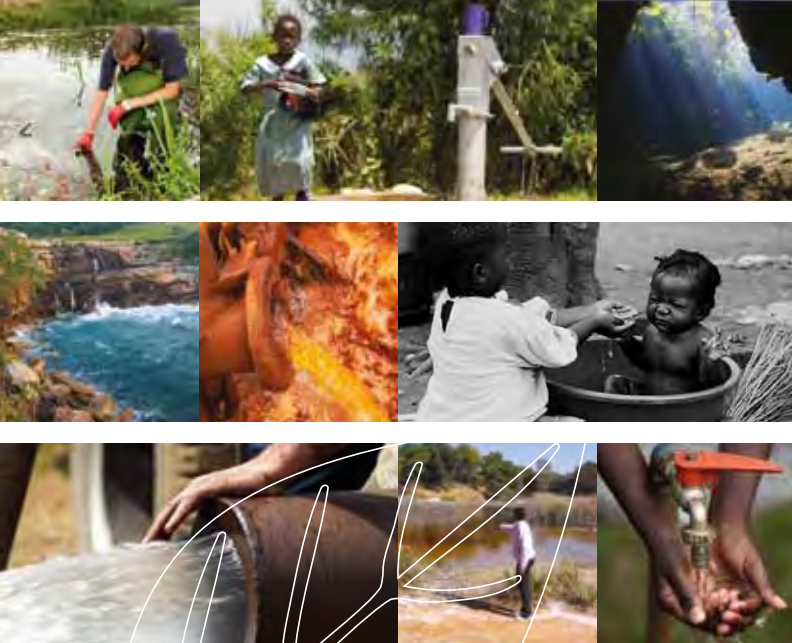


STOP TREADING WATER:

WHAT CIVIL SOCIETY CAN DO TO GET WATER GOVERNANCE IN SOUTH AFRICA BACK ON TRACK



Centre *for*
Environmental Rights

Advancing Environmental Rights in South Africa

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RECOGNISING THAT THE ULTIMATE AIM
OF WATER RESOURCE MANAGEMENT IS
TO ACHIEVE THE SUSTAINABLE USE OF
WATER FOR THE BENEFIT OF ALL USERS.

– *Preamble to the National Water Act, 1998*



EXECUTIVE SUMMARY

The effective governance of South Africa's scarce water resources plays a crucial role in the realisation of the Constitutional rights to a healthy environment and to have access to sufficient water. There is severe stress on water resources and their management, and the State faces extreme capacity and other challenges in meeting its obligations in relation to water governance.

In November 2011, with the support of the Konrad Adenauer Foundation (KAS), the Centre for Environmental Rights (CER) hosted a gathering of civil society representatives and key experts in water governance, whose inputs were the primary source of this report.

In this report, we identify some of the most pressing challenges for water governance, and make recommendations on how civil society can become involved in addressing these. Some of these problems include:

- many of the tools for the protection and use of water in the National Water Act, 1998 (NWA) are overly complex and technical, causing significant delays in implementation;
- the slow processing of applications for water use licences (WULs), and water use authorisations that are plagued by procedural and substantive defects;
- the delay in rolling out water management institutions and the democratisation of water resource management (WRM) by the devolution to these institutions of WRM powers;
- the lack of progress in realisation of rights around access to water and sanitation that has reached crisis proportions in many parts of the country, and is usually blamed on implementation failures by local government;
- the lack of political and institutional priority given to compliance, monitoring and enforcement (CME), and the limitations of criminal prosecution to punish and disincentivise non-compliance;
- inadequate access to the Water Tribunal, which infringes the Constitutional right to access to courts;
- the lack of management stability and organisational integrity within the Department of Water Affairs (DWA).

In an attempt to make a positive impact on water governance, this report recommends:

- civil society coordination, empowerment and strategy development around water governance;
- strong civil society participation in reviews and amendment of key strategies and legislation;
- the promotion of institutional stability within the DWA;
- the improvement of cooperative governance affecting WRM by:
 - support to local authorities; and
 - asserting the water mandate in decisions on mining and agriculture;
- improved access to information and oversight of water governance;
- the roll-out, empowerment and resourcing of statutory and non-statutory participatory governance institutions like catchment management agencies (CMAs), water user associations (WUAs) and catchment management forums (CMFs);
- implementation of key statutory WRM tools, appropriately simplified and prioritised;
- improvement of the quality of integrated WULs and a review of general authorisations;
- legislative amendments and law reform; and
- strengthening CME through greater resourcing of the Blue Scorpions, and the incorporation of administrative penalties for non-compliance; and
- a rehaul of the composition and rules of the Water Tribunal.

In 2012, with the support of funders, the CER will continue to expand its work on water governance, working collaboratively with partners and stakeholders to assist civil society with the implementation of the recommendations in this report.

THERE APPEARS TO BE LIMITED UNDERSTANDING OF THE CONSTRAINTS ON WATER AS AN INPUT INTO ECONOMIC GROWTH, RATHER THAN SIMPLY AS AN ENVIRONMENTAL CONCERN.

– Schreiner et al, 2009

A TIME FOR CHANGE: OPPORTUNITIES FOR GETTING WATER GOVERNANCE IN SOUTH AFRICA BACK ON TRACK

THE CER IS A NON-PROFIT LAW CLINIC ESTABLISHED IN 2009 BY EIGHT NON-GOVERNMENTAL ORGANISATIONS (NGOs) IN THE ENVIRONMENTAL AND ENVIRONMENTAL JUSTICE SECTORS TO PROVIDE LEGAL EXPERTISE AND SUPPORT TO COMMUNITIES, COMMUNITY AND CIVIL SOCIETY ORGANISATIONS (CSOs). ITS MISSION IS TO ADVANCE ENVIRONMENTAL RIGHTS, AND TO PROMOTE CIVIL SOCIETY PARTICIPATION IN ENVIRONMENTAL GOVERNANCE THAT IS STRONGER, MORE STREAMLINED, AND BETTER LEGALLY AND SCIENTIFICALLY EQUIPPED.

South Africa faces extraordinary challenges in relation to the sustainable management of freshwater resources. In 2011, the National Planning Commission's Material Conditions Diagnostic contained the following warning:

"South Africa is a 'water-stressed' country, bordering on water scarce ...water may become a binding constraint on development, at least in some parts of the country. There is a need for urgent attention to be given to the management and conservation of water resources, especially in stressed water catchments... Addressing supply and demand in the context of unevenly distributed and variable resources is a matter of central importance in national planning." (p.2)

The pressures on our water governance system include both historical and on-going water pollution by the mining industry; the failure of municipal water treatment and discharge of untreated sewage into watercourses; the over-abstraction of water and discharge of water polluted in the agricultural sector. All of these challenges are becoming increasingly acute as the country starts to acknowledge and prepare for the risks posed by climate change.

The key statutes on WRM – the NWA and the Water Services Act, 1997 (WSA) – do not empower authorities adequately to manage water resources, and the implementation of those statutes is failing.

This report identifies a number of challenges informed by communities, civil society, experts and practitioners in the field of WRM and water governance.

With a new revised National Water Resource Strategy (NWRS) about to be published for comment and a legislative review underway by the DWA, this is an opportune time to plan participative interventions by civil society and community organisations in getting water governance back on track.

To date, the CER has worked primarily in the mining sector – promoting environmental compliance, transparency and accountability in mining – and on improving transparency and access to information in environmental governance. The CER uses legal advocacy, representation and litigation both in specific cases, as well as at a national strategic level, to promote the realisation of environmental rights.

Recently, our partners and stakeholders have asked the CER to expand its work to include emphasis on water governance. In November 2011, with the support of the KAS, the CER hosted a gathering of key experts in water governance, whose inputs were the primary source of this report.

Working collaboratively with key partners, and with support from funders, the CER hopes to use the shared knowledge recorded in this document, legal tools and advocacy to empower more organised civil society participation, and to catalyse positive change in water governance in South Africa.



Melissa Fourie
Executive Director
Centre for Environmental Rights

KEY LEGISLATION AND INSTITUTIONS IN WATER GOVERNANCE

S.24 of the **Constitution of the Republic of South Africa, 1998** (the Constitution) secures the right to an environment not harmful to health or well-being and to have the environment protected, for the benefit of present and future generations, through legislative and other measures that: prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development.

S.27(1)(b) provides that everyone has the right to have access to sufficient water. Government must take legislative and other measures to achieve the progressive realisation of this right.

In terms of s.156 and Schedule 4, Part B, municipalities have executive authority in respect of, and have the right to administer water and sanitation services - limited to potable water supply systems, domestic waste water and sewage disposal systems. Water supply, management and the development of water resources are the DWA's responsibility.

The **National Environmental Management Act, 1998** (NEMA) is the framework legislation that governs environmental management. NEMA gives effect to s.24 of the Constitution and provides for cooperative environmental governance.

S.2 of NEMA sets out national environmental principles applicable to actions of state organs that may significantly affect the environment. NEMA also deals with integrated environmental management, including the alignment of environmental authorisations with those under specific environmental management acts (SEMAs) (of which the NWA is one). Compliance and enforcement of NEMA and SEMAs, as well as their administration are also addressed.

The NWA provides the legal framework for WRM. Its purpose is to ensure that South Africa's water resources are protected, used, developed, conserved, managed and controlled in ways which take into account factors like:

- meeting basic human needs of present and future generations;
- promoting equitable access to water;
- redressing past racial and gender discrimination;
- promoting the efficient, sustainable and beneficial use of water in the public interest;
- facilitating social and economic development;
- providing for growing demand for water use; and
- reducing and preventing pollution and degradation of water resources.

S.3 provides that government, through the Minister of Water and Environmental Affairs (WEA), is the public trustee of water resources, and must ensure that water is dealt with in a sustainable and equitable manner, for the benefit of all persons. The Minister must ensure that water is allocated equitably and used beneficially in the public interest, while promoting environmental values.

The NWA also deals with the protection of water resources, use of water, CMAs, WUAs, appeals and dispute resolution, and offences and remedies.

The NRWS, 2004, regulations and various other documents have been published in terms of the NWA.

The WSA provides that water services authorities (municipalities) have the responsibility (through water services providers) to ensure access to water supply and sanitation services. Its main objects include providing for the rights of access to a basic water supply and to basic sanitation, and the promotion of effective WRM and conservation.

Regulations and norms and standards have been published under the WSA.

The **Local Government: Municipal Structures Act, 1998** (Municipal Structures Act) and **Local Government: Municipal Systems Act, 2000** (Municipal Systems Act) deal with the powers and functions of municipalities. In terms of s.84(1) of the Municipal Structures Act, the functions and powers of a district municipality include: potable water supply systems; and domestic waste-water and sewage disposal systems.

S.3 PROVIDES THAT GOVERNMENT, THROUGH THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS, IS THE PUBLIC TRUSTEE OF WATER RESOURCES, AND MUST ENSURE THAT WATER IS DEALT WITHIN A SUSTAINABLE AND EQUITABLE MANNER, FOR THE BENEFIT OF ALL PERSONS.

Key institutions in water governance include:

- the **Minister of WEA** and the **DWA**, responsible for implementation of the NWA;
- **CMAs** (s.78 of NWA), in order to delegate WRM to the regional or catchment level and to involve local communities, within the framework of the NWRS;
- **WUAs** (s.92 of NWA), which operate at a restricted localised level, and are effectively cooperative associations of individual water users wanting to undertake water-related activities for their mutual benefit;
- **CMFs**, voluntary bodies, not specifically mentioned in the NWA, but dealt with in the NWRS. CMFs address local water management issues, and provide a focus for public consultation and for integrating the water-related activities of other NGOs and CSOs;
- **Water Service Authorities**, defined in the WSA as **municipalities** responsible for ensuring access to water supply and sanitation services. Provision is made in the WSA for **Water Boards** to provide water supply and sanitation services to **Water Services Institutions** (which include Water Service Authorities);
- the **Water Tribunal** (s.146 of the NWA) hears appeals against certain decisions; and
- the **Department of Environmental Affairs (DEA)**, responsible for implementation of NEMA.



WHAT IS BROKEN IN WATER GOVERNANCE IN SOUTH AFRICA? RISKS AND OPPORTUNITIES

In their key paper *Reality check on water resources management: Are we doing the right things in the best possible way?* Schreiner et al, 2009, identify the following "drivers of change" that contribute to the severe stress on water resources and their management:

- economic growth, including in major growth sectors like mining and manufacturing, which impacts directly on water use;
- demographic change, including population growth, migration and improved standards of living;
- on-going changes in land use and environmental degradation, including intensification of agriculture and stock exceeding carrying capacity, land degradation and desertification;
- food insecurity, exacerbated by high levels of unemployment;
- climate variability and climate change; and
- the state's lack of capacity to manage the country's water resources effectively and sustainably, due partly to loss of expertise within the government, and partly to overly complex implementation strategies.

Many of these drivers are apparent in the key challenges listed below.

1. The lag in implementation of statutory tools in NWA

The NWA provides for inter-dependent tools to be implemented for the protection and use of water, through resource-directed measures (RDMs) and source-directed controls (SDCs) respectively.

- RDMs focus on the quality and quantity of the water resource. They aim to protect water resources by setting objectives for the desired condition of resources, and comprise tools like:
 - classification of water resources;
 - establishing resource quality objectives; and
 - setting an ecological reserve and basic human needs reserve.

- SDCs aim to regulate water use so that impacts are at acceptable levels, as defined through RDMs. Conditions in **water use authorisations** (integrated WULs) and general authorisations) are the main means of implementing SDCs, but there is also provision for **compulsory licensing**, which a responsible authority can require in areas that are, or are likely to be, under "water stress", or where it is necessary to review prevailing water use to achieve equity of access to water.

Although some progress has been made, many of these measures have not yet been implemented to the extent required, despite the NWA coming into effect as long ago as 1998. Moreover, in the absence of the necessary monitoring undertaken by DWA, the exact extent of implementation is unclear.

Some of these delays can be ascribed to:

- the complexity of transforming a complex system and achieving the integration of many components of integrated WRM;
- the absence of coordination between key departments, particularly between the DWA, the DEA and the Department of Mineral Resources (DMR) – DMR continues to issue coal prospecting licences in high conservation and critical water-yield areas;
- the fact that many of the tools and implementation strategies are too complicated and resource-intensive to implement;
- no clear policy direction on a number of issues, including the roll-out of water management institutions (WMI) and the transformational approaches in water allocation and licensing;
- insufficient capacity, technical skills, experience, leadership and stability within DWA, resulting in poor leadership, low morale and severely depleted institutional memory; and
- poor financial management coupled with inadequate financing.

Ultimately, all of this culminates in government not taking the required reasonable measures to ensure the progressive realisation of WRM.



The experts and civil society representatives consulted in the drafting of this report supported the simplification and prioritisation of implementation of statutory tools, particularly the Reserve determination, classification and verification, and increased use of compulsory licensing in stressed catchments. They also called for greater and more effective monitoring and evaluation of the implementation of statutory tools, and publication of those results.

"To date, the method has been one of designing highly sophisticated water management strategies and then attempting to build the capacity to implement them. This approach has not been successful. The lack of capacity has impacted on the state's ability to issue licences and to control water abstraction and discharge... It is critical that the water sector should recognise such capacity constraints and begin to operate within them, rather than seeking, unsuccessfully, to build sufficient capacity for implementing overly ambitious programmes." – Schreiner et al, 2009

The evaluation of IWULAs is complicated and a lack of experienced and qualified officials to adjudicate these applications causes both compromised decision-making on licences, as well as significant delays; licences are also issued without the inclusion of important recommendations made in the evaluation process. There is confusion as to responsibility for decision-making, with DWA head office appearing to override regional recommendations, or even recommendations from internal advisory committees.

Applicants for licences also contribute to the backlog through IWULAs that are both procedurally defective and substantively weak. Typically, not all applicable water uses are applied for; incorrect water uses are applied for; there is inadequate public participation in the process; applications are technically incomplete and incorrect; and there is poor impact assessment that does not comply with DWA Guidelines.

The problems with IWULAs are exacerbated by a lack of integration between DWA, DEA, and DMR regarding decision-making, leading to ad hoc decisions instead of integrated planning.

The experts and civil society representatives consulted in the drafting of this report made a number of practical recommendations on improving the quality and effectiveness of water use authorisations, including a review and republication of general authorisations.

2. Procedural and substantive challenges in water use authorisation: quality of decision-making, timeframes for processing, and quantity of applications


Water use authorisations are an essential tool in the NWA, and proper control over water use authorisation is essential to ensure that activities are controlled and that water is used sustainably.

There are many challenges in considering applications for, issuing and monitoring compliance with water use authorisations. Among these are, firstly, the huge numbers of applications which are made, which far outstrip DWA's processing capacity. To illustrate the impact of the significant WUL backlog, national government's Medium Term Budget Statement 2011 found that, amongst other factors, lengthy delays in issuing water licences contributed to the stagnation of the economic growth of the mining sector between 2001 and 2008. Although DWA's Project Letsema has reduced the backlog through outsourcing some of the necessary work, this project has not yet addressed the full extent of the backlog or the on-going obstacles to efficient and timely processing of integrated WUL applications (IWULAs).

3. Devolving and democratising water governance: establishing and empowering WMLs

To ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled, the NWA provides for the establishment of suitable WMLs with appropriate representation. It also provides for the democratisation of WRM by the devolution to WMLs of WRM powers. A WML includes a CMA and a WUA. CMFs are non-statutory consultative bodies.

The purpose of CMAs is to delegate WRM to the regional or catchment level to address catchment specific issues and to involve local communities, within the framework of the NWRS. Its initial functions are in the NWA, and the Minister may delegate or assign other functions to it. The Minister acts as the CMA where one has not been established. Its governing board must represent the



interests of existing and potential water users, local and provincial government, and environmental interest groups. CMAs must cooperate and seek consensus on water-related matters affecting stakeholders and interested persons. Because CMAs have greater access to information regarding their area and stakeholder interests than the Minister, decision-making and implementation are improved.

Since the NWA commenced in 1999, only two CMAs have been established of the envisaged 19, and those CMAs are not appropriately supported to fulfil their potential.

Status of CMAs: The Breede Overberg CMA and the Inkomati CMA

The **Inkomati CMA** was established in March 2004 with initial functions in terms of the NWA. Its water management area currently includes the catchments of the Sabie, Crocodile and Komati rivers in Mpumalanga Province. The Minister of WEA delegated further functions to it on 17 December 2010.

The **Breede-Overberg CMA** was established in July 2005, but only became operational - with the same initial functions as the Inkomati CMA - when its Board was established in 2007. Its water management area is the Breede River catchment in the Western Cape. The Breede-Overberg received the same further delegated functions as the Inkomati CMA on 17 December 2010.

Both CMAs have prepared draft catchment management strategies and submitted these to the Minister. Both CMAs await approval of their strategies by the Minister before they can be gazetted for public comment. In both CMAs, further functions are still required to be delegated or assigned in future.

Inkomati CMA:
www.inkomaticma.co.za and 013 753 9000

Breede-Overberg CMA:
www.bocma.co.za and 023 347 8131

This delay in roll-out of the CMA structure appears to be the result of uncertainty, reservations and fear within the Ministry and DWA about the impact of empowering these agencies as intended in the NWA. There appear to be concerns about delegating functions to these agencies, and how such transfer of functions would impact on existing DWA structures and decision-making powers. In addition, more than a decade of delay in the roll-out has created inertia around the issue.

The experts and civil society representatives consulted in the drafting of this report were in strong agreement that finalising the roll-out of these agencies, even if in a more limited number than initially contemplated, was in the interest of improved water governance.

WUAs are cooperative associations of individual water users wishing to undertake water-related activities for their mutual benefit. A WUA's functions depend on its constitution, and it may only exercise management powers and duties assigned or delegated to it. Because WUAs act at a local level, they are well-placed to address WRM issues. Water and irrigation boards can be restructured as WUAs.

As with CMAs, the experts and civil society representatives consulted in the drafting of this report believed that WUAs are a crucial part of the water governance architecture, and that these should effectively become sub-catchment management entities accountable to CMAs. There was also consensus that priority should be given to conversion of irrigation and water boards to WUAs for the purpose of establishing these institutions, with a more detailed transformation programme to follow to ensure inclusion of women and historically disadvantaged individuals.

The NWRS recognises the existence and value of CMFs, which are voluntary bodies not specifically mentioned in the NWA. They consist of local stakeholders (government, water users, and civil society) and address local water management issues - like water licensing, water quality, and education - and provide a focus for public consultation and for integrating the water-related activities of other NGOs and CSOs. CMFs provide a ready platform for CMAs to account to citizens and other stakeholders on their plans, performance and challenges, and monitoring WMIs' activities.



Benefits of active citizen's involvement in water quality

Researchers at Mvula Trust found that citizens' active involvement in water quality issues can create greater awareness, raise water quality as a priority issue on political agendas, and provide practical support to the regulator for both on-going monitoring and accident reporting. Public involvement strengthens WRM through broadening participation, and helping to build a culture of participatory democracy. CMFs, with their local knowledge, have an important role to play; because local government and polluters are part of CMFs, public accountability is increased.

Mvula Trust offered support to the Rietspruit Forum to implement steps towards compliance with the Green Drop Campaign. It found that, by collaborating with the regulator and local government officials on the frontline of the wastewater treatment works challenges, the real obstacles to compliance could be identified, and the Green Drop process vastly improved. CMFs provide a good platform for such collaborative engagements, and the engagement, in turn strengthens CMFs.

— Munnik et al, 2011.

Despite the recognition of their value in the NWRS, CMFs have no legal standing under the NWA. As volunteer organisations, they suffer from a lack of financial resources, technical support and enforcement capacity, and a slow response from the DWA to issues raised by the CMFs. Citizens often become frustrated by a lack of progress, leave the CMF, and use other means to deal with water quality challenges. Recruitment of new members is difficult.

The experts and civil society representatives consulted in the drafting of this report support the incorporation of CMFs in CMA architecture, the recognition of legal status of CMFs and provision of administrative and legal support for CMFs.


4. Water service delivery: the WSA, cooperative governance and environmental rights

There is ample provision for legal responsibility for water service delivery, oversight and intervention in the Constitution and national legislation. However, in practice, the lack of progress in realisation of rights around access to water and sanitation has reached crisis proportions in many parts of the country, usually blamed on implementation failures by local government.

In a concept paper entitled Enhanced Local Government Support Approach, 2011, the DWA states that the "current mode of water services operation is in significant decline" and that most municipalities "are still unable to provide water services sustainably and effectively on their own." The Department of Cooperative Governance & Traditional Affairs, 2009, identifies many serious problems in local government, among many others:

- policy inconsistency and incorrect policy assumptions between spheres and communities with regard to municipal ability to deliver;
- instability between spheres of government, lack of governance or policy coherence;
- weak oversight, supervision, support and intervention mechanisms across government;
- poor political management and leadership;
- poor ethics;
- governance paralysis, poor support to cope; and
- weak and insufficient service delivery capacity.

In their oversight and support role, the DWA has taken some steps to improve the situation, most notably through an incentive-based regulation programme to improve poor service delivery of water services known as the Blue Drop Certification Programme for Drinking Water Quality Management Regulation. The Blue Drop Programme measures and compares the results of municipalities' performance, and rewards (or penalises) them. Awareness of this performance is obtained by pressure through customers, the media, political classes, and NGOs. The average national Blue Drop score has improved each year from 2009. This incentive-based regulatory approach seems to have raised awareness and created a stimulus for gradual and sustainable improvement.



In *Enhanced Local Government Support Approach*, 2011, the DWA sets out various new initiatives aimed at contributing towards the sustainable provision of water services. These are grouped in four categories:

1. taking full ownership of the water value chain;
2. intensifying local government sustainability;
3. supporting the provision of basic services; and
4. working as one government.

A report by Munnik et al, 2002, found that community-based organisations (CBOs), who manage projects closest to the community, should seriously be considered by municipalities as water services providers in facilitating sustainable development in rural areas.

Algotsson Et Murumbo, 2009, discuss the possibility of a constitutional challenge to address the lack of water services. However, in *Mazibuko and Others v City of Johannesburg* 2010 (3) BCLR 239 (CC), the Constitutional Court held that there is no positive obligation on the state to immediately deliver sufficient water, but rather that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of ... these rights". The Court found that there is no constitutional core minimum right to water, and that it cannot adjudicate the steps government should take to ensure the right to sufficient water.

The experts and civil society representatives consulted in the drafting of this report recommended implementation of the interventions identified by DWA in the *Enhanced Local Government Support Approach, 2011*, plus a number of other interventions by civil society both to support and increase pressure on local authorities and DWA for improved compliance with obligations on water quality and water service delivery.

5. Building a strategic CME programme: strengthening the Blue Scorpions, and making use of administrative penalties

There is limited information publicly available about the compliance and enforcement capacity and results within the DWA. The most regular information is obtained through questions posed to the Minister of Water Affairs or the DWA in Parliament.

Too few Blue Scorpions

In August 2011, the Minister reported to Parliament that there were 29 posts in the CME unit within the DWA's head office in Pretoria, of which eight were vacant at the time. According to the Minister, only the Mpumalanga regional office has a fully functional CME unit with eight posts. "All other regional offices utilise staff from various components to carry out CME related activities." In January 2012, DWA reported to a multi-stakeholder forum in Cape Town that there were only 14 officials in the unit.

In contrast, as at March 2011, the Environmental Management Inspectorate had approximately 183 inspectors in national and provincial government responsible for CME of NEMA, the National Environmental Management: Waste Act, 2008 and the National Environmental Management: Air Quality Act, 2004.

In September 2010, the most senior dedicated position in CME in DWA was a director, followed by two deputy directors (one in the Western Cape, and one in DWA head office). Although DWA has indicated plans to elevate the relevant Chief Directorate (which includes the CME unit) to a branch headed by a Deputy Director-General, it is not clear when this would take place, and whether funding had been secured for this purpose.

THE PROVISION OF BASIC SERVICES TO THOSE THAT CURRENTLY DO NOT HAVE THEM CONTINUES TO BE A HIGH PRIORITY OF THE GOVERNMENT, AND DESERVEDLY SO. ALTHOUGH MUCH HAS BEEN ACHIEVED IN THIS REGARD, THERE ARE STILL SIGNIFICANT WATER AND SANITATION BACKLOGS, PRIMARILY IN INFORMAL SETTLEMENTS AND IN THE RURAL AREAS.

— *Enhanced Local Government Support Approach, 2011*



Non-compliance and enforcement action taken since 1 April 2011

In January 2012, the Minister reported to Parliament the following existing number of cases under investigation by the Blue Scorpions:

- 85 cases in agricultural sector under investigation for failure to apply for verification of lawfulness of existing water use and failure to take action specified in notices to rectify contraventions;
- 18 cases in mining sector related to non-compliance with WUL conditions or operating without WULs or authorisation;
- 42 cases in which Water Services Authorities have failed to prevent and remedy the effects of pollution, such as poorly operating waste water treatment works; and
- 8 cases in which other organs of state have failed to prevent and remedy the effects of pollution.

Although these figures are difficult to verify, anecdotal evidence available to civil society suggests that non-compliance is significantly more far-reaching than is represented in these cases.

Against this information, the Minister also reported the following enforcement results to Parliament for the period 1 April 2011 to January 2012. Where useful, we compare these with results achieved by Environmental Management Inspectors (EMIs) in 2010–2011:

- 107 pre-directives issued (authorising provision not specified), 91% of which were in Gauteng, Free State and Mpumalanga. In 2010–11, EMIs issued 326 pre-directives and pre-notices.
- 32 notices issued (authorising provision not specified) (nil in each of Gauteng, Northern Cape, Western Cape and Eastern Cape).
- 26 directives issued: nil in each of Limpopo, Northern Cape, Eastern Cape and KwaZulu-Natal. In 2010–11, EMIs issued 221 directives and compliance notices.
- Nil criminal charges laid for transgression of NWA. In 2010–11, EMIs had opened 738 criminal dockets.

If these figures are correct, and ignoring for the moment the complete lack of criminal prosecution in the DWA results, considering that there are only somewhere between 14 and 21 Blue Scorpions undertaking all this enforcement action for the entire country, they are achieving a great deal.

What is clear from such information as is published, however, is that:

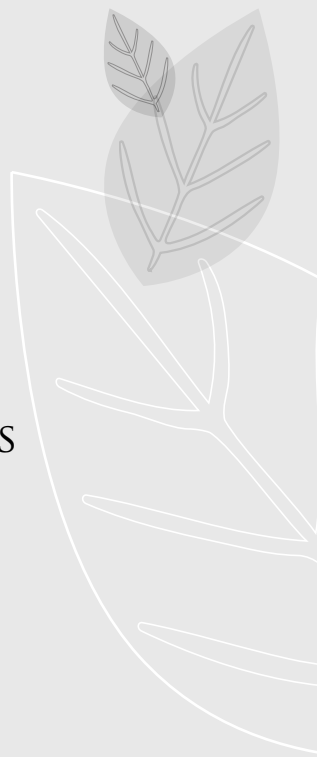
- CME is not given the required political and institutional priority within the DWA;
- there is a severe shortage in the number of positions in DWA dedicated to CME, and inadequate seniority for these dedicated positions;
- these positions are not filled, and are not filled by officials with adequate skills and expertise, particularly in relation to criminal investigation and prosecution;
- DWA appears to have rejected existing environmental CME training developed at significant expense by the DEA, preferring instead to develop its own training; and
- CME activities and results are inadequate in the context of the scope and nature of non-compliance with the NWA.

"The introduction of Compliance Monitoring and Enforcement (CME – "Blue Scorpions") Unit has made a good intervention in the area of dealing with unlawful water use. However the impending process of reviewing legislation and regulations will strengthen this area and improve the service delivery environment of the Department. Functions like the enforcement on critical offences could not be fully implemented as a result of the lack of capacity." – DWA Annual Report 2010–11, 6 September 2011.

The experts and civil society representatives consulted in the drafting of this report made a series of practical recommendations to enhance the status and effectiveness of CME within DWA, including facilitating greater support by civil society. Urgent interventions required include:

- a demand by civil society and other stakeholders to make CME a political priority;

ADMINISTRATIVE PENALTIES, WHICH ARE QUICKER AND SIMPLER THAN COURT PROCEEDINGS, COULD REDUCE THE BURDEN OF TIME AND WORRY PLACED ON BUSINESSES UNDER THREAT OF PROSECUTION, WHILE ALLOWING REGULATORS TO RESTRICT PROSECUTION TO THE MOST SERIOUS CASES, WHERE THE STIGMA OF A CRIMINAL PROSECUTION IS REQUIRED. – Hampton, 2005



- the appointment of a senior "champion" within DWA with the right skills and vision to make the so-called Blue Scorpions a force to be reckoned with;
- increased resources to fill expanded staff structures (including more senior positions);
- recruitment of staff with appropriate compliance monitoring, investigation and legal skills;
- increased alliance-building and information-sharing between the Blue Scorpions and other agencies in environmental CME;
- development of an appropriate CME strategy (incorporating prioritisation, compliance promotion and media strategy);
- increased criminal penalties in legislation;
- commencement of collection and publication of CME data; and
- immediate roll-out of more visible compliance monitoring in all sectors of water users.

In addition, the experts recommend the incorporation of an administrative penalty system to promote compliance with the NWA. Within the existing legal regime, the only way of ensuring that a violator pays a punitive monetary penalty is to prosecute that offender beyond reasonable doubt in a criminal court, and to rely on a magistrate to levy an appropriate fine. This places an undue burden on an already overburdened criminal justice system, and the resulting low prosecution success rate discourages prosecution. Inadequate fines mean that it is much cheaper for violators to continue to breach environmental legislation (and, if they are convicted, pay the small fine imposed) than to comply with it.

Comparative international experience shows that a civil and administrative penalty system will significantly improve environmental compliance, encouraging a general trend away from criminal prosecution and towards administrative penalties. In South Africa, similar

provisions in the Competition Act, 1998 (the Competition Act) have resulted in significantly increased compliance and awareness.

An administrative penalty system typically provides for:

- complaints to be investigated and filed by the responsible agency, in this case DWA;
- the adjudication of contraventions on a balance of probabilities by a tribunal like the Water Tribunal;
- the determination of an appropriate, meaningful monetary penalty (having regard to particular penalties in a permit, or by reference to a published formula that takes relevant factors into account), which should be paid to the National Revenue Fund; and
- rights of appeal against decisions of the tribunal to a court.

Fourie, 2009, argues that, following international trends, an administrative penalty system will result in more violations being pursued, and more fines imposed. The system will create meaningful, transparent and consistent regulatory responses, as well as proper consideration of the economic benefit of non-compliance – with disincentives for non-compliance (and *vice versa*). The result would be increased compliance and better enforcement of water legislation.

6. Increasing the potential and effectiveness of the Water Tribunal

S.146 of the NWA establishes the Water Tribunal to hear administrative appeals in the circumstances set out in s.148. As an institution, the Tribunal performs an important function and has many positive aspects, including its accessibility (it conducts hearings anywhere in the country), and the fact that, compared with litigation, it is expeditious and cost-effective. In addition, its members are required to have expertise in law, engineering, WRM or related fields.

However, a number of problems have arisen with the Water Tribunal over the past few years. These include:

- despite the requirement in s.147 that the chairperson should consider the necessary field of knowledge for the purposes of hearing matters, non-lawyers have, in the past, been appointed to determine questions of law;

- s.41(2)(c) of the NWA gives the responsible authority a discretion to invite written comments from any organ of state or person with an interest in an IWULA, and to require the applicant to invite objections to the IWULA. Where no public participation is so required and rights are affected by the licence issued, as is more often the case than not, the licence may be subject to judicial review on the basis of procedural unfairness. To make matters worse, the Tribunal has held repeatedly found that written comments or objections have no force, unless these have been invited in terms of the NWA, and that a third party has no standing to approach the Tribunal for relief, unless it has made comments in response to an invitation. This means that DWA can effectively exclude the right of access to the Tribunal simply by not requiring a public participation process in an IWULA, thereby impinging on the Constitutional right of access to courts;
- in *Goede Wellington Boerdery (Pty) Ltd v Makhanya NO & another* [2011] JOL 27640 (GNP) and *The Guguleto Family Trust v Chief Director, Water Use, Department of Water Affairs and Forestry & another* (unreported judgement case number A566/10, delivered on 25 October 2011), it was held that the Tribunal incorrectly regarded s.27(1)(b) of the NWA (the need to redress the results of past racial and gender discrimination) as a "trump" when the responsible authority considers the factors to be taken into account in the evaluation of a IWULA. Although this factor may require special attention – given South Africa's history of inequitable access to water and water services – it is one of several factors that must be considered; and
- Pejan, 2011, points out that the Tribunal Rules do not provide timeframes for procedural aspects, resulting in unacceptably long delays in appeals. There is also no provision for interim relief, cost orders, regulating evidence, or regarding the style and format of documents.

Kidd, 2011, points out that Tribunal decisions demonstrate that there is confusion about its jurisdiction and mandate. The Tribunal has held that it is not a "tribunal" in terms of the Promotion of Administrative Justice Act, 2000 (PAJA) and is not established to review administrative action. Despite this, it tends to focus on issues of regularity and to avoid the merits of decisions. The Tribunal has jurisdiction to hear matters afresh – it can consider the merits as well as the regularity of the decision.



WHEN IT IS CONFRONTED WITH DIFFICULT AND COMPLEX ACTIONS AND ISSUES..., IT IS NOT CLEAR WHETHER THE TRIBUNAL IS UP TO THE TASK. DWA MUST ACT URGENTLY TO ADDRESS THE SHORTCOMING SURROUNDING THE TRIBUNAL... TO DELAY IMPORTANT REFORMS WILL JEOPARDISE THIS IMPORTANT MECHANISM FROM REALISING ITS TRUE POTENTIAL.

– *Pejan and Sefatsa, 2012*

RECOMMENDATIONS

Pollard and Du Toit, 2011, propose that the ability to plan, monitor and enforce within a complex context depends on factors that include:

- an understanding of the legal requirements for water reform by the regulator and stakeholders;
- the availability of catchment-scale benchmarks against which to monitor;
- the presence of a "watchdog" to monitor benchmarks;
- leadership with authority;
- responsive managers and users;
- the ability to self-organise;
- the development of trust, collaboration and learning between role-players;
- the internal mechanisms for monitoring and action, and
- the development of a flexible management system that users understand and respect.

Wherever possible, these factors have been incorporated into the recommendations listed below.

1. Civil society coordination, empowerment and strategy development

- Establishment of an inclusive civil society alliance on water governance with support for networking and information-sharing, access to information and access to expertise, and training to understand technical aspects of WRM like waste water treatment works.
- Coordination of civil society strategies and interventions.
- Development of an appropriate, effective and efficient civil society toolkit to implement the interventions listed below. Such strategies include:
 - Building better communication channels between civil society and key role-players like the Minister of Water Affairs and the DWA; the Parliamentary Portfolio Committee on Water and Environmental Affairs (PPC); National Treasury and National Planning Commission; Public Service Commission; labour unions and the Chamber of Mines.

- Submission of requests for information, including through use of the Promotion of Access to Information Act, 2000 (PAIA).
- Using legal proceedings that include:
 - legal challenges of decisions made by the Minister and the DWA at the Water Tribunal and in court (including judicial review under PAJA);
 - strategic litigation to force realisation of Constitutional rights that affect water resources, and implementation of statutory obligations by the Minister and DWA;
 - civil legal proceedings for damages caused to water resources, including potential class actions, and nuisance; and
 - criminal prosecution of offenders, including through private prosecution.

2. Civil society participation in reviews and amendment of key strategies and legislation

- Ensuring effective opportunities for civil society participation in the revision of the NWRS in 2012.
- Ensuring effective civil society and expert input into the current review and proposed amendment of the NWA, the WSA, the Water Research Commission Act, 1997, (see Recommendation 10) and the Minerals and Petroleum Resources Development Act, 2002.
- Ensuring coordination between civil society work on water governance and the Mining, Environment and Community Alliance's Civil Society Legal Strategy to Promote Environmental Compliance, Transparency and Accountability in Mining.
- Ensuring increased awareness of and participation by civil society in water governance issues in Integrated Development Plans and Water Services Development Plans.

3. Promoting institutional stability within the DWA

- Addressing stability of senior management within the DWA, including finalisation of disciplinary action against various senior officials and

expediting permanent appointments of senior managers in the DWA.

- Advocating greater incentives for the attraction and retention of high quality staff within the DWA.
- Advocating the implementation of specialist mentorship programmes to build expertise in the DWA.
- Advocating provision of administrative justice training for DWA officials.
- Advocating improvement of record-keeping and prioritisation of the building of institutional memory within the DWA.

4. Improvement of cooperative governance: support to local authorities

- Increasing pressure from civil society on local authorities for improved compliance with obligations on water quality and water service delivery.
- Promoting the ramping-up of oversight of and assistance by DWA in municipalities' delivery of water and sanitation services, and promoting implementation of interventions identified by

DWA in the *Enhanced Local Government Support Approach*, 2011.

- Encouraging National Treasury to freeze funding to a local authority and/or take appropriate steps (including supervision) in cases of poor performance and misallocation of funds.
- Increase proactive civil society participation in monitoring of waste water treatment and appropriate resourcing and support for waste water treatment facilities.

5. Improvement of cooperative governance: asserting water mandate in decisions on mining and agriculture

- Increased and improved engagement with the competent environmental authorities, to ensure integration and alignment with regard to legislative reform, decision-making and the setting of conditional authorisations or water use licenses.
- Ensuring appropriate consideration of water resources in decisions made on prospecting and mining.
- Increased engagement with key authorities and role-players in the agriculture and mining sectors.



6. Improved access to information and oversight of water governance

- Far greater oversight and public reporting on the management of revenue and expenditure of the Water Trading Entity.
- Collaborating on civil society monitoring of implementation of regulatory functions under the NWA and WSA.
- Advocating dramatically improved implementation of PAIA by the DWA.
- Encouraging bodies like the South African Human Rights Commission, the Public Protector and the Water Tribunal to play watchdog functions in relation to water governance.
- Coordinating civil society liaison with and support for the PPC and making submissions relevant to water governance.
- Calling on DWA to publish the updated Sector Education Training Authority-aligned Water Care Works Classification System and Registration Regulations.
- Advocating publication of an annual National Water Compliance and Enforcement Report.
- Tracking, distributing and analysing decisions of the Water Tribunal.
- Advocating the public disclosure of all State tender processes related to building water infrastructure and waste water treatment works.

7. Roll-out and empowerment of participatory governance institutions: CMAs, WUAs and CMFs

- Promoting appropriate assignment and delegation of powers to existing CMAs and WUAs.
- Promoting the urgent establishment and empowerment of outstanding CMAs.
- Advocating WUAs becoming sub-catchment management entities accountable to CMAs.
- Speeding-up conversion of irrigation and other water boards to WUAs, initially placing less emphasis on transformation, but addressing better representivity thereafter.
- Promoting incorporation of CMFs in CMA architecture; recognition of legal status and provision of administrative and legal support for CMFs.
- Advocating CBOs, who manage projects closest to the community, as water services providers in facilitating sustainable development in rural areas.

8. Overdue implementation of statutory WRM tools

- Advocating simplification and prioritisation of implementation of statutory tools, particularly the Reserve determination, classification and verification.
- Advocating increased use of compulsory licensing in stressed catchments.
- Advocating the prioritisation of the implementation of the Waste Discharge Charge System and ensuring the ring-fencing of funds generated by National Treasury for water management purposes.
- Ensuring greater and more effective monitoring and evaluation of the implementation of statutory tools, and publication of those results, to inform civil society evaluation and action.

9. Improving quality of authorisations: Integrated WULs and General Authorisations

- Calling for more appropriate positioning of decision-making powers on authorisation within DWA and CMA, including ensuring appropriate delegation of authorisation functions to CMAs.
- Urgent training and on-going capacity-building for DWA and CMA officials on process and substance of authorisations.
- Advocating outright refusal and referral back of substantially deficient applications for Integrated WULs.
- Ensuring improved and meticulous record-keeping of all aspects of the IWULA process, including decisions taken at various stages, and advocating publicly accessible online electronic system for submission and processing of IWULAs.
- Advocating increased use of integrated permitting as provided for in s.24L of NEMA.
- Advocating use of peer review mechanisms to ensure integrity of Integrated WULs.
- Advocating the increased use of security for obligations arising from the Integrated WUL (s.30 of the NWA).
- Calling for urgent revision, expansion and re-publication of general authorisations.
- Ensuring independent quality control of Integrated WULs, and advocating the opportunity for public comment on and/or peer review of draft Integrated WULs.

10. Legislative amendments and law reform

- Making submissions and motivating for amendment of existing provisions:
 - NWA s.41(2)(c) and 41(4)(a)(ii): public participation must be a compulsory component of IWULAs, aligned with Environmental Impact Assessment Regulations (including amendment of the *DWA Generic Public Participation Guidelines*, September 2001). The administrative burden and delay of this requirement can be significantly mitigated through integrated permitting under s.24L of NEMA.
 - NWA ss.49-52: clarification and simplification of procedure for amendment of Integrated WULs.
 - NWA ss.43-48: review compulsory licensing to address the need for equity and sustainability within the capacity constraints of the DWA and the water sector.
 - NWA ss.151-152: dramatically increased criminal penalties for violations.
 - NWA s.146 and Schedule 6: reconsideration of requirements for appointments of members to Water Tribunal.
 - NWA s.148: amendment of legal standing provisions before the Water Tribunal to be in line with PAJA; clarification and expansion of substantive mandate of Water Tribunal (including expanded appeal grounds); specifying circumstances under which Minister can exercise her discretion to lift suspension in terms of s.148(2)(b).
 - NWA Schedule 6: improvement and expansion of the rules of procedure for the Water Tribunal (particularly to include timeframes).
- Making submissions and motivating for scrapping of existing provisions or incorporation of new provisions:
 - Advocating the revocation of the WSA and alignment with Municipal Services Act and Municipal Structures Act, or by regulations promulgated under the NWA.
 - Advocating incorporation of administrative penalties for violations of the NWA based on system established by the Competition Act, using the existing Water Tribunal.
 - Advocating incorporation of power to declare surface and groundwater protection zones and groundwater recharge zones, with associated

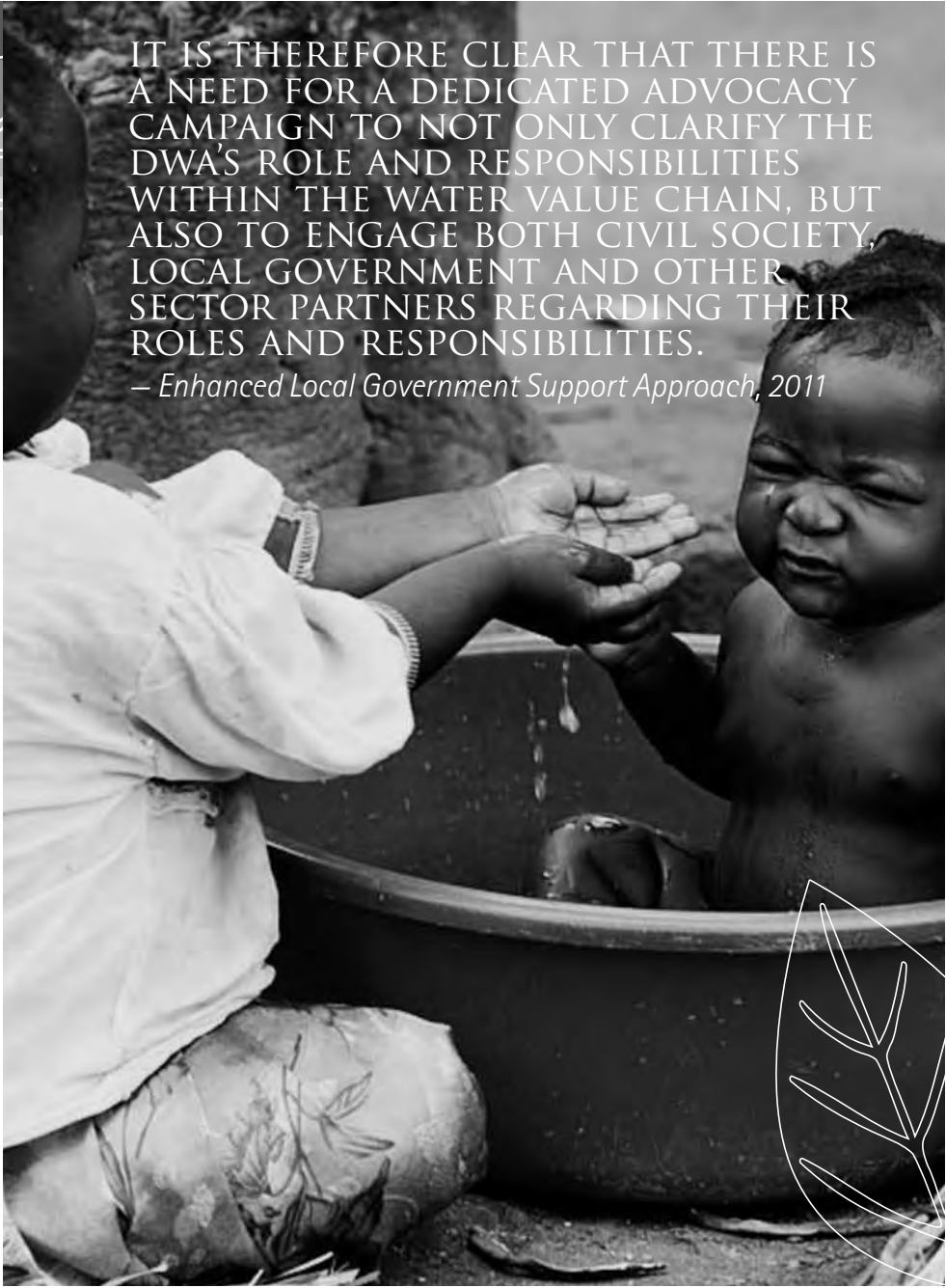
limitations on authorisation of water use in these zones.

11. Strengthening CME

- Advocating improved CME to be a political and management priority, and appointment of senior champion within DWA with right skills and vision to raise CME profile, skills and expertise of Blue Scorpions.
- Advocating additional resources to fill expanded staff structures (including more senior positions) in DWA and engagement of staff with appropriate specialised skills and experience.
- Advocating an inter-government forum and increased cooperation between DWA, CME, the Environmental Management Inspectorate and other enforcement agencies, including shared training and networks.
- In collaboration with Blue Scorpions, identifying and supporting legal research needs on CME.
- Advocating development and publication of appropriate CME strategy (incorporating prioritisation, compliance promotion and a media strategy to publicise results), and engaging with Blue Scorpions on immediate increase in visible compliance monitoring in prioritised sectors (incorporating, where possible citizen monitoring).
- Calling for implementation of improved reporting mechanism to incentivise reporting and whistleblowing by civil society.

12. New research required

- Compilation of a comprehensive research report on impacts of mining on water resources and critical analysis of socio-economic benefits of mining.
- Research on the impacts of energy generation options on water resources.
- Implementation of a media strategy to ensure increased public awareness of the consequences of mining and energy generation on water security.
- Research on effects of climate change on water resources.
- Comparative research on use of water for sanitation systems v dry disposal methods.



IT IS THEREFORE CLEAR THAT THERE IS A NEED FOR A DEDICATED ADVOCACY CAMPAIGN TO NOT ONLY CLARIFY THE DWA'S ROLE AND RESPONSIBILITIES WITHIN THE WATER VALUE CHAIN, BUT ALSO TO ENGAGE BOTH CIVIL SOCIETY, LOCAL GOVERNMENT AND OTHER SECTOR PARTNERS REGARDING THEIR ROLES AND RESPONSIBILITIES.

– *Enhanced Local Government Support Approach, 2011*

ABBREVIATIONS AND ACRONYMS

CER	Centre for Environmental Rights
CMA	Catchment Management Agency
CMF	Catchment Management Forum
Competition Act	the Competition Act, 1998 (Act 89 of 1998)
Constitution	the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)
CBO	Community-Based Organisation
CSO	Civil Society Organisation
CME	Compliance Monitoring and Enforcement
DEA	Department of Environmental Affairs
DMR	Department of Mineral Resources
DWA	Department of Water Affairs
EMI	Environmental Management Inspectorate
IWULA	Integrated Water Use Licence Authorisation
KAS	Konrad Adenauer Stiftung
Municipal Structures Act	Local Government: Municipal Structures Act, 1998 (Act 117 of 1998)
Municipal Systems Act	Local Government: Municipal Systems Act, 2000 (Act 32 of 2000)
NEMA	National Environmental Management Act, 1998 (Act 107 of 1998)
NGO	Non-Governmental Organisation
NWA	National Water Act, 1998 (Act 36 of 1998)
NWRS	National Water Resource Strategy
PAIA	Promotion of Access to Information Act, 2000 (Act 2 of 2000)
PAJA	Promotion of Administrative Justice Act, 2000 (Act 3 of 2000)
PPC	Parliamentary Portfolio Committee on Water and Environmental Affairs
RDM	Resource-Directed Measure
SDC	Source-Directed Control
SEMA	Specific Environmental Management Act
WEA	Water and Environmental Affairs
WMI	Water Management Institution
WRM	Water Resource Management
WSA	Water Services Act, 1997 (Act 108 of 1997)
WUA	Water User Association
WUL	Water Use Licence

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