
Project Country Report

Water Permit Systems, Policy Reforms and Implications for Equity in Malawi

By

Wapulumuka Mulwafu, Chancellor College, University of Malawi

&

Oswald Mwamsamali, Ministry of Agriculture, Irrigation & Water Development

March 2017



DISCLAIMER

This document is an output from the REACH programme 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.

Contents

1. Brief history and context of the water sector	1
1.1. Introduction	1
1.2 Pre-law status and background	1
2. Legislative Status	3
2.1 Law regarding water use authorisations (permit systems).....	4
2.2 Three (3) types of authorisations are provided:	5
3. Implementation Status	7
3.1 Strategy for rolling out of the permit system	7
3.2 Status of law implementation	7
3.3 Regulatory authority for water sector	8
4. Fees (or levies, tax).....	9
4.1 Applicable regulations regarding fees related to permits.....	9
4.2 Amount of fees per user/applicant	9
4.3 Estimated Total Revenue	9
4.4 Where the Revenue goes.....	9
5. Institutional Arrangements	10
6. What are the challenges.....	12
7. References.....	13

List of Figures

Figure 1: Government structure of the Water Resources Board.....	10
Figure 2: Government structure of the National Water Resources Authority	11

1. Brief history and context of the water sector

1.1. Introduction

The Constitution of the Republic of Malawi (1995) provides a foundation for many of the freedoms and rights its citizens are supposed to enjoy. Section 16 protects the right to life and section 20 promotes equality, while Sections 29 & 30 provides for the right to economic activity and development. What is not specifically mentioned is the right to water and yet without water there can be no life. The state is obligated to actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving health care of international standards, enhance quality of life in rural communities, as well as a healthy living and working environment for the people of Malawi (Section 13(d)). This is important for understanding the significance of water to human lives and whether efforts to license would not necessarily restrict access to the resource, particularly by the poor (Van Koppen and Schreiner, 2014).

All subsequent laws and policies on water have taken into account these fundamental principles in the constitution. At the same time, laws have been promulgated to introduce permit or licensing system as a way of regulating use of the resource. The key question is whether licensing restricts or broadens access to the resource and particularly by the poor. This report provides an assessment of the implementation of water licensing in Malawi by collecting empirical data on the status of implementation against a review of relevant legislation and policies. This report is divided into six sections. Section one gives a broad historical overview of water use before the first ever water legislation of 1969. It shows that although Malawi became independent in 1964, water legislation was not developed until three years later. This meant that any water authorisations used were based on colonially designed policies and guidelines. Section two discusses the current policy and legislative status and developments which have taken place since 1969. Section three discusses the implementation status by examining the strategies used and its impact on the ground. Section four examines the specific issue of fees and levies and attempts to relate these to the economic status of the people. This will help to establish whether licensing is indeed meeting the needs of the poor. Section five looks at institutional arrangements that have been put in place for implementing the permits while section six reflects on the challenges associated with water licensing in the country.

1.2 Pre-law status and background

When Malawi became a British protectorate in 1891, ownership and management of land and other natural resources, including water, came under the control of Her Majesty the Queen as Head of State and she was represented in the territory by the Governor. Water issues were not well coordinated and fell under different departments such as forestry and agriculture. Groundwater resources fell under the management of the department of Geological Survey and Hydrology. The colonial state managed the resource through issuance of ordinances and policy documents which, as

indicated earlier, linked the resource to other issues such as forestry and agriculture. This situation remained unchanged until the Water Resources Act of 1969. In the history of water resources management in Malawi, 1969 is a watershed period because for the first time ever the country came up with legislation to regulate the sector. By that time, the population had increased and the demands on water resources had equally expanded. It therefore became necessary to introduce some regulatory measures.

Although water as a public resource was owned by the state, not all water resources were regulated. In most cases, the state controlled use of water in the larger water bodies across the country. Water in many other smaller rivers and streams was often beyond the gaze of state authority. In such cases, traditional and religious leaders as well as individuals controlled use of water. Unwritten rules were used to guide people on what kind of water to use and when to use it. The introduction of the colonial state transformed management of water resources. In most cases, state officials replaced African traditional leaders as new players in the management of natural resources. The state assumed ownership and control of some natural resources. All major water bodies were put under the control of the state although the general public was allowed to use them. This is partly because the state did not have adequate human and financial resources to monitor and manage the resources.

The only time the colonial state raised issue on regulation of water resources was in the early 1950s. At that time, two developments forced government to introduce policy on some kind of licensing. First, it was the perceived uncontrolled sinking of wells and boreholes by both European settlers and Africans. In fact, the colonial agricultural staff at the time regularly complained that European settlers, as well as some Africans were disturbing the underground water supplies by sinking such boreholes and wells in inappropriate areas as well as opening up farming in catchment areas. The state made a provision in the *Natural Resources (Amendment) Ordinance* of 1952 to guide the sinking of boreholes. Under Section 6 of the 1952 Ordinance, a water user could apply for a licence/permission to carry out any work such as digging a well, drilling a borehole or doing some other work for the extraction of underground water. As part of the broader programme of conserving natural resources in the country, the ordinance placed three specific restrictions. First that an individual planning to sink a well or borehole, exceeding a depth of 10 metres, had to report its exact location to the provincial natural resources board. Second, that the governor had powers to declare any area in the protectorate banned from sinking boreholes where underground water supplies were in danger of being exhausted. Third, the provincial boards were given powers to enforce compliance in the implementation of the ordinance and the governor's declaration. However, although pre-law authorisations were granted to users of water for boreholes, it is difficult to establish the exact number as information cannot be easily found (Mulwafu, 2005).

Compared to many countries in the eastern and southern African region, Malawi has numerous water bodies in the form of lakes and rivers. Apart from Lake Malawi, there are smaller lakes such as Chilwa and Malombe and major rivers such as the Shire, Rukuru, Bua, Linthipe and Lilongwe.

On account of this abundance of water resources the country should ideally not be described as water stressed. However, the distribution of these resources varies considerably and access by the majority of the population is limited. Mulwafu (2010) argued that although Malawi had been registering some success stories in increasing access to safe drinking water (74%) and also access to good sanitation/improved toilets (36%), the greatest challenge remains that the country hosts a large segment of some of the poorest people in the world. This means that any policy or legal intervention must strive to ensure that the most vulnerable groups are not adversely affected. The availability of water has historically enabled the population to use the resource to meet their domestic needs (drinking, cooking and washing) as well as for productive purposes (such as irrigated agriculture, fishing and transportation). Currently, we do not have adequate information on pre-colonial patterns of water use and management in Malawi and it is difficult to draw any specific conclusions on authorisations that were used.

2. Legislative Status

The Water Resources Act of 1969 provides for the control, conservation, apportionment and use of water resources of Malawi. The Act vests ownership of all public water in the President while the control of all public water is vested in the Minister responsible for water affairs. The Act prohibits any person to divert, dam, store, abstract or use public water for any other purpose except in accordance with the provisions of the Act. Any individual or corporate wishing to abstract or divert water must obtain the necessary water user rights. The Act further prohibits any person to interfere, alter the flow of or pollute or foul any public water. Non-compliance is an offence.

The National Water Policy of 2005 addresses all aspects of water management including development of water resources and service delivery conforming to the current global and regional trends and the requirements as reflected under the Millennium Development Goals and Sustainable Development Goals. The overall policy goal is sustainable management and utilization of water resources in order to provide water of acceptable quality and of sufficient quantities, and ensure availability of efficient and effective water and sanitation services that satisfy the basic requirements of every Malawian and for the enhancement of the country's natural ecosystems. One of its objectives is promoting public and private sector participation in water resources management, development, supply and conservation. The policy is based on the premise that all people shall have access to potable water and adequate sanitation services to reduce incidences of water related diseases. The protection and use of water resources has been accorded the highest priority over other uses by this policy.

The Water Resources Act of 2013 recognises the importance of water to human sustenance and the multiple functions that the resource provides. The law outlines procedures to be followed for water abstraction by individuals and private sector. The procedures include the steps to be undertaken to acquire water starting from issuance of formal notices to persons with existing land interests to

payment of compensations formal ownership transfer. Specific details on provisions in the Act are discussed in the following sections below.

2.1 Law regarding water use authorisations (permit systems)

Key Dates - effective dates when such permits came into effect, how it was rolled out etc

For a long time, Malawi has been using the Water Resources Act of 1969- this has been the major piece of legislation supporting implementation of policies and programmes in the water sector.

The new Water Resources Act became effective on 1 December 2012 but passed on 5 March 2013, and assented to on 9th April 2013. The actual publication through government gazette took place on 19th April 2013.

Development of new Act involved a consultative process with various stakeholders participating in the initiative. The new Act has not officially been launched yet but this is an issue government is considering the matter so that it can also help to publicise the Act.

Prioritisation – do laws or regulations or individual permits indicate a certain prioritisation of water uses?

Issues of Prioritisation are covered under Section 37 of the Act.

Regulations – what regulations are in place to operationalise/implement the permit systems?

Supporting regulations were approved by the Minister on 13 September 2016 and subsequently submitted to the Ministry of Justice for vetting before they can become effective after gazetting (GOM, 2016).

The regulations cover a broad spectrum of issues including the following:

- Registration of Existing Rights
- Licensing of Water Abstraction and Use
- Surface Water Management, Development and Administration
- Groundwater Management, Development and Administration
- Water Quality Management and Pollution Control
- Water Works
- Conditions of Authorization, Permits and Approved Water Uses
- Water and Effluent Charges

- Conservation of Riparian and Catchment Areas
- Catchment Management Strategies
- Protected Catchment Areas
- The Water Reserve
- Qualified Professionals and Contractors
- Miscellaneous Provisions

In the meantime, Pollution Control Regulations of 1978 are being used, Section 162 to carry over the old regulations but can only amend the schedule of fees. Cost rate formula revised too.

2.2 Three (3) types of authorisations are provided:

1. Surface water abstraction permit licences
2. Ground water abstraction permit licences
3. Ministers consent to discharge effluent into public water permits- effluent discharge back to the environment

NB – pollution control, in general, is also a responsibility of the Environmental Affairs Department in Malawi by using the Environmental management Act of 1996 (GOM, 1996). Sometimes joint monitoring is also carried out with Environmental Affairs Department, Local Government, and other relevant departments.

The authorisation on Minister's Consent- this is signed by the Chairman of the Water Resources Board while the other authorisations (groundwater and surface water permits are co-signed by the Director of Water Resources, and the Chief Water Resources Officer.

Institutions Supporting Licensing

Previously, the Ministry responsible for water used to manage licensing of water through the following Technical Committees:

- Kamuzu Barrage Technical Sub-committee-
- Water Abstractions Sub-committee- surface and ground water
- Water Pollution Control – monitoring, applications under minister consent and recommended to the Board

All recommendations made by the technical committees are submitted to the Board for approval.

Now these three sub-committees have been merged into one, that is, the National Water Resources Management and Development Technical subcommittee- currently working since early 2000.

Number of permits: currently, over 3,000 licences have been issued

Status in the New Water Act

For a long time, the 1969 Water Resources Act has been the framework for issuing licences in the country. But permit holders will now be required to register their existing rights and National Water Resources Authority (NWRA) will issue permit holders with new water rights (Refer to Sections 159-160 of the new Act of 2013). All permit holders are required to notify NWRA secretariat within 12 months, in this case 1st Dec 2013. A procedure exists for transition but operationally not possible because secretariat not yet in place. NWRA is now being established with support from the World Bank funded Shire River Basin Management Programme.

In this transition process, the existing rights under the 1969 Act are still enforceable.

The new committee can only issue temporary permits or licences valid for one year since new Water Act would have to create a new Board for the Authority. But at the moment, there is only the secretariat and the technical committee. For instance, the latest technical committee recommended a total of 182 permits or licenses for ministerial approval.

Application for variation – this is possible and it affects payments. Cases involve cancellation or renewal

But in some cases the fines are so small that they do not serve as a deterrent to stop pollution of water

Compliance on abstraction permits is done through monitoring carried out by the Secretariat together with staff from the sister departments (sometimes in form of joint monitoring). Of course, the challenge is that it is not always easy to know exactly whether or not the amount abstracted is the same as that indicated on the abstraction permit. The new regulations propose the introduction of flow meters to ensure that users abstract the amount of water licensed to them.

Basis for water allocation- the law takes into account water for basic human needs and environmental flow requirements. This appears under domestic users

Protection to small scale water users- this is covered under Sections 37-38 of the 2013 Water Act which provides for water for primary use and ecological integrity.

Water allocation during drought conditions: NWRA has the powers to vary abstractions

The Water Resources Board Secretariat conducts stakeholder meetings especially for the Lake Malawi- Shire River Basin system which is a major water resource system for Malawi.

Collective rights- WUAs under irrigation sector but also the Water Act provides for that (Refer to Sections 131-137 of GOM, 2013).

Decentralised management of schemes – mostly done at the level of O&M. In the rural areas, water supply schemes have Local Utility Operators – as in the case of boreholes. These are also responsible for protection of catchment areas and schemes. In urban areas, water boards (GOM, 1995) have

established their own WUAs but these do not have permits which are held by the parent board or water utility.

Water supply from boreholes for rural community use is free as a matter of government policy. Also boreholes with annual water rentals less than MWK 1,000 are excluded from paying these rentals.

NWRA has powers to control activities in catchment areas /protected areas– can proscribe some activities such as Mudi River in Blantyre, Lilongwe River, Mulunguzi River in Zomba, and Lunyangwa River in Mzuzu.

3. Implementation Status

3.1 Strategy for rolling out of the permit system

This activity involved two consultancies:

First, a consultancy was done to advise government on establishment of NWRA including institutional structure- taking into account human resources, capacity development, etc. The final report has been received but government is yet to adopt it.

Second, licensing of the reform campaign- collection of data on the number of clients licensed, how many not, how much money collected? This involved consultations at lowest levels in all the 28 districts and later followed by the National launch on 10 July 2015. Media sensitization campaign to follow with various activities such as jingles, brochures, etc

3.2 Status of law implementation

Since the new Water Resources Act of 2013, several activities have taken place including:

Operationalisation of institutions e.g. secretariat, proposal to appoint a Board for the Authority, development of regulations, setting up of new offices in Area 47, and procurement of office equipment and vehicles. Mailing address in place, that is, P/Bag 363, LL3. The NWRA has also been registered as a statutory corporation with the following number SC 84. NWRA is also expected to keep revenue raised

For future, the law provides for establishment of Catchment Management Committees (CMCs) - have advisory roles (Sections 25-33). Composition of these CMCs- to include farmers, government institutions, NGOs, etc

Below CMCs, there are WUAs (Sections 131-137) - users with licence, for irrigation, water supply, domestic etc. WUAs will be expected to have constitution and to register with NWRA. The NWRA can help to set up or de-establish WUAs.

3.3 Regulatory authority for water sector

Initially regulation was to be part of the proposed Malawi Water Energy Regulatory Authority (MWERA). But this recommendation was not successful and only the Malawi Energy Regulatory Authority (MERA) was established. A separate regulator for water resources had to be established. For water supply no regulator on tariffs and performance of utilities. But the NWRA is supposed to be an independent body for resource protection and control of pollution.

Informal permits

Not covered – traditional areas

Number of licences

3,000 holders by 2015

Categorisation of applications

Not based on use but rather on water source abstraction – ground/surface; wastewater- discharge permit

Compliance, monitoring & enforcement

Yes, this is done under the polluter pay principle such as Kayerekera Uranium Mining. Other cases are handled on an *ad hoc* basis because of limited resources. However, there is routine monitoring.

Awareness creation on laws and permits

Around 2004, during the programme on Strengthening of the Water Resources Board, awareness campaign meetings were held across the country (Mott MacDonald, 2003). Three regional meetings were held with stakeholders. Then went down to district level – the idea/aim was to sensitize all users of water on the need to have permits. At that time, stakeholders were also sensitised on the new Water Act which was in the pipeline.

Next licensing campaign took place from April 2014 to Sept 2015: this was a nation-wide campaign and also talked about the new Act. Prior to that, a meeting of various stakeholders was organised in Lilongwe to discuss the inception report. This was a consultative process.

Media: various activities such as development of posters, fliers, and letters carrying different messages

Estimated number of actual water users that are formally obliged to apply

Application is demand driven and only those who apply are captured in data base. There is no information on other potential water users. However, it is possible that the Licensing Reform Report mapped that information through the Google earth study. We need to check on the list of potential water users. However, there are some sleeping licences, not active licences.

4. Fees (or levies, tax)

4.1 Applicable regulations regarding fees related to permits

New regulations have Schedule 23 (an update of old regulations of 1969) on fees, charges and penalties, effluent discharge charges (Refer to Regulations no 1-176 in GOM, 2016).

The Schedule contains a formula to calculate fees for effluent discharge, annual water rentals, application fees for different uses, fees for hire of staff to perform task, collection of data e.g. hydrometric data, hire of plants and equipment

Procedure for applications is that ideally they are supposed to be published as required by law, get feedback from public and then present to the Board for licencing. Section 122 of the new Water Act also provides for creation of water tribunal- for appeals- and to hear cases across Malawi.

Section 121 of the new Water Act provides for the establishment of the Water Resources Trust Fund - to promote water resources conservation and management of water resources in Malawi.

There are other issues in the law which have not yet been implemented: CMCs, Trust Fund, Water Tribunal and WUAs not yet operationalised.

4.2 Amount of fees per user/applicant

Application fee for surface/ground: MK3, 000 (\$4.10)

Application for Discharge permit: MK5, 000 (\$6.80). This is also applicable for renewal, variation, or cancellation.

Annual water rental or discharge fees: dependent on formula in Schedule 23 taking into account several factors such as source and proposed use

Registration: previously no registration fees and now still in transition phase

4.3 Estimated Total Revenue

Collection rates vary a lot depending on challenges of staffing. Highest amount estimated at about MK120 million (\$163,550) per year but most of times less than that. The main challenges include lack of equipment, vehicles, limited funding. But it is potentially possible to collect about MK210 million per year (\$286,220).

4.4 Where the Revenue goes

All revenue collected goes to government main account as part of the national operations budget. The funds may not necessarily come back to NWRA.

5. Institutional Arrangements

Who implements the laws/permits: in general implementation is done by government but specifically through Water Resources Board secretariat under the Department of Water Resources

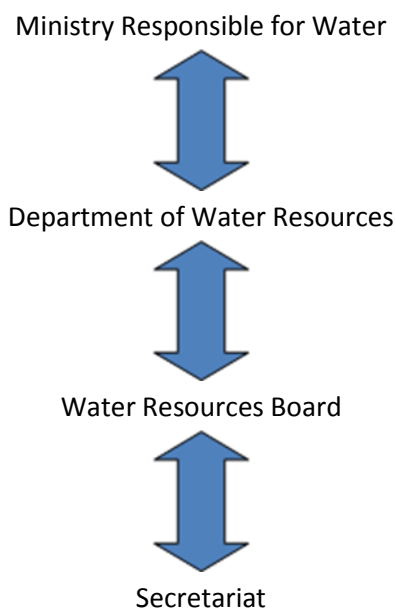


Figure 1: Governance Structure of the Water Resources Board

Under the 1969 Water Resources Act, the WRB was under the Ministry of Water. Board members, initially 6 but later increased to 9, were appointed by the Minister. The WRB Secretariat was considered a division of Department of Water Resources providing secretarial services to Board. The old structure had the head of the WRB at the position of Chief Water Resources Officer and only 6 out of 31 positions were filled.

Under the 2013 Water Resources Act, the WRB has been repealed and a new entity, the NWRA, is to be created. It will have its own governing body of 13, of whom 4 are independent members and 9 ex-officio members. Management unit of the NWRA to be headed by the Executive Director will serve as the secretariat.

Procedure for application:

An applicant is required to complete prescribed forms, make appropriate payment. Ideally the application is supposed to be published locally (to solicit objections/views from public regarding applications for 30 days), then call for technical committee meeting to review applications, and then the Board meeting to receive and deliberate upon recommendations from the technical committee for ministerial approval.



Figure 2: Governance Structure of the National Water Resources Authority

How long does the procedure take for different categories?

No specific categories and levels but only technical committee and the Board. But the Board can meet 6 times a year, that is, every 2 months.

What consultation is required?

Consultations with relevant stakeholders must be done within 30 days: general public in newspapers, and where necessary making reference to other authorities

What recourse, review, and/or appeal arrangements are in place?

The new Water Act of 2013 provides for the establishment of a Water Tribunal. The old Act was not very clear and the only recourse available then was that an applicant or water user could appeal to the Minister.

6. What are the challenges

The following are some of the challenges under the old Act providing for the WRB:

1. The WRB had no management unit of its own; it was dependent on staff from Ministry
2. Financing – revenue from fees, penalties, levies went to Treasury but WRB received little. In fact, WRB had no resources for its own operations
3. Inadequate equipment such as vehicles
4. Inadequate human resources – out of 29 existing positions had only 6 filled. No staff in the regional offices
5. Autonomy of WRB not guaranteed in 1969 Act- no powers or leveraging powers. It was an appendage of the Ministry and as such could not police activities of the Ministry. However, the Ministry still remains the ultimate institution for water resources management in the country and as such it is responsible for policy making. However, the Ministry responsible for water affairs in Malawi has been hitherto functioning as a regulator and also implementer of its own policies and decisions. At times, this has been a source of conflict. Therefore, an autonomous body, the NWRA, has been created to independently carry out the water resources regulatory functions. The law that establishes this “independent” agency somehow insulates the agency from the bureaucratic red tape that is common with mainstream civil service and injects some “private sector” mentality into how the agency can and should perform its functions! Promotion of own water interests may not arise as the agency is still a government entity performing these functions in a delegated capacity!

Currently, the following challenges are being experienced under the new Water Act providing for the NWRA:

- Slow speed of operationalisation of NWRA - governance structure and hiring of CEO. This requires functional review of DWR
- Difficulties to obtain seed money to kick off NWRA (the National Water Development Programme (NWDP) II phased out in Oct 2015). Funding arrangement not yet settled – receiving no subvention at the moment but proposal to set up Treasury Fund as interim measure under discussion.

7. References

Derman, Bill and Anne Ferguson (2003) "Value of Water: Political Ecology and Water Reform in Southern Africa" *Human Organization* Vol. 62, No. 3, pp. 277-288.

Government of Malawi (GOM) (1969) Water Resources Act of 1969. Zomba: Government Printer

GOM (1995) *The Constitution of the Republic of Malawi*. Lilongwe

GOM (1996) Environmental Management Act. Lilongwe, Ministry of Environment and Natural Resources.

GOM (1999a). Water Resources Policy and Strategies. Lilongwe, Ministry of Water Development

GOM (2005). The National Water Policy. Lilongwe, Ministry of Irrigation and Water Development

GOM (2013). National Water Resources Act. Lilongwe, Ministry of Irrigation and Water Development.

GOM (2016) Water Resources Regulations Draft Lilongwe, Ministry of Agriculture, Irrigation and Water Development

Mehta, L et.al (2014), "The politics of IWRM in Southern Africa" *International Journal of Water Resources Development* Volume 30, No.3, pp.528-542

Mott MacDonald (2003). Strengthening of the Water Resources Board: Final Report. Prepared, in association with MD Initiative and Stewart Scott, for the Republic of Malawi Ministry of Water Development, National Water Development Project

Mulwafu, W.O. (2005) "Does Water Have a History?: Water Use and Management in Malawi" in J.W.N. Tempelhoff (ed.) *African Water Histories: Transdisciplinary Discourses* Vanderbijlpark, Gauteng: North-West University, pp.1-14.

Mulwafu, W.O. (2010), "Water Rights in the Context of Pluralism and Policy Changes in Malawi" *Journal of Physics and Chemistry of the Earth*. Vol.30, pp752-757

Van Koppen and Schreiner (2014), "Priority General Authorisations in rights-based water use authorisation in South Africa" *Water Policy* 16, (2014): 59-77

Van Koppen and Schreiner (2014) "Moving beyond integrated water resource management: developmental water management in South Africa" *International Journal of Water Resources Development* Volume 30, No.3, pp.543-558