

Regulatory Impact

Statement

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

PROPOSED WATER TRIBUNAL RULES, 2019

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## Regulatory Impact Statement

*February 2019*

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# **PROPOSED WATER TRIBUNAL RULES 2019**

## **Regulatory Impact Statement**

**Prepared by the Ministry of Water and Sanitation (MWS)**

**2019**

This Regulatory Impact Statement (RIS) on the proposed Water Tribunal Rules 2019 has been prepared in compliance with Part III of the Statutory Instruments Act (No. 23 of 2013).

The purpose of the RIS is to inform the Cabinet Secretary, Members of Parliament, and the Kenyan society of the potential impacts of adopting the proposed Water Tribunal Rules 2019. It provides an assessment and analysis of possible positive and negative effects of the regulatory proposals made on Kenyan society. The analysis is underpinned on information, suggestions and feedback received from public consultation processes that have been undertaken in the process of drafting these rules.

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## EXECUTIVE SUMMARY

This Regulatory Impact Statement (RIS) examines the impact of reforming water-related dispute resolution and administrative justice processes in Kenya. The proposed reforms seek to repeal and replace the current Water Appeal Board established by section 84 of the Water Act 2002 and its related Water Appeal Board Rules (*circa 2007*). The proposed Water Tribunal Rules 2019 are aimed at giving effect to the Water Act 2016 which established a Water Tribunal *vide* section 119 and tasked the same to make rules governing its procedures *vide* section 122. Therefore, the proposed Water Tribunal Rules 2019 are aimed at clarifying the procedure for the operations of the Water Tribunal.

Article 43 of the Constitution 2010 and section 63 of the Water Act 2016 recognize access to clean and safe water in adequate quantities and to reasonable standards of sanitation as a basic constitutional right; and Article 48 of the Constitution provides that the State shall ensure access to justice for all persons. This RIS examines the costs and benefits of establishing a Water Tribunal as a specialist judicial body through which the right to clean and safe water can be protected and realized. The regulatory changes introduced by the proposed Water Tribunal Rules 2019 include provisions for: -

- strict timelines for hearing and determining appeals;
- discouraging litigation and encourage the use of alternative dispute resolution mechanisms;
- the possibility of granting intervener status to persons/parties that seek to enforce the right to clean and safe water at hearings;
- flexible quorum requirements including for election from among members to act as chairperson in the absence of the substantive chairperson; and
- Clarification of the role of the Tribunal Secretary;

This RIS concludes that subsidiary legislation that provides an operational procedure for the Water Tribunal will lead to a less expensive and expeditious avenue for resolving water-related disputes, hence contributing to the decongestion of the court system and to the realization of the right to clean and safe water in Kenya.

The proposed regulations have undergone multiple rounds of consultation with water sector consultations and the general public and have garnered support.

## 1. INTRODUCTION

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The Water Act 2016 does not provide an operational procedure for the Water Tribunal but instead tasks the Tribunal, through section 122, to make rules governing its procedure. 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. Therefore, the proposed Water Tribunal Rules 2019 aim to provide the operational procedure for the Water Tribunal. The proposed rules, and in effect the Water Tribunal should contribute towards the protection and realization of the constitutional rights to clean and safe water, consumer rights to quality goods and services, and access to justice (Articles 43, 46 and 48 of the Constitution respectively).

Article 21 of the Constitution provides that it is a fundamental duty of the state and every state organ to promote and fulfil the rights and fundamental freedoms in the bill of rights. Consequently, it is a policy objective for the Ministry of Water and Sanitation (MWS) to promote and facilitate the protection and realization of the above-mentioned rights. The MWS considers that a regulatory approach, as opposed to a non-regulatory approach, is best placed to achieve this policy objective.

The proposed legislation is still in draft form. It will be subjected to further public and stakeholder consultations for comments and suggestions, which will lead to revisions to ensure that the regulations presented for Parliament's approval will provide the best administrative justice mechanism that promotes greater access to justice for water-related disputes, protects consumer rights to quality water services and safeguards the right to safe and clean water including sanitation services as enshrined in the Constitution.

## 2. OBJECTIVES OF THE PROPOSED WATER TRIBUNAL RULES 2019

### *2.1 Compliance with the Legal and Institutional Framework*

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Article 43 of the Constitution 2010 and section 63 of the Water Act 2016 recognize access to clean and safe water in adequate quantities and to reasonable standards of sanitation as a basic constitutional right. The Constitution further recognizes the right of consumers to goods and services of reasonable quality, which is interpreted to include water and sanitation services.

Pursuant to Article 21 of the Constitution it is a fundamental duty of the state and every state organ to promote and fulfil the rights and fundamental freedoms in the bill of rights. A Water Tribunal will be a specialist judicial body with a mandate of deciding water-related disputes will provide an important form of administrative justice and a mechanism through which the right to clean and safe water can be protected and realized. The simplified procedure proposed in the draft rules seeks to avoid legal technicalities and formality, which will foster greater access for majority citizens and is in line with Article 48 of the Constitution which provides that the State shall ensure access to justice for all persons. The Tribunal, having members with expertise and specialized knowledge on the subject matter and the possibility of granting intervener status to persons/parties that seek to enforce the right to clean and safe water for hearings, will be better placed to analyse facts pertinent to disputes and will provide cheaper and faster access to justice for water-related disputes.

Among other reasons, the Water Act 2016 was enacted to align the water sector to the Constitution of Kenya 2010 and to ensure that water sector institutions have mandates and operating procedures that enhance efficiency and effective response to challenges in the water sector. Therefore, the proposed Water Tribunal Rules 2019, address the requirements of section 122 of the Water Act which states that the Tribunal shall make rules governing its procedures and section 142 of the Water Act 2016 which 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.

The proposed rules are aimed at giving effect to the Water Act 2016 and are in compliance with the constitutional guarantees of access to justice for all, access to safe and clean water and of the protection of consumer rights for water and sanitation services.



## 2.2 Objectives of the proposed Regulations

The Water Act 2016 established a Water Tribunal in section 119 and in Section 155 provides for the transfer of functions from the Water Appeal Board to the Water Tribunal. The Water Appeal Board was established by section 84 of the Water Act 2002 with the jurisdiction to hear appeals from ‘...any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or licence ...’. Pursuant to section 88 of the Water Act 2002, the Water Appeal Board was tasked with making ‘...rules for or with respect to the lodgment, hearing and disposal of appeals...’ which led to the drafting of the Water Appeal Board Rules (2007). Pursuant to section 122 of the Water Act, the objective of the proposed Water Tribunal Rules 2019 is to provide the procedure governing the operations, and for the effective functioning, of the Water Tribunal. There exist some distinct differences between the provisions in the Water Act 2002 and 2016 respectively on appointment of officials, jurisdiction, possibility of appealing decisions, and on staffing, which are summarized in Table 1 below.

**Table 1: Overview of differences between the Water Appeal Board (2002) and the Water Tribunal (2016)**

Differences	Water Appeal Board Water Act 2002	Water Tribunal Water Act 2016
Appointment of chairperson and members	<ul style="list-style-type: none"> <li>- Chairperson appointed by President on the recommendation of the Chief Justice s.84(2) (a)</li> <li>- Two members appointed by the Minister s.84(2) (b)</li> </ul>	<ul style="list-style-type: none"> <li>- Chairperson appointed by the Judicial Service Commission s.119 (2)</li> <li>- Six members appointed by Judicial Service Commission</li> </ul>
Jurisdiction	<ul style="list-style-type: none"> <li>- Hear and determine appeals of any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or</li> </ul>	<ul style="list-style-type: none"> <li>- Hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the Authority of the</li> </ul>

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	licence under the Act s.85(1)	Cabinet Secretary, Authority and Regulatory Board s. 121(1) - Hear and determine any dispute concerning water resources or water services where there is a business contract unless the parties have otherwise agreed to an alternative dispute resolution mechanism s.121 (2)
Possibility of appeal	Decision of Water Appeal Board is final except on a matter of law, which can be appealed at the High Court s.87 (3-4)	Decision of Water Tribunal can be appealed within 21 days to the Environment and Land Court s.124
Staffing	- No provision -	Staff of the Tribunal appointed by the Judicial Service Commission

The Water Appeal Board Rules (2007), though providing a procedural basis for operations of the Water Appeal Board have never been gazetted in the Kenya Gazette. The proposed Water Tribunal Rules 2019, will provide a legislative basis for the functioning of the Water Tribunal and do introduce some regulatory changes such as: -

- strict timelines for determining appeals – Rule 39 (1) stipulates that the Water Tribunal should make its decision within a month of conclusion a hearing of an appeal.
- discouraging litigation and encourage the use of alternative dispute resolution mechanisms – Rule 4 requires parties to demonstrate genuine steps taken to resolve a dispute including the use of alternative dispute resolution mechanisms
- the possibility of granting intervener status to persons/parties that seek to enforce the right to clean and safe water at hearings – Rule 17 makes provision the Water Tribunal to grant intervener status to any person, organization, association or corporation who

seek to enforce the right to clean and safe water, who may make a statement in relation to the appeal.

- flexible quorum requirements with a larger membership of six (6) and the possibility of electing a member to act as chairperson in the absence of the substantive chairperson – Rule 28 (1) provides that quorum shall consist of at least the chairperson, or a person acting as chairperson and two (2) other members; Rule 41(2) makes provision for election of a member to the Tribunal to act as chairperson and discharge the functions of the chairperson; Rule 41 (3) makes provision for the chairperson to delegate the performance of any of his functions
- Clarification of the role of the Tribunal Secretary- Rule 43 provides for the role of Secretary to the Tribunal who shall perform the functions of a registrar.



### 3. IMPACT OF NEW REQUIREMENTS

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The main impact of the proposed Water Tribunal Rules 2019 is to provide a simplified and predictable procedure for the functioning of the Water Tribunal. Rule 28 (3) of the Water Tribunal Rules provides that the Tribunal shall seek to avoid legal technicality and formality in its proceedings. By adopting a simplified procedure, the proposed rules will facilitate cheaper and greater access to justice and expeditious decision making for water-related disputes, which is in line with Article 48 of the Constitution which provides that the State shall ensure access to justice for all persons. A positive by-product of an efficient and effective Water Tribunal will be that the normal court system will not have to deal with water-related disputes, and hence it will be a contribution towards decongesting the court system.

The MWS will review and consider comments from stakeholders and the wider public on the proposed Water Tribunal Rules 2019 in terms of the net costs and benefits to society including to the justice system. Conducting a cost-benefit analysis is critical in understanding the potential impacts on the public as water service users; water service providers and the business community; government water regulatory agencies; and the judicial system. The following 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 Tribunal Rules 2019. This includes a characterization of the potential benefits and a qualitative assessment of benefits (monetized where possible). This section will identify the costs associated with the implementation of the proposed Regulations.

##### 3.1.1 *Benefits analysis*

The following have been identified as potential benefits and costs of adopting Water Tribunal Rules 2019 are highlighted in Table 3.1 below.

**Table 2: Characterization of Potential Benefits and Costs**

Benefits	
Facilitating greater access	- Protection of fundamental right to clean and safe water - Protection of consumer right to goods and services of reasonable quality

to justice for all	
Use of expert members with specialized knowledge	<ul style="list-style-type: none"> <li>- Expeditious decision-making</li> <li>- Decongestion of normal court system</li> </ul>
Application of simplified non-technical procedures	<ul style="list-style-type: none"> <li>- Greater access of justice to the public</li> <li>- Faster and cheaper dispute resolution</li> </ul>
<b>Costs</b>	
Administration of Tribunal	<ul style="list-style-type: none"> <li>- Administration costs of Tribunal secretariat</li> <li>- Costs implications of a 6-member Tribunal (sitting allowances and travel costs when necessary)</li> </ul>

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

### *3.1.2 Costs analysis*

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The fact that the Water Tribunal will have a localized location, possibly Nairobi, will mean that those travelling from Nairobi will spend time travelling to the Tribunal and incur traveling and related costs. This is likely to have a net effect of limiting access to justice for people living outside Nairobi who are not able to raise the requisite funds to travel to the Tribunal.

Another costs is related to the administration of the secretariat to the Tribunal which will be responsible for carrying out the functions of a registrar and those related to facilitating the Tribunal's work. There will also be rising cost implications for sitting allowances and travel costs when necessary, for a 6-member Tribunal which is an increase from the former 2-member Water Appeal Board.

## **3.2 SOCIAL AND ECONOMIC IMPACTS**

### *3.2.1 Social Impacts*

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The Water Tribunal will provide a mechanism for faster and cheaper means of resolving water-related disputes which will have the net effect of providing a means to greater access to justice. The lower fees, as compared to the court system, prescribed for filing an appeal will ensure that justice is accessible even to those who cannot otherwise afford filing fees and other costs within

the court system. Additionally, the fact that the Tribunal’s procedure is simplified and less technical means that a good number of members of the public will be able to follow proceedings easily without feeling alienated from proceedings. The Water Tribunal will therefore have a net positive social impact by creating an equitable society where justice is accessible to a vast majority of the society. The possibility of bringing appeals that touch on water resource use will have the net effect of encouraging sustainable exploitation of water resources which will then have a positive social impact of preserving Kenyan natural resources. The fact that such matters can be heard and determined by the Water Tribunal will also mean that the Environment and Land Court (ELC) which currently struggles with a huge backlog of cases will not have hear matters that can otherwise be determined by the Water Tribunal.

### *3.2.2 Economic Impacts*

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The proposed Water Tribunal Rules 2019, will encourage an expeditious and cheaper dispute resolution mechanism which will save parties time and money spent on litigation in the court system. The fact that the Rules encourage parties to consider alternative dispute resolutions before making launching an appeal at the Tribunal saves the public purse the money that would otherwise be spent on facilitating a sitting by the Tribunal and ultimately the court system.

## 4. PUBLIC CONSULTATIONS

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The proposed draft Water Tribunal Rules 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 20<sup>th</sup> November 2018*

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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 first drafts of the four sets of subsidiary legislation. 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 regulations. 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:

- A definition of key terms;
- Clarify the list of documents required to initiate an appeal;
- Outline of the procedure for filing an appeal, how, where, time limit etc
- Clarify the membership of the tribunal;
- Make provision for an acting chairperson;
- Clarify timelines for determining an appeal to avoid matters dragging on;
- Provide procedures for replying to claims; withdrawal of appeals and the decision making process

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 Water Tribunal Rules 2019.

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

A second consultation which focused on the technical requirements for developing the draft rules was held in Nairobi on 31<sup>st</sup> January – 1<sup>st</sup> February 2019. The aim of the consultation was to present a draft of the proposed Water Tribunal Rules 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: -

- There should be a provision on deputation of a member to function as a deputy chairperson exercising powers of the chairperson to satisfy quorum requirements.
- There should be an increased number of members to the Tribunal (from 3 to 6).
- There should be a provision which encourages the use of ADR before matters are brought to the Water Tribunal.
- Applications for extension of time should be limited expressly in the rules.
- The rules should impose costs for sittings and adjournments.
- Rule 6 (2) should specify that service of appeal and reply to appeal together with any other documents shall be effected in seven days.
- The Rules should provide a time limit within which appeals to the Water Tribunal must be heard and determined.

Issues raised at this stakeholder consultation were factored in revising the regulations, which are presented as the current draft Water Tribunal Rules 2019.

#### *4.1.3 Further Planned Consultations*

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 Tribunal Rules 2019 will provide an operational procedure for the Water Tribunal 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, and access to justice (Articles 43, 46 and 48 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 simplified procedure proposed in the draft rules seeks to avoid legal technicalities and formality will foster greater access to justice for majority citizens and is in line with Article 48 of the Constitution resulting in net positive social and economic impacts for the Kenyan society.

## **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