

# **General authorisations as a tool to promote water allocation reform in South Africa**

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## **Abstract**

South Africa faces significant inequities in access to and use of water for productive purposes. The National Water Act seeks to address these inequities and introduced a public rights system where water is owned by the people of South Africa and held in custody by the state. This public trust doctrine forms the basis for the State to give effect to its constitutional obligation for redress. Compulsory licensing is a mechanism to proactively reallocate water on a catchment basis to achieve redress, while at the same time promoting economic efficiency and ecological sustainability. During compulsory licensing, all users are required to reapply for their water use entitlement, and a process is followed to allow for a fairer allocation of water between competing users and sectors. Some concerns have been raised that equity may not be achieved through compulsory licensing as historically disadvantaged individuals may not have the capacity to partake in the process. Similarly, the administrative burden of processing large numbers of licences from small scale users may cripple licensing authorities. Moreover, the compulsory licensing process, while encouraging Historically Disadvantaged Individuals (HDIs) to apply, may have little impact on poverty if the poorest are not able to participate in the process. General authorisations are proposed as a way of addressing these concerns by setting water aside for specific categories of users. This paper introduces the concept of general authorisations in support of compulsory licensing and outlines some of the implementation challenges.

## **Key Words**

compulsory licensing, entitlements, general authorisation, public trust doctrine, redress, South Africa, water allocation reform

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## 1. INTRODUCTION

Policies, laws and regulations provide the national framework through which water management can take place and can determine the rights that different sectors have or don't have in gaining access to different resources. In many cases, people are poor because policies, laws and regulations (or absence of them) circumscribe or limit their opportunities to gain access to certain resources.<sup>1</sup> The UN MDG Task Force highlights policy, legal and regulatory reform (including issues of water rights and allocation) as one of the key policy areas required to contribute towards poverty reduction.<sup>2</sup> The Task Force highlights the importance of giving special attention to the specific needs and opportunities of the how the poor can have improved access to water resources. Probably one of the most complex challenges water laws pose is the administration of water rights (i.e. administration and control of licenses, concessions or permits) and the compliance of that use within the law.<sup>3</sup> These challenges are further exacerbated in contexts where reforms are required to transform existing patterns to benefit the poor. Changing inequitable, established water use patterns and entitlements requires phased implementation, allowing institutions the opportunity to invest time, training and other resources to give effect to new approaches. "Implementable" legislation is one that a government is able to administer and enforce, and where water users have the ability and time to adapt to the revised provisions.<sup>4</sup> In addition, policy tool and mechanisms are needed that promote mixed management systems and allow flexibility to meet national and regional contexts.<sup>5</sup> Reforms in allocations need to be carefully structured so that they do not just reaffirm previous patterns of inequity.

This paper introduces South Africa's role as public trustee of the nation's water resources. This public trust doctrine is a cornerstone of South Africa's National Water Act (NWA) and provides a mechanism by which the state gives effect to its constitutional mandate to redress the inequities of the past.<sup>6</sup> General authorisations (GAs), used in conjunction with compulsory licensing, is examined as a water allocation tool that can be used to support water allocation reform. The use of water under a general authorisation does not require a licence and therefore provides a tool to authorise water use for categories of individuals without the administrative burden of processing and applying for individual licences. GAs provide a flexible, phased approach to water reform which can be delegated to the regional level and that can be adapted to address local concerns and priorities. In accordance with their role as public trustee of the resource, GAs provide a means for the government to set water aside for specific categories of users. Considering the pluralistic nature of water laws in Africa, GAs can also be used to ease the often uncomfortable relationship between customary water rights and statutory water rights.<sup>7</sup> This paper introduces the concept of GAs and their potential advantage to support water allocation reform. The final section outlines some of the challenges that could be faced in using this approach and which will need to be tested and addressed through implementation.

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<sup>1</sup> Jean-Philippe Audinet and Sappho Haralambous, Achieving the Millennium Development Goals: Rural Investment and Enabling Policy Panel Discussion Paper IFAD Governing Council – Twenty-Eighth Session, Policy Division IFAD 16-17 February (2005).

<sup>2</sup> Global Water Partnership, Sharing Knowledge for Equitable, Efficient and Sustainable Water Resources Management. Version 2. (2003). See [www.gwpforum.org](http://www.gwpforum.org).

<sup>3</sup> Héctor Garduño, 'Water Rights Administration: Experiences, Issues and Guidelines' In FAO Legislative Study 70. Development Law Service. FAO Legal Office (2001).

<sup>4</sup> Héctor Garduño, 'Making Water Rights Administration Work,' in proceedings of the African Water Laws: Plural Legislative Framework for Rural Water Management in Africa. (2005). See [www.nri.org/waterlaw/workshop.htm](http://www.nri.org/waterlaw/workshop.htm).

<sup>5</sup> See note 2 above.

<sup>6</sup> Prof Robyn Stein, Personal Communication.

<sup>7</sup> For a discussion on customary laws and their interface with national laws see: Ruth Meinzen-Dick and Leticia Nkonya, 'Understanding legal pluralism in water rights: Lessons from Africa and Asia', in proceedings of the African Water Laws: Plural legislative Framework for Rural Water Management in Africa. (2005). See [www.nri.org/waterlaw/workshop.htm](http://www.nri.org/waterlaw/workshop.htm).

## 2. THE PUBLIC TRUST DOCTRINE

The end of apartheid saw the dawning of a new era of democracy in South Africa. A hallmark of this process was the development of an interim constitution, which allowed for the scrutiny and reformation of legislation through a common Bill of Rights. The Bill of Rights guaranteed every South African the right to have access to sufficient water.<sup>8</sup> The reform of natural resource legislation became a priority because people's dignity, equality and freedom could not be effectively restored without allowing them access to the most fundamental of all rights, water. The drafting process for the new Water Act began in May 1995 with the publishing of a set of principles, open to public comment. To include the voice of the rural poor, along with other sectors such as agriculture, mining, and the environment, consultative meetings were held across the country. In October 1996, the consultations culminated with the publishing of the fundamental principles and objectives for a New Water Law in South Africa.<sup>9</sup> Based on these principles the NWA was drafted and passed in August 1998. The first fundamental principle on which the NWA is based states that:

The water law shall be subject to and consistent with the constitution in all matters including the determination of the public interest and the rights and obligations of all parties, public and private, with regards to water while taking cognisance of existing uses the water law will actively promote the values enshrined in the Bill of Rights.

The Constitution of the Republic of South Africa, states in the preamble that, 'We the people of South Africa, Recognise the injustices of our past; Honour those who have suffered for justice and freedom in our land; [and] Respect those who have worked to build and develop our country.'<sup>10</sup> Organs of state have a responsibility to alleviate the injustices of the past which were reflected in past approaches to the allocation of water resources, and to 'establish a society based on democratic values, social justice and fundamental human rights.'<sup>11</sup>

Under the NWA, water is a national resource, owned by the people of South Africa and held in custody by the state. The Act replaces a private right system with a public right system. The control of water is now entrusted in the State with the proviso that it be managed in the public's interest with consideration of environmental needs. This principle reiterates the original position of Roman Law where things belong to no-one, but are available for public use, subject to state control.<sup>12</sup> Through the NWA, the State has a responsibility to act in the public interest to redress past inequities and ensure that all South Africans have access to water resources. The NWA states that 'as the public trustee of the nation's water resources the National Government, acting through the Minister, must ensure that water is protected, used, developed, conserved, managed and controlled in a sustainable and equitable manner, for the benefit of all persons and in accordance with its constitutional mandate.'<sup>13</sup>

Water allocation, is one component of a wider government mandate to address the inequities of the past. Water allocation reform is being implemented by the Department of Water Affairs and Forestry (DWAF), through the Water Allocation Reform Programme. Box 1 lists the guidelines for the process. Compulsory licensing is one of the main instruments in the NWA to give effect to water allocation reform. Compulsory licensing is a mechanism to reconsider all water use authorisations in an area so as to potentially achieve significant reform of existing legal access to

<sup>8</sup> South Africa, Constitution, No. 108 of 1996, Section 27(1b).

<sup>9</sup> Department of Water Affairs and Forestry and the Water Research Commission. The philosophy and practice of integrated catchment management: Implications for water resource management in South Africa. WRC Report No TT 81/96. (1996).

<sup>10</sup> South Africa, Preamble to the Constitution, No. 108 of 1996.

<sup>11</sup> South Africa, Preamble to the Constitution, No. 108 of 1996.

<sup>12</sup> See note 9 above.

<sup>13</sup> South Africa, National Water Act, 36 of 1998, Sections 3 (1).

water.<sup>14</sup> All users within an area are required to reapply for their water use entitlement, and a process is described to allow for a fairer allocation of water between competing types of users and sectors, with the primary intention to achieve race and gender equity.

### **3. WATER USE OBJECTIVES AND ENTITLEMENTS**

General authorisations are one type of water use entitlement described in the NWA. The NWA provides a range of other entitlement options that can be adapted to meet certain water use objectives and which can be exercised and used in different contexts. This unique feature of the NWA provides a means of facilitating implementation. For example, licences which pose the most administrative burden on the processing authority and the applicant, are only required in water stressed areas and can be phased in over time. Figure 1 summarises the range of water use entitlements and how they are met through the entitlements described in the NWA. These are further outlined below.

#### **3.1 Water use Objectives**

##### **3.1.1 Water to meet Basic Human Needs**

Water required to meet basic human needs (BHN) is defined in the NWA as part of the Reserve and includes the quantity and quality of water required to satisfy BHN. Every person in South Africa has a constitutional right to ‘sufficient food and water’<sup>15</sup> – this right is accommodated by the BHN Reserve and is, together with the ecological Reserve, the only right to water defined in the NWA. The currently accepted amount of water that constitutes the BHN Reserve is 25 ℓ/c/d.

##### **3.1.2 Water for Subsistence Use**

Water for subsistence use is water that is used for reasonable domestic purposes, subsistence farming and limited stock watering. This water use is in excess of the BHN volume, but is not used for commercial purposes. This water allocation is usually accommodated through Schedule 1 in the NWA.

##### **3.1.3 Water for Livelihood Support**

In addition to providing for the BHN and reasonable domestic use, there is a need to make water available for livelihood support, through small-scale home industries and household food gardens. As part of a diverse support strategy, livelihood support typically includes a measure of commercial activity, and as such cannot strictly classify as use under Schedule 1.

##### **3.1.4 Water for Small Micro and Medium Enterprises**

Water used in the establishment of small, micro and medium enterprises, and in excess of the amount necessary for livelihood support represents the threshold above which water use is considered commercial. Due to the fact that these entities often rely on entrepreneurial labour, do not have specific administration personnel and do not have significant start up capital, they are likely to benefit greatly from the reduced administrative and/or cost burden of the water use authorisation process. This category of water users would include car washing, beer making, and brick making enterprises as well as small-scale irrigation schemes.

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<sup>14</sup> South Africa, National Water Act, 36 of 1998, Sections 43 to 48.

<sup>15</sup> South Africa, Constitution. No. 108 of 1996. Section 27(1b).

### **3.1.5 Water for Large-scale Commercial Use**

These users have an exclusive commercial orientation and users often coordinate their use through registered legal entities, such as an Irrigation Board or Water User Association. In most cases, so as to manage the potentially significant impacts on the resource, water used by large commercial enterprises is most appropriately authorised through a licence. The level of capacity and information required to apply for a licence, including the requirement to develop a business plan, undertake water use monitoring and undertake an Environmental Impact Assessment, is usually within the scope of the enterprise and frequently in the interests of the enterprise so as to ensure its sustainability.

## **3.2 Water use Entitlements**

### **3.2.1 Schedule 1**

Schedule 1 use is defined in the NWA as water used for reasonable domestic purposes, small gardening, and the watering of livestock (excluding feedlots). Schedule 1 use can be taken up anywhere in the country and the user is not required to register their water use with the DWAF. The core objective of Schedule 1 use is to support reasonable domestic use, while keeping the protection of the resource in place. Schedule 1 use does not attract any water resource management charge. However, users would still have to pay the municipal fees associated with purifying and distributing the water, if it is supplied to the user through the municipal grid. If the water is taken directly from a surface or ground water source, no charge would be applicable.

### **3.2.2 Licensed Water Use**

This includes larger volumes of water that are applied for by an applicant and authorised as a licence issued under the NWA. In situations where a water use application is being considered on a resource for which no ecological Reserve has been set, an individual reserve determination is required before a licence can be issued.

### **3.2.3 Existing Lawful Use**

The term "existing lawful use" plays an important role throughout the NWA. It is specifically relevant in the bridging period between the previous Water Act and the current NWA. The NWA makes allowance for water users to continue a use that lawfully took place in the period two years before the commencement of the NWA. The verification of an existing lawful use is a formal process described under Section 35 of the NWA. One of the aims of the water allocation reform process is to replace existing lawful use with one of the other water use entitlements under the NWA. In most cases this will be through an individual licence, but in some cases, particularly in the tribal areas, some existing lawful use may be better served by a GA.

### **3.2.4 General Authorisations**

The use of water under a GA does not require a licence and therefore provides a tool to authorise water use for categories of individuals, without the administrative burden of processing and applying for individual licences. GAs include users that cannot be covered by a licence but require more water than is permissible under Schedule 1. The NWA states that a,

A responsible authority may, subject to Schedule 1, by notice in the Gazette –

- (a) Generally;
- (b) In relation to a specific water resource; or
- (c) Within an area specified in the notice,

Authorise all or any category of persons to use water, subject to any regulation made under section 26 and any conditions imposed under section 29.<sup>16</sup>

National resource specific GAs have been published in Government Notice 399 of 26th March 2004 and Government Notice 398 of 26th March 2004, authorising specific water uses. These GAs are given in terms of a specified volume of surface or groundwater that may be abstracted by any persons, without a licence, in identified quaternary catchments across the country. The existing GAs are not defined for a specific category of users but can be taken up by all users within the specified area, subject to certain exclusions and conditions. Initially GAs were considered by the DWAF to be a temporary entitlement to allow small volumes of water to be taken up before the licensing process was formalised. However, there has been a shift in thinking that category specific GAs could be used to promote uptake of water by HDIs, in support of water allocation reform.

## 4. THE COMPULSORY LICENSING PROCESS

The compulsory licensing process is summarised in Figure 2 and is initiated by a responsible authority issuing a general invitation to persons to apply for a licence within a specified area.<sup>17</sup> The invitation requires that all existing and potential users be given the opportunity to apply to a specific address and within a specified timeframe. Once these applications are received, the responsible authority prepares a proposed allocation schedule, in accordance with the factors outlined in Section 27 of the NWA (See Box 2). The schedule outlines how the water is to be allocated to each of the applicants and is published in the Government Gazette for comments. The responsible authority does not have to allocate all the available water and may set some aside. After considering all objections received, the responsible authority prepares a preliminary allocation schedule which is published in the Government Gazette. Appeals can then be made to the Water Tribunal, which if successful will require further amendments to the allocation schedule. The preliminary allocation schedule becomes final if no appeals are lodged within the time limit and it has been amended following every successful appeal, or every appeal lodged is dismissed. The responsible authority must then issue licences according to the new allocation schedule.<sup>18</sup>

### 4.1 Equity in Compulsory Licensing

In developing countries, there is often a tension between the state's attempt to rationalise the world through defined rights and the often complex and dynamic nature of the real world. Resource rights in developing countries are usually conceived through legal pluralism and a prescriptive approach to rights allocation may conflict with locally derived approaches.<sup>19</sup> 'Administratively directed water allocation can fall prey to manipulation by the most influential sectors of society, thus allowing them to augment their wealth and power.'<sup>20</sup> In conditions of established inequalities of power, there is a concern that participants may not be able to contribute equally. There is ample evidence to show that certain groups, such as women or the rural poor, often lose out in processes of resource formulation because they may lack the

<sup>16</sup> South Africa, National Water Act, 36 of 1998. Section 39.

<sup>17</sup> Responsible authority is defined in the NWA as the catchment management agency to which that specific power or duty in respect of water uses has been assigned, or if that power or duty has not been so assigned, the Minister (NWA, Section 1 xx).

<sup>18</sup> Hubert Thompson, *Water Law: A Practical Approach to Resource Management and the Provision of Services*, 126 (Cape Town: Juta & Co, 2006).

<sup>19</sup> Fran ois Molle, 'Defining Water Rights: By Prescription or Negotiation', 6 *Water Policy* 207 (2004).

<sup>20</sup> Fran ois du Bois, 'Water Rights and the Limits of environmental Law', 6 *Journal of Environmental Law* 73, 83 (1989).

resources (knowledge, time, travel, money) required to obtain formal authorisation through the state.<sup>21</sup>

In South Africa, hierarchies of power and privilege have formed complex patterns of power relations.<sup>22</sup> Some concerns have been raised that equity may not be achieved through compulsory licensing as historically disadvantaged individuals may not have the capacity to partake in the process. Similarly, the administrative burden of processing large numbers of licences from small scale users may cripple licensing authorities. Under these circumstances, processes and tools are required that explicitly recognise power imbalances and seek to overcome them. Strategies should be available that anticipate and counteract structural inequalities. Recent findings on the delays in processing South African water licences showed that one of the reasons for the delays was difficulties in obtaining the correct information from applicants.<sup>23</sup> This indicates that the application process could be too onerous and that the administrative burden on the applicant may be too significant or costly to follow through to completion. Consequently, the DWAF has engaged in strategies and programmes to empower disadvantaged communities to engage effectively in water allocation reform, but there is still a risk that compulsory licensing could favour existing balances of power because the ability to participate may be dominated by those with more power and knowledge.

#### **4.2 General Authorisations in support of Compulsory Licensing**

The Water Allocation Reform Programme, has investigated GAs as one of the tools that could be used to overcome these power imbalances and ensure the State meets its constitutional obligation to alleviate the injustices of the past. During the compulsory licensing process water can be set aside for potential uptake by the rural poor. This water could then be generally authorised. Figure 3 summarises the approach of issuing GAs during compulsory licensing. Once an area has been defined for compulsory licensing, a responsible authority would assess existing and potential development options that could meet regionally defined development objectives or priorities. The responsible authority, in dialogue with other government agencies, would then prioritise the development options most suitable for a GA and set this water aside as part of the compulsory licensing process. Table 1 provides some examples of the where category specific GAs may be applied. The draft GA would then be published for comment as part of the draft allocation plan. The final GA notice would be published once the final allocation schedule has been published. General authorisations allow a means of ring fencing water for race and gender reform, and allow for the gradual uptake of this water in the post compulsory licensing phase. Water that is general authorised may require the curtailment of existing lawful users. The decision to issue a GA therefore requires a balanced perspective on the importance of promoting gender and racial equity, while at the same time carefully considering the impact on the resource and existing users.

### **5. IMPLEMENTATION CHALLENGES**

The implementation of water use rights embody implicit and optimistic assumptions about technical capacity, including knowledge of hydrology, quantitative definition and monitoring of water use and the ability to enforce regulations and monitor water use uptake.<sup>24</sup> All of these place a heavy burden on the administrative and judicial systems. The natural complexity of the

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<sup>21</sup> Ruth Meinzen-Dick and Leticia Nkonya. ‘Understanding legal pluralism in water rights: Lessons from Africa and Asia’, in proceedings of the African Water Laws: Plural legislative Framework for Rural Water Management in Africa. (2005). See [www.nri.org/waterlaw/workshop.htm](http://www.nri.org/waterlaw/workshop.htm).

<sup>22</sup> Valerie Taylor, *Social mobilisation: Lessons from the mass democratic movement*. (Bellville: University of the Western Cape, 1997).

<sup>23</sup> Flip Nöthling, personal communication.

<sup>24</sup> Françoise Molle, ‘Defining Water Rights: By Prescription or Negotiation’, 6 *Water Policy* 207 (2004).

hydrological system, involving ‘complex interaction between diverse clusters of competition,’ coupled with the implication of transaction costs, results in an inability to rely on the market to ensure equitable sharing of water resources.<sup>25</sup> The NWA does not rely on the market but assigns water use rights based on pre-determined priorities, such as, amongst others, the importance of racial and gender redress. However, without careful capacity development, resource allocation and planning, the risks of administrative failure to undertake these processes could be as much of a concern as market failure. In certain regions of South Africa, water use license can take between 20 and 30 months to process.<sup>26</sup> During the compulsory licensing process, administrative systems will need to be in place to respond adequately to the administrative requirement of the process. GAs presents a valuable means of reducing the administrative burden on both the responsible authority and the applicant. The ability to identify one category of users and issue one general authorisations for similar users in a particular area may assist in reducing some of this burden but the process of publishing a GA in itself involves administrative requirements that need to be considered. Some of these are outlined below.

## **5.1 Public engagement and empowerment of beneficiaries**

Section 39 of the NWA outlines the public participation process required to issue a GA. The GA must be published in the Gazette and it must invite written comments. The responsible authority should take all necessary steps to communicate the contents of the notice to interested persons and to consider all of the comments received on or before the date specified in the notice. Channels of communication, particularly within disadvantaged communities, should not be limited to the Government Gazette, but should include suitable media such as radio, farmer’s associations, catchment forums and water user associations, as well as informing other spheres of government who may be active in the area. In addition to inviting and responding to comments on the GA notice, the responsible authority would need to encourage and support the uptake of water that is set aside under a GA. As part of the public participation process it is important to communicate that once a GA is taken up it has the same legal standing as a license and is not considered a ‘second class’ right.

## **5.2 Cooperative governance**

The applicability of GAs in the agricultural sector needs to be seen in the context of wider initiatives that work together to promote the productive use of water and more broadly to support agrarian reform. An entitlement to use water is by no means the only requirement for ensuring poverty alleviation and the equitable use of water for productive purposes. Other factors such as the availability of land, financial resources, skills, and markets play a pivotal role. As with many of the water allocation reform initiatives, implementation of GAs needs to be planned in cooperation with other support programmes and government initiatives.

A GA authorises the water use and not the activity. The user still needs to obtain the authorisations required under any other applicable laws. Because GA’s place a significant emphasis on promoting the productive use of water, some consideration needs be given to other laws before issuing a GA. For example, GAs should not be authorised in areas where a particular activity is likely to be in contravention of environmental legislation, such as the National Environmental Management Act.

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<sup>25</sup> Francois du Bois, ‘Water Rights and the Limits of environmental Law’, 6 *Journal of Environmental Law*. 73, 83 (1989).

<sup>26</sup> See note 24 above.

### **5.3 Defining the resource and the volume of water to be authorised**

A GA notice should specify an upper limit for the cumulative use of water, in which case the GA will operate on a first-come-first-service basis up until the upper limit is reached. The cumulative upper limit of the GA needs to be developed based on an assessment of the available resource, the likelihood for productive use under the GA, and the demands from other users. The volume of water authorised should be determined as a volume or a rate of abstraction and not in terms of irrigated area or the size of the property

The GA notice should also specify an individual volumetric cap, which could be based on an estimate of the minimum sustainable yield of the specific resource. The individual cap should be determined based on the most likely activity within the area (e.g. the minimum irrigated area required for the sustainable cultivation of the most likely crop) but the user should be afforded the flexibility to change the activity, provided the water use remains within the suggested volume and rate of abstraction. The individual cap and the cumulative cap would need to be monitored to assess the impact on the resource.

The conditions of the GA notice should allow for a regular review and amendment of the condition of the GA. If the uptake of the GA is more than was anticipated, the notice may need to be reviewed at the specified period and amended (i.e. the uptake period could be shortened or the individual cap reduced for those who have not yet taken up the use). Once the GA is taken up, within the conditions of the notice, it becomes a legally authorised use with similar legal standing as a licence.

### **5.4 Ensuring effective monitoring**

The existing GAs require that all users conduct a monitoring programme that regularly measures the quantity and quality of water used under the GA. Many of the users that could qualify for category specific GAs may not have the capacity to effectively monitor their water use. Direct measurement requires a capital expenditure for the provision and fitting of equipment, as well as the infrastructure and resources required for meter readings, meter calibration and meter maintenance. Due to the costs involved, the responsible authority would be required to take on some of the responsibility of monitoring the uptake of water authorised under a GA.

### **5.5 Time frame for uptake, registration and the review period**

A GA is issued for a specified time period after which it is subject to review. The existing National GAs have a review period of five years, but in situations where water is likely to be taken up quickly or where the DWAF needs to monitor the uptake more carefully, this review period could be shortened. During the specified time period anybody who is eligible for the GA may take up the water.

At the end of the specified time period, the GA is reviewed. At this point the responsible authority can consider the extent of the uptake of the GA, and consider if there have been any changes to the available resource or to the type of activity authorised under the GA. The GA can then be closed, extended in its current form, or re-issued with different conditions for a further time period. In some cases, the nature of the activity may require the user to now apply for a licence. In all cases, the users who have already taken up their use, under the original GA, can continue to use that water subject to the conditions of the original GA. If a total cap for the uptake of the GA has been reached, a notice must be published stating the withdrawal of the GA.

## **5.6 Trading**

During the period of uptake of a GA, there is no incentive to trade the water authorised under that GA as other users in that category could take up the use without needing to trade. However, once the GA is closed and no further uptake of the GA to new users is permitted, a user could trade their entitlement to a new user within the authorised category. Trading a GA to a user outside of the defined category would require more careful consideration to ensure that the water does not impact on the equitable allocation or efficient and effective use of water in the catchment.

The trading limitation associated with GAs needs to be clearly communicated to potential beneficiaries as it could present a limitation to prospective financiers who may want to use a water entitlement as collateral for loans. The fact that the entitlement can only be traded within the specified category may be a disadvantage in cases where financiers are seeking to use a water entitlement as collateral for loans. This aspect will need to be clarified and clearly communicated to beneficiaries so that they understand the advantages and disadvantages of different entitlement options.

## **6. CONCLUSION**

The South African national government has a role to act as public trustee of the nation's water resources. This requires that the State give effect to its constitutional obligation to ensure equitable access to water. GAs provide a tool to promote water allocation reform and to ensure more equitable access by marginalised and dis-empowered sectors of society. Due to the fact that they assist in ring fencing water during the compulsory licensing process, GAs facilitate a phased approach to implementation, particularly in situations where the poor may not be immediately capacitated to productively use the water. The process could assist the DWAF in acting in the public interest, without reproducing existing relations of unequal power and authority. The decision to issue a GA requires a balanced understanding of the requirement to ensure gender and racial equity, while at the same time understanding the cumulative impact on the resource and existing users. Although GAs present a means of reducing some of the administrative burden on the responsible authority and the application, they also present their own challenges in defining, implementing and monitoring uptake. Some of these have been outlined in this paper but many more will be identified during the compulsory licensing process.

In light of the challenges that face the compulsory licensing process and the Water Allocation Reform Programme as whole, there is often a tendency to conclude that it is all too complex, and administratively overwhelming, with too many trade offs and choices to be made. There is often a sense that it is easier and more politically safe to maintain current polices and practices, without risking new approaches. However, in the current South African political environment, doing nothing can no longer be seen as an option, a preferred approach is to move forward incrementally, while continually monitoring and adapting approaches as lessons are learned.

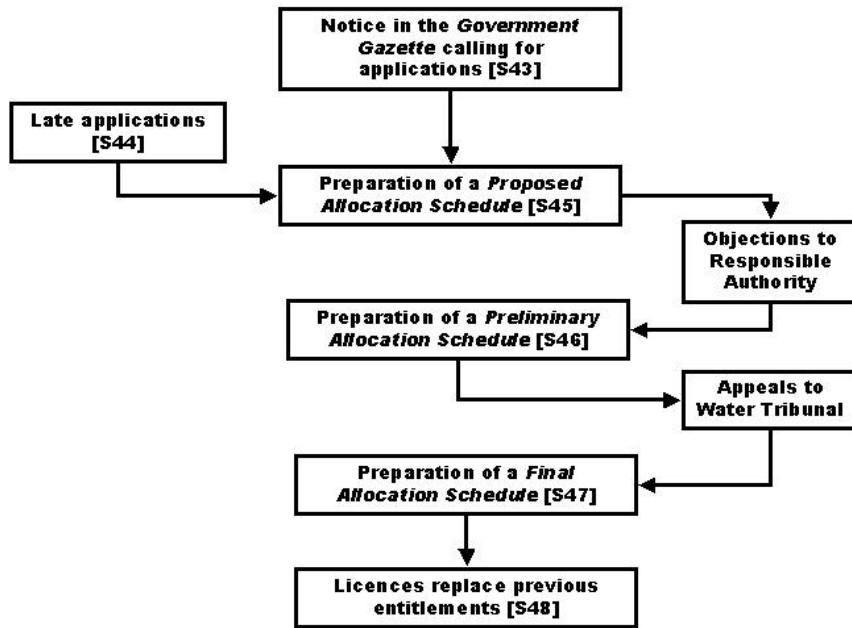
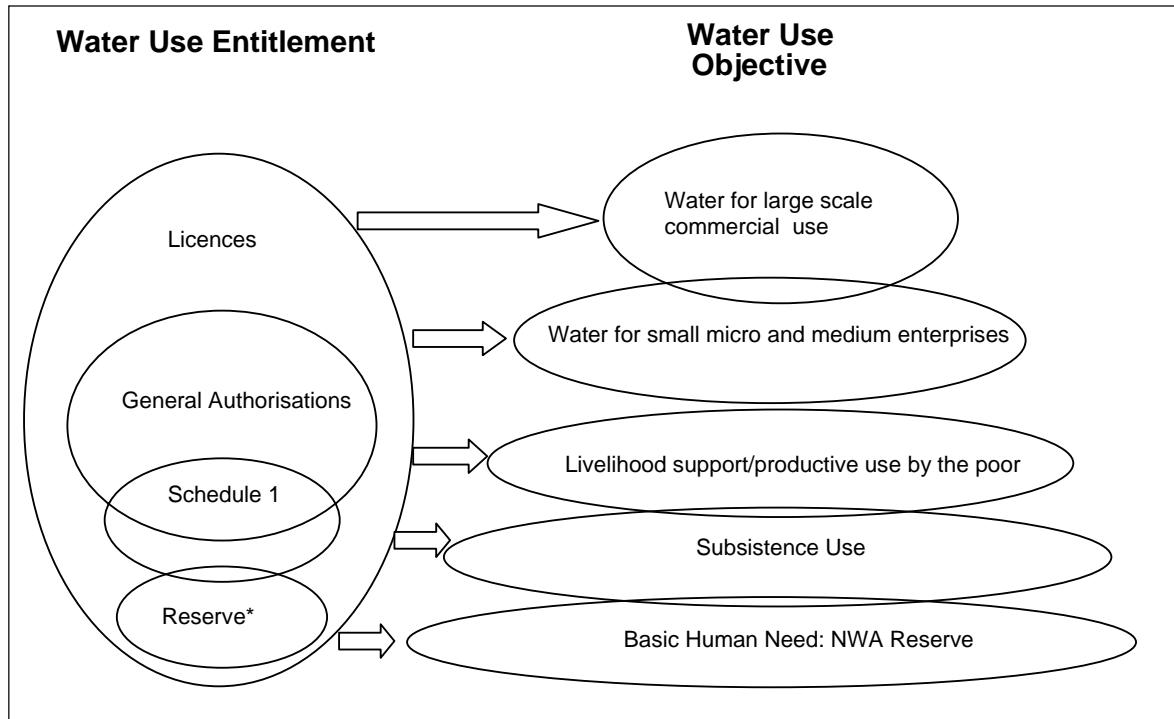


Figure 2: The compulsory licensing process as outlined in Sections 43 to 48 of the National Water Act.



\*Note that the allocation to the BHN component of the Reserve is not an entitlement mechanism, but is a right guaranteed in the Constitution and the NWA. It is included in this diagram to indicate that, in certain areas, the only water that people are entitled to is the BHN Reserve. This is either provided through basic services, in which case it is covered in the licence to the relevant Water Service Provider, or in rural areas it is contained in the Reserve requirements of the local water resource.

Figure 1: Water Use Objectives and Water Use Entitlements

Figure 3: Regional User Specific GAs as Part of Compulsory Licensing

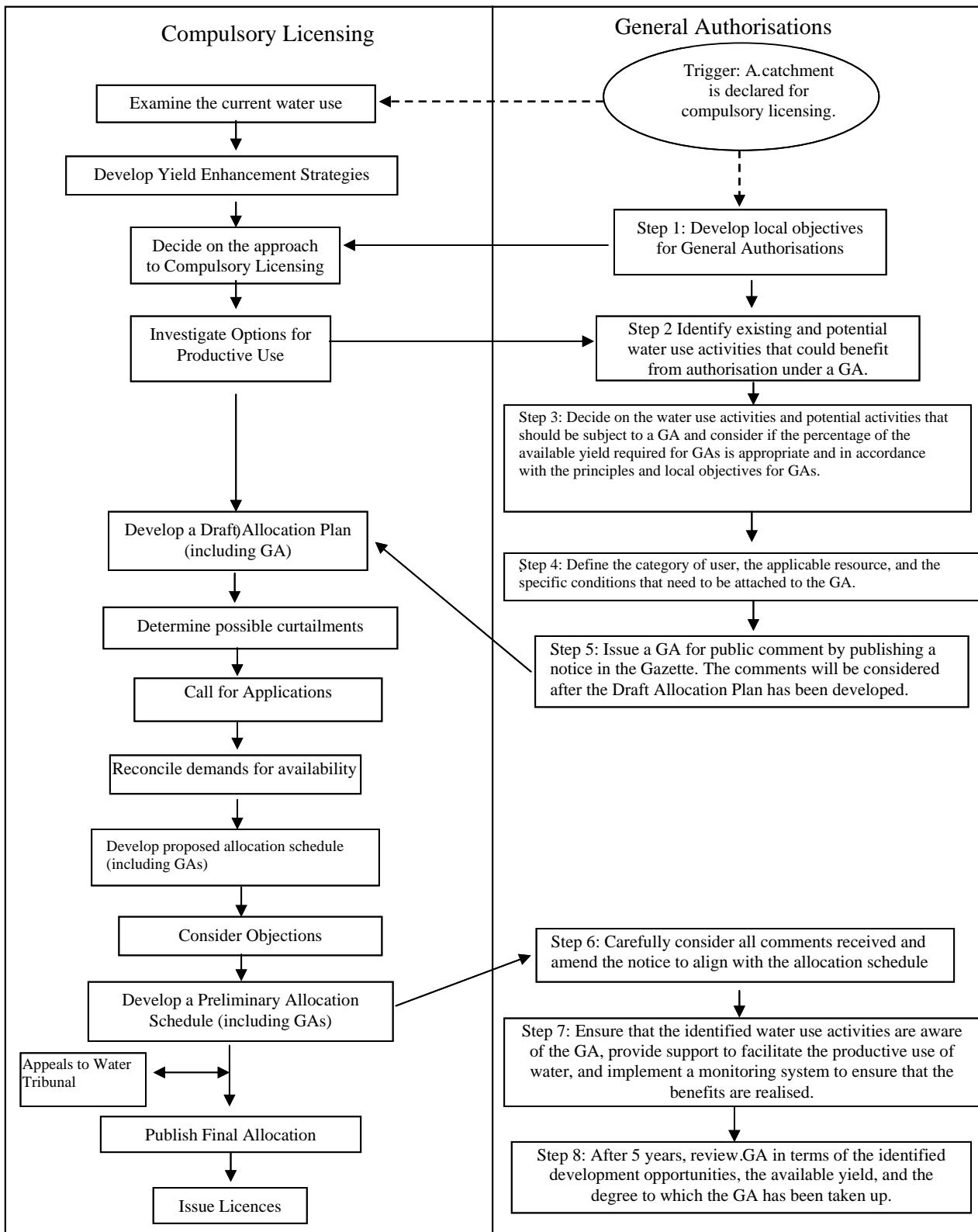


Table 1. Examples of where a category specific GAs may be applicable.

Communal food gardens for schools, churches or women's groups	There are many cases where community groups have come together to use water productively by growing vegetables and other staple food on small plots of land. These initiatives are primarily aimed at providing food security and can therefore be considered as Schedule 1 use. In some cases, however, these initiatives are intended for commercial purposes to provide an alternative form of income. These initiatives could be authorised through a category specific GA, particularly in cases where the resource is clearly identified such as a specific borehole or stream.
Small-scale forestry	All commercial forestry is defined as a Stream Flow Reduction Activity and therefore requires a water use licence under the NWA. Small-scale forestry, however, provides a potential opportunity for poverty alleviation and livelihood support through the development of small-scale woodlots. A category specific GA could be considered to encourage the development of small-scale forestry in areas that have been identified as having potential for small-scale forestry.
Existing small-scale users in the tribal areas	There are a number of existing small-scale users in the tribal areas. These users are often known to the DWAF and would qualify as existing lawful users in many cases. There are, however, potential benefits to incorporating these users into the formal water use authorisation process, particularly in the case of compulsory licensing.. This would give the DWAF a greater degree of understanding of existing resource use.
The beneficiaries of land reform	The land reform process has the potential to facilitate significant redress in the equitable access to water in South Africa. In many cases land under a land claim has an existing water use entitlement. When the land is transferred, it is important that the water use entitlement is also transferred and it is the joint responsibility of the DWAF and the Department of Land Affairs to ensure that water is not traded off the land prior to the transfer. After transfer, and particularly in the case of compulsory licensing, it will be necessary to convert the existing lawful use into a licence, but in some cases the final beneficiaries of the land reform may not be clearly identified or may consist of a number of smaller users. In this case, a category specific GA could be considered as an alternative to issuing many smaller licences to the individual users.
In support of traditional and customary law <sup>27</sup>	In accordance with Section 211 (1) and 2 of the Constitution, the institution, status and role of traditional leadership, according to customary law are recognised subject to the Constitution and the courts must apply customary law. <sup>28</sup> The new constitution poses a variety of legal and political problems for traditional leaders as their undifferentiated powers of governance under customary law might be in conflict with many aspects of the new order. The constitution confirmed the status quo of traditional leaders with the qualification that the powers of the leaders are subject to fundamental rights and legislative control. There is currently no legislation stipulating the role that traditional leaders should play in managing water resources and the details of how customary law complies with the constitution is still to be confirmed through courts and legislation. As this emerges, category specific GAs could be seen as tools to give effect to customary law, in cases where it promotes sustainable and efficient use in accordance with the NWA.

27 Hubert Thompson, Water Law: A Practical Approach to Resource Management and the Provision of Services, 126 (Cape Town: Juta & Co, 2006).

28 See note 27 above.

### **Box 1 Guidelines for Water Allocation Reform<sup>29</sup>**

- Guideline 1. A primary focus of water allocation processes will be to redress past imbalances in water allocations to Historically Disadvantaged Individuals (HDIs)
- Guideline 2. The water allocation process must be supported by capacity development programmes that support the use of water to improved livelihoods and to support the productive and responsible use of water by all users. These capacity development programmes should also help HDIs and the poor to participate equitably in the process of informing the allocation of water.
- Guideline 3. The water allocation process will contribute to Broad-Based Black Economic Empowerment and gender equity by facilitating access by black- and women-owned enterprises to water.
- Guideline 4. The water allocation process responses to local, provincial and national planning initiatives, as well as to South Africa's international obligations and regional Southern African Development Community initiatives.
- Guideline 5. The water allocation process will be undertaken in a fair, reasonable and consistent manner and existing lawful uses will not be arbitrarily curtailed.
- Guideline 6. The water allocation process will give effect to the protection of water resources as outlined in the NWA by promoting the phased attainment of both developmental and environmental objectives.
- Guideline 7. Innovative mechanisms that reduce the administrative burden of authorising water use, while still supporting its productive use, as well as the effective management and protection of water resources will be developed.

### **Box 2 Considerations for issue of general authorisations and licences (Section 27 of the NWA)**

27. (1) In issuing a general authorisation or licence a responsible authority must take into account all relevant factors, including -
- (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 socio-economic impact –
    - (i) of the water use or uses if authorised; or
    - (ii) of the failure to authorise the water use or uses;
  - (e) any catchment management strategy applicable to the relevant water resource;
  - (f) the likely effect of the water use to be authorised on the water resource and on other water users;
  - (g) the class and the resource quality objectives of the water resource;
  - (h) investments already made and to be made by the water user in respect of the water use in question;
  - (i) the strategic importance of the water use to be authorised;
  - (j) the quality of water in the water resource which may be required for the Reserve and for meeting international obligations; and
  - (k) the probable duration of any undertaking for which a water use is to be authorised.

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<sup>29</sup> A strategy for Water Allocation Reform in South Africa, available online at [www.dwaf.gov.za/WAR](http://www.dwaf.gov.za/WAR).