

## Executive Summary

The effective regulation of the water sector is an increasingly critical focus of the work of the Department of Water Affairs. While the water services regulatory strategy has been fully developed, a comprehensive regulatory strategy for water resources management is still required – one that focuses on the overall regulation of water resources as a critical part of water resources management.

There is a need to consider regulation in its broadest understanding which includes economic, technical and governance regulation, as defined in the previous report under this project (A Survey of Approaches to Water Resources Regulation, WRC, 2009).

Technical regulation, such as water quality control, is related to, but distinct from governance or economic regulation of water management and water services institutions. Governance and economic regulation in the water sector cover issues such as ensuring good corporate governance, regulating financing and protection of consumers from excessive tariffs/charges.

Water for sustainable growth and development in an increasingly stressed water environment that will experience significant future change (demographic, growth and climate) provides a key sub-text for the project. In this regard, of key importance is that improved regulation provides certainty and stability for investment and job creation, and that the benefits of regulation should outweigh the costs of regulation. In particular, taking into the socio-economic context of South Africa, it is critical that water regulation is consciously pro-poor.

A particular challenge is, thus, ensuring the development of a regulatory framework that is suitable for the needs of a developing country, that serves to protect the interests of the poor and the marginalized, and that contributes to the transformation and democratization of South African society.

This research project, Towards Water Resources Regulation in South Africa, aims to assess international best practice on technical/policy regulation of water resource management and linkages to water services regulatory approaches; clarify definitions, objectives and scope for effective and transparent water resources regulation in South Africa; assess the institutional principles and considerations to guide the roles, responsibilities and institutional arrangements; examine appropriate tools for achieving effective regulation, understand the benefits and risks to using regulatory impact assessments and to disseminate the findings of the project to relevant decision makers.

This report is the second of three in this project, the first being the Survey of Approaches to Water Resources Regulation). The report aims to develop a set of criteria to guide institutional arrangements for water resources regulation, assess the functions associated with water resources regulation, and draw out some lessons and possible institutional approaches for water resources regulation in South Africa. This examination draws on international experience, and is consciously focused on supporting the aims of a transformative state, and addressing a socio-economic context which includes both high levels of poverty and under-development and a highly developed sector of the economy.

The report begins by dealing with the issue of pro-poor regulation in order to provide a clear context within which the rest of the discussion is situated. This is followed by an analysis of international practice in institutional arrangements for water resources regulation, looking at how institutional arrangements may be influenced by hydrology and by the state of development of the country.

Arising from these two discussions, the report identifies some key issues facing South Africa in relation to the institutional arrangements for water resources regulation. The next section draws on international governance literature and interviews with a range of experts in South Africa, as well as South African policy documents, to compile a list of criteria that serve to inform decisions around regulatory institutional arrangements. Following on from this, some space is dedicated to an analysis of the key functions within water resources regulation, and issues of scale in terms of the performance of these functions. This section draws, inter alia, on the international experience described in section 3. The penultimate section raises some issues around possible models for water resources regulation in South Africa, and is followed by a concluding section which pulls some of the key threads together on the topic.

Water resources regulation in South Africa is currently very weak. This can be seen in the high levels of illegal water use, deteriorating water quality, and the increasing concern in the media regarding the state of South Africa's water resources. There are a number of reasons for this, including major issues of regulatory capacity. However, there is also a question of whether the appropriate institutional arrangements are in place.

What emerges from an analysis of international literature and practice is that there is no clear and simple correct answer for the appropriate institutional arrangements for water resources regulation. What does emerge is that there are many models that could work, each with its own areas of potential excellence and limitations.

While a decentralised model has a slight edge over a centralised model, largely due to the improved responsiveness to local conditions arising from decentralisation, decentralisation can take place at a range of levels, from the basin level, through sub-basin level, to the truly local. With large basins, such as the Orange-Senqu, for example, it is hard to argue that an institution at this level is likely to be particularly well attuned to local issues and conditions. The issue of scale within the framework of decentralisation is critical in terms of what benefits it will or will not deliver.

In terms of agentising water resources regulation, there are good reasons in the water resources technical regulatory arena for recommending that decentralised agencies be created, such as

- an improved ability to recruit and retain staff
- stronger accountability to local stakeholder needs and therefore
- improved legitimacy and public confidence.

However, decentralised agencies require strong governance and economic regulation, an area in which South Africa has been weak both in the water sector and in other sectors. Without the capacity for strong governance and economic regulation systems, the establishment of decentralised technical regulatory agencies is fraught with potential dangers.

While the establishment of an independent economic regulator for water appears to have strong political support, insufficient work has been done on understanding the nature, purpose and scope of such an institution. Current international discourse suggests a better approach as being an incremental approach to the improvement of economic regulation, rather than the once-off creation of an independent regulator. In particular, more work is needed to understand the role and scope of such a regulator in relation to raw water tariffs.

The technical regulator must be held accountable for performance of its regulatory function. This

can be done through DWA regulating the performance of CMAs, or, if DWA is to continue to perform the technical regulation of water resources (such as water quality regulation, protecting the reserve, allocating water, etc.) accountability for performance of these functions must reside somewhere. This does not imply the need for an independent regulator, but rather suggests that the courts, Parliament, the Water Tribunal, NGOs, and other civil society bodies have a more active role to play in this regard.

Ultimately, it is clear that there is no one blueprint for effective water resources regulatory institutional arrangements. A number of models can, and do, work. Each model has its benefits and its drawbacks and risks. What is critical is to identify the potential risks and to ensure that measures are put in place to minimise and manage those risks.

During the course of this research, several questions were identified where further research would be useful. These are outlined briefly here. In the context of pro-poor regulation, where the issue of access by the poor and the marginalized to