

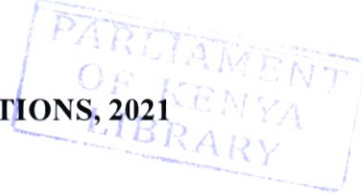
SCHEDULE

[Section 8]

EXPLANATORY MEMORANDUM

TO

THE IRRIGATION (GENERAL) REGULATIONS, 2021



PART I

Name of the Statutory Instrument:	Irrigation (General) Regulations, 2021
Name of the Parent Act:	Irrigation Act, No. 4 of 2019
Enacted Pursuant to:	Section 34(1) of Irrigation Act (No. 4 of 2019)
Name of the Ministry:	Ministry of Water, Sanitation and Irrigation
Gazetted on:	1 st October, 2021
Tabled on:	

PART II

1. Purpose of the Statutory Instrument

The primary objective of the regulation is to facilitate better carrying out of the purposes and provisions of the Irrigation Act, 2019, which was enacted in August 2019. The Irrigation Act was enacted to promote and regulate the development and management of irrigation in Kenya.

The purpose of the Regulation was to ensure: -

- i. Sustainable development, management, financing, provision of support services and effective regulation of the entire irrigation sector in Kenya; and
- ii. Compliance to the Constitution and laws of Kenya, international laws and treaties, agreements and other ratified instruments

2. Legislative Context

The Constitution of Kenya 2010 did not expressly classify irrigation as a devolved function under the 4th Schedule. This position was clarified by the Irrigation Act, 2019 which divides the function of irrigation between the National Government and the County Government as a shared

function. This is with aim to ensure development, management and regulation of irrigation, to support sustainable food security and socio economic development in Kenya.

The Constitution, 2010 provides for the management and control of the natural resource base including water used for irrigation. Chapter Five of the Constitution on Land and Environment covers issues of land use and water resources. The Fourth Schedule, Part 1 Clause 2 on the management of international waters and water resources is key to the development of irrigation and other water uses. Clause 22 of the Fourth Schedule deals with the protection of the environment and natural resources necessary for establishment of durable and sustainable development. Subsection (c) thereof defines the national Government role as ‘*water protection, securing sufficient residual water, hydraulic engineering and safety of dams*’ (MWI, 2016).

Responsibilities for the irrigation sector in Kenya are shared among (i) Ministry of Agriculture, Livestock, Fisheries and Cooperatives, responsible for production activities under irrigation, (ii) the Ministry of Water, Sanitation and Irrigation in charge of development and managing the irrigation schemes and water delivering services, and (iii) East African Community and Regional Development under the State department for Regional Development and which have been responsible for construction and management for the majority of multi-purpose dams in the country. This configuration has been in place since 2005 following reforms in the Water Act (2002 and 2016).

The Irrigation Act, 2019 has expanded mandate of the Cabinet Secretary responsible for irrigation in consultation with County Governments to necessitate the need for the effective regulatory framework to regulate the irrigation sector and particular areas for licensing, harmonization of registration and charging of fees among others in the irrigation sector.

3. Policy Background

In the past, irrigation development strategies and approaches were articulated in a number of government policy papers including: the Sessional Paper No.4 of 1981 on National Food Policy; Sessional Paper No. 1 on Economic Management for Renewed Growth; Sessional Paper No.2 of 1994 on National Food Policy; the Economic Recovery Strategy (2003 - 2007); the Strategy for Revitalizing Agriculture (2004-2014); the Agriculture Sector Development Strategy (ASDS 2010-2020) and the Kenya Vision 2030 and more recently in the Agriculture Sector Growth and Transformation Strategy (2018-2030). All these policies and strategies have not comprehensively

explored ways and means on how the irrigation potential could be better harnessed since they aimed at providing employment and settlement of the landless basically through development of national irrigation schemes, as well as broadly dealing with aspects of irrigation (MoWI,2016).

The National Water Master Plan 2030 (NWMP 2030), Kenya's water resources development and management blue print provides estimates of the country's water resources and its planning for the period 2010–2030. The NWMP 2030 was formulated based on NWP 1999 and Water Act 2002 and adopts the Dublin principles whose thrust is that water should be managed on a catchment basis and treated as an economic good in order to attain sustainability in water resources management and development (WRMA, 2013).

Reforms in the Water Act of 2002 (CAP 372), which was repealed by the Water Act of 2016, separated 'water resources management and development' from 'water delivery services' through the creation and institutionalization of parastatals. With the devolution initiated in 2013, the water services mandate has been divided between national and county governments. Water remains a national resource and the service delivery is now a county responsibility; whenever water crosses county boundaries, the national-level institutions are called upon to intervene to regulate water service provision (Boulanger, *et al.*, 2018).

The Constitution of Kenya 2010 however does not directly or explicitly refer to irrigation as a devolved function. However, the irrigation function is residual in nature and its vesting at the national level under Article 186(3) of the Constitution. The Irrigation Act, 2019 comprehensively shares the functions of irrigation to both the national and county government.

The Fourth Schedule of the Constitution has assigned specified functions on agriculture to the national government and the county governments and it stipulates that the two levels of government shall conduct their mutual relations on the basis of consultation and cooperation (Article 6, Article 189 (1) (b) (c)). The provisions related to irrigation at the national government include: the use of international waters and water resources; national public works; protection of the environment and natural resources (water protection, securing sufficient residual water, hydraulic engineering and the safety of dams; and agricultural policy and capacity building and technical assistance to the counties and public investment). The Executive Order No 1/2016 of May 2016 established the Ministry of Water and Irrigation and a State Department of Irrigation (SDI) (National Irrigation policy, 2017).

The Kenya National Water Master Plan 2030 included aspects of Kenya Vision 2030, aims to present a framework for water resources development and management consistent with the country's social and economic development activities. One of the objectives of the plan is to increase the area under irrigation to 1.2 million hectares (from around 160,000 in 2013). The main purpose of Water Act 2016 is to adapt national water management to the decentralized structure in place since the approval of the Constitution of Kenya 2010 (Boulanger, *et al.*, 2018).

The Irrigation Act Cap 347 of 1966 Revised 2012 [1986] (now repealed) established the NIB with a mandate to identify, design, develop, administer and manage public irrigation schemes. The public schemes are Mwea, Hola, Perkerra, Bura, West Kano, Ahero and Bunyala, and more recently the Galana Kulalu irrigation scheme. Over time the NIB activities have expanded to include development of smallholder irrigation schemes.

This Act did not take into account community-based smallholder and private irrigation schemes. Moreover, there are other public irrigation schemes managed by Regional Development Authorities (RDAs) which are statutory Boards and parastatals. These include TARDA Act Cap 443, CDA Act Cap 449, ENNDA Act Cap 448, KVDA Act Cap 441, LBDA Act, and ENSDA Act etc. There are also other institutions and semi-autonomous agencies involved in irrigation development and management and other state agencies responsible for infrastructure development, environmental conservation and management, public health, research and training institutions including universities which are not covered under the Act.

The Irrigation Act No. 14 of 2019 addresses gaps in the old law while cognizant of the new governance structure created by the Constitution and provides for the development, management and regulation of irrigation, to support sustainable food security and socioeconomic development in Kenya, and for connected purposes.

The institutions that regulate the irrigation sector include: the Ministry of Water, Sanitation and Irrigation, Water Resources Authority (WRA) and the National Environmental Management Authority (NEMA) and other related institutions.

4.0 Challenges being addressed

The irrigation sector has faced many challenges including operating without an established and specific Irrigation Policy now which has recently been developed, low rate of irrigation infrastructure development, inadequate funding for development and investment by public and private sector, poorly developed marketing channels and lack of diversification of irrigated commodity value chains. Further, the legal and regulatory frameworks have not been reviewed to reflect the emerging operational and socio-economic realities.

A well organized, coordinated and regulated irrigation sector in the country will facilitate accelerated development. This will enable and encourage accelerated irrigation infrastructural development, increased productivity per unit volume of water, increased water harvesting and storage, improved scheme management, enhanced stakeholder participation and improved business opportunities in the sector.

In order to attain the envisaged economic growth and sustained food production, the country needs to reduce reliance on rain-fed agriculture and increase irrigation-based systems that allow production throughout the year and increased agricultural productivity.

Irrigation accounts for 1.7 percent of total land area under agriculture, contributes 3% to the GDP and provides 18% of the value of all agricultural produce, demonstrating the potential of irrigation in increasing agricultural production and productivity. With irrigation, agricultural production can be increased by up to 400%, and jobs created at the rate of up to 15 persons per hectare directly and indirectly. A robust irrigation sector will guarantee raw materials for agro-industries, create employment opportunities especially for youth and women, improve security and stem the tide of rural urban migration in search of employment opportunities (MoWI, 2017).

Kenya has not fully developed her irrigation potential estimated at 1.342 million Ha. The irrigation potential is based on surface and underground water including water harvesting and storage. By the end of 2015, approximately 180,503 Ha of irrigation had been developed. This is about 13.5% of the potential leaving more than 80% of Kenya's irrigation potential untapped.

The irrigation development plan in the National Water Master Plan 2030 (NWMP 2030) was formulated assuming that water saving irrigation is introduced to maximize the new irrigation development area. If the water saving irrigation is not introduced, the possible new irrigation

development area in 2030 will decrease from 623,700 ha to 530,800 ha (decrease of about 15%) because the overall irrigation efficiency is lowered. The irrigation development plan is expected to actively introduce the water saving irrigation to be close to the target of the Kenya Vision 2030 to the maximum (MENR, WRMA, 2013).

5. Consultation outcome

The Ministry undertook mapping of various stakeholders from different levels as is the spirit of the Statutory Instruments Act, 2013. The Ministry organized four workshops to provide an opportunity for the public to participate in the process. The workshops were distributed throughout the country in which the Ministry chose a central region for the participants. The workshops took place in KALRO Dairy Research Institute Naivasha for counties in Central and Rift Valley Regions, Tom Mboya Labour College Kisumu for Counties in Western, Nyanza and neighbouring Rift Valley Counties, Embu Agricultural Training College in Embu for counties in Eastern and North Eastern regions and Bandari Maritime Academy Mombasa for the counties in coastal region and other neighbouring regions.

The workshops were attended by representatives from all the forty seven counties, two farmers from each county and two other farmers from each National irrigation Scheme, representative from the Council of Governors, Representatives from educational institutions and representatives from Water Resource Authority among other professionals. The Ministry also made a presentation to the Joint Agricultural Sector Consultation and Cooperation Mechanism Working Group on Policies, Standards and Regulations and received useful comments on the draft regulations.

The National Validation Workshop held at the Kenya School of Monetary Studies (KSMS) in Nairobi on 23rd January, 2020 was attended by a large representation of the stakeholders likely to be affected by regulations, CECMs from various counties who are likely to be affected by the regulation and most importantly farmers from different schemes across the country.

The Ministry presented the draft regulations to the attendees explaining each and every clause as well as engaging the participants on their possible views on the regulations. The Ministry explained the importance of the regulations in realigning the irrigation industry and reforming the agricultural sector.

The records from the public forums show extensive deliberations on myriad of issues that arose from the proposed regulations. The participants were further given opportunity to read and analyze to the regulations and share their views through email to the Ministry. It was also apparent that the Ministry collated, reviewed and incorporated into the proposed regulations the issues raised and comments received from the workshops.

The public consultations outcomes were as follows:

NO.	PROPOSALS	OPINION BY (STAKEHOLDERS)	RESPONSE BY MINISTRY	ACTION TAKEN
1.	Proper definition of various terms under the regulations including; irrigation services, good agricultural practices, smallholder and small scale, federation, designated area and designated scheme, among others	To define terms including; irrigation services, good agricultural practices, small holder and small scale, federation, designated area and designated scheme, in the Regulations	The Ministry will provide definitions to the terms used in the Regulations	Amendment of regulation 2 to include proper definition of terms under the Regulations
2.	Delineation of the minimum acreage forming an irrigation area	To define the specific minimum acreage that is deemed by the regulations to for a service area/irrigation area	The Ministry will look at this provision in consultation of various stakeholders in the industry and thereafter will be able to define the acreage for the service area. Members of the public may also submit their proposal to the	Definition of minimum acreage in the service area under regulation 2 was provided.

			Ministry for consideration.	
3.	Conflicting roles of the agencies under the Regulations.	To harmonize the roles of National Irrigation Authority, the National government and the County government with the provisions of the Irrigation Act, 2019	This is admitted as necessary and the Ministry will harmonize the provisions of the regulations with the parent Act.	The regulations should be amended taking into account the conflicting roles of the National Irrigation Authority, the National Government, the County Government and other agencies under the Regulations
4.	Registration of professionals in the irrigation industry.	To harmonize the registration of professionals in the irrigation industry with the existing regimes in Kenya.	It was clarified that the Ministry seeks to create a database of all the professionals in the industry	Amendment of part V and the Fifth Schedule of the regulations to create an integrated information system for professionals in the sector in line with the existing regime.
5.	Capacity building and awareness creation among farmers	To create awareness amongst farmers on the importance of irrigation	The Ministry agreed to conduct awareness of the regulations.	To be provided for in the regulations
6.	The regulation lack provisions on climate change resilience, integration of ecosystem and economic sustainability.	To ensure that the environmental standards are met within the existing legislations	The Ministry Agreed to take into account the recommendation	Amendment of regulation 5 to take into account climate resilience, integration of the ecosystem and economic sustainability.
7.	Gender sensitivity	To be in line with the two third gender rule requirement in the Constitution	To be included	Amended in regulation 5

6. Guidance

There is need to conduct stakeholder sensitization for the various players in the irrigation industry. This should be done both at the National and County Government Levels of government. Further consultations will also be held at the County level of Government to provide insights on the implementation of the Regulations.

The stakeholder engagement and sensitization was adequately done by the Ministry and all the stakeholders both at the national, private sector and the county governments were involved and consulted.

7.0 Impact

7.1 Impact on Fundamental Rights and Freedoms

It is envisioned that the regulation shall have a positive impact on the on the fundamental rights and freedoms through promotion of economic and social rights of the citizenry as contemplated under Article 43 of the Constitution and ensuring accessibility of employment opportunity and other opportunities for social and economic advancement.

The regulation shall also enhance the right to access information to industry players as provided in article 35 of the Constitution.

The regulation also creates alternative dispute resolution mechanisms which will enhance the right to fair administrative action as provided in article 47 of the Constitution that require administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair.

7.2 Impact on the Public Sector

The Regulations shall have a positive impact by enhancing coherence and streamlining of the management and supportive strategies towards the improvement of the irrigation industry.

7.3 Impact on the Private Sector

It is expected that all the key players including farmers, financial institutions, academic and research institutions, stakeholders and irrigation service providers will stand to benefit from a better regulated irrigation sector and conducive operating environment for their different businesses and will protected from often negative interferences from Governments and

Government agencies; and other political interferences. This will improve productivity in the agricultural sector.

8. Monitoring and Review

The Ministry working together with the National Irrigation Authority and the National Government and the County Governments will thus work hand in hand to promote research, reviewing, monitoring and evaluating the effectiveness of the draft regulation towards promoting the growth and development of the irrigation sector. The review, monitoring and evaluation will be a subject of great interest to all parties particularly because of its potential to make it easier for the Ministry to regulate the irrigation sector. It is projected that the aim will be to cause a reduction in incidences of non-compliances with the Act thus ensuring food security for Kenya.

9. Contact

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