



Department of Water Affairs and Forestry
Directorate: Water Allocation
Republic of South Africa

**A POLICY FOR
WATER ALLOCATION REFORM IN SOUTH AFRICA**

SEPTEMBER 2006

FOREWORD

As custodians of the national water resource, the Department of Water Affairs and Forestry must promote the beneficial use of water in the best interests of all South Africans.

In order to do this, water allocations must be carried out in a manner that promotes equity, addresses poverty, supports economic growth and provides opportunities for job creation. The allocation process recognises that redressing the effects of previous discriminatory legislation is necessary for social stability and to promote economic growth. Moreover, the water allocation process must allow for the sustainable use of water resources and must promote the efficient and non-wasteful use of water.

However, allocating water without ensuring that all users have the capacity to use this water productively will limit these benefits. Water allocations should, therefore, not only aim at realising the above goals, but must work closely with all spheres of government and other institutions to promote the productive and responsible use of water. Likewise, where possible, water reallocations should try to minimise possible negative impacts on existing productive lawful water users who are contributing to our social and economic stability, growth and development. Water allocations must promote shifts in water use patterns that are equitable but also phased and carefully considered.

These objectives go well beyond the Department's primary mandate and require the active pursuit of cooperative governance arrangements to support the productive use of water. In many instances, this will be a difficult and costly process. Accordingly, approaches to reallocating water between users will initially be rolled out in areas experiencing shortages of water. However, in order to address the urgent short-term need for equity across the country, rollout will also be fast-tracked in areas where there are less serious water availability concerns. These implementation approaches take into account our prevailing resource and capacity constraints within the Department and our country.

In order to address these challenges, the Department of Water Affairs and Forestry has, with financial assistance from the United Kingdom's Department for International Development, reviewed the way we have been allocating water, and developed appropriate approaches for the South African situation.

This document outlines this framework for allocating water. It considers the issues raised by a wide range of stakeholders during an extensive public consultation process and serves as the basis for allocating water fairly, equitably and sustainably into the future.

Some for all, forever, together!!!

Minister: Water Affairs and Forestry
September 2006

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SECTION 1 - INTRODUCTION

Why change the way we allocate water?

Equitable access to water, or to the benefits derived from using water, is critical to eradicating poverty and promoting growth. This is particularly important in South Africa, which is still facing significant inequities in access to, and the benefits from the use of, water.

These inequities are reflected both in the disproportionate use of water along race and gender lines and, in many cases, a lack of capacity to use water to generate income and jobs. In addition, much still has to be done to improve the capacity of Historically Disadvantaged Individuals (HDIs) and the poor to participate equitably in water resources management.

It is therefore important for water allocation processes to:

- Take proactive steps to meet the water needs of HDIs and the poor;
- Ensure participation by these groups;
- Work with other agencies to help build capacity to use water productively;
- Promote the sustainable use of water resources; and
- Promote the beneficial and efficient use of water in the public interest.

Why develop this document?

South Africa's National Water Act (NWA) and National Water Policy (NWP), and the National Water Resource Strategy (NWRS) provide the legislative and policy framework for water allocations. However, these documents do not provide the detailed strategies and approaches necessary to promote equity, sustainability and efficiency in water use, in a fair, reasonable and consistent manner.

The process of water reallocation to realise equity will be both technically demanding and contentious. Accordingly, participation by all stakeholders is vital to the process. Furthermore, stakeholder partnerships will be required to coordinate support for the productive use of water. It is therefore important to have clearly articulated approaches to allocating water.

This document, based on extensive consultations with stakeholders, outlines clearly defined strategies and approaches for water allocations, and serves as the benchmark for water allocation processes and a formal basis for the implementation of the programme.

A Balancing Act

Even though South Africa has entered its second decade of democracy, and the NWA its eighth year since promulgation, there are still significant inequities in access to and use of our water resources, as well as inequities in the benefits that accrue from this water use. There are urgent demands to rapidly address these inequities.

The way in which this is done is important, particularly in areas where it may be necessary to re-allocate water between users and/or sectors to achieve equity and beneficial use. Where it is critical to address equity needs, attempts to deal with this must be balanced with the consideration that many existing lawful water users are making productive, efficient and beneficial use of water and are contributing to socio-economic stability and growth.

Introduction Cont...

As such, if the programme of water reform is implemented too quickly, or haphazardly, there is the possibility of economic or environmental damage as new users struggle to establish productive and beneficial uses for the reallocated water. Conversely, if water reform takes place too slowly, the possibility of socio-political unrest and instability is increased.

Water allocation reform, while founded on sound water resources management approaches, is therefore profoundly a social, political, economic and legal process. This document presents a framework that informs the determination of an appropriate balance for the programme during implementation in different parts of South Africa.

Part of an ongoing process

This document does not represent a new approach to water reform, but gives effect to the reform processes initiated in 1995 with the Water Law Review process. The approaches outlined here are consistent with the National Water Act and the National Water Policy for South Africa, and the water allocation priorities outlined in the NWRS.

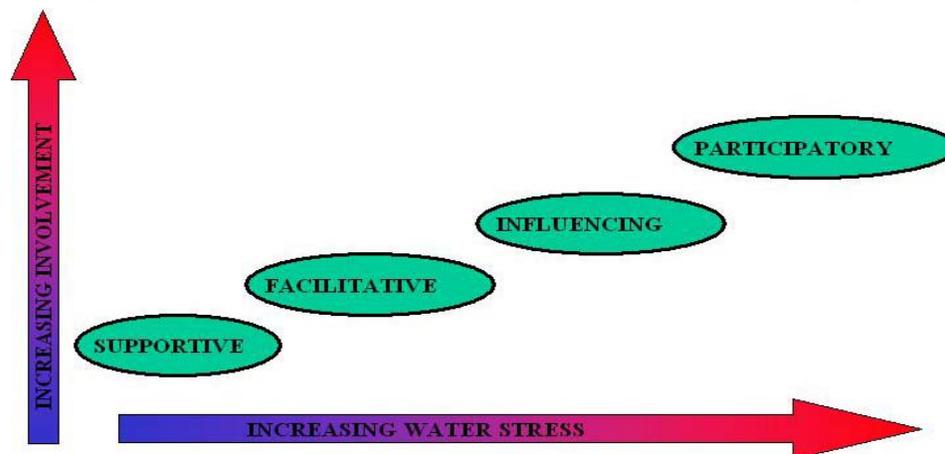
What is the role of the water allocation process?

The water allocation process must support Government's strategic objectives. The Department of Water Affairs and Forestry (the DWAF) and Water Management Institutions should, therefore, work towards providing the water required to meet these objectives.

It is recognised that the DWAF or the CMAs role within these programmes is to:

- (a) indicate where water is available to support growth;
- (b) influence and be a part of the planning processes in water stressed areas to promote and support growth and development initiatives; and,
- (c) encourage the establishment of enterprises that are less water intensive.

The role of water allocation in supporting economic development programmes will therefore increase as water becomes more limiting.



THE ROLE OF WATER ALLOCATIONS IN DEVELOPMENT

Introduction Cont...

What is “the beneficial use of water in the public interest”?

Water allocation must promote the beneficial use of water in the public interest (see Glossary Box 1). This includes a commitment to the fair, reasonable and equitable allocation of water to all South Africans.

In supporting the provision of water for uplifting the poor, the water allocations process must aim at providing water for subsistence purposes and sustaining basic livelihoods. Furthermore, it must also start people along the journey to becoming commercial and competitive users should they wish to. The water allocation process must therefore also support and facilitate Broad-based Black Economic Empowerment by encouraging and supporting larger-scale productive commercial uses of water wherever these opportunities exist.

In addressing issues of equity, the water allocation process must support water uses that generate employment and growth. Similarly, where water must be re-allocated between users, the impacts of curtailing existing beneficial uses of water for establishing new enterprises must be carefully considered. Where appropriate, re-allocations should be phased in. Beneficial use also means promoting a broad range of uses of water across a variety of socio-economic sectors to support a diverse, robust and stable economy.

The impact of HIV/AIDS

Apart from the enormous human suffering caused by HIV/AIDS, there is growing evidence that the pandemic will have significant impacts on economic growth. These impacts are not only related to the rate of infection, but also to the quality of life, and life expectancy of people living with HIV and AIDS.

The water allocations process must support programmes aimed at improving the nutritional status of those infected, especially the poor, in an attempt to help stave off the most debilitating impacts of the disease. Water allocations aimed at improving household food security must consequently receive priority attention.

Why a framework for water allocation?

This document consolidates the purpose and ideals of South Africa's Constitution, National Water Policy, National Water Act and the National Water Resources Strategy as a framework for allocating water. This framework also addresses the concerns and issues raised by stakeholders in the consultation phase of developing this document and the National Water Resources Strategy. It focuses and re-affirms these in the context of a framework to guide the water allocation reform process.

This framework therefore provides:

- ◆ A link between the Constitution, the National Water Policy, the National Water Act and the National Water Resources Strategy within the water allocation process;
- ◆ A code of practice to guide water allocation processes both inside and outside of compulsory licensing;
- ◆ A commitment to stakeholders regarding the intention and purpose of these processes; and,
- ◆ The basis for developing the water allocation principles that must be included in Catchment Management Strategies [**NWA, Section 9 (e)**].

Introduction Cont...

What “water use” is included?

The National Water Act [**NWA, Section 21**] refers to 11 uses of water including abstraction, storage, stream flow reductions, recreational use, discharge of waste, diverting and impeding flow, controlled activities and altering the bed, banks or characteristics of a water course.

This document, however, currently only provides a framework for the following water uses;

- Abstraction of water (either from groundwater or surface water sources) [**NWA, Section 21 a**]
- Storage of water [**NWA, Section 21 b**], and
- Stream Flow Reduction Activities. [**NWA, Section 21 d**]

However, the impacts on other water uses of allocating water to any of the above uses must be considered in the allocation process, and guidelines to this effect are included in the framework. This is consistent with the integrated water resources management approaches outlined in the National Water Act.

Specific allocation approaches and associated processes for the other Section 21 uses of water are receiving attention and will be formally documented. Notwithstanding this, the guidelines described in Section 2 of this document serve as the basis for allocation approaches for the all the water uses described in Section 21 of the National Water Act.

How is water use authorised?

The National Water Act only makes provision for one right to water, the Reserve. This represents the water required for basic human needs and the water required to maintain ecosystem functioning. This Reserve gets the priority allocation and therefore determines the amount of water available for other uses.

Except for the water required for the Reserve and Schedule 1 uses, all other water uses must be authorised.

Entitlements to use water are outlined as follows:

- Schedule 1 use - small volumes of water for household use with little potential for negative impacts on the water resource, for which no application for authorisation needs to be made.
- General Authorisations - larger volumes of water which may be generally authorised in any catchment, or for a specific type of water use or category of water user anywhere in the country.
- Existing Lawful Use - which is a water use that lawfully took place in the period two years before the commencement of the National Water Act, and
- Licensed Water Use - water use authorised in terms of a licence issued under the National Water Act, and upon approval of an application by a responsible authority.

Water allocation reform addresses the last three of these authorisations and aims to replace existing lawful water use entitlements with licences or general authorisations issued under the National Water Act via compulsory licensing. These licences are not issued in perpetuity and will be reviewed as specified in the licence conditions. As such, water allocation is an iterative process that continually responds to the dynamics of South Africa’s ongoing development and growth.

Introduction Cont...

What is compulsory licensing?

Compulsory licensing [NWA, Sections 43-48] is a mechanism to reconsider all the water use authorisations in an area, to:

- (1) achieve a fair allocation of water from a resource that is under stress or to achieve equity in allocations;
- (2) promote beneficial use of water in the public interest;
- (3) to facilitate efficient management of the water resource; or
- (4) to protect water resource quality.

Allocation considerations to be taken into account include: the needs of the Reserve and any relevant international obligations, the requirements of existing licences, allocations for the need to redress the results of past racial and gender discrimination in accordance with the constitutional mandate for water reform, existing lawful water uses to whom the licensing authority determines that licences should be issued, and other allocations by public tender or auction.

Monitoring water allocations

It is vital that the water allocations are monitored, not only to support the water resource management process, but also provide a basis for measuring changes in the beneficial and equitable use of water.

While this document does not address the approaches to monitoring in detail, it provides a benchmark against which water allocation processes can be tested. Separate studies are being initiated to develop approaches to scrutinizing water use patterns so that progress with respect to redressing past inequities and beneficial use of water can be monitored and reported on.

GLOSSARY BOX 1

Re-allocation: This refers to the re-allocation of water between users via compulsory licensing or when licences are reviewed

Allocable water: This refers to that water that can still be allocated to new licences or General Authorisations after meeting the requirements of the Reserve, and International Obligations.

Water stressed: This refers to areas where the existing water use and additional demands for water exceeds the water available.

“In the public interest”: This refers to water allocations that are to the benefit of the public and the nation as a whole. It balances the broader public interest with the rights of the individual, and includes the commitment to equity.

The responsible authority: Refers to the agency charged with the water allocations process, This may be either the Department of Water Affairs and Forestry, or the Catchment Management Agency.

Equity in water use: This refers to equitable access to water, as well as to actions to promote race and gender redress in water use. It is underpinned by the equitable distribution of the benefits of water use, and not the equal distribution of water.

SECTION 2 – GUIDELINES FOR WATER ALLOCATION

The guidelines in this section provide a benchmark against which water allocation processes can be tested. These guidelines underlie the proactive reallocation of water via compulsory licensing as well as the way individual licence applications are processed.

Guideline 1: Redress Race & Gender Imbalances

A primary focus of water allocation processes is to redress past race and gender imbalances in water use. The need for clear and decisive action for redress is not only a constitutional imperative, but is also now compelled by the slow progress with redress in the first decade of South Africa's democracy. Water allocation processes will therefore be aimed at intensified efforts towards redress. Redress includes, and is balanced with, actions to promote the distribution of the benefits of water use.

The role of the Responsible Authority

The responsible authority must develop and implement specific programmes of action for water allocation reform. Interventions in support of this include, *inter alia*, budget and financial provision and support; forging strategic co-operative partnerships; developing, supporting and/or implementing appropriate capacity building initiatives; and, aligning actions with other development initiatives. The first edition of the National Water Resource Strategy outlines early steps in this process by indicating the programmes for compulsory licensing and establishment of Catchment Management Agencies. Once established, Catchment Management Agencies will carry this process further by describing Allocation Plans in the Catchment Management Strategies.

Guideline 2: Capacity Development

Water allocation processes must be supported by capacity development programmes that promote the use of water to improve livelihoods as well as the productive and responsible use of water by all users. These capacity development programmes must also help HDIs and the poor participate actively and equitably in the process of informing the allocation of water.

The allocation process must do more than allocate water – it should also support and facilitate the development of capacity, especially among HDIs and the poor, to actively and equitably participate in the process of water allocation. Special focus should be given to the needs, participation and importance of women in the water allocation process. These capacity development programmes must not only enable the use of water to meet basic household needs, but should also assist emerging users along the path to becoming commercial and competitive users in their own right.

The role of the responsible authority

While the responsible authority has the mandate to allocate and authorise the use of the water, ensuring its productive use requires support from a wide range of government departments, Water User Associations, catchment forums, NGOs, CBOs and civil society. The responsible authority must involve these agencies, not only in identifying opportunities for the use of water by HDIs, but also in ongoing programmes to support the productive use of water. Wherever feasible, these should be formal working relationships. In particular, links with the Land Reform programme and local and provincial government can be formalised as Implementation Protocols under the Intergovernmental Relations Framework Act.

Guideline 3: Broad-Based Black Economic Empowerment

The water allocation process must contribute to Broad-Based Black Economic Empowerment (BBBEE) and gender equity by facilitating access by black- and women-owned enterprises to water.

After securing water for basic livelihood needs, water allocations processes must facilitate the authorisation of water use for emerging black- and/or women-owned enterprises wishing to make productive use of water for commercial gain. The water use authorisation process must include mechanisms to ensure that the benefits of the water use actually flows to BBBEE enterprises and women, and that “fronting” does not occur.

The role of the responsible authority

The establishment and support to BBBEE enterprises is outlined in the Broad-Based Black Economic Empowerment Act (Act 53 of 2003). The water allocation process must support and facilitate the establishment of these enterprises. In areas where there is allocable water, the process should establish working relationships with line function Departments and other agencies that promote and support the establishment of these enterprises. This should include “advertising” the availability of water, as well as facilitating the licensing of water to these enterprises. In places where there is limited water, a more proactive stance should be adopted, where opportunities for productive use of water by BBBEE and women-owned enterprises will be jointly identified with line function Departments and other agencies (including private enterprise). The compulsory licensing process can be used to make water available to these enterprises.

Guideline 4: Local, Provincial & National Planning Initiatives

The water allocation process must respond to local, provincial and national planning initiatives, as well as to South Africa’s international obligations and regional SADC initiatives.

Sustainable development will primarily be driven by local and provincial planning initiatives and national policies and strategies. Many of these initiatives have water resource implications. The water allocations process must respond to these initiatives by, wherever feasible, making the water required for these development initiatives available. However, the water allocations process must also inform planning processes to influence regional and local planning in water stressed areas and to encourage developments that have smaller impacts on water resources. Special attention must be given to working with local government to support Integrated Development Plans and Integrated Sustainable Rural Development Plans, or to influence these processes in catchments where water is scarce.

The role of the responsible authority

It is recognised that water allocations must respond to, rather than drive, local development initiatives. However, as water availability can constrain development, the responsible authority must establish working relationships with government agencies in all spheres of government to give effect to this principle.

Guideline 5: Fair, Reasonable & Consistent

The water allocation process must be undertaken in a fair, reasonable and consistent manner and existing lawful uses must not be arbitrarily curtailed.

Issues of inequitable water use occur in most catchments in South Africa. As an arid country with little opportunity to further develop our water resources, there will be curtailments to existing users to meet equity goals in these catchments. Processes of reallocation will be undertaken in a manner that minimises the extent of disruption to local, regional and the national economy. Accordingly, the water allocation process will be informed by potential options to meet water demands before the re-allocation of water is

considered. Furthermore, where appropriate, water curtailments will be effected on a progressive basis, with users being given the opportunity to reduce their water use by becoming more efficient water users.

The role of the responsible authority

The responsible authority must carefully consider a range of options before curtailments to existing water users are implemented. Communication and engagement with all roleplayers during this process is paramount to minimising the possibility and/or extent of conflict among existing and future users.

Guideline 6: Phased Attainment of Developmental & Environmental Objectives

The water allocation process must give effect to the protection of water resources as outlined in the National Water Act by promoting the phased attainment of both developmental and environmental objectives.

Job creation and economic growth are among South Africa's most important priorities. These require water on the one hand, but also provide the financial resources necessary for the management of the resource on the other. However, these short-term development needs should not be allowed to compromise sustainability. Equally, overprotective approaches can slow the pace of development and compromise our economic development. The National Water Act makes provision for a Reserve, a Resource Classification System and Resource Quality Objectives, which are an expression of the most appropriate balance of these needs, and what the Minister: Water Affairs and Forestry considers to be in the best interests of the country. The water allocation process must ensure that the requirements of the Reserve, Class, and Resource Quality Objectives are met.

The role of the responsible authority

The Department of Water Affairs and Forestry is responsible for establishing the Reserve. A Reserve, or a preliminary determination of the Reserve, must be in place before water use can be licensed. The water allocation, or re-allocation, process must give effect to these Reserve requirements. As such, in water stressed catchments the processes of establishing the Reserve and Resource Class should ideally be completely integrated with the allocation process. In this way, users would be aware of the implications of various Reserve and Class scenarios on the water available for allocation purposes. Where this is not possible, and where a Reserve or preliminary Reserve has already been established, these may have to be reviewed should new information become available during the allocations process.

Guideline 7: Water Quality Considerations

Where water is re-allocated from one sector or user to another, and where this reallocation could impact on the quality of the water resource, re-licensing of the waste discharge or non-point source impacts of the recipient should be considered.

It is possible that the re-allocation of water from one sector, or user, to another (in order to promote a more beneficial use of water) may increase the pollutant loads to the water resource, or change the nature of the impacts on the water resource. Where this happens the responsible authority must review any existing waste discharge authorisations, or consider implementing new source directed controls.

The Role of the Responsible Authority

The responsible authority must consider the possible impacts of re-allocations on resource quality within the compulsory licensing process.

GLOSSARY BOX 2

The Reserve is the quality and quantity of water required to satisfy basic human needs and to ensure the ecologically sustainable development and use of the relevant water resource. The Reserve is the only right to water use in the National Water Act, and water must be assigned to meet the requirements of the Reserve before water can be allocated to other uses. As such a Reserve must be determined before any water use can be authorised.

A Preliminary Determination of the Reserve can be made before the methodologies for determining the Reserve and classification system have been finalised.

Guideline 8: Reduction of Administrative Burden

Mechanisms that reduce the administrative burden of authorising water use must be implemented.

Mechanisms to facilitate licence evaluation procedures and speed up the time it takes to authorise water use must be implemented. These initiatives must be consistent with the Administrative Justice Act and Batho Pele principles. Methods for evaluating licences must balance the likely impacts of water use with the public benefits that result from the authorisation and must give effect to the provisions of Section 27 of the National Water Act. These evaluation procedures may be used to guide and inform applicants on options for increasing benefits of the proposed water uses, and/or reducing its impacts.

Similarly, mechanisms that expedite authorisation processes of water use on a catchment scale must be explored. This may include determining resource specific General Authorisations for certain defined areas and/or categories of persons.

SECTION 3 – APPROACHES TO WATER ALLOCATION

This section links the guidelines described in the previous section with more detailed approaches to water allocations. These approaches differ according to the availability of water, and the nature of the individual application.

A

THE APPROACH FOR APPLICATIONS WHERE THE ALLOCABLE WATER IS SUFFICIENT TO MEET THE NEEDS OF THE APPLICANT, AS WELL AS DEMANDS FROM OTHER USERS IN THE FORESEEABLE FUTURE

The principles that apply to evaluating applications that may fall in this group are;

- 1) All applications must be tested against Section 27 of the Act.
- 2) Where the applicant is a non-HDI, and water is available and authorisation is unlikely to impact on existing and future water users, efforts should still be made to encourage HDI participation of benefits from the water use.
- 3) The principles outlined in this section should be applied to water trading arrangements.
- 4) Special efforts must be made to encourage HDI applications in areas where water is available.

Applications for water use must be evaluated on an individual basis as they are received. However, applications that promote redress must be sought and encouraged. In order to encourage applications from HDI users, awareness and capacity building programmes will specifically target this sector.

All licence applications in areas where compulsory licensing has not been announced must be evaluated as they are received. If these applications do not impact on other existing or potential future applications they can be dealt with on an individual basis. This means that they are not compared to other potential uses of water. However, it does not mean that all such applications must be authorised. The requirements of Section 27 of the National Water Act must be used in the evaluation process and the primary focus of water allocation in areas where water is available is to promote redress and equity, as well as economic growth and job creation for every application. Applications that promote these ideals must be encouraged in these areas.

Stakeholder empowerment and communications processes in these areas must highlight the ways in which HDIs and the poor can use water to improve their livelihoods, and where they could get advice and extension support for the productive use of water. This must be done together with other agencies and all spheres of government. Applications that are in accordance with regional planning goals should be encouraged. Awareness programmes should highlight the licence evaluation process. Allocation approaches should include support via cooperative governance arrangements.

The evaluation of applications that support the beneficial use of water in the public interest, and that have little impact on the water resource must be expedited.

Applications that make a significant contribution to race and gender redress or poverty eradication, either because the applicant is an HDI or because of significant employment opportunities and or equity ownership, must be considered as being in the public interest. If the application is also expected to have little or no impact on the water resource, the application should be processed rapidly. Preliminary determinations of the Reserve for these applications are likely to be required at a desktop or rapid level.

Conversely, if the application has little benefit in terms of redress, and has adverse impacts on the resource, then detailed impact assessments must be requested before the application can be evaluated. Preliminary determinations of the Reserve for these applications are likely to be required at an intermediate or comprehensive level.

Once a Reserve and Class has been determined for the resource, then the allocation of water cannot impinge on these. However, if the preliminary determination of the Reserve is required to authorise the water use, then no lowering of the ecological state of water resources below the present state should be considered.

By definition, water use applicants addressed under these processes will not impinge on the preliminary determination of the Reserve. However, no lowering of the preliminary Reserve requirements by lowering the preliminary determination of the Class should be considered in order to make water available for future users, or to authorise any particular use so that an application may be processed in this manner.

B

THE APPROACH IN CATCHMENTS WHERE THE APPLICATION(S) MAY EXCEED THE ALLOCABLE WATER.

The principles that apply to evaluating applications that may fall in this group are:

- 1) All applications must be tested against Section 27 of the Act;
- 2) Licences may be refused if the use impinges on existing users, or potential future beneficial uses; and,
- 3) Every effort must be made to find water for HDI applicants.

In these cases, the approach must be to prioritise the applications based on an initial screening. This screening should balance the expected benefits of the use with the expected impacts of the use. Applications that represent the beneficial use in the public interest and have low impacts would receive priority attention.

Tools that help determine the likely public interest benefits, as well as the possible impacts that may arise from the water use, have been developed. These must be used to help prioritise applications for evaluation. Applications that promote equity, BBEE, job creation and economic growth, with little impact on other users or the resource will be given priority consideration. Again, this will include taking into account the requirements of Section 27 of the National Water Act. Applicants must be advised of their order of priority, and the basis thereof, and may wish to reconsider their applications.

Attempts must be made to find water for high priority applications. This will be done by, *inter alia*, curtailing possible unlawful use, instituting water conservation measures, lowering the assurance of supply, or by encouraging water trading for water users that are able to purchase water entitlements.

The underlying principle of water allocations under these circumstances would be to authorise as many of the outstanding applications as possible, with a preference being given to uses that represent beneficial use in the public interest. However, if there are applicants requesting water for beneficial and high public interest uses that cannot be accommodated with the available water, attempts must be made to find the water to support these uses by identifying local unlawful use, encouraging more efficient use, lowering the assurance of supply or by helping them identify opportunities for water trading.

Applications that cannot be accommodated within the initial prioritisation must still be evaluated. However, should the water not be available after detailed investigations, applicants may be refused a licence, but could reapply once compulsory licensing is initiated.

By definition, once the applications have been evaluated and all the available water has been allocated, water use in the catchment will match availability. Consequently, further allocation or re-allocation to promote beneficial use or equity must be undertaken via compulsory licensing. The prioritisation for compulsory licensing will be informed by a number of factors, including the availability of water, potential demands from emerging users, potential water quality problems, as well as priorities in other government agencies.

Water allocations in these areas may not impinge on the Reserve and class, if they have been determined. However, if preliminary determinations of the Reserve are required to authorise these applications, these Reserve determinations may be based on an ecological state below present state to create allocable water, but only if highly beneficial water use applications cannot be accommodated once the above actions have been instituted.

While a principle of “not below the present ecological state” should be followed, it may be counter productive to slow the uptake of water for redress if the catchment has not been prioritised for this intervention in the short term. In these cases, a preliminary determination of the Reserve could be made based on an ecological state below present conditions to facilitate the authorisation of applications that promote redress, provided that measures are put in place to give effect to the desired Class of the Resource once it has been established¹. However, where aquatic ecosystem functioning is already severely impacted, no further lowering of the present ecological state should be considered.

¹ This does not imply that there will be a permanent degradation of aquatic ecosystems, but simply that a higher risk of degradation will be accepted before the final determinations of the Reserve and Class can be made, and before compulsory licensing is implemented.

C

THE APPROACH FOR CATCHMENTS THAT HAVE BEEN PRIORITISED FOR COMPULSORY LICENSING

The approaches outlined below must serve as a basis for the allocation and re-allocation of water in the compulsory licensing process. They will apply as soon as compulsory licensing has been announced in the catchment (This may be some time before the call for licence applications). Following this announcement, the evaluation of individual applications using approaches outlined in 'A' and 'B' above cannot be applied.

In catchments where the water resource is already over-allocated, the compulsory licensing process will be initiated as soon as circumstances allow, or as outlined in the National Water Resource Strategy.

In areas where there is no available allocable water, water may have to be re-allocated using compulsory licensing - to ensure the fair and equitable use of water, to correct over-allocations or to protect resources. In these cases, special attention will be given to the possible social, economic and ecological implications of the re-allocation process, as well as to supporting other government initiatives.

In catchments where compulsory licensing has been announced, calls for new licence applications will be made after studying all viable opportunities for productive water use. These opportunities may be outlined in an Allocation Plan or draft Allocation Plan (if a Catchment Management Agency has not been established. These studies will guide the reconciliation of water availability with demands for water, and will be developed in consultation with stakeholders.

Studies aimed at identifying beneficial uses of water in any catchment will be initiated once compulsory licensing has been announced. These will be based on the Allocation Plan, if one is available, and will identify viable opportunities for productive water use by HDIs, as well as the contributions of existing water use to the regional economy and job creation. These studies may also highlight where water use by HDIs could be generally authorised.

Allocation of water to applications received as a result of the call for licences under compulsory licensing will be made as outlined in Section 45 (2) of the National Water Act.

Water allocations in compulsory licensing will be made as follows;

- Water will be assigned to meet the requirements of the Reserve and class, and international obligations
- Water will be assigned to meet the requirements of existing licences and strategic users.
- Water will then be allocated to applicants to redress race and gender imbalances.
- Water will then be allocated to existing lawful users of water, who have made application under compulsory licensing, and who demonstrate beneficial use of the water in the public interest.
- Water may also be allocated to HDI users via General Authorisations before the remainder of the water is allocated according to the above guidelines.

This does not mean that all the water will be given to HDI applicants, and the provisions of Guideline 5 in Section 2 must still be applied.

Applications for water use under compulsory licensing should be met by taking into account all relevant considerations, including alternative sources of water.

The following processes (among others) can be progressively followed to identify allocable water before curtailing existing lawful water uses:

1. Ending unlawful use;
2. Removal of invasive alien plants;
3. Promoting the use of groundwater resources, where possible and available;
4. Actively promoting Water Conservation and Demand Management²;
5. Phased and progressive curtailment of existing lawful water use;
6. Lowering the assurance of supply;
7. Viable options for developing the resource (for example, construction of new impoundments);
8. Promoting water trading between existing lawful water users, including licence holders.

Where water must be re-allocated to support equity, support programmes should be established through co-operative government processes to promote the productive and sustainable use of water by all users.

The compulsory licensing process should not only promote equity in water use, but should also encourage the most beneficial use of water resources in the public interest. Accordingly, an important consideration in the re-allocation process should be the ability of beneficiaries of re-allocated water to use the water productively. This means that co-operative government capacity development and support programmes (see Glossary Box 1) should form part of the compulsory licensing process. Re-allocations between users should also be undertaken in a phased manner to optimise the benefits of the process to both the beneficiary and the existing user.

Water use allocation schedules resulting from the compulsory licensing process must give a greater measure of security to water users.

Compulsory licensing will require the active support and participation among existing and potential users. This is only possible if the final allocation schedule provides security of use to all users. This means that licences issued at the end of compulsory licensing should be issued recognising the need for economic and social stability of users who may decide to make investments to effectively take up their allocations.

Where re-allocation of water must be considered to meet equity needs, water users using water most efficiently and productively should have their existing lawful water use curtailed last and to the least extent.

One of the intentions of the compulsory licensing process is to promote the efficient and beneficial use of water. To encourage this, and as an incentive to users in the early phases of compulsory licensing, efficient water users should be curtailed circumspectly when identifying possible curtailments in existing lawful water use. The validation and verification of the extent of the existing lawful water use will provide the basis for these assessments.

The water re-allocation process must include mechanisms to work directly with the public throughout the process to ensure that their concerns are consistently understood and considered.

The compulsory licensing process could be controversial and conflictual because it affects stakeholders' livelihoods and potential livelihoods. This demands a high level of participation in the process. The commitment to stakeholders in this respect (as defined by the International Association of Public Participation) should be: "We will work with you to ensure that your concerns are reflected in the alternatives developed and we will provide feedback on how public input influenced the decision." This will primarily be given effect during the development of the Allocation Plan or draft Allocation Plan.

The compulsory licensing process should be paralleled with procedures to assist emerging and existing users to form Water User Associations or any other appropriate water management institution.

The Compulsory Licensing process should actively encourage the establishment of Water User Associations and/or other co-operative structures that could make use of this facility. Water User Associations would be eligible for subsidies to support their enterprise development.

Where existing lawful use of water is curtailed on the basis of a preliminary determination of the Reserve, stakeholders may be afforded the opportunity to comment on the Reserve.

Where a preliminary determination of the Reserve, and/or emerging demands indicate that existing lawful use will need to be curtailed, the responsible authority may publish the preliminary determination of the Reserve in the Gazette, as is contemplated in Section 16 (3) of the NWA. This will give water users the opportunity to comment on the proposed preliminary Reserve determination, or to propose alternative options for realising the desired level of ecosystem protection.

The assurance of supply associated with the allocation of water should be determined by taking into account all relevant factors, including, but not limited to, the strategic nature of the water use and the impacts of reduced water availability on the economic viability of the enterprises.

Some users of water do not have the resilience to withstand reduced assurances of supply. These users should consequently be given a greater but not absolute assurance of supply. Similarly, the water required for basic livelihood support should be given an even greater assurance of supply. Strategically important water users should be given a very high assurance of supply.

SECTION 4 – CONCLUSION & WAY FORWARD

This framework document will inform the development of water allocation plans as contemplated in Section 9(e) of the National Water Act, with a specific focus on race and gender water use reform. These plans must then provide a consistent basis and guide for the way in which individual applications for Section 21 water uses are authorised, as well as how water allocation schedules are developed during compulsory licensing.

While the present focus of this document is to speed up the pace of gender and race reform in South Africa, its provisions are nevertheless far-reaching in addressing all the elements and principles of Integrated Water Resources Management. Whether, and how, it may change as a framework document in the future depends heavily on the extent to which race and gender reform is achieved in all catchments in the country.

In the latter regard, although race and gender targets, and their scale of applicability, were not described in the document, Guideline 1 infers this via the development of specific programmes of action to address race and gender reform in water allocations and reallocations.

Finally, this framework document is the product of three years of intensive and rigorous debate and engagement, with inputs from a number of individuals representing a very wide range of interests and disciplines. It is by no means an exhaustive account or documentation of these contributions, but is intended to reflect in as concise and succinct a manner as is possible, the essence of these debates and discussions.