

## THE LEGAL REGIME applicable to WETLANDS and WETLAND REHABILITATION

### The Importance of wetlands

1. Wetlands fulfil the following social and ecological functions:
  - Biological diversity
  - Water security and flood attenuation
  - Source of natural materials

### Legal duties on the State to conserve and/or rehabilitate wetlands

2. The legal duty to conserve and/or rehabilitate wetlands arises from various legal instruments:
  - 2.1 In terms of the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat, 1975 ("Ramsar Convention") to which South Africa is a party:

- States must designate wetlands for inclusion on the list. 12 wetlands have been included on the list by South Africa
- Article 3.1 provides that:

**“the Contracting Parties shall formulate and implement their planning so as to promote...as far as possible the wise use of wetlands in their territory”**

The thrust of the Convention is towards creating reserves but it makes allowance for use.

- 2.2 In terms of the Convention on Biological Diversity, to which Africa is also a party:
  - the State has a duty to conserve wetlands and a duty to rehabilitate them.
  - Article 8 provides that:

**“Each Contracting Party shall, as far as possible and as appropriate:**

    - (c) **Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use;**
    - (f) **Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and**

- implementation of plans or other management strategies.**
- (g) **Develop or maintain necessary legislation and/or regulatory provisions for the protection of threatened species or populations.**

2.3 The Constitution of South Africa also creates a duty on the State to conserve and rehabilitate wetlands

- Section 24 provides that:

**“Everyone has the right –**

- (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that-**
- i) prevent pollution and ecological degradation;**
  - ii) promote conservation; and**
  - iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.**

What "other measures" have been adopted?

- R30 million was budgetted for wetland rehabilitation for the 2001/2 financial year
- The Working for Wetlands Programme has been established as a nation-wide implementation programme

2.4 Principles underpinning environmental management contained in the National Environmental Management Act

These are required to be taken into account by any organ of state in the exercise of any power that may impact on the environment.

**“(4)(a) Sustainable development requires the consideration of all relevant factors including the following:**

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or where they cannot be altogether avoided, are minimised and remedied;”**

**Other legal rights and duties relating to wetlands can be considered in the light of the normal procedure for rehabilitation:**

3. Establish a forum of relevant organs of State
4. Identify and prioritise catchments
5. Identify and prioritise wetlands
6. Inspection and access

This can be secured through invoking the relevant inspection provisions of any one of the following pieces of legislation

- National Water Act
- Conservation of Agricultural Resources Act
- Section 41A Environment Conservation Act

7. Seek agreement with landusers/community

It is important to note that the long term success of any conservation or rehabilitation strategy is based on ongoing community support. In this context it is important to build relationships. However, it is also worth noting that there are various legal measures that have been adopted by the State to protect wetlands including the following:

- 7.1 Legislation dealing directly with Biological Diversity

A draft White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity was published in May 1997 and the Department of Environmental Affairs and Tourism is currently preparing a National Biodiversity Bill for submission to Parliament.

- 7.2 Section 31A of the Environment Conservation Act prohibits the following:

Performing of any activity as a result of which the environment is or may be 'seriously damaged, endangered or detrimentally affected'

- 7.3 Section 28 of the National Environmental Management Act provides that:

Every person who may cause or has caused significantly detrimental pollution or degradation of the environment must take reasonable steps to remedy the cause.

- 7.4 Section 19 of the National Water Act provides that:

If there is land where there is an activity or process which causes, has caused or is likely to cause pollution of a water resource, the person in control must take all reasonable measures to prevent such pollution from occurring, continuing or recurring

Pollution is defined as the altering of the physical, chemical or biological properties of water rendering it less fit for anticipated beneficial use or making it potentially harmful to humans, aquatic and non-aquatic organisms, to the resource quality or to property.

7.5 In terms of Section 22 of the National Water Act a water use must be authorised. In section 21 "water use" is defined to include:

- (b) storing water
- (c) impeding or diverting the flow of water in a watercourse
- (i) altering the bed, banks, course or characteristics of a watercourse.

7.6 Various regulations promulgated in terms of the Conservation of Agricultural Resources Act are also relevant:

Regulation 4 deals with harm to land generally and requires land users to protect cultivated land against excessive soil loss as a result of erosion through the action of water through crop rotation, crop residues and suitable grazing plant and then withdrawn from cultivation

Regulation 7 relates to the utilisation of wetlands and provides that:

No land user shall:

- utilise the vegetation in a vlei, marsh or water sponge or within the flood area of a water course or within 10 metres horizontally outside flood area in a manner that causes or may cause the deterioration of or damage to the natural agricultural resources.
- drain or cultivate any part of a vlei, marsh or water sponge; or cultivate any land within the flood area of a water course or within 10 metres horizontally outside the flood area of a water course.

Regulation 8 regulates the flow pattern of run-off water

No land user shall:

In any manner whatsoever divert any run-off water from a water course without of a written permission.

Effect an obstruction that will disturb the natural flow pattern of run-off water or permit the creation of such obstruction unless the provision for the collection, passing through and flowing away of run-off water through, around or along that obstruction is sufficient to ensure that it will not be a cause for excessive soil loss due to erosion through the action of water or the deterioration of the natural agricultural resources.

Remove or alter an obstruction in the natural flow pattern of run-off water on his farm unit if such removal or alternation will result in excessive soil loss due to erosion through the action of water or the deterioration of the natural agricultural resources.

7.7 Provincial laws and municipal by-laws

8. A written landowner agreement should be concluded before rehabilitation work starts

9. The project must be approval in principle
10. It must then be assessed by a technical expert
11. Prepare a business plan and rehabilitation plan
  - including a technical plan and maintenance plan
12. Legislation impacting on rehabilitation plan
  - Environmental Impact Assessment Regulations have been promulgated in terms of Section 21 of the Environment Conservation Act, No 73 of 1989 and relate inter alia to

**The construction or upgrading of-**  
**(i) canals and channels, including diversions of the normal flow of water in a river bed..**

**(j) dams, levees or weirs affecting the flow of water**

- In terms of the regulations application for approval must be submitted to the relevant provincial authority which may refer it to the Minister of Environmental Affairs and Tourism
  - The authority must decide whether advertising is necessary, a plan of study for scoping or a scoping report, and , thereafter, an environmental impact assessment.
  - The Applicant may seek exemption for rehabilitation works determined by the size of the catchment and the structure
  - Sections 22 and 117 of the National Water Act which relate to the construction of water barriers and dams an include:
    - Size classification
    - Hazard potential classification
    - Risk categories
  - Regulations 4 and 8 promulgated in terms of the Conservation of Agricultural Resources Act provide that:
    - Soil conservation works must be constructed to divert run-off water from other land and to restrict the run-off speed of water
13. Renegotiate the land owner agreement if necessary
  14. Proceed to implementation
  15. Arrange for hand over
  16. Monitoring and Inspection

**Sanctions**

(These procedures are the same as those that would be followed with regard to invading alien plants and are dealt with in detail in the Legal duties on landowners to control invading alien plants.)

17. Issuing of directives
  - Environment Conservation Act

- National Environmental Conservation Act
- Conservation of Agricultural Resources Act
- National Water Act

18 Rehabilitation by the State

19 Cost recovery

20 Securing costs

21 Delegation

22 Criminal sanction