

# Regulatory Impact

## Statement

*February 2019*



MINISTRY OF WATER AND SANITATION  
KENYA WATER SECURITY AND CLIMATE RESILIENCE  
PROJECT (KWSCR)  
SUPPORT TO WATER SECTOR REFORMS

PROPOSED WATER SERVICES REGULATIONS, 2019

# PROPOSED WATER SERVICES REGULATIONS 2019

## Regulatory Impact Statement

*February 2019*

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**PROPOSED**

**WATER SERVICES REGULATIONS 2019**

Regulatory Impact Statement

Prepared by the Ministry of Water and Sanitation (MWS)

2019

This Regulatory Impact Statement (RIS) has been prepared in compliance with the Statutory Instruments Act, 2013 (Acts *No.* 23) requirement for Regulatory Impact Statement on the proposed Water Services Regulations 2019.

The purpose of the RIS is to enable the Cabinet Secretary, Members of Parliament, and the Kenyan Community to be informed of the environmental, social and economic implications of the implementation of the proposed Water Services Regulations 2019.

Public comments from stakeholders and submissions were invited on the proposed regulations.

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## **ABBREVIATIONS**

<b>CS</b>	Cabinet Secretary for water
<b>CECM</b>	County Executive Committee Member
<b>KWSCRIP</b>	Kenya Water Security and Climate Resilience Project
<b>MWS</b>	Ministry of Water and Sanitation
<b>PPP</b>	Public Private Partnership
<b>RIS</b>	Regulatory Impact Statement
<b>WRA</b>	Water Resources Authority
<b>WSB</b>	Water Service Board
<b>WSI</b>	Water Service Institution
<b>WSP</b>	Water Service Provider
<b>WSTF</b>	Water Sector Trust Fund
<b>WASREB</b>	Water Services Regulatory Board
<b>WWDA</b>	Water Works Development Agency



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## **EXECUTIVE SUMMARY**

This Regulatory Impact Statement (RIS) examines the impact of reforming the regulation of water supply and sewerage services in Kenya and recommends that the current suite of subsidiary legislation under the Water Act (2002) be repealed and replaced with these new regulations.

The regulation of water supply and sanitation services by the county government helps to ensure that every Kenyan has access to clean and safe water in adequate quantities and to reasonable standards of sanitation. This endeavor will help maximize the long term value of water to the broader community and ensures public health.

In exercise of the powers conferred under Section 110 of the now repealed Water Act (2002) the Minister for Water made the Water (Services Regulatory) Rules, 2012 (L.N. No. 137 of 2012) (the current regulations) which rules applied to the Regulatory Board, all licensees in Kenya or their contracted agents or associates and all water service operators.

The current regulations do not comprehensively address the new mandates, roles and functions of various entities as provided for in the Water Act (2016). The proposed Water Services Regulations 2019 (the proposed regulations) seeks to replace the current regulations with substantive amendments to align with the requirements of the Constitution of Kenya 2010 and the Water Act (2016).

This RIS examines the costs and benefits of implementing a suite of regulatory reform measures in Kenya in order to enable the provision of water and sewerage services in the country.

This RIS advises that this would lead to better investments in water use, higher value use of water, greater flexibility to deal with climate and rainfall variability and population growth and further contribute to the improved protection of the condition of water resources in Kenya.

The proposed regulations are underpinned by multiple rounds of consultations, which have shown support from various stakeholders within the water sector.

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## 1. INTRODUCTION

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The new constitutional dispensation (Constitution of Kenya 2010) recognizes water supply and sewerage services as a basic right for all Kenyans. Consequently, it mandates the county governments to undertake the function of water supply and sanitation services. The Constitution of Kenya 2010 has prompted a suite of legislative reforms in the water sector, repealing the Water Act (2002) and leading to the enactment of the Water Act (2016).

The Water Act (2016) recognizes the shared mandate of national and county governments as regards water related functions and is meant to align water governance to the devolved structure. The Water Act (2016) has retained some existing institutions and also created new institutional arrangements. As regards water supply and sewerage services the relevant institutions include the Ministry of Water (MWS) as the sector coordinator, Water Services Regulatory Board (WASREB) for regulation of water and sewerage services provision, the Water Service Providers (WSPs) as established by the county governments, Water Sector Trust Fund (WSTF) and the Water Works Development Agencies (WWDAs) to replace the Water Service Boards (WSBs).

Section 142 of the Water Act (2016) empowers the Cabinet Secretary 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. Due to the substantive amendments made by the Water Act (2016), MWS did not consider it appropriate to identify other options to achieve its objective. Instead, this RIS sets out the substantive changes from the Water Act 2002 to the Water Act 2016 and the proposed legislation, namely the Water Services Regulations 2019, given the new constitutional dispensation and the Water Act 2016. The RIS identifies the proposed legislation's impacts, the gaps in the Water Act 2016 it seeks to fill, and the costs and/or benefits for stakeholders and Kenyans.

MWS considers that the proposed regulations will meet the water sector reform objectives and aligns with the Water Act, 2016. The legislation is not finalized and changes based on stakeholder comments in response to the Public Consultations will help to ensure that the final Water Services Regulations 2019 presented to Parliament delivers the best outcomes.

The regulations should deliver legislation that is outcomes-based and combines the requirements of the Constitution of Kenya 2010, the Water Act 2016, the National Water Master Plan 2030, the National Water Services Strategies, as well as the existing and proposed water sector policy.





## 2. OBJECTIVES OF THE PROPOSED WATER SERVICES REGULATIONS 2019

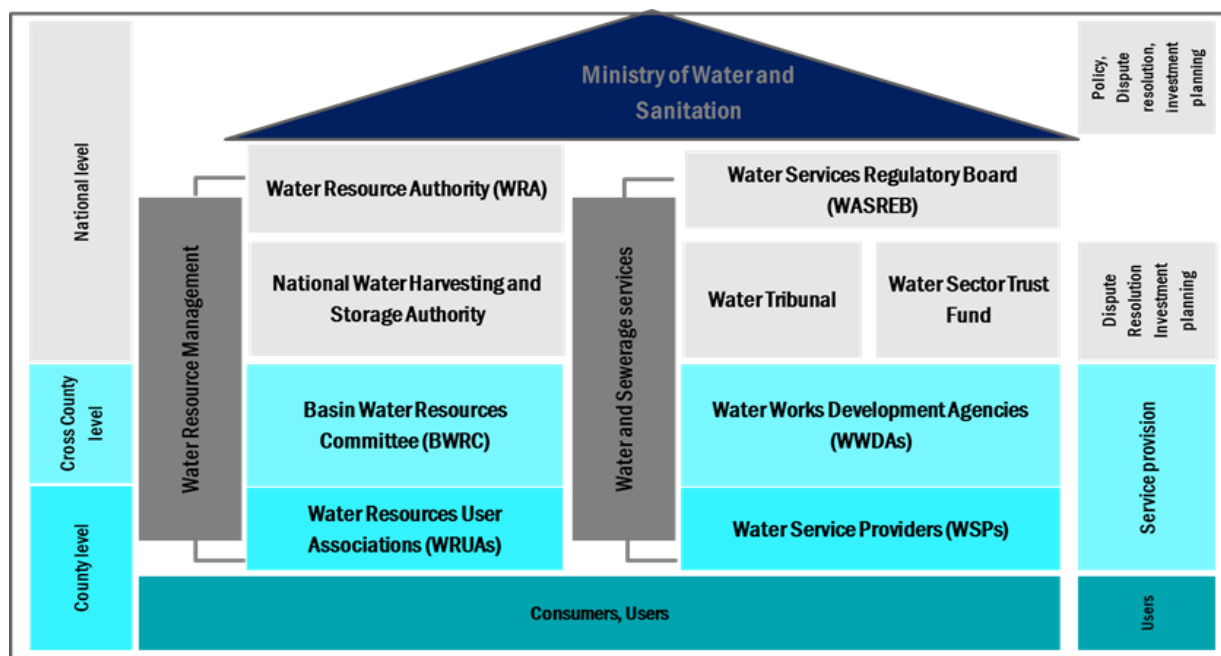
### 2.1 Compliance with the Legal and Institutional Framework

The principles enshrined in the Water Act 2016 are the need to maintain the gains of the reform process and the alignment of the legal and the institutional framework to the Constitution of Kenya 2010.

The Constitution of Kenya 2010 created two levels of government: the national government and the county government. The Fourth Schedule distributes functions between the national government and county government. Whereas the national government is responsible for the use of international waters and water resources, the county governments are tasked with water and sanitation services provision. Pursuant to the Fourth Schedule, both the national and county governments may undertake public works.

A key pillar of the Bill of Rights in the Constitution of Kenya 2010 is the right to clean and safe water in adequate quantities and to reasonable standards of sanitation (Article 43). Since the State and every state organ is obliged to fulfill these rights (Article 21), both the national and county government have a shared mandate to ensure universal access to water services. The Water Act 2016 (the Parent Act) was enacted to align the water sector to the Constitution of Kenya 2010 and to ensure that relevant institutions have mandates to respond to challenges of the water sector. Figure 1 below depicts the new institutional framework formulated in the Water Act 2016.

**Figure 1: New Institutional Framework Formulated in the Water Act 2016**



The development of the Water Services Regulations 2019 is an imperative element in giving effect to the mandate, roles and functions of various entities including the Water Services Regulatory Board (WASREB), Water Service Providers (WSPs), Water Works Development Agencies (WWDAs), Water Sector Trust Fund (WSTF) and Water Action Groups (WAGs).

These regulations are in compliance with the overall objectives of the Constitution to ensure universal access to water services and sanitation systems.

## *2.2 Objectives of the proposed Regulations*

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The Water Services Regulations 2019 makes key elements of the Water Act 2016 operational – including but not limited to the following areas –

- a. Defining various procedural matters;
- b. Specifying the form and process requirements for applications for licenses, approvals and the accreditation of water services providers;
- c. Specifying the functions, areas of operation, financing and powers of Water Services Providers;
- d. Keeping public registers of information related to water supply and sewerage services;
- e. Specifying modalities for consumer engagement through Water Action Groups;
- f. Specifying arrangements for bulk water supply by the newly established Water Works Development Agencies (WWDAs);
- g. Specifying modalities for tariffs and levies for and by WSPs;
- h. Specifying the roles and functions of county governments in water and sewerage services provision;
- i. Specifying the systems and standards for the operation of water services and effluent discharge;
- j. Specifying arrangements for mechanisms for complaints, compliance and enforcement;
- k. Dealing with details and modalities that are left out or left open in the Water Act 2016 generally.

These objectives are consistent with the stated purposes of the Water Act (2016) which is to ensure that every citizen has access to clean and safe water in adequate quantities and to reasonable standards of sanitation as stipulated in Article 43 of the Constitution (Section 63).

## *2.3 Institutional Arrangements under the Water Act (2016)*

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The Water Act (2016) establishes key water sector institutions (WSIs) to align with the requirements of the Constitution of Kenya 2010 in the area of water and sewerage services provision. Table 1 provides an overview of their mandates and functions.

**Table 1 : Mandates and Functions of WSIs in water supply and sewerage services**

<b>INSTITUTION (WSIs)</b>	<b>MANDATES UNDER WATER ACT (2016)</b>
<b>Water Services Regulatory Board (WASREB)</b>	<ul style="list-style-type: none"> <li>• Determine and prescribe national standards for the provision of water services and asset development for water service providers</li> <li>• Evaluate and recommend water and sewerage service tariffs to county WSPs and approve imposition of such service</li> <li>• Set license conditions and accredit WSPs</li> <li>• Monitor and regulate licensees and enforce license conditions.</li> <li>• Monitor compliance with standards by the WWDAs and WSPs.</li> </ul>
<b>Water Service Providers (WSPs)</b>	<ul style="list-style-type: none"> <li>• Provision of water services within the area specified in the license.</li> <li>• Development of county assets for water service provision.</li> </ul>
<b>Water Sector Trust Fund</b>	<ul style="list-style-type: none"> <li>• Provide conditional and unconditional grants to counties to assist in financing the development and management of water services in marginalized and underserved areas.</li> </ul>
<b>Water Works Development Agencies (WWDAs)</b>	<ul style="list-style-type: none"> <li>• Development, maintenance and management of National Public Water Works within area of jurisdiction.</li> </ul>

The establishment of WWDAs which seek to replace the WSBs as established under the Water Act (2002) is key to the operationalization of the Water Act (2016). The WWDAs as institutions formed under the Water Act (2016) will alter the way the sector operates. Table 2 below highlights the mandates of both institutions.

**Table 2: Mandate and Functions of WSBs and WWDAs**

<b>Water Service Boards (Water Act 2002)</b>	<b>Water Works Development Agencies (Water Act 2016)</b>
1. Efficient and economical provision of water services	1. Development, maintenance and management of national public water works
2. Developing water and sewer facilities, investment, planning and implementation	2. Operate water works and provide water services until operation
3. Rehabilitation and replacement of infrastructure	3. Provide reserve WSP capacity in the case of a defaulting WSP
4. Applying regulations on water services and tariffs	4. Provide technical services and capacity building to county governments and WSPs
5. Procuring and leasing water and sewerage facilities	5. Provide technical support to the Cabinet Secretary
6. Contracting WSPs	

The proposed Water Services Regulations 2019 are necessary to operationalize and give effect to the requirements under the Water Act 2016 and govern the various institutional arrangements under the Act. The proposed regulations should deliver improved water supply and sewerage services in the water sector. Table 3 highlights the detailed issues addressed by the proposed regulations.



**Table 3: Detailed table of issues addressed by the proposed legislation**

No.	Topic/Key Principle	The Parent Act	Proposed Legislation: Water Services Regulations 2019	Comments/Explanation
1	<b>Applicable Legislation</b>	The Water Act, 2016	Water Services Regulations 2019	Legislation is based on the Water Act 2016 and gives it effect.
2	<b>Application of Water Services Regulations</b>		<ul style="list-style-type: none"><li>The regulations apply to and extend to the National Government and national government entities, County Governments and county government entities and other persons providing water services in Kenya.</li></ul>	<b>ALL:</b> Scope aligns with the Water Act 2016 and the Constitution of Kenya 2010; the National Water Master Plan 2030, the National Water Services Strategies, as well as the existing and proposed water sector policy
3.	<b>County Government Framework For Water Services Provision</b>	The Act does not specify the modalities for the development and provision of water and sewerage services within the county.	<ul style="list-style-type: none"><li>The rules provide for the powers and duties of counties in the provision of water services. County involvement in water services provision is not provided for under the current regulations.</li></ul>	Scope aligns with the Fourth Schedule of the Constitution of Kenya 2010 giving counties the mandate to undertake water and sewerage services provision.

4.	<b>Establishment, Operation And Financing Of Water Services Providers</b>	<p>The Act calls for the establishment of WSPs.</p> <p>There are gaps in relation to the modalities in terms of governance of WSPs among other prevailing issues.</p> <p>Modalities for the extension of water services to rural areas is not provided for</p>	<p>The rules provide for the establishment, functions and governance mechanisms for WSPs.</p> <ul style="list-style-type: none"> <li>• The rules specify for the finances of county WSPs and county government financial support to WSPs.</li> <li>• Issues such as annual estimate of county WSPs revenues and expenditures and the ring fencing of water revenues are addressed in the regulations.</li> <li>• Compliance with accounting and auditing procedures is a requirement.</li> <li>• Counties are mandated to facilitate the development of community WSPs in rural areas.</li> </ul>	
5.	<b>Application For License</b>	<p>Detailed procedure for license applications by WSPs is not enumerated in the Act.</p>	<ul style="list-style-type: none"> <li>• WASREB undertakes the role as the regulatory authority in the issuance of licenses to WSPs. The rules provide for the procedure for making applications for licenses, mid-term reviews and renewals.</li> <li>• Applications are subject to public consultation in line with constitutional requirements. Applications may be subject to objections.</li> <li>• Provision is made for appeals to the Water Tribunal regarding decisions by WASREB regarding applications.</li> <li>• The regulations address a number of other key issues such as the validity of licenses and basic criteria, the</li> </ul>	<p>WASREB retains its role as the licensing authority.</p> <p>The newly established Water Tribunal under the Water Act 2016 is mandated to hear appeals regarding decisions of WASREB.</p>



			<p>scope of licenses, extension of licenses, and default in applications for renewal, fees and mapping of service areas etc.</p> <ul style="list-style-type: none"><li>• WASREB may require WSPs to deposit guarantees or other security in order to secure payment of recoverable expenses.</li><li>• WASREB is required to establish a comprehensive register of all WSPs.</li></ul>	
6.	<b>Systems And Standards For Operation Of Water Services</b>	The modalities of operation are left open ended in the Act.	<ul style="list-style-type: none"><li>• Water services is managed on a commercial basis; this requires licensed WSPs to implement tariffs.</li><li>• A schedule of water services must be established by WSPs.</li><li>• Works may be executed by WSPs subject to consent by the Water Resources Authority and/or any other state organ as the case may be.</li><li>• Licensees must include suitable sampling programmes in line with standards established by the Kenya Bureau of Standards (KEBS)</li><li>• Licensees are required to inform the relevant authorities of any possible public health risk regarding the water supply.</li></ul>	
7.	<b>Effluent</b>	The Act provides for the control of trade effluent.	<ul style="list-style-type: none"><li>• WSPs in consultation with the county government are required to set appropriate sewerage or sanitation systems for waste water disposal.</li></ul>	



			<ul style="list-style-type: none"><li>• WSPs will submit to WASREB and the county government a sewerage system plan for progressive improvement of infrastructure for sewerage systems.</li><li>• Persons will obtain consent from licensees to discharge trade effluent in accordance with the rules and regulations provided for under the Environmental Management and Coordination Act (1999). Aggrieved persons have recourse to the Water Tribunal.</li></ul>	
8.	<b>Tariffs</b>	The means of implementation are not enumerated in the Act.	<ul style="list-style-type: none"><li>• WSPs are to implement tariffs as approved and <i>gazetted</i> by WASREB.</li><li>• Regular and Extraordinary Tariff reviews may be undertaken by WASREB.</li><li>• WASREB at the request of WSPs may permit automatic tariff adjustments as part of the Regular or Extraordinary Tariff Review.</li></ul>	
9.	<b>Clustering</b>	The methods for clustering of WSPs is not explicitly specified in the Act.	<ul style="list-style-type: none"><li>• WASREB may require the clustering of two or more WSPs.</li><li>• Clustering may be initiated by a WSP or two or more WSPs acting jointly, the county, WASREB, consumer group or groups acting jointly, or a stakeholder group within the area of supply.</li><li>• Counties are to prepare feasibility studies on the proposal to cluster services.</li></ul>	The regulations provide for the procedure of clustering in explicit detail and identifies the roles of affected stakeholders.





			<ul style="list-style-type: none"><li>• Clustering process will be overseen by a joint committee comprising members of the board of directors of the WSP and three other persons appointed by the county executive committee member.</li><li>• Clustered services will apply for new licenses and new tariffs.</li></ul>	
10.	<b>Levies</b>	The procedure and process for the imposition of levies and the operation of levies bank account by WSPs are not outlined in the Act.	<ul style="list-style-type: none"><li>• WASREB will approve levies of the monthly water consumption bill as a sewerage services levy.</li><li>• The sewerage services levy will cover part of the costs of waste disposal within the area of supply of the WSPs.</li><li>• The CS will impose a water consumption levy payable into a Fund maintained by the WSTF.</li><li>• Levies collected by WSPs are to be maintained in a separate bank account which will be operated subject to rules set by WASREB and WASREB will inspect the sales records of WSPs to ensure compliance.</li><li>• WSPs will charge an administration fee of not more than 0.1% of each levy to cover costs of collection and administration of the levy.</li><li>• WASREB may impose penalties for WSPs' failure to remit levies based on the deposit interest rate payable by a commercial bank for a deposit of the amount not</li></ul>	



			remitted. WSPs will be subject to the special regulatory regime for repeated failure to remit collected levies.	
11.	<b>Administration of certain water supply and infrastructure services</b>	<p>The Act has left a number of issues open regarding easements and access rights.</p> <p><i>Other applicable laws the proposed Water Tribunal Rules 2019.</i></p>	<ul style="list-style-type: none"><li>• WSPs will apply for abstraction permits from WRA, access rights, easements and source development agreements to enable it obtain raw water as required.</li><li>• WASREB may make arrangements for the purchase of bulk water where the WSP lacks access to adequate sources of raw water.</li><li>• WSPs requiring easements, access right and/or property rights will obtain and register such rights in its name.</li><li>• A WSP within whose area of supply a borehole is to be drilled is entitled to consultation on the permit application and to issue ‘no-objection’. In considering a ‘no-objection’ WSPs shall take into account its water services capabilities in respect of the borehole application. Disputes over borehole construction will lie with the Water Tribunal.</li><li>• WSPs will maintain an inventory of boreholes within its area of supply and WSPs may enter into contracts with the owner of the borehole to take water.</li><li>• WSPs will regulate water vending through kiosks or mobile means including water tankers within its area of supply.</li></ul>	



			<ul style="list-style-type: none"><li>• WSPs in collaboration with WRA and a public health officer may order the closure of unsafe supplies of water or compel users of such water to take supply from the WSP. Disobedience of the order results in liability to prescribed penalties. The WSP may close the source of supply either temporarily until remedial measures are implemented, or permanently and recover costs from the operator as a civil debt.</li><li>• WSP will ensure community WSPs or private WSPs operating in rural and underserved areas maintain water quality and service quality standards set by WASREB.</li><li>• If a community WSP or private WSP fails to meet required standards posing a public health risk, the WSP with the approval of WASREB and the CECM may require the provider to cease services and the WSP will assume responsibility of provision of water services.</li><li>• WSPs will make rules governing the receipt of septic tank sludge into the sewerage system it operates.</li></ul>	
12.	<b>Approvals of construction works affecting infrastructure etc.</b>		<ul style="list-style-type: none"><li>• Any constructions that will affect water and sewerage infrastructure require approval from the WSP. Failure to obtain such approval constitutes an offence and a penalty of a fine not less than 20,000/- Kenya Shillings or imprisonment not exceeding 6 months or both.</li></ul>	



			<ul style="list-style-type: none"><li>• In addition to other prescribed penalties, where damage is caused to infrastructure a person will be liable to a surcharge of the full repair or replacement costs notwithstanding any purported prior approval by the WSP. This also applies to public bodies undertaking construction works in their capacity or through private persons under contract.</li><li>• All property development works connecting to water mains will be approved by the relevant WSPs.</li></ul>	
13	<b>Inspection, Evaluation and Monitoring</b>	The Act is silent on how inspections, evaluation and monitoring is to be carried out.	<ul style="list-style-type: none"><li>• WSPs will maintain an inspectorate service with adequate resources and staff for inspections between the hours of 8am and 6pm except in emergencies.</li><li>• Inspections will cover the distribution system; the water metre(s); water storage systems; the sewerage system; and any other water and sewerage systems.</li><li>• WSPs will communicate to the customer methods and procedures for identifying its inspectors.</li><li>• WSPs may apply for a warrant to enter premises from the courts where it suspects illegal or unauthorized access or use of water and/or sewerage services.</li></ul>	
14	<b>Offences relating to conduct of employees of WSPs</b>	The Act is silent on the types of offences that may be committed by employees of WSPs	<ul style="list-style-type: none"><li>• Employees of WSPs have immunity from liability and prosecution from losses occasioned in the lawful performance of their duties in good faith. Notwithstanding, offences related to solicitation and</li></ul>	



		and the requisite penalties that may be imposed. <i>Other applicable laws include the Public Officer Ethics Act, Penal Code and the Anti-Corruption and Economic Crimes Act including their replacements or amendments.</i>	receiving bribes and corrupt practices are punishable under the relevant laws	
15	<b>General Offences</b>	The Act is silent on the types of offences that are punishable under the Act.	<ul style="list-style-type: none"><li>• These include:<ul style="list-style-type: none"><li>a. Impersonation of staff of WSPs</li><li>b. Vandalism of water and sewerage services infrastructure</li><li>c. Illegal connection of water services</li><li>d. Contamination of water and supply to domestic premises.</li></ul></li><li>• All offences carry a penalty of not less than six months or fine not less than twenty thousand shillings or both.</li><li>• Upon conviction subsequent offences relating to vandalism in addition to any other prescribed penalty is subject to a surcharge in an amount equivalent to the vandalized infrastructure and will be recoverable as a civil debt.</li></ul>	



			<ul style="list-style-type: none"><li>• In addition to the general penalty persons convicted for illegal connections will be liable to a surcharge subject to interest at 12% per annum and will be owed to the WSP.</li></ul>	
16	<b>Bulk Water Supply</b>	<p>The Act establishes WWDAs among other duties to undertake the development, maintenance and management of national public water works within its area of jurisdiction.</p> <p>The current regulations do not make provision for the operation of WWDAs.</p>	<ul style="list-style-type: none"><li>• WWDAs will provide bulk water services to WSPs in a county or counties other than the county in which the bulk water works are situate.</li><li>• WSPs may establish works for bulk water supply within the county</li><li>• Applications for bulk water supply are subject to approval by WASREB following public consultation.</li><li>• WASREB will determine any application within six months and any aggrieved party may appeal to the Water Tribunal.</li></ul>	
17	<b>Reporting and Record Keeping</b>	<p>The Act does not provide for the technicalities and modalities for information gathering and reporting mechanisms.</p>	<ul style="list-style-type: none"><li>• WASREB and WSPs shall prepare annual reports.</li><li>• WASREB will maintain a national database and georeferenced information system on water services. All persons will have access to the information in the system subject to a prescribed fee.</li><li>• WSPs will maintain equipment, accurate records and accounts.</li></ul>	<p>This is in line with constitutional requirements regarding access to information enshrined in the Bill of Rights.</p>



		<i>Other applicable laws Access to Information 2016 (Act No. 31).</i>	<ul style="list-style-type: none"><li>• WSPs will publicize any plans and operations as required by WASREB.</li></ul>	
18	<b>Complaints</b>	The Act calls for the establishment of a complaints mechanism.	<ul style="list-style-type: none"><li>• WSPs will establish a complaints mechanism and provide easy access to information including details of local Water Action Groups (WAGs) and maintain a customer service center.</li><li>• WAGs or any other consumer may lodge complaints concerning WSPs through the complaints mechanisms.</li><li>• Complainants may seek recourse to WASREB if dissatisfied with the handling of the complaint by the WSP.</li></ul>	
19	<b>Consumer Engagement</b>	The Act calls for consumer engagement with WSIs. The mechanisms for such engagement are not explicitly mentioned in the Act.	<ul style="list-style-type: none"><li>• WSPs and WASREB will engage with WAGs.</li><li>• WAGs will provide relevant information to consumers and liaise with WSPs.</li><li>• WAGs will follow-up on consumer complaints and submit unresolved complaints to WASREB as part of the groups' operational reports.</li><li>• WASREB will serve a supervisory role and oversee operations of mechanisms relating to consumer engagement and consumer protection.</li></ul>	This is in line with the constitutional requirement in regards to consumer protection.

20	<b>Compliance and Enforcement</b>	The mechanisms for compliance and enforcement are left open in the Act.	<ul style="list-style-type: none"><li>• WASREB may take enforcement against WSPs subject to the issuance of a notice to show cause and make such findings as it deems fit.</li><li>• WASREB may appoint any person(s) to be water services inspectors who may exercise powers of entry, inspection and apprehension.</li><li>• WASREB may issue a cure notice to remedy any breach, specifying the relevant actions to be undertaken.</li><li>• WASREB may direct a staff member or agent to monitor implementation of orders, direct the transmission of weekly reports or direct an official of WASREB monitor day to day operations.</li><li>• Inspections will be conducted at random by WASREB. Costs associated with the special regulatory regime will be borne by the concerned licensee or agent.</li><li>• WASREB may in addition mandate its agent to become a mandatory signatory to the accounts of the licensee; direct punitive process against key staff; recommend to the CS the taking of measures against the board of directors, among other measures, if it appears that under the special regulatory regime the licensee is still unable or unwilling to meet obligations or is in continued breach.</li><li>• WASREB may delegate its functions to any person.</li></ul>	
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21	<b>General Penalty</b>		<ul style="list-style-type: none"><li>• Liability is to imprisonment for a term not exceeding 6 months or a fine of 20,000/- Kenya Shillings or to both.</li></ul>	This is in line with the general penalties provided for in the Water Act (2016).
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### **3 IMPACT OF NEW REQUIREMENTS**

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The main impact of the proposed Water Services Regulations 2019 is its contribution to water supply and sewerage services provision in urban, *peri*-urban and rural areas across the country. The proposed Water Services Regulations 2019 will ensure that customers are protected and there is transparency in the water services market.

WASREB will administer and ensure compliance with the rules and regulations. The proposed Water Services Regulations 2019 will provide WASREB with more direct enforcement power. Non-compliance with the proposed regulations may result in the WSP being in breach of its licence. If licensees breach their water service license conditions WASREB can take enforcement action under the Water Act 2016 and the proposed Water Services Regulations 2019. In severe cases, the WASREB can cancel a licence.

Following comments on the proposed Water Services Regulations 2019 from stakeholders, MWS will review the changes in terms of their advantages and disadvantages to Kenya. The cost-benefit analysis is a key step in evaluating the potential impacts on business, consumers and the economy. A broader impact assessment will examine effects on individuals, the community as a whole and the environment where these are relevant. Key areas have been identified to assist stakeholders understand the changes and assess likely impacts.

#### **3.1 COST-BENEFIT ANALYSIS**

This section presents an analysis of the costs and benefits associated with the proposed Water Services Regulations 2019. This includes a characterization of the potential benefits and a qualitative assessment of benefits (monetized where possible).

The section will also identify the costs associated with the implementation of the proposed Regulations.

##### ***3.1.1 Potential Benefits***

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The broad kinds of benefits resulting from the proposed Water Services Regulations 2019 are highlighted in Table 4 below.

**Table 4: Characterization of Potential Benefits**

Use Benefits	
<b>Clustering of WSPs</b>	<ul style="list-style-type: none"> <li>Improved and efficient water services and sanitation delivery</li> </ul>
<b>Tariffs and Levies</b>	<ul style="list-style-type: none"> <li>Ensure commercial viability of WSPs</li> <li>Publication ensures transparency</li> </ul>
<b>Systems And Standards For Operation Of Water Services</b>	<ul style="list-style-type: none"> <li>Maintenance of quality standards in line with requirements to ensure public health</li> </ul>
<b>Inspection, Evaluation and Monitoring</b>	<ul style="list-style-type: none"> <li>Maintenance of quality standards in water and services provision</li> </ul>
<b>Bulk Water Supply</b>	<ul style="list-style-type: none"> <li>Increased supplies to WSPs and consumers by WWDAs</li> </ul>
<b>Effluent</b>	<ul style="list-style-type: none"> <li>Improved effluent control and protection of the environment</li> </ul>
<b>Consumer Engagement</b>	<ul style="list-style-type: none"> <li>Improved service delivery through the resolution of complaints</li> </ul>
Non-Use Benefits	
<b>Existence values</b>	<ul style="list-style-type: none"> <li>Access to clean, safe water and sanitation services</li> <li>Transparency and access to information</li> <li>Public participation in decision-making</li> <li>Dignity, social status, cleanliness and overall well-being</li> </ul>
<b>Bequest values</b>	<ul style="list-style-type: none"> <li>Intra- and Intergenerational equity from sustainable use of water resources</li> </ul>

The introduction of the proposed Water Services Regulations 2019 will provide clarity on the obligations of WSPs, community WSPs or private WSPs in the provision of water and sanitation services. All WSPs established by the counties will have to be licensed in order to provide a water service (water supply, sewerage, irrigation or drainage service). The proposed regulations will ensure consistent service standards across urban and *peri*-urban areas and rural and underserved areas. It will create a level and uniform standard of water supply and sanitation services provision across the different counties.

Inspections of WSPs under the proposed Water Service Regulations 2019 will ensure compliance with the provisions of the licence such as the reporting requirements which are necessary for tracking performance, delays in implementation of approved tariffs, and poor implementation of capital works plans. The benefits of the inspection regime under the proposed regulation will be to ensure proper accounting and record keeping.

The following sections provide information on possible areas costs associated with the proposed legislation.

### 3.1.2 Potential Costs

The proposed regulations may result in an increase in compliance costs for public authorities and Kenyan society at large. These changes may occur in ‘set-up’ costs or in ‘ongoing’ costs associated with the changes.

There may be some small costs associated with setting up further public stakeholder and/or consultative meetings to advise on the proposed Water Services Regulations 2019 and review them.

**Table 5: Summary of Potential Costs**

Entity	Associated Costs
<b>National Government</b>	<ul style="list-style-type: none"> <li>• MWS will incur costs through administration, capacity-building, education, development of implementation guides and monitoring of the proposed Water Services Regulations 2019.</li> <li>• Costs may include investments in cross-county bulk water infrastructure, urban water and sanitation services infrastructure and rural water and sanitation services infrastructure.</li> <li>• The implementation of the proposed regulations will require stakeholders to familiarize themselves with the provisions of the regulation. Associated costs will also further include designing of implementation systems and developing and implementing staff-training and adapting to new internal process. Establishment costs could therefore also include amendment of work processes and the provision of updated training to employees and key staff.</li> </ul>
<b>County Government</b>	<ul style="list-style-type: none"> <li>• The counties will be the primary mode through which the Water Services Regulations 2019 will be implemented.</li> </ul>



	<ul style="list-style-type: none"><li>• Establishment costs such as new processes and updating systems that will be required when the legislation is implemented. These costs will fall to the national government in the transition and implementation of the legislation.</li></ul>
<b>WSPs</b>	<ul style="list-style-type: none"><li>• Compliance costs to WSPs include the purchasing of equipment for proper maintenance and management water supply and sanitation services provision; 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.</li><li>• WSPs will incur costs in order to satisfy compliance with reporting and record keeping requirements as provided for in the regulations.</li><li>• WSPs will incur costs related to fees for application for licenses, raw water abstraction permits, annual license fees, deposit of guarantee or security etc.</li></ul>
<b>WASREB</b>	<ul style="list-style-type: none"><li>• WASREB is mandated to gather and collect information relevant information from WSPs. Additional compliance costs related to the implementation of the proposed regulations in data collection include the 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.</li><li>• It is also acknowledged that costs with streamlining inspections, evaluations and monitoring procedures by WASREB will be incurred.</li><li>• WASREB will incur costs associated with enforcement such as the issuance of advisory circulars, warnings, cure orders, the special regulatory regime and other penalties for non-compliance.</li></ul>

<b>WWDAs</b>	<ul style="list-style-type: none"> <li>• The proposed regulations may require the procurement of goods and services and/or the recruitment of additional staff particularly with the establishment of the WWDAs. The development and publication of guidance material for regulated parties such as WSPs or community water service providers or small-scale operators will also be required.</li> </ul>
<b>Society</b>	<ul style="list-style-type: none"> <li>• WASREB is mandated to set tariff guidelines applicable to WSPs to charge to consumers.</li> <li>• Consumers may also be subject to sewerage series and water consumption levies.</li> </ul>

### **3.2 ENVIRONMENTAL, SOCIAL AND ECONOMIC IMPACTS**

Investments in water supply and sewerage services provision generates a number of economic, environmental and social benefits. Providing access to clean drinking water and sanitation reduces health risks, and allows time for other productive activities such as education and also contributes to a productive labor force.

The safe disposal of waste water further improves the quality of surface water which greatly benefits the environment by preserving the functioning of ecosystems and biodiversity among other ecological benefits. These benefits also accrue to economic sectors that depend on water as a resource for example those involved in fishing, agriculture, tourism etc.

#### *3.2.1 Social Impacts*

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The availability of water is linked to poverty in terms of access to water for household use, farming and industrial activities. Such access has direct social impacts including those on health, family welfare and higher living standards.

#### ***Water Quality and Service Standards and Licensing Conditions***

The lack of access to proper water supply and sewerage systems typically has adverse effects on the public health. Table 6 below illustrates the types of associated health risks linked to unsafe supplies of water and lack of proper sewerage and sanitation systems.

**Table 6: Illnesses caused by Waterborne Fecal Viral Pathogens**

<b>Enteric Virus</b>	<b>Illness</b>
Poliovirus	<b>Paralysis</b>
Coxsackievirus A	Meningitis, fever, respiratory disease
Coxsackievirus B	<b>Myocarditis</b> , congenital heart disease, rash, fever, <b>meningitis</b> , encephalitis, <b>pleurodynia</b> , diabetes melitis, <b>eye infections</b>
Echovirus	<b>Meningitis</b> , encephalitis, rash, fever, gastroenteritis
Norwalk virus and other caliciviruses	<b>Gastroenteritis</b>
Hepatitis A virus	<b>Hepatitis</b>
Hepatitis E virus	<b>Hepatitis</b>
Small round structured viruses (probably caliciviruses)	<b>Gastroenteritis</b>
Rotavirus	<b>Gastroenteritis</b>
Enteric Adenovirus	Respiratory disease, <b>eye infections</b> , <b>gastroenteritis</b>
Astrovirus	<b>Gastroenteritis</b>
<b>Bold</b> highlights indicate diseases directly caused by the enteric virus; other illnesses are secondarily associated with the virus. <i>Source:</i> 1994 Encyclopedia of Microbiology	

The incidences linked to unsafe sources of water supply and poor sewerage and sanitation systems will be greatly reduced due to the quality requirements imposed by the proposed Water Services Regulations 2019. The primary regulatory impact of the proposed regulations will be on the proper design, operation and maintenance of water supply and sewerage systems in order to mitigate public health risks.

As a tool for regulating the sector, the licence as provided for in the proposed Water Services Regulations 2019 will set conditions and targets of performance of WSPs which aim to ensure quality in service provision. The conditions include the development of sophisticated investment, financing and business plans, indicating how the WSPs Boards intend to achieve the government objective of increasing water access to households. The WSP Boards are also expected to develop a pro-poor strategy in the provision of water services.

In line with licence conditions, the proposed Water Services Regulations 2019 mandates WSPs to regulate small scale operators through the enforcement of water quality and service standards,

particularly in rural and underserved areas. The purpose of bringing these businesses into formal regulation is to ensure the sale of safe quality water at a cost reflective tariff.

### ***Tariffs***

WASREB is mandated under the proposed Water Services Regulations 2019 to ensure that the tariffs set are fair, adequate, and simple and encourage conservation of water. These measures ensure equitable service provision thereby benefiting all consumers.

### ***Consumer Engagement and Consumer Complaints Mechanism***

The proposed Water Service Regulations 2019 will help to improve service levels and ensure consumer protection by bridging the gap between WSPs and consumers through the establishment of WAGs. Consumers will greatly benefit through the improved responsiveness to consumer concerns. WAGs serve as a feedback mechanism for WSIs in order to strengthen citizen participation within the sector and protecting consumer interests.

The proposed Water Services Regulations 2019 mandates the development of a complaints handling mechanism by WSPs. All WSPs are required to submit to WASREB a customer complaints handling procedure.

### ***Other Positive Social Impacts***

The increased availability of water that would be facilitated by the implementation of the proposed regulations would have a direct impact on the availability of adequate and nutritious food which would greatly impact on the health of the community. Other significant impacts of the proposed regulations would include –

- improved school attendance, particularly for girls;
- time gains e.g. from avoiding collecting water, open defecation, caring for sick family members and sickness itself etc.
- increased life-expectancy and therefore productive life-expectancy;
- increased worker productivity;
- opportunities for small-scale industry and market gardening; and
- reduced expenditures on curative health.

Socio-cultural norms surrounding division of labor means that women are often segregated to the home. The proposed Regulations seek to improve water services delivery to rural and underserved areas. This will have a direct social impact on communities and in particular women



who will be able to increase their productivity through participation in socio-economic development. The extension of water services to rural and underserved areas will have a direct impact on communities by providing reliable and adequate domestic water as a basic human need and also to provide adequate water for their lives.

### ***Negative impacts***

There are some potential negative impacts that may be experienced by society during the construction of water service systems such as impacts on roads traffic, access problems to pedestrians or to riders of motorcycles or bicycles. The issue of access will have more of an impact on the elderly, handicapped and children who may fall into open trenches for example.

### ***3.2.2 Environmental Impacts***

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#### ***Control of Trade Effluent***

The proposed Water Services Regulations 2019 will have an impact on the control and discharge of trade effluent. This will have significant environmental impacts particularly in water quality through the treatment and removal of different polluting substances.

#### ***Negative impacts of during construction of works***

The development of cross-county bulk water infrastructure by WWDAs may have some negative impacts to the environment. These include waste materials from the construction phase such as concrete, metal, wood, adhesives and sealants etc. Such solid wastes may be hazardous to the environment and would require mechanisms for their proper disposal. Emissions associated with the combustion of fuel by construction vehicles and equipment will also have an impact of the environment. Such emissions should comply with national and international standards. Site preparation activities during the construction phase may have a negative impact on soil.

There is potential for significant impacts on flora if developments are undertaken in and around forest areas, road reserves and in sections of private land undertaking crop cultivation. Measures should be undertaken to restore any vegetation loss. Construction activities may also have an effect on the surface and groundwater quality within the area from sediments, detergents and other chemicals leading to a degradation of river water quality that may affect downstream users and aquatic life. Other associated negative environmental impacts may include noise pollution, and occupational health hazards to those involved in the construction of infrastructure.

### 3.2.3 *Economic Impacts*

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#### ***Tourism, Construction and other related industries***

The proposed Water Services Regulations 2019 seek to have an impact in the improved provision of water and sewerage services which may have significant economic impacts. This may be felt in the tourism sector due to efficient water service provision to establishments and improved water quality standards.

The construction of bulk water supply infrastructure by WWDAs will provide for numerous employment opportunities across counties to semi-skilled, unskilled laborers and formal employees. Abundant unskilled laborers engaged in gainful employment will also help minimize social vices such as alcohol abuse etc.

Counties will also benefit from the injection of funds into the local economy as a result of construction activities. This will be in the form of salaries to skilled and unskilled laborers; purchases of construction materials from local suppliers; and payments for local provisions including fuel, foods and accommodations. In the long-term numerous sectors will benefit from improvements in the reliability and efficiency of water supply and sanitation services.

#### ***Tariffs and Tariff Adjustments***

The proposed Water Services Regulations will have an impact on ensuring sustainability in the water services sector. WASREB is mandated under the regulations to use tariff adjustments which are an important economic instrument in improving water use efficiency and securing the financial sustainability of WSPs. The tariff review process in the proposed Water Services Regulations 2019 focuses on balancing commercial and social interests in water service provision. The fixing of tariffs considers justified costs, in order to eliminate any costs that may result from inefficiency, and which should not be borne by consumers.

Tariff adjustments enable WSPs to attain cost coverage of operations and maintenance, while improving performance in specified indicators. Gradually, adjustments are made to cover full cost recovery in order to ensure long-term sustainability. Cost-reflective tariffs enable WSPs to maintain their operations and, at the same time, develop assets for water services provision.

### ***Clustering of WSPs***

The proposed Water Services Regulations 2019 operationalize the clustering process such that new entities can benefit from economies of scale. This ensures that non-performing entities need to either restructure or risk collapse. These regulations will improve service delivery and the long-term sustainability of WSPs.

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## 4. CONSULTATIONS

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The proposed draft Water Services Regulations 2019 have been subjected to a series of consultations processes wherein stakeholders have been allowed the opportunity to identify and correct faulty assumptions and reasoning and to provide information and suggestions that have enriched the drafting process. The following section provides a summary of the consultations that have been held and are supported with annexures of workshop reports.

### 4.1 CONSULTATIONS

#### *4.1.1 Stakeholder Exploratory Consultation held on 20th November 2018*

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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 the Water Services Regulations 2019.

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 **Annex 1**.

The meeting proposed the following as the key issues for inclusion in the proposed rules:

- Licensing of water sector engineers and other sector professionals;
- Rules 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
- Constitution of WSP Boards
- Establishment of Consumer Complaints Mechanism by WSPs;

- Provision of water to rural areas;
- Protection of Water Sources; and
- Control of trade effluent

The feedback received at the consultation forum provided insights as to the content expectations of the stakeholders; hence providing guidance on what should constitute the broad chapters/parts of the proposed Water Services Regulations 2019.

#### *4.1.2 Stakeholder Consultation Technical Requirements for Developing Draft Rules held on 31st January – 1st February 2019*

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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). The details of the second consultations were provided in Annex 2. The workshop participants proposed the following for inclusion in the draft rules: -

- Equitable services provision in Arid and semi-arid areas in particular with the conditions for licensing WSPs operating in these areas;
- framework for accreditation by MWS and the formation of a register of professionally run small-scale water service providers to be maintained by MWS.
- the application of international standards in the governance of WSPs;
- the charging of bulk water tariffs, water consumption tariffs, among others which should consider loan repayment requirements and national standards;
- the inclusion of a provision on rainwater harvesting.

#### *4.1.3 Further Planned Consultations*

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Further consultations on the proposed draft rules are planned to be held in March 2019 where the wider public and water sector stakeholders will be invited to provide their feedback including on this RIA. The feedback received from these consultations will inform further revision of the draft proposed rules.

## **5. CONCLUSION**

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The proposed Water Services Regulations 2019 will provide an operational procedure for the various institutions engaged in water supply and sewerage services delivery and in effect contribute towards the protection and realization of the constitutional rights to clean and safe water, consumer rights to quality goods and services (Articles 43 and 46 of the Constitution respectively). It is a policy objective for the MWS to promote and facilitate the protection and realization of the above-mentioned rights, hence it considers that a regulatory approach, as opposed to a non-regulatory approach, is best placed to achieve this policy objective. The streamlining of water supply and sewerage services delivery and the capacity-building efforts will in the long-run result in net positive environmental and socio-economic impacts for the Kenyan society as a whole.

## **6. APPENDICES**

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- 6.1 Stakeholder Exploratory Consultation Held On 20th November 2018 Workshop Report
- 6.2 Stakeholder Consultation Technical Requirements For Developing Draft Rules Held On 31st January – 1st February 2019 Workshop Report