



water affairs

Department:
Water Affairs
REPUBLIC OF SOUTH AFRICA

NATIONAL WATER POLICY REVIEW (NWPR)

APPROVED WATER POLICY POSITIONS

1. INTRODUCTION

1.1 Purpose of the document

A national policy provides currents and future national actions or imperatives, selected from a number of options. The policy thus outlines a course of action or statements of guidance which a government adopts at the national level in pursuit of the national objectives of a country. Over time, governments review and reflect on policies to amend these to address new and current development in a particular sector. This amendment can take a number of forms.

The South African National Water Policy Review is such a review and refinement of the water policy of the country. The amendments which are recommended by this policy review take the form of policy positions which outline additional, new or updated courses of actions which the government wishes to adopt in pursuit of national water objectives in the future.

A policy review is usually followed by review of the legislative framework of a country, which will then be new, refined or updated policy objectives within the legislative framework.

1.2 Overview of Policy Review

The mandate of the policy review is to determine any unintended oversight and gaps in the current water policies to provide amendment to address these.

Water policy positions in earlier policies, set out below, which are not recommended for amendment in this document, remain valid.

There are currently four policy documents that underpin the legislation administered by the Minister: White Paper on Water Supply and Sanitation (1994), White Paper on a National Water Policy for South Africa (1997), White Paper on Basic Household Sanitation (2001) and the Strategic Framework for Water Services (2003). Since the promulgation of these policy documents, and based on several years of implementation of policy, a number of challenges and unintended interpretations have been identified that require a policy review, and consequent legislative amendment.

The key policy issues that need to be addressed are discussed in this policy review, with recommendations on revised or updated policy positions. Three overarching issues are discussed briefly below (Section 1.2-1.4), with each of the specific policy challenges following from sections 2 and 3.

1.3 Financial and legal implications

This policy review will be used to inform a revised National Water Bill. Interested parties will be involved in this process to make sure that the goals of the policy are achieved, and the legislation that is created is practical, efficient and effective.

The financial implications of any of the legislation and regulatory changes resulting from the policy review will be quantified prior to implementation of the changes.

Any legislative provisions resulting from the policy review will be carefully considered.

1.4 Developmental water management

The National Water Resources Strategy has adopted a position of developmental water management, a framework which directly addresses the linkages between water management and the developmental and transformational goals of government. This approach also requires the consideration of the entire water value chain in terms of how water can contribute to achieving equitable, beneficial and sustainable development across the country. Developmental water management is also focused on those priority actions within the delivery capacity of the state and other role players that will have the greatest developmental impact.

Based on this framework and on experience of the previous fifteen years, the decision has been taken to bring the National Water Act and the Water Services Act into one, seamless piece of legislation governing the entire water chain. Interestingly, this was the original vision of the late Kader Asmal and his Director general at the time, but two separate acts were promulgated for practical reasons and due to the need to get the Water Services Act through parliament as fast as possible in order to facilitate the delivery of safe drinking water to the 14 million people lacking this service at that time, as required by the Constitution.

The Constitution indisputably mandates developmental water management and requires that the legislation and its implementation actively promote and give effect to the rights enshrined in the Bill of Rights.

1.5 Dealing with the whole water value chain – from resource to consumptive and productive use to resource- in a seamless fashion

There have been a number of implementation challenges arising from two pieces of legislation, which will be dealt with in the revision of the legislation. Many of these issues do not require policy shifts or elaboration, but simply improved alignment and articulation of the integration of the two separate pieces of legislation.

Having one piece of legislation, rather than two, will enable the Minister, the department, water management and services institutions, and water users to have a clearer understanding of legislative aspirations and requirements regarding water across the entire water value chain, and will prevent the need for the cross-reading between the two acts.

The water value chain in South Africa extends from the water resource to consumptive and productive use; back to the water resource. This water value chain requires definition and must include the social, ecological and economic value of the water resource.

Water resources have to be managed in each catchment to ensure that the demands of all users are met sustainably, efficiently and equitably, as mandated by the NWA. Consumptive and productive

use of water interacts with the water resource primarily at the points of abstraction from and discharge/return flow to the resource.

The protection, use, development, conservation, management and control of water resources, as required by the NWA, includes but is not limited to:

- the protection, management and allocation of the water resource,
- water use, development, management and control to address the water requirements of the Reserve, international water obligations, transfers between water management areas, and water uses of strategic importance.
- development, use and management of:
 - water taken directly from the water resource for reasonable domestic purpose and for water of small household gardens and animals (excluding feedlots);
 - water stored and used from run-off water from a roof;
 - water for emergency situations and recreational purposes; and
 - the discharge of waste or run-off water into a canal, sea out fall or other conduit for purification, treatment and disposal by another person authorised to do so.
- use, development, management and control of water for consumptive and productive use, including use in the:
 - agricultural sector, where water use is dominated by irrigated agriculture - the largest single use of water in South Africa.
 - domestic sector which includes water use for:
 - water supply service which the Strategic Framework for Water Services currently defines as *the abstraction from a water resource, conveyance, treatment, storage and distribution of potable water, water intended to be converted to potable water and water for industrial or other use, to consumers or other water services providers* and
 - a sanitation service which the Strategic Framework for Water Services currently defines as *the collection, removal, disposal or treatment of human excreta and domestic wastewater, and the collection, treatment and disposal of industrial wastewater.*
 - energy, food, beverage, manufacturing and mining sectors which are all highly dependent on reliable supplies of water.
 - tourism sector where drinking water quality that matches international standards as well as a reliable water supply and sanitation services are critical to the success of this sector, and
- treatment and management of discharge and return flows to the water resource.

The DWA's mandated function in the domestic water use sector is the monitoring and regulating of water supply and sanitation activities, in accordance with the Constitution. This requires the capacity to establish national policy guidelines, a national water and sanitation development strategy, the

formulation of criteria for State subsidies, the setting of minimum services standards as well as monitoring and regulating water supply and sanitation service provision.

The Minister's roles and responsibility in sanitation, as outlined in the 1994 White Paper, 1997 Water Services Act, 2001 White Paper on Basic Household Sanitation and the 2003 Strategic Framework for Water Services, remains unchanged. The status quo is that the Minister of Water Affairs is responsible for national policy, regulation and coordination of sanitation.

The 2003 Strategic Framework for Water Services reaffirms national government's constitutional responsibility to provide regulatory support to local government to ensure effective performance of its water supply and sanitation services duties, through the development of legislation governing the provision of water and sanitation services. Where Water Services Authorities fail to plan and implement strategies for the universal provision of basic services and where they fail to provide efficient, effective and sustainable services, national government (together with provincial government) has the right and obligation to intervene to ensure the users are serviced adequately.

There is a proactive role for DWA to drive an effective operational system across all spheres of government, for water and sanitation. Where disputes arise between water management institutions or between water management institutions and any other organs of state, after making every reasonable effort to settle the dispute, the Minister may declare the dispute a formal intergovernmental dispute in line with the Intergovernmental Relations Act (2005).

1.6 Establishing a National Water Strategy

Currently, with the separation of the two Acts, the National Water Resources Strategy, under the National Water Act, only refers to the management, development, control and protection of the nation's water resources. It is not intended to deal with water supply and sanitation services.

The Strategic Framework for Water Services (2003) provides the approach for the provision of water supply and sanitation services in South Africa.

Separate strategies for the management, development, control and protection of water resource and the provision of water supply and sanitation service results in inconsistency in the management of the entire water value chain.

The current legislation does not contain any mandate at the national level for the development of a strategy that covers the entire water value chain, although the department is working on an infrastructure investment framework which covers both water supply and sanitation services and water resources infrastructure.

It is recognised that the delivery of water supply and sanitation services is a local government function under the Constitution, and that national government has an obligation to support local government in meeting this constitutional mandate. The inclusion of water supply and sanitation services into a National Water Strategy would enable the development of a structured national approach to managing water across the entire value chain, with clear institutional roles and

responsibilities, and defined and commonly agreed on targets against which progress can be monitored.

It is not merely the establishment of a national strategy that covers both water resources and water supply and sanitation services that is important, but the participatory process of developing such a strategy, particularly for water supply and sanitation services, which should be done in a manner that enhances and promotes co-operative government.

For this reason, is recommended that the Minister be accorded the mandate to develop a National Water Strategy that deals with both water resources management and water supply and sanitation services, and that a key part of this proposed policy includes the development of an infrastructure investment strategy for both water resources and water supply and sanitation services infrastructure.

2 WATER FOR EQUITABLE USE

Equity in the water sector has several critical elements:

- The provision of an adequate supply of safe water to all households to meet their domestic and productive requirements, with a minimum of 25 liters per person per day provided free of charge to all indigent households;
- Ensuring that the authorization to use water for productive purposes (i.e. access to water as a means of production) is radically transformed to align with the demographic realities of South Africa and serves to support black economic empowerment, including both black women and men, and the development of an inclusive economy;
- That the allocation and use of water supports the reduction of poverty and inequality across the country and that the water needs of poor rural communities are met and protected to support the development of sustainable livelihoods.
- That the indirect benefits of water from healthy river systems are protected and maintained.

There is an imperative for the development state to ensure the capacity of water users to use the water effectively, in pursuit of the development objectives of the state. This is linked to ongoing monitoring and compliance monitoring of equity and beneficial use of water.

2.1 Use-It or Lose-It

Policy Positions

Any authorised water use, including Existing Lawful Use (ELU), which is not utilised for a period specified by the Minister, should be reallocated to the public trust managed by the Minister as custodian of the nation's water resources.

The Minister will re-allocate this water to address social and economic equity. This aligns the ELU to the provision of the NWA.

Minister will mandate timeframes and methodology by which all ELUs entitlements will cease to be recognised and users must have applied for a license.

2.1.1 Motivation

The objective of this policy position is to optimise the use of water in support of the guiding principles of the NWA.

The NWA identifies *“sustainability and equity”* as *“central guiding principles in the protection, use, development, conservation, management and control of water resources. These guiding principles recognise the basic human needs of present and future generations, the need to protect water*

resources, the need to share some water resources with other countries, the need to promote social and economic development through the use of water and the need to establish suitable institutions in order to achieve the purpose of the Act”.

Sixteen years after the White Paper, a large number of water use allocations that are authorised under an ELU have remained in force. The ELU was an instrument intended to operate as a transitional mechanism in the NWA, and it is imperative that appropriate actions be taken to ensure registration and replacement by licence of all ELU's as envisaged in paragraph 34 of the NWA. The benefits of this will be a vast improvement in the knowledge of the use of water; the extent to which this use is optimal; and the extent to which water is available for allocation in support of the equity principles of the NWA.

The legislation and regulations that may follow from this policy position will serve to strengthen and support the sections of the NWA that deal with existing lawful use and compulsory licensing. In developing the mechanisms required to support this policy position, consideration will be given to a number of important factors raised during the public participation process, so as to ensure that undesirable unintended consequences are prevented. Such considerations include, for instance, providing a definition of beneficial “use” as it is recognised that actual use of allocated water may vary on an annually due to a number of reasons. Consideration will also be given to a reasonable transition period. The concept of “public trust” remains as is defined in the White Paper on a National Water Policy for South Africa (1997).

2.1.2 Current Policy and Legislative Environment

The NWA empowers on a discretionary basis that the use-it or lose-it principle be applied to the licensing of an authorised water use. The current legislation does not contain any mandate for this provision to be applied to Existing Lawful Water Use.

There are a variety of mechanisms which can be used in order to support the application of use-it or lose-it principle. These include an appropriate drafted transitional mechanism and the use of more powerfully articulated declarations, validations and reallocation interventions as currently provided for in the NWA.

2.2 Water Trading between Authorised Water Users

Policy Positions

There shall be no form of temporary or permanent trading between authorised water users. It will be obligatory for any holder of an entitlement to use water which is no longer utilised to surrender such use to the public trust.

The Ministers discretion to approve water use will be guided by the needs and requirements of the transformation and development objectives of the state.

This position strengthens the use-it or lose-it principle.

2.2.1 Motivation

Water transfer and trading mechanisms were introduced by the 1997 on a National Water Policy for South Africa as mechanisms to divorce water use entitlements from land rights: *“Water use allocations will no longer be permanent, but will be given for a reasonable period, and provision will be made to enable the transfer or trade of these rights between users, with Ministerial consent.”*

The NWA makes provision for transfer of water use authorisations (Section 25). However, since 1998, many instances of water trading have emerged that have undesirable unintended consequences. This results from regulatory powers in water allocations to water management institutions and limited oversight mechanisms for DWA. Two key undesirable, unintended consequences that arise from this are: (a) that the allocation of water may now take place without Ministerial consent; and (b) that water, because it is a scarce good, becomes commoditised, and water traders use it as a means to make profit, to the cost of users.

This policy position intends to limit these undesirable consequences whilst still achieving the original intention of the 1997 on a National Water Policy for South Africa stated above.

2.2.2 Current Policy and Legislative Environment

The 1997 White Paper enables, with Ministerial consent, the transfer or trade of water allocations between users.

Section 25 of the current legislation permits an authorised irrigation water user to temporarily transfer, based on conditions set by the management institution, some or all of that water for a different purpose, or to allow the use of some or all of that water on another property in the same vicinity for the same or a similar purpose.

2.3 Prioritising Social and Economic Equity in the Reallocation of Water

Policy Positions

Decision making in reallocation of water will have equity as the primary consideration.

Priority will be accorded to water use authorisation applications that meet the equity requirement, as provided in the regulatory instruments.

Priority in reallocations should be afforded to black women and men, these include Africans, Coloureds and Indians, all of whom were citizens of South Africa and were disenfranchised before 1994 and therefore had unfair constrained water access.

The Minister has discretion to determine priority considerations for reallocation of water.

2.3.1 Motivation

The 1997 White Paper mandates that equity in its various forms is fundamental to water management in South Africa, in support of Constitutional requirements. The policy goes on to state that *equity implies a concept of fairness which allows for **different practices in the management of water in response to different social, economic, and environmental needs**. It is important to identify the policies, institutions and practices that will support the principle of equity and equitable access.* The policy also indicates that it is *not, however, immediately obvious what we mean by equity in the context of water policy.*

The NWA stipulates that equity, sustainability and efficiency are the guiding principles of water resources management in the country. However, since the promulgation and implementation of the NWA, one principle that has not received the desired attention is equity, resulting in perpetuation of the status quo.

This policy positions motivates for different practice in the management of water in the country in response to different social (equity) needs. This principle of prioritising equity in reallocation of 'set-aside' water which has been returned to the public trust, supports the fundamental water principles and Constitution imperatives of equity and equitable access in the country.

The policy position supports the WARS (2008) imperative of finding appropriate means of resource allocation that achieve redress in water allocation while ensuring optimal use of the resource. The WARS (2008) has already identified several criteria which could ensure that redress and equity is achieved as outlined in the BBBEE guideline.

2.3.2 The policy position is in direct support of the WAR (2008) imperative of the set-aside of water in a catchment, specifically for allocation to Blacks. In stressed catchments, water that becomes available, for example, from water conservation, water demand management and illegal water use recovered during the verification and validation process, as well as from return of unutilised water returned to the public trust, will be set aside for Blacks. Individual licences or general authorisations will then be issued to applicants from this group. Current Policy and Legislative Environment

The 1997 White Paper currently prioritise water allocations by the state in a manner that ensures the efficient, equitable and sustainable use of the resource, as is entrenchment in the NWA.

The NWA has the prerequisite for the responsible authority to consider in a request for authorisation: - (a) existing lawful water uses; (b) the need to redress the results of past racial and gender discrimination;(c) efficient and beneficial use of water in the public interest; (d) the socioeconomic impact of the water use or uses if authorised; or of the failure to authorise the water use or uses. These provisions need to be considered within the context of Section 2 of the NWA.

2.4 Multiple Water Use Approach in Planning Infrastructure

Policy Positions

A multiple water use approach, which incorporates all water uses in an area including water supply, must be adopted in planning of bulk water infrastructure. This approach will also have equity and transformation as a priority.

A participatory planning approach will be adopted to avoid conflicts over allocations to different purposes or users.

This approach enables users to realise short- and long-term benefits, including improved health, education and access to food, savings in time and costs, higher productivity and income, all of which contribute to the reduction of poverty.

2.4.1 Motivation

Planning of bulk raw water infrastructure for integrated water resource management addresses a fundamental principle of the water policy and legislation of the country.

In the past, there have been instances where bulk raw water infrastructure was planned for a specific sector's needs, to the exclusion of other water users. Planning bulk raw water infrastructure for a single water use is inefficient use of financial resources as additional, often much higher, financial resource are required to provide water to other water users, after the raw infrastructure had been provided. Bulk raw water planning needs to consider all water users in an area, including all users for productive and consumptive uses, at the planning of the infrastructure. This will minimise resource inputs required to address raw water requirements in an area.

This policy positions will be supported by a strategy for the implementation of the multiple use approach to bulk raw water infrastructure planning, including consideration of the financial mechanisms and long-term sustainability and efficiency considerations of this approach to water resources and infrastructure.

2.4.2 Current Policy and Legislative Environment

The 2003 Strategic Framework for Water Services mandates water institutions to align and integrate planning of water resources, water supplies and regional or bulk infrastructure. An integrated water resources management approach which promotes co-ordinated planning, development and management of water, land and related resources should be adopted in order to maximise equitable social and economic benefits.

2.5 Access to Basic Water Supply

Policy Positions

Reaffirming the rights enshrined in the Bill of Rights

Reaffirming the 1994 Policy principle that *everybody in South Africa has the right to a basic amount of water and a basic sanitation service that is affordable. With this right comes a responsibility – not to abuse the right to free basic services and to pay for services where these are provided over and above a basic service.*

Reaffirming the Strategic Framework for Water Services definition of a basic water supply service *as the provision of a basic water supply facility, the sustainable operation of the facility (available for at least 350 days per year and not interrupted for more than 48 consecutive hours per incident) and the communication of good water-use, hygiene and related practices.*

A basic water supply facility is defined as the infrastructure necessary to supply potable water to a formal connection at the boundary of a stand or site of a public institution (school, clinic, hospital etc.).

A WSA should work progressively or incrementally towards providing higher levels of a sustainably water supply to all households and public institutions, including rural areas.

In line with the Strategic Framework for Water Services mandate of stepping up the water ladder when providing water supply, a WSA must in planning, consider a basic water supply which addresses current domestic and productive use requirements, as well as future growth in these requirements.

If a household is willing and able to pay for a higher level of service, planning standards need to make provision for a household to apply through the WSA process for a higher level of service. This reaffirms the 1994 Policy position that *the desire of many communities to upgrade a basic service to provide for household connections should be taken into account during planning.*

2.5.1 Motivation

The 2003 Strategic Framework for Water Services defines a **basic supply facility** as supply of potable water *within 200 metres of a household*. Recent Census statistics show that 91.3 % of households in South Africa have access to piped inside the dwelling/yard or outside the yard (Census, 2011). South Africa is thus made significant progress in realising the universal right to access a basic water supply facility, as defined in the Strategic Framework for Water Services (2003).

The provision of this minimum basic water supply facility to all South Africa should be the first step in realising the right to water, as enshrined in the Bill of Rights. The country now has the opportunity to focus efforts on moving households up the water ladder, as set out by national government policy. Currently WSA's plan and provide for only the basic level of water supply facility as set out in the Strategic Framework for Water Services, despite it being practical, financially viable

and sustainable for some of these Water Services Authority to provide or upgrade basic water supply facilities to intermediate and higher levels. This policy positions supports the effort to focus water supply facility provision by WSA on the next level of the water ladder, namely to the individual erf/stand of a households.

Priority for provision of this basic water supply facilities should however, be given to those households which currently do not have access to a basic water supply facility (as defined in the SFWS), with upgrading of current basic water supply facilities following.

The policy positions will be supported by development, in collaboration with SALGA and CoGTA, of clear definitions, norms, standards and criteria for provision of this basic water supply facilities to households across a range of settlement types and spatial settings.

2.5.2 Were practical, financially viable and sustainable some WSA's are already providing a higher level of basic water supply facilities, such as provision of a facilities into the households. The progressive movement of household up the water supply ladder is currently and will remain at the own cost of the WSAs. This policy position will be similarly support by the development of norms, standards and potential financial mechanism for providing these higher level of water supply facility. Current Policy and Legislative Environment

The Constitutional right of all people to have access to sufficient water is interpreted by the 1994 White Paper as a right of all individuals *to a basic amount of water and a basic sanitation service that is affordable. With this right comes a responsibility – not to abuse the right to free basic services and to pay for services where these are provided over and above a basic service.* A basic service in the White Paper is 25 litres of potable water per person per day, a maximum distance of 200 metres from a dwelling and with a flow rate of not be less than 10 litres a minute.

The 2003 Strategic Framework for Water Services defines a **basic supply facility** as the *infrastructure necessary to supply 25 litres of potable water per person per day supplied within 200 metres of a household and with a minimum flow of 10 litres per minute (in the case of communal water points) or 6 000 litres of potable water supplied per formal connection per month (in the case of yard or house connections).*

The Strategic Framework for Water Services permits that wherever practical, financially viable and sustainable, preference should be given to water supply services which makes 50 litres per person per day available in close proximity to domestic dwellings (in the yard).

Both the 1994 White Papers and the 2003 Strategic Framework for Water Services mandates that, where affordable, communities which desire to upgrade a basic service to provide for household connections should be taken into account during planning.

2.6 Free Basic Water Supply to Indigent Households

Policy Positions

Free basic water supply will be provided to only indigent households.

The free basic water supply applies to the provision of a minimum of 25 litres per person per day

The Minister may attach conditions to the provision of free basic water.

DWA will provide norms and standards for provision of free basic water supply to indigent households.

2.6.1 Motivation

Providing free basic water service to all South Africa places a burden on the state and on the WSA's, especially where individuals are able to afford these services. National Treasury thus strongly supports this policy position of providing a Free Basic Water Supply only to indigent households in the country.

Equitable access to water supply and sanitation services should target FBW supply to the most needy, indigent individuals. Placing limitations on beneficiaries of FBW supply will facilitate the future efforts of WSA, were affordable and sustainable, to provide a high level, than the specified 25 litres per person per day, of Free Basic Water supply to indigent households. This has already been demonstrated by a number of WSA in the country.

Free basic water supply should be provided as part of the basket of social services available to support and assist indigent households.

The policy position will be support by the development by DWA, in collaboration with SALGA and CoGTA, of defined norms, standards and levels of services which clearly related to how FBW is to be provided in across different settlements, spatial and geographical situations. These norms, standards and levels of services need to be realistic, easy to implement and reasonable.

Strong oversight by national government of implementation of the FBW policy position by WSAs is required. Regulations to monitor the enforcement of this policy position will need to be developed to ensure that water services institutions comply with the provision and to ensure that beneficiaries do not circumvent the system.

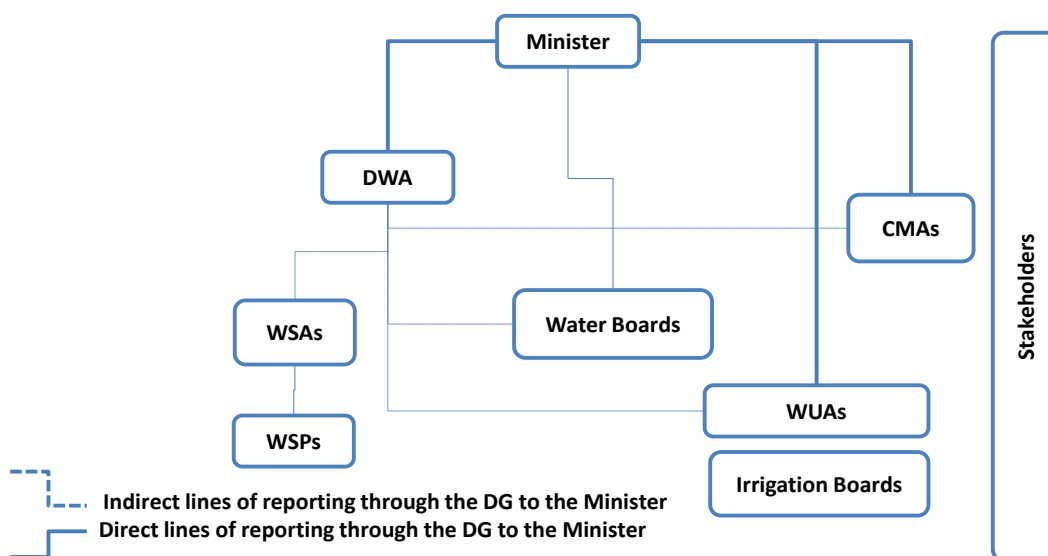
2.6.2 Current Policy and Legislative Environment

The 1994 White Paper provides the definition of a basic water supply as 25 litres per person per day, which is considered to be the minimum required for direct consumption, for the preparation of food and for personal hygiene. The Strategic Framework for Water Services affirms this definition, indicating that a basic waste supply facility is the infrastructure required to provide this 25 litres of potable water per person per day.

The 2003 Strategic Framework for Water Services introduced the ground-breaking policy of free basic water (FBW), which makes provision for the right of all South Africa to a basic amount of water and a basic sanitation service that is affordable. With this right comes a responsibility – not to abuse the right to free basic services and to pay for services where these are provided over and above a basic service.

3 INSTITUTION ARRANGEMENT AND GOVERNANCE

The current water institutional management arrangements are outline in the diagram below.



The roles and responsibilities of these water institutions are outline in the current policy as:

DWA: responsible for water sector policy, support and regulation;

Water Boards: are state-owned regional water services providers who may provide both bulk services to more than one Water Services Authority area (regulated directly by DWAF) and retail services on behalf of Water Services Authorities (regulated by contract with the Water Services Authority). The Minister of Water Affairs is the primary regulator of a Water Board.

Catchment Management Agency (CMA): undertake water resource management at a regional or catchment level and involve local communities, within the framework of the national water resource strategy. Regulation of CMAs is the responsibility of the Minister of Water Affairs.

Water User Associations (WUA): operate at a restricted localised level, and are in effect co-operative associations of individual water users who wish to undertake water related activities for their mutual benefit. A water user association may exercise management powers and duties only if and to the extent these have been assigned or delegated to it. Regulation of WUAs is the responsibility of the Minister of Water Affairs.

Irrigation Board: these are established by or deemed to be an Irrigation Board in terms of any law in force immediately before the commencement of the NWA. The Act mandates that a board may continue to exist until it is declared to be a water user association or until it is disestablished in terms of the law by or under which it was established. The NWA contends that Irrigation Boards must submit a proposal to transform to a WUA, within 6 months of commencement of the NWA.

Water Services Authorities (WSA): these could be a metropolitan municipality, an authorised district municipality or an authorised local municipality which is responsible for ensuring provision of water

services within their area of jurisdiction. Regulation of a WSA is the responsibility of Department of Cooperative Government and Traditional Affairs;

Water Services Provider (WSP): this is a WSA or any person who has a contract with a Water Services Authority or another water services provider to sell water to, and/or accept wastewater for the purposes of treatment from, that authority or provider (bulk water services provider); and/or has a contract with a Water Services Authority to assume operational responsibility for providing water services to one or more consumers (end users) within a specific geographic area (retail water services provider). Management of a WSP is through a contract with a WSA.

At a regional level, water management is currently carried out by the regional offices of DWA. These offices continue to function as part, and respond to the priorities, of a central office and do not necessarily reflect the intent of **Principle 23** of the 1997 White Paper which requires responsibility for the “development, apportionment and management of available water resources” to be delegated to a “catchment or regional level in such a manner as to enable interested parties to participate”.

The present generalised lack of technical and managerial expertise means, however, that a mechanical decentralisation or delegation of functions is unlikely to achieve the objectives of more responsive and effective water management. The goals of public policy will only be achieved if such delegation goes hand in hand with systematic capacity building and effective monitoring and support from the national Department. This should include specific attention to make sure that the objectives of equity and corrective actions are promoted and that existing differences in economic and social power are reduced and not strengthened.

Organisations such as water boards will interact with the CMA primarily as stakeholders within the catchment; however, given the limited water management expertise available, it may be appropriate in some circumstances to delegate certain functions to them.

3.1 Economic Regulation

Policy Positions

Economic regulation will be applied throughout the water value chain.

Scope and functions of economic regulation will encompass the setting of the rules to control, monitor, enforce and/or change tariffs/charge; tariff/charge determination structures and service standards for the water sector whilst recognising and supporting government policy and broader social, environmental and economic imperatives and the function of technical regulation of water infrastructure.

To avoid any conflict of interest, real or perceived, water use tariffs will be determined annually by DWA, in consultation with National Treasury.

3.1.1 Motivation

There is currently no coherent economic regulation of the entire water value chain. Economic regulation is targeted at specific water management institutions operating in the value chain, including raw water charge setting, water user association charges, bulk water charges, water services charges (water and sanitation) and waste discharge charges and other charges that may arise.

Transparent economic regulations for each value chain segment have many benefits. It will enable the use of water tariffs as a policy instrument, for example to subsidise or incentivise achievement of equity, efficiency, pollution prevention and other water use characteristics of public interest. Other examples include for instance improved financial sustainability of water management institutions; or improved organisational performance measures.

While there is a mechanism to regulate water resource pricing through the raw water pricing strategy, and guidelines for determination and implementation of water use charges, in reality the guidelines are not comprehensive and thus some charges are set by DWA without regulatory oversight.

Economic regulation does not exist in isolation of other regulatory functions/domains in the water sector, and there are overlaps and interdependencies with other key regulatory domains such as technical, environmental, and social regulation. Economic regulation must be strongly linked to social regulation.

Due to the range of different water management institutions involved in the water value chain, economic regulation approaches and mechanisms will be different and or applied differently for the different types/categories of institutions. For instance, the regulation of municipal water tariffs may have a significant impact on municipal budgets. Water economic regulation will therefore be done to ensure a fair regulatory regime, and will be done with appropriate technical diligence, and with appropriate consultation with these water management institutions and their stakeholders.

This policy position may be implemented in an incremental manner, in close collaboration with, and with appropriate oversight from National Treasury, in order to prevent any conflict of interest that may arise. In the event that this policy position may require the establishment of a "Water Economic Regulator", this will be established through its own legislation (standalone act). Such legislation would give the regulator autonomy as well as define the regulatory role, functions and process.

3.1.2 Current Policy and Legislative Environment

The 1997 White Paper indicates that water must be *valued as an economic resource, the costs incurred to make the resource available to users and the methods used to cover those costs. In pursuit of the objectives of water management, it is widely agreed that the setting of the appropriate price for a natural resource such as water can be an effective mechanism to achieve its efficient and productive use.* The White Paper states that government will move systematically to achieve realistic water pricing within a reasonable time frame.

The NWA mandates that the Minister, from time to time, after public consultation, to set a pricing strategy which may differentiate among geographical areas, categories of water users or individual water users.

The 2003 Strategic Framework for Water Services mandates DWA, as the national water services regulator, to regulate water supply and sanitation services authorities in terms of economic regulation. This includes review of the appropriateness of investment decisions of water services providers and tariffs and review of the efficiency of water service provision.

The 2003 Strategic Framework for Water Services also mandates DWA to undertake the direct economic regulation of water boards and regional water services providers, with a view to protecting consumer and public interests. The centrality of public participation in water management issues cannot be overemphasized. This partnership between communities, the State and state regulated regional water services providers is necessary to inculcate shared trusteeship over water resources. This economic regulation may extend to the approval of business plans and the approval of tariffs, taking into account any existing contracts as well as the approved pricing policy.

3.2 Establishment and Functions of Regional Water Utilities

Policy Positions

The Minister is responsible for Region Bulk Infrastructure, including master planning and its functioning.

The functions of the Regional Water Utility will be to plan, build, operate, support and maintain Regional Bulk Infrastructure.

Regional Water Utility institutional arrangements will be appropriate to the area of operation.

A Regional Water Utility must be established based on clear principles such as financial sustainability and clear funding mechanism and clarity on requirements for additional fiscal support to build, operate and maintain Regional Bulk Infrastructure in the area of need

The Minister may issue a directive for a Regional Water Utility to address water infrastructure development and/or maintenance needs in an area.

3.2.1 Motivation

Current arrangements of the water management institution are limited in the effective development and management of Regional Bulk Infrastructure. Water Boards, originally envisaged by the Strategic Framework for Water Services 2003 to fulfil this role, are largely considered to be regional water service providers.

The cross-boundary nature of regional water infrastructure precludes the management of this infrastructure by a single WSA. WSAs also have no or limited capacity for managing and developing

Regional Bulk Infrastructure. Current arrangement for bulk provision and infrastructure development is fragmented and weak.

DWA currently does not have an institution which is able to implement water resource management and Regional Bulk Infrastructure provision. CMAs and Regional Water Utilities can fill this gap in the institutional arrangement, with a CMA responsible for water resource management implementation at a catchment level and a Regional Water Utility fulfilling the role of building, operating, maintain and supporting Regional Bulk Infrastructure.

3.2.2 Current Policy and Legislative Environment

The 2003 Strategic Framework for Water Services provides for regional water services providers, which are water services providers who operate regional infrastructure (crossing Water Services Authority boundaries) and provide water services to (or on behalf of) more than one Water Services Authority.

The 2003 Strategic Framework for Water Services affords a water board, which is an organ of state, the primary function of a bulk water services provider. The role and institutional structure of water boards and regional water service providers may change over time.

The Minister as the custodian of water is responsible for the effective development and management of Regional Bulk Infrastructure.

3.3 Roles and Functions of WUAs

Policy Positions

Reaffirming the 1997 White Paper's policy position that the national Department *promote the establishment, and support the functioning of Catchment Management Agencies (CMAs), as and where conditions permit. Where CMAs are not established, the Department (or a delegate) will carry out the management functions until they can eventually be handed over to such an agency.*

A CMA, in consultation with the Minister, will determine the water institutional structures required to manage water within their jurisdiction.

The Minister will specify a date by which WUAs and Irrigation Boards (IBs) will cease to exist, with the appropriate functions related to a state-owned water scheme being delegated to a CMA or Regional Water Utility. The process of dis-establishment will be aligned to the establishment of CMAs and will ensure adequate measures are put in place to ensure a smooth transition from the existing arrangements.

3.3.1 Motivation

The objective of this policy position is to achieve sustainable institutional arrangement to efficiently manage and coordinate water resources activities at the local level through disestablishment of Irrigation Boards and Water Users Associations whilst accelerating transformation and equity by using appropriate institutions in the manner water is controlled, allocated and used.

Despite there currently being 78 Water Users Associations, both managing and not managing state infrastructure, fifteen years after promulgation of the NWA there still remains 129 untransformed Irrigation Boards in the country. Some of these Irrigation Boards manage state infrastructure, while others are private Irrigation Boards. It is recognised in this regard that old irrigation boards have often failed to meaningfully transform to WUAs and participate in or achieve the transformation goals of the NWA. Transformed Irrigation Boards have also failed in achieving the adequate participation of other users such as municipalities.

The delays in the achievement of transformation and equity objectives have created a sense of discouragement, anger and disillusionment to those who have little resources whilst establishing a sense entitlement to those who presently manage water resources at a local level. The present institutional arrangements in local water resource management in terms existing structures (WUA and IB) have not all adequately addressed the objectives of transformation and equity. The need to accelerate transformation objectives is urgent. The country is moving towards celebrating the second decade of democracy in 2014 but in most cases the status quo remains in terms of who controls resources and how they are allocated at a local level.

Some WUAs have assumed a regulatory role, based on the definition of a water management institution in the NWA and under Section 25 of Act. Consequently, certain sectors are utilising this provisions of the NWA to transfer water use entitlements within the WUA, which is not the intention of localised and collective water use management.

The existing tension between small localised Irrigation Boards owning infrastructure versus the broader intention of a WUA aimed at supporting the decentralisation of water management is creating a confusion of roles. The merits of decentralised management of water resources to this level in monitoring water use, enhancing enforcement of water management cannot be disputed. However, there are number of challenges posed by WUAs in water resource management. In addition, oversight of a large number of WUAs is becoming a challenge for the Department.

At a regional level, water management is carried out by offices of the national department as only 2 CMAs have been gazetted. These regional offices continue to function as part of the national department which does not address the intent of Principle 23 which requires the responsibility for the “development, apportionment and management of available water resources” to be delegated to a “catchment or regional level in such a manner as to enable interested parties to participate” CMAs are statutory institutions entrusted with management of water resources within various catchments. It is envisaged that these institutions would have been established by end of 2014. CMAs, together with DWA, will decide on the most suitable structures to co-ordinate water activities at the local level. This is in line with the provisions of the NWA. DWA will therefore use this prerogative through the actions of the Minister and ensure that objectives of transformation and

equity are achieved without compromising local water management. The exercise of this prerogative will lead to the dis-establishment of IBs and WUAs and the restructuring of existing water management and water coordination activities at the local.

3.3.2 Current Policy and Legislative Environment

WUA

The 1997 White Paper mandates that irrigation boards established with no water supply functions (but mainly with supervision, control and distribution functions in terms of the Water Act of 1956), be transformed and incorporated into Catchment Management Agencies (CMAs).

Water User Associations (WUAs) are established in terms of the NWA.

Irrigation Boards operate in terms of the 1956 Water Act. Transformation of Irrigation Boards into WUAs is a statutory requirement of the NWA, with the date of transformation of Irrigation Boards to WUA being 6 months after promulgation of the NWA. The transformation due date was extended for another year, but up to now not all of them have transformed.

CMAs

The 1997 White Paper mandate the national Department the key function to *promote the establishment, and support the functioning of Catchment Management Agencies (CMAs), as and where conditions permit*. The delegated powers and functions of these agencies will depend on the requirements of the specific catchment/s and systems within their jurisdiction, their capacity to undertake the management tasks, and policy decisions on the overall approach. The national Department is tasks with providing guidelines and standards for the management of these activities. The functions of a CMA are to be done within the parameters of these national policy and standards.

The 1997 White Paper also mandates that *where CMAs are not established, the Department (or a delegate) will carry out themanagement functions until they can eventually be handed over to such an agency*.

The 1997 White Paper also indicated that the focus will be on the development of local capacity to undertake an increasing range of water management functions.

The 1997 White Paper outlines that the main tool proposed to facilitate management at regional or catchment level is the use of a catchment or system management plan, which would be drafted within a nationally determined framework either by the CMA or in consultation with all role players where a CMA does not exist. These plans will need to be approved by the national department, and when combined, would constitute the basis of a national water management plan.

The 1997 White Paper indicates that organisations such as water boards and Irrigation Boards will interact with the CMA primarily as stakeholders within the catchment; however, given the limited water management expertise available, it may be appropriate in some circumstances to delegate

certain functions to them. Existing Irrigation Boards established with no water supply functions (but mainly with supervision, control and distribution functions in terms of the existing Water Act), could be transformed and incorporated into CMAs.

The Minister will establish nine CMAs in South Africa.

3.4 Appeal functions to be aligned with best practices and others appeal mechanisms

Policy Positions

Reaffirming the 1997 White Paper's position that *appropriate mechanisms will be created to make sure that there is procedural fairness in all allocation decisions and the development of appropriate dispute resolution mechanisms will make sure that the new system meets all the requirements of administrative justice.*

In line with best practices, the process of speedily, cheaply and transparently resolving difference or disagreements will be mediation.

The Minister may appoint an independent panel, based on the conditions that he/she deems necessary, to advise on a dispute/s.

Where mediation does not resolve the matter, parties may refer the matter to arbitration.

Failure to resolve an appeal through this mechanism may proceed to adjudication in a court of law.

3.4.1 Motivation

The Water Tribunal is currently the chief dispute resolution mechanism in the water sector. Any appeal related to a decision made under NWA reverts to the Water Tribunal. The Water Tribunal has been largely ineffective and limited in addressing water disputes.

An appropriate, administratively simpler mechanism is required where disputes are resolved through internal dispute resolution such as round-tables, negotiation and mediation. Failure to resolve an appeal through this mechanism may proceed to adjudication in a court of law.

NEMA provides additional dispute resolutions mechanism which may be considered in conjunctions with mechanisms outline in the NWA. Other dispute resolution mechanism will be investigated and reviewed for inclusion in the water sector, to facility an appropriate, administratively simpler mechanism can implemented in the sector.

3.4.2 Current Policy and Legislative Environment

The 1997 White Paper mandates that *appropriate mechanisms will be created to make sure that there is procedural fairness in all allocation decisions and the development of appropriate dispute*

resolution mechanisms will make sure that the new system meets all the requirements of administrative justice.

Currently legislation interprets the appropriate mechanism of dispute resolution in the water sector to be adjudicated by an appeal to a Water Tribunal. NWA outlines the establishment and functions of the Water Tribunal. A person may appeal to a High Court against a decision of the Tribunal on a question of law.

The Minister may also at any time and in respect of any dispute between any persons relating to any matter contemplated in the NWA, request that a dispute be settled through a process of mediation and negotiation.

3.5 Powers and Functions of WSAs

A WSA powers and functions will be determined by CoGTA, in concurrence with DWA.

DWA will develop a norms and standards for the technical component of the authorisation of a WSA and strengthen regulation of compliance to new and existing norms and standards.

3.5.1 Motivation

Despite the Minister's role of regulation of water services, DWA currently plays little role in the authorisation of powers and functions of a Water Services Authority. Moreover, DWA currently does not provide technical norms and standards for the water supply and sanitation services provided by a WSA.

The objective of this position is to ensure that DWA provides influences the decision in the determination of Water Service Authority status to ensure that relevant water service delivery issues and sustainability are meaningfully considered through the technical measure that will test and determine suitability as a WSA.

The existing mechanism to determine WSA is governed by COGTA who may not be in a position to evaluate and determine relevant technical requirement to perform Water service authority functions with competence. There is a need to strengthen policy framework within which the determination of WSA powers and function is done to ensure that key issues are raised before such powers and functions are conferred to lessen institutional and technical failure to deliver water services.

3.5.2 Current Policy and Legislative Environment

The Constitution assigns responsibility to local government to ensure the provision of services to communities in a sustainable manner. The 1997 Water Services Acts define local government, as a Water Services Authority, the constitutional duty to ensure all consumers or potential consumers in

its area of jurisdiction are progressively provided with efficient, affordable, economical and sustainable access to water supply and sanitation services. This duty is subject to a number of provisions in the Act.

The Municipal Systems Act (MSA) mandates a municipality to determine the mechanism for provision of services, which include water supply and sanitation services. The MSA mandates that a municipality assess whether it is able to undertake service provision. If deemed capable, the WSA may provide these services through internal mechanism. The local government also has the option to explore the possibility of providing the service through an external mechanism.

There can only be one Water Services Authority in any specific area.

Water Services Authorities are metropolitan municipalities, district municipalities and authorised local municipalities.

3.6 Public Water Institutions and Appointment of Boards and Chief Executives

Policy Positions:

The appointment of members to the Board and the Chief Executives of a water institution will be aligned with best practice models, the Presidential Review Committee Report and the PFMA.

The appointment of Chief Executives will be by the Board of the water institution, in concurrence with Minister.

3.6.1 Motivation

The NWA legislative requirements of the Minister for appointing members to the Board of a water institution do not align with best practice models and the PFMA.

Presidential Review Committee on State Owned Entities Report (2012) Volume 1 indicated that, despite an attempt to harmonise and formalise recruitment practices by SOEs in all three spheres of Government by publication of the *Handbook for the Appointment of Persons to Boards of State and State-Controlled Institutions*, the Handbook is used only sporadically in these appointments. The PRC has identified a number of issues and challenges with the current framework for recruitment, selection, appointment and induction of boards of SOEs. These include:

- The absence of a clear legislative framework for recruitment, selection, appointment and induction of boards of SOEs; and
- The lack of uniformity in the application of appointment procedures, not least in respect of to each category of SOEs.

3.6.2 Current Policy and Legislative Environment

The 1994 White Paper designates Water Boards as one of the role players in the water management institution of the country. The White Paper assigns these second tier institutions responsibility to provide bulk or regional water supplies or wastewater disposal services to local authorities.

Public Water Entities, such as Water Boards and CMAs agents of the DWA, are established under the NWA and the Water Service Act.

The Presidential Review Committee on State Owned Entities Report (2012) Volume 1 outlines recommendations for best practice for appointment of Boards and Chief Executives of these entities. These include

- Recommendation 3(a): Board Appointments - the Government should develop a framework for the appointment of SOE Boards including clarifying the role of the Minister in relation to Cabinet and to Parliament and clarification of the Board appointment process. The appointment of an independent Board should be made in writing by the Executive Authority, and should be duly gazetted.
- Recommendation 3(b): CEO Appointments - the appointment of the CEO shall be done by the Minister in concurrence with cabinet, at the recommendation of the Board. The following is the recommended process:
 - The Board is responsible for the process of recruitment and assessment of the nominated candidates.
 - The Board recommends to the Executive Authority two or three appointable candidates for approval.
 - The Executive Authority confirms the appointment in writing.

4 WAY FORWARD

This document provides the key policy positions to address oversight and gaps in the current water policy and their unintended consequences.

There is a need to conduct a comprehensive review of the four policy documents which currently underpin the water legislation and to consolidate these into one streamlined water policy document. Policies which need to be reviewed and consolidated are the White Paper on Water Supply and Sanitation (1994), White Paper on a National Water Policy for South Africa (1997), White Paper on Basic Household Sanitation (2001) and the Strategic Framework for Water Services (2003).

In addition, a few policy issues require further investigation before any new policy position, or amendment to a policy position, can be recommended. These issues include:

1. *Free Basic Sanitation*: - this issue requires further review and discussion before it can be included in the consolidation policy document
2. *Mechanisms for partnerships*: - there is an opportunity to explore innovated and new mechanisms to encourage water use efficiencies within and between the various water use sectors of the country. This and other water use efficiency mechanisms should be considered, particularly where partnership can be formed to incentivise water use efficiencies
3. *Recognition of historical entitlement to water under customary law*: - there is a need to create linkages between the provisions of the legislation governing land reform and the NWA. The NWA is currently silent on this aspect, which raises concerns as to the legality of entitlement to water obtained under the land reform process. The NWA has severed links between access to water and access to land. There is a need to align these process in order to secure the water allocation reform, which has 'naturally' occurred in the course of the land reform process, in order to ensure security of new entitlements.
4. *Climate change*: -consideration is needed of the impacts of climate change on water resources, the existing and predictive vulnerability and necessary legal and policy responses thereto.