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WATER REGULATORY AUTHORITIES IN INDIA THE WAY FORWARD?

Sujith Koonan & Lovleen Bhullar

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I. BACKGROUND

The water sector in India has undergone dramatic changes. Traditionally, government departments/ministries (such as irrigation department and water-related government institutions) were responsible for regulation of water resources. In the post-liberalisation era, however, water sector reforms, which adopt the premise that water is an economic good,ⁱ have facilitated the development of a new institutional framework. This has led to the transfer of some of the regulatory powers and functions from government departments/ministries to ‘independent’ or ‘autonomous’ water regulatory authorities. The regulatory authority exercises rule making powers, implements these rules and settles disputes in respect of its sphere of regulation.ⁱⁱ The reasons given for the establishment of sector-specific regulatory authorities include: freedom from political interference,ⁱⁱⁱ to improve the credibility of regulation in order to facilitate private sector participation in the water sector; and to involve qualified persons given the technical nature of water regulation.^{iv}

The idea of setting up a separate authority for water regulation at the state level was first adopted in the Andhra Pradesh Water Resources Development Corporation Act, 1997.^v This institution, though technically separate from the government, continued to be controlled by the government. A significant change in the institutional framework for water regulation was introduced through the Maharashtra Water Resources Regulatory Authority Act, 2005 which establishes a state level ‘independent’ water regulatory authority, the Maharashtra Water Resources Regulatory Authority (MWRRA). A number of states have followed Maharashtra and enacted laws for the establishment of ‘independent’ water regulatory authorities [Table 1].^{vi} Other states are also considering the establishment of water regulatory authorities.^{vii}

1.	Arunachal Pradesh Water Resources Regulatory Authority	Arunachal Pradesh Water Resources Regulatory Authority Act, 2006
2.	Uttar Pradesh Water Management and Regulatory Commission	Uttar Pradesh Water Management and Regulatory Commission Act, 2008
3.	Jammu and Kashmir State Water Resources Regulatory Authority	Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010
4.	Kerala State Water Resources Regulatory Authority	Kerala State Water Resources Regulatory Authority Ordinance, 2012
5.	Gujarat Water Regulatory Authority	Gujarat Water Regulatory Authority Notification, 14 February 2012

While water regulatory authority laws have been enacted in some states, the authority has been operationalized in only one state (Maharashtra). The examples of ‘paper authorities’ include the UPWMRC, among others. The water regulatory commission was established in Uttar Pradesh on 23 October 2008. While the Chairperson, members (Water Resources, and Drinking and Waste Water Management) and the Secretary have been appointed, the other members are still to be appointed. Other states lag further behind. Even in the case of Maharashtra, where the authority has been established and is actually functioning, the state government has curtailed its effectiveness. In addition, the Andhra Pradesh Water Resources Regulatory Commission Act, 2009 establishes the Andhra Pradesh Water Resources Regulatory Commission. However, this authority is advisory in nature; while the others are responsible for performing regulatory functions.

II. REASONS FOR THE EMERGENCE OF WATER REGULATORY AUTHORITIES IN INDIA

Several external and internal factors have provided the impetus for the setting up of water regulatory authorities in India.

A. Role of International Financial Institutions

International financial institutions, such as the World Bank, have played a pivotal role in entrenching the idea of water regulatory authorities in India. The World Bank was advocating the establishment of independent regulatory entities to regulate tariff in the irrigation sector as early as in 1998.^{viii} Subsequently, the establishment of water regulatory authorities was made a condition precedent, explicitly or implicitly, for loan disbursements to state governments for water improvement/restructuring projects. For example, the Uttar Pradesh Water Management and Regulatory Commission (UPWMRC) Act, 2008, which established the UPWMRC, was enacted partly in order to comply with the World Bank-funded Uttar Pradesh Water Sector Restructuring Project 2001. One of the stated objectives of this project was '[S]etting up of an enabling institutional and policy framework for water sector reform in the state for integrated water resources management'.^{ix} Similarly, loan disbursement under the World Bank-funded Water Sector Restructuring Project (approved in September 2004) to the State Government of Madhya Pradesh was subject to drafting of legislation for the establishment of an autonomous State Water Regulatory Tariff Commission by the end of 2005.^x While this legislation had been drafted by March 2006, it has neither been passed nor been made publicly available.^{xi}

B. Role of the Central Government

The Central government has been, and continues to be, instrumental in the establishment of state level water regulatory authorities through policy guidelines and the provision of financial assistance to state governments.

The Planning Commission's Mid-Term Appraisal of the 10th Five Year Plan identifies the MWRRA model as being worthy of replication for regulation of water resources in all the other states.^{xii} In its mid-term appraisal of the 11th Five Year Plan, however, the Planning Commission acknowledges the weaknesses of the MWRRA model. The appraisal highlights the need for 'a new institutional, legal, and regulatory framework that draws lessons from both the strengths and weaknesses of especially the Maharashtra Water Resources Regulatory Authority'.^{xiii} This shows the consistent and strong policy push from the central government for the establishment of state level water regulatory authorities. The persuasive power of the policy push from agencies like the Planning Commission is immense given its control over financial resources of the Central government.

This policy push is also evident in the recently released draft National Water Policy 2012, which strongly encourages the establishment of 'autonomous' water regulatory authorities in each state.^{xiv} This is a significant shift as there is no mention of water regulatory authorities in the National Water Policy 2002. The Central government has also exploited its financial leverage over state governments in order to push the institutional reform agenda. Most importantly, the report of the Thirteenth Finance Commission recommends access to central government's water resource grants upon the establishment of an 'independent' state-level water regulatory authority by 2011-2012 by the state government, its notification in the official gazette by 31 March 2012, and recovery of at least 50 percent of the water charges mandated by the regulatory authority.^{xv}

This grant conditionality coupled with the policy push may have expedited the establishment of state-level water regulatory authorities in some states. This may also provide an explanation for the tendency to copy the provisions of an existing water regulatory law without taking into account local circumstances and conditions, which may vary from one state to another. For example, some water regulatory authority laws are verbatim reproductions with very minor changes as in the case of laws in Maharashtra (2005) and Arunachal Pradesh (2006).

C. Role of State Governments

State water policies, many of which were adopted before undertaking World Bank-funded projects,^{xvi} have also provided the impetus for the enactment of laws establishing state water regulatory authorities/commissions. For example, the Andhra Pradesh State Water Policy 2008 explicitly called for the establishment of the Andhra Pradesh Water Resources Regulatory Commission while the Maharashtra State Water Policy 2003 and the Uttar Pradesh State Water Policy 1999 recognised the need for legislation for regulation and control of water resources, including creation of entitlements/water rights in favour of users. The state water policies of other states that are considering the enactment of water regulatory authority laws, such as the Orissa State Water Policy 2007 and the West Bengal State Water Policy 2011, recognise the need for the formation of state water regulatory authorities.

III. SALIENT FEATURES OF WATER REGULATORY AUTHORITY LAWS

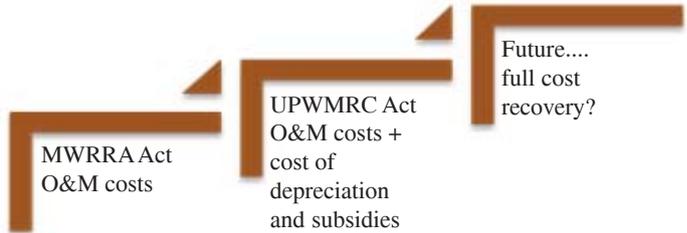
This section examines and analyses some important features of water regulatory authority laws.

A. Design of Regulatory Instrument: By-passing the Legislature

The establishment of state water regulatory authorities has taken place in different ways, all of which constitute laws as defined in the Constitution of India. In Maharashtra, Arunachal Pradesh, Uttar Pradesh and Andhra Pradesh, the State Legislature comprising of elected representatives of the people, have passed specific laws,^{xvii} whereas in Jammu and Kashmir, the provisions relating to state water regulatory authority form part of a comprehensive law for management and regulation of water resource. In Kerala, the constitution of the State Water Regulatory Authority was the result of the promulgation of an Ordinance by the Governor. Although a draft Gujarat Water Resources Commission Bill, 2006 was under consideration, a notification was issued in 2012 for the establishment of the Gujarat Water Regulatory Authority.^{xviii} Notifications and ordinances are passed by the Executive wing of the government without any direct representation of the people. The policy push and grant conditionality, as discussed in the previous section of this paper, may be one reason for the establishment of water regulatory authorities in many states through executive action by-passing the legislature. It is not advisable to introduce such drastic reforms in a critical sector like water without the sanction of the democratically elected representatives of the people.

B. Prioritising Economic Interests Over Equity

The key function of the water regulatory authorities is to fix and regulate the water tariff system based on principles of cost recovery and reducing subsidies. **Table 2** illustrates the progressive strengthening of the principle of cost recovery in water regulatory authority laws.



While the MWRRA Act is restricted to recovery of O&M costs, the UPWMRC Act allows for recovery of cost of depreciation and subsidies as well. One cannot rule out the possibility of introduction of the principle of full cost recovery in new laws in other states or through amendment of these laws.

Another key function of the authority under some of these laws, which is a matter of concern, is the determination of water entitlements, which involves the allotment of certain shares of water to various water users and groups of users, based on the rules framed by the state government. The MWRRA Act also empowers the authority to fix criteria for trading of water entitlements that are also 'deemed to be usufructuary rights which can be transferred, bartered, bought or sold...within a market system'.^{xix} Such provisions may facilitate the creation of a water market, which is likely to have certain negative impacts. It could result in transfers to richer farmers rather than to the ones best able to put the water to effective use for the community as a whole. Further, unmonitored trading of water rights might allow a corporate entity to buy water entitlements in bulk, leading to a loss of control at the local level.^{xx}

Water tariffs, the cost recovery principle, and the creation of water entitlements (and markets) may result in inequitable water distribution besides adversely affecting the provision of affordable access to water, especially for poor and vulnerable communities.^{xxi} This impedes the realisation of the fundamental right to water, which has

been interpreted as a part of the right to life guaranteed under Article 21 of the Constitution of India, in a number of decisions of the Supreme Court of India and various High Courts.^{xxii} The implication of the constitutional recognition of a fundamental right to water is universal entitlement to water without any discrimination (on economic or social basis).

C. Whither Environmental Concerns?

Sustainable management of the state's water resources is another stated objective of a majority of the existing water regulatory authority laws (except Gujarat). For instance, the water regulatory authority in Maharashtra, Arunachal Pradesh and Jammu & Kashmir is required to promote and implement sound water conservation and management practices. The UPWMRC is required to promote and monitor sound water conservation and management practices (and techniques). In several states, the authority is also responsible for promoting efficient use of water (resources) and minimizing the wastage of water.^{xxiii}

However, most of the water regulatory authority laws are silent as to the mechanisms to achieve these objectives. To some extent, the Andhra Pradesh and Kerala laws represent an exception as they state that these objectives are to be reached by fixing and monitoring implementation of stipulated standards. However, it is unclear whether the authority will stipulate these standards or simply implement the standards stipulated by another authority. Some of the laws also seek to impose obligations on the authorities that are broader than their actual mandate. For example, the UPWMRC is required to monitor conservation of environment. This obligation can never be fulfilled as it is beyond the authority's capacity resulting in the inclusion of non-implementable provisions in the statute.

D. State-level Regulator: Extent of Political Legitimacy?

Water regulatory authorities are non-elected 'experts' who are required to perform different functions: rule making, implementation and regulation. As an institution consisting of non-elected members, the water regulatory authority lacks political legitimacy. However, it is required to handle matters with strong social and political implications, such as determination of water tariffs. Further, water regulatory authorities are established at the state level. This can result in alienation from ground reality and they become inaccessible to the actual water users.

E. Co-existence of 'Independent' Regulator and Government Control

The effectiveness of water regulatory authorities depends on the absence of bias and freedom from political interference, among other factors.

Membership of authority

The effectiveness of water regulatory authorities is premised on their independence from government interference. This objective is achieved by excluding incumbent ministers or civil servants from its membership. The membership of the MWRRA does not directly include any incumbent minister or civil servant. Similarly, under the Uttar Pradesh law, a member of, or candidate for election to, Parliament or any State Legislature or any local authority; or an active member of, or holder of a post in, a political party is disqualified from membership of the UPWMRC.

In practice, however, the functioning of the authorities is usually entrusted to bureaucrats who are subject to government control. The Chairpersons of all the water regulatory authorities examined are bureaucrats (Chief Secretary of the State Government or equivalent rank or Chief Engineer). The laws state that members of the authority are to be selected from among water 'experts' and this may introduce a measure of independence in regulation. In practice, as illustrated in the case of the MWRRA, the experts are drawn from among retired bureaucracy.^{xxiv} As a result, the independence of the authority is compromised.

Some laws seek to promote greater inclusiveness by providing for the participation of actors in the functioning of the authority. The water regulatory authority in Andhra Pradesh, Kerala and Gujarat 'may' invite experts and members from Farmers' Organizations within the state as special invitees. This allows representatives of important

actors to participate in the decision-making process. However, the decision to invite them is left to the discretion of the authority. Moreover, while it is explicitly stated that the experts can assist the authority in taking policy decisions, no such role is envisaged for members from Farmers' Organizations.

Composition of selection committee

The State government controls the selection process of the Chairperson and members of the authority. The appointment of the Chairperson and the members of the water regulatory authority is subject to recommendations of the selection committee. In nearly all the state water regulatory authority laws examined, the selection committee is headed by the Chief Secretary of the State, and comprises of secretaries of relevant government departments, all of whom are bureaucrats (except Uttar Pradesh where one of the members belongs to the Indian Institute of Management, Lucknow). In any case, the decision of the selection committee is not final; it only has recommendatory powers. The final selection is done by the State Government or the Governor of the State, depending on the law.

Term of office

Water regulatory authority laws provide for irrevocable appointments of the Chairperson and members of the authority for fixed terms to reduce the risk of political pressure on regulatory authorities. In order to prevent the situation where the regulator takes instructions from the appointer in order to get reappointed, some laws prohibit reappointment of the Chairperson or members of the regulatory authority for a second term.^{xxv} In other states, however, the issue remains unresolved as the Chairperson or members can be reappointed for another term.^{xxvi}

The Chairperson and the members of the authority are ineligible for further employment under the State Government for a period of two years from the date they cease to hold office.^{xxvii} This ensures that the authority functions in an impartial manner and members are not influenced by the promise of future employment prospects within the government. In the Uttar Pradesh law, however, this requirement can be relaxed 'with the permission of the Government'.

The laws include a number of safeguards to rule out the risk of regulatory capture, for example by holding up the prospect of well-paid jobs if the regulators are sympathetic to the views of the industry.^{xxviii} For instance, the Chairperson or members are not permitted to hold any other office; they are disqualified from appointment to, or continuance in, office if they have financial or other interest that is likely to affect their functioning; and they cannot accept any commercial employment for a period of two years from the date they cease to hold office.

Financial independence

The extent of financial independence of the regulator from the government is an important determinant of the degree of control exercised by the latter. The regulator can be financed either by a fee levied on the regulated entities or from the state budget. The former method is more independent than the latter,^{xxix} because governments can influence regulators by cutting budgets. Most of the water regulatory authority laws do not include a provision for financing by levying a fee on the regulated entity. However, the Uttar Pradesh law grants the UPWMRC discretion to charge fee towards its expenditure.

An appraisal of the water regulatory authority laws indicates that these authorities lack financial independence from the state government. In most cases, the budget of the water regulatory authorities is fully dependent on grants made by the State Government. While this is in the nature of a legal obligation in the Uttar Pradesh law, it is not obligatory in other laws.^{xxx} Further, in the latter case, the grants and advances are subject to the terms and conditions determined by the State Government in its Budget. In both cases, the financial independence of the authority is compromised. This is more so where the State Government decides not to exercise its discretion and make grants to the authority. The absence of alternative sources of funding may jeopardise the effectiveness of the authority.

F. Minimal Attention to Transparency, Accountability and Participation

There are very few formal mechanisms to ensure transparency and accountability of water regulatory authorities. They are non-elected bodies and therefore they are not directly answerable to the public. Some laws disqualify a person who acts prejudicially to the public interest and government directions from holding the post of member/

chairperson.^{xxx1} This provision may at least partly address the concerns relating to water regulatory authorities. Some of the laws empower the State Government to issue policy directions to the authority,^{xxxii} which are binding in some cases.^{xxxiii} However, the field of policy direction is not unlimited and the policy direction must be consistent with the water regulatory authority law.^{xxxiv}

Prior publication of regulations introduces a measure of transparency by informing the public of the proposed regulations before they are implemented. However, there is no provision for prior publication of regulations that will be prepared by the water regulatory authority for implementation of the law. The MWRRA Act includes a provision for prior publication of rules prepared by the government though.

The water regulatory authority laws envisage very little public participation in the rule making or execution/implementation. The MWRRA Act provides for ‘stakeholder’ consultation in the formulation of tariff regulations but there is no such provision in the subsequent water regulatory authority laws.

IV. RETHINKING THE STATUS QUO? PLANNING COMMISSION’S PROPOSED MODEL BILL

The existing water regulatory authority laws suffer from a number of shortcomings. In order to address them, as well as to introduce new features, a Draft Model Bill for State Water Regulatory System (Model Bill),^{xxxv} has been prepared by the Sub-Group on Model Bill for State Water Regulatory Authority Act constituted by the Planning Commission under its Working Group on Water Governance for the Twelfth Five Year Plan period (2012-2017).^{xxxvi} The object of the draft Model Bill is ‘to reform and/or replace existing governance structure’. This section discusses the pros and cons of the Model Bill while comparing its provisions with the existing water regulatory authority laws.

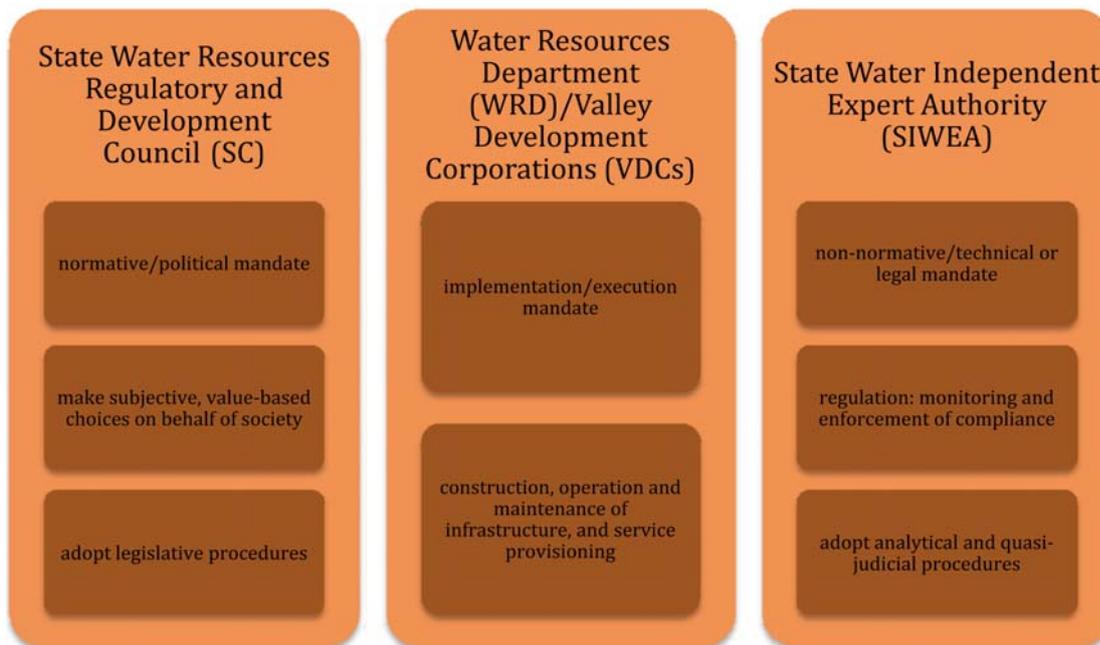
A. Balancing Economic Interests and Environmental Concerns

Like the water regulatory authority laws, the Model Bill includes setting of water tariffs and water sector privatization as core objectives. However, the Model Bill seeks to address some of the criticisms of the provisions in the existing laws by incorporating social objectives within these core objectives. These include, for example, ensuring ‘equity, fairness, and justice in provisioning of water services and supply across communities and regions’, ‘appropriate, prudent, fair, equitable, and affordable charges and costs for accessing and using water services’, ‘equity and justice in obtaining private sector participation and prevention of adverse implications of such participation on provisioning of services, especially on the weaker and disadvantaged sections of society’ etc. But the Model Bill is silent on the mechanisms for realisation of these objectives, and the procedure to be followed in case of their non-realisation.

The Model Bill also includes extensive provisions relating to environmental sustainability. The water regulatory system is also responsible for preparing and enforcing norms and criteria for water-related disaster management. Another additional responsibility relates to the impacts of climate change on water resource situation. This certainly reflects progressive thinking on the environmental aspects of water regulation. However, the extent to which these objectives are adopted and realised by state governments remains to be seen.

B. Trifurcation of Water Regulatory Authority’s Powers

Instead of one institution, namely the water regulatory authority, the Model Bill seeks to entrust policymaking, execution/implementation of policies and regulatory functions in different agencies at different levels. **Table 3** details the different institutions at the state level and the nature of functions to be performed by them.



The State Government is responsible for establishing the State Water Resources Regulatory and Development Council (SC) and the State Independent Water Expert Authority (SIWEA) based on the recommendations of two different selection committees. The selection committee for the SC will be guided by a list of names prepared by the Water Resources Department (WRD). There is no such requirement in the case of selection of SIWEA.

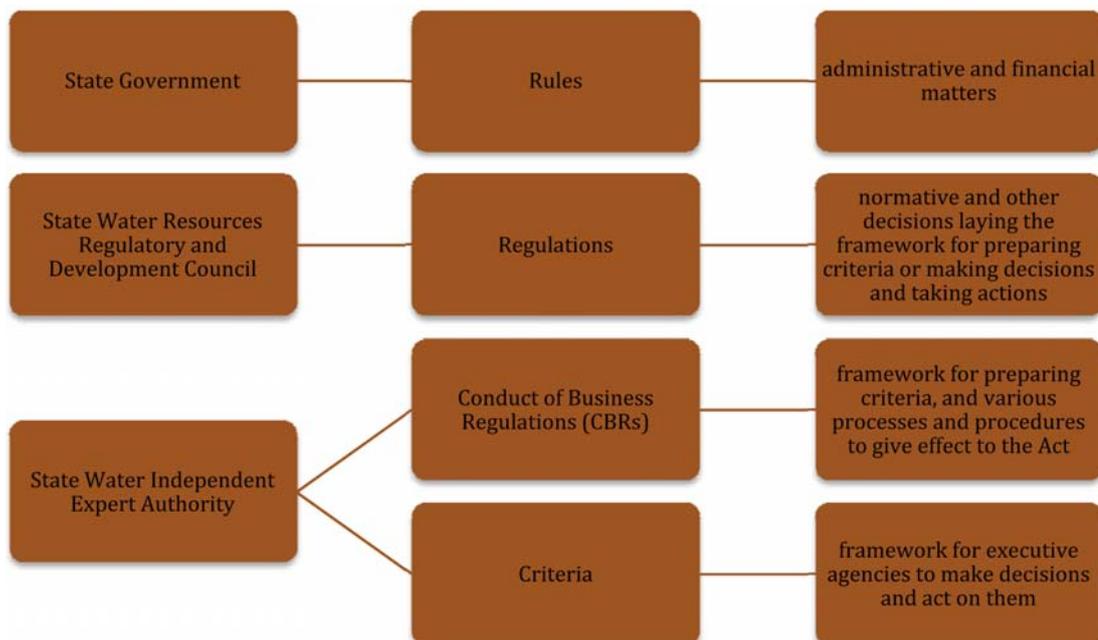
The creation of a multi-tiered, hierarchical institutional structure is an attempt to address some of the shortcomings of the existing legal framework where all powers vests in the state-level water regulatory authority. The Model Bill incorporates the principle of subsidiarity,^{xxvii} and envisages decentralisation to four levels (State, river basin, sub-basin and local) with corresponding institutions (see **Table 4**).

	Agencies with political mandate	Agencies with execution/implementation mandate	Independent and expert agencies
State level	SC	WRD	SIWEA
Basin level	River Basin Council	River Basin Agency (RBA)	Basin (level) Independent Water Expert Authority (BIWEA)
Sub-Basin level	Sub-Basin Water Council	Sub-basin office of RBA	Sub-basin office of BIWEA
Local level	Stakeholder organisations	Water User Associations	Stakeholder participation through comments and suggestions

The state-level institutions have been described above. At the basin level, the River Basin Council (RBC) shall be the agency with political mandate. It shall consist of members of the state legislative houses, zilla panchayat,

taluka panchayat and gram panchayat, and representatives of stakeholder groups (farmers, industries and civil society organizations) in equal proportion. The RBC will also include proportional representation for Scheduled Castes, Scheduled Tribes, women and other sections of society (in accordance with 73rd and 74th constitutional amendment). Similarly, the River Basin Agencies shall be the executive or implementing agencies. They may emerge from transformation of the existing Valley Development Corporations in the state, or from the basin-level offices of the state WRD. The three- or five-member Basin Independent Water Expert Authorities will perform the role of the independent and expert agency at the basin level. There are corresponding institutions at the sub-basin level and stakeholder participation/representation is envisaged at the local level.

The multi-tiered regulatory structure is accompanied by a number of policy instruments. **Table 5** describes some of these instruments as well as the institutions responsible for their creation.



However, the implementation of the Model Bill will need to coordinate the range of vertical and horizontal institutional linkages while ensuring that persons with the required ‘expertise’ are appointed to discharge these institutional responsibilities. This presents a daunting task for the implementing agencies.

C. Insulating the Regulator from Government Control

The Model Bill proposes a number of changes to overcome the critique of water regulatory authority laws insofar as the independence of SIWEA is concerned.

Membership of authority

All the members of SIWEA will be professional experts in the fields of civil engineering, ecology or environmental sciences, economics, or accounts and auditing, sociology or political sciences, or social sciences, and geology and hydrogeology. This is a significant change from the water regulatory authorities, which mainly comprise of bureaucrats.

Composition of selection committee

The selection committee that is responsible for recommending the appointment of the Chairperson and the members of SIWEA is not restricted to bureaucrats. It also includes a retired or sitting High Court judge, a representative of the Ministry of Water Resources, Government of India or a professional member of the central/state level independent regulatory agency in any infrastructure sector from a different cadre/state respectively, and a senior professor with experience from the fields of expertise for which the positions are to be filled. Like in the case of water regulatory authority laws, the decision of the Selection Committee is not final; it can only make recommendations to the State Government. The state government is required to select one of the two candidates recommended by the selection committee for each vacant position. This reduces the exercise of discretion by the government.

Financial independence

The state government is required to constitute a SIWEA Fund, which will include loans and grants made by the state government, all fees received, and all sums received from other sources as may be decided by the state government. In order to address the lack of financial independence of the existing water regulatory authorities, the Model Bill provides for levy and recovery of a regulatory fee amounting to SIWEA's budgeted fund requirement from all water provisioning utilities across the state and water users across all user categories. However, this approach continues to endorse the principle of cost recovery without clarifying its scope and extent, which may adversely affect the realisation of the fundamental right to water, particularly of poor and vulnerable. Though the Model Bill explicitly recognises the fundamental right to water, it fails to subject the scope and extent of the cost recovery provisions to the realisation of the fundamental right to water.

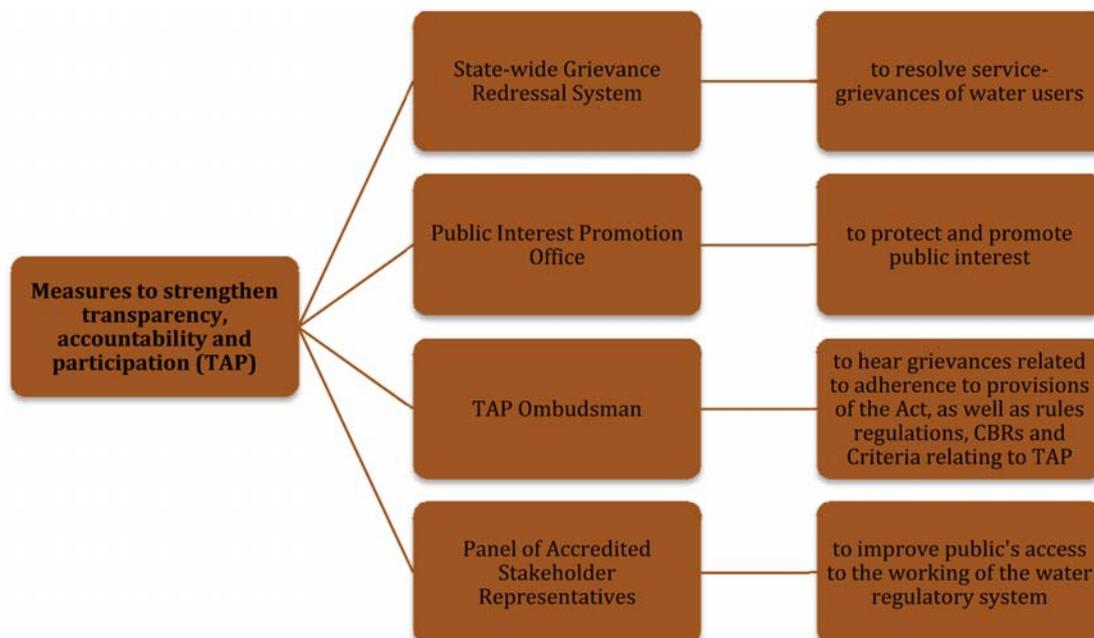
D. Strengthening Transparency, Accountability and Participation

The Model Bill vests the authority to make different decisions with different agencies in order to ensure autonomy and accountability. The State Water Regulatory and Development Council, which consists of elected representatives, can be held directly accountable for political decisions affecting performance of water sector. Like the water regulatory authorities, SIWEA is a non-elected body and therefore it is not directly answerable to the public. The Model Bill seeks to ensure accountability by subjecting all of SIWEA's non-normative decisions and orders to regular review by a panel of peer experts (PPE). A major limitation of this progressive provision is that the selection committee, which is responsible for selecting PPE, shall be appointed by SIWEA, which may defeat the purpose.

Further, in order to ensure transparency and accountability of the decision making process, unlike the water regulatory authority laws, the selection committees for SC and SIWEA are required to submit a detailed report on the selection procedure to the state government. The report will be tabled before the State Legislative Houses and made available on the websites of the state government and the Water Resources Department.

The Model Bill envisages two different public deliberation mechanisms for making and promulgating decisions relating to certain areas of regulation: Procedure of Public Deliberation (PPD) (environmental sustainability, grievance redressal and disaster management) and Procedure of Comprehensive Public Deliberation (PCPD) (water access, extraction and use; water service provisioning and private sector participation). The period for comments and suggestions of the stakeholders, third party agencies, and the public in general is also different: two weeks in case of PPD and four weeks in case of PCPD. Further, in case of PCPD, printed copies of the draft of the document will be made available at the sub-basin level offices of the WRD. The Model Bill does not provide any explanation for these differences.

The Model Bill also envisages the establishment of a set of institutions by SIWEA to strengthen transparency, accountability and participation (see **Table 6**).



V. THE WAY FORWARD...

There is an urgent need for institutions that adopt a holistic perspective towards the regulation of water resources. However, the existing model of state-level water regulatory authorities is unsuitable for this purpose. The impetus for the proliferation of water regulatory authority laws has been largely provided by policy push and grant conditionality instead of an articulated public demand for such legal and institutional reforms. The adoption of a market-based approach towards water resource management has limited the scope of regulation (largely to water tariffs and entitlements) and implicitly provided support for private sector participation. This has also resulted in inadequate attention to social and environmental aspects of water resource management, as well as absence of provisions relating to transparency, accountability and participation. The independence of the regulatory authority has been compromised due to excessive government control and dependence on government funding.

The Planning Commission's Model Bill for State Water Regulatory System represents a conscious and laudable effort to overcome the criticisms of the water regulatory authority laws. For example, the water regulatory authority laws have been criticised for their one-size-fits-all approach. In order to overcome this problem, the Model Bill adopts a modular approach, which leaves room for flexibility to accommodate the different stages of development of the water sector in states. It provides a range of regulatory functions that states can choose to incorporate in their respective state legislation, depending on priorities and ground realities and thus implicitly emphasises the need for taking into consideration specific needs and circumstances of the concerned state instead of following an available model. Further, the regulatory functions listed in the Model Bill are merely indicative. Such a modular approach obviously has a positive effect.

However, the Model Bill warrants more debate and discussion especially given its ambitious nature. It is one thing to prepare a document that appears to address the concerns of different stakeholders; operationalising it is another matter altogether and one that depends on the willingness and capacity of states. The issues of institutional transition, operationalisation of the modular structure and effective implementation of the Act, among others, require closer examination as and when corresponding state-level laws are adopted or existing laws are modified. It is also important to ensure that like the water regulatory authority laws, the Model Bill does not lead to the creation of water regulators who are predominantly concerned with water tariffs and water entitlements to the exclusion of social and environmental objectives.

The discussion of different models of water regulatory authorities should not lead one to assume that there is consensus insofar as their effectiveness is concerned. The criticisms of this model include the absence of policy debates at the state or national level preceding their creation and the absence of an informed public debate or demand from stakeholders for such an authority. The Planning Commission's initiative recognizes the problems with the existing model and seeks to introduce changes to the status quo. However, instead of first engaging in a comprehensive deliberation on the need for such an authority for the water sector, the Planning Commission has also proceeded on the assumption that regulatory authorities are the most suitable mechanism for water governance in India.

ENDNOTES

- i The recognition of water as an economic good has certain implications: (i) focus on water demand management and water use efficiency; (ii) introduction of pricing of all water services (and water trading); and (iii) introduction of full cost recovery. See Philippe Cullet, *Water Law, Poverty, and Development – Water Sector Reforms in India 71-72* (Oxford: Oxford University Press, 2009).
- ii F. Demarigny, 'Independent Administrative Authorities in France and the Case of the French Council for Competition' in G. Majone (ed.), *Regulating Europe* (London and New York: Routledge, 1996).
- iii United Nations Development Programme, *Human Development Report 2006 – Beyond Scarcity: Power, Poverty and the Global Water Crisis* 100 (New York: UNDP, 2006).
- iv See, for example, G. Majone, *Controlling Regulatory Bureaucrats: Lessons from the American Experience*, EUI Working Paper SPS No. 93/3, San Domenico (1993).
- v See Cullet, note i above, at 118.
- vi For the purpose of this policy paper, the term 'authorities' refers to the state-level water regulatory authorities and commissions. Further, following the first reference to the complete title of the state water regulatory authority laws, all subsequent references are stated as follows; "[name of state] law".
- vii Delhi, Himachal Pradesh, Karnataka, Rajasthan and Orissa
- viii World Bank, India – Water Resources Management Sector Review – Report on the Irrigation Sector (Report No. 18416 IN, 1998) v.
- ix World Bank, Uttar Pradesh Water Sector Restructuring Project (Project Appraisal Document, Report No. 23205-IN, 2001) 35.
- x See World Bank, Madhya Pradesh Water Sector Restructuring Project (Project Appraisal Document, Report No. 28560-IN, 2004) 10.
- xi See Shripad Dharmadhikary, *Water sector reforms: Time for a new model*, 10 November 2008, <http://www.indiatogether.org/2008/nov/env-regulate.htm>. According to a State Government department, the formation of the water regulatory authority is in progress as per the 13th Finance Commission recommendation. See Government of Madhya Pradesh, Planning, Economics and Statistics Department, *Annual Plan 2011-2012*, p.147, available at <http://mp.gov.in/spb/annualplan/ap-2011-12/Volume%20-1%202011-12.pdf>.
- xii Planning Commission, *Mid-Term Appraisal of the Tenth Five Year Plan (2002-2007)* 226 (para 6.28) (New Delhi: Planning Commission).
- xiii Planning Commission, *Mid-Term Appraisal of the Eleventh Five Year Plan (2007-2012)* 437 (para 21.44) (New Delhi: Planning Commission).
- xiv Government of India, Ministry of Water Resources, *Draft National Water Policy (2012)*, para 13.1, available at http://mowr.gov.in/writereaddata/linkimages/DraftNWP2012_English9353289094.pdf.
- xv Finance Commission, Chapter 12 'Grants-in-Aid' in *Report of the 13th Finance Commission (2010-2015)*, p. 216 (para 12.58), available at http://fincomindia.nic.in/writereaddata%5Chtml_en_files%5Ctfc/Chapter12.pdf.
- xvi Sachin Warghade and Subodh Wagle, 'Water Sector Reforms – Implications on Empowerment and Equity' in Industrial Development and Finance Company, *India Infrastructure Report 2011* (New Delhi: Oxford University Press, 2011).
- xvii The Arunachal Pradesh law and the draft Himachal Pradesh law are verbatim reproductions of the Maharashtra law and the Uttar Pradesh law respectively. The only difference is the inclusion of an appeal provision in the draft Himachal Pradesh law, which is missing in the Uttar Pradesh law.
- xviii Government of Gujarat, Narmada, Water Resources Water Supply and Kalpsar Department, Notification No. GS/2012/24/GEN/2002/(22)/PART-2/K-1 (M.I. Cell.), 14 February 2012.
- xix MWRRA Act, section 11(a).
- xx See Cullet, note i above, at 125.
- xxi For a detailed discussion, see, for example, Subodh Wagle and Sachin Warghade, 'New Laws Establishing Independent Regulatory Agencies in the Indian Water Sector – Long Term Implications for Governance', 2(1) *SAWAS* 49 (2010).
- xxii *Subash Kumar v. State of Bihar*, AIR 1991 SC 420; *F.K. Hussain v. Union of India*, AIR 1990 Kerala 321; and *Hamid Khan v. State of Madhya Pradesh*, AIR 1997 MP 191.
- xxiii Maharashtra, Arunachal Pradesh, Andhra Pradesh, Kerala and Jammu & Kashmir
- xxiv See Wagle and Warghade, note xxi above.
- xxv Andhra Pradesh, Gujarat and Kerala laws
- xxvi Arunachal Pradesh, Himachal Pradesh, Maharashtra and Uttar Pradesh laws
- xxvii Andhra Pradesh, Arunachal Pradesh, Himachal Pradesh, Kerala, Jammu and Kashmir, Maharashtra and Uttar Pradesh laws
- xxviii See, for example, G. Stigler, "The Economic Theory of Regulation", 2 *Bell Journal of Economics* 3-21 (1971).

- xxix See Anders Larsen *et al.*, Independent Regulatory Authorities in Europe, 'Harmonising Effective Regulation', Sustainable Energy Specific Support Assessment (SESSA) conference, Bergen, Norway, 3-4 March 2005, available at <http://sessa.eu.com/documents/wp/D73.1-Larsen.pdf>.
- xxx Andhra Pradesh, Arunachal Pradesh, Kerala and Maharashtra laws
- xxxii Gujarat and Andhra Pradesh laws
- xxxiii For a discussion on policy directions, in the context of electricity regulatory authorities, see S.K. Sarkar, 'Regulatory Reforms and Policy Direction of the Government' 1(3) *Regulateri* 3 (1999).
- xxxiiii Maharashtra and Arunachal Pradesh laws
- xxxiv See *Chittoor Zilla Vyavasayadarula Sangham v. A.P. State Electricity Board & Others*, (2001) 1 SCC 396.
- xxxv The discussion in this section is based on the draft Model Bill that is attached as an annexure to a report of the Planning Commission of January 2012. See Planning Commission, Government of India, *Report of the Steering Committee on Water Resources and Sanitation for Twelfth Five Year Plan (2012-2017)* 207 (New Delhi: Planning Commission, 2012), Annexure 4.
- xxxvi Planning Commission, Approach Paper to Model Bill for State Water Regulatory System Act, November 2011, available at http://planningcommission.nic.in/aboutus/committee/wrkgrp12/wr/wg_wtr_regu.pdf.
- xxxvii The Model Bill defines 'principle of subsidiarity' to mean 'devolution of functions, functionaries, and financial resources to the lowest possible level of governance, without foregoing optimal efficiency, efficacy and sustainability of governance'.

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