

CURRENT CHALLENGES AND GOOD PRACTICES FOR WATER USE AUTHORISATION SYSTEMS IN AFRICA

Experiences from Malawi, Kenya, South Africa, Uganda and Zimbabwe

Disclaimer: This document is an output from the REACH program funded by UK Aid from the UK Department for International Development (DFID) for the benefit of developing countries (Aries Code 201880). However, the views expressed and information contained in it are not necessarily those of or endorsed by DFID, which can accept no responsibility for such views or information or for any reliance placed on them.

Summary

Across Africa, water permit systems are used as a tool to regulate and control water use. And yet, the implementation of these systems is not without challenges: they are resource intensive, and require regular updating, and compliance monitoring and enforcement. In addition, their historical legacy and the way that they have been structured under contemporary legislation means that the water uses by rural and peri-urban small scale water users governed under customary law have largely been rendered illegal without a permit. A study on and exchange of experiences by water authorities and researchers in Malawi, Kenya, South Africa, Uganda, Zimbabwe and elsewhere, identified both common challenges and different good practices in relation to three key functions of permit systems: water resources management, information generation, and revenue generation. Arising from this process, certain good practices and needs for further action were identified:

- how to recognise customary water law within the formal water law to overcome exclusion of small scale rural water users from the formal system, and to improve their legal water security;
- understanding the cost-effectiveness of billing and revenue collection systems in relation to the collection of small sums of money from small-scale water users;
- developing a targeted and differentiated approach to the issuing of permits and to compliance monitoring and enforcement.

Further comparative study and policy dialogue between the water authorities and researchers in the five countries and elsewhere is needed.

Water Use Authorisation Systems in Africa: ‘the challenge a century later’

Across most of Africa, Integrated Water Resources Management (IWRM) has been introduced as the gold standard for managing water resources. A key tool in the IWRM tool box is the use of permits or licences to authorise water use. These permit systems, however, derive, for the most part, from a long colonial history, and despite the changed intentions of post-colonial African governments, they have carried some of the negative colonial intentions with them into the present day.

A study in five countries (Malawi, Kenya, South Africa, Uganda and Zimbabwe) shows that permit systems were introduced in these countries as far back as 1929 in Kenya, under the Water Ordinance, or 1927 under the Water Act in Zimbabwe.

National water legislation and water permit systems were introduced by the colonial governments to claim ownership of water resources, and to harness them in the interests of the white, colonial minority. Only Uganda escaped the imposition of a water permit system, with use of water being controlled under the land legislation instead.

Africans were excluded from the formal permitting systems, with a gradual but effective erosion of their rights to water over the colonial period, as colonial governments claimed more and more control over water resources to serve the colonial economy.

Since liberation, African governments have revised their water policy and legislation, with very different intentions from those of the colonial governments, focused, more recently, on sustainable and equitable development and poverty eradication. However, despite the laudable policy intentions, in practice, water permit systems risk continuing to serve as tools of dispossession and exclusion for large numbers of small scale water users in rural areas who cannot all be reached individually by under-resourced government agencies. The challenge is to reconfigure permit systems into appropriate and pro-poor water use authorisation systems.

Why water permit systems?

Permit systems, in general, have three main functions:

- Management: To regulate and control water use, to ensure sustainable water use and to reduce and resolve conflict over limited water resources;
- Information: To provide information to the regulator on the nature and amount of water use, as well as hydrological and geo-hydrological information; and
- Money: To support the generation of revenue from water users.



But have permit systems achieved the policy intentions behind them? Lessons from Kenya, Uganda, Malawi, Zimbabwe and South Africa indicate that few of these policy intentions have been fully realised, and that, in practice, permit systems fail to reach small scale users in rural areas, leaving them, de facto, outside the law. Equally, however, examination of permitting practices across the five countries reveals several good practices that could well be drawn on by other countries. Some of these challenges and good practices are dealt with in the following section.

Alternative Approaches

Across the five countries studied, there has been varied success in rolling out water permit systems, but nowhere has it been completely successful. In Kenya, by 2016, there were 4194 water permits captured in the Permit Database, (with many more surface water permits yet to be captured), up from 1700 in 2013. In Malawi, by 2016, 3042 licences had been issued, of which 1881 were 'sleeping licences'. On the other hand, in Uganda, 1320 permits had been issued by 2016 and 10799 in Zimbabwe. South Africa has the largest number of authorisations under the existing lawful use clause of the 1998 National Water Act (around 80 000) while just under 6 000 new licences have been issued under the Act. In all of the countries, the number of water users with permits is considerably lower than the number who should be permitted, including (but by no means limited to) large numbers of small scale rural water users. All five countries report challenges in issuing permits and in enforcing permit conditions, not least due to limited state capacity. Some interesting options in relation to management, information, and money present themselves as possible solutions to these challenges:

Management

Taking a Differentiated Approach

In Kenya, they have adopted an approach in which permit applications are categorised as A, B, C or D, depending on the level of impact on the water resource. Different requirements and intensity of investigation are applied to permit applications, depending on the category. In Uganda, they have adopted a targeted approach focused on the large users that have the most significant impact on water resources – the so-called 80/20 principle. In South Africa, general authorisations are used to enable small water users to legally use water without applying for a licence. In all of the countries, very small uses are exempted from the need for a permit. All of these approaches result in more streamlined systems, less administrative demands on the state, and less cost and time demands on smaller water users. They do not, however, sufficiently deal with the issue of small-scale water users in the rural areas. This is where the issue of customary law requires further examination.

A targeted approach will also make compliance monitoring and enforcement easier, focusing resources on the high impact users and those with a poor track record of compliance.

Role of customary law in protecting small-scale water uses for livelihoods

Except for Malawi, the water law of the five countries does not recognise customary water law as part of the legal system, and yet, in all five countries, customary law is still active in large parts of the rural areas. This raises whether the recognition of customary law would not be a useful addition to the tools for water use authorisation, on condition that water allocated under customary law has the same or higher legal protection as permitted water. Moreover, a Reserve could, in principle, be defined as including human rights to water for basic domestic *and* basic productive uses. This links to the idea of group management and protection of water resources and forms of organisation that can also play a useful role in the compliance monitoring and enforcement of permit conditions.

Information

Despite the intention that permit systems require users to provide hydrological, geo-hydrological and water use information to the state in order to support more effective management and development of water resources, in reality, they are a relatively weak tool in this regard in the five countries. This is due to several factors. Firstly, only a portion of water users have permits, so that any information received through this mechanism is also only partial, at best. Secondly, as is evidenced by the registration of water use in South Africa, information provided by water users, particularly information on water use, may be inaccurate and need verification. This begs the question as how mechanisms such as remote sensing and aerial photography can be used to verify and complement the information provided by permitted users and through required hydrological and geohydrological assessments.

Money

On the financial side, there are two key questions that need to be addressed around using permit systems to generate funds for water resources management. The first of these relates to the cost-effectiveness of billing systems. The act of billing a water user, receiving and banking the money, and taking action against defaulters, costs the state money. However, no one done the calculations of what the minimum volume of water is to bill cost-effectively. From high level estimates, it would appear that in the case of small users, the state may well be paying more than they are collecting.

In addition, the question of what water resources management (WRM) functions should be paid for by users, and by which users, needs further examination, particularly in the context of encouraging small scale water use as a way out of poverty for millions of people across the five countries. For example, the exemption of small-scale users from paying water charges is an option that needs further exploration. The other side of the coin is to ask what WRM functions should be being paid for out of taxes, rather than water use charges, particularly in relation to using water for poverty eradication.

Conclusion

Despite the challenges faced by the five countries in implementing permit systems as part of a broader suite of water resource management tools, there are also useful adaptations and good practices emerging. In most countries in Africa, water permit systems are still in the early stages of implementation, and the time is ripe for the sharing of knowledge and experience. Without this, the risk of failure in the implementation of permit systems is real. This risk underscores the need for further robust study, and the documentation and sharing of best practices among officials, practitioners and researchers to reconfigure permit systems into realistic fit-for-purpose regulatory tools that improve the water security of all, in particular the most vulnerable, in Kenya, Malawi, South Africa, Uganda, Zimbabwe and elsewhere in Africa.



Figure 1: Participants in the Policy Dialogue on Permit Systems (from l-r): Eng. Boniface Mwaniki; Dr Hodson Makurira; Rosanna Bartlett; Dr Nicholas Kiggundu; Mohammed M. Shurie; Siphoskosana; Barbara Schreiner; Susan Nakuti Byakika; Dr Pinimidzai Sithole; Oswald Mwamsamali; Prof Wapulumuka Mulwafu; Jessica Troell; Dr Callist Tindimugaya; Dr Barbara van Koppen; Tyler Farrow; and Nomvuzo Mjadu

This policy brief arises from a project led by the Pegasys Institute and the International Water Management Institute, funded by REACH, Oxford, and entitled Water Law Reform to Improve Water Security for Vulnerable People in Africa. The project was conducted in 2016/7. In January 2017, a two-day workshop brought together senior decision makers and researchers from Malawi, Uganda, Kenya, Zimbabwe and South Africa as well as representatives of Fair Water Futures and the Environmental Law Institute, and researchers from the Pegasys Institute and IWMI, to examine the implementation of permit systems and to share good practices. For more information, the following documents are available on www.pegasysinstitute.org and www.iwmi.org :

- **Water Permit Systems, Policy Reforms and Implications for Equity in Kenya**; February 2017; Prof Patricia Kamiri-Mbote, Mohamed M Shurie, Eng. Boniface Mwaniki
- **Water Permit Systems, Policy Reforms and Implications for Equity in Malawi**; February 2017; Wapulumuka Mulwafu , Oswald Mwamsamali.
- **Water Permit Systems, Policy Reforms and Implications for Equity in South Africa**; February 2017; Barbara Schreiner, Dr. Pinimidzai Sithole, Dr. Barbara van Koppen
- **Water Permit Systems, Policy Reforms and Implications for Equity in Uganda**; February 2017; Nicholas Kiggundu
- **Water Permit Systems, Policy Reforms and Implications for Equity in Zimbabwe**; February 2017; Hodson Makurira, Nyashadzashe Viriri
- **Water Law Reform to Improve Water Security for Vulnerable People in Africa: Workshop Report**, February 2017
- **Water Law Reform to Improve Water Security for Vulnerable People in Africa: Synthesis Report**, Pegasys Institute and IWMI February 2017

Also of interest might be: Van Koppen, B. and B. Schreiner. 2015. Gender-Equality in Statutory Water Law: the Case of Priority General Authorizations in South Africa. Chapter 15 in: Hellum, A., P. Kameri Mbote and B. van Koppen (eds). Water is life: Women's human rights in national and local water governance in Southern and Eastern Africa. Harare: Weaver Press

http://www.iwmi.cgiar.org/Publications/Books/PDF/water_is_life.pdf?galog=no&iwmi=1