sets out the purpose of the Act, which is to ensure that the nation's water resources are protected, developed, used, conserved, controlled and managed in ways that take into account, *inter alia*: meeting the basic human needs of present and future generations; protecting aquatic and associated ecosystems and their biological diversity; and reducing and preventing pollution and degradation of water resources. A wetland falls within various definitions used in the NWA – namely, in the definitions of "wetland", "water resource", and "watercourse", respectively. Therefore, SEMAs, for example CARA, that use any of the aforementioned expressions should be construed to include a wetland in the ordinary sense.

Chapter 3 of the NWA is titled "Protection of Water Resources". Embedded in this chapter is section 12, which prescribes a classification system for water resources. The significance of the classification system is that it is used to determine whether a water resource is minimally used, moderately used, or heavily used. Pursuant to this determination, the Act requires the establishment of resource quality objectives (RQOs) for each category (minimally used, moderately used or heavily used) (s 13(*b*)). The significance of RQOs in light of water resource management is that it encompasses:

> "[t]he quantity, pattern, timing, water level …; the water quality, including the physical, chemical and biological characteristics of the water; the character and condition of the instream … and the characteristics, condition and distribution of the aquatic biota." (s 1)

The description of RQOs therefore provides and addresses information that is pertinent to sustainable wetland conservation and monitoring. Moreover, the Ramsar Convention Secretariat Laws and Institution Guidelines indicate that "the absence of legal measures for environmental management of water quantity and quality" hinders the wise use of wetlands (Ramsar Convention Secretariat *Ramsar Handbook* 33). From a water resource management perspective, the incorporation into national legislation must be lauded. However, with specific reference to wetlands protection, it could lead to challenges as the management of this resource is multifaceted and ultimately requires the RQOs to be set cooperatively rather than by one

department. Although section 13(4)(*a*)(ii) of the NWA makes provision for the invitation of comments on the proposed classification and RQOs after the fact, it does not infuse the spirit of cooperative environmental governance. It is submitted therefore that a proposed class and RQO must be established by all affected departments prior to publication for comments. Failure to do so goes against the grain of section 41(1)(*h*)(iii) of the Constitution.

A failure by the State to give effect to the principle of CEG in setting RQOs could arguably lead to water quality issues not being adequately addressed, and to poor water security. This would hamper advancing human rights as guaranteed by the Constitution, as well as conservation, which is in conflict with its constitutional duty as prescribed by section 24(*b*)(i) and (iii) and section 41 of the Constitution.

The recommendation is that section 12 of the NWA should be amended to read: "The Minister, in concurrence with other environmental affairs departments, must prescribe a system for classifying water resources" (suggested insertion underlined). Section 41(1)(*h*)(iii) of the Constitution requires that they consult one another on matters of common interest. The recommendation is that the departments address wetland conservation and protection as part of the agenda when decisions are made, then agree on procedures in addressing these matters and adhere to them. Moreover, opportunity must be afforded to each department (DEFF, DWS and DALLRD) to ensure better coordination for the establishment of RQOs. In this way, the constitutional imperative of fostering friendly relations could be fulfilled.

5 2 National Environmental Management: Biodiversity Act 10 of 2004

The purpose of NEMBA is to provide for the conservation and management of South Africa's biodiversity; and for the protection of species and ecosystems that warrant protection, among other things. One object of the Act is to provide for cooperative governance in biodiversity management and conservation (s 2(*c*)). As a point of departure, it is evident that nowhere in NEMBA is reference made to a wetland *per se*, and nor does NEMBA include any of the other definitions describing or including wetlands, as envisaged by the other SEMAs. The task of administering the Act in terms of Chapter 8 of the NEMBA rests with the Minister (meaning the "Cabinet member responsible for national environmental management" (s 1(1))). Here, the meaning of "Minister" is not confined to, or does not refer to, a single department. It has been submitted that national laws of relevance to biodiversity fall within the remit of the DWS and DEFF (Paterson, "Biodiversity, Genetic Modification and the Law" in *Environmental Law in South Africa* (2018) par 13.4.2.4). The DEFF is backed by the South African National Biodiversity Institute (SANBI) in carrying out the former's mandate (Paterson, "Biodiversity, Genetic Modification and the Law" in Environmental Law in South Africa par 13.4.2.4). Among other things, SANBI contributes to the management of biodiversity resources (s 10).

Of relevance here is the protection afforded to ecosystems. An ecosystem is defined by NEMBA to mean "a dynamic complex of animal, plant and

micro-organism communities and their non-living environment interacting as a functional unit" (s 1). The definition of a wetland therefore merits inclusion in the meaning of an ecosystem.

Section 70 of NEMBA mandates the Minister or Member of the Executive Council (MEC) for environmental affairs in a province to publish a national or provincial list of alien and invasive species (AIS). In giving effect to this obligation, the national list, consisting of four Notice Listings, has been published and identifies AIS within the various provinces (GN 864 in *GG* 40166 of 2016-07-29: Alien and Invasive Species Lists). The introduction of AIS to wetland conservation has raised global concern as this leads to damage and ultimate loss of wetlands (Ramsar Convention Secretariat "The Fourth Ramsar Strategic Plan 2016–2024" in *Ramsar Handbooks* 5ed (2016)). What should be noted is that the Conservation of Agricultural Resources Act 43 of 1983 also makes provision for the listing and identification of Declared Weeds and Invader Plants (GNR 208 of 2001 Table 3).

5 3 The Conservation of Agricultural Resources Act 43 of 1983

The Conservation of Agricultural Resources Act 43 of 1983 (CARA) has been enacted to conserve natural agricultural resources by the maintenance of the production potential of land, by the combating and prevention of erosion and weakening or destruction of water sources (s 3). The mandate of CARA is within the remit of the Department of Agriculture, Land Reform and Rural Development (DALRRD).

CARA defines natural agricultural resources to mean "soil, the water sources and vegetation" (s 1). "Wetland" is not mentioned or defined in CARA. However, a wetland falls within the meaning of a water source as expressed earlier; and therefore, it is presumed that CARA, by its wording, is responsible for wetland conservation. This meaning is further given effect to in CARA's description of "soil conservation work", which means "any work which is constructed on land for the conservation or reclamation of any water source" (s 1). With specific focus on water sources, CARA empowers the Minister (DALRRD) to prescribe control measures that must be complied with by land users (s 6). Such control measures may relate to the utilisation and protection of vleis, marshes … and water sources; and the protection of water sources against pollution on account of farming practices (s 6(2)(*n*)). Section 18(1) of CARA vests powers of investigation in the executive officer, any other officer of the department and any member of a soil conservation committee to: "determine whether and to what extent the water sources on that land are polluted on account of farming methods or have become weaker or have ceased to exist" (s 18(1)(*e*)); make surveys, take samples (soil or plant) to make an assessment of the water sources (s 18(1)(*g*) and (*h*)), and may take photographs for purposes of the assessment as s/he deem fit (s 18(1)(*h*)). This officer is the same as an environmental management inspector (EMI). The functions of the EMI are set out in section 31G of NEMA. It includes monitoring and enforcing compliance with the law for which they have been designated. Designation of the EMIs could be in

any staff member of the department responsible for environmental management in the province. This includes the DWS (NWA), DEFF (NEMBA) and DALLRD (CARA). In terms of NEMA, the EMIs are empowered to investigate an offence in terms of the law for which they have been designated; a breach of such law; or a breach of a term or condition of an authorisation, permit or instrument issued in terms of such law (s 31G(*b*)(i)–(iii).

CARA, similar to NEMBA, sets out its goals in regulations for the combating of declared weeds and invader plants (GNR 208 of 2001 Table 3). The species named in the regulations to NEMBA and CARA are identical. This could lead to enforcement issues by the various departments' EMIs which would exacerbate wetland conservation challenges rather than bolster conservation.

With a view to managing or combating these plants, the CARA regulations list these categories of plants in its Table 3 (GNR 208 of 2001). As stated above, 50 per cent of the AIS listed and identified by NEMBA regulations are also covered by the CARA regulations. This creates an uncertain catch-22 situation regarding "CARA's" wetlands. Is the EMI appointed in terms of CARA required to do an assessment on this 50 per cent of AIS, while the remaining AIS (although on a "CARA" wetland – regulated by CARA) is managed by another environmental department or SANBI? Another concern is that EMIs empowered by NEMBA and CARA respectively could attend to the same AIS (as their mandate allows) by reporting on the exact same matters; this may lead to duplications in the performance of their duty and in reporting. This exacerbates the potential for inconsistency in the data. This also has the potential to instigate conflict among the departments, which goes against the constitutional directive to foster friendly relations. In addition, this flies in the face of cooperative environmental governance. Lastly, Van der Linde's theory (in Strydom and King *Environmental Management in South Africa* 2ed (2009) 194) – that sectoral laws, such as our SEMAs referred to above, provide greater and more specific protection – is hamstrung by the manner in which the wetland SEMAs are not only out of sync with each other, but also conflicting. As indicated above, the Ramsar Convention Secretariat Laws and Institution Guidelines listed conflicting sectoral laws as a factor hindering wise use (ramsar.org/sites/default/files/documents/pdf/ lib/hbk4-03.pdf).

Controlling, eradicating and managing AIS is an integral part of the "Ramsar Strategic Plan 2016–2024" (ramsar.org/sites/default/files/ documents/library/ hb2_strategic_plan_2016_24_e.pdf). The Plan advances protection and research with regard to AIS. To avoid duplication of duties by CARA and other departments' EMIs, it is recommended that the DALRRD have *carte blanche* to investigate AIS issues in "CARA" wetlands, and to have these demarcated. The EMI is at the heart of the administration and implementation of environmental legislation and enforcement (Glazewski *Environmental Law in South Africa* par 27.6). Furthermore, nothing prohibits joint ventures from expediting investigation, and lessons can be learned on a case-by-case basis.

5 4 National Climate Change Response White Paper of 2011

The United Nations stated unequivocally that

> "climate change not only exacerbates threats to international peace and security, it is a threat to international peace and security." (Strydom *International Law* (2016) 96–97)

The National Climate Change Response White Paper of 2011 (White Paper NCCR) is a presentation of the South African Government's vision for an "effective climate change response and long-term, just transition to a climate-resilient and lower-carbon economy and society" (White Paper NCCR). The White Paper NCCR commits South Africa to two objectives:

1. Effectively manage inevitable climate change impacts through interventions that build and sustain South Africa's social, economic and environmental resilience and emergency response capacity; and
2. Make a fair contribution to the global effort to stabilise greenhouse gas concentrations in the atmosphere at a level that avoids dangerous anthropogenic interference with the climate system within a timeframe that enables economic, social and environmental development to proceed in a sustainable manner.

In the 2018 Ramsar report on the State of the Wetlands, Martha Rojas Urrego, head of the Ramsar Convention on Wetlands, submitted that "we are losing wetlands three times faster than forests" (Ramsar Convention on Wetlands *Global Wetland Outlook: State of the World's Wetlands and their Services to People* 2018 (2018)). Given the natural services provided by wetlands acting as a carbon sink (Turpie "Environmental Management Resources Economics" in Strydom and King *Environmental Management in South Africa* 2ed (2009) 45), it is expected that these efforts should be integrated into functions rather than stand-alone provisions exercised in silos. As indicated above, coordination is a vital component of sustainable development.

The White Paper NCCR introduces the streamlining of climate change efforts to protect ecosystems with provisions that "conserve, rehabilitate and restore natural systems that improve resilience to climate change impacts or that reduce impacts, [f]or example … wetland ecosystems" (Ch 5 Adaptation 5.5.2). Irrespective of the terminology used for a wetland or the manner in which it is described in SEMAs, the effects of climate change on wetlands affect all environmental affairs departments concerned. In the same breath, however, it is clear that coordination is lacking; there is no coordination of actions and legislation, nor agreed procedures to manage these or to share information with all the relevant players on this common matter of interest – that is, to bolster wetland resilience cohesively. This leads to a diminished upholding of the provisions of section 41(1)(*h*) of the Constitution.

Of recent vintage and to implement the White Paper NCCR, is the draft Climate Change Bill of 2018 that has been published for comment. The Bill is a breath of fresh air in that it explicitly includes the promotion of integrating climate change efforts throughout the departments. The initial indication is the inclusion of the definition "sector department", which is read with a

scheduled list of functional areas. Briefly, the coordination is further embraced by the following provisions: section 8 of the Bill establishes a Ministerial Committee on Climate Change that comprises the Minister responsible for planning, monitoring and evaluation in the Presidency, the Minister, those Ministers in the Functional Areas in the Schedule to the Bill, as well as all MECs responsible for the environment; section 8(6)(*a*) obliges the Committee to "coordinate efforts across all sector departments and spheres of government"; section 10(3) obliges the Minister (DEFF) to consult with sector departments and provinces for the development and publication of the National Adaptation Strategy as well as the review thereof; and section 10(10) requires a sector department to submit a report on the "progress made in relation to the implementation of the climate change response implementation plan". The Draft Climate Change Bill is an outstanding model of a precursor to climate change law in South Africa through the vein of CEG.

6 Conclusion: getting the octopus into the jar

South Africa must be lauded for its body of SEMAs and the extent to which they bolster wetlands conservation and protection. However, the uncoordinated nature of the pieces of legislation and regulations appears to hinder cooperative environmental governance, and ultimately the proper management of wetlands. The result is apparent uncertainty and possible duplication by regulations – for example, in the management and control of invasive species. With reference to the NWA and the setting of RQOs, and although water quality and quantity by nature are administered by the DWS, when considering RQOs for wetland regulation and management with its tentacles in a series of acts and institutions, it is evident that RQOs cannot be designed and decided upon with a silo-mandate approach. The White Paper NCCR and the Climate Change Bill introduce a more cooperative and inclusive model for the manner in which future environmental laws should be adopted, and for the fulfilment of section 2(4)(*l*) of NEMA.

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