

Executive summary

It is widely recognised that the water resources challenges facing the world today will need to be solved through improved water resources management. There are a number of pillars to improved water resources management, of which regulation is one. While a number of water resources regulatory instruments already exist and are in use in South Africa, such as water use licensing, deteriorating raw water quality and high levels of water theft, amongst other things, indicate the failure of current regulatory practices to adequately address the water resource challenges.

This study, *Towards Water Resources Regulation in South Africa*, aims to support the development of an effective water resources regulatory framework in South Africa through assessing international good practice in the technical regulation of water resources; clarifying definitions, objectives and the scope of effective and transparent water resources regulation in South Africa; assessing the institutional principles and considerations that might inform roles, responsibilities and institutional arrangements; examining appropriate tools for achieving effective regulation, understanding the benefits and risks of using regulatory impact assessments and disseminating the findings of the project to relevant decision makers. The scope of the research was focused primarily on technical regulation, i.e. regulation of water use and impacts on water, not on governance or economic regulation.

This report brings together the results of three research reports arising from the study which are published as appendices to this report and are available at www.wrc.org.

WHAT IS WATER RESOURCES REGULATION?

Regulation can be defined as “the means by which any activity, person, organism or institution is guided to behave in a regular fashion, or according to rule.”¹ Under this definition, the regulatory framework for water resources consists of a great number of players and processes, some falling within the formal regulatory process, i.e. regulation as practiced by the state, and some falling within a more informal regulatory process, for example through the media, community pressure groups, consumer behaviour, and so on.

Water resources regulation is a form of social regulation, aimed at the protection and equitable use of a common pool resource² – water. Within water resources regulation, however, there three different types of regulation are defined in this study:

- technical regulation,
- governance regulation and
- economic regulation.

Technical regulation, such as water quality or abstraction control, is related to, but distinct from the governance or economic regulation of water management and water services institutions. Technical water resources regulation refers to the control of activities that impact on a water resource.

Economic regulation, on the other hand, refers to interventions in what are considered to be market decisions, such as pricing, competition, the entry to or exit from the market, and promoting economic efficiency.

The term ‘governance regulation’ has been coined in this study to refer to the regulation of the governance of subsidiary water institutions, such as catchment management agencies and water user associations. This includes regulation of such matters as whether Governing Boards are operating according to statutory and best practice requirements, whether adequate financial

management systems and controls are in place, and that statutory requirements relating to business plans, audited financial statements, and annual reports are met.

In addition, water resources regulation in South Africa operates in a different context from many other countries, in that there is a profound social and economic transformation requirement. This has implications for the types of tools that are used, and how they are applied. Unfortunately, not enough research has been done on the distributional impacts of water resources regulation in developing countries – that is how regulation impacts on different groups in society, and on the poor and marginalised in particular. More research is required in this regard to ensure that the water resources regulatory strategy and tools adopted in South Africa support poverty eradication, sustainable economic growth, and race and gender transformation, not only in design, but in implementation.

Thus, the South African context of a highly unequal society with high levels of poverty³ requires that water resources regulation should have a consciously pro-poor and equity-driven focus, and in order to achieve this, necessary to understand the various dimensions of poverty in the country.

One of the many ways of understanding poverty is through what is called structural poverty⁴. The structurally poor lack the “minimum sufficient combination of assets” to rise above poverty. These are households that don’t have sufficient assets, of whatever nature, to recover from a setback, and to generate sufficient income and food. Access to natural assets, such as water, can play an important part in reducing structural poverty, particularly, but not only, in rural areas.⁵ While the provision of infrastructure is, in many cases, a critical part of enabling access to water for the poor, a regulatory approach which protects and enhances the entitlement of communities to such water is also important. This refers to water for both domestic and productive purposes and the waterdependent ecosystem services on which poor communities, households and individuals depend.

These latter include wetland services, fish, building materials such as reeds, and water quality. Even small amounts of water can provide important income support to poor households, including through activities such as ice-making, planting fruit trees, brewing beer, and supporting livestock, enabling increased income per capita per year of between around USD6 from tree planting to just under USD200 for beer brewing⁶. In general, the poorer the household the more important is the income generated through common natural resources, including wetlands and water resources⁷. The challenge in South Africa is not only one of high levels of poverty, but the degree of inequity in the country. The South African economy is one of the most unequal in the world, with a vast gap between the rich and the poor. In this context, one of the drivers of water resources regulation must be to contribute to raising the living standards of the poor and closing that gap. This approach is mandated by the principle of ‘equity’ in the water resources policy and legislation. In a context where certain sectors of the society have been disadvantaged for generations, equity calls for redistribution and redress, and for actions that will address the needs of the poor, close the gap between rich and poor and benefit the poor disproportionately.

Thus, in South Africa, in addition to the normal challenges of water resources regulation, there are challenges in terms of meeting social and economic redress, including, but not restricted to, redress in access to water and to the benefits derived from water. South Africa can be seen as a redistributive state⁸, focused on the transformation of the economy and society. Regulation is one approach used by the South African state to achieve its redistributive objectives. Unfortunately, however, South Africa is also a weak regulatory state, and regulation in the water resources sector is not achieving its stated objectives.

THE REGULATORY FRAMEWORK

The regulatory framework for water resources has four key elements – policy, legislation, organisational arrangements and instruments.

POLICY AND LEGISLATION

Policy and legislation form the backbone of any regulatory framework, providing the principles, objectives, and legal approaches that can be used to regulate, in this case, human impact on water resources. The development of policy and legislation, and the interplay of different actors in shaping them, influences the nature of regulation. In this regard, it is important to recognise that the development of regulatory policy and legislation is a contested terrain, with different interest groups vying for regulatory policy to serve their interests.

There are a number of policy principles, drawn from both international experience and South African policy, which should underpin water resources regulation in South Africa.

- Principle 1: Water resources regulation must be pro-poor, equitable and redistributive
- Principle 2: Water resources regulation must be non-discriminatory
- Principle 3: Water resources regulation must be adaptive
- Principle 4: Water resources regulation must be transparent and participatory
- Principle 5: Water resources regulation must be aligned with broad government objectives
- Principle 6: Water resources regulation must be necessary.

ORGANISATIONS

There are a range of organizational issues to be considered in understanding what makes an effective regulatory framework. Despite the general support in the international discourse for basin or catchment management of water resources⁹, there is no one particular model that can be recommended, and there are, indeed, questions around to what extent the establishment of river basin organisations is an effective model. Experience in southern and eastern Africa has shown the establishment of a number of river basin authorities and agencies which are, often due to a lack of financial resources, human capacity, or delegated authority, unable to perform their expected functions.

There are also differences between the organizational arrangements that regulate the formal water economy, and the structures that regulate the informal water sector through customary law. Understanding the roles, responsibilities and relationships of these organisations and structures is an important area for further research.

In understanding organisational issues for water resources regulation, it is useful to understand the current regulatory chain and the roles of the various players active in water resources regulation in South Africa. The figure below maps these key players and their relationships, and indicates the authors' interpretation of the regulatory role of the various players, both currently and in the near future.