

# Republic of Kenya



## Ministry of Water, Sanitation and Irrigation

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### Explanatory Memorandum

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

to

### The Water Harvesting and Storage Regulations, 2021 Legal Notice No. 169 of 2021

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#### PART I

<b>Name of the Statutory Instrument:</b>	Water Harvesting and Storage Regulations, 2021
<b>Name of the Parent Act:</b>	Water Act No. 43 of 2016
<b>Enacted Pursuant to:</b>	Section 142 of the Water Act No. 43 of 2016
<b>Name of the Ministry:</b>	Ministry of Water, Sanitation and Irrigation
<b>Gazetted on:</b>	12 <sup>th</sup> August 2021
<b>Tabled on:</b>	17 <sup>th</sup> August 2021

## PART 2

### **1. The purpose of the Water Harvesting and Storage Regulations, 2021**

- a) The Water Harvesting and Storage 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 enhance the protection and conservation of water catchments and ensure availability of ground and surface water for water supply through enhancement of harvesting and storage capacity.
- 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 such as harvesting and storage; and water for emergency drought interventions.
- 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- a) The Water Act was enacted in 2016, and came into force on 21 April 2017, to replace the now repealed Water Act No. 8 of 2002.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. This includes water harvesting and storage in order to reduce pressure on freshwater resources; and make available adequate water for supply and sanitation.
- b) The Cabinet Secretary is empowered by section 142(1) to make the regulations for any matters that are permitted by the Water Act which concern the mandate of the National Water Harvesting and Storage Authority and other mandates and provisions relating to this water sub-sector.
- c) Further, the statute in section 142(2), provides relevant matters for which regulations are required, as follows-
  - a. abstraction of ground water and works therefore, including the licensing of borehole constructors;
  - b. construction, extension or improvement of dams and the licensing of persons carrying on business as dam contractors;

- c. the licensing of engineers and other persons offering professional services in respect of water resources or water services;
  - d. national public water works,
  - e. information to be made available to the public under the Act,
  - f. requirements for the keeping of records and the furnishing of information to the Water Resources Authority;
  - g. the transfer of functions, assets, liabilities and staff;
  - h. rain water harvesting and household water storage; or
  - i. any saving, temporary or transitional provision in consequence of the repeal of the Water Act, 2002
- d) Based on the Statutory power given under the Water Act, the Cabinet Secretary has published the Water Harvesting and Storage Regulations 2020 which making provision for the implementation of the principal law through specified mechanisms and procedures, as follows:
- (i) Classification of water storage dams and other waterworks; including classification of national public water works;
  - (ii) Definition of the minimum net freeboard and minimum spillway design for dams;
  - (iii) Development of waterworks, including prior right to water for storage;
  - (iv) Requirements for construction of waterworks;
  - (v) Prerequisites for dams including feasibility study, design by a qualified water sector professional; dam design report;
  - (vi) Dam construction progress report, dam completion reports;
  - (vii) Dam operation report including provisions for cessation or resumption of operations;
  - (viii) Procedures and conditions for release of water from storage dams and other waterworks;
  - (ix) Procedures and requirements for the maintenance and management of waterworks;
  - (x) Provisions concerning strategic water emergency interventions, including drought response plan; water supply and demand management; and improved system efficiency;
  - (xi) Provisions concerning climate change and flood mitigation;
  - (xii) Rules on water harvesting including water harvesting policy and strategy; roof-based rainwater harvesting; land-based rainwater harvesting; and storm water run-off.
  - (xiii) Licensing of qualified professionals and contractors with respect to dam waterworks;
  - (xiv) Provisions on offences, penalties and complaints mechanisms.

### **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. 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, Sanitation and Irrigation is the Cabinet Secretary Ms. Sicily K. Kariuki, or the Principal Secretary Mr Joseph Irungu.

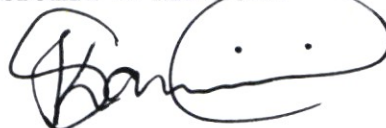
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SICILY K. KARIUKI



CABINET SECRETARY

**MINISTRY OF WATER, SANITATION AND IRRIGATION**

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