

TRANSFER OF NATIONAL PUBLIC ASSETS REGULATIONS 2021 – MARCH 08 2021

Kenya Gazette Supplement No xxx

(Legislative Supplement No xxx)

LEGAL NOTICE NO.

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THE WATER ACT
(No. 43 of 2016)

THE WATER (TRANSFER OF NATIONAL PUBLIC ASSETS) REGULATIONS, 2021

IN EXERCISE of the powers conferred by Section 84 (1) and (2) of the Water Act 2016, the Cabinet Secretary for Water, Sanitation and Irrigation makes the following Regulations—

THE WATER (TRANSFER OF NATIONAL PUBLIC ASSETS) REGULATIONS, 2021

PART I - PRELIMINARY	
Citation.	1. These Regulations may be cited as the Water (Transfer of National Public Assets) Regulations 2021.
Interpretation	2. In these Regulations, unless the context otherwise requires— “Act” means the Water Act 2016, No 43 of 2016 or as may be amended by Parliament from time to time; “Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to water resources; “depreciated replacement cost” means an amount equivalent to the cost to replace the asset on the date of transfer adjusted by a deemed depreciated cost at the date of the transfer taking into account the age and condition of the asset; “fair market value” means the value at which a knowledgeable willing buyer would buy and a knowledgeable willing seller would sell the asset in an arm’s length transaction; “historical cost” means the original purchase price or cost of acquisition of the asset at the time it was acquired; “Ministry” means the Ministry of Water, Sanitation and Irrigation; “Person” means natural or legal person and includes a corporate;

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	<p>“National Public Water Works” has the meaning assigned to it under Section 8 of the Act; “private sector party” means a person who is not a state entity;</p> <p>“realisable value” means the amount of cash or cash equivalent that could currently be obtained by transferring the asset less the estimated costs of completion and the estimated cost necessary to make the transfer;</p> <p>“subsidiary asset” means an asset that forms an integral part of the primary asset or of the operation or maintenance of the asset; “transfer” means transfer of ownership in the asset;</p> <p>“Water Service Provider” means an entity established in accordance with Section 77 of the Act;</p> <p>“Water Works Development Agency” means an entity of the national government established under Section 65 of the Act;</p>
<p>Application of the Rules</p>	<p>3. These Regulations shall apply to and govern –</p> <p>(a) the transfer of national public assets to a county government or county water services provider; and</p> <p>(b) Public private partnerships relating to the development, use, operation or management of national public assets, facilities and infrastructure by a private sector party.</p>
<p>Principles for Transfer</p>	<p>4. These Regulations are governed and must be implemented in accordance with the following principles:</p> <p>(a) Valuation principle: the need to attach a value to the transfer of the asset in order to ensure that the interests of the Water Services Provider are not prejudiced by the transfer.</p> <p>(b) Liability transfer principle: the need to transfer liabilities relating to the asset in conjunction with the transfer of the asset.</p> <p>(c) Continuity of service principle: the need to ensure as little service disruption as practicable when an asset that is being used in the delivery of that service is transferred.</p>
<p align="center">PART II – THE PROCESS OF ASSET TRANSFER</p>	
<p>Due diligence review and the Verification Report.</p>	<p>5. (1) Prior to entering into a transfer agreement in terms of Regulation 8, the Water Works Development Agency in conjunction with the relevant county government or county water service provider to whom a national public asset is to be transferred, shall a due diligence review on such public assets and liabilities.</p>



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	<p>(2) The joint due diligence review conducted by the Water Works Development Agency and the county government or county water service provider shall seek to -</p> <ul style="list-style-type: none">(a) ensure that the national public assets, infrastructure, facilities and liabilities and any other aspect to be transferred by the Water Works Development Agency are in existence and can be accounted for; and(b) provide for a detailed assessment of national public assets, infrastructure and facilities including a detailed technical, financial and service performance assessment which shall be undertaken on each national public asset whose ownership is to be transferred in order to ascertain the current condition of such assets, infrastructure and facilities. <p>(3) The due diligence review carried out in respect to the national public assets shall be based on -</p> <ul style="list-style-type: none">(a) the national public water works defined in accordance with section 8 of the Act; and(b) an inventory by the Water Works Development Agency of all system facilities, assets, liabilities and any other aspect to be transferred by the Water Works Development Agency. <p>(3) The results of the due diligence shall be documented in a verification report that shall be taken into account in any transfer of a national public asset in terms of these Regulations.</p> <p>(4) The verification report shall be filed with the Ministry and shall be accessible to the public in accordance with the Access to Information Act (No. 31 of 2016) and the relevant provisions of the County Governments Act (No. 17 of 2012).</p>
<p>Determination of the Assets</p>	<p>6. (1) The transfer of ownership of national public assets from a Water Works Development Agency to the county government or county water service provider shall encompass –</p> <ul style="list-style-type: none">(a) Certificates of title and lease agreements relating to land, property and buildings and other immovable structures such as water infrastructure and or sewerage infrastructure assets used for or in connection with the provision of water and or sewerage services;(b) Plant, machinery and equipment and other moveable assets used for or in connection with the provision of water and or sewerage services;



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	<ul style="list-style-type: none"> (c) Other infrastructure assets such as offices, staff houses, workshops etc.; (d) Completion certificates for infrastructure assets; (e) Built drawings of works and infrastructure for ongoing infrastructure projects; (f) Books and records; (g) Cash and bank balances derived from the performance or provision of water and or sewerage services; (h) Logbooks for motor vehicles including motor cycles; and (i) Intangible assets recorded in the accounting records of the Water Works Development Agency or Water Services Provider as an integral part of the provision of water and or sewerage services. <p>(2) The transfer of liabilities shall include -</p> <ul style="list-style-type: none"> (a) Loan documents provided by the National Treasury relating to outstanding infrastructure loans; (b) Ongoing suits and proceedings in which the Water Works Development Agency is a party to ensure that the relevant county government or county water service provider is substituted; and (c) Any other liabilities either actual or contingent affecting the waterworks being transferred.
<p>Valuation of assets</p>	<p>7. (1) The value of national public assets transferred to a county government or county water service provider shall be determined in accordance with the applicable accounting standards that the Water Works Development Agency is required by law to apply in preparing its annual financial statements and shall be undertaken on a case-by-case basis.</p> <p>(2) In the absence of sufficient guidance in those accounting standards regarding the valuation of national public assets, any of the following valuation methods shall be applied:</p> <ul style="list-style-type: none"> (a) historical cost of the national public asset, adjusted for accumulated depreciation and impairment losses as at the date of transfer of the asset; (b) book value; (c) fair market value of the national public asset;



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	<p>(d) depreciated replacement cost of the national public asset; or</p> <p>(e) realizable value of the national public asset.</p> <p>(3) The value of liabilities transferred to a county government or county water service provider shall be determined in accordance with the accounting standards that the Water Works Development Agency is required by law to apply in preparing its annual financial statements.</p> <p>(4) In the absence of sufficient guidance in those accounting standards regarding the valuation of liabilities attached to those assets, any of the following valuation methods shall be applied:</p> <p>(a) the settlement value of the liability, which is the amount that will be paid; or</p> <p>(b) the net present value of the liability, after discounting future settlement values to present values.</p>
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PART III – THE AGREEMENT

<p>Transfer Agreement, Deed of Transfer or Notice</p>	<p>8. (1) A Water Works Development Agency shall transfer assets, liabilities and any other aspects to be transferred in terms of these Regulations by means of –</p> <p>(a) a joint inspection carried out by the transferring Water Works Development and the receiving county government or county water service provider and in accordance with a written transfer agreement or deed of transfer concluded between the transferring Water Works Development Agency and the receiving county government or county water service provider; or</p> <p>(b) a joint inspection followed by a legal notice effecting the transfer published in the Kenya <i>Gazette</i> by the Cabinet Secretary.</p> <p>(2) In the case of a transfer effected by the execution of a transfer agreement or deed of transfer by the transferring Water Works Development Agency and the receiving county government or county water service provider, the agreement or transfer deed shall -</p> <p>(c) set out the terms and conditions of the transfer including as a minimum –</p> <p>(i) a sufficient description of the primary asset being transferred in order to identify the asset;</p> <p>(ii) particulars of any subsidiary assets that are transferred</p>
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	<p>with the primary asset;</p> <ul style="list-style-type: none"> (iii) particulars of any liabilities transferred with the asset including the assumption by the Water Service Provider of the responsibility of the repayment of such outstanding loans and liabilities; (iv) the effective date from which the risk and accountability for the asset(s) is transferred to the Water Service Provider; (v) the value of the asset determined in accordance with Regulation 7 (Valuation of Assets); (vi) appropriate evidence to support the valuation of the asset; and (vii) details of any encumbrances, rights and servitudes, applicable to the asset. <p>(d) state that the transfer is effected on the basis of the provisions of the Act, these Regulations and that these provisions must for this purpose be regarded as forming part of the agreement; and</p> <p>(e) be signed on behalf of the transferring Water Works Development Agency and the receiving county government or county water service provider respectively.</p> <p>(3) Once the transfer has been effected in accordance with Regulation 8 (1), all funds, assets, liabilities and other property, movable and immovable, which immediately before the date of transfer were held by the Water Works Development Agency shall vest in the county government or county water service provider upon execution of the transfer agreement or publication of the legal notice in the <i>Gazette</i>.</p>
<p>Access to Transfer Agreements.</p>	<p>9. A transfer agreement or deed of transfer in terms of which a Water Works Development Agency transfers an asset to a county government or a county water service provider in accordance with these Regulations –</p> <ul style="list-style-type: none"> (a) Shall be lodged at the relevant registry in accordance with the relevant laws on registration of assets; (b) Shall be made available in its entirety to the Ministry and filed in the Ministry’s register to form part of the Water Assets Register; and (c) may not be withheld from public scrutiny except as provided for in terms of the Access to Information Act (No. 31 of 2016) and



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	the relevant provisions of the County Governments Act (No. 17 of 2012).
Indemnity from third party claims.	<p>10. (1) The transfer agreement shall indemnify the county government or county water service provider from any action, claim or demand arising whatsoever from a third party in respect of the transfer of any national public asset.</p> <p>(2) Where documentation evidencing ownership for the national public assets to be transferred are missing, cannot be traced or are incomplete, the county government or county water service provider shall be indemnified from any such actions, claims or demands arising in relation to the transfer of national public assets.</p>
Duties of Public Officers to register transfer.	<p>11. Every public officer having the power or duty to effect or amend any entry in a register relating to property, or to issue or amend any certificate or other document effecting or evidencing title to property and facilities, shall without payment of fee or other charge and upon request made by or on behalf of the Water Service Provider, do all such things as are by law necessary to give final effect to the transfer of property.</p> <p>Provided that such duty shall be without prejudice to any provision made by any other law in relation to the functions of that public officer.</p>
Public Private Partnerships	<p>12. (1) The county government or county water service provider may engage in a public private partnership or other appropriate contractual agreement with a private sector party for the development, operation, maintenance, and rehabilitation of water services infrastructure and facilities and or the provision of water and or wastewater and faecal sludge disposal services.</p> <p>(2) Any assets, facilities and infrastructure developed in accordance with subsection (1) and used for the provision of water and or sewerage services shall be deemed to be national public assets and ownership shall be vested with the appropriate county government or county water service provider.</p>
PART IV - GENERAL PROVISIONS	
Encumbrances.	13. The transfer of an asset in terms of these Regulations does not affect or extinguish any existing encumbrances, rights and servitudes attached to the asset.
Continuation of services.	<p>14. (1) As soon as reasonably practicable following the <i>gazettement</i> of these Regulations, the process of transfer shall commence.</p> <p>(2) In effecting the transfer of national public assets, the Water Works Development Agency, the county government or county water</p>

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	services provider involved must take all reasonable steps to ensure that such transfer will not interrupt service provision.
Transfer of assets to be effected in accordance with the law.	15. The transfer of assets in terms of these Regulations must be given effect to and formalized in accordance with any legislation applicable to such transfers including the Public Procurement and Asset Disposal Act 2015 and the regulations thereunder.

Dated the 2021

SICILY KARIUKI

**Cabinet Secretary
Ministry of Water, Sanitation and Irrigation**

