



A DRAFT POSITION PAPER FOR WATER ALLOCATION REFORM IN SOUTH AFRICA

*Call for comment by Department of Water Affairs and Forestry, Directorate:
Water Allocation*

INTRODUCTION

The South African Human Rights (SAHRC) welcomes the opportunity to comment on the *Draft Position Paper for Water Allocation Reform in South Africa*. In particular, we welcome the commitment by the Department of Water Affairs and Forestry (DWAF) to ensuring that the process of determining a new water allocation system in South Africa is inclusive of all the diverse interests that different members of our communities have and which need to be considered when determining such an important issue. We need creative solutions for allocating water fairly and equitably into the future.

This *Draft Position Paper* addresses the second layer in the progressive realisation of the right to water, which is enshrined in our constitution. During our first ten years of democracy, government has concentrated on providing access to clean water for basic necessities such as drinking and sanitation. Now, as the Minister for Water Affairs stated in a recent speech (12/04/05), "... we are moving towards ensuring fairness in access to water for productive purposes and fairness in sharing the benefits from that use"

Constitution

Section 27(1) everyone has the right to have access to –

....

(b) sufficient food and water

(2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Water is a scarce resource. There is only a limited amount that can be accessed by all potential users in this country. We thus need to create a water allocation policy that will ensure equitable access to this resource by all water users. This may result in existing water users access being revisited in light of

the competing demands by those who have been previously excluded. At the same time, we need to achieve equity in water use that is sustainable and efficient.

The overarching issue at hand in the Draft Position Paper is the achievement of equality. This achievement of equality relates both to individuals equality in the allocation of water but also the achievement more broadly of equality in our society. Water in many instances is the key to addressing the imbalances that were created in the past in this country, particularly in the area of access to water allocation for business, agricultural and commercial purposes. Water is a limited resource, therefore in redressing these past imbalances it may be necessary to revisit current water allocation. In other words, the Draft Position Paper is a further measure by DWARF to take affirmative action measures in order to advance persons and categories of persons who were disadvantaged by unfair discrimination.

From a human rights perspective the following stands out in the *Draft Position Paper*:

- Uncomplicated and pragmatic approaches to observe the constitutional mandate to undertake redress in water allocations to Historically Disadvantaged Individuals (HDIs)
- Capacity development programmes to support the productive and responsible use of water by all users.
- The Water Allocation Process will contribute to Broad Based Black Economic Empowerment and the development of women owned enterprises.

The Position Paper should state it's constitutional basis boldly.

Equitable access to water requires a complicated balancing act between important national interests, namely eradicating poverty and promoting economic growth. Whilst we may want the achievement of both of these objectives simultaneously they do not always go hand and hand and may call for differing approaches. It is welcomed that the Department recognises that water allocation is a “profoundly social, political, economic and legal process.” The Department is encouraged to state in more direct language that it is also a human rights issue that must be dealt with within the context of the founding values of our constitution and the rights enshrined therein.

Reference should be made in the introductory sections to the provisions of chapter 9 of the constitution and the constitutional mandate for government to take measures to address previous discrimination.

Affirmative action is enshrined in our constitution:

“Section 9(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”

The Position Paper should make reference to international human rights law

There is a body of international law which can give guidance and direction to this Position Paper. References to these international sources and, in some instances, our international obligations, will add to firmly grounding the Position Paper in a human rights framework. Sources that ought to be included are (see the SAHRC 5th Economic and Social Rights report for a summary and discussion of these various international instruments):

- International Covenant on Economic and Social Rights (ICESR)
- Work of the United Nations Committee on Economic, Social and Cultural Rights
- Convention on the Rights of the Child (CRC)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- African Charter on Human And People's Rights
- General Comment 15, The Right to water, UN CESR, (2002) (This comment is particularly useful)

The Position Paper should provide a historical and factual analysis of the system of water allocations

It would be beneficial to the reader of the *Position Paper* to be provided with this information in the *Position Paper* rather than having to revert to other sources to obtain this information. This would assist the reader in understanding and realising the implications of the *Position Paper*.

The Position Paper must make provision for the inclusion of all relevant role-players

Guideline 2 makes a commitment to the water allocations process being supported by capacity development programmes. Furthermore, that these capacity development programmes should also help HDI and the poor to participate equitably in the process of informing the allocation of water. In a society as unequal as ours, we have layers of inequalities that exist. Even within groups that are identified such as HDI's and 'the poor' there are pervasive practices of inequality. For example, women are often still marginalized and discriminated against from taking part in decision-making processes within communities. Levels of education are another ground that often excludes people from participating. The Position Paper should express a commitment to representivity and diversity within groups of HDI's and 'the poor' who participate in capacity development programmes.

In identifying the role of the Department a strong commitment is made to interdepartmental cooperation based on principles of co-operative government as set out in Chapter 3 of our constitution. These provisions of the constitution only bind state role-players. However, capacity development programmes that are intended for HDI's and the poor must ensure that these groups are also provided with mechanisms whereby they can participate in decision making processes concerning these programmes which will affect them.

An additional paragraph should be added to this Guideline, which in broad terms sets out a commitment to the inclusion in decision making processes of the recipients of these programmes.

Water Allocation Reform relies on co-operation from various government departments. It involves at times difficult and complex relationships in which it can be difficult to clearly identify where the roles and responsibilities of the various state role-players lie. It is even more difficult for members of communities to understand these relationships.

Therefore, a further additional paragraph should be added to the section on *The role of the Department* that states that the DWAF will seek to enter into cooperative government agreements with relevant state parties and that these agreements will set out clearly the roles and responsibilities (including monitoring roles and responsibilities) of the parties to the agreement.

The Position Paper must make a commitment to processes that will ensure that the intended beneficiaries do benefit

It is most unfortunate that those who oppose transformation have subverted some programmes and measures designed by government to redress the imbalances of the past. Guideline 3 recognises this and provides for “mechanisms to ensure that benefits of the water use actually flow to BBBEE enterprises and women and that “fronting” does not occur.” However, the subversion of these programmes can take many forms other than fronting. Many beneficiaries are manipulated in a number of creative manners. The Guideline should rather in positive language make a broader commitment to ensuring that the intended beneficiaries of programmes do benefit.

The Position Paper must make a commitment to ensuring equal participation by all stakeholders

Guideline 5 indicates a commitment to consultation with stakeholders in decisions concerning water allocations and re-allocations. The Guidelines need to make an express commitment to ensuring the equal participation by all affected stakeholders. Whilst processes may be provided for in law for participation, these processes may not ensure the equal participation of stakeholders. It is particularly important that processes that seek to include people who have been previously marginalized are designed in such a manner that the “playing fields of participation are levelled”.

The nature of stakeholder participation must be set out clearly. It must be indicated that there will be processes designed to ensure that there is equal participation by all stakeholders.

It is important that communities feel included in decision-making processes concerning the allocation of water. In this manner, communities will be educated about this resources and the need to care for it in a sustainable and efficient manner.

The Position Paper must make a strong commitment to working with the implementers on the ground

In our second decade of democracy it has become increasingly clear that local and municipal government are key role-players in ensuring the delivery of services and resources to our people. It is recognised that reference is made in the Policy to cooperative government, and, liaison with provincial and local government. This commitment needs to be spelt out more clearly. The Policy must clearly set out the role that local and municipal government role-players can exercise in ensuring that the policy is implemented on the ground.

Guideline 6 must clarify which Reserve will be affected by the Position Paper

On a reading of the *Role of the Department* it is unclear whether the integration of the allocation process in water stressed areas into the determination of the reserve will only be applicable to future determinations of reserves (the word 'establishing the Reserve...' is used) or whether all determinations of the Reserve (section 16 of the National Water Act) and Preliminary determinations of Reserves (section 17 of the National Water Act) will be revisited in light of the Position Paper.

The Position Paper must address the potential for abuse of the compulsory licensing approach to water allocation

Licensing of water use can result in the creation of water markets and these licenses becoming tradable commodities. This creates the potential for abuse by and of water license holders. Whilst the initial procedure may ensure that the granting of the license is in accordance with the *Position Paper*, the recipient of the license may sell the license or be induced to sell or transfer the license. This potential for exploitation should be recognised in the *Position Paper*. The *Position Paper* should set out clearly that the compulsory licensing process will ensure that this process will be carefully monitored and that there will be a dedicated Inspection Unit that will ensure that licenses are used in the manner for which they were granted and for the benefit of the intended beneficiaries.

Monitoring is an important component in ensuring the progressive realisation of the right to water

It is welcomed that the Department has stated a strong commitment to the monitoring of the process of water allocation and re-allocation. Without sufficient monitoring systems the progressive realisation of a right will be difficult to accurately assess. The SAHRC has concerns about the lack of resources that are allocated to monitoring and the enforcement of water laws. The Department is encouraged to ensure that the necessary and adequate resources are allocated in their Budget to the monitoring of the allocations process.

There is an error in the Diagram on p12

The High and Low indicators on the left hand side of the diagram do not make logical sense. They appear to have been misplaced.

Conclusion

Ensuring that water is allocated equitably in a sustainable and efficient manner is an important component to realising the right to water for all South Africans. The Department is encouraged to continue in its participative efforts to ensure that the Position Paper is reflective of a broad consultation process.