



The Chair: Portfolio Committee on Water and Environmental Affairs  
National Assembly, Parliament  
PO Box 15  
Cape Town  
8000  
Attention: Ms Tyhileka Madubela  
Committee Co-ordinator  
Email: [tmadubela@parliament.gov.za](mailto:tmadubela@parliament.gov.za)

Copies to:

Mr Helgard Muller [MullerH@dwa.gov.za](mailto:MullerH@dwa.gov.za)  
Mr Fred van Zyl [SchoemanW@dwa.gov.za](mailto:SchoemanW@dwa.gov.za)  
Department of Water Affairs

18 October 2012

Dear Advocate de Lange

## **DRAFT NATIONAL WATER RESOURCE STRATEGY 2<sup>ND</sup> EDITION**

### **Introduction**

1. In this document, the Centre for Environmental Rights (CER) submits comments on the Draft Second Edition of the National Water Resource Strategy 2 (“draft NWRS2”) published by the Minister of Water and Environmental Affairs on 7 September 2012 in terms of the National Water Act, 1998 (“NWA”).<sup>1</sup>
2. The Centre for Environmental Rights is a non-profit company and law clinic based in Cape Town. The Centre was established in October 2009 by eight prominent civil society organisations (CSOs) in South Africa’s environmental and environmental justice sector to provide legal and related support to environmental CSOs and communities. The Centre’s mission is to advance environmental rights in South Africa, and its vision is stronger civil society participation in environmental governance. To achieve this, the Centre supports and represents civil society organisations and communities who wish to protect their environmental rights, and engages in legal research, advocacy and litigation to achieve strategic change.
3. As you are most likely aware, the draft NWRS2 is several years overdue. While we understand the constraints within the DWA that have led to this delay, we also cannot condone the significant non-compliance with the requirements of the NWA. The NWRS is a crucial document that *“provides the framework for the protection, use, development, conservation, management and control of water resources for the country as a whole. It also provides the framework within which water will be managed at regional or catchment level, in defined water management areas. The national water resource strategy, which must be formally reviewed from time to time, is binding on all authorities and institutions exercising powers or performing duties under this Act.”*<sup>2</sup> The delay in reviewing and updating the NWRS has contributed to the significant challenges currently experienced in the management of water resources in South Africa, which in some instances, have reached crisis proportions.

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<sup>1</sup> GN 721 in GG 35648

<sup>2</sup> NWA Chapter 2 Part 1

4. The scope of this submission is not to provide comment on the entire draft NWRS2, but to:
  - a. identify key legal, regulatory and governance matters in the draft NWRS2 that are aligned with the recommendations made by CER in its March 2012 report *Stop Treading Water*, and which we therefore support;
  - b. identify instances where the draft NWRS2 contradicts or fails to address our recommendations, and in respect of which we therefore submit the draft NWRS2 should be amended;
  - c. highlight other issues in the draft NWRS2 that will impact on water law, regulation or governance and implementation, which is of particular relevance to the Portfolio Committee.

### **Stop Treading Water**

5. In March 2012, the CER published a report entitled “Stop Treading Water: What Civil Society can do to get Water Governance in South Africa Back on Track”<sup>3</sup> (*Stop Treading Water*). This report (a copy of which is submitted herewith) was compiled pursuant to a gathering of key experts in water governance, together with civil society representatives, convened by the CER in November 2011. These experts and representatives’ inputs were the primary source of this report.
6. *Stop Treading Water* identified some of the most pressing challenges for water governance, some of which are also recognised in the draft NWRS2, as:
  - a. many of the tools for the protection and use of water in the NWA are overly complex, causing significant delays in implementation;
  - b. the slow processing of applications for water use licences (WULs) and water use authorisations, which are also plagued by procedural and substantive defects;
  - c. the delay in rolling out water management institutions such as catchment management agencies (CMAs), and the democratisation of water resource management (WRM) by the devolution of decision-making to these institutions;
  - d. the lack of progress in realisation of rights around access to water and sanitation that has reached crisis proportions in many parts of the country, and is usually blamed on implementation failures by local government;
  - e. the lack of political and institutional priority given to compliance, monitoring and enforcement (“CME”) and the limitations of criminal prosecution to punish and disincentivise non-compliance;
  - f. lack of access to, and poor operation of, the Water Tribunal, which infringes the constitutional right to access to courts; and
  - g. the lack of management stability and organisational integrity within the Department of Water Affairs (DWA).
7. In order to make a positive impact on water governance, the report recommended, *inter alia*:
  - a. civil society co-ordination, empowerment and strategy development around water governance as well as strong participation in reviews and amendment of key strategies and legislation;
  - b. the promotion of institutional stability within the DWA;
  - c. the improvement of cooperative governance affecting WRM by:
    - i. support to local authorities;
    - ii. asserting the water mandate in decisions on mining and agriculture;
  - d. improved access to information and oversight of water governance;
  - e. the roll-out, empowerment and resourcing of statutory and non-regulatory participatory governance institutions like catchment management agencies (CMAs) and catchment management forums (CMFs);
  - f. implementation of key statutory WRM tools, appropriately simplified and prioritised;

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<sup>3</sup> <http://cer.org.za/themes/water-governance/stop-treading-water/>

- g. improvement of the quality of integrated WULs and a review of general authorisations;
- h. legislative amendments and law reform, including strengthening public participation in authorisations;
- i. strengthening CME through greater resourcing of the Blue Scorpions, and the incorporation of administrative penalties for non-compliance; and
- j. a re-haul of the composition and operating rules of the Water Tribunal.

8. We deal with our comments on the draft NWRS2 in the order of our recommendations listed above.

### **DWA institutional stability**

9. The draft NWRS2 acknowledges the lack of appropriate skills and capability in the right places within the DWA, and views lack of leadership, governance and oversight as critical to the DWA's success.
- a. The draft NWRS2 acknowledges that the loss of institutional knowledge, experience and competence in the water sector limits its ability to perform optimally. Although recognised as a challenge, it envisages drawing on a range of skills, knowledge and capability in the private sector and civil society for the implementation of the draft NWRS2.<sup>4</sup> The draft NWRS2 also includes a key strategic action in terms of which DWA and CMAs will "appoint appropriate staff, in both leadership and technical positions, to ensure that it can play this leadership role".<sup>5</sup>
  - b. A key element proposed is for senior management to play a strategic role in motivating staff, ensuring that all employees understand and support the spirit and substance of the Constitution of the Republic of South Africa, 1996 and water policy and ensuring that all employees understand and implement draft NWRS2.<sup>6</sup>
  - c. Core Strategy 8 of the draft NWRS2 envisages strengthening DWA's planning capacity, its leadership and associated capacity; separating policy development from operational implementation activities; accelerating the establishment of CMAs and providing them with adequate resources; and allocating adequate resources to build competencies.<sup>7</sup>
  - d. Enabling Strategy 2 of the draft NWRS2 focuses on water sector capacity-building,<sup>8</sup> and provides a comprehensive strategic plan for capacity-building, education and training with the overall objective of putting in place a well-coordinated coherent capacity-building system within 18 months after the adoption of draft NWRS2.
10. These ambitious proposals have the potential to create a department with the significantly improved skills and leadership. However, the draft NWRS2 needs to be more specific about:
- a. securing the financial and human resources to implement these proposals;
  - b. how the DWA will go about drawing on the skills, knowledge and capability in the private sector and civil society without compromising its independence;
  - c. ensuring that such skills, knowledge and capability will be transferred to the DWA from these outside experts;
  - d. addressing the perpetual challenge of staff turnover and skills retention.

### **Cooperative governance: Support to local authorities and asserting the water mandate, particularly in relation to mining and agriculture**

11. In *Stop Treading Water*, the CER recommended the improvement of cooperative governance affecting WRM by (a) effective support to local authorities, and (b) asserting the water mandate in decisions on mining and agriculture.

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<sup>4</sup> At 17

<sup>5</sup> At 84

<sup>6</sup> Implementing NWRS2, New Paradigm Key Elements.100

<sup>7</sup> Core Strategy 8: Achieving effective water governance and Developmental Water Management 78-79

<sup>8</sup> At 172

12. Although the draft NWRS2 states that water is valued and recognised as a strategic national asset, which means that water and its management must form an integral part of the development planning and framework, it is thin on strategic actions and mechanisms that will:
- a. make its support to local authorities more effective, despite the draft NWRS2 itself quite correctly characterising weak performance in the management of water supply and sanitation services by many municipalities - which compromises the extension of services to the poor and results in unreliable and unsafe services - as one of the key drivers of change;<sup>9</sup> and
  - b. ensure that the DWA plays a pivotal role in decisions about development, particularly mining and agriculture. For example, the draft NWRS2 says that “DWA and CMAs will proactively engage with relevant national and provincial departments and the National Planning Commission to ensure that water is included in all relevant sector strategies at national and provincial levels.” The Draft NWRS2 should provide details of mechanisms to enforce this engagement and inclusion.
13. In relation to local government, *Stop Treading Water* recommended implementation of the interventions contained in the important DWA document “Enhanced Local Government Support Approach” of 2011. We do not see any reference to this document in the draft NWRS2. *Stop Treading Water* recommendations that are not covered in the draft NWRS2, and that we would have liked to see there, include:
- a. encouraging National Treasury to freeze funding to a local authority and/or take appropriate steps (including supervision) in cases of poor performance and misallocation of funds; and
  - b. increasing civil society participation in monitoring of waste water treatment.
14. Some suggestions in the draft NWRS2 that we support, despite the lack of details:
- a. that current budgets need to be “at least doubled” to ensure water security and minimise negative impacts on growth and development.<sup>10</sup> Many of the interventions in *Stop Treading Water* can only be implemented with a significantly increased budget for the DWA;
  - b. the establishment of an intergovernmental forum to facilitate improved inter-sectoral water-related governance and planning between departments.<sup>11</sup> According to the draft NWRS2, the Inter-Departmental Liaison Committee on Inland Water Ecosystems will, within 5 years, be a well-established forum for enhanced co-operation and decision-making.<sup>12</sup> Essential is that this committee is given the necessary profile and influence, for example by making consultation with this Committee mandatory in any big infrastructure developments;
  - c. support for the implementation and enforcement of the Conservation of Agricultural Resources Act, 1983 (CARA) and the provision of formal mechanisms for strengthening collaboration around managing and conserving freshwater ecosystems between DWA, the Department of Environmental Affairs (DEA), the Department of Agriculture, Forestry and Fisheries (DAFF) and other key government departments; and
  - d. targets for water use efficiency by both the agriculture and mining sectors (which presumably will translate into licence conditions) and targets for water reallocation to historically disadvantaged water users.<sup>13</sup>
15. The draft NWRS2 suggests a limited role for provincial conservation authorities, including commenting on development applications, such as environmental impact assessments and mining and prospecting applications; providing specialist freshwater ecological input, and advising on mitigation measures and

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<sup>9</sup> At 199

<sup>10</sup> At 56

<sup>11</sup> 52 at 90

<sup>12</sup> At 110

<sup>13</sup> At 27

appropriate river and wetland buffers.<sup>14</sup> This input by provincial conservation authorities should rather be made mandatory.

### Access to information and oversight

16. *Stop Treading Water* made a number of recommendations for improved access to information and oversight. Only two of these recommendations were included in the draft NWRS2, namely:

- a. Greater oversight and public reporting on the management of revenue and expenditure of the Water Trading Entity: Core Strategy 8<sup>15</sup> of the draft NWRS2 emphasises the importance of allocation of financial resources for ensuring effective water governance and calls for transparency as a prerequisite for effective budgeting and financial management, which means that water sector institutions must make information about their budgets available to the public. It also requires that inclusive stakeholder participation and consultation be supported<sup>16</sup>. Internal audit capacity is to be strengthened to ensure financial accountability. It is recommended that specific provision be made for public reporting on the management of revenue and expenditure of the Water Trading Entity.
- b. Compliance information systems: Enabling Strategy 3<sup>17</sup> provides a plan of action on how the legal framework for monitoring and information - which already exists - can be implemented. This includes: (1) investment in information systems; (2) monitoring governance; and (3) access to and dissemination or sharing of water data and information with government, the private sector and the general public. In particular, it provides for ensuring that the largest possible collection of high quality data and information for supporting, *inter alia*, regulation, monitoring and compliance enforcement, are identified and made accessible to public and private institutions.<sup>18</sup> This supports CER's recommendations and can facilitate, *inter alia*, the publication of an annual National Water Compliance and Enforcement Report.

17. The following recommendations on access to information and oversight from *Stop Treading Water* should be incorporated in the draft NWRS2 are:

- a. Dramatically improved implementation of the Promotion of Access to Information Act, 2000 ("PAIA") by the DWA. The training and management programmes envisaged throughout the draft NWRS2 should include specific training in PAIA and the principles and procedures provided for in the Promotion of Administrative Justice Act, 2000, so that department officials act procedurally fair with the public, and respond timeously and accurately to requests for information.
- b. The administrative burden imposed by access to information requests under PAIA would be reduced if the status of licences and licence applications were readily accessible on the DWA website (as foreseen in s.139(2)(d) of the NWA), so as to enable meaningful public participation.
- c. Bodies like the South African Human Rights Commission, the Public Protector and Water Tribunal should be encouraged to fulfil a watchdog function in relation to water governance by the DWA.
- d. The updated Sector Education Training Authority-aligned Water Care Works Classification System and Registration Regulations should be promulgated.
- e. The publication of an annual National Water Compliance and Enforcement Report, similar to that produced by the DEA and the other agencies that make up the Environmental Management Inspectorate. The compilation of such a report will provide invaluable information for management around the state of compliance with the NWA, as well as designing interventions for more effective compliance monitoring and enforcement.
- f. Decisions of the Water Tribunal should be tracked, distributed and analysed.

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<sup>14</sup> At 119

<sup>15</sup> 77 Core Strategy 8: Achieving effective water governance and DWM

<sup>16</sup> At 79

<sup>17</sup> 176 Enabling Strategy 3: Monitoring and Information

<sup>18</sup> Enabling Strategy 3: Monitoring and Information at 179

- g. The public disclosure of all State tender processes related to establishing water infrastructure and waste water treatment facilities.

### **Participatory Governance: CMAs and CMFs**

18. *Stop Treading Water* recommended the roll-out, empowerment and resourcing of statutory and non-regulatory participatory governance institutions like CMAs and CMFs.

19. In relation to participatory governance of CMAs, we welcome the following aspects of the draft NWRS2:

- a. The acceleration of the establishment of 9 CMAs will be accelerated, and resourcing of the CMAs to perform their roles as stated in the NWA.<sup>19</sup> DWA will establish a dedicated high-level team to drive the establishment of the 9 CMAs by 2015,<sup>20</sup> and a detailed programme for each CMA will be developed for the progressive delegation of functions from DWA.<sup>21</sup> The establishment of CMAs in priority areas will be fast-tracked.<sup>22</sup> The aim as set out in the draft NWRS2 is to have fully functional CMAs that can do the bulk of regulation at catchment level and that transfer of regulatory responsibility is effected as soon as possible.<sup>23</sup>
- b. The development of a policy framework for the provision of financial and technical support to CMAs and a water governance framework for effective oversight and support to CMAs.<sup>24</sup>
- c. DWA, over the next 3 years, will delegate WULs to at least 4 CMAs as they are established and will develop relevant capacity.<sup>25</sup>

20. In relation to participatory governance of CMFs, the CER recommended the incorporation of CMFs into CMA architecture and the recognition of legal status and provision of administrative and legal support for CMFs. CMFs are voluntary bodies, not specifically mentioned in the NWA, but dealt with in NWRS1, which provide a focus for public consultation and for integrating the water-related activities of other non-governmental organisations and civil society organisations. The only direct references to CMFs in the NWRS2 are the following:

- a. The draft NWRS2 proposes that DWA and CMAs will ensure transparent and inclusive stakeholder participation in water governance through CMFs and other appropriate consultative forums and processes.<sup>26</sup>
- b. The draft NWRS2 actions the allocation of resources for supporting the establishment of CMFs to facilitate stakeholder engagement in WRM.
- c. Dedicated and active involvement in water governance and management structures including national water information, integrated catchment management - including CMA involvement, water user associations (WUAs), water boards as well as planning and management forums.<sup>27</sup> An engagement and response framework has been developed to guide this process

21. Whilst these references recognise the existence of CMFs, they still do not afford CMFs legal status, and it is recommended that the NWA be amended to afford legal status to CMFs as stakeholders. The type of resources to be provided to CMFs i.e. financial and/or human should be spelt out more clearly and quantified in the engagement and response framework.

22. CER recommendations not taken up in the draft NWRS2 include:

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<sup>19</sup> 79 Core Strategy 8: Achieving effective water governance and DWM

<sup>20</sup> 71 at 93

<sup>21</sup> 72 at 93

<sup>22</sup> 200 Strategic actions

<sup>23</sup> At 192

<sup>24</sup> 200 Strategic actions

<sup>25</sup> At 85

<sup>26</sup> 57 at 91

<sup>27</sup> 22, Business, stakeholder and sector involvement framework

- a. that WUAs become sub-catchment management entities accountable to CMAs;
- b. the incorporation of CMFs into CMA architecture;
- c. recognition of legal status and provision of administration and legal support for CMFs;
- d. that community-based organisations, which manage projects closest to the community, be water service providers to facilitate sustainable development in rural areas.

### Implementation of statutory WRM tools

23. *Stop Treading Water* strongly advocates the simplification and prioritisation of implementation of statutory tools, particularly the Reserve determination, classification and verification.
24. The draft NWRS2 proposes a revision of the Reserve and related policy due to the provision of higher levels of service in urban areas and the need to facilitate enabled economic development in support of poverty eradication.<sup>28</sup> It is not clear what is meant by a *revision of the Reserve*: whether it means the legal content of the Reserve or the quantity and quality of the Reserve or both, or the entire Reserve determination methodology. Economic development is not, at present, an element of the Reserve or policy related to the Reserve and an amendment to the NWA will be required to give effect to this. It can be concluded that if a revision of the Reserve is envisaged, as described and for the reasons provided, then the determination thereof will be further complicated and its implementation delayed even further.
25. The Reserve determination process still presents a major challenge and the determination of the ecological Reserve requires advanced reconciliation with existing water situation, uses and water systems management.<sup>29</sup> It is noted repeatedly throughout the draft NWRS2 that, in several water management areas (WMAs), the ecological component of the Reserve is not yet fully implemented, as other water users are given priority. From a review of Part C: Spatial Perspectives,<sup>30</sup> it is clear that, in many instances, the ecological Reserve is not being met. This poses a major threat to ecosystems and their resilience. Moreover, due to the over-emphasis of the current Reserve determination methodology on the ecological reserve, the basic human needs component of the Reserve is not properly determined, which implies that the principles of s.2 of NEMA is not being met by the current reserve determination methodology.
26. This failure to properly implement the basic human needs component of the Reserve demonstrates a fundamental lack of understanding of the significance and legal status of the Reserve. The right to the Reserve is unconditional; all other use is subject to authorisation.<sup>31</sup> It has priority of use which legally cannot be usurped by other users being given priority. “The Minister, the Director-General, an organ of state and a water management institution *must give effect to the Reserve* as determined in this part when exercising any power or performing any duty in term of this Act.”<sup>32</sup>
27. The draft NWRS2’s intention to fast-track the Reserve determination is to be commended.<sup>33</sup> Determination of basic human needs reserve must be properly implemented, the methodology for the determination of the ecological Reserves must be simplified and accelerated by DWA, along with a structured programme to implement Water Resource Classification, and determination of Resource Quality Objectives at a catchment

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<sup>28</sup> At 40

<sup>29</sup> At 68

<sup>30</sup> At 207

<sup>31</sup> Principle 3 of the NWA: “[t]here shall be no ownership of water but only a right (for environmental and basic human needs) or an authorisation for its use.” Principle 8 defines the Basic Human Needs Reserve (BHNR): “The water required to ensure that all people have access to sufficient water shall be reserved.” Principle 9 elaborates the Ecological Reserve (ER): The quantity, quality and reliability of water required to *maintain the ecological functions on which humans depend* shall be reserved so that the human use of water does not individually or cumulatively compromise the long-term sustainability of aquatic and associated ecosystems.

<sup>32</sup> NWA, Part 3, s16-17

<sup>33</sup> At 85

scale.<sup>34</sup> A programme for monitoring the status of implementation of the Reserve and for monitoring the impacts on ecosystems will be developed jointly by DWA, DEA and the WRC. Implementation of this monitoring programme will begin by 2015.<sup>35</sup> The delay in only setting up a monitoring programme in 2015 is not understood as the NWA commenced in October 1998, some 14 years ago.

28. Objective 1 for the implementation of water resource classification, the Reserve and Resource Quality Objectives at catchment scale sets as a 5 year target that at least 4 stressed catchments in WMAs have classification and Reserve determination completed and implemented.<sup>36</sup> There is no time-scale set for the other Reserve determinations, other than that the 20 year goal is that the Reserve is met.<sup>37</sup> This is a critical milestone which must be determined and included in the final NWRS2.
29. Although the draft NWRS2 does set, as a strategic action, simplifying the procedures for- and acceleration of - Reserve determination and classification of rivers<sup>38</sup> (which is supported by the CER's recommendation) it fails to give much content or detail to this critical action. It is recommended that this be urgently addressed, as failure to do so will further exacerbate an already critical situation.
30. The draft NWRS2 states that, so far only 20% of water users have been verified, which makes it difficult to effectively regulate water resources.<sup>39</sup> It proposes, as a strategic action, verification of all groundwater use within a 5 year period,<sup>40</sup> which supports CER's recommendation. It also lists as a strategic action, the commencement and completion of water use validation and verification projects country-wide. This does not include a time-frame and it would assist planning if it were to, given the backlog.
31. The draft NWRS2 supports CER recommendations for the implementation of the Waste Discharge Charge System,<sup>41</sup> although no time-frame is set for its implementation.

#### **Water use authorisation: integrated licensing**

32. The draft NWRS2 recognises that water use authorisation has become a critical business risk which has to be managed. It is no longer a routine matter and, given the recognition of the human right to water, water stewardship is a key aspect of business strategy, governance and operations for both direct and indirect water use.<sup>42</sup>
33. An objective set out in the implementation and support strategy<sup>43</sup> for the core strategy of protection of water resources is the integration of freshwater ecosystem priority areas (FEPAs) into water resource planning and decision-making at national and regional levels, as well as within CMAs within 5 years.<sup>44</sup> A thorough assessment of the ecological condition of the FEPAs is called for with FEPA management guidelines to be used as a starting point for assessing the impact of the proposed application of the FEPAs. This will support the protection of the ecological condition of the water resource implicated, as FEPAs will inform consideration of WUL applications, not only in the application itself, but also in considering the conditions to be imposed on granting the WUL with regard to water quality, quantity and impact of use on the resource. In particular, stringent ecological requirements should be included in the conditions to prevent degradation of the resource and allow for rehabilitation of FEPAs, where necessary.<sup>45</sup>

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<sup>34</sup> At 68

<sup>35</sup> At 88

<sup>36</sup> At 113

<sup>37</sup> At 108 Operational Objectives 1.

<sup>38</sup> At 121

<sup>39</sup> At 190

<sup>40</sup> 147 Policy, Legislation and Regulation

<sup>41</sup> 159, Technical Strategy 7: Water Re-Use

<sup>42</sup> At 21

<sup>43</sup> At 114

<sup>44</sup> Milestone indicator at 115

<sup>45</sup> 117, Situational analysis

34. Under the same heading, recognition is given to the key issue of the delayed implementation of regulatory instruments – including: (a) a backlog in issuing licenses, which results in water use taking place without proper authorisation and regulation; and (b) illegal water use.<sup>46</sup> Due to the slow process of licensing water use so far, only 10% of water is used in terms of licences, and 57% of water services authorities did not have appropriate licences for wastewater treatment works in 2007.<sup>47</sup>
35. Core Strategy 8 of the draft NWRS2<sup>48</sup> deals with achieving effective water governance and recognises that, *inter alia*, a one-size-fits-all approach in regulation is not appropriate in the South African context and that the focus should be on a targeted approach to high-impact uses, where the most gains can be achieved with limited resources. This supports a number of the recommendations by CER with regard to the improvement of water governance and regulation, and specifically with regard to the revision of general authorisations to include more water uses with minimal impacts, and the improvement of the quality of integrated WULs.
36. Proposed actions which support CER’s recommendations are included in Core Strategy 8 and include: strengthening DWA’s capacity, extending the water governance model to support stronger leadership and regulation, allocation of adequate resources to build competence for the regulation of water use, and supporting inclusive stakeholder participation in water governance. Key strategic actions include:
- a. actions to improve and strengthen the leadership role, capacity and resources of DWA and CMAs (as mentioned under heading “DWA’s Institutional Stability” above);
  - b. DWA will clear the backlog in WULs by 2016 and will put in place streamlined processes to ensure that licence applications are dealt with in a reasonable time.<sup>49</sup> It is recommended that every effort should be made to reduce the time suggested for clearing of the backlog, but, at the same time, this should not compromise the thorough consideration of all aspects of the applications. Possibly priority should be given to expediting Integrated WUL (IWUL) applications and those applications for high impact uses;
  - c. greater use will be made of General Authorisations to reduce the burden of licence applications on the DWA.<sup>50</sup> It is recommended that this should include a thorough revision, expansion and republication of general authorisations;
  - d. DWA will fast-track Reserve determinations,<sup>51</sup> so that this does not become a bottleneck in the water use authorisation process;
  - e. over the next 3 years, DWA will delegate water use licensing to at least 4 CMAs.
37. With regard to groundwater protection, strategic actions include:
- a. processing and evaluation of all groundwater use licence applications within 6 months;
  - b. ensuring that all groundwater users are registered and possess water use licences (no time limit has been imposed and it is recommended that this be done); and
  - c. verifying existing groundwater use within a 5 year time period.<sup>52</sup>
38. Under Governance Strategy 2 for Regulation of Water Resources,<sup>53</sup> the need to address an efficient water use authorisation process is again highlighted as a key issue. Proposed strategic actions include:
- a. the development of a dedicated water use authorisation process in DWA (including issuing of licences);
  - b. acceleration and streamlining the issuing of licences;

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<sup>46</sup> At 107

<sup>47</sup> 190

<sup>48</sup> Achieving Effective Water Governance and Developmental Water Management at 77

<sup>49</sup> 9.13 at 85

<sup>50</sup> 9.13 at 85

<sup>51</sup> 9.13 at 85

<sup>52</sup> Technical Strategy 4: Groundwater Development and management at 147

<sup>53</sup> 4.2 at 190 , Chapter Improved Governance Strategies

- c. the application system for all water use authorisations must be drastically improved so that all applications are dealt with within 3 months;
  - d. the implementation of an electronic on-line system;
  - e. the establishment of fully functional monitoring and information management systems to enable access to high quality information;
  - f. involving the public and civil society as partners for regulation; and
  - g. strengthening co-operation between DWA and DEA in the implementation of regulations to optimise use of limited capacity.
39. Unfortunately, the proposed strategic actions provide little detail as to time-frames, content, actors and implementation thereof, and these should be more thoroughly traversed and given content to.
40. Concern is also raised with the proposal that all applications must be dealt with in 3 months. This would require not only adequate, experienced and skilled resources, but the co-operation of all stakeholders and departments. Whilst the importance of an efficient application process is acknowledged, the comments already made in relation to this process are emphasised, i.e. that a thorough consideration of IWULs and the quality of authorisations cannot be compromised to meet set deadlines. A further comment is that the process of speeding up WUL applications may contribute to exacerbate water scarcity - "if there is not enough water, the process cannot be sped up."<sup>54</sup>
41. CER has recommended the following actions to improve the quality of authorisations. None of these are expressly dealt with in the draft NWRS2, and we submit that they should be incorporated:
- a. advocating a policy of outright refusal and referral back of substantially deficient applications for IWULs;
  - b. meticulous record-keeping in all aspects of the IWUL process and public accessibility thereto by means of an online electronic system (though the "online system" proposed by the draft NWRS2 could be developed to make this possible);<sup>55</sup>
  - c. increased use of integrated permitting. Although the CER is aware that the DWA has been part of ongoing negotiations and planning with the DEA and DMR around integrated permitting, particularly for mining, none of this is reflected in the draft NWRS2 - save for a reference that "DWA, DEA and CMA will work together to improve regulation and enforce compliance<sup>56</sup> and the establishing of integrated compliance and enforcement between DEA and DWA";<sup>57</sup>
  - d. peer review mechanisms to ensure integrity of IWULs and independent quality control;
  - e. increased security for obligations arising from IWUL; and<sup>58</sup>
  - f. allowing for public comment on and/or peer review of draft IWULs (the strategic action advocating involvement of public and civil society as partners for regulation is the right approach to support this, and amendment of the NWA to allow for compulsory (as opposed to discretionary) public participation in IWUL applications would give effect to this).

### **Compliance, enforcement and administrative penalties**

42. The draft NWRS2 acknowledges that a critical factor which must be addressed and receive priority attention is inefficient governance, regulation, compliance monitoring and enforcement,<sup>59</sup> and that it has been a weakness in the implementation of NWRS1<sup>60</sup>; and that AMD and municipal wastewater pollution have

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<sup>54</sup> Muller M, Living with Water Scarcity and Ma Vilakazi's Cabbages, *Business Day*, Thursday 6 September 2012

<sup>55</sup> 192, Strategic Actions

<sup>56</sup> 36 at 89

<sup>57</sup> Strategic Action at 121

<sup>58</sup> S30 NWA

<sup>59</sup> v

<sup>60</sup> xii

reached unacceptable levels.<sup>61</sup> Levels of non-compliance with prescribed tolerable ranges at a national scale are at 88%.<sup>62</sup>

43. It acknowledges that very limited capacity exists within the Department to carry out enforcement effectively, which results in weak enforcement of WUL conditions as well as water users continually ignoring directives issued.<sup>63</sup>
44. Core Strategy 7 of the draft NWRS2<sup>64</sup> regards compliance and enforcement of abstraction management as a critical element - this would include improved water use knowledge and affect water loss management. No mention is made of CME for water uses that impacts on water quality, and the over-emphasis on abstraction is not aligned with the Promotion of Administrative Justice Act, 2000 (PAJA).
45. Key strategic actions to give effect to the core strategies and support CER's recommendations are:
- a. for DWA to intensify its CME activities to reduce illegal activities that impact on water quality and the health of aquatic ecosystems. It will be focused on high impact activities in order to achieve the optimal use of limited state resources;<sup>65</sup>
  - b. to ensure implementation of CARA to protect riparian and wetland buffer zones, critical groundwater recharge areas and estuaries;<sup>66</sup>
  - c. DWA and CMAs will put in place improved regulation of water abstraction, including through increasing capacity for CME, and will work in close partnership with the DEA "Green Scorpions";<sup>67</sup>
  - d. DWA, DEA and CMAs will work together to improve regulation and enforce compliance,<sup>68</sup> and the establishing of integrated compliance and enforcement between DEA and DWA;<sup>69</sup>
  - e. DWA and CMAs will develop and implement a targeted regulatory strategy focused on ensuring compliance from high impact water users as a priority;<sup>70</sup>
  - f. enhanced capacity for institutions that are responsible for water quality management and compliance enforcement;<sup>71</sup>
  - g. ensuring that the largest possible collection of high quality data and information for supporting, *inter alia*, regulation, monitoring and compliance enforcement are identified and made accessible to public and private institutions;<sup>72</sup>
  - h. effective utilisation of mobile technology and satellite imagery in resource monitoring, compliance monitoring and enforcement activities;<sup>73</sup>
  - i. raising the credibility of DWA as regulator by: immediate action against transgressors; making key rulings public; being objective; and through short turn-around times.<sup>74</sup>
46. In order to strengthen CME, CER further recommends:
- a. that a senior champion be appointed in DWA with the right skills and vision to raise CME's profile, and the skills and expertise of Blue Scorpions;
  - b. the development and publication of an appropriate CME strategy (incorporating prioritisation, compliance promotion and a media strategy to publicise results) and engaging with the Blue

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<sup>61</sup> 12 Water Resource Quality

<sup>62</sup> 12 it is not clear whether this is only for phosphorus or generally

<sup>63</sup> Governance Strategy 2: Regulation of Water Resources *Enforcement* at 191

<sup>64</sup> 74 Core Strategy 7 : Optimising and stretching our water resources, ss Improved water resource management and quality

<sup>65</sup> Key Strategic Actions s.28 at 88

<sup>66</sup> Key strategic action 31 at 88

<sup>67</sup> 51 at 90

<sup>68</sup> 36 at 89

<sup>69</sup> Strategic Action at 121

<sup>70</sup> 56 at 91

<sup>71</sup> Detailed Core Strategy 1: Protection of Water Resources – at 108

<sup>72</sup> Enabling Strategy 3: Monitoring and Information at 179

<sup>73</sup> Enabling Strategy 4: Research and Innovation at 185

<sup>74</sup> Governance Strategy 2 – Strategic Actions at 192

- Scorpions on immediate increase in visible compliance monitoring in prioritised sectors (incorporating, where possible, citizen monitoring);
- c. that improved reporting mechanisms be implemented to incentivise reporting and whistle-blowing by civil society;
  - d. the amendment of s151-152 of the NWA to provide for dramatically increased criminal penalties for violations;
  - e. the incorporation of an administrative penalty system<sup>75</sup> to promote compliance with the NWA. Currently, reliance on criminal penalties (if and when prosecution does take place) places an undue burden on an already overburdened criminal justice system and the resulting low prosecution rate discourages prosecution. Inadequate fines mean that it is cheaper for a violator to continue to breach environmental legislation (and, if convicted, pay a small fine) than to comply with it. The advantage of such a system is that more violations will be pursued and more fines imposed. Such a system will create meaningful, transparent and consistent regulatory responses, as well as proper consideration of the economic benefit of non-compliance.<sup>76</sup>

## Water Tribunal

47. *Stop Treading Water* made specific recommendations regarding the functioning of the Water Tribunal, and the Committee will be aware that the Minister has recently taken a somewhat controversial decision not to reconstitute the Tribunal, but to refer all appeals to mediation under s.150 of the NWA while amendments are sought to the NWA and the provisions relating to the Tribunal. We have been advised that the Minister expects to be able to take an amendment Bill to Parliament in the 2<sup>nd</sup> quarter of 2013.
48. The NWRS2 makes no reference to the Water Tribunal and, as is submitted below, the Water Tribunal performs an important function, the effective performance of which is hampered by problems highlighted in *Stop Treading Water*. S.146 of the NWA establishes the Water Tribunal to hear administrative appeals. As an institution, the Tribunal performs an important function and has many positive aspects; including its accessibility and that it is cost-effective and expeditious. Its members are also required to have expertise in law, engineering, WRM and related fields. However, it is recommended that in order to give effect to her mandate of setting out procedures and institutional arrangements to achieve the purpose of the NWA, it is necessary for the Minister to address some key problems, both the problems as highlighted here. Problems (and proposals to address this) associated with the Water Tribunal include:
- a. the appointment of non-lawyers to determine questions of law – S.146 of the NWA and Schedule 6 require reconsideration of the requirements for appointments of members to the Water Tribunal so as to provide for lawyers (with requirements for experience and expertise in water and administrative law) to be appointed when matters of law are considered;
  - b. the effective exclusion of the right to access to courts by interested and affected parties because of decisions by the Water Tribunal that parties have no legal standing, unless they have been invited to and submitted comments in the process provided for in WUL applications;
  - c. decisions by the Water Tribunal regarding considerations to be taken into account when granting a WUL, which result in a particular set of considerations being held to “trump” others;
  - d. apparent confusion demonstrated in its decisions as to its jurisdiction and mandate, in that the Tribunal has held that it is not a tribunal in terms of PAJA and is not established to review administrative action;
  - e. problems discussed under (b) to (d) can be remedied by the amendment of s.148 to provide for legal standing provisions to be in line with PAJA; a clarification of the substantive mandate of the Water Tribunal (including expanded appeal grounds); and specifying circumstances under which the Minister can exercise her discretion to lift suspensions in terms of s.148(2)(b); and
  - f. the Tribunal Rules do not provide timeframes for procedural aspects - resulting in unacceptably long delays in appeals and there is also no provision for interim relief, cost orders, regulating evidence or

<sup>75</sup> The administrative penalty provisions in the Competition Act, 1998 have resulted in significantly increased compliance and awareness.

<sup>76</sup> *Stop Treading Water*, at 14

regarding the style and format of documents. This can be remedied by the amendment of Schedule 6, so as to provide for improvement and expansion of the rules of procedure, including timeframes.<sup>77</sup>

## **Other issues in the draft NWRS2 that will impact on water law, regulation or governance, statutory tools and implementation**

49. Other issues from the draft NWRS2 that will impact on water law, regulation or governance, statutory tools and implementation include the following:

- a. DWA will revise the NWA, the Water Services Act, 1997 and the Water Research Act, 1971 by the first half of 2013;<sup>78</sup>
- b. promoting the equity-oriented agenda will entail adjustments in the structure, functions, priorities and budget of DWA and CMAs;
- c. an amendment to priority allocations of water so that the 3<sup>rd</sup> priority allocation is accorded to water for poverty eradication, the improvement of livelihoods of the poor and marginalised, and uses that will contribute to greater racial and gender equity. This is an amendment of the previous protocol where water for strategic use was awarded priority 3 allocation.<sup>79</sup> Matters to be considered include:
  - i. the determination of the proposed new 3<sup>rd</sup> priority as envisaged may cause further delays in the determination of the Reserve and impact on the quantity of the Reserve. The revaluation of the Reserve to reduce the quantity of water determined for the ecological reserve has already been tabled in the draft NWRS2;<sup>80</sup>
  - ii. the proposal suggests that, in the face of drought threats, SA should reduce the reliability of water to key strategic users such as large cities, Eskom and major industries, as allocation to strategic users now ranks as a priority 4;<sup>81</sup>
  - iii. the draft NWRS does not spell out which criteria will be used in determining the trade-off that will result in the proposed priority 3 allocation and to whom this decision-making would be delegated. As Muller points out this is an important debate – will the criteria be the number of jobs created, the number of black beneficiaries, or the contribution of the water use to the fiscus?<sup>82</sup>
- d. joint WUL and Environmental Authorisation<sup>83</sup>, which may require amendments to the NWA;
- e. DWA to draft regulations for Mountain Catchment Area protected environment are drafted under the Protected Areas Act, 2003 with support from DEA<sup>84</sup> (timeline of 5 years);
- f. applying CARA and/or new regulations to protect riparian and wetland buffer zones and critical groundwater recharge areas;<sup>85</sup>
- g. the implementation of the Water Allocation Reform programme, which will include promulgation of regulations on Black Economic Empowerment and gender requirements for issuing of water use licences;<sup>86</sup>
- h. promulgation of regulations requiring the measuring and reporting of raw water use;<sup>87</sup>
- i. finalising water conservation regulations;<sup>88</sup>
- j. finalising Water Conservation and Water Demand Management standards and regulations for all sectors, particularly the energy sector;<sup>89</sup>

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<sup>77</sup> Also see the analysis of the Water Tribunal Rules by Rapson, G. "A Critical Analysis of The South African Water Tribunal Rules" submitted as an LLM dissertation to the University of the Witwatersrand in 2012.

<sup>78</sup> ss58 at 91

<sup>79</sup> At 44

<sup>80</sup> AT 232, when referring to water reconciliation studies

<sup>81</sup> Muller M, Living with Water Scarcity and Ma Vilakazi's Cabbages, Business Day Thursday 6 September 2012

<sup>82</sup> Ibid 94

<sup>83</sup> At 118

<sup>84</sup> At 118

<sup>85</sup> At 71

<sup>86</sup> At 86

<sup>87</sup> At 89

<sup>88</sup> At 123

<sup>89</sup> At 125

- k. developing industrial water conservation regulations;<sup>90</sup> and
- l. a review of water related laws and regulations to assess the need for revision driven by water re-use. Legislation may then be revised to accommodate the need to facilitate, streamline, encourage and control water re-use projects.<sup>91</sup> The re-use strategy will require guidelines and a review of water quality standards.

## Conclusion

50. As mentioned at the outset, the draft NWRS2 is a pivotal document in the work to improve water governance and water resource management. The draft NWRS2 sets out 10 core strategies intended to build on NWRS1 and to address the weaknesses identified in the implementation of NWRS1. Many of these strategies speak to and touch on the recommendations of our *Stop Treading Water* report. To the extent that key recommendations in that report have not yet been taken on board in the draft NWRS, we ask the Portfolio Committee to consider these. We will also be making submissions to the DWA on these in more detail.

51. The timeous and effective implementation of the strategies in the draft NWRS2 will be hampered by lack of detail and absence of clear timeframes in the document. These factors are of critical importance for a comprehensive 5 yearly review of the NWRS, as provided for in the NWA. Without detail and timeframes we run the risk that key proposed strategic actions will simply be rolled over into an indefinite future, and accountability for the implementation of the NWRS cannot be assessed.

Yours faithfully

**CENTRE FOR ENVIRONMENTAL RIGHTS**



Per:

**Melissa Fourie**

**Executive Director**

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<sup>90</sup> At 127

<sup>91</sup> At 159