

Republic of Kenya



Ministry of Water and Sanitation

Kenya Water Security and Climate Resilience Project (KWSCR)

Support to Water Sector Reforms

WATER SECTOR INSTITUTIONS CONSULTATION FORUM REPORT

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Water Sector Institutions Consultation Forum Report

About this publication:

This Report summarises the discussions and conclusions from the Public Consultation Forum held on 28th March 2019. The workshop was jointly organised by Ernst & Young LLP and Ministry of Water and Sanitation (MWS). It took place at the Crowne Plaza, Upper Hill in Nairobi.



Ministry of Water and Sanitation
Maji House, Upper hill, Nairobi.
P.O BOX 49720 – 00100, Nairobi.
Telephone: +254 020 2716103, 4900000



Ernst & Young LLP
Re Towers, 3
P. O. Box 44286,
Ragati Rd, Nairobi

Disclaimer:

This Report summarises discussions held in a forum setting. The views expressed are those of the individual participants who took part.

Contents

ABBREVIATIONS	4
LIST OF FIGURES	5
LIST OF TABLES	5
1. BACKGROUND	6
1.1 The Consultation Workshops	7
1.2 The Consultation Forums	7
1.3 Water Sector Institutions (WSIs) Consultation Forum	8
2. WSI CONSULTATION FORUM OBJECTIVES	8
3. STRUCTURE OF THE WSI CONSULTATION FORUM	9
4. WSI CONSULTATION FORUM	10
4.1 PRESENTATION AND INTERACTIVE Q&A SESSION	10
4.1.1 Draft Water Resources Regulations 2019	10
4.1.2 Draft Water Services Regulations	17
4.2 General Commentary on the WSI Consultation Forum	22
5. ANNEX	23
a. Annex I: WSI Consultation Forum PowerPoint Presentation	23
b. Annex II: WSI Consultation Forum List of Participants	61

ABBREVIATIONS

BWRC	Basin Water Resources Committee
CECM	County Executive Committee Member
CS	Cabinet Secretary for water
EIA	Environmental Impact Assessment
ESIA	Environmental and Social Impact Assessment
KWSCRP	Kenya Water Security and Climate Resilience Project
MWS	Ministry of Water and Sanitation
NEMA	National Environmental Management Authority
NWHSA	National Water Harvesting and Storage Authority
NWCPC	National Water Conservation and Pipeline Corporation
RIS	Regulatory Impact Statement
WASREB	Water Services Regulatory Board
WRA	Water Resources Authority
WRUA	Water Resource User Association
WSB	Water Service Board
WSI	Water Services Institution
WSP	Water Service Provider
WSTF	Water Sector Trust Fund
WWDA	Water Works Development Agency

LIST OF FIGURES

Figure 1: Structure of the WSI Consultation Forum.....	9
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LIST OF TABLES

Table 1: Interactive Session on Approval, Authorization and Permits	11
Table 2: Interactive Session on Surface Water	12
Table 3: Interactive Session on Groundwater.....	13
Table 4: Interactive Session on Water Quality Monitoring and Effluent Discharge and Works.....	14
Table 4.1: Interactive Session on Water Quality Monitoring and Effluent Discharge and Works.....	14
Table 5: Interactive Session on Water Use Charges	15
Table 6: Interactive Session on Conservation of Riparian Land and Catchment Areas	16
Table 7: interactive Session on Protected Areas and Groundwater Catchment Areas	16
Table 8: interactive Session on System and Standards for Operation of Water Services	19
Table 9: interactive Session on System and Standards for Operation of Water Services	20
Table 10: Interactive Session on Administration of Certain Water Supply and Infrastructure Services	22

1. BACKGROUND

The promulgation of the *Constitution of Kenya 2010* created two levels of government: national government and county governments. The Fourth Schedule of the Constitution distributes functions between the national government and county governments in recognition of the fact that water related functions are a shared responsibility between the national and county governments. The national government, through the MWS is responsible for use and regulation of water resources, consumer protection and national public works. County governments on the other hand, have the mandate for water and sanitation service provision and the development of county public water works.

The enactment of the *Water Act 2016* sought to align the water sector to provisions of the Constitution of Kenya, 2010. The legislative reform process undertaken by MWS includes the development of subsidiary legislation to facilitate among others, a further interpretation and full implementation of the *Water Act 2016*; to streamline existing regulations with the National Water Master Plan 2030 and the proposed Water Sector Policy and the National Water Services Strategy. Several key functions and/or mandates of new and existing water sector institutions require the enactment of the new or revised Regulations.

The Cabinet Secretary (CS) is empowered *vide* Section 142 of the *Water Act 2016* to make regulations with respect to any matter required, or which is necessary or expedient to be prescribed for carrying out, or giving effect to the Act. Consequently, Key Task 4 (KT- 4) of this project involves the development of four sets of subsidiary legislation, namely:

- The Water Tribunal Rules 2019;
- The National Water Harvesting and Storage Regulations 2019;
- The Water Resources Regulations 2019; and
- The Water Services Regulations 2019.

The aim of these subsidiary legislation will be to:

- 1) Provide further details and clarity on provisions which have been left open or omitted entirely in the *Water Act 2016*.
- 2) Fill in existing gaps relating to the mandates of water sector institutions and for managing the transition process from the *Water Act 2002* regime to the new regime under the *Water Act 2016*.
- 3) Put in place timeframes of achieving transition objectives that have been left open-ended in the *Water Act 2016*.

To perform these tasks, the MWS engaged the Consultant who conducted a desk review and diagnosis of the *Water Act 2016* and the existing water sector policy framework. The analysis involved an assessment of,

- relevant literature and pertinent case studies on water sector regulation;
- the legislative and administrative gaps in the *Water Act 2016* and a further identification of issues in need of legislative clarity;
- issues relating to the efficiency of the *Water Act 2016* including streamlining of the existing sector subsidiary legislation; and
- multi-sectoral implications of the proposed regulations.

1.1 The Consultation Workshops

Prior to the **Water Sector Institutions Consultation Forum on March 28th 2019**, two consultative workshops were held namely a stakeholder exploratory and consultative meeting and a subsequent consultation workshop in which the Draft Regulations were presented to sector-wide stakeholders;

- **Stakeholder exploratory and consultative meeting 20th November 2018:** this meeting included staff from the MWS and from WSIs namely the Water Services Regulatory Board (WASREB), Water Regulatory Authority (WRA), the Water Sector Trust Fund (WSTF), the National Water Harvesting and Storage Authority (NWHSA) and Water Services Boards (WSBs). It was held prior to the development of the first drafts of the four sets of subsidiary legislation. The key objective was to gain initial insights on the prevailing matters to be addressed by the legislative reform process. The concerns that were broached were ultimately factored in and incorporated into the drafting and development of the Draft Regulations. The details of the consultations were provided in the *Kenya Water Security and Climate Resilience Project (KWSCRIP) Support to Water Sector Reforms Interim Report No. 1*.
- **Consultation Workshop 31st January – 1st February 2019:** Over the two (2) day period, the Consultant presented the first drafts of the four sets of subsidiary legislation at a sector-wide consultation workshop which was held in Nairobi. The workshop provided a forum for stakeholders to give feedback on the first drafts of the subsidiary legislation. The details of the consultations were provided in the *Kenya Water Security and Climate Resilience Project (KWSCRIP) Support to Water Sector Reforms Workshop Report Jan 31st - 1st February 2019*.

1.2 The Consultation Forums

In accordance with the national values and principles relating to Citizen Participation and as enshrined in Articles 10, 43, 60 (c), and 232 of the Constitution and further pursuant to the provisions of section 5(3) and section 8(1) of the Statutory Instruments Act No. 23 of 2013, on 6th March 2019, the CS issued a Gazette notice to inform the general public of the preparation of the first Drafts of the Regulations under the Water Act 2016. The CS gave further notice of the preparation of Regulatory Impact Statements (RISs) for each of the four sets of Draft Regulations, which were intended to inform the public of the impact of the Draft Regulations (the RISs are available on the MWS website at <http://www.water.go.ke/downloads/>).

- **Public Consultation Forum 25th March 2019:** was held at KICC with the aim of informing and presenting to the public the drafts of the four sets of subsidiary legislation and receiving feedback and recommendations. Details of the Consultation Forum are provided for in the **Public Consultation Forum Report**.

- **Other Consultation Forums:** Professional Bodies and Civil Society Organisations Consultation Forum was held on 29th March 2018 at Crowne Plaza. A Forum with the Council of Governors will also be held. Details of these Forums are provided for in the **Professional Bodies and Civil Society Organisations Consultation Forum Report** and the **Council of Governors Consultation Forum Report**.

1.3 Water Sector Institutions (WSIs) Consultation Forum

In keeping with the constitutional requirement regarding public participation, a Consultation Forum with Water Sector Institutions (WSIs) was held on the 28th March 2019 held at Crowne Plaza, Nairobi with the aim of informing and presenting to this targeted section of stakeholders the drafts of the four sets of subsidiary legislation and to obtain their views regarding key areas of concern for the sector.

This report provides the details of the Consultation Forum with the Water Sector Institutions. It provides an overview of the Consultation objectives, highlights the major discussion points as well as detailing the feedback and recommendations following from the discussion. The Forum was moderated/facilitated by Mr Julius Ngonga who is the Team Leader for the Project and presentations of the draft subsidiary legislation were made by Prof Albert Mumma who is the Legal Specialist for the Project.

2. WSI CONSULTATION FORUM OBJECTIVES

Public Participation is a crucial and imperative component of the legislative process. The primary purpose of the Consultation Forum with the WSIs is to facilitate the scrutiny of the Draft Regulations by these sector-wide stakeholders in order to enable them make recommendations, endorsements and to generally have an opportunity to have their views heard.

The following were the objectives of the Consultation Forum with Water Sector Institutions: -

- To present Draft subsidiary legislation under the Water Act 2016 on behalf of the Cabinet Secretary MWS;
- To facilitate Water Sector Institutions' participation in the development and drafting of subsidiary legislation;
- To obtain feedback on the Draft subsidiary legislation;
- To address all issues and concerns raised by the Water Sector Institutions relating to the deliverable for Key Task 4 (KT4);
- To provide certainty to the Water Sector Institutions that their contribution to the legislative process are duly considered; and
- To ensure the outcomes of the *WSI Consultation Forum* are used to inform the preparation of a comprehensive subsidiary legislation to support the MWS and WSIs which is to be tabled before Parliament.

3. STRUCTURE OF THE WSI CONSULTATION FORUM

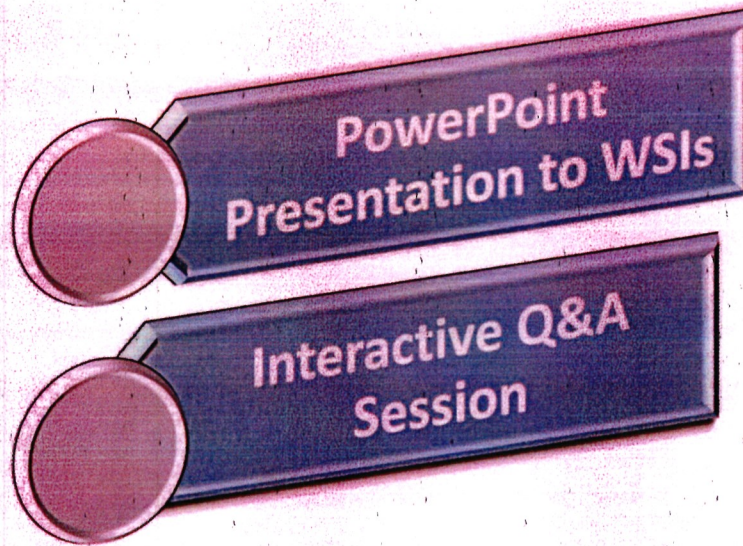


Figure 1: Structure of the WSI Consultation Forum

The figure above illustrating the Consultant's WSI engagement strategy to inform the drafting of the Subsidiary legislation, was designed to attain meaningful participation and involvement that would enable the WSIs to actively contribute to the development of new ideas and options as the final revised drafts are prepared.

Water Sector Institutions Presentations: The purpose of the presentations was to guide the members of the WSIs through the key elements of the Draft subsidiary legislation namely, the draft Water Resources Regulations 2019; draft National Water Harvesting and Storage Regulations 2019; draft Water Services Regulations 2019 and draft Water Tribunal Rules 2019.

Interactive Question & Answer Session (Q&A): The Consultant proposed that much more time is geared towards (Q&A) sessions rather than the presentation of the actual drafts given that the WSIs are already familiar with the draft pieces of legislation. This enabled the members of the WSIs in attendance an opportunity to focus attention and deliberate on contentious issues and specific key areas of the drafts. Additional inputs and comments were also welcomed.

4. WSI CONSULTATION FORUM

In terms of sequence the Consultant sought to address key areas for deliberation in the draft subsidiary pieces of legislation, particularly the draft *Water Resources Regulations 2019* and the draft *Water Services Regulations 2019*. The mode of presentation was to further aid the WSIs to deal with the crucial and substantive details of these Regulations. The views of the WSIs was to be exposed in the open and interactive forum for deliberation.

4.1 PRESENTATION AND INTERACTIVE Q&A SESSION

4.1.1 Draft Water Resources Regulations 2019

A number of key issues were identified for discussion in the draft *Water Resources Regulations of 2019*. These included:-

- A. Approval, Authorization and Permits (Part II)
- B. Surface Water (Part III)
- C. Groundwater (Part IV)
- D. Water Quality Monitoring and Effluent Discharge (Part V) and Works (Part VI)
- E. Water Use Charges (Part VIII)
- F. Conservation of Riparian Land and Catchment Areas (Part IX)
- G. Protected Areas and Groundwater Catchment Areas (Part XI)
- H. The Reserve (Part XII)
- I. Miscellaneous provisions of the Water Resources Regulations 2019 (Part XIII)

A. Approval, Authorization and Permits

The Draft *Water Resources Regulations 2019* are premised on the 2007 Regulations with further amendments. Part II of the Regulations looks at the approval process based on the categorization of water use. Small users i.e. Category A dams do not require a great deal of input from the public or other users. Table 1 below summarizes the session on this key issue:-

Comments by Participants
➤ Indefinite use under Category A guarantees indefinite use. These users must inform WRA of any change of use.
➤ Category A deals with small users. If the approval process becomes bureaucratic it will be burdensome.
➤ WRUAs or other key users should be consulted.
➤ Category B, C and D should undergo Hydrological studies and ESIA's.
➤ There should be an emphasis on principles that guide the allocation of water for example in borehole use e.g. where there's an aquifer approvals may be based on criteria such as capacity etc.
➤ WRA should develop some principles. Principles exist as guidelines and not statutorily required.

<ul style="list-style-type: none"> ➤ The requirement may be incorporated in a Schedule. In terms of Category A, provide a two year period for Category A dams i.e. permit lapses. At the end of two years there would be a review or reassessment.
Response by Consultant
<ul style="list-style-type: none"> ➤ There will be difficulty in ensuring compliance if small users are required to return after every two years for the review process. ➤ There is the possibility of making it a condition of the permit that the user must continue to use the water resource as required.

Table 1: Interactive Session on Approval, Authorization and Permits

B. Surface Water

In prior consultations, there have been proposals regarding the mode of calculation of normal flow and flood flow. Further to the foregoing, the questions of boundaries had also been raised. The Consultant further iterated that in previous engagements it was suggested that the allocation of water for irrigation is another matter that ought to be substantively addressed. In addition, it was stated that irrigators should have storage facilities (90 days) to store flood flow. It was also indicated that dry season flow is supposed to be identified for reservation and storage and should not be made available for allocation.

The Consultant stated that the WRMA Rules 2007 prescribed parameters i.e. Q₉₅, whereas other proposals in previous consultations directed that normal and flood flow should be dealt with on a case-by-case basis. Below are the questions, comments and proposals made by the WSIs at the Consultation Forum regarding this particular key issue:-

Comments by Participants	
<ul style="list-style-type: none"> ➤ Q80 distinguishes threshold from normal flow. Movement away from standardization would require specifications. Leaving it open-ended will be an issue. ➤ Values take into account all river systems. Quantification also enables hydrological assessments. ➤ Regulated flows will take a while to achieve. ➤ The 90 day storage to cater for unavailable flow 	
Question/Comment by Participants	Response by Consultant
<ul style="list-style-type: none"> ➤ Is it possible to connect NWHSA regulations and WRA regulations with regards to the issue of 90 day storage? 	<ul style="list-style-type: none"> • Within the sector there is confusion about the establishment of NWHSA. The concept of NWHSA is a water resources organization and not services. Mandate is water resources management. It is to build dams and release into river the outflow. It is to enable abstraction. NWHSA is to regularize river flow through artificial intervention and provide even flows throughout the year. • The thought was that this function would be for big dams. The question is can this be done widely?
<ul style="list-style-type: none"> ➤ The function of NWHSA is water harvesting and storage. The position of NWHSA is that water storage can be available for other services. There is no limitation in law to expand the function of national water. 	<ul style="list-style-type: none"> • The mandate of NWHSA is clear in the <i>Water Act 2016</i> namely it is established to deal with water resources and not services provision.

<ul style="list-style-type: none"> ➤ Everywhere there is dam there is a major treatment work. WWDAs will be involved in the development of cross-county bulk water supply. 	<ul style="list-style-type: none"> • This discussion concerns the difference between normal flow and flood flow. Weather patterns effect seasonal changes on rivers. Dams are artificial interventions that facilitate the abstractor from having 90day storage. Most abstractors don't have land to store water let alone for 90 days. Therefore it is necessary to create a mechanism to even out river flows.
<ul style="list-style-type: none"> ➤ It is advisable to recognize the concept of regulated flow. Have a provision in terms of thresholds such that threshold value will be different depending on the flood flow. ➤ Distinguish between natural flow systems and other systems. 	<ul style="list-style-type: none"> • Categorization between natural flow and regulated flow. A link will be created between regulated flow and 90 day storage.
<ul style="list-style-type: none"> ➤ Make storage a permit condition for all categories. Each category will have to have certain storage capacity. 	<ul style="list-style-type: none"> • It is not possible to do this as most people do not have land. More and more rivers will have regulated flows.

Table 2: Interactive Session on Surface Water

C. Groundwater

On this issue the Consultant remarked that there is an underlying assumption that groundwater does not have specific principles for abstraction and that these should be developed. Another key issue is that individuals with permits to drill boreholes often do not share the water with their neighbours and there is currently no existing mechanism to make this a requirement. Table 3 below illustrates the general comments and proposals made by the participants:-

General Comments and Proposals
<ul style="list-style-type: none"> ➤ Issue is longstanding. In the new regulations there should be a possibility of splitting the allocation of groundwater.
<ul style="list-style-type: none"> ➤ Reintroduce the requirement for spacing. Proposal for 500m from an existing borehole. Where there are pitlatrines or sock-pit 50m.
<ul style="list-style-type: none"> ➤ Change of use of boreholes should be a public function. It should be subject to public consultation.
<ul style="list-style-type: none"> ➤ In the services regulations borehole owners should be mandated to provide water in terms of shortage. Authority should define the spacing to subcatchments. WRA will have the prerogative to determine the spacing.
<ul style="list-style-type: none"> ➤ If boreholes can be registered as water service provider it can be better regulated.
<ul style="list-style-type: none"> ➤ There can be a condition introduced in the water use permit, that the permit is conditional on you to supply water.

➤ Linkage to services provision is good. Service provider has to give no-objection. Formalised service would guarantee the human right to water.
➤ There should be a simultaneous licensing between water use permit and water service.
➤ Counties have been complaining that they need to be involved in the no-objection. There should be a mechanism of involving the counties.
• Response by Consultant: Provision may be made in the Regulations to give them powers to veto decisions.

Table 3: Interactive Session on Groundwater

D. Water Quality Monitoring And Effluent Discharge And Works

When an applicant seeks an effluent discharge permit this is considered a water use under the *Water Resources Regulations 2019*. The Regulations make it a requirement for the development of an effluent discharge plan which provides the basis for monitoring and enforcement.

Applications for construction of works will be processed with associated water use requirement for inspection of works. WRA is mandated to undertake inspections. If there are abandoned works they are to be rehabilitated. Deployment of resources by WRA to carry out inspections is necessary to ensure compliance.

The Consultant engaged the participants in an interactive session in an effort to facilitate the discussion in this particular area. The responses in this exchange is captured in Table 4 below:-

Comments by Participants	
<ul style="list-style-type: none"> ➤ WRA must have ability to inspect as per design. ➤ Works should be supervised by Qualified Water Resources Professionals (QWRPs). ➤ Inspection must be done even on renewal and variation. ➤ The applicant pays for the inspection. 	
Questions by Consultant	Comments from Participants
➤ Should QWRPs just hand over reports?	• There should be physical inspection.
➤ What if WRA inspector does not show up to inspect?	• Inspections must be done by WRA. Completion of works falls upon the applicant and the QWRP.
➤ What remedies are there if the WRA inspector does not show up?	<ul style="list-style-type: none"> • There is provision for timelines in which activities are to be undertaken. • The WRA inspector can be sanctioned. It becomes an administrative issue. The applicant may take advantage of the mechanism for complaints.
➤ Can the inspection report by the QWRP be a substitute if the WRA inspector does not appear for physical inspection?	• Inspection is the responsibility of WRA

Table 4: Interactive Session on Water Quality Monitoring and Effluent Discharge and Works

The Participants offered further commentary in the discussion above and addressed the key issues as follows:-

Comments by Participants	
<ul style="list-style-type: none"> ➤ All the fees have been separated because of the permitting system. There should not be an issue in wrapping up all the fees. ➤ Inspection fee should be separated for the purpose of taking responsibility. Payment of inspection fees means there is a commitment. ➤ If an individual pays for inspection fees upfront and the construction does not go ahead another process of refund would ensue. 	
Questions/Comments by Participants	Response by Consultant
<ul style="list-style-type: none"> ➤ Inspection fee is another level of bureaucracy. ➤ The inspection fee should be part of the application fee. 	<ul style="list-style-type: none"> • Inspection fee in draft rules was intended to help the WRA to conduct the inspections. Consensus is that fees is set low. The thinking was that in order to increase fee was to facilitate charge for specific points of intervention.
<ul style="list-style-type: none"> ➤ Is it possible to link the provision on easements to the Land Registration Act? ➤ Introduce requirement for registration. 	<ul style="list-style-type: none"> • There should be a process of notification to the owner in the Regulations

Table 4.1: Interactive Session on Water Quality Monitoring and Effluent Discharge and Works

E. Water Use Charges

The Water Use Charges under the *Water Resources Regulations 2019* follow the same format but the water use charges are subject to change. The increase in rates is necessary. The idea is to peg the rates to specific activities and then to establish a mechanism for collection. Table 5 below summarizes the exchange between the participants and the Consultant.

Comments by Participants	Response by Consultant
<ul style="list-style-type: none"> ➤ Payments should be made on a monthly basis to ensure compliance and increase cash flow. ➤ Billing monthly and payment monthly but not quarterly. 	<ul style="list-style-type: none"> • Bills are paid monthly thus enabling users to take this into account in their monthly bill payments.
Question/Comment by Consultant	Response By Participant
<ul style="list-style-type: none"> ➤ Modes of collection by agents. Can WRUAs be collection agents? 	<ul style="list-style-type: none"> • Amounts going to the WRA would be reduced due to paying Revenue Collection.
<ul style="list-style-type: none"> ➤ WRUAs better placed to determine who uses the water and can remit the same to the authority. Increased use 	<ul style="list-style-type: none"> • How would the agent be distinguished as a legitimate agent? This would create loopholes for corruption.

<p>means increased revenues that can offset any payment of services.</p>	<ul style="list-style-type: none"> • There is no effective means of collection of revenue by themselves. A firm can be engaged to collect revenue for a specific area. • if the clause remains, there is an incentive to collect revenue. • Review of water use charges: clause 81(2) – the cost of managing water catchment areas is huge.
<p>➤ Sharing of revenue from water use charges highly contested amongst different entities e.g. counties, WSTF, NWHSA, WRA.</p> <ol style="list-style-type: none"> 1. Counties argue that they have role in catchment management activities. "Payment for ecosystem services". 2. WRUAs have a direct role in supporting the WRA in regulatory activities. They need financial resources. 3. WSTF: argues that they have an expanded mandated including financing services in the water sector 4. NWHSA: revenue funds may help finance the activities of the NWHSA in their maintenance and management functions. 	<ul style="list-style-type: none"> • Water use – means the fees that are paid for abstraction. Instead of talking about the permit part, we should discuss the end-user. The consumption charge should be the focus (end-put). There would be no need for WRUAs as the counties will collect the funds and the revenues distributed accordingly. • End-cost should be apportioned amongst the different institutions. • Specify formula for apportionment. On the issue of counties it is difficult to imagine. How will this be apportioned across the counties? WRA would have to track where each revenue is collected. The level of financial bureaucracy on the authority will be enormous. • Water needs to be looked as a social good to be provided equitably. Proposal has been made for 5% for groundwater. Which county will benefit? What about counties with ASALS. WRUAs comments would attract a fee. How does the component of NWHSA fall under water use? WSTF are supposed to source for funds. Imposition of fees is facilitate use and management. • WSTF should be given a proportion of the funds. • Levies at the consumption level: requirement that counties make that tariff available to the consumer. The funding mechanisms needs to be addressed such that it does not infringe on the right to water by burdening the consumer. • In the road sector the Kenya Roads Board collects revenue and it is distributed amongst the institutions as decided by Parliament.

Table 5: Interactive Session on Water Use Charges

F. Conservation of Riparian Land and Catchment Areas

Riparian land is defined on the basis of highest flood flow. There is contestation that flood flow levels should not be used as a basis for defining and determining the extent of Riparian Land. Table 6 below illustrates the discussion on this key issue:-

Comments by Participants
➤ The high-water mark can change e.g. climate change and urbanization etc. It is a moving target. Previous regulations marked from the bank, a physical feature, fixed points that are identifiable.
➤ Riparian land defined broadly in order to ensure that watercourses are clean among others. In today's context this is no longer feasible. Development should be the solution and way forward.
➤ Riparian land defined where floodplains are concerned becomes a technical issue. It is not good practice to adopt the Netherland's approach of canalization. A canalized river is a dead river. Riparian land is necessary to maintain the life of the river.
➤ WRA can identify and map rivers and identify riparian land and purchase them from WRA.
➤ We need to relook at the definition of watercourse in light of the definition of riparian land. Is there a reserve area for dams? Or riparian land for dams?
➤ Depending on the flow, this is how riparian land should be determined.
➤ Response by Consultant: As regards riparian land in relation to dams, this can be captured in the Regulations relating to protected areas.

Table 6: Interactive Session on Conservation of Riparian Land and Catchment Areas

G. Protected Areas and Groundwater Catchment Areas

The main issue is that designation of Protected Areas and Groundwater Catchment areas should be on a case-by-case basis however such designation has been very little. Table 7 below illustrates the discussion on this key area by the participants, and the respective feedback given by the Consultant in the interactive session:-

Comments by Participants	
➤ WRA has tried to implement to a certain extent.	
➤ There are two issues Kenya Forest Service and Kenya Wildlife Service. Create a relationship between these institutions.	
➤ Make a provision for securing data from Kenya Meteorological Department without payment or at a subsidized rate.	
➤ Some boreholes are financed through loans. An easier approach is for the WRA to determine the amount of persons to potentially be supplied. The WRA should be able to determine the tariffs. This would avoid the multiplicity of tariffs.	
Questions/Comments by Participants	Response by Consultant
➤ Obligation on requirement to supply water from boreholes.	<ul style="list-style-type: none"> • Pay a portion of the initial capital investment to the borehole owner when they seek supply of water.
➤ Numerous capital costs associated with boreholes. There must be a mechanism for the borehole owner to charge a reasonable tariff.	

Table 7: interactive Session on Protected Areas and Groundwater Catchment Areas

H. The Reserve

The Regulations provide that the Reserve is Q_{95} and below. The participants' response on this issue was as follows: -

1. The threshold should not be put in the Regulations.
2. Q_{95} is not practical for seasonal rivers for example.
3. Other methods should be used for making this determination in natural flow/non-regulated rivers.
4. Unless there are other guidelines developed by WRA, as specified Q_{95} can be characterized as the standard minimum in the Regulations.
5. More detailed analysis can be in a document developed by WRA.

I. Miscellaneous Provision in the Water Resources Regulations 2019

Discussion in this particular section centered on the registration of QWRPs. Particular reference was also made with regard making provision in the Regulations regarding the role of geophysicists in groundwater exploration and their registration. The comments and suggestions regarding the issue of registration of professionals generally included:-

1. WRA to register these individuals. Registration is a regulatory function and should be undertaken by the Ministry.
2. Registration should be with WRA. On the geophysicists, there is no need to mention them. They should continue to be registered as a QWRPs.
3. Regulating the professionals should be at the Ministry. QWRPs are involved in a number of areas and spans water resources and other water sectors. Professionals practice across the sectors.
4. Geologists have an element of Geophysicists. There is no need for specific distinctions. WRA cannot also be a regulator in terms of registration. Registration should be done by a neutral body.
5. Other regulators such as NEMA provided experts to WRA and not the ministry of environment; the same should go for WRA.

4.1.2 Draft Water Services Regulations

A number of key issues were identified for discussion in the draft Water Services Regulations of 2019. These included:-

- A. Establishment, Operation and Financing of Water Services Providers (Part III)
- B. Systems and Standards for Operation of Water Services (Part V)
- C. Tarrifs (Part VII)
- D. Clustering (Part VIII)
- E. Levies (Part IX)
- F. Administration Of Certain Water Supply And Infrastructure Services (Part X)
- G. Complaints (Part XVII), Consumer Engagement (Part XVIII), Compliance and Enforcement (Part XIX) and Penalties (Part XX)

A. Establishment, Operation and Financing of Water Services Providers

Participants of the consultation forum proposed that:

1. There is need for counties to make reference to the national policy standards, including reporting to the county assembly.
2. Reports should be shared with WASREB.
3. Pursuant to S. 72 of the Act WASREB can come up with standards. These are the standards that are being referred to and thus be applicable. County governments can use WASREB draft rules as far as services provision is considered.

B. Systems and Standards for Operation of Water Services

The Consultant engaged the participants in an interactive session in an effort to facilitate the discussion in this particular area. The responses in this exchange is captured in Table 8 below:-

Comments by Participants	
<ul style="list-style-type: none"> ➤ Build up this section such that borehole suppliers may fall under private WSPs or community water project. ➤ The systems and standards for operation of water services must be established by WASREB including the nature of works; nature of services; the construction of works etc. ➤ A system must be developed to allow implementation in conjunction with other institutions or even the county government. ➤ One of the key issues is that there are numerous WSPs which may create a risk of bottleneck to operations if the system is based on WASREB being the regulator of all the standards including their enforcement. ➤ There should be provision made for boreholes in the system and standards section. ➤ Boreholes should not be the only focus. Other sources such as rivers should be looked at. ➤ National duty to ensure that poorest are served. WSP must show that it has capacity to supply the customer but also the wider population. The issue of sustainability of the WSP must also be addressed. ➤ Community water projects – there is a hierarchy. WSP should have an inspection role over private WSPs and community projects i.e. sub regulator. 	
Response by Consultant	
<ul style="list-style-type: none"> • Part III of the Water Services Regulations provides for several arrangements - <ol style="list-style-type: none"> i. County established WSPs ii. Private WSPs and; iii. Community water projects. • The rules as written provide that the primary mandate is on counties to provide water services but they may partner and enter into agreements with the other two. 	
Question/Comment by Participants	Response by Consultant

<p>➤ What happens if county refuses the sharing mechanism of the borehole?</p>	<ul style="list-style-type: none"> • County WSPs argue that they have invested in a water system and expect revenue from tariffs. When boreholes are drilled they lose customers. Those drilling are usually the richest. Thus they are unable to recover to meet their costs. Their complaint is that no one should be allowed to drill boreholes. Compromise position is that county WSPs should be in a position to state that these individuals cannot drill.
<p>➤ Adopt what the Water Resources Regulations say. WASREB should be able to say your objection is not justified. There should be an intervention mechanism from regulator.</p>	<ul style="list-style-type: none"> • This would work as an appeal mechanism such that WASREB may intervene if county refuses.
<p>➤ WSPs are interested parties. Most WSPs cannot meet supply. WSPs should not be left with the power to determine the drilling of boreholes. There is a need for an impartial regulator and not an interested party.</p> <p>➤ There is need for a no-objection to cater for instances where the county WSP may have a viable plan for the provision of water services.</p> <p>➤ The process may be subject to various factors including political interference; capacity of the county WSP among other issues. Therefore a regulator should be in charge.</p>	<ul style="list-style-type: none"> • There should be a system that maintains WASREB as a focused regulator. WSPs must be allowed to comment. If a dispute arises the objector can go to WASREB. There is a need to secure investments. But WSP cannot stifle other rights. There needs to be synchronization.

Table 8: interactive Session on System and Standards for Operation of Water Services

C. Tariffs

The current position on tariffs in urban areas is premised on full cost recovery i.e. the capital investments and operation and maintenance costs. WASREB is required to determine the full cost recovery. In rural areas the principle is that the tariff is based on recovery of the operation and maintenance costs. Capital investments in these areas should be covered by the taxpayer. WSPs should move in direction of being viable on the basis of cost recovery.

Prior consultations elicited the view that tariff review should be undertaken every three years, however the *Water Services Regulations 2019* suggest five years. Other proposals have provided for approved tariffs to be the subject of indexation according to the rate of inflation. The issue of affordability has also been another area of concern.

The Consultant engaged the participants in an interactive session in an effort to further facilitate the discussion in this particular area. The responses in this exchange is captured in Table 9 below:-

Comments by Participants	
<ul style="list-style-type: none"> ➤ WASREB recommends 5 years. Current applicable indexation has been provided to the Consultant. ➤ There is already an existing formula for categorization of WSPs whether small or large etc. Commercial viability criteria distinguishes between small and very large WSPs. ➤ The distinction of areas should be based on size and will eliminate the need for distinction of WSPs based on size. ➤ Number of active connections is what determines the size of the WSP. 	
Response by Consultant	
<ul style="list-style-type: none"> • Part III of the Water Services Regulations provides for several arrangements - <ul style="list-style-type: none"> i. County established WSPs ii. Private WSPs and; iii. Community water projects. • The rules as written provide that the primary mandate is on counties to provide water services but they may partner and enter into agreements with the other two. 	
Question/Comment by Consultant	Comments by Participants
<ul style="list-style-type: none"> ➤ How does one differentiate since operational costs may not necessarily coincide with the issue of size. 	<ul style="list-style-type: none"> • COK guarantees access to water. Levies collected should go to subsidizing specific providers dependent on the operational costs that are incurred. Consider the volumes being consumed. These users should be charged higher. Cheap schemes should support expensive schemes.

Table 9: interactive Session on System and Standards for Operation of Water Services

D. Clustering

In this discussion the Consultant iterated that under the clustering principle WSPs should be structured on the basis of viability criteria. The necessity of a feasibility study was also stressed.

In previous consultations it was noted that the prevailing position is that counties are interested in establishing either one or two WSPs without first making a determination of whether they are improving service provision or not. In addition, it has been observed by stakeholders that there is a connection between tariffs and the commercial viability of WSP. In other forums it was further stated that costs should not be unjustifiably high.

Participants of the WSI Consultation Forum observed that:-

1. WASREB has clustering guidelines. Water Services Rules should refer to the guidelines in order to ensure compliance by counties.
2. There should be an evaluation of financial competence and technical competence and recommendations made thereafter.

E. Levies

The Regulations have two levies: the water consumption levy and the sewerage services levy. The WSPs charge the sewerage levy to offset sewerage services costs. The current proposal is 5%. The water consumption levy is to be determined by CS and held by the WSTF. The current proposal is 3% of monthly consumption. The *Water Services Regulations 2019* stipulate that collection of said levies is to be done by the WSP and deposited into the levy account.

In this interactive session, the participants commented that:-

1. The issue of affordability was a key area of concern.
2. There should be a percentage breakdown of how the levies is to be distributed to the WSIs.

F. Administration Of Certain Water Supply And Infrastructure Services

The Consultant's presentation discussed the Regulations requirement for WSPs to ensure the availability and development water resources in sufficient and adequate quality and quantity. In addition there is the requirement on WSPs to obtain access rights and easements, and may further make arrangements with WASREB to purchase bulk water. Further a WSP within whose area of supply a borehole is to be drilled shall be entitled to be consulted on the permit application and to issue a "no-objection".

In an effort to facilitate the discussion in this particular area the Consultant engaged the participants in an interactive session which elicited the comments in Table 10 below:-

Question/Comment by Participants	Response by Consultant
<ul style="list-style-type: none"> ➤ There is need to regulate where the level of supply needs to be determined. ➤ Large areas like Nairobi will not be dependent on one system. If the design is unable to capture the projections this would be too late. There must be an immediate short term & a long-term projection. ➤ WSP should have ability to maintain infrastructure to enable increased supply through storage. 	<ul style="list-style-type: none"> • WSP should have reasonable and reliable sources of supply.
<ul style="list-style-type: none"> ➤ WWDAs according to the Act are infrastructure developers and not WSPs. ➤ In line with S. 72(1)(b) of the Act there is need for collaborative framework between WWDAs and counties. This needs to be anchored in the regulations. ➤ Who are the WWDAs? 	<ul style="list-style-type: none"> • WWDAs are a bulk water supplier to WSPs. WWDAs to hand over systems once developed to the user. • There is handover where there is an agreement for the person being handed over to pay costs of construction. There must be dialogue from the planning stage in regards to this arrangement.
<ul style="list-style-type: none"> ➤ If WSP wants to increase bulk supply within the area it must engage a WWDA. Infrastructure is to bring water to supply area. Quite restrictive and forces WSPs to 	<ul style="list-style-type: none"> ➤ Provision of water services by WWDAs as a measure of last resort should be captured in the regulations.

<p>engage with WWDAs. Complicated collaborative framework could be a hindrance to the service.</p>	<p>➤ The idea will be clarified. WASREB ultimately the regulator. Where the WSP may not be compliant, WASREB may have to revoke the licence. However there must be another viable entity. WWDAs mostly deal with similar systems and they could step in. Or another WSP may step in.</p>
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Table 10: Interactive Session on Administration of Certain Water Supply and Infrastructure Services

G. Complaints, Consumer Engagement, Compliance and Enforcement and Penalties

The WSP is required to establish a complaints mechanism. Complainants may make further complaints to WASREB. The Regulations make further provision for WAGs with a mechanism for their intervention in a group context.

The Regulations recognize that WASREB has an enforcement role and may issue a cure notice. If a utility is collecting a water consumption charge and not remitting it may be sanctioned.

It was proposed that

1. under the special regulatory regime a receiver manager may be appointed.
2. As regards penalties there was the feeling that there should be a general penalty which should be enhanced.
3. On annual reporting, the WSP should have the responsibility to ensure that the community projects and private WSPs are in compliance.

4.2 General Commentary on the WSI Consultation Forum

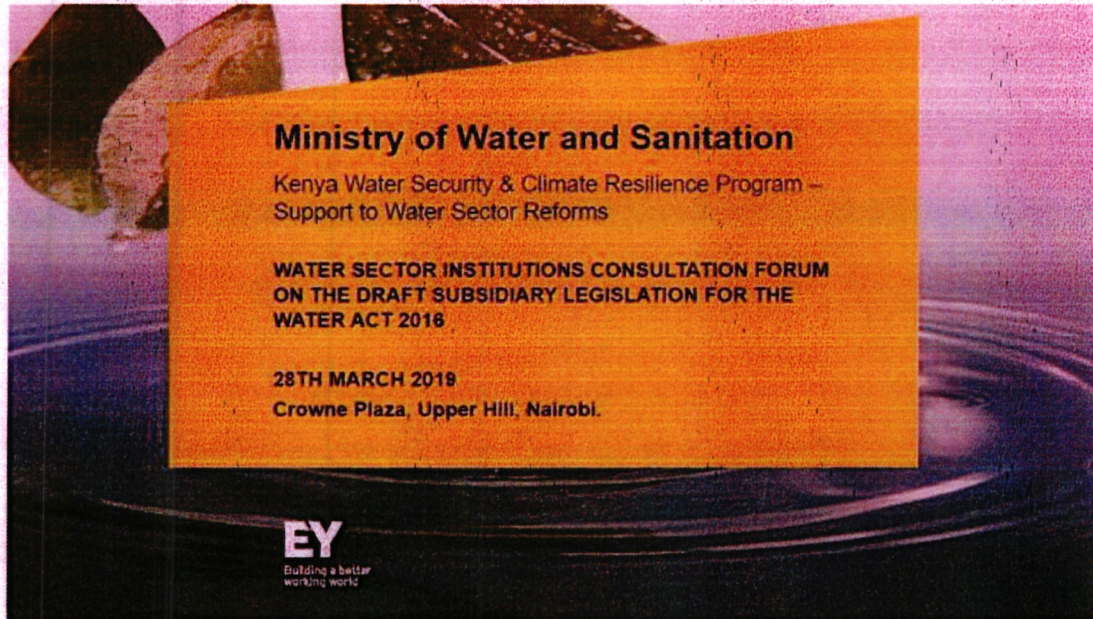
The Presentation to the WSIs exhaustively presented what the participants termed as the key issues in requiring further deliberation and scrutiny in the subsidiary legislation.

Way Forward: The MWS welcomes the comments received and will continue to engage the WSIs. The participants were informed that they have 7 days to provide any further comments to the Consultant which would be accordingly considered and incorporated in the final revisions and refinement of proposed drafts prior to the National Validation Workshop and tabling before Parliament.

It has been acknowledged that some of the issues raised and which may not be provided for in the subsidiary legislation will form important recommendations for legislative amendments.

5. ANNEX

a. Annex I: WSI Consultation Forum PowerPoint Presentation



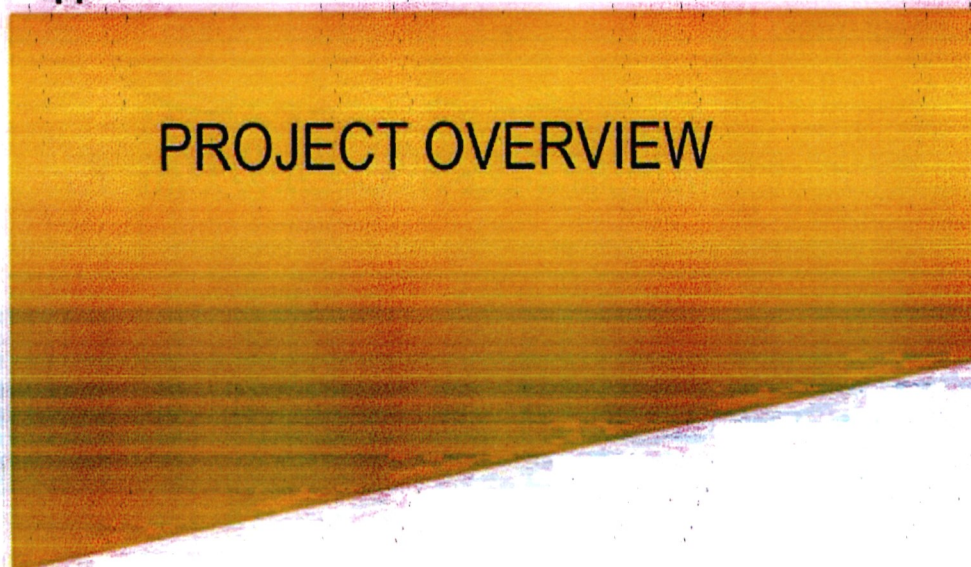
AGENDA

Time	Item	Presenter
8:30- 9:00 am	Welcome & Introductions	MWS
9:00-9:15 am	Briefing <ul style="list-style-type: none"> • Overview of the Project • Update of the Project 	Consultants
9:15- 9:30 am	Key Task 4 - Development and drafting of subsidiary legislation <p>Background</p> <ul style="list-style-type: none"> • Constitutional and legal considerations - Water Act 2002 (Rules) and 2016 (Proposed Rules) • Initial Considerations for the Proposed Regulations • The four categories of the Proposed Regulations • Regulatory Impacts Assessment • Stakeholder consultations in the sector 	Consultants

AGENDA

Time	Item	Presenter
9:30-10:30 am	Water Resources Regulations 2019 Question & Feedback Session	Consultants
10:30am – 11:00am	Tea Break	
11:00am-12:00pm	Water Harvesting and Storage Regulations 2019 Question & Feedback Session	Consultants
12:30pm – 13:30pm	Lunch Break	All
13:30pm- 14:30pm	Water Services Regulations Question & Feedback Session	Consultants
14:30pm-15:30pm	Water Tribunal Rules	All
	Question & Feedback Session	MWS/Consultants
Page 5	Draft Subsidiary Legislation	EY

Kenya Water Security & Climate Resilience Program – Support to Water Sector Reforms



BACKGROUND – SCOPE OF WORK

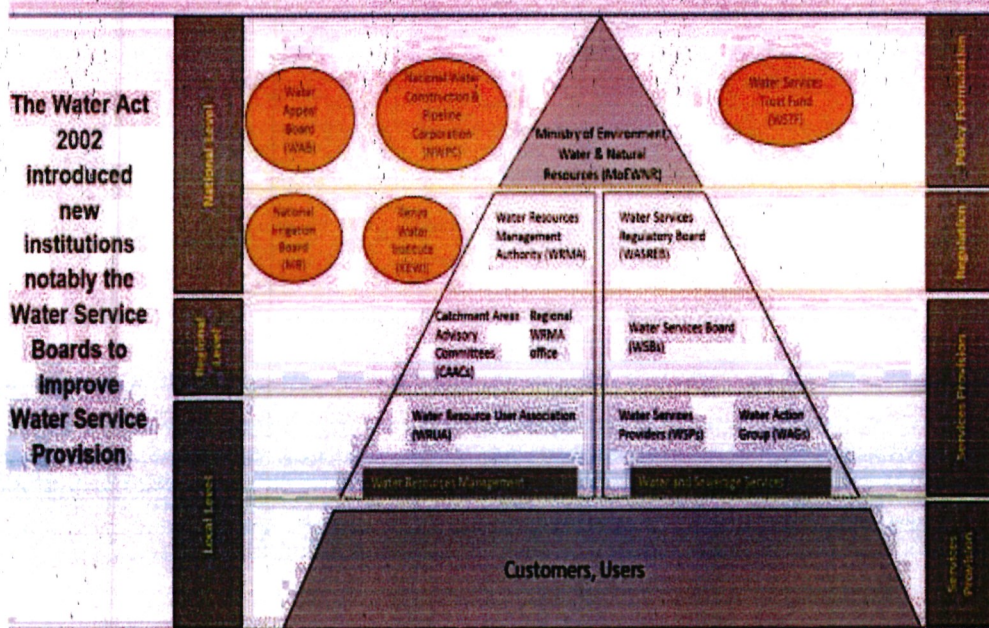
Task	Scope of Work	Inputs	Outputs
1	Organizational Capacity Needs Assessment	<ul style="list-style-type: none"> Workshops Analysis 	<ul style="list-style-type: none"> Report Workshops Toolkits
2	Costed Water Sector Transition and Transfer Plan	<ul style="list-style-type: none"> Reviews Workshops Consultative Forums 	<ul style="list-style-type: none"> Report Consultation Transition Plan Workshop
3	Analytical Study and Stakeholder Consultation on Criteria for set up of WWDAs	<ul style="list-style-type: none"> Reviews Workshops Consultative Forums 	<ul style="list-style-type: none"> Reports Workshop Regulations Draft Consultation
4	Development and Drafting of Subsidiary Legislation	<ul style="list-style-type: none"> Reviews Workshops Consultative Forums 	<ul style="list-style-type: none"> Reports Workshop Regulations Draft Consultation

Page 9

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INSTITUTIONAL SETUP (WATER ACT 2002)

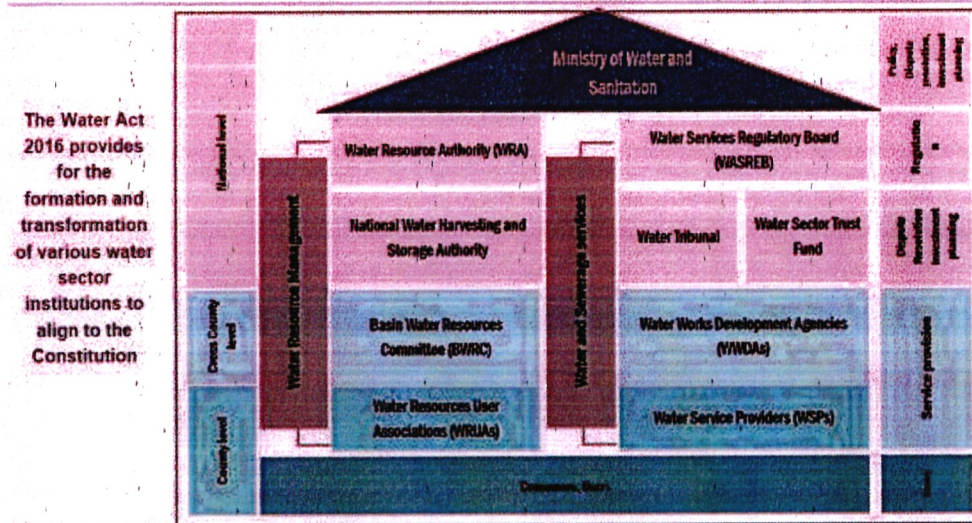


Page 11

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INSTITUTIONAL FRAMEWORK WATER ACT 2016



Page 13

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THE FOUR SETS OF REGULATIONS

Page 15

EY

WATER RESOURCES REGULATIONS

- For the establishment administration and operation of WRUAs (s. 29)
 - ▶ Engagement modalities with Council of Governors.
 - ▶ Financing of Water Resource Users Associations (WRUAs)
 - ▶ Technical support to WRUAs
 - ▶ Engagement modalities with Water Resources Authority (WRA)
- Delegation of WRA regulatory functions to Basin Water Resources Committees (BWRCs) (ss. 13 & 25)
- Conservation of ground water - s.23 (3)
- Governing issuance of permits for water rights and works (ss. 36 – 62)
- Governing abstraction of ground water and works including licensing of borehole construction – s. 142 (2) (b)
- Governing construction, extension or improvement of dams and licensing of persons carrying out business as dam constructors – s.142 (2)(c)

Page 17

Draft Subsidiary Legislation

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NATIONAL WATER HARVESTING AND STORAGE REGULATIONS

- Governing development, maintenance and management of national public water works – s. 32 (1) (a, b, & f)
- Governing undertaking of strategic water emergency interventions during drought – s. 32 (1) (e)
- Governing rain water harvesting and household water storage – s.32 (1) (d)
- Governing construction, extension or improvement of dams and licensing of persons carrying out business as dam constructors – s. 142

Page 18

Draft Subsidiary Legislation

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WATER SERVICES REGULATIONS

- ❑ Land compensation and easements for private and/or community land used for national public works - s. 8(5-6)
- ❑ Licensing of water sector engineers and other sector professionals
- ❑ Governing transfer of functions, assets, liabilities and staff
- ❑ Prescribing water levies for:
 - Water Trust Fund (County vis-à-vis National level)
 - Sewerage services
- ❑ Water Services Regulation:
 - Water Quality
 - Infrastructure development
 - Enforcement of technical and engineering standards and requirements

Page 21

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WATER SERVICES REGULATIONS (continued)

- ❑ Constitution of Water Service Providers (WSP) Boards (s 79)
- ❑ Establishment of Consumer Complaints Mechanism by WSPs (s. 92)
- ❑ Provision of water to rural areas (s. 94)
- ❑ Protection of Water Sources (s.104)
- ❑ Control of trade effluent (s. 108)
- ❑ Financing for infrastructure developments - PPP arrangements

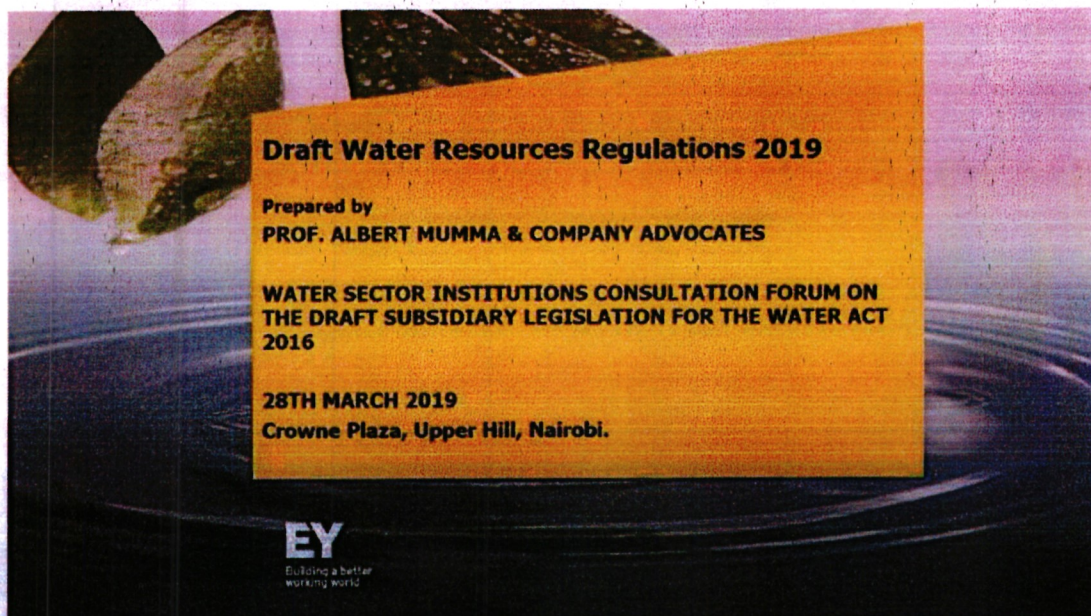
Page 22

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WATER TRIBUNAL RULES

- Rules governing procedures for the Water Tribunal (s.122)



IN EXERCISE of the powers conferred by Section 142 of the Water Act 2016, the Cabinet Secretary for Water and Sanitation makes the following Regulations

THE WATER RESOURCES REGULATIONS, 2019

**THE WATER ACT
(No. 43 of 2016)**

THE WATER RESOURCES REGULATIONS, 2019

ARRANGEMENT OF REGULATIONS

- PART I - PRELIMINARY
- PART II - APPROVAL, AUTHORISATION AND PERMITS
- PART III - SURFACE WATER
- PART IV - GROUNDWATER
- PART V - WATER QUALITY MONITORING AND EFFLUENT DISCHARGE
- PART VI - WORKS
- PART VII - CONDITIONS OF AUTHORISATION, PERMITS AND APPROVED WATER USES
- PART VIII - WATER USE CHARGES
- PART IX - CONSERVATION OF RIPARIAN AND CATCHMENT AREAS
- PART X - BASIN WATER RESOURCES
- PART XI - PROTECTED AREAS AND GROUNDWATER CONSERVATION AREAS
- PART XII - THE RESERVE
- PART XIII - MISCELLANEOUS

□ **PART I – PRELIMINARY**

1. Citation
2. Interpretation
3. Units
4. Application of regulations

□ **PART II - APPROVAL, AUTHORISATION AND PERMITS (Rules 5 – 34)**

❖ **LICENSING**

- Categorization of Water Resource Use Applications (Section 2 Sixth Schedule) (Category A, B, C and D)
- Procedure for Approval of Category A
- Procedure for Approval of Category B, C and D Water Use Applications
- Requirement for Site Assessment or Technical Reports for Category C and D
- WRUA Comments on Applications
- Public Notification of Permit Applications for Category C and D
- Site Meetings following objection to Category C and D permits
- Rejection of Applications

Draft Subsidiary Legislation – January 2019

❖ **CONSTRUCTION OF WORKS**

- **Authorization to Construct Works (Rule 20)**
 - Limitations of Authorization (Rule 21)
 - Extension of Authorization (Rule 22)
 - ✓ Progress Report
 - ✓ Explanatory Report
- **Completion Certificate (Rule 24)**
 - Inspections by Water Resources Inspector
- **Variations and/or cancellation (Rule 28 & 29)**
 - by Permit Holder
 - by the Authority
- **Public Notification of Authorizations and Permits (Rule 33)**

Draft Subsidiary Legislation – January 2019

□ PART III - SURFACE WATER (Rules 35-42)

❖ WATERCOURSES

- Normal Flow and Flood Flow (Rule 35)
- Declaring a Watercourse (Rule 36)
- Boundary of Properties Defined by a Watercourses (Rule 37)
- Wetlands (Rule 38)
- Allocation of water for Irrigation (Rule 39)
 - irrigation for subsistence
 - crop water requirements
 - limits to abstraction
- Hydro Power (Rule 40)
- Surface Water Data (Rule 41)
- Works Associated With Fish Movement for Protection and Control of Fish (Rule 42)

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□ PART IV – GROUNDWATER (Rules 43 – 52)

- Authorisation
- Regulation of Development
- Borehole and well test pumping
- Supervision of works
- Borehole or Well Completion Record
- Issue of permit or approval

□ PART V - WATER QUALITY MONITORING AND EFFLUENT DISCHARGE (Rules 53 - 62)

- Control of Water Pollution
- Water Quality Requirements
- Effluent Discharge Records & Effluent Discharge Control Plan
- Consideration of effluent discharge applications based on Category A, B, C and D
- Spillage

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❖ MONITORING AND ENFORCEMENT

- Water Quality Monitoring
- Water Quality and Effluent Discharge Data
- Pollution Control Enforcement

❑ PART VI - WORKS (Rules 65 - 67)

- Inspection of works prior to, during and post construction
- Temporary works: diversion, abstraction, impoundment, obstruction, storage or use water temporarily
 - Deadline for removal
- Abandoned Works
 - Orders issued by Authority on abandoned works

Draft Subsidiary Legislation, January 2019

❑ PART VII - CONDITIONS OF AUTHORISATION, PERMITS AND APPROVED WATER USES (Rules 68-79)

- Easements
- Compliance with the Environmental Management and Coordination Act
- Inspection of Works
- Controlling and Measuring Devices
 - Class B, C or D water users
- Limitation of Flow or Quantity
- Collection and submission of Abstraction, Water Quality and Effluent Discharge Data
 - Class B, C or D permit holder
- Storage
- Installation of an airline in boreholes
- Entry Upon Land
- Water Resource Inspector
- Water Resource Data

Draft Subsidiary Legislation, January 2019

□ PART VIII - WATER USE CHARGES (Rules 80-91)

- Variation of Water Use Charges
- Assessment of Water Used
- Time Limitation on Arrears.
- Water Resource Conservation Charge.

❖ REVENUE COLLECTION

- Appointment of Revenue Collection Agents.
- Modes of payment of water use charges.

❖ PENALTIES & INCENTIVES

- Penalty for Over- Abstraction.
- Incentive for Flood Water Storage
- Penalty for Lack of Measuring Device
- Failure to pay the appropriate water use charges.

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□ PART IX - CONSERVATION OF RIPARIAN AND CATCHMENT AREAS (Rules 92-97)

- Determination of the Riparian Land
- Demarcation of the Riparian Land
- Proscribed Activities on Riparian Land
- Orders Related to Riparian Land.
- Soil and Water Conservation Plan
- Collaboration with Water Resources User Associations (WRUAs)
 - Registration requirements for WRUAs

□ PART X – BASIN WATER RESOURCES

Draft Subsidiary Legislation, January 2019

**□ PART XI - PROTECTED AREAS AND GROUNDWATER CONSERVATION AREAS
(Rules 100-102)**

- Process of Identifying Areas to be Protected or Designated as Groundwater Conservation Areas
- Management Rules related to a protected area or groundwater conservation area
- Public Consultation regarding areas to be protected or designated as groundwater conservation areas

□ PART XII - THE RESERVE (Rules 103-105)

- Composition of the Reserve
- Reserve Quantity
- Information on and Protection of the Reserve Quantity

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□ PART XIII - MISCELLANEOUS (Rules 106-128)

- Categories of Qualified Water Resource Professionals (Ninth Schedule)
 - Criteria for QWRPs
- Application to be licensed as a Qualified Water Resource Professional
- Need for Professional Interview
- Issuance of Professional Water Resource License
- Compliance with Professional Codes of Practice
- Complaint made against a Qualified Water Resource Professional
- Requirement of a Qualified Water Resource Professional to Approve Designs and Drawings
- Misrepresentation as a Qualified Water Resource Professional
- Categories of Qualified Contractors (Ninth Schedule)
 - Criteria for QCs
- Issuance of license to Qualified Contractor and Annual License Fees
- Misrepresentation as a Qualified Contractor
- Recognized Water Quality Laboratories
- Orders
- Mechanism for Complaints

Draft Subsidiary Legislation, January 2019

SCHEDULES

First Schedule:	Fees and Water Use Charges
Second Schedule:	Content and Format of Technical Reports
Third Schedule:	Penalties for Specified Offences
Fourth Schedule:	Guideline Standards for Effluent Discharge
Sixth Schedule:	Water Use Activities and Permit Details
Seventh Schedule:	Riparian and Catchment Protection and Conservation
Eighth Schedule:	Violations of the Reserve
Ninth Schedule:	Qualified Water Resource Professionals and Qualified Contractors
Tenth Schedule:	Emergency Orders
Eleventh Schedule:	Complaints
Twelfth Schedule:	Water Quality Sampling Procedures
Thirteenth Schedule:	Forms and Registers

Draft Subsidiary Legislation, January 2019

REGULATORY IMPACTS:

THE WATER RESOURCES REGULATIONS 2019

COSTS AND BENEFIT ANALYSIS

□ BENEFITS

- ▶ **Water Permitting Regime:**
 - clear and consistent permit conditions
 - Reduction of legal disputes on scope of permit and breach of permit conditions
 - Simplified permitting regime reduces the regulatory burden
 - Sustainable use of water resources
- ▶ **Data Collection and information gathering:**
 - Relevant and timely information for water allocation, water resources investment decision-making and disaster management
- ▶ **Water Quality Monitoring and Effluent Discharge:**
 - Reduction of wastewater
 - Control of pollution and contamination of water resources
 - Improved water quality of water resources

Page 59

Draft Subsidiary Legislation

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□ Costs

- ▶ **MWS and WRA:** administration, capacity-building, education, development of implementation guides and monitoring.
- ▶ **County Governments:** Establishment costs such as new processes and updating systems that will be required when the legislation is implemented
- ▶ **Qualified Water Resources Professionals and Qualified Contractors:** payment of the requisite application fees and annual licensing and/or renewal fees; establishment costs for registration of QWRPs and QCs.
- ▶ **BWRCs:** establishment costs including administration, capacity-building, education of water users.
- ▶ **Permit Holders:** application for raw water abstraction permits, annual license fees, renewal fees etc.

Page 61

Draft Subsidiary Legislation

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QUESTION AND FEEDBACK SESSION:

THE WATER RESOURCES REGULATIONS 2019

Page 63

EY

Draft Water Harvesting and Storage Regulations 2019

Prepared by
PROF. ALBERT MUMMA & COMPANY ADVOCATES
WATER SECTOR INSTITUTIONS CONSULTATION FORUM ON
THE DRAFT SUBSIDIARY LEGISLATION FOR THE WATER ACT
2016

28TH MARCH 2019
Crowne Plaza, Upper Hill, Nairobi.

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Building a better
working world

IN EXERCISE of the powers conferred by Section 142 of the Water Act 2016, the Cabinet Secretary for Water and Sanitation makes the following Regulations

THE NATIONAL WATER HARVESTING AND STORAGE AUTHORITY REGULATIONS, 2019

**THE WATER ACT
(No. 43 of 2016)**

THE WATER HARVESTING AND STORAGE REGULATIONS, 2019

ARRANGEMENT OF REGULATIONS

- **PART I – PRELIMINARY**
- **PART II- DEVELOPMENT OF WATER WORKS**
- **PART III- OPERATION OF DAMS AND OTHER WATER RESOURCE STORAGE FACILITIES**
- **PART IV- MAINTENANCE AND MANAGEMENT OF WATER WORKS**
- **PART V - LICENSING OF QUALIFIED PROFESSIONALS IN RESPECT TO WATERWORKS**
- **PART VI – DATA GATHERING AND COLLECTION**
- **PART VII- WATER HARVESTING**
- **PART VIII – STRATEGIC WATER EMERGENCY INTERVENTIONS**
- **PART IX – GENERAL PROVISIONS**

❑ PART I – PRELIMINARY

1. Citation.
2. Interpretation.
3. Application of Rules

❑ PART II- DEVELOPMENT OF WATER WORKS (Rules 4-14)

- Designation of National Public Water Works.
- Development of works.
- Financing of works.
- Consultation and Environmental Impact Assessment.
- Classification of Dams.
- Works to be designed by Qualified Water Resources Professional.
- Minimum net freeboard.
- Minimum spillway design flood.

❖ REPORTS

- Dam Design Report.
- Dam Construction Progress Report.
- Dam Completion Report and Dam Operation Report.

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❑ PART III- OPERATION OF DAMS AND OTHER WATER RESOURCE STORAGE FACILITIES (Rules 15-19)

- Prior Right to Water for Storage.
- Need for Storage.
- Release and Use of Stored Water.
- Compensation Flow
- Notice Downstream
 - Responsibility to take adequate measures
 - Dam Operation Report

Draft Subsidiary Legislation, January 2019

□ PART IV- MAINTENANCE AND MANAGEMENT OF WATER WORKS (Rules 20-32)

- Maintenance and Management of Works.
- Maintenance and Management Plans.
- Maintenance Operational Plan.
- Maintenance Outcomes.
- Maintenance Analysis.
- Infrastructure Maintenance Budget.
- Waterworks Infrastructure Maintenance System.

❖ FLOOD CONTROL

- Flood control works, maintenance and operation of structures and facilities.
- Maintenance of Levees.
- Maintenance of Flood Walls.
- Emergency Management Plans for dams affected by floods.
- Inspections and Inspection Reports.
- Dam Damage or Failure Report

Draft Subsidiary Legislation, January 2019

□ PART V - LICENSING OF QUALIFIED PROFESSIONALS IN RESPECT TO WATERWORKS (Rule 33)

- Application to be Approved Water Resource Professional for a Task.

□ PART VI - DATA GATHERING AND COLLECTION (Rule 34)

- National Water Resources Storage and Flood Control Database.

□ PART VII- WATER HARVESTING (Rule 35-38)

- Water Harvesting Policy.
- Rainwater Harvesting in Buildings.
- Rainwater Harvesting on Parcel of Land.
- Agricultural Establishments.

Draft Subsidiary Legislation, January 2019

□ **PART VIII – STRATEGIC WATER EMERGENCY INTERVENTIONS (Rules 39 & 40)**

- Drought Response Plan.
 - National Drought Management Authority
- Water Supply and Demand Management.

□ **PART IX – GENERAL PROVISIONS (Rules 41-44)**

- Offences.
- Further Offences
 - condition attached to the operation and maintenance
 - Fail to comply with an order or directive
 - Fail or refuse to give data or information, or give false or misleading data
 - Intentionally refuse to perform a duty, or obstruct
- Complaints Mechanism.
 - Chief Executive Officer reply to the complainant with a final decision
- Transitional Arrangements.

Draft Subsidiary Legislation, January 2019

SCHEDULES

First Schedule:	Designated Water Works
Second Schedule:	Categorization of Dams and other waterworks
Third Schedule:	Details For Storage Dams
Fourth Schedule:	Content And Format Of Technical Reports
Fifth Schedule:	Complaints

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**SECOND SCHEDULE
(Rule 8)
CATEGORIZATION OF DAMS AND OTHER WATERWORKS**

Category	Description
A	Waterworks deemed by virtue of scale and or location to pose low risk to the safety of people and the environment.
B	Waterworks deemed by virtue of scale, location and or function to pose a significant (medium) risk to the safety of people and the environment but whose disruptive and potential can be mitigated adequately.
C	Waterworks deemed by virtue of scale, location and or function to pose a serious (high) risk to people and the environment and with the potential to cause widespread disruption to economic activity and national life with respect to which limited mitigation measures are available.

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**SECOND SCHEDULE
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THIRD SCHEDULE
(Rule 8)
DETAILS FOR STORAGE DAMS

Table 1: Classification of Dams

Class of Dam	Maximum Depth of Water at NWL (m)	Impoundment at NWL (m ³)	Catchment Area (km ²)
A (Low Risk)	0 – 4.99	< 100,000	< 100
B (Medium Risk)	5.00 – 14.99	100,000 to 1,000,000	100 to 1,000
C (High Risk)	> 15.00	> 1,000,000	> 1,000

Table 2: Design and Supervision of Dam

Class of Dam	Category of Qualified Water Resource Professional
A (Low Risk)	Panel II C, Panel I C1 & Panel I C2
B (Medium Risk)	Panel I C1 & Panel I C2
C (High Risk)	Panel I C2

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Table 3: Category of Dam Contractor

Class of Dam	Category of Dam Contractor
A (Low Risk)	C1, C2
B (Medium Risk)	C1, C2
C (High Risk)	C1

Table 4: Dam safety Inspection Schedule

Class of Dam	Frequency of Inspection	Inspection by
A (Low Risk)	Once in 5 years	Panel I C1, Panel I C2, Panel II C
B (Medium Risk)	Once in 3 years	Panel I C2, Panel I C1
C (High Risk)	Once every 2 years	Panel I C2

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Table 5: Minimum Return Period for Spillway Design

Class of Dam	Minimum Return Period for Design of Spillway
A (Low Risk)	1 in 50 years
B (Medium Risk)	1 in 100 years
C (High Risk)	1 in 500 years

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REGULATORY IMPACTS:

THE WATER HARVESTING AND STORAGE REGULATIONS 2019

Page 45

EY

COSTS AND BENEFIT ANALYSIS

□ BENEFITS

- Development of National Public Water Works and Water Harvesting Strategies
 - Increased water resources capacity
- Maintenance, Management Operation of Dams:
 - Management and mitigation of floods downstream
- Data Collection and Information Gathering:
 - Relevant and timely information for disaster management
- Bequest values: Intra- and Intergenerational Equity

□ Costs

- Public Authorities:
 - Designing of implementation systems and developing and implementing staff-training and adapting to new internal process
 - Procurement of goods and services and/or the recruitment of additional staff
 - Establishment costs: updating training modules for operation and dam maintenance, amendment of work processes etc.
 - preparation of official notices, transmitting and publishing data, confirming receipt of data/information or obtaining missing data/information, finalizing information, carrying out content-related checks, calculations and evaluations, implementing monitoring and supervisory measures and classifying risks

QUESTION AND FEEDBACK SESSION:

THE WATER HARVESTING AND STORAGE REGULATIONS
2019

Page 99

EY

Draft Services Regulations 2019

Prepared by
PROF. ALBERT MUMMA & COMPANY ADVOCATES

WATER SECTOR INSTITUTIONS CONSULTATION FORUM ON
THE DRAFT SUBSIDIARY LEGISLATION FOR THE WATER ACT
2016

28TH MARCH 2019
Crowne Plaza, Upper Hill, Nairobi.

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Building a better
working world

IN EXERCISE of the powers conferred by Section 142 of the Water Act 2016, the Cabinet Secretary for Water and Sanitation makes the following Regulations

THE WATER SERVICES REGULATIONS, 2019

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THE WATER SERVICES REGULATIONS 2019

ARRANGEMENT OF RULES

- PART I - PRELIMINARY
- PART II - COUNTY GOVERNMENT FRAMEWORK FOR WATER SERVICES PROVISION
- PART III - ESTABLISHMENT, OPERATION AND FINANCING OF WATER SERVICES PROVIDERS
- PART IV - APPLICATION FOR LICENCE
- PART V - SYSTEMS AND STANDARDS FOR OPERATION OF WATER SERVICES
- PART VI - EFFLUENT
- PART VII - TARIFFS
- PART VIII - CLUSTERING
- PART IX - LEVIES
- PART X - ADMINISTRATION OF CERTAIN WATER SUPPLY AND INFRASTRUCTURE SERVICES
- PART XI - APPROVALS OF CONSTRUCTION WORKS AFFECTING INFRASTRUCTURE ETC.
- PART XII - INSPECTION, EVALUATION AND MONITORING
- PART XIII - OFFENCES RELATING TO CONDUCT OF EMPLOYEES OF A WATER SERVICES PROVIDER
- PART XIV - GENERAL OFFENCES
- PART XV - BULK WATER SUPPLY
- PART XVI - REPORTING AND RECORD KEEPING
- PART XVII - COMPLAINTS
- PART XVIII - CONSUMER ENGAGEMENT
- PART XIX - COMPLIANCE AND ENFORCEMENT
- PART XX - GENERAL PENALTY

□ PART I- PRELIMINARY (Rules 1-3)

1. Citation.
2. Interpretation.
3. Application of Rules.

□ PART II- COUNTY GOVERNMENT FRAMEWORK FOR WATER SERVICES PROVISION (Rules 4-7)

- Powers and Duties of County Executive Committee member.
- County Water and Sewerage Services Strategy.
- The Directorate of Water and Sewerage Services.
- Annual Monitoring and Evaluation by County Executive.

107

□ PART III- ESTABLISHMENT, OPERATION AND FINANCING OF WATER SERVICES PROVIDERS (Rules 8-20)

- Establishment of County Water and Sewerage Service Providers.
- Functions of the county water services provider.
- Governance of water service providers.
- Meetings and Procedure of the Board.
- Chief Executive Officer and other employees of county water services providers.
- Finances of county water service providers.
- County government financial support to the water services provider.
- Ring fencing of water revenues.
- Annual estimates of county water services provider.
- Accounts and audit.
- Private sector participation.
- Register of water service providers.
- Operation of community water projects.

109

□ PART IV-APPLICATION FOR LICENCE (Rules 21 – 38)

- Application for a Licence.
- Public Consultation.
- Application Fee.
- Determination of an Application.
- Objections to grant of a license.
- Appeal to the Water Tribunal by licensee or objector.
- Issuance of a License.
- Provisional Licence.
- Extension of a Provisional License.
- Annual License Fee.
- Validity of License and Basic Criteria.
- Mid-term review of the license.
- Renewal of Licence.
- Default of Application for Renewal.
- Scope of a License.
- Deposit of Guarantee or Security.
- Register of all water service providers.
- Maps.

111

□ PART V- SYSTEMS AND STANDARDS FOR OPERATION OF WATER SERVICES (Rules 39-45)

- Operating Systems.
- Implementation of standards and systems.
- Schedule of water services.
- Execution of Works.
- Consent for Execution of works.
- Approval of the road authority for Execution of Works.
- Sampling Programme.

□ PART VI – EFFLUENT (Rules 46 – 48)

- Sewerage or Sanitation Systems.
- Sewerage System Plan.
- Control of Trade Effluent.

□ PART VII – TARIFFS (Rules 49 – 53)

- Implementation of Tariffs by Water Service Provider.
- Tariff Reviews.
- Application for Tariff Reviews.
- Extraordinary Tariff Review.
- Tariff Adjustment.

113

□ PART VIII: CLUSTERING (Rules 54 – 59)

- Clustering of Water Services Providers.
- Proposal for Clustering Water Services Providers.
- Feasibility Study and Report.
- Operationalization of Clustering.
- Application for a new Service Provision Area license and new tariff.
- Interpretation of Clustering and Commercial Viability.

□ PART IX – LEVIES (Rules 60-66)

- Sewerage Services Levy.
- Water Consumption Levy.
- Levies Bank Account.
- Inspection of Sales Records.
- Operation of Levies Bank Account.
- Administration Fee.
- Failure to remit levies.

115

□ PART X - ADMINISTRATION OF CERTAIN WATER SUPPLY AND INFRASTRUCTURE SERVICES (Rule 67-73)

- Raw water abstraction permits and access rights.
- Easements, access rights etc.
- Construction boreholes within supply area.
- Regulation of water vending.
- Closure of unsafe supplies of water.
- Water Quality and Service Standards for rural and underserved areas.
- Septic Tank Sludge Management.

□ PART XI - APPROVALS OF CONSTRUCTION WORKS AFFECTING INFRASTRUCTURE, ETC (Rule 74-75)

- Approval of construction works.
- Certification of property development works connecting to water mains.

□ PART XII - INSPECTION, EVALUATION AND MONITORING (Rule 76)

- Inspectorate Service.

117

□ PART XIII - OFFENCES RELATING TO CONDUCT OF EMPLOYEES OF A WATER SERVICES PROVIDER (Rule 77)

□ PART XIV - GENERAL OFFENCES (Rule 78 – 81)

- Impersonation of staff of the water services provider.
- Vandalism of water and sewerage services infrastructure.
- Illegal connection to water services.
- Contamination of water and supply to domestic premises.

□ PART XV - BULK WATER SUPPLY (Rule 82 – 86)

- Bulk Water Supply Services by Waterworks Development Agencies.
- Establishment of works for bulk water supply.
- Application for Bulk Water Supply License.
- Public Consultation on Application for Bulk Water Supply License.
- Determination of Application for Bulk Water Supply License.

□ PART XVI - REPORTING AND RECORD KEEPING

- Annual Reports by the Regulatory Board.
- National database and georeferenced information system.
- Annual Reports by Water Service Provider.
- Public Reporting and Transparency.
- Obtaining Water Service Data.

119

□ PART XVII - COMPLAINTS (Rules 92 & 93)

- Complaints Mechanism.
- Complaints to the Regulatory Board.

PART XVIII – CONSUMER ENGAGEMENT (Rules 94 – 97)

- Consumer participation through Water Action Groups.
- Provision of information by Water Action Groups.
- Consumer complaints and follow-up by Water Action Groups.
- Supervision and Oversight of Consumer Complaints Mechanism.

□ PART XIX - COMPLIANCE AND ENFORCEMENT (Rules 98 – 102)

- Enforcement against licensed water service providers.
- Inspection by Water Service Inspector.
- Cure Notice.
- Special Regulatory Regime.
- Delegation by Regulatory Board.

□ PART XX - GENERAL PENALTY (Rule 103)

- Penalties.

121

REGULATORY IMPACTS:

THE WATER SERVICES REGULATIONS 2019

Page 123

EY

COSTS AND BENEFIT ANALYSIS

□ BENEFITS

- Clustering of WSPs: Improved and efficient water services and sanitation delivery
- Tariffs and Levies:
 - Ensure commercial viability of WSPs
 - Publication ensures transparency
- Systems And Standards For Operation Of Water Services:
 - Maintenance of quality standards in line with requirements to ensure public health
- Inspection, Evaluation and Monitoring:
 - Maintenance of quality standards in water and services provision
- Bulk Water Supply:
 - Increased supplies to WSPs and consumers by WWDAs
- Effluent control and environmental protection
- Consumer Engagement

Page 126

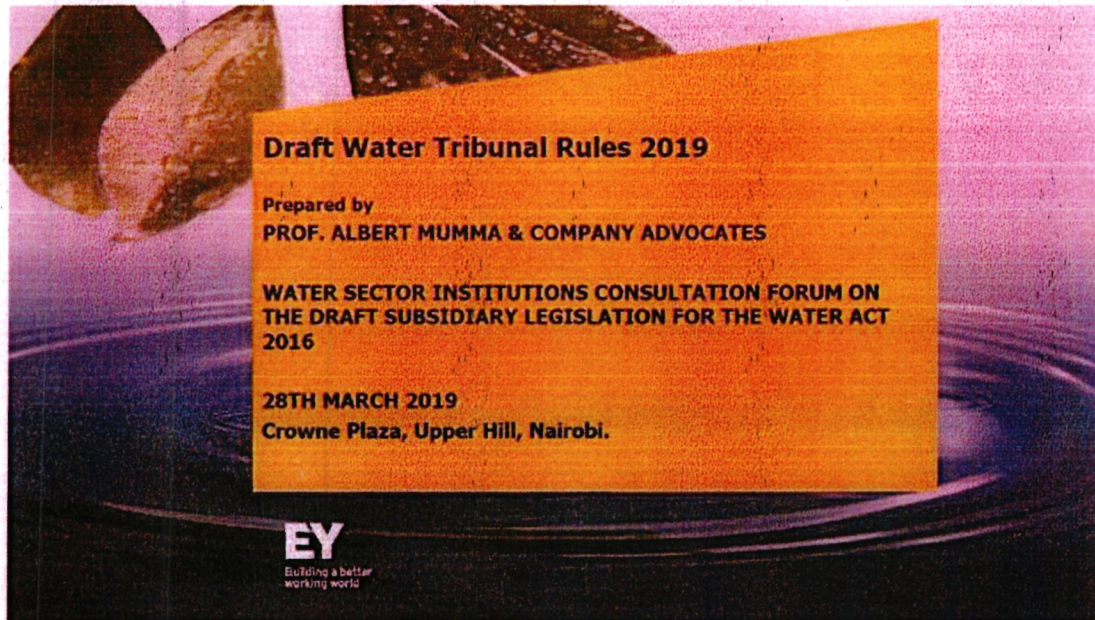
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- **Costs**
 - **MWS:**
 - administration, capacity-building, education, development of implementation guides and monitoring
 - **County Government:**
 - Establishment costs such as new processes and updating systems
 - **WSPs:**
 - purchasing of equipment; provision of certain services or commissioning them to community water service providers or small-scale water service providers or other third parties; verifying the implementation of the obligations; drafting correspondences to WASREB; obtaining advice and making necessary payments as required by the WASREB etc.
 - **WASREB:**
 - preparation of official notices, transmitting and publishing data, confirming receipt of data/information or obtaining missing data/information,
 - **WWDAs:**
 - Establishment costs
 - Recruitment of Staff

QUESTION AND FEEDBACK SESSION:

THE WATER SERVICES REGULATIONS 2019



**THE WATER ACT
(No. 43 of 2016)**

THE WATER TRIBUNAL RULES, 2019

ARRANGEMENT OF RULES

- PART I – PRELIMINARY
- PART II- APPEALS TO THE WATER TRIBUNAL
- PART III- REPLY
- PART IV- THIRD PARTIES
- PART V - HEARING
- PART VI – DETERMINATION OF APPEAL
- PART VII- MISCELLANEOUS PROVISIONS

□ PART I – PRELIMINARY

1. Citation.
2. Interpretation.

□ PART II- APPEALS TO THE WATER TRIBUNAL (Rules 3-12)

- Appeals.
- Appeals to the ELC.
- Form of Appeal.
- Registration of Appeal.
- Application of Extension of Time.
- Documents.
- Preliminary Objections.
- Amendment of Appeal and Delivery of Supplementary Grounds of Appeal.
- Withdrawal and Suspension of Appeal
- Additional matters

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□ PART III- REPLY (Rules 13-14)

- Action by Respondent.
- Amendment of Reply

□ PART IV – THIRD PARTIES (Rules 15 -16)

- Joinder of Parties
- Appearance and Representation

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□ PART V- HEARING (Rules 17 - 30)

- Directions.
- Failure to Comply with Directions.
- Varying or Setting Aside Directions.
- Subpoena and Orders.
- Hearing Notice.
- Business Hours.
- Public Notice of Hearings.
- Hearing to be Public.
- Failure of Parties to Attend Hearing.
- Quorum and Procedure of Hearings.
- Judicial Notice.
- Determination of Interlocutory Matters.
- Opportunity to be Heard or Cross-Examine
- Change of Advocate

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□ PART VI- DETERMINATION OF APPEAL (Rules 31 - 37)

- Failure to Reply and no Contest.
- Preliminary Issues
- Power to Determine Appeal without Hearing
- Consolidation of Appeals
- Decision of Tribunal
- Reason for Decisions
- Order for Costs and Expenses

□ PART VII- MISCELLANEOUS PROVISIONS (Rules 38 - 47)

- Chairman to Act.
- Correcting Irregularities.
- Proof of Documents and Certification of Decisions.
- Service or Delivery of Documents.
- Substituted Service.
- Language.
- Filing Fees.
- Prescribed Forms.
- Recording Proceedings.

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REGULATORY IMPACTS:

THE WATER TRIBUNAL RULES 2019

Page 143

EY

COSTS AND BENEFIT ANALYSIS

□ BENEFITS

- Facilitating greater access to justice for all:
 - Protection of fundamental right to clean and safe water
 - Protection of consumer right to goods and services of reasonable quality
- Use of expert members with specialized knowledge:
 - Expeditious decision-making
 - Decongestion of normal court system
- Application of simplified non-technical procedures:
 - Greater access of justice to the public
 - Faster and cheaper dispute resolution

□ Costs

- Administration of Tribunal
 - Administration costs of Tribunal secretariat
 - Costs implications of a 6-member Tribunal (sitting allowances and travel costs etc.)

Page 145

Draft Subsidiary Legislation

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QUESTION AND FEEDBACK SESSION:

THE WATER TRIBUNAL RULES 2019

Page 147

EY

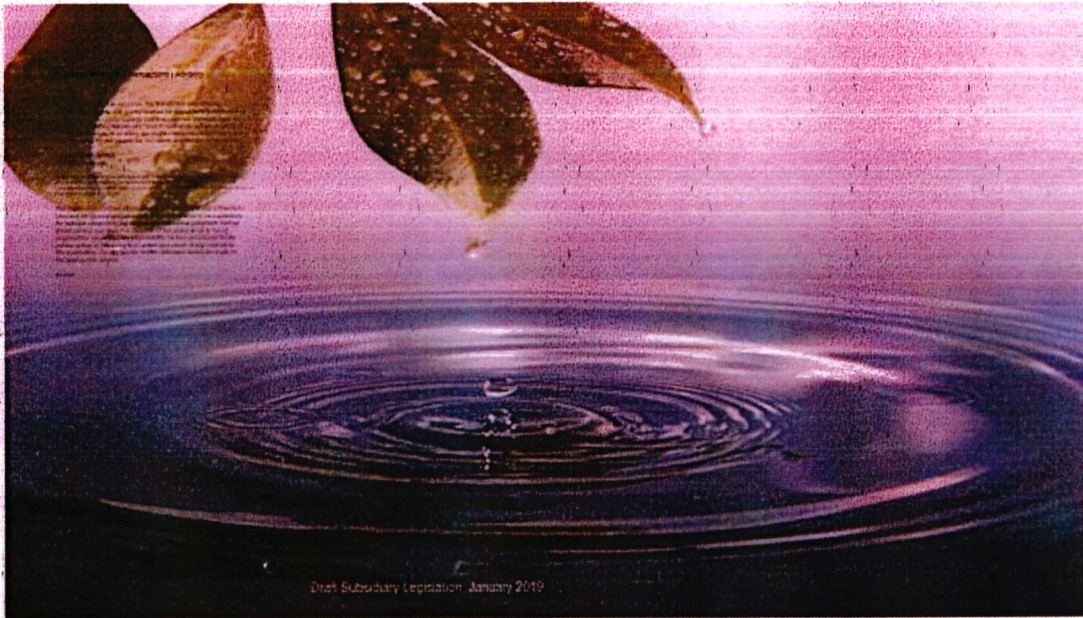
**PROF. ALBERT MUMMA & COMPANY
ADVOCATES**

5TH AVENUE OFFICE SUITES
5TH FLOOR SUITE NO. 1
5TH NGONG AVENUE
P.O. BOX 10481-00100,
NAIROBI - KENYA

TEL: (254-20) 2730132 / 2711579
E-MAIL: amumma@amadvocates.com

Page 148

Draft Subsidiary Legislation January 2019



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b. Annex II: WSI Consultation Forum List of Participants

REPUBLIC OF KENYA



MINISTRY OF WATER AND SANITATION

Kenya Water Security and Climate Resilience Project (KWSCR)

Support to Water Sector Reforms

Sector Institutions Consultation on the Draft Regulations

Date: 28th March 2019

Venue: Crowne Plaza

Time: 8:30am. - 5:00pm

REGISTRATION FORM



No.	Name	Institution and Position	Telephone Number	E-mail Address	Signature
1.	JOSITH MTEM WEN	COOB - LEGAL	0724990494	mjenileli@gmail.com	
2	Sharon Donyo	NWIKK	0711277929	Sobonyo@waterauthority.go.ke	
3	JUSTUS A. WABUYABO	NWISA - GMCL	0733813110	jwabuyabo@waterauthority.go.ke	
4	Daniel Otimu	LUNWISA - MCA	0729353621	dowino@lunwisa.go.ke	
5	JOHN H. MURUKA	WASREB	0721292402	johnmuruka@wasreb.go.ke	
6	Carute Mwakamba	WRA - DTCM	0720540554	CaruteMwakamba@gmail.com	
7	Joash Omuta	WRA - DTCM	0722478616	joash.omuta@yahoo.com	
8.	Janet Olewe	WRA - Legal	0720567257	janetolewe@gmail.com	
9	Halima Ali	WSTF - Legal	0723146944	Halima.Ali@wstf.go.ke	
10	Rose Nyakwaya	MWS	0726424205	andersonrose@gmail.com	
11.	MIKE THOMAS	Water Focus Ltd.	0733984503	miwe@waterfocus.com	
12	Marion Motari	Prof Albert Mumba & Co Advocates	0718999885	mmotari@amumba.com	



No.	Name	Institution and Position	Telephone Number	E-mail Address	Signature
13.	Viviana Bondi	Prof. ALBERT MUMMA & CO. ADVOCATES	0725805040	vbondi@amadvocates.com	
14.	Mujum Julius	MWHA	071	j.kmugum@mwha.or.ke	
15.	Mureithi F				
15	Dorah Omoll	MWS	0720778191	dorahomoll@yahoo.com	
16	David Denge	MWS	-	-	
17	Charles Omondi	EY	-	-	
18.	Esther Omondi	EY	0722825555	-	
19.	Titus Mbugua	EY	-	-	
20.	Alex Mwangi	Atkins	-	-	
21.	Julius Njoroge	EY	-	-	
22.	Winyard Musyoki	EY	-	-	
23					





REPUBLIC OF KENYA
MINISTRY OF WATER AND SANITATION

WATER SECTOR INSTITUTIONS AND PRIVATE SECTOR CONSULTATIONS ON DRAFT REGULATIONS MEETING AT CROWN HOTEL, NAIROBI ON 28TH MARCH 2019

NO	NAMES	INSTITUTION REPRESENTED	EMAIL ADDRESS & MOBILE NO.	SIGN
1.	Sham Sang	NWHA	1. Sobonyo@waterauthority.go.ke 2. 0711277929	
2.	John H. MURUKA	WASREB	1. jmuruka@wasreb.go.ke 2. 0721 292402	
3.	JUSTUS WABUYABO	NWHA	1. jwabuyabo@waterauthority.go.ke 2. 0733 893110	
4.	JUDITH NJENI WELI	CROSB	1. njenileli@gmail.com 0724990494	
5.	MIKE THOMAS	Reed & Focus	MIKE@reedfocus.com 0733994503	
6.	Stephen Githinji	MWS	0722439761 stephen.githinji@com	
7.	ALEX MARIA	ATKINS	072242531 Alex.Maria@atkinsglobal.com	
8.	ROBERT KIBUGI	MWS-KWSRP		
9.	Geoffrey Chesire	NWHA	geoffche@gmail.com	

NO	NAME	INSTITUTION REPRESENTED	EMAIL ADDRESS & MOBILE NO.	SIGNATURE
10	Rose Mwangi	MJNS	rosemwangi@gmail.com 0725424205	
11	Dr. Ali I Hassan	NWUSA	ali.hassan@nwusa.org	
12	David Odhiambo	LIWASA	david@liwasa.org	
13	Halima Ali	WSTF	0713146444	
14	Maria Motari	Prof. Albert Mwangi & Co. Advocates	0718995865	
15	Vivian Benti	"	0725805040	
16	Negus Julius	NWUSA	0715436133	

