The Regulatory Framework and Implications for Partnership-Based River Management, based on lessons from key river partnership programmes

C40 Cities Finance Facility

October 2020
ABOUT THE C40 CITIES FINANCE FACILITY

The C40 Cities Finance Facility (CFF) is a collaboration of the C40 Cities Climate Leadership Group and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH. The CFF supports cities in developing and emerging economies to develop finance-ready projects to reduce emissions to limit global temperature rise to 1.5°C and strengthen resilience against the impacts of a warming climate. The CFF is funded by the German Federal Ministry for Economic Cooperation and Development (BMZ), the Children’s Investment Fund Foundation (CIFF), the Government of the United Kingdom and the United States Agency for International Development (USAID).
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1. INTRODUCTION
Climate change, urban expansion, changes in land use, and increasing resource consumption are leading to levels of pressure and unpredictability in the water system not originally planned for in governance structures. Water governance which focusses only on water abstraction, treatment and distribution loses sight of the inter-dependent water cycle recognised by the National Water Act (Act No. 36 of 1998). For municipalities that have a mandate and responsibility to manage water, wastewater and stormwater services in such a way as to fulfil citizens’ Constitutional rights to a safe and healthy environment and access to adequate water, whilst simultaneously redressing historical imbalances, new approaches and associated structures are required. In particular, there is a need to re-imagine water governance as a system where the multiple spheres of government, as well as business, civil society and traditional authorities, work together towards a common goal of shared value creation, equity and resilience.

There are some examples where the above has already been taking place. We see them as 'seeds of transformation', where a diverse mix of local scale interventions are gaining enough momentum, successes and learnings to necessitate thinking about river management and transformation on a much larger, strategic level than before.

In this review we evaluated nine such river management approaches to distil key elements to consider in the implementation of broader river management programmes. These insights are also used to develop insights into a regulatory framework relating to water-related services to make a case, and propose potential governance structures, for partnership-based riverine management by municipalities.

A high-level review of the regulatory framework related to water management provides initial insights and suggests key focus areas that offer possibilities to enhance partnership-based riverine management at the local level, namely:

- The relationship between the three spheres of government (National, Provincial and Local), with particular emphasis on the management of water resources and services.
- A more detailed review of the mandate of local government with regards to water services and those riverine management processes that are incidental to, or required for, municipalities to fulfil their mandates.
- A review of eight river management programmes in KZN.
- The relationship between different stakeholders based on their rights and responsibilities in relation to riverine and water management. Included in this discussion is the importance of building partnerships between these different stakeholders in order to better manage water resources and services.
- Possible institutional arrangements that would enable and support partnership-based riverine management at three levels in South Africa.
2. SCOPE AND DEFINITIONS
In order to manage the scope of this review within the limitations of this project, and to provide a depth of insight that guides innovative and transformative practice, four areas have been identified as requiring particular attention:

1. **Regulatory framework**: This includes the constitutional requirements related to water management, as well as the policies, legislation and regulations that give effect to these requirements. The emphasis in this review is thus on the “constitutional regime” while acknowledging the importance of “rights-based” approaches (relatively well covered in the Constitution) and “customary law and traditional systems”.

2. **Municipal mandate**: Given the potentially very broad scope of ‘water management’ it has been necessary to focus on particular areas that have the potential to enable municipalities, in partnership with relevant stakeholders, to enhance the water related services they are responsible for providing. It is thus the relationship between the provision of water services, and the riverine management incidental to the provision of these services, that provides both the focus and the transformative potential of this review.

3. **Partnership-based management**: Two broad levels of partnership are considered. The first is partnerships within the public sector and particularly the notion of co-operative government. The second is partnerships between public and private sectors. Private sector includes business, civil society and traditional leadership. A key consideration here is the distinction between public and private land and the rights related to river management on this land.

4. **Water management**: Water can be viewed from multiple perspectives and performs a range of environmental, social and economic functions. These functions are managed through a multitude of social constructs including religious/philosophical narratives, traditional systems, policies, laws and regulations. This review focuses on the regulatory framework and particularly on the distinction between the management of water as a national resource and water as a local service. These two dimensions of water management are interlinked and it is the implications of this interlinkage that serve as the focus of this review.

3. POLICIES, LEGISLATION AND REGULATIONS
Below is provided as a high-level overview of the relevant key pieces of legislation, policies and regulations related to water in South Africa, as well as a summary of some of the initial insights drawn from these. Due to the time- and resource-limited nature of this study this is by no means an exhaustive review.
3.1 Relevant policies, legislation, and regulations

The Constitution guarantees everyone’s right to access sufficient water and places an obligation on the state to achieve the progressive realization of this right. The Bill of Rights is binding on all organs of state and municipalities are obliged to give effect to it. The Constitution also allocates different responsibilities and related competencies to national, provincial, and local government in the management of water. National government has legislative and executive authority over freshwater resources while municipalities must administer water and sanitation services limited to potable water supply, domestic wastewater, and sewage disposal systems.

The National Water Act (NWA) (Act No.36 of 1998) provides the legislative framework for South Africa’s water resource management and places sustainability and equity as central principles. The national government, acting through the Minister of Human Settlements, Water and Sanitation, must thus ensure the protection, use, development, conservation, management and control of water resources for the benefit of all. To achieve this broad mandate the National Water Act requires the establishment of a number of institutions, including the Catchment Management Agencies and Water Users Associations. These decentralized institutions make allowance for meaningful participation in managing water resources by local stakeholders, including communities, businesses, farmers and local government.

The Water Services Act (Act No. 108 of 1997) regulates access to and delivery of water as a service and places a duty on municipalities, as water services authorities, to ensure the efficient, affordable, economical and sustainable access to water services. The act compliments the NWA by promoting effective water resource management and conservation.

The National Water Resource Strategy (now in version 2) seeks to ensure that national water resources are protected, used, developed, conserved, managed, and controlled in an efficient and sustainable way towards achieving South Africa’s development priorities in an equitable manner. Key principles include the management of water resources at the appropriate level, coherence between national and local water-related plans, partnerships, and financial sustainability. The Strategy states that “water management operates within a social, economic and ecological environment, and for effective and integrated management of water resources, top-down consultation should be replaced by citizens’ participation, which will be facilitated through community forums and civil society organisation structures to achieve the required balance in the decision making process within a developmental water management agenda”.

The Integrated Water Quality Management (IWQM) Policy supports a consistent interdepartmental approach on how water quality is managed in the country. It calls for cooperative and integrated approaches to water quality management across sectors, including the private sector and civil society.

The National Environmental Management Act (NEMA) (Act No. 107 of 1998) provides the legislative framework for the management of natural resources, including

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1 Importantly, there has recently been call for Governing Body members for the Pongola-uMzimkhulu CMA
rivers and catchments. An important principle within NEMA is the statutory duty of care on every person who may or does cause degradation of the environment to prevent, minimize or rectify the damage. NEMA also directs that the actions of all organs of state that may significantly affect the environment are governed by the principles set out in section 2.

The Local Government: Municipal Systems Act (Act No.32 of 2000) provides the fundamental principles, mechanisms and processes necessary for municipalities to ensure access to basic services, such as water and sanitation. It is the main piece of legislation dealing with how local government operates from a functional basis, rather than how it is structured or financed. The Act makes it clear that municipalities must exercise their executive and legislative authority within the constitutional system of cooperative government (see section 41 of Constitution) and that national and provincial spheres of government must not compromise or impede a municipality’s ability or right to exercise this authority. It requires that municipalities: promote a safe and healthy environment in the municipality; strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner; and encourage the involvement of the local community. Chapter 4 of the Act requires that municipalities develop a culture of community participation in the affairs of the municipality.

The National Development Plan (NDP) highlights the urgency and national commitment to transform our society and economy towards a more equitable, inclusive, productive and ecologically sustainable future. In order to achieve these aspirations, the Medium-Term Strategic Framework (MTSF)\(^2\), highlights the importance of ensuring that: ecosystems are sustained and natural resources used efficiently; effective climate change responses are put in place; and human communities are sustainable. Targets here include a focus on water conservation, management and protection. In order to achieve the country’s NDP a “new development approach seeks to involve communities, youth, workers, the unemployed and business in partnership with a capable state.”

### 3.2 Key insights from the high-level review

- Although the legislation is multi-faceted and complex, it is also comprehensive. This suggests that rather than a need for more legislation there is a need to implement and enforce the existing legislation. Before determining that legislation is limiting it should be tested through innovative approaches. The enforcement of water-related legislation at the levels of broad catchment conservation, the prevention of pollution and the adherence to planning regimes requires that all three spheres of government have the financial and human capacity to implement and enforce the legislation. Beyond compliance, however, opportunities exist for achieving better water management through productive partnerships. It is this latter dimension that is the focus of this review.

\(^2\) Under Outcome 10 of the MTSF

Funding partners: Implementing agencies:
• The interrelated nature of water resources and water services, along with the land-water interface, with regards to ‘water management’, ‘riverine corridors’ and ‘river management’ requires a sophisticated and nuanced understanding of the relationships between the three spheres of government (National, Provincial and Local) as different spheres are, primarily, responsible for different aspects of water management.

• The commitment to partnership approaches to governance in South Africa, and in particular the commitment to partnerships in water management, requires a deeper understanding of the relationship between the public and private sectors. This includes the relationship between government, business, civil society and traditional authorities and communities.

• The partnership approach is reflected in a number of institutional and service provision structures that are allowed for in legislation, common, and customary law. These structures have different governance requirements, as well as different areas of jurisdiction. Each of these different areas are considered in more detail below.

• The explicit recognition of the need for more partnership-based approaches to the management of water resources is already explicitly embodied in water management policy (e.g. NDP, NWRS (2) etc.).

4. SPHERES OF GOVERNMENT AS THEY INFLUENCE WATER MANAGEMENT

The management of water as a national resource, and as an essential local service, requires all three spheres of government to work together. This section of the review examines the rights, duties, possibilities and constraints created by co-operative governance within the public sector.

Chapter 3 of the Constitution of South Africa (1996) provides for the notion of co-operative government. This co-operation must occur across the national, provincial and local spheres of government with the spheres being “distinctive, interdependent and interrelated” (s40(1)). The use of the word spheres has been held to indicate that the relationship is non-hierarchical and the spheres must:

• ‘respect the constitutional status, institutions, powers and functions of government in the other spheres;
• not assume any power or function except those conferred on them in terms of the Constitution;
• exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
• co-operate with one another in mutual trust and good faith by co-ordinating their actions and legislation with one another’. (s41(1)(e), (f), (g) and (h)(iv)).
Municipalities (and Metros) fall within local government and Chapter 7 of the Constitution (s152) sets out the objectives of local government which are:

(a) ‘to provide democratic and accountable government for local communities;
(b) to ensure the provision of services to communities in a sustainable manner;
(c) to promote social and economic development;
(d) to promote a safe and healthy environment; and
(e) to encourage the involvement of communities and community organisations in the matters of local government’.

In achieving these objectives, local government must respect the distinctive powers and responsibilities of the other spheres of government. However, national and provincial government “must support and strengthen the ability of municipalities to manage their own affairs” (s154(1)). These objectives also provide a broad scope for local government to build partnership-based management structures to support the provision of services and promote sustainable development.

<table>
<thead>
<tr>
<th>Summary</th>
</tr>
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<tbody>
<tr>
<td>• Each sphere of government must cooperate with, and respect the role of, each other sphere and engage only in powers and functions conferred on them</td>
</tr>
<tr>
<td>• Municipalities must ensure the provision of services in a sustainable manner, and national and provincial government must support them and strengthen their ability to do so</td>
</tr>
<tr>
<td>• Municipalities must develop a culture of community participation in the affairs of the local government and put in place the mechanisms, processes and procedures to enable such participation.</td>
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5. MANDATE OF LOCAL GOVERNMENT

5.1 Powers of local government

Section 156 of the Constitution provides that local government has executive authority (i.e. it administers and implements laws) dealing with the subject matters listed in Parts B of Schedules 4 and 5 to the Constitution and the right to make laws (by-laws) in respect of any of these matters. Furthermore, ‘national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.’ Any subject matter not listed in Schedules 4 or 5 is regarded as being exclusively the function of national government. Various subject matters, taken from
Schedules 4 and 5 of the Constitution, are listed below as these are relevant to the present discussion.

Schedule 4

Both the national and provincial spheres of government may make laws dealing with the subject matters listed in Schedule 4. If listed in Part A then national and province administer the laws unless the administration is specifically assigned to local government. If a subject matter is listed in Part B, then all three spheres can make laws, but only local government can administer and implement these.

Table 1. Subject matters listed in Parts A and B of Schedule 4 of the Constitution.

<table>
<thead>
<tr>
<th>Part A</th>
<th>Part B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Which sphere can make laws: National or provincial</td>
<td>Which sphere can make laws: National or provincial or local government</td>
</tr>
<tr>
<td>Which sphere can administer and implement laws: National or provincial unless specifically assigned to local government</td>
<td>Which sphere can administer and implement laws: Only local government</td>
</tr>
<tr>
<td>Agriculture</td>
<td>Local tourism</td>
</tr>
<tr>
<td>Environment</td>
<td>Municipal planning</td>
</tr>
<tr>
<td>Nature conservation (excluding national and marine resources)</td>
<td>Municipal public works</td>
</tr>
<tr>
<td>Pollution Control</td>
<td>... jetties, piers and harbours</td>
</tr>
<tr>
<td>Regional planning and development</td>
<td>Storm water management in built up areas</td>
</tr>
<tr>
<td>Soil conservation</td>
<td>Water and sanitation services limited to potable water supply systems and domestic waste water and sewage disposal systems.</td>
</tr>
</tbody>
</table>

Schedule 5

Only the provincial and local spheres of government may make laws dealing with subject matters in schedule 5. If listed in Part A, province makes and administers the laws unless the administration is assigned to local government. If a subject matter is listed in Part B then provincial and local government spheres can make laws, but only local government can administer and implement these.
In summary, the powers granted to, and which may be exercised by, local government are those pertaining to the subject matters listed under Parts B (and matters incidental thereto), and any power assigned to them relating to those matters in Parts A. Lastly, section 238 of the Constitution provides that a function or power conferred on any sphere of government can be validly exercised by any other sphere of government if the power or function is delegated to it. Thus, **local government can exercise national or provincial functions if authorised by the national or provincial sphere to do so.**

A municipality therefore “has the right to exercise any power concerning a matter reasonably necessary for” (s156(5)), amongst others, the provision of water and sanitation services, the management of stormwater and the management of beaches. Along with this power comes a responsibility to deliver these services. What is significant for this discussion is that **issues related to water resource management, catchment management and riverine management are not expressly covered in Schedules 4 and 5 and are therefore interpreted as being a responsibility of the national sphere of government to the extent that they do not fall within the scope of a listed competency.**
5.2 Incidental Powers

Section 156(5) of the Constitution provides that: ‘A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.’ This has been broadened slightly in legislation to provide: ‘A municipality has the right to do anything reasonably necessary for, or incidental to, the effective performance of its functions and the exercise of its powers.’

If we acknowledge that a municipality is constrained by the Constitution with regard to its legislative (i.e. law making) and executive (i.e. law administration / implementation) powers to those subjects lists in Schedules 4 and 5 of the Constitution, as well as ‘any other matter assigned to it by national or provincial legislation’; then it follows that a municipality must base its powers on:

- a) the Scheduled subjects,
- b) matters assigned to it by legislation,
- c) matters incidental to the above,
- d) or reasonably necessary for performance of the above.

In this regard the concept of ‘incidental to’ must be understood. A robust and generally accepted viewpoint is that, in order to qualify as being incidental to the primary power, the incidental power must, when viewed objectively, be an indivisible element of the primary power and not constitute a power in its own right. These incidental powers would therefore have to be viewed restrictively – they must form a part of the primary

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3 S8(2) of the Local Government: Municipal Systems Act, 32 of 2000
4 S156(1)(b) of the Constitution.
power which is Constitutionally granted to a sphere of government and which cannot be usurped by any other sphere. As stated by the Constitutional Court:

‘The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another’.5

To qualify as a permitted incidental power, the power must be squarely rooted in the primary power. For example, where Alien Invasive Plants (AIPs) are choking a municipal potable water supply abstraction point, clearing them would be incidental to the supply of potable water. Where they are not physically choking an abstraction point, clearing them is not incidental to potable water supply even if, in theory, doing so leads to better water supply overall. Flood attenuation as being incidental to the primary competencies of beaches and protection of municipal infrastructure (public works) probably gives the greatest scope for incidental powers which are not point based. Where an incidental power overlaps with another sphere’s primary power, this overlap will only be restrictively permitted to the extent that it does not amount to an impermissible intrusion into the other sphere’s power. Care must therefore be taken not to try to use ‘incidental’ to allow the municipality to intrude into and usurp another sphere’s power. Rather, to the extent that a municipality has a duty to provide ‘water and sanitation services’ or ‘well managed beaches’, ensuring the sustainable supply of that water or the water quality at beaches must be viewed as the (incidental) duty of a municipality. Where the ‘incidental’ power is a primary power of another sphere it is unlikely to be permitted as it will, most likely, be regarded as an impermissible intrusion. Therefore national and provincial spheres of government must, under the constitutional system of co-operative government, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality’s ability or right to exercise its executive and legislative authority.’

In so far as water resource management is exclusively a national competence (it is not mentioned in Schedule 4 or 5) the municipality would be ‘exercising power in its own competence’ if it were to engage in riverine management to the extent that it was ‘incidental to’ the fulfilment of its primary functions. Where an area of activity is not strictly ‘incidental to’, but is related to the performance of its functions, and such activities are contained in Schedule 4 or 5, it could be argued that ‘national government and provincial governments must assign to a municipality, by agreement and subject to certain conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.’ (s156(4)). This argument can be further supported by the requirement within the Municipal Systems Act that municipalities provide municipal services “in a manner that is conducive to prudent, economic, efficient and effective

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5 Maccsand (Pty) Ltd v City of Cape Town and Others 2012(4) SA 181 (CC) at [47].
5 Municipal Services Act Section 73(2)(b)(c) and (d).
use of available resources” and that services must be financially and environmentally sustainable. **Such assignment would not divest the national or provincial sphere of its power, but would extend the power to the municipality.**

Municipalities are at the forefront of service delivery and thus have great potential to influence the progressive realisation of fundamental human rights. All of the above suggests that if a municipality’s ability to provide the services required by the Constitution and a number of supporting pieces of legislation (Water Services Act, Municipal Services Act etc) is compromised and it fails to act, it may be held accountable (Mosdell 2011). In order for municipalities to fulfil their responsibilities they may address issues that are incidental to the delivery of municipal services.

<table>
<thead>
<tr>
<th>Selected government functions as per Schedules 4 and 5</th>
<th>Matters which might be considered to be incidental to the delivery of services</th>
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<tbody>
<tr>
<td>Water services - Potable water supply (financially &amp; environmentally sustainable)</td>
<td>Ensuring that the quantity and quality of water supply enables the provision of access to and affordability of potable water in as cost-effective manner as possible. This suggests that where quality or quantity of water directly used for supplying water services is compromised the municipality has the power and a duty to act. This should include developing a culture of community participation.</td>
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<tr>
<td>Storm water management in built up areas</td>
<td>Storm water management includes flood attenuation through for example wetland rehabilitation, water course stabilisation and other Sustainable Urban Drainage Systems. This provides substantial opportunities for partnership based riverine management in built up areas.</td>
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<tr>
<td>Local tourism and beaches</td>
<td>The impact of water pollution, from poor catchment management practices, on beaches is both direct and devastating. Solid waste (especially plastic) as well as sewage can close beaches. The quantity of water and activities, such as sand mining, also has an impact through for example beach sand recharge or the functioning of estuaries. This requires that municipalities work on these issues in the catchment.</td>
</tr>
<tr>
<td>…jetties, piers and harbours.</td>
<td>Pollution will impact on the functioning of the harbour and the value of local amenities such as those on the uMngeni estuary. In addition the impact of both siltation and of sand mining require that the municipality act on practices in the catchment that directly threaten beaches, jetties, piers, the harbour and local amenities such as the promenade.</td>
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The above are illustrative examples of functions assigned to municipalities and areas of activity that could be considered incidental to the ‘effective performance of its functions and the exercise of its powers’. It is up to the municipality to develop a clear ‘line of sight’ between functions and matters incidental to the delivery of these functions and then to engage with the relevant sphere of government. National and Provincial government must
assign to a municipality the administration of a matter where that matter can most effectively be administered locally and the municipality has the capacity to administer it.

Co-operative governance suggests that spheres of government need to work together to address both the responsibilities of service delivery and the aspects incidental to the delivery of these services. How this co-operative governance takes place is not the focus of this review. More important is how the municipality works with ‘private’ landowners and the Ingonyama Trust to achieve this expanded mandate.

### Summary

<table>
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<tr>
<th>Key enablers</th>
<th>Key constraints</th>
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<tr>
<td>The municipality would be exercising power in its own competence if it were to engage in activities, such as riverine management, that were incidental to the fulfilment of its primary functions. Where an activity is not incidental to, but is related to the performance of a municipality’s functions and is contained within Schedule 4 or 5, it is possible to argue that national or provincial government must, provided certain conditions are met, assign the administration of the matter to the municipality.</td>
<td>Where an incidental power is the primary power of another sphere, it is unlikely to be permitted. This thus reduces the scope of activities that the municipality could engage in. Powers are only likely to be viewed as incidental provided they are squarely rooted in a primary power.</td>
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### 6. INCIDENTAL POWERS AND THE IMPLICATIONS FOR AN EXPANDED MANDATE OF ACTIVITY IN RIVERINE MANAGEMENT

The following section looks at the issue, from a legal perspective, of whether or not the municipality can undertake certain Transformative Riverine Management Programme (TRMP) activities outside of co-operative government or true partnerships. The discussion is a cursory one and does not attempt to provide a comprehensive answer. Instead, what we seek to do is to provide a theoretical construct which will then need to be amplified and interrogated before any reliance can be placed on it. The TRMP envisages that the municipality will be involved, either operationally or strategically, in the following activities (amongst others):

- Clearing of alien invasive species (AIP clearing),
- The stabilising of river banks and water courses (Flood attenuation), and
- Improving water quality through waste and pollution mitigation (Mitigation).
Whether or not the municipality can undertake these activities depends on certain legal constraints. Broadly speaking these are whether or not the municipality is legally empowered to do so. In other words; is the municipality competent to do so. Second, if the municipality is competent, is it able to do so without intruding into the exclusive jurisdiction of another sphere of government or without infringing private property rights. This second constraint is largely an issue of contestation.

The answers to these questions of competency and, especially, contestation will be influenced by who owns the water course. In this regard the water course refers to the physical banks and bed of a surface water body and not to the water itself (it being recognised that water ‘belongs’ to the national government to the extent that it might be owned by anyone). Two broad classes of land ownership are recognised, private ownership and state ownership. Each of these classes can be further divided into two sub-classes. In the state-owned water course these are either municipal owned or national / provincially owned. In the class of privately owned, the sub-classes of registered title holders and Ingonyama Trust (ITB) Land. We regard the ITB land as being privately owned whilst recognising that the trustee of the ITB is the legal owner of the land and the occupiers are the holders of the beneficial interest in the land having personal rights exercisable against the trustee. For practical purposes the land should be regarded as being owned by both the trustee of the ITB and the occupier. ITB land therefore presents a complex suite of private rights but, when viewed as a whole, ITB land is essentially privately owned land and must be treated as such.

A municipality can claim Constitutional competence with regard to potable water supply, domestic wastewater treatment (including discharge) stormwater management, municipal public works (infrastructure) and beaches. Pollution control and the environment are competencies of national and provincial government whilst freshwater (quantity and quality) is a competency of national government. Therefore, in order for a municipality to claim any competency with regard to the TRMP activities (in any water course other than a municipally owned water course) these either have to be primary competencies of local government or else they must be incidental to the primary competencies. It is clear that the municipality has primary competency with regard to potable water from point of abstraction (presuming this is within the municipal boundary) from the water resource until discharge back into a water resource. This would not include TRMP activities before abstraction or after discharge. To establish an incidental interest it will be necessary to show that the activity is directly linked to this primary function. Upstream TRMP activities which directly influence abstraction would, logically, be incidental to the primary competency of abstraction. Potable water supply would be directly influenced by water quality and quantity. However, if there is no abstraction then upstream TRMP activities are not incidental to a primary competency. AIP clearing can be linked to water quality and quantity and therefore is, arguably, an incidental interest upstream of an abstraction point. Flood attenuation, to the extent that it can be linked to water quality and quantity upstream of abstraction is arguably an incidental interest. Flood attenuation, to the extent required to protect and preserve municipal infrastructure, is strongly arguable as an incidental interest throughout the water course. Flood attenuation and water flow, to the extent required for preservation of beaches, is also strongly arguable as an incidental interest.
Pollution and waste control – insofar as these can be directly linked to a primary competency may be argued as being an incidental interest.

An incidental interest does not constitute a right – it simply establishes a legal competency to act. The closer the link between a primary competency and the TRMP activity the stronger the argument that the activity comprises an incidental interest. As the activity becomes more remote, either in terms of physical distance or in terms of cause and effect, the weaker the argument. The promulgation of by-laws or a zonation with rezoning would allow an incidental interest to become a legal right.

In addition to the above the municipality will need to address the issue of contestation. Legal competence will be constrained by external parties disputing or resisting the activity or by legal prescripts which clearly limit a competency. In the latter case an example would be AIP clearing. This is provided for in terms of NEM:BA and is squarely rooted in the Schedule 4A competency of ‘environment’. AIP clearing for the purpose of environmental health would therefore be a provincial competence and an intrusion by the municipality would be unlawful. AIP clearing as part of flood attenuation directly linked to a municipal primary competency would not be an intrusion. The point at which such AIP clearing becomes an impermissible intrusion is a question of scale and remoteness from the primary competency which in turn is a question of law and fact. The fact that the municipality can compel the provincial government to assign these functions to it means that a court is unlikely to grant original competency (through incidental interest) to a municipality but would rather prefer to follow an established legal route.

Activities on private land will require landowner consent or a legal right. An incidental or primary competence does not amount to such a legal right until a by-law, zoning or other law provides as much. Any such law would have to comply with s25 of the Constitution which protects private property rights. Any court will have to weigh the municipality’s interests against deprivation of private property rights and the municipality’s incidental interests are likely to be restrictively interpreted in order to protect Constitutionally enshrined rights. Without a legal right to conduct the activity such actions may amount to ‘self-help’ which is unlawful.

Last, other spheres of government may well contest any intrusion into their primary competencies. Water resources (including water courses, water quantity and water quality) is a national competency. Environment is a national and provincial competence (includes AIP clearing) but the municipality can compel assignment to it. An incidental interest cannot be the same as another sphere’s primary interest but they can overlap if rooted in different primary competencies. Thus mining requires a national mining permit but also requires local government zoning. Local government doesn’t have the competency to regulate mining but it does have the competency to regulate activities from a town planning perspective. Similarly, a municipality cannot regulate water quantity and quality as this is a national competence but it can regulate activities directly related to preservation of municipal infrastructure, water treatment and beaches. It is also critical to note that water resource management is likely to trigger a requirement to obtain permits / authorisations from various spheres of government and a municipality is obliged to do so even if exercising a primary or incidental (or assigned) competence.
In summary:

- There don’t appear to be any primary municipal competencies allowing for TRMP activities.
- To establish a legal right to conduct these activities the municipality will need to establish an incidental interest and there appears to be ground to do so, or else to have an existing provincial right assigned to it.
- The fact that the Municipality doesn’t have the right to move onto private land, does strengthen the notion of working in partnerships, capitalize on what is already in existence, and strengthen these aspects. It will be necessary for the municipality to deal with any contestation and must assume that an incidental interest will be restrictively interpreted.

7. KEY LESSONS FROM EXISTING RIVER MANAGEMENT PROGRAMMES

7.1 Approach

There are a wide range of initiatives that are addressing river management issues on private and public land. These initiatives include private, civil society, government and business led and supported projects. Many of them work through partnerships across these sectors.

In order to consolidate learning about river management models and to inform ideas around partnership approaches, we looked at eight water and riverine management project case studies from KZN:

- Aller River Pilot Project
- Mpophomeni Enviro-Champs
- Save Midmar
- Palmiet Catchment Rehabilitation Project
- Piesangs River Floodplain Project as part of the Bridge City-KwaMashu Open Space Project
- Sihlanzimvelo Stream Cleaning Programme
- uMhlathuze Water Stewardship Partnership
- Wise Wayz Water Care Project
- DUCT

We distilled key enablers and constraints, insights and learnings from these projects by looking at the following elements of the approaches they employed:

- Management/governance models
- Legal basis of operations & establishment
- Partnerships (key actors)
• Financing frameworks and investment
• Socio-economic context / land ownership

For more project-specific details of each project, please refer to Deliverable 1.3: ‘Key Riverine Partnership and Management Models and Frameworks’.

7.2 Elements of, and key insights into, river management programmes

By engaging in-depth with the river management programmes above, a number of high-level, key insights and recommendations were distilled.

There is no one-size-fit-all model: rather, river management programmes are highly context- and situation-dependent. The actors involved (and the absence of potential key actors) have a significant effect on these projects, as their agendas, and their pre-existing worldviews shape approaches and interventions.

Secondly, design approaches interact and are shaped by the ecological, economic, governance, legislative, political and social systems, as well as other factors such as the physical location. As these variables change so projects adapt or cease to exist.

Lastly, any river management programme should acknowledge that it is crucial to invest in social and human capital alongside investments in built and ecological infrastructure (Jewitt et al., 2020). An example is the importance of creating safe, co-engaged spaces where learning can take place and context-specific solutions can be co-developed (See Section 7.2.4 and 7.2.5), with sound governance and financing frameworks that are underpinned by a legal mandate to support the efforts.

The following 13 critical elements that are key to successful riverine management programmes were distilled:

7.2.1 Sustainable financing

Multiple means of financing are utilized across the projects, including accessing international funds (e.g. Global Environment Facility; Green Climate Fund, Adaptation Fund); corporate funding (through CSI initiatives) (e.g. AECI, IDANA), national and international research funding (e.g. the Water Resource Commission), provincial and municipal funding from departmental budgets (e.g. EPCPD, DEA:NRM), Development Bank of South Africa, National Lotteries Commission funding, NGO allocations (e.g. WESSA, DUCT), user fees and levies in an Special Ratings Area structure, and volunteerism.

Funding is one of the main reasons for projects to stall, fail or have limited success. Across most projects ad-hoc funding mechanisms are used which is usually insufficient and limited in nature and time. Most funding sources do not support the whole project, and the funder gets to stipulate what, where and who the funding is designated for (and thus provides a decisive frame with specific boundaries); or there are time constraints associated to the funding; or funding is only sufficient to cover a
portion of the work. Multiple sources of funding thus need to be accessed, so that if one source fails, the project is not compromised. The challenge in a river management programme is finding a sustainable source of funding or securing financial flow.

Learning from the uMhlathuze Water Stewardship Partnership, which is the case study at the greatest geographic scale in this report, it is critical to diversify and coordinate funding and investment from a variety of sources. In this instance a number of large companies at the end of the catchment (including South 32 and Mondi) together with support from a national NGO (WWF-SA) and international grant agency (giz) created a diversified funding stream.

**7.2.2 Models of governance**

There are typically three types of governance approaches in river management programmes – Hierarchical-, Network-, and Market style (Pahl-Wostl, 2019b) - which typifies how decisions are made, stakeholders managed and resources invested and distributed. Market style of governance utilizes and relies on material benefits and capital markets to influence and incentivize interventions and outcomes. Hierarchical governance relies on strict rules, clearly defined positions in a formal hierarchy, and authoritarian implementation of activities. Network-style governance, on the other hand, is based on trust, knowledge and relationships; where stakeholders are partners with a role in a network. It is important to understand the river management programmes from the perspective of these governance models, as governance is a societal function which steers groups towards a desired outcome, and how these programmes are steered as implications for how their initiatives play out in reality.

The selected case studies typically reflect a hybridity of governance modes. The governance model is directly framed by the stakeholders involved in a project, their power relative to others, the scale of the project (and sites of intervention), and funders requirements.

The market style of governance is not commonly implemented, but there are examples where elements of market style are incorporated alongside network governance in a type of hybrid governance (e.g. Piesang RFP, UWASP). Hierarchical governance models (e.g. Sihlanzimvelo) are well aligned with operational work associated with the local government’s managerial and command and control approaches; although it is dependent on good governance by the implementing agent. It is acknowledged that well-managed hierarchical governance models have the benefit of demonstrability with potentially multiple benefits, and is certainly a very effective model in certain contexts with certain desired results. However, hierarchical governance models are not based on inclusive processes, it is not very flexible, and cannot facilitate bottom-up decision-making. Considering city-wide river management, multiple land owners, users, beneficiaries, partners and stakeholders: all have a claim to how rivers are managed. When there is more than one land owner involved in managing a stretch of river, a partnership-based network-style approach will most likely be required. However, it is possible that the various partners and stakeholders can implement river management in a manner of their choice, as long as these ‘silied’ efforts contribute to a broader, shared vision for the catchment, again highlighting the importance of partnerships. It
needs to be noted, however, that in a network-style governance the presence and role of intermediaries or boundary spanning agents/objects in developing relationships and partnerships are critical (see the next section).

### 7.2.3 The role of intermediaries

Intermediaries are typically individuals or institutions who support interaction, learning, and knowledge exchange and integration between science and decision-making, potential partners, clusters of activity and ways of understanding river management. This is usually facilitated by creating and maintaining a co-engaged space where various perspectives and knowledge types can interact and learn, while maintaining individual identities (Kirchhoff et al., 2015). Intermediaries are also known as boundary spanning agents and –objects and embedded agents, and their critical role are linked with inclusivity, cross-collaboration, knowledge co-creation and knowledge translation.

An intermediary can be a boundary spanning object - i.e. an artefact (such as the Action Plan in the Palmiet Catchment Rehabilitation Project (PCRP), or the Learning Labs in the LIRA project) - which is created to establish common ground and enable cross-boundary work. An intermediary can also be a boundary spanning agent, which can either be individuals (e.g. Eco-champs) or institutions (e.g. an NPO), which are trained and tasked to build and sustain common platforms for engagement, mediate between stakeholders, and build trust and relationships. Intermediaries and boundary spanners are critical in developing approaches and solutions to dynamic and complex wicked problems, such as water projects, which cannot be holistically governed by a single actor.

### 7.2.4 Transdisciplinary participatory processes and learning

From the various river management programmes evaluated, it appears that social learning, co-engaged learning pathways, action learning and bottom-up knowledge production processes work well, especially in peri-urban and former township communities. However, the process needs to be carefully managed. It is critical for communities, and their situated knowledge, to be included in water-related projects where there are community-based initiatives. Meaningful participatory processes are the key to learning and transformation although such processes require thoughtful and co-engaged approaches. Where clear learning pathways are developed, and relationships with participants develop well, the learning becomes deeper and is more likely to be effective and long-lasting. It is also important that participants’ prior knowledge and understanding is mobilised into the learning. Historically awareness raising messages were targeted at participants and such top-down processes have not proved effective, and run the risk of alienating participants. Social learning and transformation take time and effort, and involves the two-way flow of knowledge. Developing agency in participants requires a sensitive mixture of bringing forward knowledge and understanding, engaging with it, if appropriate, but also offering structure from contemporary ecological knowledge. Such processes underpinned the approaches with much success in the Aller River Pilot Project, the Mpophomeni Enviro-Champs and Palmiet Catchment Rehabilitation Project.
7.2.5 Inclusive, co-engaged platforms (third spaces)

To promote inclusivity (critical in post-apartheid South Africa) it is essential to create and sustain safe spaces for co-engagement of stakeholders - even within hierarchical modes of governance (e.g. as is seen with the initial negotiation with councillors and model selection in Sihlanzimvelo; and engagement around the selection of Ecological Infrastructure interventions in the Baynespruit Rehabilitation Project). This is critical for political and community acceptance of interventions, and highlights that water projects do not focus on biophysical and technical interventions alone.

There is also a need for shared project platforms at catchment and city scale for project stakeholders to learn from one another (including learning from failures) and share knowledge, approaches and skills (and how these were overcome). Enabling support systems are key for sustaining project activities linked to communities (whether it is municipal, private sector, civil society, and academia).

7.2.6 Partnership types

There are multiple partnership types evident in the case studies: e.g. formal, informal (Palmiet CRP, WWWC), joint venture partnerships (Aller RPP), Special Purpose Vehicles (Piesangs RFP), MoU between organisations and/or local governmental departments (UWASP), and contractual (Sihlanzimvelo and WWWC). When analysing the range of case studies, it is clear that the type of partnership is based on the actors involved, the project’s goals and objectives, level of budget and resources, relations with legislation, policy and mandates, and the context (social, biophysical). Building on pre-existing relationships seems to be an important factor for partnership development. For example, in the Wise Wayz Water Care project, pre-existing relationships between the community and Durban Solid Waste were instrumental in showcasing to AECI that the community was eager to be involved.

The partnerships (i.e. the stakeholders involved and the institutional nature of the partnership) in the projects is a crucial element, as it has the potential to directly influence the form of governance (e.g. hierarchical if the City needs to maintain control, but network if not); funding (certain partners have access to certain pools of funding, e.g. research funding through a university or corporate funding through a business partner); and commitment and buy-in of stakeholders (e.g. through formal vs informal arrangements).

Challenges and opportunities with different partnership types are unpacked in Section 9 of this document.

7.2.7 Time to build trust and partnerships

The amount of time required to build trust and partnerships in a catchment, and develop a shared vision and group cohesion, is often overlooked, and should be considered alongside funding requirements and availability, and partnership arrangements and expectations.
7.2.8 Situational context and catchment connectivity

It is crucial to interrogate the physical location of riverine programmes, projects or interventions, since rivers are connected systems that both receive from upstream and deliver downstream. A programme/project/intervention downstream of an industrial area would require actors to enforce and penalise those infringing the law (e.g. Palmiet CRP); while a programme/project/intervention upstream of a water user has the potential to access possible CSI funding (e.g. WWWC). Relations between different land uses in catchments (which land uses are upstream and which are downstream) have an important bearing on stakeholder engagement and commitment. The relative location of built infrastructure in relation to the programme/project/intervention could have potentially important ecological implications (e.g. unmaintained wastewater treatment, or new developments contributing to changing flood peaks, which affect engineering interventions downstream). Material reality, or context, needs to be considered when framing or designing a water project and its interventions.

7.2.9 Involvement of corporates/industries/water users in a catchment

There is a stark absence of the corporate/industry/business sector in the majority of riverine programmes reviewed. It is crucial to develop pathways to engage this sector properly as their involvement has implications for land use changes, sustainability, river degradation and sustainable funding. Although it is acknowledged that these are important actors in other contexts and areas where river management is taking place (e.g. the uMhlanga Sibiya SRA), currently it is unclear what the most appropriate South African-specific approach is. Most likely, context-specific approaches to involve this sector needs to be developed. The Aller RPP managed to raise some corporate funding by involving the manufacturer of their main pollutant, nappies (disposable diapers). Save Midmar get logistical support from businesses by trading their governmentally-funded labour. Mpophomeni managed to get donations from business who are doing professional consulting work in the riparian zone/catchment/adjacent to the river. WWWC holds the largest and most sustained corporate sector funding through corporate CSI investment, as the company are water users dependent on a water abstraction from their local river. UWASP used risk to water supply as an incentive and motivation to get businesses in the catchment involved. Relying on risk as an incentive is precarious, however, as such risk may change over time. There is some evidence, captured in one of the workshops, from the NPO DUCT that sentiments in the sector might be changing, and that voluntary financial support is becoming more common. The most beneficial relationship with this sector would most probably be if the sector is fully committed to their involvement in their catchment, by being involved in the management and decision-making of the riverine programme.

7.2.10 Research, documentation and monitoring

Research within and of the various case studies contributed significantly 1) within each case study context to contribute to learning cycles and knowledge collection; 2) to understanding interventions across different contexts. Furthermore, researchers and research bodies may play a boundary spanning role (as they operate without a specific mandate and apply a particular, sometimes transparent, perspective), and can
contribute funding to facilitate and develop research around the project (which in itself can create and sustain project momentum) and profiling of key useful project outcomes.

A number of the projects are ongoing and interventions are relatively recently conceptualised; therefore it is critical to establish some form of data collection to monitor, and evaluate project implementation and to use this as the basis for social learning over time. This is particularly relevant to the models which are related to open space planning (e.g. Piesangs RFP), where rivers are a component of overall projects. It is critical for projects and interventions to quantify and profile their benefits, impacts and value. The recording of data, e.g. waste (type of waste, number of bags) and its subsequent analysis and communication is critical for showing the value of the initiative.

7.2.11 Project dependency

There is a debate (within the LIRA project team and practitioners) about the tension between volunteerism and stipended work. WWWC (for example) operate without paying their project participants stipends in order to avoid financial dependency, and develop an imperative for their project participants to actively grow their SMMEs and take ownership of their skill development. A similar discussion was observed in the Mphophomeni Enviro-Champs. This notion is in direct contrast to Sihlanzimvelo, who also facilitate the creation of small businesses (through the co-op model), but with the co-ops being completely dependent on the employment with local government.

The DUCT review showed a hybrid measure. A dependency, initially using Lotto funding to initiate and grow project teams, business skills and with the ultimate aim of a satellite of SMMEs around the mothership (DUCT), but which was explicitly intent on cutting the apron strings and launching the SMMEs. Several of these teams are independent contractors in the natural resource management space, whilst other teams are still dependent on DUCT for ongoing funding and support.

7.2.12 Recognising catchment connectivity and socio-ecological systems thinking

Having a catchment outlook is critical for approaches to water management that goes beyond built and technical solutions, and which includes a deep understanding of both the ecological dynamics of the catchment as well as the socio-economic characteristics of the catchment. Principles of cross-subsidisation could be important here in order achieve integration across catchments, and address the fragmented spatial structure of apartheid corridor development along certain parts of KZN.

7.2.13 Champions

Mobilizing individual, collective, and relational agency is an underpinning factor to the success of many of the projects (where individuals contribute skills, competences and resources to a productive end as part of a shared activity). Agency development in projects and programmes should be identified, nurtured and facilitated. According to Taylor et al (2018), "...underpinning the 'success' of these approaches are individuals,
social networks and governance systems and the dynamic interactions between social, ecological, and technical-infrastructural domains of urban systems*. In the riverine programmes agency can refer to the Enviro-Champs, where there was explicit focus in the Aller RRP and Mphophomeni project to develop and nurture the capacity of the Enviro-Champs over a period of years. This is also a visible element in WWWC, where agency is developed by facilitating participants to develop and grow SMMEs. While the latter is also done in Sihlanzimvelo, the stipend dependency and the hierarchical nature of this project limits true agency, and the co-op members can not necessarily be regarded as ‘agents of change’ as with the Enviro-Champs. On another level, UWASP illustrated elements of agency created within business partners in the project, where an initially absent stakeholder over time became a proponent of the programme. In Sihlanzimvelo, created agency (both individual and institutional within the municipality) lead to the envisioning of the TRMP.

7.3 Implications for appropriate institutional structures to undertake partnership based riverine management

There are numerous key elements of the riverine management programmes highlighted in this report, which, if well considered, will lead to an enabling environment for a successful programme. However, further to this is the importance of and need for scaling – how do we appropriately scale the various elements of these projects to advance the benefits of the insights described above?

According to Lotz-Sisitka et al. (2020) four forms of scaling need to manifest for an initiative such as the TRMP to gain momentum and achieve full potential. Some of these types of scaling are evident in some of the existing riverine management programmes already, but ideally all four needs to be achieved, from local interventions, to beyond city-wide interventions.

**Vertical scaling** requires expanding mandates and competencies through policy, which mainly involved cooperative governance across 3 spheres of government (as unpacked in Section 4). Although involvement of some levels of government is evident in some of the projects (e.g. Save Midmar and Sihlanzimvelo), there is no good example in the case studies evaluated where this form of scaling is explicitly developed. Certain elements can facilitate this form of scaling, including the presence of intermediaries to engage these spheres (Section 7.2.3), transdisciplinary participatory process to facilitate inclusivity (Section 7.2.4) on a co-engaged platform (Section 7.2.5), and the nurturing of champions and agency (Section 7.2.13) within these spheres of government. It will require time, however, to build relationships and community (Section 7.2.7) when implementing vertical scaling. Through these processes innovative actions can inform policy development and reform (at multiple levels including local regulations) thus creating an enabling environment for better practices related to partnership based river management.

**Horizontal scaling** takes place over geographic scales (local, catchment, City, beyond-City) and an associated expansion of organisations and number of people involved. An example of such a river management programme would be the UEIP (not
dealt with in this report), DUCT and UWASP, although local governments (beyond uMhlathuze Municipality) were not very actively involved in UWASP. Horizontal scaling would require a strong focus on connectivities and socio-ecological systems thinking (Section 7.2.12). Also crucial in this form of scaling would be the establishment of co-engaged platforms to facilitate transdisciplinary processes to co-develop solutions over such a large geographical area, as issues of shared interest become very diffuse and thus needs to be approached and managed strategically.

**Functional scaling** refers to the broadening of single-concept approaches by adding new or more functionality, without disrupting existing activities. In river management programmes this might be an expansion from focusing only on water quantity to include water quality and built- and ecological infrastructure and growing environmental awareness of ecological infrastructure- for example, DUCT’s work in environmental education. Important here from a city perspective would be understanding the “incidental to” powers of the City. The envisioning of the TRMP is an example of potential functional scaling.

![Figure 1. Functional and horizontal scaling with examples of relevant institutional structures.](image)

**Depth scaling** happens when capacity is developed across scales through co-engaged learning processes and collaboration (collaboration for resources, capabilities, co-ordination and to address complexity). Elements of depth scaling are evident on a local scale in projects like WWWC, Aller RPP, Mphophomeni Enviro-Champs, Palmiet CRP and the UEIP (not covered in this report). During the LIRA 2030 project ‘Transforming southern African cities in a changing climate’, a number of these river management programmes co-developed knowledge and shared experiences in a series of Learning Labs. These Labs clearly showed how safe, co-learning spaces are needed for projects to engage, learn from each other and share experiences. Currently there is a lack of such spaces in the river management community, and this will be a key required intervention in the TRMP – probably across multiple scales.
8. LAND OWNERSHIP

The ability of municipalities to implement their mandate, including aspects incidental to the delivery of services, is influenced by their ability to enforce existing legislation on issues such as land-use changes, water use, and pollution, as well as their ability to work directly on public or private land. Where the ability to enforce legislation is constrained and the access to land is limited by the mandates of spheres of government or by private property rights then the necessity for partnerships requires careful consideration as an enabling mechanism.

8.1 Compliance and Enforcement on Public or Private Land

A mechanism for enforcing available legislation on public or private land is provided by the National Environmental Management: Biodiversity Act (NEM:BA) (Act No.10 of 2004), particularly in reference to AIP management, which states that 'the owner of land on which a listed invasive species occurs must- (a) notify any relevant competent authority, in writing, of the listed invasive species occurring on that land; (b) take steps to control and eradicate the listed invasive species and to prevent it from spreading; and (c) take all the required steps to prevent or minimise harm to biodiversity.' The competent authority may issue a directive to comply with this requirement which directive, if not complied with, may be effected by the competent authority at the land owner’s cost. Any person may request the competent authority to issue such directive. The competent authority would normally be the MEC, but could be a municipality if the power was delegated to it as specifically provided for and contemplated.

Another possible mechanism for managing land outside the City’s control is the issuing of notices under section 31A of the Environment Conservation Act (Act 73 of 1989). Although this Act has largely been replaced by NEMA, this section still remains in force and grants the only original power to municipalities to issue directives for the remediation of environmental degradation. It provides that where, among others, a local authority believes that anyone is performing, or failing to perform any activity, the results in, or may result in, the environment being seriously damaged, endangered or detrimentally affected, the local authority may direct that person to stop the activity or to take prescribed steps (such as clearing the AIPs using a specified method) within a required period, failing which the local authority may perform the directed steps and recover the costs of doing so from the delinquent. It would be possible to access this power to require landowners (both private and public) to clear AIPs, failing which the municipality could take the steps itself and recover the costs from the landowner.

Despite the provisions listed above, the entrance onto private land and interference with that land is often resisted by the landowner. Although it may be possible to overcome such resistance, this will involve litigation, which is counter-productive.

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6 S73(2) of the National Environmental Management: Biodiversity Act, 10 of 2004.
7 S73(3) and (4) of the National Environmental Management: Biodiversity Act, 10 of 2004.
8 S74 of the National Environmental Management: Biodiversity Act, 10 of 2004.
partnership involving the relevant parties in a consensual manner is more likely to produce beneficial results.

**Summary**

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<thead>
<tr>
<th>Key enablers</th>
<th>Key constraints</th>
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<tbody>
<tr>
<td>• Under NEM:BA the municipality could, if delegated the role of competent authority, issue landowners with a directive to engage in steps to prevent or minimise harm to biodiversity, including the control of AIPs, and if not complied with, effect this directive themselves at the landowner’s cost</td>
<td>• Accessing private land is difficult and may require litigation if resisted by the owner.</td>
</tr>
<tr>
<td>• The municipality could issue directives for the remediation of degradation, such as the clearing AIPs, and if not complied with effect the directive themselves and reclaim the costs from the delinquent</td>
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**8.2 Land ownership and implications for river management**

**8.2.1 Public Land**

The Local Government: Municipal Systems Act empowers municipalities to fulfil their mandates through executive and legislative authority and to use the resources of the municipality in the best interests of the community. While this is clear within a municipality’s own municipal boundaries there has been some uncertainty about the extent to which a municipality can act outside of its boundaries. In an opinion commissioned by the City of Cape Town relating to protecting water resources through the maintenance of ecological infrastructure (EI), it is argued that municipalities may work beyond their boundaries subject to certain restrictions.

“It therefore seems unarguable that in the clearing of [Alien Invasive Plants] AIPs for EI Maintenance, the City can only do so outside its boundaries where it does that by agreement with the Municipality that has jurisdiction over the area. Given that it is highly likely that any such municipality will be either a user of the [Western Cape Water and Sanitation Services] WCWSS or will otherwise benefit from the clearance of the AIPs, a request of this kind by the City (or any other municipality reliant for water supply from a catchment outside its boundaries) is unlikely to be refused. Practically, it would be necessary for the two municipalities to enter into an agreement regarding the activities that would be undertaken, by whom and at whose cost”.

This opinion is also clear that “There is nothing in the MFMA which prohibits the funding of municipal activities outside of a municipality’s boundaries.” There are requirements imposed upon this by the MFMA and the mechanism employed would
need to conform to those requirements, but it is beyond the scope of this work to address these.

### Summary

<table>
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<th>Key enablers:</th>
<th>Key Constraints:</th>
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<tr>
<td>• The Municipal Systems Act allows municipalities to use resources in the best interests of the community</td>
<td>• The Municipal Systems Act is unclear about the extent to which a municipality can act outside of its boundaries</td>
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<tr>
<td>• The MFMA does not prohibit the funding of municipal activities outside of a municipality’s boundaries</td>
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### 8.2.2 Private Land

The starting point is the basic presumption that an owner is the holder of all rights to their property. With regards to land, the property is defined by the relevant survey diagram. Typically, this includes land underneath water (i.e. the watercourse). A municipality therefore has no inherent right to access privately owned riparian land. However, access to private property can be enforced through expropriation of the property, through a servitude or by way of landowner consent. A servitude creates a real right, enforceable by the municipality, to gain access to a property. A servitude can be acquired through agreement or by expropriation. A servitude is limited to the basic rights necessary and thus only allows access, not clearing or building.

Another possibility is provided through section 125 of the National Water Act which states that ‘An authorised person may enter a property with the necessary persons, vehicles, equipment and material –

(a) after giving reasonable notice to the owner or occupier of the property, which notice must state the purpose of the proposed entry; and

(b) after obtaining the consent of the owner or occupier of that property, in order to –

(i) clean, repair, maintain, remove or demolish any government waterwork operated by any water management institution;

(ii) undertake any work necessary for cleaning, clearing, stabilising and repairing the water resource and protecting the resource quality;

(iv) undertake any work necessary to comply with an obligation imposed on any person under this Act, where that person has failed to fulfil that obligation;
(v) erect any structure and to install and operate any equipment on a temporary basis for monitoring and gathering information on water resources; or
(vi) bring heavy equipment on to a property or occupy a property for any length of time’.

The authorised person contemplated above is someone authorised by the Minister in terms of s124. It must be noted though that the primary responsibility for pollution prevention and the power to enter onto private land to effect pollution prevention (which includes protection of water quality) lies with the Catchment Management Agency and the NWA does not seem to anticipate that a municipality would have this function.

### Summary

<table>
<thead>
<tr>
<th>Key enablers</th>
<th>Key constraints</th>
</tr>
</thead>
<tbody>
<tr>
<td>The NWA makes provision for authorised personnel to access private land to undertake work relating to the maintenance and protection of water resources</td>
<td>Municipalities have no inherent right to access privately-owned riparian land</td>
</tr>
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<tbody>
<tr>
<td></td>
<td>Although servitudes can be acquired, they allow only access to private land, not any clearing or building activities</td>
</tr>
<tr>
<td>The power to enter private land provided by the NWA lies with CMAs, not municipalities</td>
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</tr>
</tbody>
</table>

### 8.2.3 Trust Land

The Ingonyama Trust administers approximately 2.8 million hectares of land in KwaZulu-Natal. Of this, 79 913 hectares fall within the eThekwini Municipality. Under the KwaZulu-Natal Ingonyama Trust Act 3KZ of 1994, and as amended by Act 9 of 1997, the trust is mandated to hold land for “the benefit, material welfare and social well-being of the members of the tribes and communities” living on the land. According to the Traditional Leadership and Governance Framework Act (Act No. 41 of 2003) a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned, and in applicable legislation. Although the Ingonyama Trust has certain rights related to land tenure, it is not exempt from adhering to the National, Provincial and Local policies and regulations pertaining to land, environmental affairs, water and conservation (Sutherland et al 2019). As such, environmental legislation, such as NEMA and NEM:BA, provides a useful tool to regulate the use and management of natural resources and activities incidental to the provision and maintenance of water resources on Ingonyama Trust land. All Ingonyama Trust land falls within the jurisdiction of, and is subject to, national, provincial and local government. These provincial, national and local level regulations, along with the rights enshrined in the Constitution, and the customary laws, thus...
provide the framework in which to ensure the management of riverine corridors on Ingonyama Trust land in the eThekwini Municipality.

In accordance with Section 27 of the Constitution, the local municipality is responsible for service delivery to communities residing on this land (Sutherland et al 2014). The Municipality thus has a responsibility to ensure that the catchment is managed in a manner that contributes to the sustainable provision of water. The legal responsibility of the Municipality to ensure the delivery of services should provide the framework to allow the Municipality to fund activities on Ingonyama Trust Land that are incidental to the provision of water.

Given the purpose of the Department of Cooperative Governance and Traditional Affairs (COGTA) to improve cooperative governance across the three spheres of government, in partnership with institutions of traditional leadership, COGTA could assist in partnership building, particularly with regards Trust land, and could contribute to enabling municipalities to carry out their service delivery and development functions effectively in collaboration with traditional authorities.

**Summary**

<table>
<thead>
<tr>
<th>Key enablers</th>
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</thead>
<tbody>
<tr>
<td>• National, provincial, and local regulations are applicable and enforceable on Ingonyama Trust Land. Thus, regulations applicable to the management of riverine corridors, such as those in NEM:BA, can be enforced on trust land.</td>
</tr>
<tr>
<td>• COGTA could assist in partnership building with regards to Trust Land and enabling municipalities to carry out service delivery and development functions in collaboration with traditional authorities.</td>
</tr>
</tbody>
</table>

**9. PARTNERSHIPS**

9.1 Participatory Water Management

Beyond the need for co-operative government, is a requirement within the regulatory framework for participatory governance that includes participatory water management. The Integrated Water Quality Management (IWQM) Policy of 2017 positions adaptive co-management as a significant policy and process framework for water quality management in South Africa. It defines this as an “intergovernmental, adaptive and systems-based approach in partnership with the private sector and civil society”. Integration can be interpreted at a number of levels and in a number of different ways. The most obvious of these emphasise integration of mandates across government departments insofar as there is need to collaborate on enabling water quality management action and outcomes. Another dimension is the integration of roles and responsibilities for water quality management amongst government, business and civil society stakeholders.
The IWQM policy highlights that it is the complexity of managing water quality that requires more active engagement of stakeholders. The policy notes that both national and international experience shows that active engagement with the private sector and civil society can contribute substantively to IWQM, and these groups are recognized as important strategic partners. Linked to the NDP policy intentions, the Strategy states that: “This supports the concept of developing local solutions for local problems, and enables cooperative and coordinated actions that reduce the burden on government for command and control style compliance. Supported by improved reporting systems these partnerships can enable timeous, efficient and effective response to water quality issues”.

A key requirement for building partnerships is either identifying well capacitated and reliable partners or where these do not exist progressively building the capacity of potential partners. All potential partners, whether from government, civil society, business or local authorities, should fulfil broad ‘good governance’ requirements. Even with these in place different institutional forms will have certain benefits and some constraints that need to be considered in partnership formation. In order to support high level consideration of potential partners and partnership arrangement brief points are provided below to stimulate discussion in different contexts.

### 9.2 Good governance requirements of institutional structures

There are a number of key considerations in deciding on an institutional structure to support a partnership-based approach to riverine management. Within such an institutional structure it is important to support and nourish, within the partnerships, the following:

- **Governance**
  - Setting strategic direction
  - Address conflicts of interest
  - High degree of autonomy
- **Accountability**
  - Legal basis for fulfilling mandate
  - Transparency
  - Accountability to all partners
- **Capacity**
  - To attract and manage funding from government, private sector, international development institutions, local finance institutions
  - Capacity to make and carry out decision timeously
- **Collaboration in the interest of public good**
  - Broad understanding of value (not only profit focused)

Institutional forms for a partnership should be able to:

- Collaboratively set strategies relevant to partners’ priorities;
- Manage funds transparently;
- Have the capacity to deal with complexity; and
- Monitor and report on the outcomes of activities.
Based on the considerations outlined above, five proposed institutional categories of partnership are included below.

### 9.3 Potential institutional Arrangements

The more closely riverine management can be aligned to water service delivery, either as an incidental part or a being reasonably related to it, the stronger the municipality’s claim for partnership and, even a driving role, is. There are a wide range of institutional arrangements that could be considered to enable partnership-based riverine management where municipalities are one of the partners. The focus of this discussion is on partnerships between the public, municipalities, and private, including business and civil society entities.

#### 9.3.1 Public entity

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Relatively secure funding if built into organizational plans</td>
<td>• Governance and Accountability concerns</td>
</tr>
<tr>
<td>• Well positioned to work with government departments e.g. policy</td>
<td>• Complex and sometimes slow procurement processes and reporting requirements</td>
</tr>
<tr>
<td>• Well aligned with national, provincial and local level planning (e.g. IDP)</td>
<td></td>
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</table>

#### 9.3.2 Non-Profit Company (NPC) (could also be a PBO)

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Membership Based</td>
<td>• Uncertain whether there are limitations on who can be members</td>
</tr>
<tr>
<td>• Independent Board – volunteers</td>
<td>• Donor funding environment is very tight at the moment and also potentially drives the ‘agenda’ for the entity</td>
</tr>
<tr>
<td>• Can attract ‘18A’ business and individual funding</td>
<td>• Sustainability of institution uncertain</td>
</tr>
<tr>
<td>• Can attract international development aid</td>
<td>• Competition with existing NPCs in the catchment for funds</td>
</tr>
<tr>
<td>• Driven by mission rather than profit but need to be financially sustainable</td>
<td>• Although project funds are available it is increasingly difficult to generate core funds to sustain the implementing organization</td>
</tr>
<tr>
<td>• Grant in Aid from Municipality receivable</td>
<td></td>
</tr>
<tr>
<td>• Some such as Special Rating Areas are specifically mentioned in national legislation and local regulations while</td>
<td></td>
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</tbody>
</table>
others are formed to respond to a wide range of member interests.

### 9.3.3 Water Fund (Western Cape example)

<table>
<thead>
<tr>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Managed by International NPO The Nature Conservancy</td>
<td>• High requirements on showing Return on Investment if more conventional financing</td>
</tr>
<tr>
<td>• Good vehicle to pool funding and financing from various sources</td>
<td></td>
</tr>
<tr>
<td>• Substantial global experience</td>
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</tbody>
</table>

### 9.3.4 Legislated Water Focused Entities

<table>
<thead>
<tr>
<th>Irrigation Boards; WUAs; CMAs</th>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Legislated entities with appropriate mandates</td>
<td>• Uncertainties about:</td>
</tr>
<tr>
<td></td>
<td>• Existing mechanisms for sourcing core funding</td>
<td>• Selective membership</td>
</tr>
<tr>
<td></td>
<td>• Reputation for managing large-scale, labour-intensive infrastructure and environmental</td>
<td>• Narrow Focus</td>
</tr>
<tr>
<td></td>
<td>projects in the province</td>
<td>• Economic sustainability</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Political agenda and machinations which derail on the groundwork</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Requires high level of shared interest and commitment</td>
</tr>
</tbody>
</table>

### 9.3.5 B-Corporation

<table>
<thead>
<tr>
<th>PTY (LTD)</th>
<th>Benefits</th>
<th>Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• New kind of business that balances purpose and profit</td>
<td>• Not well established in South Africa</td>
</tr>
<tr>
<td></td>
<td>• “Shareholders” manage the arrangement</td>
<td>• Still no specific tax break or incentives</td>
</tr>
<tr>
<td></td>
<td>• Independent Board and very high transparency – int. certification</td>
<td>• May be seen as just another business</td>
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</table>
Each of the above institutional forms could participate in a partnership for river management. As noted, each would bring with it potential benefits and concerns. It would be up the individual institutions and the partnership as a whole to maximise the benefits and mitigate the concerns, including through the way that the partnership was structured. If the partnership chose to put in place an independent or overarching institution to coordinate, guide or support the partnership than again any one of the above institutional forms could be appropriate with consideration given to the benefits and concerns. In the following sections consideration is given first to two different forms the partnership may take and secondly to existing institutional forms that have the potential to provide consolidated clusters of partners at multiple levels. Such clusters allow for various institutional arrangements to play to their strengths according to the mandates of each within a bigger structure.

**Partnerships**

Given the emphasis of this project on identify opportunities for the public (particularly local government) and private (including business, civil society and traditional authorities) sectors to work in partnership on river management it is not surprising that the term ‘public-private partnership’ came up regularly in the various interactions. The term however is used in two very different ways with significant implications that are considered below.

**Public-Private Partnership (Full)**

Public-private partnerships (PPPs) are contractual agreements whereby the private sector is given the right, and agrees, to provide a public service or public infrastructure traditionally provided by the public sector on behalf of the government. The intention of a PPP (that could include civil society organisations) is to formalize the institutional structures associated with these partnerships. These partnerships are seen as supplementary sources of private financing for creating public assets to achieve broader development goals and the delivery of services. In this sense they create public assets with private money and are not a process of privatization in which government transfers public assets to private actors. More formally in South Africa, PPPs are defined as “a contract between a public-sector institution and a private party, where the private party performs a function that is usually provided by the public sector and/or uses state property in terms of the PPP agreement.”

The Public Finance Management Act (Act No.1 of 1999) regulates national and provincial PPPs through Treasury Regulation 16, while the Municipal Finance Management Act (Act No.56 of 2003) regulates municipal PPPs. The Treasury Regulation requires National Treasury approval for all phases of the PPP, while at the municipal level PPPs are approved by the Council.
Broadly, PPPs must demonstrate value for money, affordability and risk transfer. However, a number of the requirements for registering PPPs were set out in documents dating back to 2004. Many of these requirements are now acknowledged to be cumbersome and expensive, and in an appendix to the Budget Review in 2019 there was an undertaking to consider:

- Merging some of the approval requirements.
- Developing a framework for soft PPPs (these projects relate to the provision of “soft” infrastructure facilities and related non-core services).
- Reviewing the PPP legislative framework.
- Putting in place mechanisms to address the affordability gap in PPPs.

In terms of Treasury Regulation 16 it appears that the ‘private institution’ in the public-private relationship can be any party other than:

a) ‘An institution to which the Act applies;

b) A municipality or an entire enterprise or other entity controlled by one or more municipalities; or

c) The accounting officer, accounting authority or other person or body acting on behalf of an institution, municipality, enterprise or entity referred to in paragraph (a) or (b)’

This suggests that the institutional form that is created to enter into the PPP is not a major consideration and could, in fact, be a private (Pty Ltd) or a Non-profit Company (NPC).

One of the advantages of this structure is that there would be a range of financing options available for the Private Entity and thus the PPP between the municipality (Institution) and the Private entity. Funding options include *inter alia* Loans, Corporate Finance, and Capital Contribution. Simultaneously the municipality could access grant finance from international donors as well as national and local funding raised through taxes and rates. Ecological Infrastructure based approaches/ focused PPPs will require innovative techniques to quantify and value often implicit revenue streams, or externalities and thus implicit risk and value destruction. There are national projects such as the GEF6 project on Ecological Infrastructure for Water Security and catchment wide initiatives such as the P4G funded project involving the UEIP and DUCT exploring options to create full PPPs focused on catchment management.

One of the primary advantages associated with PPPs is the ability to raise funding and mobilise capacity/ resources around shared objectives such as enhanced security and affordability of the provision of water services in the catchment. These shared objectives and the value creation/ risk reduction to which they contribute mean that benefits can be created for all stakeholders.

**Public-Private Partnership (Lite)**
This form of public-private partnership is a looser arrangement than the formal PPP outlined above. In this instance one or more organisations, including the municipality, can enter into a Memorandum of Understanding, or Memorandum of Agreement. The Umgeni Ecological Infrastructure Partnership (UEIP) provides an example of this kind of partnership.

The challenge with this approach is the disconnect between the value added by many of the NPC and CBO partners and the funding that they receive. In many instances these NPCs struggle to raise ongoing funding and thus continue to meaningfully participate in the partnership. In addition, much of the funding is project-focused with little allowance made for the funding of core activities including management, system development, staff development, office costs, etc. This means that the partner organisations may not be able to contribute to supporting the achievement of objectives that further riverine management if funders change their focus or if funding is not available. Also, the transaction costs involved in maintaining and supporting partnerships may place an additional burden on core staff in these institutions. One of the major challenges therefore is to develop a mechanism for securing core funding that can be used to strengthen the ability of NPCs/CBOs to raise funding to enable partnership linked and aligned projects whilst maintaining strategic focus.

Clusters of interest groups

Central to setting up functional public-private partnerships (whether full or lite) is ensuring that representative structures are in place that have a mandate from their ‘members’ and that have the capacity to make and act on decisions timeously. Furthermore some reliable source of income for core funding is required to ensure the sustainability of the institutions and continuity of the partnerships. Within local government this will require creating appropriate contact points through internal agreements between the multiple departments affected by river and water related issues. This work is currently being considered in other workstreams related to the TRMP and will not be covered here. Within the private sector (broadly defined to include business, civil society and traditional authorities) this will also require multiple institutions and interest groups to channel their engagement through recognised focal points. In addition to the institutions reviewed in Section 7 two legislated forms of partnership are introduced below. At the local level Special Rating Areas have played a significant role in recent work on water quality impacting on tourism, infrastructure and beaches in and adjacent to the oHlanga River. The potential of these structures, often working in partnership are worth exploring further in local partnership-based river management. At the catchment level the establishment of Water Users Associations (WUAs) is recommended by national water legislation and could be considered as a formal structure (within the broader Catchment Management Authority) for a partnership-based approach.

Special Rating Areas

The Special Rating Areas (SRAs) legislation, within section 22 of the Municipal Property Rates Act (Act No.6 of 2004), provides a possible route for achieving partnership-based riverine management. Globally, the SRAs or City Improvement Districts have been used in countries such as the USA, Canada, and Japan. In South
Africa there are currently more than 100 SRAs, though they are known by different terms in different parts of the country (e.g. “City Improvement Districts” in Cape Town and “Urban Improvement Precincts” in eThekwini). In eThekwini the Special Rating Area Policy (2014) sets out the regulatory framework for the establishment of SRAs.

An SRA is a defined geographic area within which property owners (ratepayers) agree to pay for certain additional municipal services to enhance the physical and social environment of the area. There is nothing in the legislation or local regulations that seems to dictate how this geographic area is defined. What is required is that the SRA is initiated by ratepayers and that more than 50% of the ratepayers in the area give written support to the formation of the SRA. Once this has been obtained, the Steering Committee has to submit the business plan, motivation report and implementation plan, as an application to the Municipality. After the Municipality has approved the application, a board is elected and a Non-profit Company (with members) is established.

Once all of this has been achieved the Municipality bills all property owners in the SRA by adding a predetermined amount (calculated as a percentage of property value) to the rates bill of the property owners. The Municipality then pays over the rates bill to the SRA. In addition to the normal governance and reporting requirements of NPCs, the SRA management submit financial reports to the Municipality who include these in their consolidated accounts for submission to the Auditor-General. It must be stressed, however, that the SRA NPC is an independent organization that can raise additional funds from the private sector, government and donors.

There are a number of benefits associated with establishing an SRA including:

- They are allowed for in existing national and municipal legislation and regulations and are already extensively used in South Africa including eThekwini.
- The cost of providing the supplementary services (enhanced water resource management) is borne by all property owners, in proportion to property value.
- The municipality still has to provide existing services and the services required by the Constitution, MSA, WSA etc.
- The SRA is not limited to one particular service and can therefore also invest in issues such as security, the installation of cycle paths, etc.
- The SRA provides private sector management and accountability.
- The SRA creates a unified voice for putting forward suggestions for improvement to Council and other local government units.

It may be possible to form a number of SRAs along strategic sections of rivers within eThekwini (or any other municipality) and to set up a ‘Master Management Association’ to work with the individual SRAs to carry out the riverine management actions that are incidental to the provision of a range of municipal services including water and sanitation services, stormwater management and the maintenance of...
beaches. This ‘Master Management Association’ could support the establishment of SRAs and the coordination of the SRA activities along particular rivers.

A significant challenge with this approach is that the concentration of rate payers has a significant bearing on the financial viability of the SRAs. For example, in areas such as Umhlanga Ridge a high concentration of business, large tourism establishments, shopping centres and high value residential properties provide significant income for an Urban Precinct. Even these well-resourced Urban Precincts are, however, struggling to fulfil an ever-expanding set of expectations related to security, waste management, sewage leaks, transport, etc. The ability of these Precincts to focus on riverine management is thus likely to be limited. In this regard the Giba Gorge Special Rating Area provides a number of important lessons. This SRA is focused on environmental issues and has required additional support from the municipality through direct financial support and indirect expertise and human resources. These lessons should inform any considerations of up-scaling and the implications for private rate payers and the Municipality itself. In areas that have a lower concentration or income with regards to the rates base it is extremely unlikely that Urban Precinct structures would be sustainable or able to make a significant contribution to riverine management given a range of other priorities, such as safety and security, waste management and broader environmental concerns.

**Water Users Association (WUA)**

Another option is the establishment of a large WUA that covers strategic riverine areas that are incidental to the provision of services within a municipality. Water User Associations (WUAs) are statutory bodies established by the Minister of DWAF under Section 92 of the NWA. They operate at the local level and are effectively cooperative associations of individual water users wanting to undertake water-related activities for their mutual benefit.

The definition of water use in Section 21 of the NWA includes all activities that have an impact on the quantity, quality and/or aquatic ecosystem (habitat and biota) of a water resource. The establishment of a WUA requires Ministerial approval but its functions depend on its constitution which needs to be aligned with the National Water Act, the NWRS II and the catchment management strategy. In particular, the WUA should contribute to the achievement of sustainable and equitable use of water for the benefit of all water users. There does not appear to be any specific limitation on the area that a WUA can cover and there may be more than one WUA in an area as long as the focus of the WUA is distinct from another WUA in the area. It is therefore possible to have one WUA focused on irrigation whilst another focuses more on water resource management in the catchment.

The following are listed as possible primary functions of a WUA that have relevance to the current report:

- To prevent water from any water resource being wasted.
- To protect water resources.
- To prevent any unlawful water use.
• To remove, or arrange to remove, any obstruction unlawfully placed in a watercourse.
• To prevent any unlawful act likely to reduce the quality of water in any water resource.
• To exercise general supervision over water resources.
• To regulate the flow of any watercourse by -
  • clearing its channel;
  • reducing the risk of damage to the land in the event of floods;
  • changing a watercourse back to its previous course where it has been altered through natural causes.

In addition, the following ancillary functions are also listed.
• Providing management services, training and other support services to -
  • water services institutions; and
  • rural communities.
• Providing catchment management services to or on behalf of responsible authorities.

It is not clear what institutional forms WUAs can take. They are generally described as ‘voluntary associations’ but seem to be able to sign Water Services Provider contracts with Water Services Authorities/Municipalities. This suggests that there is the possible need to set up a more formal institutional structure such as an NPC. One of the challenges is the influence that the Minister may have over a WUA and the ability of the Minister to disband a WUA. This would undermine the independence of the association.

With regards to financing, although membership of the WUA is voluntary, all water users are liable to pay the relevant water use charges according to the Pricing Strategy for Raw Water Use Charges, some of which may be used to fund activities of the WUA. Different categories of membership may be defined according to water use type (or sector), water resource used and/or support requirements. Each membership group would have its own rights and responsibilities, particularly in funding and managing infrastructure.

Although a WUA could meet the requirements of partnership-based approach to riverine management at the municipal level it is not clear whether the WUA could be converted into an institutional form that could attract, manage, distribute and report on funding from multiple sources. This may require further research and discussion. At present it appears that the WUA would be subject to the PFMA thus undermining many of the benefits associated with a private institution including faster response times and the avoidance of the complexity of current procurement requirements.
10. SUMMARY RECOMMENDATIONS

As part of the envisioning of the TRMP, the various levels and scales of interventions need to be investigated: 1) local scale interventions in, and partnerships around, stretches of rivers across the City; 2) catchment-wide, strategic partnerships or programmes; and 3) City-wide partnerships that function at an advanced, strategic level. The key river management programmes that were identified and evaluated in Section 7 were mostly located at a local level to address very context-specific issues in a stretch of the river. Some of the programmes like the Palmiet Catchment Rehabilitation Programme and the Umhlatuze Water Stewardship Programme aims to address more systemic issues across a whole catchment; however, these programmes still need to strategically identify stretches of the river to intervene in, and manage the stakeholders, activities, means of interventions and budgets around this very carefully. Each level (local, catchment, and city-wide) will require a specific, strategic aim and objectives, a different arrangement of stakeholders, a deliberate governance configuration, and intentional engagement platforms. At each of these levels the city may decide whether it wants to drive the process or be a partner in the process. Partnerships at the various levels are discussed below.

10.1 Partnerships at a local level

As detailed in Section 7 and section 9 there are already a wide variety of existing initiatives and some fledgling partnerships which can be used as examples of what is achievable in which contexts. Most of these programmes and partnerships are detached (or semi-detached) from each other, however, and largely decentralised partnership networks. Clearly identifiable intermediary or representative structures are usually present, which is partly responsible for the successes of these interventions. While there is clear evidence in the Sihlanzimvelo stream cleaning programme that hierarchical, operation-driven, municipal interventions can be highly successful on municipal land, interventions on land not owned by the city will require clear network-style partnerships in place with high-level support, high levels of capacity and commitment to working together.

A significant issue is the cost to develop and sustain such partnership. In an emerging, context-specific, small partnership which developed between a number of SRA’s, the Sibaya Coastal Precinct Conservation Trust and the Water and Sanitation Unit related to the sewer crisis in the oHlanga, significant successes were achieved. However, the transaction costs (building trust, getting meetings with key people, sharing data, taking collective action) were effectively too high to
sustain. A clear and efficient contact point within the City would go a long way to enabling and sustaining this partnership.

Important here is understanding clearly who the role-players are, what type of collaboration would be required, and how to build capable partnerships to sustain interventions.

### 10.2 Partnerships at a catchment level

At a catchment level multiple actors will need to be involved, dealing with a diversity of issues across different contexts. These would most probably be highly decentralised partnerships that may include SRAs, WUAs, multiple city departments, CBOs, NGOs, tribal authorities, etc. One option would be to create opportunities for these decentralised groups to build their individual capacity and to strengthen the interconnections between them. One example of this that is being developed elsewhere are ‘course supported learning networks’.

Another option would be a joint management structure (e.g. through a super- WUA or a CMF) that would play a coordinating role while allowing diverse partners with a shared interest in the catchment to collaborate as peers in terms of capacity and power. This coordination will require significant capacity and resources.

Although more diffuse than at the local level there is still a direct shared interest and impact down a catchment. This shared interest creates incentive for partnerships as was evident in the UWASP project. With approximately 70 catchments in the City it makes sense to build local capacity, amongst partners, for catchment management.
10.3 Partnerships at a City level

One option is to play a convening role that brings together key partners such as city-wide business interests, large NGOs (e.g. DUCT, WESSA, Wildlands Trust); and traditional leaders to develop shared approaches and projects. This is likely to require substantial central coordination build alignment between the priorities and activities of all of the partners.

In addition, or as an alternative, the City could work together with a wide range of partners to build the capacity for partnership based river management. This would include the identification of key areas that require strengthening such as: regulatory support; collaborative fundraising; capacity development; knowledge sharing and tools development; open repositories for and access to data; communication and profiling the work; monitoring, evaluation and research.

A combination of both convening and supporting capacity building for partnership based river management within the City offers a high level role for the City. This will however require a dedicated institution to support and raise funding for this work. A reimagined and expanded Durban Green Corridors or similar institution could fulfil this role.
10.4 Across all levels

As partnerships are scaled up across larger geographical areas and multiple catchments, issues of shared interest become far more diffuse, and thus needs to be approached and managed strategically. There are already many examples of individual and collaborative initiatives between peers and in clusters, and many organisations working at multiple levels (for example EI4WS (GEF6); SANBI; UEIP; DUCT; P4G). There is thus significant value in sharing and learning across organisations and initiatives – ‘locally’ (e.g. UEIP; Durban Research Action Partnership), nationally (particularly with the EI4WS) and even further afield in cross-global-city learning, e.g. through C40 projects.

There are significant opportunities (and perhaps a real need) for city level institutions to act as intermediary and strategic support across scales. Rather than seeking to control the activities across complex networks it may be more useful, particularly at the catchment, city and beyond city levels, to link broader catchment, national and international networks to the shared opportunities for building capacity and collaboration mentioned above and addressing the key success factors identified in the review of current projects. Different provincial, national and global stakeholders will have different interests and thus different needs from and contributions to partnerships for riverine management. Mobilising and connecting these resources and interests to City level riverine work and through this into catchment and local networks is a key role that the City plays and needs to continue to play.

11. CONCLUSIONS

This report offers a high-level review of the regulatory framework related to riverine management, specifically in the eThekwini area of South Africa, to provide insights and suggestions to enhance partnership-based riverine management at the local level.

The review revealed that while the regulatory framework is adequate, there is a need to implement and enforce its provisions more effectively and efficiently. Enforcement, however, requires substantial expertise and financial resources and needs to be supplemented with approaches that seek to work with a range of partners to achieve the shared interest of better water management. This approach is supported by a firm commitment to partnership approaches and cooperative governance in South Africa.

The Constitution provides important direction in terms of the respective mandates and responsibilities across the three spheres of government for the management of water both as a resource and as a service. While much of the management of water as a
resource sits with national government, the mandate for the provisions of water and sanitation services, the management of urban stormwater and the maintenance of beaches and local amenities, sits with local government. At first glance this leaves little scope for local government to engage in riverine management beyond municipal land. A closer examination of Schedules 4 and 5 of the Constitution reveals however that where certain actions are ‘incidental to’ the primary mandates of local government, opportunities for more expansive river management become possible and in fact necessary.

The notion of incidental powers requires careful justification as discussed in section 5.2 and section 6 of this report. In-so-far as water resource management is a national government responsibility, the municipality would be ‘exercising power in its own competence’ if it were to engage in riverine management to the extent that it was ‘incidental to’ the fulfilment of its primary functions. Furthermore, the national and provincial spheres of government must, exercise their executive and legislative authority in a manner that does not compromise or impede a municipality’s ability or right to exercise its executive and legislative authority. Where an area of activity is related to the performance of a municipalities functions, and such activities are contained in Schedule 4 or 5, it could be argued that ‘national government and provincial governments must assign to a municipality, by agreement and subject to certain conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if (a) that matter would most effectively be administered locally; and (b) the municipality has the capacity to administer it.’ (s156(4)).

There are many existing government, civil society, business and traditional authority linked initiatives currently addressing aspects of river management. These initiatives and associated institutions offer a significant resource both in terms of experience and in terms of potential partners in river management.

This review therefore evaluated various existing river management models to identify best practices and insights on the ways in which partnership-based river management has been fostered, supported and hindered. Key insights from these programmes are briefly summarized here. **Sustainable financing** is a key challenge in most projects and is one of the main reasons projects stall, fail or have limited success. Therefore, it is critical to diversify and coordinate funding and investment from a variety of sources. There are various **models of governance**, using various institutional structures; and each has its strengths and weaknesses that can be expanded or mitigated given careful attention to context. **Intermediaries** are critical in facilitating approaches and developing solutions to dynamic and complex problems which cannot be holistically governed by a single actor. By creating and supporting linkages between diverse actors and clusters of activity these intermediaries accelerate, deepen and sustain knowledge exchange, collaborative action and learning. This learning for change can be further enhanced through inclusive spaces for collaboration (e.g. UEIP, D’RAP, learning networks and collective actions) that encourage **transdisciplinary processes and social learning**. The importance of identifying and cultivating **champions**, who can mobilize individual and collective action was also identified in the review. The form and structure of the **partnerships** in a river management
programme is crucial and is considered in detail in this report. Particularly exciting is the **increasing involvement of business** in water partnerships as evidenced by the role of AECI in Wise Wayz Water Care project, large companies in the uMhlathuze Water Stewardship Partnership and the tourism and property sectors in the oHlanga catchment through the SRAs. The **unique geographic contexts** of each of the projects reviewed, often related to location within the catchment, has shaped the work focus and institutional structures of the projects. Simultaneously rivers and catchments act as **connectors across socio-ecological systems** thus requiring institutional interactions across physical locations. Both the contextually located and interconnected nature of water work requires careful consideration in project and institutional design. The complex, contextual, interlinked and emergent nature of river management means that **monitoring, evaluation, research and reporting** contribute significantly to learning cycles and knowledge collection, and the understanding of interventions across different settings. Researchers and their institutions thus play critical boundary spanning and intermediary roles in partnership-based river management processes.

A key consideration in river management is land ownership and the implications that this has for diverse partners as well as the motivation that it provides for building partnerships. Within this review three broad forms of land ownership were considered along with their implications for the ability of municipalities to implement their mandates, including aspects incidental to the delivery of services. These forms of ownership were public land, private land, and Ingonyama Trust land. While there are mechanisms for enforcing legislation on public or private land - such as through NEM:BA (Act No.10 of 2004), or the issuing of notices under section 31A of the Environment Conservation Act (Act 73 of 1989), or application of section 125 of the National Water Act which allows an authorized person to enter a property to conduct work on water resources - entrance onto private land and interference with that land is often resisted by the landowner through private property rights. Municipalities have no inherent right to access privately-owned riparian land. This includes Ingonyama Trust Land (which can be regarded in the same light as private property). These rights, and the limitations that they imply for local government’s ability to access and work on private land, necessitate a careful consideration of **partnerships** as an enabling mechanism for river management.

Many different institutional forms (public entities, non-profit companies, businesses, etc.) are engaging with river management, often already within complex partnership arrangement. The review provides a synopsis of a range of institutional models that can be utilised when implementing partnerships for river managements. These considerations should inform both the formation and strengthening of individual partners and the formation and strengthening of institutions that can play a coordination or support role across partners and clusters of activity.

At a very high-level any institution, and particularly an institution seeking to fulfil a coordination or support role, within a partnerships network on river management should exhibit and build the following characteristics:

**Governance:**

- Funding partners:
- Implementing agencies:
• Setting strategic direction,
• Addressing conflicts of interest, and
• A high degree of autonomy.

- Accountability:
  - A legal basis for fulfilling mandate,
  - Transparency, and
  - Accountability to all partners.

- Capacity:
  - To attract and manage funding from various sources, and
  - Capacity to make and carry out decisions timeously.

- Collaboration:
  - In the interest of public good,
  - Including a not-only-for-profit understanding of value.

Institutional forms for a partnership should be able to

- Collaboratively set strategies relevant to partners’ priorities;
- Manage funds transparently;
- Deal with complexity; and
- Monitor and report on the outcomes of activities.

A range of institutional options to facilitate partnerships are identified. These are Public entities, Non-Profit Companies (NPC) (including community based organisations), a Water Fund, Legislated Water Focused Entities (such as Water Users Associations), and private companies (including the emergent B-Corporations). Each of these institutional forms could participate in a partnership for river management. If the partnerships choose to put in place an independent or overarching institution to coordinate, guide or support the partnership, then again any one of the above institutional forms may be appropriate with consideration given to the benefits and concerns. Such independent or overarching institutions can take the form of Public-Private Partnerships (two versions of this partnership are highlighted in the report). Finally, two specific institutions, allowed for by legislation, and having particular relevance to partnership based riverine management are considered in more detail. These are the Special Rating Areas (SRAs) and the Water Users Associations (WUA).

Evident within the existing partnerships that were either reviewed during the development of this report, or that participants mentioned in the three workshops conducted, were a range of possible partnership structures that tended to work best at specific geographic scales.

At a local intervention scale, there are already a variety of existing initiatives and partnerships which can be used as examples of what is achievable in local contexts. Most of these are largely decentralised partnership networks that are held together by a strong shared interest in a relatively focused local catchment. Examples include the businesses and communities sharing the Mbokodweni catchment and the SRAs around the lower oHlanga catchment. It is recommended that as capacity building and networking opportunities are built at the catchment and city levels, these groups be
invited to participate. It is also recommended that clear and capable communication structures be established between local government and these groups to enhance partnership opportunities and outcomes.

At a catchment level, multiple actors are involved in dealing with a diversity of issues across different contexts. Such partnerships can include SRAs, WUAs, multiple city departments, CBOs, NGOs, tribal authorities, etc. One option in terms of building partnerships would be to create opportunities for these groups to build individual capacity and to strengthen the interconnections between them. Another option would be a joint management structure that would play a coordinating role while allowing diverse partners with a shared interest in the catchment to collaborate as peers in terms of capacity and power. Currently a Water Use Association appears the most appropriate legal structure to fulfil this role. However, this is a complex structure to establish and will require significant support at a catchment level.

At a city level, a combination of both convening (i.e. a structure that plays an organising role to bring key partners together) and supporting capacity building (i.e. a structure where the city works with a range of partners to build the capacity for partnership based river management) offers a high level role for the city. This will require a dedicated institution to support and raise funding for this work. A reimagined and expanded Durban Green Corridors, or similar institution, could fulfil this role.

A crucial element in the deliberations around partnership-based river management is financing frameworks. However, as long as partnership arrangements are still fluid, this is a challenging aspect to unpack. Greater clarity is required on the ideal institutional structures to define financial frameworks. Much work on unlocking sustainable financing structures is currently being undertaken at the national level (particularly the Ecological Infrastructure for Water Security (EI4WS)/GEF6 project) and uMngeni catchment level (UEIP/ DUCT supported by P4G). Rather than duplicate this work it is proposed that the City play an intermediary role by connecting emerging outputs from these projects into existing partnerships at the City, catchment and local levels within eThekwini.

This review provides a regulatory basis for an expanded role for local government in river management. Furthermore, it identifies key aspects, including management consideration, that are important in building institutional capacity for partnership-based river management. Using these institutional insights and possible institutional structures specific insights are offered pertinent to local, catchment and City level river management and the partnerships that can support this work. These insights should be used by eThekwini and other local governments to clarify the role that they will play in partnership-based river management.

12. REFERENCES


Sutherland, C., Jewitt, G., Risko, S., et al. 2019. Demonstration of how healthy ecological infrastructure can be utilized to secure water for the benefit of society and the green economy through a programmatic research approach based on selected landscapes.

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