

Republic of Kenya



Ministry of Water, Sanitation and Irrigation

THE NATIONAL ASSEMBLY	
DATE: 10 AUG 2021	DAY
TABLED BY:	
CLERK-AT THE-TABLE:	



**Explanatory Memorandum**

(pursuant to section 11(2) of the Statutory Instruments Act, No. 23 of 2013)

to

**The Water Resources Regulations, 2021  
Legal Notice No. 170 of 2021**

**PART I**

**Name of the Statutory Instrument:** Water Resources Regulations, 2021

**Name of the Parent Act:** Water Act No. 43 of 2021

**Enacted Pursuant to:** Section 142 of the Water Act No. 43 of 2016

**Name of the Ministry:** Ministry of Water, Sanitation and Irrigation

**Gazetted on:** 12<sup>th</sup> August 2021

**Tabled on:** 17<sup>th</sup> August 2021

## **PART 2**

### **1. The purpose of the Water Resources Regulations, 2021**

- a) The Water Resources Regulations have been made to give effect to the mandate of the national government under the Constitution concerning policy and law making, and obligations including to ensure the protection and conservation of water catchments; prevention of pollution, regulating water abstraction, criteria for prioritization and allocation of water resources.
- b) The regulations provide the required details and guidance for implementation of the provisions of the Water Act, No. 43 of 2016 which include implementation of national government, and county governments' functions on soil and water conservation.
- c) The regulations are made pursuant to section 142 of the Water Act, which empowers the Cabinet Secretary to make regulations with respect to any matter which by the Act is required or permitted to be prescribed, or which is necessary or expedient to be prescribed for the carrying out or giving effect to the Water Act.

### **2. The Legislative Context**

- a) The Water Act was enacted in 2016, and came into force on 21 April 2017, to replace the now repealed Water Act No. 8 of 2002. This 2016 law gave effect to various provisions of the Constitution of Kenya including protecting the right to a clean and healthy environment, sustainable management of water resources and the national, and, county governments concerning soil and water conservation.
- b) The Cabinet Secretary is empowered by section 142(1) to make the regulations for any matters that are permitted by the Water Act; and further, the statute in section 142(2), provides specific water resources matters for which regulations are required, as follows-
  - a. delegation by the Water Resources Authority or a licensee of their respective powers and functions;
  - b. abstraction of ground water and works therefore, including the licensing of borehole constructors;
  - c. construction, extension or improvement of dams and the licensing of persons carrying on business as dam contractors;
  - d. the licensing of engineers and other persons offering professional services in respect of water resources or water services;
  - e. national public water works,
  - f. information to be made available to the public under the Act,

- g. requirements for the keeping of records and the furnishing of information to the Water Resources Authority;
  - h. the transfer of functions, assets, liabilities and staff;
  - i. rain water harvesting and household water storage; or
  - j. any saving, temporary or transitional provision in consequence of the repeal of the Water Act,2002.
- c) Based on the Statutory power given under the Water Act, the Cabinet Secretary has published the Water Resources Regulations 2020 which making provision for the implementation of the principal law through specified mechanisms and procedures, as follows:
- (i) Prescriptions on water use activities including requirements for a permit and categorization of water resource use applications;
  - (ii) Application for a water permit, or other required authorization for water use, including procedures; verification of existing permits; use of existing works for public interest; authorizations related to construction of works;
  - (iii) Application of water use permits for surface and groundwater;
  - (iv) Regulation of surface water, including surface water allocation plans and guidelines; declaration of a water course;
  - (v) Boundary of properties defined by a watercourse
  - (vi) Rules on the conservation of wetlands;
  - (vii) Requirement to obtain permit after land reclamation
  - (viii) Procedures and criteria for allocation of water for irrigation
  - (ix) Water works associated with fish movement for protection and control of fish
  - (x) Water resources data
  - (xi) Regulation and management of groundwater
  - (xii) Borehole and well test pumping, supervision of works; borehole or well completion record.
  - (xiii) Groundwater conservation, artificial ground water recharge
  - (xiv) Groundwater allocation guidelines
  - (xv) Water quality monitoring and waste disposal
  - (xvi) Control of water pollution, waste disposal control plan, water quality requirements;
  - (xvii) Effluent disposal records, spillage and water quality monitoring;
  - (xviii) Water quality, waste disposal and efficient discharge data;
  - (xix) Water quality sampling procedures
  - (xx) Pollution control enforcement
  - (xxi) Regulation of water works
  - (xxii) Regulation and oversight on dams of all categories
  - (xxiii) Dam classification, design and construction
  - (xxiv) Dam inspection and standards for enforcement

- (xxv) Dam construction progress report and statutory obligations.
- (xxvi) Conditions of authorization, permits and approved water uses, including compliance with EMCA, water resource inspectors, and register of water bodies;
- (xxvii) Conservation and management of riparian and catchment areas;
- (xxviii) Regulation and operations of Water Resource Users Associations;
- (xxix) Protected areas and groundwater conservation areas, including management rules;
- (xxx) Rules governing the reserve, including composition of the reserve, quantity of the reserve, and its protection;
- (xxxi) Licensing of water sector professionals;
- (xxxii) Licensing of water sector contractors
- (xxxiii) Recognized water laboratories
- (xxxiv) Compliance mechanisms
- (xxxv) General penalty for offences under the regulations

### **3. Policy Background**

The promulgation of the Constitution in August 2020 marked the beginning of the policy review for the water sector. This was intended to fully align the policy and legal priorities of the water sector, in terms of the mandates of the national government, and the 47 county governments as stipulated in the Constitution. In terms of policy, the water sector is divided into three main sub-sectors: water resources management; water harvesting and storage. and water services. There is also various enabling sub-sector whose importance cuts across, including water financing; climate change; gender equity; roles of youth and children; interests and needs of persons with disabilities.

The current water policy is Sessional Paper No.1 of 1999 on National Policy on Water Resources Management and Development. This was enacted to inform the Water Act, No. 8 of 2002; and was surpassed by the Constitution. For this reason, the Ministry has developed a new National Water Policy, as a draft Sessional Paper which is currently undergoing scrutiny prior to approval by Cabinet. Subsequently, this will be submitted to Parliament for approval.

The draft Policy was developed in tandem with these regulations, rather than prior to enactment of the Water Act. For this reason, and in light of lessons and insights on gaps in the legislation from policy and regulations development, the Ministry has prepared a Draft Water Act (Amendment) Bill following advice from the Attorney General of Kenya. Some of the amendments resulting from the public consultations and regulations development including enhancing provisions relating to conservation of riparian land, pollution control, and procedures and processes for permitting; as well as offences. The role of county governments has also been provided for with clarity. Every effort has been made to ensure these regulations are in compliance with article 10 of the Constitution.

#### 4. Public Consultations

Public and stakeholder consultations were held during the development of these regulations, as follows:

- a) A stakeholder exploratory and consultative meeting was held on 20th November 2018, which brought together staff from the MWS and from Water Sector Institutions (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) prior to the development of these Water Services Regulations.

The aim of the consultative meeting was to gain preliminary insights into what were viewed by this group of stakeholders as prevailing issues or concerns to be addressed by this legislative reform process. Issues raised at this stakeholder consultation were factored in the drafting and development of the proposed Water Services Regulations 2019. The details of the consultations were provided in the attached Regulatory Impact Statement.

- b) A second consultation which focused on the technical requirements for developing the draft rules was held in Nairobi on 31st January – 1st February 2019. The aim of the consultation was to present a draft of the proposed Water Services Regulations 2019 to participants, obtain their feedback, and to address any issues or concerns raised by the stakeholders. The meeting participants included staff from the MWS and representative of technical and legal departments of Water Sector Institutions (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).
- c) Public consultations were held on these regulations, and the regulatory impact statement on 25 March 2019 at the Kenyatta International Convention Centre in Nairobi. The purpose of these consultations was to present the draft regulations and the draft regulatory impact statement to members of the public. Important feedback was received and has informed and shaped the final regulations.
- d) On 18 December 2018, consultations were held with the Secretariat at the Council of Governors at the offices in Nairobi
- e) Regional public consultations forums were also held in Nakuru, Eldoret, Kisumu, Nyeri and Mombasa between 18 September and 18 December 2019 during which presentations were made to participants on the draft regulations, and the draft regulatory impact assessments. Important feedback was received and this informed provisions in the final regulations.

- f) On 28 March 2019, consultations were held with civil society organizations in Nairobi during which the draft regulations and the regulatory impact statement were presented and discussed. Important feedback was received and this informed provisions in the final regulations.
- g) On 29 March 2019, consultations were held with the private sector in Nairobi during which the draft regulations and the regulatory impact statement were presented and discussed. Important feedback was received and this informed provisions in the final regulations.
- h) On 30 - 31 May 2019, a stakeholder consultation workshop was held in Naivasha to review the advanced drafts of the regulations, with participants drawn from the water sector. Important feedback was received and this informed provisions in the final regulations.
- i) These regulations will, further, be shall subjected to the requisite scrutiny by Parliament in accordance with the Statutory Instruments Act.

## **5. Guidance**

The Ministry of Water and Sanitation & Irrigation will commence dissemination and sensitization on the provisions of these regulations immediately. This is important in order to sensitize staff at the Ministry, and Water Sector Institutions, as well as county governments. An induction programme has already been developed and implemented for the provisions of the Water Act, and this sensitization will build on the gains made through that programme which has involved training of trainers from the public service to undertake the training. A programme for public dissemination and sensitization will be developed and implemented, taking into account how these regulations impact the availability of renewal surface and groundwater resources; conservation of catchments, rivers and riparian land.

## **6. Performance Monitoring and Evaluation**

The Ministry of Water and Sanitation & Irrigation will implement a performance monitoring and evaluation programme for implementation of these regulations. This will be aligned with a mechanism put in place for implementation, monitoring and evaluation for the draft Water Policy that specifies the manner of implementation, responsible officers and the reporting requirements. Additionally, the Ministry will continue to link performance of obligations under these regulations and the Water Act to the performance contracting indicators agreed upon with its staff, and the State Corporations under it. Reporting requirements have been built into the regulations.

**7. Ministry of Water, Sanitation and Irrigation contact person**

The Contact person at the Ministry of Water and Sanitation & Irrigation is the Cabinet Secretary Ms. Sicily K. Kariuki, or the Principal Secretary Mr Joseph Irungu.

**Email communications may be addressed to:**

- a) Office of the Cabinet Secretary: [cswater625@gmail.com](mailto:cswater625@gmail.com)
- b) Office of the Principal Secretary: [pswater631@gmail.com](mailto:pswater631@gmail.com)

**With a copy to the Office of the Water Secretary: [watersecretary2@gmail.com](mailto:watersecretary2@gmail.com)**

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**SICILY K. KARIUKI**



**CABINET SECRETARY**

**MINISTRY OF WATER, SANITATION AND IRRIGATION**

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 2021



## COUNCIL OF GOVERNORS

Westlands Delta House 2<sup>nd</sup> Floor, Waiyaki Way  
P.O. BOX 40401-00100,  
Nairobi.

Tel: (020) 2403314, 2403313  
+254 718 242 203  
E-mail: [info@coog.go.ke](mailto:info@coog.go.ke)

**Our REF: COG/2/8/ Vol. 8**

9<sup>th</sup> February, 2021

Principal Secretary  
Ministry of Water and Sanitation  
**NAIROBI.**  
Attn: Eng. Sao Alima

**LEGISLATIVE MEMORANDUM ON THE WATER HARVESTING AND STORAGE REGULATIONS, 2020; THE WATER SERVICES REGULATIONS 2020; AND THE WATER RESOURCES REGULATIONS 2020**

The above subject matter refers.

The Council of Governors acknowledges receipt of your letter referenced WD/3/3/1395 Vol III (126) forwarding the Ministry's response to the legislative memorandum shared by the Council in respect to the Water Harvesting and Storage regulations, Water Services and Water Resources Regulations made pursuant to the Water Act, 2016.

We wish to note that majority of the issues raised in our memorandum have been incorporated into the regulations and as such we support the next processes of finalizing the regulations. However, the Council still maintains that the functions assigned to the various institutions established under the Act do not respect the functional and institutional integrity of the County Governments in the regulation of the water sector. It is therefore important that as a matter of urgency the Ministry prioritises the review of the Water Act, 2016 to align it with the Constitution.

In view of the foregoing, the Council requests for a consultative meeting at your earliest convenience to discuss commencement of the review of the Water Act.

Thank you for the continued support.

**Jacqueline Mogeni, MBS**  
**Chief Executive Officer**



## WATER ACT, 2016 LEGISLATIVE MEMORANDUM

The Fifth Schedule of the Water Resources Regulations 2021 deals with offences and penalties. The penalties in the Fifth Schedule are prescribed by reference to section 147 of the Water Act, 2016.

During the Consultative Workshop with the Senate Sessional Committee on Delegated Legislation, the Honourable members of the Senate proposed that the Fifth Schedule should be more specific in terms of prescribing offences and not simply make reference to section 147 of the Act.

The rationale for making reference to section 147 of the Water Act is that under the Statutory Instruments Act No 23 of 2013, there is a restriction imposed on the severity of the penalties that may be prescribed under regulations. Section 24(5) states as follows:

*“there may be annexed to the breach of a statutory instrument a penalty, not exceeding twenty thousand shillings or such term, not exceeding six months imprisonment or both...”*

In light of this provision, an attempt to prescribe penalties that depart from the maximum stipulated in the Statutory Instruments Act would render the regulations *ultra vires* the parent Act or unlawful. The approach adopted in drafting the Fifth Schedule therefore was to adopt the provision in section 147 of the Water Act, which states as follows:

*“A person who commits an offence under this Act, or any regulations made under this Act shall, if no other penalty is prescribed in respect of the offence, be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding two years or both such fine and imprisonment.”*

By making reference in the Fifth Schedule to section 147 (without prescribing specific penalties in the Regulations) it becomes lawful to expand the severity of the penalties to two million shillings and imprisonment for up to two years, which would not have been possible under the Statutory Instruments Act, 2013.