

Chapter 11

Involving role-players in decision-making

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Good water decisions could improve the lives of people, boost the economy and safeguard the natural environment. On the other hand, a poor decision could wreak havoc on nature, exacerbate poverty and diseases and create conflict. If all role-players are involved in the decision-making process and alternatives are investigated, it could lead to good decisions. The input of the stakeholders should therefore also be considered. ¹

The role-players consist of custodians of the water resources, water resource developers, regulators, water services providers, water users, affected persons and interested persons or bodies and specialists. It is therefore all persons and bodies involved in making the decision. Stakeholders on the other hand, are only those persons and bodies that have an interest in or are affected by the decision. The role-players therefore include the stakeholders. ² For who the role-players and stakeholders in the water field are, see ch 10 above.

If the custodians, developers and regulators develop and implement instruments without the will of the stakeholders by engineering centralised, paternalistic and 'top-down' ³ approaches, policies and strategies, it could result in the instruments not being acceptable. On the other hand, a 'bottom-up' ⁴ approach should also not be followed because the custodians, developers and regulators should stay responsible, accountable and liable for developing the instruments. They have to ensure that the processes to develop the instruments are structured, focused and correctly driven so as to

¹ The input from Ms Tisha Greyling from Golder Associates Africa (Pty) Ltd with the drafting of this chapter is acknowledged. Tisha is a member of the Board of International Association for Public Participation (IAP2).

² See the terms 'role-players' and 'stakeholders' in the glossary of terms in the *Generic Public Participation Guidelines* of DWAF, Pretoria September 2001 at iv and the *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* DWAF, Pretoria Republic of South Africa, 2003 at x.

³ This means that the custodians, resource developers and regulators make the decisions without considering the views of the stakeholders.

⁴ This means that the stakeholders make the decisions.

involve the relevant stakeholders at the correct time and place and to allow the

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stakeholders to contribute in an interactive dialogue manner. They should evaluate and incorporate the contributions effectively into the relevant instruments.

Water management issues and solutions, most of the time, demand difficult choices from society, particularly rooted in the trade-offs between economic growth, social equity and ecological integrity. These issues are sometimes complex to resolve. Role-players should therefore be involved, and their involvement depends on the scope and impact of the decision.

The *National Water Resource Strategy* 1st ed⁵ recognises the need to involve role-players in water resource management. This should be done with significant participation, including people from local, catchment and national levels. This requires a shift from the practices of the past in that water resource management should be more people-centred and allow for greater participation by those involved.

The shift required should be effected by the progressive devolution and decentralisation of water resource management responsibilities to role-players at the regional, catchment and local levels. This can be achieved through the establishment of organisations such as catchment management agencies (CMAs), water user associations, advisory committees and consultative forums. Some organisations will have to be created while some of the existing organisations could be transformed.

The role-players should be represented in these organisations and the necessary appropriate institutions should also be developed and put in place. The establishing of these organisations will provide an effective platform for consultation to take place with the relevant role-players and allow the role-players to participate in water resource management decisions and the implementation of these decisions.⁶

11.1 The common-law requirement to involve role-players and the need to extend it

When a decision-maker makes a decision, the common-law rule of natural justice should be applied. This rule is crystallised in two maxims:

- *audi alteram partem* (persons affected by a decision should be given a fair hearing by the decision-maker prior to the making of the decision); and

⁵ *National Water Resource Strategy* 1st ed, published in Government Notice 65 in *Government Gazette* 27199 dated 28 January 2005, (see below ch 14.1 'Established strategy').

⁶ Chapter 3.5.1 of the *National Water Resource Strategy* (n 5).

- *nemo iudex in sua causa* (the decision-making must be, and must be reasonably perceived to be, impartial).

This rule means that ' . . . an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.' ⁷

A decision has a wide meaning. It includes any action taken regarding the making, issuing or giving of an instrument that is legally binding and enforceable. It also includes any failure or refusal to make, issue or give an instrument. An instrument could be a regulation, rule, strategy, licence, directive or notice. It includes also a

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decision to construct a waterworks and undertake a development and aspects associated with the construction and development.

A person is an affected person regarding a decision if a right, interest or legitimate expectation of the person is or could be affected by that decision. ⁸ The right, interest or expectation could be material (for example property), physical or personal (for example sense of well-being or distress). An affected person need not be a water user. It could be the owner of land adjoining the land where a water use takes place or a person using a product manufactured with water.

Whether a specific form of decision should attract a hearing and, more importantly, precisely which procedure is considered sufficient to satisfy the requirement of a hearing in a given case, depends on the circumstances of the particular case. The question whether a hearing is required before a decision is made further depends on whether the decision would have an individual or general impact. If a decision is likely to have a particular impact on individuals, a hearing is required. If a decision could impact generally upon a community or class of individuals, procedural fairness does not require a hearing. Instead, a less onerous procedure would suffice, such as a notice and comment procedure. ⁹

The scope of the impact or possible impact of the decision should dictate the manner and the period the person affected by the decision should be involved in the decision-making process.

There is variety in the contents of hearings and the forms, methods and means by which hearings could take place if a decision affects the rights of a person. The Supreme Court of Appeal dealt with the

⁷ *Ridge v Baldwin and Others* 1964 AC 40 (HL). See also *Evans and Others v Llandudno/Hout Bay Transitional Metropolitan Substructure and Another* 2001 (2) SA 342 (C).

⁸ See *Ridge* (n 7).

⁹ *South African Roads Board v Johannesburg City Council* 1991 (4) SA 1 (A).

audi alteram partem rule applicable to an application for a mining licence. ¹⁰ According to the Court, all affected persons are entitled to be heard in such an application. ¹¹ A formal procedure could be initiated, although there is no legal requirement that the hearing should be formal. The hearing could therefore be informal as long as the affected persons are notified of the application and be given the opportunity to raise their objections and concerns. These objections and concerns should be taken into consideration when the decision is made.

The *audi alteram partem* rule means that fairness will often require that a person who may be adversely affected by the decision should have an opportunity to make representations on his or her own behalf. If the presentations are made before the decision is taken, it is with a view to producing a favourable result. If the presentations are made after the decision has been taken, it is with a view to procuring modification to the decision. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his or her interests, fairness will frequently require that he is informed of the gist of the case which he has to answer. The requirements of procedural fairness are depended on the

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circumstances of each case. ¹² This rule is now expressed in the Promotion of Administrative Justice Act 3 of 2000 (PAJA). ¹³

The common law therefore only requires that a person whose rights, interests or legitimate expectations are or could be affected by a particular decision should be involved in the making of that decision. It is not a requirement that a formal and structured process should be followed. If there is a need for such a process, legislation should regulate the matter.

There is no requirement in terms of the common law that a role-player other than an affected person should be involved in the decision-making process, even if the person could contribute to or benefit from the decision. However, a role-player may be involved, but it is in the discretion of the decision-maker whether and how the role-player should be involved.

The common-law approach that only affected persons should be involved has in the modern area been found to be very narrow. The

¹⁰ *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA).

¹¹ Application of the *audi alteram partem* rule is indicated for the enormous damage that mining could do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence, is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs.

¹² *Du Bois v Stompdrift-Kamanassie Besproeiingsraad* 2002 (5) SA 186 (C) at 192E-E/F and 194A-D and F-H.

¹³ Section 3. See above ch 7.7.3.

Supreme Court of Appeal said '[w]hat has to be ensured . . . is that development which meets present needs take place without compromising the ability of future generations to meet their own needs. Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.'

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It seems that there is a need to involve other persons than affected persons in the decision-making process, although no rights, interests or legitimate expectations of these persons are affected by the decision and they are also not involved in managing the water resources or providing water services. These persons are only interested in and wish to be involved in the decision-making process in order to—

- make a contribution towards the making of the decision;
- promote communication, facilitate, negotiate and mediate between the other role-players involved in the process;
- obtain a benefit or information from the process which they could use to enhance their objectives;
- be an observer of the process;
- provide financial, technical and other assistance to some of the role-players involved in the process;
- build capacity and expertise among the different role-players involved in the process; or
- educate and create awareness among the other role-players involved in the process.

The contributions from these persons are therefore most of the time a combination of protecting the resources, providing services other than water services, promoting certain objectives or gaining information. Usually these persons organise themselves into voluntary organisations or bodies such as societies, associations, non-

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governmental organisations (NGOs) and community-based organisations (CBOs), although it is not a requirement.

A group of affected persons could also organise themselves into a body. This body is then an interested person and not an affected person, while the individual members of the body are affected persons regarding the decision.

¹⁴ *Save the Vaal Environment and Others* (n 10).

Who, how and when to involve persons other than affected persons in the making of a decision depend, among other things, on the functional area involved as well as the impact of the decision on the affected persons, the public perceptions of the decision, the sensitivity of the receiving resource and the socio-economic effect of the decision. This is not regulated by the natural justice rule of the common law. Therefore, if required, the matter should be regulated by government policy and legislation. It has happened in a couple of functional areas, for example activities that could affect the environment¹⁵ and mining activities.¹⁶

11.2 Legal requirements to involve role-players

11.2.1 Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 (Constitution) requires that the State must respect, protect, promote and fulfil the fundamental rights of the people of South Africa as contained in the Constitution.¹⁷ It is submitted that—

- respect means that the State is refrained from interfering with the enjoyment of the rights;
- protect means that the State should prevent other persons from violating the rights;
- promote means that the State should encourage and advance the realisation of the rights, which includes ensuring public awareness; and
- fulfil means that the State should take appropriate legislative, administrative, budgetary, judicial and other measures towards the realisation of the rights.

The various organs of state involved in water management must ensure that the necessary measures relating to the protection, usage, development, conservation, management and control of the water resources are such that the fundamental rights relevant to water are respected, protected, promoted and fulfilled.

Each sphere of government and each organ of state must apply the following democratic values and principles:

- efficient, economic and effective use of resources must be promoted and maintained;
- people's needs must be responded to, and the public must be encouraged to participate in policy-making; and
- transparency must be fostered by providing the public with timely, accessible and accurate information.¹⁸

¹⁵ See ch 16.5 below.

¹⁶ See below chs 16.2.1 'Consultation with interested and affected persons regarding the applications' and 16.2.2.

¹⁷ Section 7(2) of the Constitution.

¹⁸ Section 195(1).

All spheres of government and the organs of state in these spheres must adhere to the principles of co-operative government by informing one another of and consulting one another on matters of common interest and providing effective, transparent,

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accountable and coherent governance for the Republic as whole.¹⁹ These principles are not applicable to the organs of state not within any sphere of government or any other organisation.

Effect could be given to the above requirements of the Constitution if the relevant organs of state are involved in the decision-making process as required in terms of the principles of co-operative government.

11.2.2 National Environmental Management Act 107 of 1998

National Environmental Management Act 107 of 1998 (NEMA) sets out principles that apply to the actions of all organs of state that may significantly affect the environment.²⁰ Development must be sustainable,²¹ which requires the promotion of participation of all interested and affected parties in environmental governance. All people must also have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation by vulnerable and disadvantage persons.²²

NEMA promotes the application of environmental management tools in order to ensure integrated environmental management.²³ Integrated environmental management is a combination of processes and procedures that maintain environmental sustainability. One of the general objectives of integrated environmental management is to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment.²⁴ See ch 16.5 below for the framework to achieve this.

Effect could be given to this if the role-players concerned are involved in the process of making the decision and not only the organs of state in the three spheres of government. This could be achieved by following the principles of co-operative governance.

11.2.3 National Water Act 36 of 1998

Explanatory notes to certain parts or chapters of the National Water Act 36 of 1998 (NWA) require that role-players should be involved in formulating certain instruments. These are establishing the National Water Resource Strategy (NWRS), catchment management and pricing strategies and CMAs, declaring controlled activities, issuing

¹⁹ Section 41(1).

²⁰ Section 2 of NEMA.

²¹ Section 2(3).

²² Section 2(4)(f).

²³ Sections 23 and 24.

²⁴ Section 23(2)(d).

general authorisations and making regulations. The explanatory note to the development of the resource-directed measures ²⁵ states that these measures should be developed in the context of the NWRS and catchment management strategies. Although explanatory notes should not be used in the interpretation of any of the provisions of the NWA, ²⁶ it is the spirit of the Act that these instruments should be formulated involving the different role-players.

Various provisions of the NWA also require that consultation should take place

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before a decision is taken. The word 'consult' and its derivatives occur not less than 40 times in the Act.

One of the initial functions of a CMA is to promote community participation in the protection, use, development, conservation, management and control of the water resources. ²⁷

It is clear that the NWA indicates that role-players should be involved in the decision-making process. However, the Act does not prescribe who should be involved, or the manner, time and extent of the involvement. The who, manner, time and extent should therefore be included in the different instruments made, issued and given under the Act. The NWRS, catchment management strategies and regulations are probably the most important instruments for this. The NWRS must set out the strategies, objectives, plans, guidelines and procedures of the Minister of Water Affairs and Forestry (Minister) and institutional arrangements relating to the protection, use, development, conservation, management and control of the water resources. ²⁸ A catchment management strategy must set out the strategies, objectives, plans, guidelines and procedures of the agency involved for the protection, use, development, conservation, management and control of the water resources within the agency's management area. ²⁹

The Department of Water Affairs and Forestry (DWAF) is currently working towards a holistic process that will integrate the public participation processes for licensing, resource-directed measures for water resource protection and catchment management. ³⁰

It seems that the statement in ch 4.1 of the *National Water Resource Strategy* 1st ed ³¹ that 'most of these . . . [strategies] are

²⁵ The measures consist of a system for classifying water resources and determining the class, resource quality objectives and Reserve of a particular water resource. See ch 15.1.1 below.

²⁶ Section 1(4) of the NWA.

²⁷ Section 80(e). See below ch 31.2 'Corporate governance and inherent powers'.

²⁸ Section 6(1)(a). See below ch 14.1 'Contents of the Strategy'.

²⁹ Section 9(c). See ch 14.2 below.

³⁰ *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* (n 2) at iv.

³¹ See below ch 14.1 'Established strategy'.

not specifically required by the Act, they are nonetheless essential for the long-term, sustained implementation' is not correct. These strategies are the type of strategies that are necessary to protect, use, develop, conserve, manage and control the water resources and should therefore be included in the NWRs. If this statement in the Strategy is correct, the inclusion of the complementary strategies will be *ultra vires* and could not legally be enforced.

The NWA requires that the following procedures should be followed in making certain decisions under the Act which could create the opportunity to involve role-players in the making of decisions.

Regulations

Before a regulation ³² could be made, the Minister must publish a notice in the *Government Gazette* setting out the draft regulations and inviting written comments

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to be submitted on the proposed regulations. The notice must specify the address to which and the date before which the comments must be submitted. The date may not be earlier than 60 days after publication of the notice. ³³ The Minister must consider what further steps, if any, are appropriate to bring the contents of the notice to the attention of interested persons ³⁴ and take those steps. ³⁵ The Minister must consider all the comments that are received on or before the date specified in the notice. ³⁶

On request by the National Assembly or the National Council of Provinces (NCOP) or a committee of the National Assembly or the NCOP the Minister must report the extent to which a specific comment has been taken into account, or if a comment was not taken into account, provide the reason why it was not taken into account. ³⁷

Instruments of legislative nature

³² See below chs 12.1 'Monitoring, assessments and information regarding water resources', 13 'Financial assistance', 18.1 'Access to and use for recreation', 17.1 'Regulations', 16.1.3, 16.2.3, 16.3.2, 20.4 'Complying with conditions and requirements', 'Management practices applicable to the discharging and disposing of waste' and 'Waterworks', 20.5 'Registration of water uses', 23.1, 23.4.1 'Procedure for applications', 23.4.3 'Process to allocate entitlements to water', 25.3 'The National Water Act 36 of 1998—Entitlements manifested as water uses', 26 'Achieving the equitable and efficient allocation of water', 29.1 'Classifying dams with a safety risk', 31.3 'Governing boards—Members' and 33.1.

³³ Section 69(1)(a).

³⁴ Reference is made only to interested and not affected persons. Interested persons, most of the time, also include affected persons, although it might be possible that some affected persons are not necessarily interested in the matter.

³⁵ Section 69(1)(b).

³⁶ Section 69(1)(c).

³⁷ Section 69(1)(d). Sections 70 and 71 set out the procedure how and when the regulations should be submitted to Parliament. Parliament must then consider the regulations to determine whether they comply with certain requirements and may even reject the regulations.

Before certain instruments of 'legislative nature'³⁸ could be made, the Minister or responsible authority, as the case may be, must publish a notice in the *Government Gazette*. The notice must set out the proposed instrument or a summary thereof, including the address where the proposed instrument is available for inspection, if only a summary is published. Written comments are invited to be submitted on the proposed instrument at the address and before the date specified in the notice, which date may not be earlier than 60 days after publication of the notice. The administrator must also consider what further steps, if any, are appropriate to bring the contents of the notice to the attention of interested persons³⁹ and take those steps. The administrator must consider all the comments that are received on or before the date specified in the notice.⁴⁰

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Issuing licences

A responsible authority may require from an applicant for a licence at the applicant's expense to obtain and provide the authority with certain information and an assessment of the likely effect of the proposed licence on the resource quality.⁴¹ In certain cases effect could only be given to this if role-players are involved in obtaining and providing the information and assessment. For that reason the responsible authority may direct that the assessment must comply

³⁸ These are—

- establishing the NWRS (s 5(1) (see ch 14.1 below));
- establishing a catchment management strategy (s 8(1) (see ch 14.2 below));
- determining the class and resource quality objectives of a water resource (s 13(1) (see below ch 15.1.1 'Classes and resource quality objectives'));
- determining the Reserve of a water resource (s 16(1) (see below ch 15.1.1 'Reserves'));
- declaring an activity a stream flow reduction activity (s 36(2) (see below ch 21.2.4 'Declared activities'));
- declaring an activity a controlled activity (s 38(1) (see below ch 21.2.5 'Declared activities'));
- authorising the use of water generally (s 39(1) (see ch 23.3 below));
- establishing a pricing strategy (s 56(1) (see ch 26 below)); and
- making rules to regulate the use of water (item 3(1) of Schedule 3 to the NWA (see below ch 20.4 'Rules regulating water uses')).

³⁹ See n 34 above in this chapter.

⁴⁰ See—

- s 5(5) regarding the establishment of the NWRS;
- s 8(5) regarding the establishment of a catchment management strategy;
- s 13(4) regarding the determination of the class and resource quality objectives of a water resource;
- s 16(3) regarding the determination of the Reserve of a water resource;
- s 36(4) regarding the declaration of an activity a stream flow reduction activity;
- s 38(3) regarding the declaration of an activity a controlled activity;
- s 39(4) regarding the authorisation of the use of water generally;
- s 56(7) regarding the establishment of a pricing strategy; and
- item 3(5) of Schedule 3 to the NWA regarding the making of rules to regulate the use of water.

⁴¹ Section 41(2)(a). See below ch 23.4.1 'Procedure for applications'.

with the requirements contained in the regulations dealing with environmental impact assessments (EIAs).⁴²

A responsible authority may at any stage of the application process require the applicant to give suitable notice in newspapers and other media describing the licence applied for and stating that written objections may be lodged against the application before a specified date. The applicant must also satisfy the responsible authority that the interests of persons having an interest in the land will not be adversely affected.⁴³

If a compulsory licensing procedure is implemented, the responsible authority must prepare a proposed allocation schedule and the schedule is made known in the *Government Gazette* for objections.⁴⁴ After considering the objections received, the responsible authority must prepare a final preliminary schedule and make the schedule known in the *Government Gazette*. There is an appeal to the Water Tribunal in respect of any unsuccessful objection to the preliminary schedule.⁴⁵ After the appeals have been dealt with, the preliminary schedule becomes the final schedule.⁴⁶ Licences are issued according to the final allocation schedule.⁴⁷

Making decisions

Before certain decisions⁴⁸ that are not necessarily instruments of legislative nature could be made, the Minister must publish a notice in the *Government Gazette*.⁴⁹ The notice must set out the proposed decision or a summary of the proposed decision including the address where the proposed decision is available for inspection. Written

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comments on the proposed decision must be invited to be submitted at the address and before the date specified in the notice, which date may not be earlier than 60 days after publication of the notice. The Minister must also consider what further steps, if any, are appropriate

⁴² Section 41(3). See ch 16.5 below regarding the requirements contained in the regulations dealing with EIA.

⁴³ Section 41(4). See also n 34 above in this chapter.

⁴⁴ Section 45(4). See ch 23.4.3 below.

⁴⁵ Section 46.

⁴⁶ Section 47(1)(b).

⁴⁷ Section 47(2).

⁴⁸ See—

- establishing a CMA (s 77(3) (see ch 31.1 below));
- disestablishing a CMA (s 88(2) (see ch 31.1 below));
- establishing a water user association (s 92(3) (see ch 32.1 below));
- disestablishing a water user association (s 96(2) (see ch 32.1 below)); and
- constructing a government waterworks (s 109 (see below ch 18.1 'Acquisition and disposal')).

⁴⁹ See—

- s 78(3) regarding the establishment of a CMA;
- s 88(2) regarding the disestablishment of a catchment management;
- s 92(3) regarding the establishment of a water user association;
- s 96(3) regarding the disestablishment of a water user association; and
- s 110(1) regarding the construction of a government waterworks.

to bring the contents of the notice to the attention of interested persons⁵⁰ and take those steps. The Minister must consider all the comments that are received on or before the date specified in the notice.

11.2.4 Water Services Act 108 of 1997

The Water Services Act 108 of 1997 (WSA) requires that the following procedures should be followed in making regulations⁵¹ under the Act which could create the opportunity to involve role-players.

Before a regulation could be made, the Minister must publish a draft of the regulations in the *Government Gazette* for public comment within a time specified in the notice.⁵² Copies of the draft regulations must be sent to the following to invite their comments:

- the Minister for Provincial and Local Government;
- the Members of the Executive Council responsible for local government in the relevant provinces;
- the relevant organisations representing municipalities; and
- the relevant water boards.⁵³

All comments timeously received must be considered and on request, the Minister must report on the extent to which a specific comment or comments have been taken into account, or, if a comment was not taken into account, provide reasons therefor.⁵⁴

11.3 Public participation as a manner to involve role-players

A process should be followed involving those affected and those who are interested and wish to be involved in the decision-making process. No two processes could be the same nor could it be applied similarly in all cases, as different role-players could be involved and different methods could be applied. Some process could take a long time and be very costly, while others would not be time-consuming and costly.

The solution lies in the design of a flexible process to involve the correct role-players effectively at the right time and place. A joint effort by stakeholders, technical specialists and the decision-makers working together could lead to produce better decisions than if they had acted independently.⁵⁵ This is, however, not easy.

Public participation could be a way to involve the relevant role-players in the process. Public participation describes a variety of relationships between the decision-maker and its stakeholders and is

⁵⁰ See n 34 above in this chapter.

⁵¹ See below chs 35.2.1, 35.2.2, 36.1 'Make by-laws', 37.1 'Matters relating to water services institutions', 37.1.1.3 and 37.1.2.2.

⁵² Section 71(1)(a) of the WSA.

⁵³ Section 71(1)(b).

⁵⁴ Section 71(1)(d).

⁵⁵ See the *Generic Public Participation Guidelines* (n 2) at 5.

decision-oriented. Its greatest benefit is its contribution to achieving sustainability. It provides for a process in which—

- all the role-players have clear and complementary roles and contribute to informed decision-making;
- public issues are integrated with technical assessment;

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- stakeholders are assured that their contributions will influence the decision; and
- the decision-maker is provided with a degree to which the different sectors of society are willing to accept or live with trade-offs between the three dimensions of sustainability.

For each decision to be sustainable, all three dimensions of sustainability, namely economic growth, social development and ecological integrity, should be taken into consideration.⁵⁶ As these three dimensions are seldom in balance, there should be trade-offs based on local needs and circumstances. The decision-makers, specialists and role-players representing the different sectors of society, assisted and supported by an independent public participation facilitator, deliberate the trade-offs they are willing to accept between the three dimensions of sustainability. This does not mean the three dimensions are seen as competitors, but assist the decision-maker to make an informed and integrated decision regarding the point of sustainability.⁵⁷

Therefore, the point of sustainability differs from decision to decision. Public participation assists decision-makers in establishing the point of sustainability for each instrument to be made, issued or given by contributing essential local knowledge and wisdom and by clarifying the degree to which role-players are willing to accept or live with trade-offs. Public participation assists decision-makers in making informed and integrated decisions about the sustainability of the instrument.⁵⁸

Greater public participation in all aspects of planning, environmental assessments, water resource management and provision of water services is a common theme in most literature⁵⁹

⁵⁶ See the text that n 130 in ch 7.5.2 above refers to.

⁵⁷ See the *Generic Public Participation Guidelines* (n 2) at 5.

⁵⁸ Pamphlet for the World Summit on Sustainable Development September 2002, Johannesburg South Africa, *Public participation critical for sustainable development* International Association for Public Participation at 2.

⁵⁹ See Sowman M *Improving the practice of public participation in environmental planning in South Africa—Town and Regional Planning* 1994 at 20–30, the *Generic Public Participation Guidelines* (n 2) at 9 and 10, Coakes S *Consulting communities—A policy maker's guide to consulting with communities and interest groups*, Bureau of rural sciences, AFFA, Australia, June 1999, *Guides for the Establishment of CMAs and Water User Associations—Working Paper on appropriate Public Participation for CMAs and Water User Associations: Towards co-operative governance* Tisha Greyling and Solly Manyaka for Manyaka Greyling Meiring (Pty) Ltd 16 August 1999 and *Public participation for CMAs and WUAs* Guide 4 in the CMA/WUA Guide Series, DWAF.

and legislation regarding water issues.⁶⁰ The reason being that in a democratic society people should actively be involved in the actions and decisions affecting their lives. According to the core values for public participation of the International Association for Public Participation—

- the public should have a say in decisions about actions that affect their lives;
- public participation includes the promise that the public's contribution will influence the decision;
- the public participation process communicates the interests and meets the process needs of all participants;
- the public participation process provides participants with the information they need to participate in a meaningful way;
- the public participation process seeks and facilitates the involvement of those potentially affected;

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- the public participation process involves participants in defining how they participate; and
- the public participation process communicates to participants how their input affected the decision.⁶¹

Authors in the past generally had difficulty in defining the concept public participation.⁶² One of the reasons could be that there are various approaches to public participation, depending on the functional areas involved and the terminology used. Synonyms were often used, such as 'consultation', 'public involvement' and 'involvement'. It seems that the difficulty could be due to the fact that previously 'public participation' was not seen as a spectrum which showed a range of levels of public involvement, ranging from inform,⁶³ consult,⁶⁴ involve,⁶⁵ collaborate⁶⁶ and empower.⁶⁷,⁶⁸ The

⁶⁰ See ch 11.2 above and ch 16.2.1 'Consultation with interested and affected persons regarding the applications', 16.2.2 and 16.5 below.

⁶¹ See www.iap2.org/corevalues/index.

⁶² See, for example, Roberts *The Reform of Planning Law* (1976) London MacMillan at 103, Alder J *Development Control* (1979) London Sweet & Maxwell at 3 and Boden R 'Public participation and the planning process' 1979 *Planning and Building Developments* at 14–19 and 49–51.

⁶³ The objective of informing is to provide the public with balanced and objective information to enable people to understand the problem, alternatives and/or solutions.

⁶⁴ The objective of consultation is to obtain public feedback on analysis, alternatives and/or decisions. It involves acknowledging concerns and providing feedback on how public input has influenced the decision.

⁶⁵ The objective of involvement is to work directly with the public through the process to ensure that public issues and concerns are understood and considered at every stage directly reflected in the planning, assessment, implementation and management of a particular proposal, activity or instrument.

⁶⁶ The objective of collaboration is to work with the public as a partner on each aspect of the decision, including the development of alternatives and the identification of the preferred solution.

⁶⁷ The objective of empowering is to place final decision-making in the hands of the public.

goal, the objective, the promise to the public and the tools for each are different. Different levels of participation reflect different objectives.⁶⁹ Therefore depending on the type of decision or instrument, the correct level should be followed.

Public participation in determining the class of a water resource, the resource quality objectives and the Reserve largely takes place at the involve level. The Minister takes final decisions regarding the determination of the class, objectives and Reserve and not the public.⁷⁰ In some instances, such as setting a vision and involvement in the development of or comment on alternative scenarios, public participation could move towards the collaborate level.

Public participation should not be confused with the making of decisions. The decision-maker stays responsible and accountable for a decision, but requires information in order to make a legally binding and appropriate decision. Public participation does not mean that the public makes a decision together with a

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decision-maker. Rather, it means that the public's views and opinions are available to the decision-maker and are considered in the decision-making process.⁷¹

The nature of a public participation process should be dependent on the goal of the process. In some instances, the public need to be informed only on certain initiatives or aspects. Other initiatives require public opinions and views in order to improve decisions and the sustainability of the initiative.⁷² Furthermore, affected persons should always be involved, while interested persons and other role-players could be involved, depending on the impact of the decision on the affected persons, the public perceptions of the decision, the sensitivity of the receiving resource and the socio-economic effect.

It should be a policy matter as to whom, how and when interested persons that are not affected persons should be involved. It should be dependent on whether the impact of the decision on the affected persons (or other anticipated impacts) is low or high, and on the

⁶⁸ See www.iap2.org/practionertools/spectrum and *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* (n 2) at 4.

⁶⁹ *Public participation critical for sustainable development* (n 58) at 4. See also the term 'public' in the glossary of terms in the *Generic Public Participation Guidelines* (n 2) at iv: '[T]he term 'public' does not refer to a homogenous group of people. The public is '. . . a constantly shifting multiplicity of affiliations and alliances that group or regroup according to issues and their understanding of the issues, perceptions of risk and the natural evolution of informal structures. There is no single 'public'. There are a number of publics, some of whom may emerge at any time during the process depending on their particular concerns and the issues involved.'

⁷⁰ See *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* (n 2) at 4.

⁷¹ See the *Generic Public Participation Guidelines* (n 2) at 1 and *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* (n 2) at ix.

⁷² See the *Generic Public Participation Guidelines* (n 2) at 5.

other side of the scale whether the public perceptions of the decision, the sensitivity of the receiving water resource and the socio-economic effect of decision are low or high. There could also be other considerations such as whether previously a public participation process had taken place, the degree of trust in the decision-makers and the degree to which stakeholders are empowered. If—

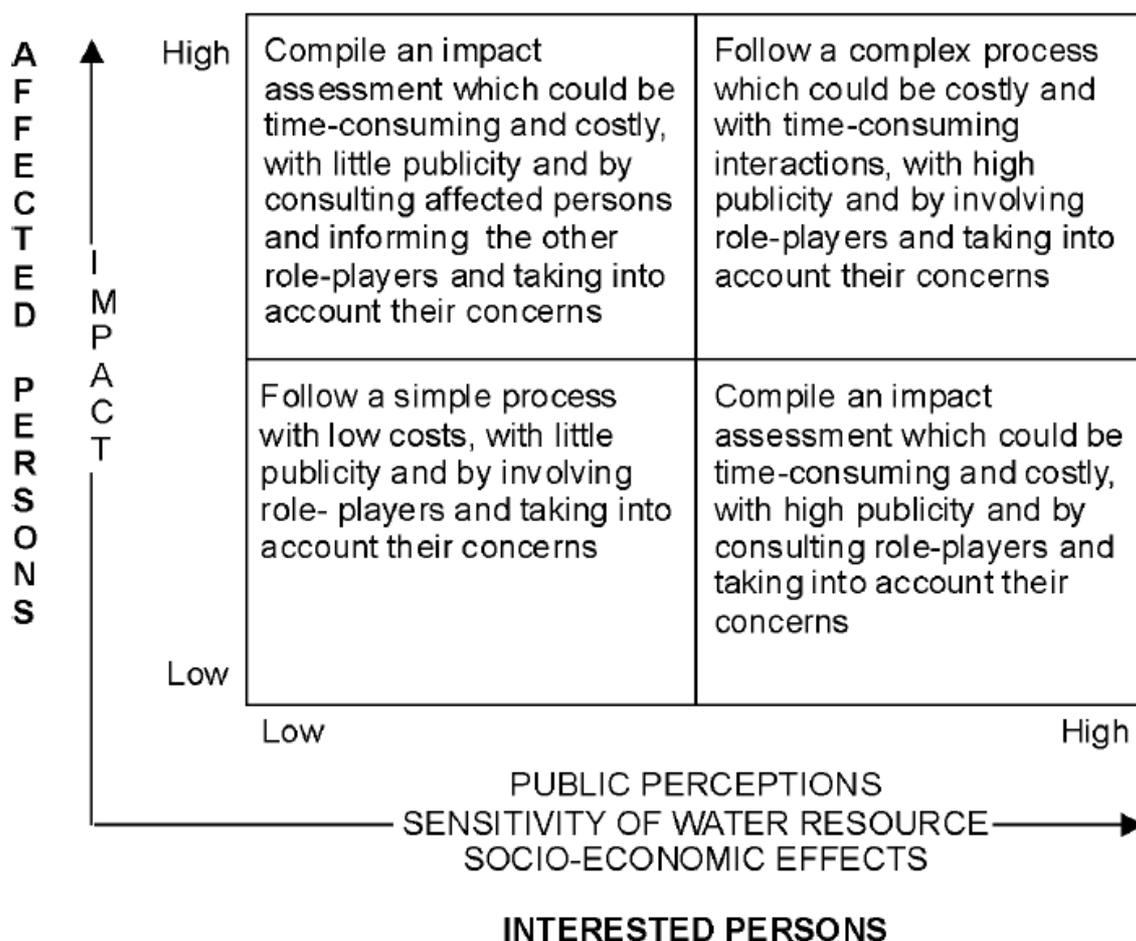
- the impact, public perceptions, sensitivity of the receiving water resource and socio-economic effects are low, a simple process with low cost could be followed, with little publicity and by informing only the role-players and taking into account their concerns;
- the impact is high and the public perceptions, the sensitivity of the receiving water resource and the socio-economic effects are low, a process consisting of compiling an assessment of the impact which could be time-consuming and costly, should be followed, with little publicity and by consulting the affected persons and by informing other role-players and taking into account their concerns;
- the impact is low and the public perceptions, the sensitivity of the receiving water resource and the socio-economic effects are high, a process consisting of compiling an assessment of the situation, which could be time-consuming and costly, should be followed, with high publicity and by consulting the role-players and taking into account their concerns;
- the impact, the public perceptions, the sensitivity of the receiving water resource and the socio-economic effects are all high, a complex process, which could be costly and with time-consuming iterations, should be followed, with high publicity and by involving the role-players and taking into account their concerns.⁷³

Figure 3 sets out the level of involvement of interested and affected persons in making decisions.

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Figure 3: Level of involvement of interested and affected persons in making decisions

⁷³ See *Guide to public participation for determining the class of a water resource, resource quality objectives and Reserve* (n 2) at 13.



What would the situation be if some of the role-players are not educated and informed? Should the process also require that they should be educated and informed? It should also be a policy matter and if necessary the law should be so formulated that effect is given to the policy. The *National Water Resource Strategy* 1st ed goes a long way towards requiring that the role-players should be educated.⁷⁴ It deals with the following complementary strategies:

- building capacity and expertise among practitioners in the water sector; and
- educating and creating awareness among role-players.

A process should be designed for each case to involve the role-players in the making of a decision, depending on the issues involved. It is therefore a case-by-case driven process. The public participatory techniques available could be grouped into extra-judicial and judicial. In practice a combination is usually used.

The extra-judicial techniques could be divided in—

- passive public information techniques, such as printed material, technical reports, advertisements and newspaper inserts;

⁷⁴ Chapter 4 of the *National Water Resource Strategy* (n 6).

- active public information techniques, such as flyers included with monthly utility bills, press releases, news conferences, broadcasting, briefings, information contact- and hotlines, information centres, field offices, field trips and open houses;

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- small group public input techniques, such as interviews, personal surveys and small formal meetings;
- large group public input techniques, such as response sheets, mailed surveys and questionnaires, telephone survey polls and public hearings;
- small group problem-solving techniques, such as community facilitators, mediation and negotiation, consensus-building techniques, focus groups, advisory committees, task forums and panels; and
- large group problem-solving techniques, such as e-mails, workshops, conferences and deliberate polling.⁷⁵

The judicial techniques distinguish between various procedures which allow for a degree of public participation, such as formal and informal contracts and agreements, mediation, adjudication, investigation and consultation. Many of these are included in the NWA, WSA and PAJA as set out in this work. Establishing of investigatory, advisory, statutory, consulting and coordinating bodies create forums for these procedures to take place. The judicial techniques distinguish between various procedures which allow for a degree of public participation, such as formal and informal contracts and agreements, mediation, adjudication, investigation and consultation. Many of these are included in the NWA, WSA and PAJA as set out in this work. Establishing of investigatory, advisory, statutory, consulting and coordinating bodies create forums for these procedures to take place.⁷⁶

DWAF committed itself to undertake (and will continue to undertake until such time as the other organisations are able to take over the responsibility) public consultation in water resource management issues.⁷⁷

⁷⁵ See www.iap2.org/practionertools/toolbox.

⁷⁶ According to *Improving the practice of public participation in environmental planning in South Africa* (n 59) at 24 the most scope for public participation occurs through establishing informal arrangements and agreements between administrative authorities and the public. Many water users and advisory groups are already involved in forums where water-related planning and enforcement issues are discussed. These forums could form the basis of the committees of the CMAs (see below ch 31.3 'Committees established by catchment management agencies').

⁷⁷ Chapter 4.3.1 of the *National Water Resource Strategy* (n 6).