



## Decision Document #1

# Recommended Changes in the Regulatory Framework

June 2005

## Implementation of a Regulatory Framework for the Water and Sanitation Sector in Kenya

GTZ/MWRMD Water Sector Reform Program  
Reference No.: 810 746 12  
Project No.: 04.2027.3-001.00  
KENYA



# **Implementation of a Regulatory Framework for the Water and Sanitation Sector in Kenya**

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**Water Sector Reform Program  
Supported by GTZ**





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## Executive Summary

An important objective of the Government of Kenya (GoK) is to increase the percentage of the population having access to clean water and hygienic sanitation. This objective was formulated in GoK's policy for the water sector in 1999 and enshrined in the Water Act ("the Act") promulgated by the Parliament in 2002.

Key aspects of the reforms introduced by the Act include reduction of the direct involvement of the executive arm of the government in routine administration of the sector, establishing an agency with specific responsibility for managing and protecting water resources, giving precedence to the use of water for domestic purposes, providing opportunities for non-governmental agencies operating on commercial principles to undertake provision of water services and creating a Water Sector Regulatory Board (WSRB) to regulate the provision of these services in accordance with GoK policies.

Under the new sector structure, responsibility for the provision of water and sewerage services is entrusted to seven Water Service Boards (WSBs), each authorized to provide the services in a specific geographic region of the country. The WSBs are appointed by the Minister of Water and the statutory authority to provide the services is conveyed to each WSB in a licence issued by the WSRB. A WSB, in turn, may enter into contractual agreements with one or more agents to discharge the provisions of its licence. These agents are known as Water Service Providers (WSPs) and the agreement between the WSBs and WSPs is known as a Service Provision Agreement (SPA). Each WSP will be restricted to performing the services in a designated area within the WSBs scope of supply. The SPA must be approved by the WSRB before becoming effective.

In addition to issuing the licences to WSBs, the prescribed functions of the WSRB include determining standards for the provision of water services to consumers, monitoring service provision and ensuring that WSBs comply with licence conditions, developing guidelines for fixing tariffs for the provision of water services, monitoring the operation of the SPAs and taking action to improve their effectiveness, advising licensees on procedures for dealing with consumer complaints and establishing procedures for handling complaints made by consumers against WSBs.

GTZ is assisting GoK in the implementation of the new legal framework of the sector. GTZ engaged Castalia to help develop the tools and processes important for successful implementation of the regulatory framework prescribed in the Act. Castalia's assignment involves identifying impediments in the proposed regulatory framework, defining effective and transparent regulatory processes and developing a simple but effective regulatory model. This Decision Document reviews the regulatory responsibilities and functions assigned in the Act with the objective of identifying potential obstacles and proposing strategies to enhance the effectiveness of the regulatory regime.

There are several features of the legal and institutional structure established by the Act that create concerns for the implementation of the regulatory framework. These include:

### **Licencing requirement**

Under the Act WSBs must apply to the WSRB for a licence to provide water services, but only WSBs appointed by the Minister are qualified to apply for licences. As the Minister will appoint only one WSB for each region, the application process will not be competitive, and the entity selected for the licence will not necessarily be the one best qualified to provide the services. Further, the Act empowers the Minister to issue directions to the WSRB concerning the performance of its functions. Therefore, it is unlikely that the WSRB will reject the application for a licence made by a WSB appointed by the Minister. This makes the licensing exercise more pro forma in nature than a viable regulatory instrument.

### **Role of the WSBs**

In the provision of water and sewerage services WSBs have both operational functions and a regulatory role. The regulatory responsibilities assigned to WSBs by the Act include determining the tariffs to be applied for providing water services, monitoring and enforcing regulations made under the Act and protecting water resources from degradation. Whereas the WSBs may determine tariffs, the WSRB is authorized only to develop tariff guidelines. Allowing an operator to exercise regulatory functions as well is not consistent with good regulatory practices as it creates potentials for conflict of interest. For example, by determining higher tariffs, the WSB may provide itself with advantages. It also creates confusion between the roles of the WSRB and the WSB with regard to regulation.

### **Regulation of SPAs**

Although the WSBs may delegate their powers and authorities to WSPs, the WSRB issues the license to WSBs and therefore it is the WSBs which will be held accountable for quality of service and compliance with the other licence conditions. Under this arrangement, the WSRB should not normally interface with WSPs. However, there are some areas in which the prescriptions of the Act are unclear or ambiguous. The SPA requires the approval of the WSRB in order to become effective, but the Act is silent as to the grounds on which the WSRB may withhold approval of the agreement. The Act also empowers WSBs to make certain regulations which will have the force of secondary legislation and would apply to WSPs, but will again require WSRB approval before entering into force. However, the Act allows such regulations to be subsequently relaxed or dispensed with if the WSB considers their operation to be unreasonable, but the prior approval of the WSRB is not specified in such instances.

### **Status of the WSRB**

As a result of the Minister's authority to issue directions to the WSRB, the Board is not an independent regulatory agency in the internationally accepted sense of the term. Its role is more that of an advisor to the Minister. This reality will reduce the effectiveness of regulation of the sector as originally envisaged in the GoK's statement of policy, and may have the effect of being a disincentive to investment by private enterprise in the sector.

These and other provisions of the Act raise concerns that the regulatory framework as prescribed in the Act may prevent the objectives of GoK's water sector policies from being as expeditiously and effectively realized as was intended. The document makes certain suggestions on actions that would reduce or remove some of the impediments identified. It also proposes specific amendments to the Act in order to address the ambiguities or uncertainties created by its current formulation.

Although the document focuses on the regulatory framework as envisaged in the Act, in its review of the processes underway for establishing the WSRB and realizing the sector reforms generally, Castalia found other reasons for concern that the process may not develop as expected. Implementation of the reform process is not being effectively managed and schedules developed for accomplishment of certain milestones are not being adhered to. Unless tighter control is exercised over the implementation of the critical activities as scheduled, completion of the initial phase of the reform process will be significantly delayed. It is of particular importance that the organizational structure of the WSRB be decided on and that competent staff be recruited as a matter of urgency.

# **1 Introduction**

## **1.1 Background**

Providing safe water and hygienic sanitation to an increasing percentage of the population is an important objective of the Government of Kenya (GoK). In 1999, a new policy was developed for the water sector and adopted by the Government to introduce key reforms in the sector and put into place a strategy for improving sector performance. To implement the policy, new sector legislation was drafted and passed by the Parliament as the Water Act 2002, hereinafter referred to as “the Act”.

The new Act introduced drastic and innovative reforms to the legal and institutional framework for the administration of the water sector. These reforms separated management of water resources from the provision of water services; decentralized the service provision functions, separating policy making from day-to-day administration; created opportunities for non-governmental agencies to become formally involved in the provision of water services; and, importantly, established a regulatory agency, the Water Sector Regulatory Board (WSRB) whose key functions are to licence Water Supply Boards (WSBs) and regulate their activities to ensure compliance with governmental policies. Box 1.1 sets out the new institutions created under the Act and their respective functions.

## **1.2 Project Objectives**

Under the Water Sector Reform Program, GTZ is assisting the GoK in the implementation of its new policy and legal frameworks for the water sector. GTZ has engaged Castalia to assist in the development of regulatory tools, processes and capacity for the successful implementation of the regulatory framework as set out in the provisions of the new Water Act. The assignment is expected to contribute to capacity building of key stakeholders in water sector regulation and includes:

- Identification of the shortcomings of the existing regulatory framework
- Establishment of effective and transparent regulatory processes, and
- Development of an effective, simple and practical regulatory model.

## **1.3 Objectives and Structure of this Decision Document**

The objective of this Decision Document (Decision Document #1)<sup>1</sup> is to review the regulatory framework and regulatory practices with a view to identifying potential impediments to effective regulation and making recommendations on ways to strengthen the regulatory framework and institutional arrangements for the regulation of water services. This evaluation is based on a review of key legislation and policy documents and discussions with a number of sector stakeholders.

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<sup>1</sup> This Decision Document is the output of Task 1 – Review of Regulations and Regulatory Practices.

**Box 1.1: Institutions Provided for in the Water Act**

- **Water Resources Management Authority (WRMA)** – Regulating protection of water sources, allocation of abstraction rates (with conservation as a prime objective), and water quality management
- **Water Services Regulatory Board (WSRB)** – Regulating the provision of water and sewerage services, including issuance of licences; setting guidelines for determining tariffs; and providing mechanisms for resolution of consumer and inter-agency complaints
- **Water Service Boards (WSBs)** – Operating under licences assigned by the WSRB, the WSBs have responsibility for efficient and economical provision of water and sewerage services, each within the area of jurisdiction assigned to it under its licence. Water Service Boards would not normally directly provide water and sewerage services
- **Water Service Providers (WSPs)** – The agencies that perform the functions of providing the water and sewerage services defined by the licences issued by the WSRB to each WSB. These services will be provided under a formal agreement, to be known as the Service Provision Agreement (or SPA) between the WSB and the WSP
- **Water Services Trust Fund (WST)** – To assist in financing provision of water services to areas without adequate water services
- **Water Appeal Board (WAB)** – Responsible for hearing and determining disputes between parties with a right or proprietary interest directly affected by a decision or order of the Minister, the WRMA or the WSRB. The decision of the WAB will be final, with the exception that an appeal on a matter of law may be made to the High Court
- **The National Water Conservation and Pipeline Corporation (NWCPC)** – Responsible for developing and managing state-owned assets for bulk water supply systems, and, under specific circumstances on the Minister's instructions may also provide water services to consumers (the NWCPC is not a new organization but as envisioned in the Act, its responsibilities will change to focus primarily on bulk water supply).

This Decision Document is structured as follows:

- Section 2 reviews the regulatory responsibilities as set out in the Water Act 2002
- Section 3 reviews the key regulatory functions, focusing on how they are addressed in the Water Act, identifying potential impediments and recommending strategies for strengthening the regulatory functions
- Section 4 reviews regulatory practices and decision-making processes and provides some observations and recommendations on existing practices, and
- Section 5 provides a summary of the recommendations for strengthening the regulatory framework and provides an indicative action plan for discussion with the WSRB and other stakeholders.

As we will discuss in this Decision Document, there are a number of problems with the institutional roles and regulatory requirements set out in the Water Act. We take the view however that changes in the Act itself, other than correction of typographical errors, are not possible in the short to medium term until the reform process is further advanced and solidified. Therefore, our recommendations are focused primarily on strategies for clarifying responsibilities through the existing regulatory arrangements and developing implementing rules and regulations and guidelines that further develop the regulatory framework. In specific cases, we also identify where important changes may be required in the Act if the regulatory responsibilities and processes cannot reasonably be developed and clarified through sector rules and regulations.

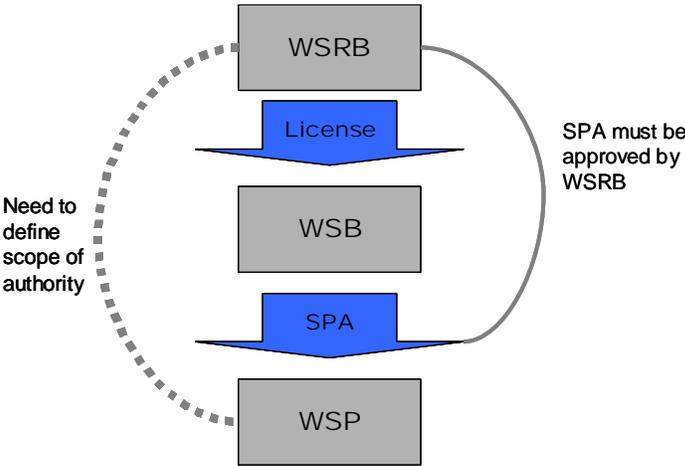
# 2 Analysis of Regulatory Responsibilities

## 2.1 Institutional Structure

The Water Act sets out a new sector structure that is based on the creation of regional Water Services Boards (WSBs) responsible for the “efficient and economical” provision of services, and the creation of the Water Services Regulatory Board (WSRB) responsible for regulating the water sector. The primary regulatory instrument envisioned under the Act is the licence. The WSBs, which are appointed by the Minister, must be licenced by the WSRB and comply with the conditions set out in the licence.

Under the Act, the WSBs may enter into arrangements with “agents” called Water Services Providers (WSPs),<sup>2</sup> which will collectively enable the WSB to fulfill its service obligations. These arrangements are referred to as Service Provision Agreements (SPAs), which are essentially contracts between the parties. WSBs enter into SPAs with the WSPs on the basis of their licence, and through the SPA are allowed to delegate any or all of their powers and duties. Figure 2.1 presents the sector structure and the legal instruments that govern the relationships between the parties.

**Figure 2.1: Institutional Structure and Legal Instruments**



<sup>2</sup> The Act is unclear on whether the WSBs “may” enter into agreements with WSPs or whether they are required to enter into these arrangements. Section 55 (1) states that “a water service board may, in accordance with this section, arrange for the exercise and performance of all or any of its powers and functions under the licence by one or more agents, to be known as water service providers.” (underline added for emphasis). However, Section 53(2) states that “Water services authorized by a licence shall be provided by an agent of the board in accordance with section 55, except in circumstances where the Regulatory Board is satisfied that the procurement of such an agent is not possible or that the provision of such services by an agent is not practicable.” (underline added for emphasis). There is a conflict between the words “may” (Section 55(1) and “shall” (Section 53(2), creating confusion over the requirement imposed on the WSB and the role of the WSB.

The Act envisions that a WSB will enter into SPAs with one or more WSPs within its service area. Given the number of water systems, it is likely that there may be hundreds of WSPs within any given service area. As the process of developing WSPs is still being developed, it is not yet known how many there will be, and the final number will largely depend on whether it will be possible to “cluster” water systems. Even with an effective clustering strategy, it is likely that there will be several urban WSPs and possibly hundreds of rural WSPs within each WSB service area.

A critical factor in developing the regulatory framework is clarifying and understanding the respective roles of the WSRB and the WSBs with respect to regulation. We discuss the specific functional roles and responsibilities in subsequent sections, but it is important to consider a number of factors that influence the respective roles.

Under the licence, the WSB has the responsibility for the provision of services, and as provided under the Act, the WSB will delegate the responsibility for providing services to customers to the WSPs through the SPAs. Therefore, the WSB is responsible for monitoring the WSPs to ensure that they fulfill their obligations under the SPAs. The WSB is also responsible for ensuring that collectively the service provided by the WSPs enables it to fulfill its obligations to the WSRB under its licence.

It is important then to define the role of the WSRB with respect to the WSPs. This role should be limited to:

- Approving the SPAs as provided in section 55(1)
- Monitoring the “effectiveness of the arrangements” as provided in section 47(j)

The latter is quite distinct from directly monitoring the implementation of the SPAs, which as stated above should be the responsibility of the WSB. The role of the WSRB is to verify that the arrangements are functioning as expected, and to intervene only when there is a clear issue or concern that must be addressed. This approach is also supported by practical considerations. It is likely that there will be thousands of WSPs and it would be impossible for the WSRB to directly regulate all of them. Therefore, the WSRB is dependent upon the WSBs to effectively monitor the performance of the WSPs.

## **2.2 Overview of the Key Regulatory Roles**

Regulation of the provision of water services under the Act is exercised at a number of levels. The role players are the Minister, the WSRB and the WSBs. An express objective of the Act was to separate the policy and regulatory functions. However, the WSRB, in the exercise and performance of its powers and functions, is subject to such directions as may be given from time to time by the Minister, effectively making the Minister the key decision maker in regulatory oversight of the sector.

The Act ascribes to the WSRB the following powers and functions:

- Issue licences, monitor, regulate and enforce licence conditions
- Develop guidelines on regulations to be adopted by licensees in providing water services
- Develop tariff guidelines
- Develop model service agreements (SPAs) between WSBs and WSPs
- Monitor operation of SPAs, take action to improve effectiveness
- Determine service standards
- Develop cost/efficiency guidelines for management
- Establish complaints procedures and advise WSBs on complaints handling
- Determine fees, levies, premiums and other charges to be imposed for water services
- Monitor compliance with technical standards
- Gather, maintain and disseminate information on water services
- Promote water conservation and demand-side management
- Monitor and evaluate the national water services strategy
- Liaise with other bodies for effective management of the water sector
- Advise the Minister on matters relevant to the water sector.

The Act requires or authorizes the WSBs to:

- Provide the services prescribed in the licence safely and efficiently
- Arrange for one or more agents, known as Water Services Providers, (WSPs) to undertake any or all of its powers and functions under the licence. Such arrangements between the WSB and the WSP are to be reduced to writing in a Service Provider Agreement (SPA). An SPA will specify the powers and functions under the licence that are to be exercised by the WSP. The SPA, and any subsequent amendments, are not effective unless approved by the WSRB
- Make regulations relevant to conditions for providing water services, and the tariffs applicable
- Make regulations to protect against degradation of water sources
- Monitor and enforce regulations made under the Act
- Relax or dispense with any requirements of a regulation made by it if, in any particular case, it considers that the application of the requirement would be unreasonable, and
- Fix and impose a sewerage services levy on all water services within the licensees' limit of supply (in consultation with the WSRB and with the approval of the Minister).

Most of the WSB functions listed above require the approval of the WSRB in order to be made effective. For example, regulations made by the WSB require WSRB

approval. However, this raises two concerns. First, the Act does not specify the grounds on which such approval may be withheld if the WSB regulations do not conform with the guidelines or advice issued by the WSRB. Second, regulations made by a WSB and approved by the WSRB may subsequently, without reference to the WSRB, be relaxed or dispensed with if the WSB considers that the operation of the regulation would be unreasonable in any particular case (section 74 (2)). To address these problems, it will likely be necessary to amend the Act to:

- Specify unambiguously the grounds upon which the WSRB may withhold approval of regulations, including determinations by the WSB, and
- Resolve the apparent irregularity posed by section 74(2) which allows a WSB to relax or dispense with regulations previously approved by the WSRB if the WSB considers that operation of the regulation would be unreasonable in any particular case.

### 3 Review of Regulatory Functions

The roles and responsibilities of the WSRB are exclusively regulatory in nature, and are focused primarily on the WSBs. The provision to monitor and regulate licensees and to enforce licence conditions (section 47(d)) also authorizes the WSRB to undertake such audits and other investigations of WSB affairs, as it may consider appropriate to the discharge of its responsibilities conferred by the Act.

An inherent problem in the institutional structure prescribe by the Act is that the WSBs functions include those of an operator engaged in the provision of water services as well as, to a certain degree, those of a regulator of those services.

- WSB as an operator – The WSB is an operating agency because it is the entity charged with the responsibility for the efficient and economical provision of water services (section 53 (1)).
- WSB as a regulator – The WSB performs the role of a regulator because it has authority under the Act to monitor and enforce regulations made under the Act as well as to discharge certain other regulatory functions such as determining the tariffs applicable for provision of water and sewerage services, and protecting water resources from degradation.

This not only creates potential conflict of interest in the roles of the WSB as an operator and regulator, but also contributes to the confusion between the regulatory roles of WSRB and the WSB. In some of the instances in which WSBs are empowered to make regulations (for example, in the determination of tariffs for provision of water services), the function of the WSRB is limited to developing guidelines whereas the WSB is responsible for developing the regulations. Regulations made by a WSB must be approved by the WSRB before being gazetted, but, as has been previously noted, the grounds on which the WSRB may withhold approval are not specified in the Act. It is unusual in international practice for a regulated operating enterprise to be itself exercising statutory regulatory functions over other entities operating in the same sector, since opportunities for conflict of interest may arise.

The listing of the WSRB's powers and functions include many instances in which it develops guidelines, advises and monitors but few in which it is the ultimate decision maker. Section 47 of the Act gives the WSRB specific authority to make decisions on a very limited range of issues, namely to:

- Determine quality standards for the provision of water services (section 47(b))
- Establish procedures for handling consumer complaints against licensees (section 47(c)), and
- Determine fees, levies, premiums and other charges to be imposed for water services (section 47(0)). These items do not include tariffs payable for routine water services.

Even the power to establish procedures for consumer complaints is not unambiguously defined. Section 47 (c) restricts the WSRB's functions to addressing consumer complaints against licencees (i.e., WSBs) while section 47 (f) limits the

regulator’s power to “advising licensees in procedures for dealing with complaints from consumers”. It is possible that section 47 (c) is intended to apply to complaints specifically registering consumer dissatisfaction with the WSB, whereas in 47 (f) general consumer complaints are addressed, which in most cases would be directed at the service provided by WSPs and not the WSBs. If this interpretation is correct, then the WSRB could instruct the WSBs on procedures to be followed if consumers have complaints against the WSB itself, but only suggest a suitable course of action when the consumers complain about services being provided by the WSP.

In the following sections, we review and analyze the various functions involved in the provision of water services and the respective regulatory roles of the WSRB and the WSBs. A “regulatory map” was developed to support the analysis of the institutional responsibilities and regulatory provisions as specified in the Act and is presented in Appendix A. This “map” sets out the basic regulatory functions and identifies which institution has that regulatory function as set out in the Act. This exercise helps to identify where there are gaps, inconsistencies, and overlaps in the regulatory functions with the sector regulatory framework.

### **3.1 Licensing**

The Ministry of Water has divided Kenya into seven regions and established a WSB responsible for the provision of water services in each region. In accordance with the Act, the WSBs must be licenced. The licence is the legal instrument which grants the WSBs the rights (and obligations) to provide water services, and requires that all water services provided in the region are covered under the licence.<sup>3</sup> Under the Act, the WSBs must make an application to the WSRB for the licence (section 57(1)), and the Act prescribes the process to be followed by the WSRB in arriving at a decision as to whether or not the licence should be granted (section 57(2)). In theory the approach is sound, and would be especially so in a competitive environment. However, in practice, this is not the case:

- Applications for licenses are only accepted from WSBs that have already been appointed by the Minister. As the Minister will make only one such appointment for each service area, these will essentially have a monopoly on the provision of services within their service area
- Replacing the WSBs would likely have a very high transaction cost.<sup>4</sup> As statutory governmental organization subject to civil service rules, dismantling a WSB would not be easy. A better and more likely strategy is to replace the management team for non-performance
- Under the spirit of the Act, it was envisioned that the contracts for the WSPs would be awarded on a competitive basis but that the WSBs would remain in place as asset owners.

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<sup>3</sup> The Act provides for exceptions for very small scales service provision (section 56(1)).

<sup>4</sup> The Act provides (section 69) that the Regulatory Board may, if the licensee is guilty of an offense under section 68, make an order transferring the powers and duties under the licence to another licensee or to the Minister. However, this provision is a measure of last resort.

In view of the Minister's authority to issue directions to the WSRB concerning the performance of its functions and the fact that the Minister appoints the WSB, it is unlikely that the WSRB would reject any WSB's application for a licence. The evaluation process is therefore not likely to be an exercise in selecting the enterprise best qualified for a licence award but a *pro forma* exercise to comply with the Act. It has been suggested that the threat of not granting the licence is a mechanism to encourage the WSBs to perform; however, because of the aforementioned issues, this is not likely to be a credible threat and the risks associated with having the licence of the WSB lapse due to failure to grant (or renew) the licence are likely to outweigh any incentives for improved performance.<sup>5</sup> Ultimately, if this sector structure is retained, it is recommended that the Act be amended to dispense with the licencing application and evaluation processes as currently prescribed.

However, the licences may nevertheless serve a useful purpose in defining the responsibilities of the WSB and helping to define the WSB's plans for service provision, the performance targets, and investment strategy. There are several important issues that must be addressed with regard to the licence. These include licence duration, the scope of authority of WSRB within the licence, and licence amendment.

### **3.1.1 Licence duration**

The Act envisions a process in which the WSB must make an application for a licence, which will only be granted by the WSRB if it is satisfied that certain conditions are met. These include:

- The Water Service Provider(s) engaged by the WSB are financially sound and technically competent
- The WSB has presented a sound plan for the efficient, affordable and sustainable service, and
- The WSB has presented acceptable performance targets, a program for planned improvements, and an acceptable tariff structure.

As such, the Act envisions that the licence would be granted (or renewed) on a periodic basis. During the application process, the WSRB would have an opportunity to review the strategy for providing service, the investment plan, the tariffs, and the performance targets of the WSB and to modify the conditions of the licence as necessary. The licence duration is not defined in the Act.

The duration of the licence is a critical decision, as it will have a significant impact on the incentive structure within the sector. While a licence of a short duration (e.g., 5-10 years) would appear consistent with the spirit of the Act, there are a number of problems:

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<sup>5</sup> A more credible strategy to encourage performance improvements would be to tie the compensation of the WSB Management (and possibly the Board) to the performance of the WSBs through management Performance Contracts.

- A short duration licence introduces a high degree of regulatory risk into the system because all of the SPAs between the WSB and the WSP are valid only if the WSB has a valid licence<sup>6</sup>
- The licensing process involves high transaction costs, imposing additional costs on the sector which will ultimately be reflected in higher tariffs. There are significant financial and human resources costs associated with preparing, reviewing and granting a licence which do not directly add value to the sector
- Because of the nature of the organization, the WSBs must have a long-term planning horizon which is inconsistent with a short-term licence. The WSBs are designed to be asset owners, holding water system assets on behalf of the state. In addition, it is likely that the WSBs will assume long-term loans to develop the water sector infrastructure
- The process may undermine the credibility of the regulatory process. The WRSB will, in practice, have limited scope for rejecting an application even though it will be very difficult, particularly in the early years of the sector restructuring, for the WSBs to fulfill the conditions specified in the Act for granting the licence.

For these reasons, it is recommended that the licence be granted for a long-duration or for an indefinite period of time<sup>7</sup> and that other mechanisms be developed to address the process for reviewing investment programs, service obligations and performance targets, and tariffs be identified. For example, the WSB should be required as a condition of the licence to develop and periodically update strategic plans that set out their strategy for the provision of services, the investment program, and performance objectives.<sup>8</sup>

### **3.1.2 Scope of licence**

Another important issue is the scope of the licence and the amount of discretion the WSRB has in defining the set of obligations of the WSB under the license. The Act is unclear on this point. Although the WSRB has the power to issue licences (section 47(a)), the limited specific authority entrusted by the Act to the WSRB in determining the formulation of licences would seem to relegate that agency to a subsidiary role in the licensing process. However, section 61(1) of the Act prescribes that a licence shall be subject to such other conditions, provided that they are not inconsistent with conditions prescribed by or under the Act, “as the Regulatory Board may impose by endorsement on, or instrument in writing annexed to, the licence.”

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<sup>6</sup> Different types of SPA would have different durations, some may be 5 years while others could be 10 or more. In addition, the SPAs will enter into force at different times and therefore in any given year, the WSB would potentially have a large number of SPAs in force. The possibility that the WSB’s licence may not be renewed during the implementation of the SPA creates significant risk, and is likely to deter operators from entering into an SPA. If the licence were transferred to another WSB or to the Ministry, it is likely that the SPA would be transferred; however, this changes the contracting party and may be unacceptable to an operator.

<sup>7</sup> There is precedent for indefinite licences in the water sector. The licences issued to the National Water Corporation and Pipeline Corporation were issued for an indefinite period.

<sup>8</sup> See Castalia’s report “*Options Report for Term Sheets for Licenses and Service Provision Agreements*” March 2005.

Typically a licence should reflect the requirements of the regulatory system. In this case, because the regulatory framework is still being developed, it will be difficult for the WSRB to develop a comprehensive licence at this point in time. Therefore, we recommended that the WSRB develop a simple and straightforward licence that includes a provision for regulatory regulations/rule/guidelines that are developed by the WSRB to become conditions of the licence. This approach enables the WSRB to put into place the legal instruments for regulation required by the Act while giving it time to develop suitable secondary regulations/rules/guidelines that would be applicable across all licences.

There are two ways that these secondary regulations/rules/guidelines may become binding on the WSBs. The WSRB would develop *guidelines*<sup>9</sup> on various regulatory matters as provided in the Act. The licence would then include the condition that these guidelines would be made binding on the WSB when they are developed, in essence making the guidelines mandatory. One potential problem with this approach is that it is possible that a decision by the WSRB to make guidelines with respect to a regulatory matter (for example, the tariffs) a binding requirement of the licence could be considered inconsistent with the conditions prescribed by the Act, if that function is assigned to the WSB. Another concern is that the WSRB use the development of the guidelines as a way to unilaterally impose conditions on the WSBs. Therefore, it is essential that a consultation process be developed to ensure that the guidelines that are developed are consistent with sector policies.

The alternative is that these regulatory matters could be developed as rules or regulations that are gazetted, and thus would be applicable regardless of whether or not they are conditions of the licence. Section 61(2) of the Act states that “Rules made under this Act may make provision imposing conditions on or with respect to the conditions which are or shall be imposed on licences generally or any class or description of licences”. It may therefore be possible for the WSRB to make rules that would allow it to include provisions in the licence which the Act does not specifically empower it to determine. However, section 61 is silent on who should make such rules. The authority to make rules is not restricted to the WSRB, but also includes the Minister.

### **3.1.3 Licence amendment**

The Act provides that once issued, licences may be modified by the WSRB only on application by the WSBs and after public consultation (section 62(1)) and in specific instances (such as due to a need to vary the limits of supply (section 64)). However, it appears that the ability of the WSRB to vary or amend the licence while the licence is effective is limited. This should be addressed to enable the WSRB to make changes as necessary (it will need to be defined what will constitute “necessary”), particularly if the licences are issued on a long term or indefinite basis. The WSRB must have the ability to update the licence conditions to respond to changing sector needs and an evolving regulatory framework. Typically any variation should be subject to concurrence by the licensee and subject to public consultation. To address this, it may be necessary to amend section 61(2) of the Act to specify that the WSRB may

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<sup>9</sup> Guidelines are not legally binding, whereas rules and regulations are binding. However, if the guidelines are made a condition of the licence they would become legally binding.

make rules imposing conditions to be applied to the licences generally or with respect to any class or description of licenses.

**Recommendations – Licences:**

- Specify the licence duration – A longer term (e.g. 25-30 years) or indefinite duration licence is recommended
- Clarify the mechanism to develop the scope of licence through implementing guidelines (set out as condition of the licence) or through secondary rules and regulations
- Develop clear rules and procedures for amending the licence

### 3.2 Service Provision Agreements

Water services authorized under a licence will typically be provided by “agents” of the Board rather than the WSB itself (except in exceptional cases<sup>10</sup>). Under the sector structure, the WSB delegates responsibility for the performance of some or all of its water supply functions to one or more agents known as WSPs. This arrangements will be accomplished by an agreement in writing known as a Service Provision Agreement (SPA) defining the powers and functions to be performed by the WSP.

The WSRB is required (section 47(i)) to develop model SPAs. Because of Kenya’s diverse geographic and demographic characteristics, no single format will adequately address the performance requirements of all WSPs. Therefore, the model agreement will need to be tailored by the WSB to fit the particular circumstances of the WSP and the area to be served. At the same time it is crucial that a consistent approach be followed throughout the sector. In the Term Sheet project, we recommended the following approach:<sup>11</sup>

- *Develop a set of WSP categories* – As a starting point, we recommended three categories of WSPs:
  - Category I – Urban WSPs
  - Category II – Rural WSPs
  - Category III – Externally Managed WSPs

Additional categories will likely be necessary as the sector develops and different types of WSPs emerge. However, it is recommended that these categories be formalized rather than done on an ad hoc basis to develop some consistency within the sector

- *Develop agreements for each category that are comprised of a set of General Conditions and Specific Conditions*

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<sup>10</sup> The WSB may provide the water services itself only in cases where the WSRB is satisfied that the procurement of an agent (WSP) is not possible or practical. In this case, it is recommended that the WSB set up a subsidiary operating company that is “ring fenced” from other WSB activities with a separate management team and financial accounts. The WSB should entered into a SPA with the operating company just as it would a wholly separate WSP.

<sup>11</sup> Additional detail can be found in Castalia’s “Options Report for Licence and Service Provision Agreement Term Sheets” March 2005.

- General Conditions – set out the conditions that are applicable to all WSPs within that category. The General Conditions cannot be modified
- Specific Conditions – sets out the conditions that are specific to the individual WSP such as service area, initial tariffs, and performance targets.

Overall the model agreements must reflect the service delivery functions listed in section 47, including any procedures specified for the fixing of tariffs; procedures for handling consumer complaints; regulations for the provision of water services; and requirements for the provision of such information as will enable the WSRB to evaluate the quality, efficiency and effectiveness of the service being provided.

### 3.2.1 Standards and the SPAs

The Act specifically authorizes the WSRB to determine the stipulations of the SPA in two instances only: (a) standards for the provision of water services to consumers, and (b) determining fees, levies, premiums and other charges to be imposed for water services (section 47(0)). Standards for the provision of water services to consumers include definition of the quality of service to which the service contract entitles consumers. The standards must be reflected in the SPAs.

### 3.2.2 Role of WSRB and the WSBs in regard to the SPAs

The licence will make provisions for duties to be undertaken by the WSB in the provision of water services. The WSRB will hold the WSB accountable for the proper discharge of these duties even though in many instances, they will be performed by the WSPs. The WSRB should therefore not normally directly interface with WSPs in the discharge of its regulatory functions as it is the WSBs responsibility to ensure that its agent conforms to all statutory obligations. It is important for the SPAs to stipulate that the WSP must comply with the requirements of the licence and any relevant regulations in all respects and impose on the WSP those sanctions that the licence imposes on the WSB.

#### Recommendations – Service Provision Agreements:

- Develop the General Conditions and model Specific Conditions for the different categories of WSPs. WSRB should also develop instructions for the WSBs to use in tailoring the Specific Conditions for each WSP.

## 3.3 Tariffs

The provisions related to tariff setting in the Act are potentially problematic and must be further clarified within the context of the licensing procedures. As stated in the Act, the WSRB’s role is restricted to developing *guidelines* for the fixing of tariffs for the provision of water services (section 47(g)) and for approving the WSB’s proposed *tariff structure*<sup>12</sup> as part of the licence approval process (section 57(5)(c)).

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<sup>12</sup> There is no definition of tariff structure in the Act and the definition that was intended in the drafting of the Act is not clear. The definition of tariff structure that is generally accepted internationally is a “set of

Separately, the Act authorizes the WSBs to make regulations for the provision of water services and the tariffs applicable (section 73(1)). The Act does not specifically assign the responsibility for determining *tariff levels* (the level that equates to a reasonable and efficient cost of providing services as determined by the prevailing tariff setting procedures). Although not clearly specified, it is inferred that the Act gives this authority to the WSB as part of its responsibility to make regulations for the applicable tariff.

It appears that it was not envisioned for the WSRB to have a role in determining tariff levels but that this responsibility was assigned to the WSBs. It is possible that this is what was envisioned in the Act. When the Act was drafted, the idea was that the WSPs would be selected on a competitive basis and therefore, the initial tariffs would be determined on the basis of the bid prices and therefore would be largely the responsibility of the WSBs. This is further supported by the provision in the Act that gives the power of making tariff regulations to the WSB. However, this approach is problematic.

Although not specifically stated in the Act, there is a division of service responsibilities between the WSP and the WSB. Although this division may differ between types of WSP, generally the WSPs will be responsible for the operation of the system (O&M) and WSB will be responsible for capital investment and monitoring the SPAs. The final tariff charged to the customers should cover at full-cost recovery levels the costs incurred by the WSP and the WSB<sup>13</sup> (as well as water abstraction costs, the regulatory levy, taxes, and any other applicable charges and levies). An indicative split of costs is illustrated in Figure 3.1, where:

- *WSP Remuneration* refers to the portion of the revenues generated by the tariff that cover the WSP's costs (typically O&M costs, but may include depreciation)
- *WSB Remuneration* refers to the portion of the revenues generated by the tariff that cover the WSB's costs (typically capital investment, sector planning costs, and SPA monitoring costs)

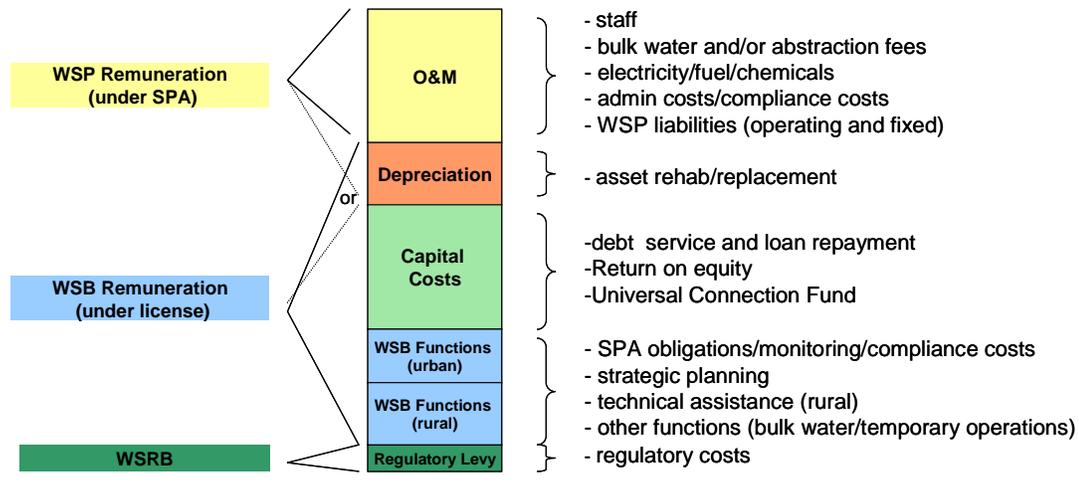
Although WSBs may determine the "WSP Remuneration", it would be not be consistent with good regulatory practice for the WSBs to determine its own allowable costs ("WSB remuneration"). This suggests that there should be a role for the WSRB in reviewing the tariffs.

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procedural rules used to determine the monthly bill for water users in various categories or classes. Examples included a fixed user charge, a volumetric charge or a combination of the two.

<sup>13</sup> It is likely that tariff, particularly in the short term, will not be set at cost recovery levels, particularly for rural WSPs. The difference between the full cost of service and what is recovered through the tariff must be funded through other means such as direct subsidies from the Government or through grants (e.g., from the Water Trust Fund).

**Figure 3.1: Determination of the Revenue Requirements and Allocations between WSB and WSP**



Overall, it is recommended that WSRB have a clear and defined role in tariff setting, in particular as regards to approving the WSB remuneration and, to a specified degree, the customer tariff (the final tariff that is charged to customers). It is important to consider that the WSRB ought to be the best qualified entity in Kenya to address tariff issues that support GoK’s objectives for the sector. It would therefore be the logical agency authorized to make the final decisions on the structure and level of tariffs to be applied for the provision of water services. WSBs will not be as well qualified to evaluate tariff issues and suffer from a further disadvantage with respect to tariff determination in that as operators in the provision of water services they lack the objectivity desirable in price regulators. However, this also must be balanced by the large number of WSPs, making it impossible for WSRB to be involved in fixing the customer tariff for all WSPs.<sup>14</sup>

It will be important to agree on the specific roles of the WSRB and the WSBs with respect to tariff setting, keeping in mind the provisions of the Act and the need to minimize bureaucratic intervention. One possible approach to the tariff setting arrangements is as follows:

- The WSRB should have a role in determining the allowed level of WSB Remuneration
- The WSB may have the responsibility for determining the WSP remuneration but only in accordance with the provisions set out by the WSRB guidelines and reflected in the SPA (which also must be approved by the WSRB), and
- The final customer tariff (which is comprised of both the WSP and WSB Remuneration) may be approved by either the WSB or the WSRB

<sup>14</sup> It is recommended that customer tariffs be set for each WSP according to the costs faced by the specific system.

depending on the type of WSP, but in accordance with well defined procedures:

- Urban systems – The WSB shall propose the customer tariff for the urban systems for approval by the WSRB
- Rural systems – Because of the sheer number of rural WSPs, the WSB may approve the WSP proposed tariff, subject to occasional review by the WSRB (for example, the WSRB may select some rural WSPs to review each year).

Further discussions and recommendations on the proposed tariff setting procedures are being developed under Castalia’s output for *Task 2 – Decision Document #2: Recommendation on Pricing Policies*.

The overall effectiveness of the WSRB in tariff determination will depend on the thoroughness with which the relevant guidelines are developed and how this is addressed in the licence.<sup>15</sup> As mentioned previously, the Act currently restricts the power of the WSRB to developing guidelines for fixing tariffs. This power does not extend to rejecting tariffs developed by the WSBs which conform to the issued guidelines. In this case, it is important that a uniform approach to tariff determination be applied nationwide, despite the fact that the tariffs may vary from supply area to supply area. It is therefore incumbent on the WSRB to develop very detailed guidelines which provide little opportunity for evasion of the intended tariff determination process by WSBs, and to have these guidelines incorporated in the SPAs. If this process cannot be established in the licencing process, the Act would need to be amended to empower the WSRB to decide tariffs.

**Box 3.1: Levies for Sewerage Services**

Under the Act, sewerage services are handled differently to water services. The Act specifies that the licensee may, in consultation with the Regulatory Board and with the approval of the Minister, fix and impose a sewerage services levy on water services (Section 77). This provision implies that the sewerage levy would be added to the water services tariff.

In this case, the approving authority is the Minister and the role of the WSRB is solely to be “consulted”. It is unclear why sewerage is handled this way. In addition, the Act specifies that the levy should cover a “reasonable” part of the costs of disposing the water supplied within those limits. The Act does not specify how the difference between the full cost of disposing the wastewater and the reasonable costs will be funded.

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<sup>15</sup> The guidelines must not only address the structure of the tariffs, i.e., consideration of the various elements affecting the costs of supply, but also the level of tariffs, i.e., the aggregate of the contributions of all elements in the supply costs, including assets and other fixed costs.

**Recommendations – Tariffs:**

- Develop definitions for terms used in tariff setting
- Clarify and agree respective roles for tariff setting for WSRB and WSB (our specific recommendations will be developed in Decision Document #2 - Recommendations on Pricing Policies)
- Set out the respective tariff setting roles of the WSRB and the WSBs in the licence and include provision for the WSBs to adhere to the tariff guidelines
- Develop guidelines for tariff setting

### 3.4 Quality of Service

Quality standards for the provision of water services is one of the issues which the WSRB is authorized to determine (section 47(b)) although it is not expressly stated what is intended to be included under this provision. Establishing the required service standards are important to clearly set out the service obligations required from the service providers. Service standards are also important to ensure that consumers are not unduly disadvantaged in the relationship between supplier and consumer. Although not a consumer advocate, the WSRB needs to become an intermediary between the consumer and the service provider. The service supplier can swiftly disconnect a consumer who is in default of the service contract. However, the consumer has no such effective method of registering his dissatisfaction with the service received. The regulator must recognize a special responsibility to the consumer and as best it can, ensure that the consumer has the same right to defined quality of service as the utilities have to compensation for service provided. Specification of measurable standards by which the service being provided to consumers can be evaluated is an important step towards protecting consumer interests.<sup>16</sup>

The list provided in Box 3.2 is indicative only and not exhaustive. The WSRB will develop an initial list and subject it to open consultation. An important consideration is how these standards will be applied across Kenya given the widely varying characteristics of the many supply systems in Kenya. It is important that the standards developed by the WSRB provide for these differences where applicable. In some instances, the WSRB may consider allowing the WSBs to establish service quality requirements on a case by case basis to reflect the specific circumstances of each WSP and what is realistically achievable. As the WSRB has a role in approving the SPAs, it will have the right to agree or disagree with the proposed level of service requirements.

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<sup>16</sup> In many jurisdictions some of the quality of service standards are guaranteed. In such instances, each customer affected by a failure to meet a guaranteed standard will receive financial compensation for each instance of failure. The compensation is normally provided in the form of a credit to the customer's account. It is recommended that experience be gained with implementation and monitoring of the standards generally before introducing a system of guaranteed standards in Kenya.

### **Box 3.2: Typical Quality of Service Standards**

- Drinking water and treated wastewater must comply with the standards of the Environmental Management Authority (NEMA) and any other national standards
- Network water pressures must be maintained within specified maximum and minimum limits
- Customers must be given 48 hours notice through the media of planned service interruptions
- Meters. If installed, must be read at least four times per year
- Bills must be dispatched within 3 days of the scheduled date of issue
- New customers must be connected within 72 hours of making payment for service
- Services disconnected for debt must be restored within 48 hours of the debt being discharged
- Supply must be restored within 48 hours of network supply interruptions
- The WSP must respond to billing queries within 72 hours of written billing complaints
- Supplies provided by trucks must be delivered on a regular schedule

The WSRB must develop a range of quality of service standards that will apply to different types of WSPs, depending on their particular characteristics. The appropriate standards will be included in the SPA, and the primary responsibility for monitoring WSP performance will rest with the WSB. The role of the WSRB will be to provide oversight of compliance with the service quality standards within the WSB as a whole. The SPAs must make provision for routine review and modification of the standards as may be appropriate without affecting the validity of other provisions in the SPA.

An important consideration is the process for enforcing the service quality requirements. Under the sector structure, ultimately the WSBs will be held responsible for the failure of the WSPs to achieve the service quality standards. Therefore, it is essential that appropriate enforcement mechanisms be built into the SPAs to enable the WSBs to require the WSPs to fulfill their service obligations and in essence to be able to “pass on” any penalties that are assessed against the WSB due to a failure of the WSP to meet the obligations.

### **Recommendations – Service Quality:**

- Develop service quality standards that are applicable to the provision of water service, ensuring that provisions are made to allow for differences between service providers and clearly setting out the enforcement mechanism for these service standards
- Develop monitoring and reporting procedures.

### 3.5 Consumer Rights and Obligations

An important function of a regulator is to protect the rights of consumers, including the right to have access to water services at a reasonable cost. Although the regulator has a special function to protect customers against monopoly abuses of service providers, it also must effectively balance the interests of consumers with the interests of the services providers, investors (assets owners), and other stakeholders. In addition, while as a regulator, the WSRB has a special responsibility to protect consumers' rights, the WSRB must also communicate to consumers the fact that they have not only rights, but obligations as well.

The rights and responsibilities of consumers are not well defined in the Act. There is no express mention of consumers, with the exception of a reference to the requirement that the WSRB must develop procedures for handling complaints made by consumers (section 47(b)). The rights and obligations of consumers should be further defined through the development of regulations, licences and SPA provisions.

The WSRB should develop a customer service regulation that would set out customer rights and obligations.<sup>17</sup> This would address issues such as connection and disconnections, billing, customer complaints, and interruptions in service. A list of consumers' rights and duties that should be addressed in the regulation is provided in Appendix B. The Customer Service regulation should be issued and gazetted by the Minister or the WSRB as it would address the rights and obligations of both service provider and the customer, and the WSB licence should refer to this regulation and require that a copy be provided to every customer so that they are informed of their rights and obligations.<sup>18</sup>

#### **Customer Rights and Obligations – Recommendations:**

- Develop a customer service regulation that sets out the rights and obligations of WSPs and customers

### 3.6 Performance Monitoring

An important function of the WSRB under the Act is to ensure that water services are provided effectively and efficiently. If the WRSB is to objectively and effectively discharge the function of monitoring and regulating licensees as stipulated in Section 47 (e) of the Act, it will need to establish a rational basis by which to evaluate the performance of the licensees and the WSPs. This is of particular importance as the pricing of the water services is not intended to be strictly cost-based, but will be required to reflect a mixture of economic, social and political considerations enshrined in the Millennium Development Goals. The price to the consumer will

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<sup>17</sup> This may be developed as a Customer Charter and adopted by each WSP. In many countries, the Customer Charter is developed by the service provider and it becomes the basis for the terms of service between the service provider and the customer. However, it is important that the terms of services be similar if not uniform across the country.

<sup>18</sup> This obligation should be reflected in the SPAs.

therefore not, by itself, constitute an adequate means for evaluating the performance of the service providers.

This objective can be achieved through the use of performance indicators. By using a consistent set of performance indicators among service providers, the WRSB can compare performance between WSPs and the performance of each WSP over time. The selection of a series of statistical indices, typically ratios, each providing a meaningful measure of utility performance within a specific functional area. When compared to use of a single parameter representing either a cost or a component of service, using a series of ratios for performance evaluation has the important advantage of compensating for the size of the utility and thereby providing a more robust basis for comparison across companies. If one WSP has more employees, and higher labor costs, than another, it is impossible to draw reasonable conclusions about the relative labor productivity of the two without a corresponding measurement of what is produced by the two sets of employees. It is the output per employee (i.e. the ratio of service provided to number of employees) that is most significant in this specific comparison.

We suggest a number of ratios that can be applied as objective performance indicators, focusing on physical and cost measures rather than revenues and profit. Revenue and profit figures tend to reflect economic performance primarily and may provide little, if any, indication of progress towards social and political objectives, such as those addressed in the Millennium Development Goals. It is therefore preferable to focus on the most direct measures of the effectiveness of utility operations—the services provided and their costs. The order in which the indicators are presented is not relevant to their relative importance in evaluating the performance of service providers.

The WSRB will need to monitor the performance not only of the seven WSBs but also that of possibly more than 3,000 WSPs. The nature of the roles of the two groups in providing water services are quite different and therefore the same group of performance indicators cannot reasonably be used in both instances. Suggestions for performance indicators for WSPs and WSBs are given below in Boxes 2.1 and 2.2, respectively. It is recommended that the WSRB determine which indicators must be used by the WSBs but that the WSB be responsible for setting the specific target (the numeric value) for the indicator that must be achieved by each WSP given its specific circumstances. The performance of each WSP will be determined on the basis of its targets. One measure of the WSB's performance could be based on the number of WSPs that achieve their targets.

**Box 3.3: Possible WSP Performance Indicators**

- Percent of population with network access to water
- Percent of population supplied by alternative means
- Annual percentage increase in network connections
- Annual percentage increase in non-network connections
- Percentage of metered network connections
- Daily per capita consumption – residential consumers
- Average frequency of network supply interruptions
- Average duration of network interruptions
- Percentage of samples failing to meet quality standards
- Percentage of sewage samples treated to primary NEMA and Ministry of Water standards
- Number of customer complaints as a percentage of total number of customers
- Maintenance costs as a percentage of total O&M costs
- Planned maintenance costs as a percentage of total O&M costs
- Productive capacity (m<sup>3</sup> per hour) as a percentage of maximum hourly demand
- Non-Revenue Water as a percentage of total water production
- Number of staff per thousand customers
- Percentage of customers with consumption below lifeline threshold
- Revenue collection as a percentage of total billing
- Ratio of revenue outstanding to average daily billing
- Ratio of current assets to current liabilities
- Ratio of revenue collected to the sum of O&M costs and debt service costs

**Box 3.4: Possible WSB Performance Indicators**

- Percentage of WSPs submitting performance reports
- Percentage of WSPs not meeting agreed benchmarks, separately for each performance indicator
- Percent of population in WSB service area with network access to water
- Percent of population in WSB service area supplied by alternative means
- Annual percentage increase in network connections
- Percentage of customers in WSB service area with consumption below lifeline threshold
- Annual percentage increase in non-network connections
- WSBs actual investment in supply infrastructure as a percentage of amount budgeted
- Productive capacity (m<sup>3</sup> per hour) as a percentage of maximum hourly demand

It is sometimes said that it will be impossible to monitor the performance of more than three thousand WSPs. The reality however is that unless the performance of every service provider is monitored, there can be no certainty as to the progress being made towards the Government's objectives and the success of the sector reforms. It is true that it will be extremely difficult for a WSB to review the performance of more than, for example, four hundred WSPs, but such reviews are not continuous tasks and can be outsourced. The reports to be reviewed in any given WSB region need not all be evaluated by the same external agent, the effort involved will be relatively light and the costs should not be oppressive.

Monitoring will involve comparing the agreed benchmarks with actual WSP performance in the various categories of performance indicators, and thereby identifying those WSPs whose performances fall significantly either above or below the benchmarks. The WSB would then investigate the probable causes of poor performance and decide on remedial action, and may also try to determine the causes for above average success. The report submitted to the WSRB would not necessarily contain information on all WSPs, but should provide a summary of performance and should highlight those which fall significantly outside the agreed benchmarks.

The WSB reports to the WSRB would, of course, not be restricted to submissions on performance against benchmarks, but must include narratives of all important issues relative to its responsibilities.

**Recommendations – Performance Monitoring:**

- Define the Performance Indicators to be applied to each category of WSP and to the WSBs
- Include requirement for performance monitoring against specified indicators in licence and SPAs
- Develop Guidelines on Performance Monitoring. Guidelines should include definitions of the Indicator, guidance on how to measure each indicator, set targets and report on each indicator.

### **3.7 Dispute Resolution**

The Act makes limited provision for disputes on issues concerning provision of water services. The jurisdiction of the Appeal Board established in section 84 is restricted to persons directly affected by a decision or order of the Water Resources Management Authority, the Minister, the Water Services Regulatory Board or a Water Services Board concerning a permit or licence issued under the Act. Provision is made for the Board to hear disputes, and to have other powers and functions as may be conferred on it or any other Act. No additional powers are conferred under the Act and it may reasonably be assumed that no other act has conferred or imposed any additional powers on the Board.

The WSRB is required to investigate any complaint made to it concerning failure by a WSB to discharge its duties under the licence. If the WSRB is satisfied that the complaint is valid and the WSB fails to remedy the failure, the WSRB may order the

WSB to make financial compensation to the complainant (section 68(2)). However, the WSB may appeal such an order to the Water Appeal Board.

The WSRB should develop clear procedures with respect to disputes. The dispute procedures related to:

- Customer complaints
- Disputes between the institutions responsible for services including between WSPs and WSBs and between WSBs and the WSRB.

### **3.7.1 Customer complaints**

The WSRB is required under the Act to establish procedures for handling complaints made by consumers against licensees (section 47(b)); however, in practice consumer disputes will typically be directed to the WSP by which the services are provided. Therefore, the guidelines should establish an entire process starting at the level of the WSP and moving to other institutions if the complaint cannot be resolved satisfactorily at a specific level.

A consumer having a complaint concerning any aspect of the water services being provided to him should first address the complaint to the provider from which he or she receives the service, i.e., most probably a WSP. If the consumer remains dissatisfied after the WSP has provided a final response to his complaint, then it would be reasonable for the consumer to address his or her complaint to the WSB. If, after investigation and consideration of the issues involved, the WSB finds no merit in the complaint, a number of alternative procedures may be considered. These alternatives include:

- Allow appeals to be directed to the minister, or some agency in the government's executive hierarchy – However, this is considered an inappropriate avenue of appeal, as the independence of the regulator would be thereby compromised
- Allow for no further action to be taken by any agency involved in the water sector, and the complainant's only legal recourse would be to take the issue to the courts – This is likely to be an expensive and protracted alternative and would be especially disadvantageous to less affluent citizens
- Allow the complaint to be raised to a higher level, that of the WSRB – The regulator's mandate to establish a level playing field between service provider and consumer would argue in favor of this approach, but there are practical difficulties. Kenya's geographic size and the large number of service providers expected to be operational will make it very difficult for the WSRB to properly investigate disputes of relatively minor financial significance which a service provider may have with a consumer in some location far removed from the regulator's offices. It would also not be equitable to allow the WSRB to consider complaints only from consumers located in Nairobi or its environs. This procedure is therefore not recommended

- Allow the complaint to be submitted to arbitration – There is no obvious legal impediment to this procedure. In this scenario, as in all others, the consumer would first raise his complaint with the service provider. If agreement is not reached, the matter may be taken to the WSB or moved to arbitration at that stage. The arbitrator need not be qualified by any professional accreditation, but may only be an individual or a group enjoying the trust of both parties who would agree to accept the arbitrator’s decision as final. This procedure is recommended as it has the advantage of being quick and relatively inexpensive. The arbitrator may be some local individual or group, such as a community council or NGO already familiar with the issues involved.

Arbitration may also be considered for the next step after the complaint has been heard by the WSB without a resolution satisfactory to the complainant.

**Recommendations – Dispute Resolution:**

- Develop guidelines on handling customer complaints
- Develop guidelines on addressing disputes between WSPs and WSBs and between WSBs and WSRB.

**3.7.2 Disputes between sector institutions**

Unresolved disputes between WSPs and WSBs can be referred to the WSRB. If the complainant remains dissatisfied after the WSRB has heard the arguments and announced its decision on the issues, the complainant may then take the dispute to the Water Appeal Board as he would qualify as one whose proprietary interest has been directly affected by a decision of the WSRB. Complaints of the WSB with regard to a WSRB decision would be referred to the Water Appeals Board. However, the appeals process developed by the Water Appeals Board is likely to be legalistic in nature and may not be a satisfactory forum for addressing issues related to economic or technical issues. We recommend that provision be made to convene an Expert Panel in the dispute is related to a technical or economic matter. This Expert Panel could be convened at the level of the WSRB for a dispute between the WSP and WSB or at the level of the WAB for a dispute that is between the WSB and WSRB.

**3.8 Enforcement**

Effective regulation requires that the regulator be vested with the authority and powers of enforcement appropriate to ensure that its directives are complied with. Normally a regulator influences the actions of service providers by providing incentives, most often financial. However, incentives take effect relatively slowly, and some of the regulator’s directives may require immediate response. The Act therefore makes provision for both the WSRB and the WSBs to issue rules or regulations and specifies the maximum financial penalty that may be imposed for breach of any of these instructions. We understand that the courts, not the regulators, impose penalties and that in order for the breaches to be considered by the courts the officers of the agencies will need to be gazetted as prosecutors.

In addition to financial penalties, the Act (section 47 (2)) prescribes that the WSRB may, with the consent of the Attorney General, undertake prosecution of any criminal offences arising under the Act or in connection with the performance of its functions. No similar mention is made of WSBs undertaking prosecutions, and it is therefore assumed that the WSRB will initiate legal proceedings in all instances of breaches of rules/regulations/orders issued by either the WSRB or a WSB. Such a procedure is not illogical inasmuch as all statutory instruments developed by a WSB must first be approved by the WSRB before being gazetted.

The WSRB may, without recourse to the courts, order a WSB to rectify any defaults in the performance of its obligations under the licence. The order may include the imposition of a financial penalty. If the default is not rectified in accordance with the order, the final sanction is for the WSRB to transfer the licence to another licensee, or to the Minister (section 69).

Overall, the enforcement mechanisms provided for in the Act are fairly weak. The financial penalties are capped and relatively nominal. Prosecution is only applicable to those offenses which are considered criminal, and the ultimate enforcement mechanism involves revoking the licence which is likely to be used only in extreme circumstances. It is not envisioned that this issue can be addressed easily; however, it is recommended that as the rules/regulations/guidelines are developed, the enforcement mechanisms that would be applicable should also be developed and incorporated into the rule/regulation/guideline.

**Recommendations – Enforcement:**

- Ensure that enforcement mechanisms that would be applied for non-compliance are set out in each regulations/rules/guidelines, and that the specific sanctions are specified.

### **3.9 Information Collection and Dissemination**

Responsible regulatory decisions are dependent on reliable information, but service providers have no inherent incentive to provide any information that may not reflect favorably on their operations. An example is the provision of accounting information. Utility accounts are normally kept to comply with statutory requirements on the submission of financial information to government departments. However, the resultant statements will seldom provide the regulator with the information needed to determine the cost of providing specific services, an important factor in deciding on equitable tariffs. The WSRB must therefore have the authority to require submission of such information as it considers necessary for the effective discharge of its responsibilities.

The Act addresses the provision of information in a number of instances. The general requirement in section 47(d) for the WSRB “to monitor and regulate licensees and to enforce licence conditions” must necessarily imply the authority to acquire such information as may be necessary for the performance of those functions. However the Act is even more specific in section 47(q) which conveys the power to “gather and maintain information on water services”; as well as in section

50(4) stipulating that “Rules made under this Act may specify requirements for keeping of records and furnishing of information to the Regulatory Board”.

These provisions of the Act permit the WSRB to instruct the licensees and service providers as to the format in which it requires accounting and other information to be submitted. It must also be able to instruct service providers to take such action as may be necessary to improve the efficiency of sector operations, but these instructions should be directed at results to be achieved, and not consist of specific action to be taken by the management. The regulator should never micro-manage.

Dissemination by the WSRB of information relevant to sector performance is required by the Act in section 50(6), which stipulates that any member of the public shall have access to information contained in any national information system. This requirement should not be problematic when only state-owned agencies are active in the sector, but would be controversial in the event of competition being introduced in the sector, as some of the information acquired by the regulator would be commercially sensitive and should be kept confidential.

The WSRB should be active in disseminating sector relevant information and not restrict its activities in this regard to persons who request and pay for information. Keeping all stakeholders informed of issues important to the performance of the sector will enhance the transparency of the regulator’s operations and encourage greater stakeholder involvement in sector issues and confidence in the regulator’s role.

**Recommendations – Information Collections and Dissemination:**

- Set out basic reporting requirements in the licences including the types of reports and the required frequency of reporting
- Prepare guidelines on reporting that provide information on the information required and the format required.

## 4 Review and Recommendations for Regulatory Practices

### 4.1 Regulatory Independence and Decision-making

#### 4.1.1 Overview

Many utility regulatory agencies established over approximately the last decade are referred to as “independent regulators”. However, a truly independent regulator functions in “arms-length” relationships with all stakeholders. “Arm’s length” in this context means that regulatory decisions are not influenced by special considerations (favorable or unfavorable) being given to any of the parties involved. The regulator’s decisions—and any resultant actions—should be taken in accordance with transparent processes and within the context of a clearly defined legal framework. It is the regulator’s responsibility to establish, to the greatest extent feasible, the proverbial level playing field in which the interests of all stakeholders are considered, and no stakeholder will receive preferential treatment or have reasonable grounds to consider itself unfairly disadvantaged.

Independence of the regulator from the regulated entities is more easily understood than independence from the political authorities. The regulatory body is an agency of the government, and to speak of such an agency being independent of political authorities can be confusing, it may sound like an oxymoron. The confusion is often greater when the regulated enterprises are state-owned as the distinction between the responsibilities of the owner and operator, on the one hand, and those of the regulator, on the other, are frequently ill-defined.

Those departments of the government through which the day to day objectives of the government are achieved are generally referred to as the “executive branches”. The political directorate issues instructions directly to such departments, often in great detail, as to what actions are to be taken. An independent regulatory agency is not part of the government’s executive arm. If regulatory decisions are subject to review or approval by the political directorate, then the regulator is not independent.

#### 4.1.2 WSRB

By the above definition, the WSRB is not an independent regulator. Section 47(4) of the Act prescribes that “the Regulatory Board shall, in the exercise of its powers and functions, be subject to such directions as may be given from time to time by the Minister”. An exception is made for the contents of any report or recommendation made by the agency.

This requirement of the Act effectively makes the regulator an advisor to the Minister, even though it has been established as a body corporate. It would clearly be confusing to stakeholders and detrimental to the status of the WSRB if it were to make a public pronouncement that was subsequently over-ruled by the Minister. This suggests that a prudent course of action would therefore be for the WSRB to seek the Minister’s approval before announcing any decision or taking any important action. An obvious problem with this scenario is that the true role of the regulator will be obscured and the practice may develop in which the regulator is by-passed. This clearly will undermine its effectiveness in the sector.

### **4.1.3 Recommendations**

The arguments in favor of an independent regulator will not be repeated here, as they will already have been considered and rejected by GoK. However, to clarify and strengthen the role of the WSRB, we recommend the following:

- It should be confirmed that the Minister would only intervene on policy issues – We understand that this is consistent with the spirit of the separation of powers established in the Act. The government has the authority and sole responsibility to establish the policies under which the various sectors of the economy are to operate, and it is the duty of the regulator to ensure that its actions comply with these policies
- Such policies must be formally announced and properly communicated – They should be reduced to writing, preferably placed before the legislature, and communicated to all stakeholders. In specific circumstances it may nevertheless be desirable from time to time for the Minister to issue directions of a general nature as to policy, prior to, or in the early stages of deliberation on any important regulatory issue.

Alternatively, the section in the Act that stipulates that the WSRB be subject to directions as may be given by the Minister should be amended to provide for the Minister to provide general direction as to policy.

## **4.2 Autonomy and Accountability**

### **4.2.1 Overview**

Autonomy is an essential characteristic of an effective regulator. Autonomy involves a wide range of issues, including:

- Independent funding – Regulatory fees paid by the regulated agencies should fund the routine expenses of the regulator. In this way those who obtain the benefits of regulation are the ones who bear the costs. If the Treasury funds the regulatory agencies, then some taxpayers who do not have the benefit of public water supplies will be contributing to their regulatory costs
- Political allegiance should not be a factor in the appointment of Board members or staff
- Board members are to be appointed for fixed terms – Appointments may be terminated only for cause
- Staff recruitment and compensation should not be restricted by civil service hiring rules.

However, autonomy (and independence if applicable) does not mean freedom to act in an arbitrary fashion.

### **4.2.2 WSRB**

The WSRB must be held accountable to the Government and the country at large for the way in which it discharges its obligations. This is addressed in the Act by the requirement for the WSRB to prepare an annual report on its work and activities

(section 50(5)); for its accounts to be independently audited and reported on (section 82(2)); and for orders, approvals, notices, etc. to be given in writing (section 100).

#### **4.2.3 Recommendations**

- It is recommended that the WSRB be required to submit its budget for the ensuing year to the Minister for approval prior to the beginning of the fiscal year.

### **4.3 Level of Discretion**

#### **4.3.1 Overview**

A regulator is expected to function in an objective manner, establishing as best it can, a level playing field for all stakeholders. Nevertheless it is inevitable that in the performance of its functions the regulator will be required to exercise a certain degree of discretion, making decisions in accordance with its best judgment.

#### **4.3.2 WSRB**

It appears that in some instances the Act allows the WSRB wider scope for applying discretion than seems necessary. For instance, section 69 allows the WSRB to transfer the licence issued to a WSB if the WSRB is satisfied that the licensee is guilty of an offence, *whether or not the licensee has been charged or convicted of such an offence*. In another instance (section 66(2)) the WSRB may, if it *appears* expedient, order any licensee to provide a bulk supply of water and another licensee to take the supply for such period and on such terms as it (the WSRB) may specify. In both instances cited it would seem that more judicious investigation of the circumstances would be warranted before arriving at a decision.

### **4.4 Organizational Structure of WSRB**

A proposed organizational structure for the WSRB, designed to facilitate the effective discharge of its functions, is attached as Appendix C. The structure has four functional departments:

- Communications and Customer Relations
- Analysis and Research
- Human Relations and Administration
- Information Management.

The chart also shows the two positions of Procurement Officer and Internal Auditor. In an organization with a staff of about 30 persons, these positions could not fully engage the services of a full-time employee each, but the law requires them to be part of the organization of all government corporations. It may be possible to arrange for them to be occupied by members of the Board.

The listings under the departments represent functions, not positions. For instance, in the Analysis and Research Department, the tariff determination functions will require inputs from financial analysts, economists and probably engineers, but will not need to be a specific position. The function of “internal communication” is placed under the Human Resources Department (HRD) and separated from that of “public awareness” in the Communications and Consumer Relations Department

because the target audiences and the messages to be communicated are different. The HRD must ensure that there is free flow of information between management and staff and between all staff groups. The HRD need not be itself the message bearer, but must be aware of problems in internal communications and initiate steps to resolve them.

**Box 4.1: Improving Regulatory Capacity**

Section 5 has reviewed some important features of the regulatory processes that should be addressed to strengthen the regulatory framework in Kenya. However, there are also a number of observations made by the team on the process for making the regulatory office operational. These areas include:

- Need to recruit appropriate staff – Currently, the WSRB has a limited number of professional staff. The key positions must be filled expediently. A particular need is a qualified economists and financial analysts and to put the management team in place
- Lack of financial resources – The WSRB does not have a clear budget and source of funding for the first years of operation. It is expected that the WSRB will be funded through some form of regulatory levy but this will take time to put into place. It is essential that the WSRB have a fixed and known budget to operate with during the initial few years.
- Lack of planning – The WSRB has a number of critical activities that it must accomplish in the first few years. A strategic plan must be developed that prioritizes these activities, sets out a clear timeline and assigns responsibilities to staff members for accomplishing these tasks. These activities and the expected delivery dates should be communicated to sector stakeholders.

Without a clear management strategy and qualified staff, the WSRB will be unable to develop into a viable organization that plays an instrumental role in shaping the development of the water sector in Kenya. Unless it acts quickly, the WSRB is at risk of being marginalized in the sector.

## 5 Summary of Recommendations

### 5.1 Overview of Recommendations

In Section 3, we discussed the treatment of key regulatory functions within the Act and provided recommendations to develop and strengthen the regulatory framework. In this document, we point to some of the inherent challenges in the institutional arrangement set out in the Water Act and areas of potential conflict, for example in particular tariff setting. After discussions with key stakeholders, we have taken the view that substantive changes to the Act are unlikely to be feasible in the short to medium term. As such, our recommendations focus on developing the licences, SPAs and implementing rules and regulations for the regulatory framework.

#### 5.1.1 Corrections to the Act

There are some instances in the Act as printed in the Kenya Gazette Supplement in which typographical errors have apparently occurred. These are set out in Box 5.1. We understand that these errors caused by a ‘slip of the pen’ can be corrected by the Attorney General’s office without being resubmitted to Parliament. We advise that this be done as soon as possible reduce confusion within the Act.

#### **Box 5.1: Typographical Errors in the Water Act 2002**

This box sets out the typographical error within Parts IV and V of the Water Act 2002.

▪ **Section 47**

- There is no 47 (1)
- In the subsections (a) to (s), sub-section (p) is missing
- Subsection 47 (5) states that a summary of any directions given under subsection (3), (this should be subsection (4) shall be published in the Regulatory Board’s annual report prepared under Section 47. This should be Section 50 (5)

▪ **Section 51**

- The (1) has been omitted for subsection 51(1)

▪ **Section 53**

- Section 53 (3) begins “without prejudice to the generality of Section 51 (2) (b)”. There is no Section 51 (2) (b). It is probable that Section 53 (2) (b) is the section intended to be referred to

▪ **Section 57**

- Section 57 (7) states that any person opposed to the grant of the licence may object in writing to the Authority (underline added). As it is the WSRB to which the licence application has been made and who will conduct the consultation and (in Section 57 (8)) respond to the objector, this objection should be made to the WSRB. Therefore, Authority should be replaced by Regulatory Body

▪ **Section 64**

- The (1) has been omitted for subsection 64(1)

▪ **Section 69**

- The (1) has been omitted for subsection 69(1)

### **5.1.2 Development of Rules, Regulations, and Orders**

There are several references in the Act to rules, regulations and orders, all of which, we understand, are instruments of secondary legislation with no significant difference in effect. These may be issued by the Minister, the WSRB or WSBs. This causes uncertainty at times as to who is the responsible authority, especially since the statement “Rules made under this Act...” is often made without designation of who would be the appropriate authority in those instances. It would help clarity of interpretation if different terms were used for the different issuing authorities, for instance regulations would be made by the Minister, rules by the WSRB and orders by the WSBs. If it is not possible to clarify this in the Act, we recommend that this be carefully considered and documented and, if required, gazetted by the Ministry.

## **5.2 Action Plan**

This section sets out a high level action plan for implementing the recommendations set out in this Decision Document. After further discussion and agreement with WSRB, we would further develop the action plan to provide a more detailed timeframe for implementing the regulations. For each recommendation, we indicate:

- A general view on the level of effort required to implement the recommendation – Because the specific level of effort will depend on a number of factors, at this juncture we will only estimate this in terms of the relative level of effort (e.g., low, medium high)
- An indicative time table for implementing the recommendations – We believe that all of the recommendations are important and therefore do not assign a level of priority, but suggest how the development of the guidelines could be phased in over a three year period.

An indicative action plan is presented in Figure 5.1.

**Figure 5.1: Indicative Action Plan**

Note: Time table is presented as 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> quarter of each Year.

Recommendation	Effort	Year 1				Year 2				Year 3			
		1	2	3	4	1	2	3	4	1	2	3	4
<b>General</b>													
▪ Correct typographical errors in Act	Low	x											
▪ Clarify the responsibility for developing rules and regulations	Low	x											
<b>Licences</b>													
▪ Determine licence duration	Low	x											
▪ Develop clear procedures for licence amendment	Med		x	x									
<b>Service Provision Agreements</b>													
▪ Develop the General Conditions and model Specific Conditions for the different categories of WSPs	High	x	x	x									
<b>Tariffs</b>													
▪ Develop definitions for terms used in tariff setting	Low	x											
▪ Clarify and agree respective roles for tariff setting for WSRB and WSB	Low	x											
▪ Set out roles in the licence and requirements for WSB's to adhere to guidelines	Low	x											
▪ Develop guidelines for tariff setting	High		x	x	x	x							
<b>Service Quality</b>													
▪ Develop service quality standards	High					x	x	x					
▪ Develop monitoring and reporting procedures	High								x	x	x		
<b>Customer Rights and Obligations</b>													
▪ Develop a Customer Charter that sets out the rights and obligations of WSPs and customers	High			x	x	x	x						

**Action Plan, continued**

<b>Performance Monitoring</b>														
<ul style="list-style-type: none"> <li>▪ Define the Performance Indicators to be applied to each category of WSP and to the WSBs</li> <li>▪ Include requirement for performance monitoring against specified indicators in licence and SPAs</li> <li>▪ Develop Guidelines on Performance Monitoring.</li> </ul>	Med	x	x											
	Low	x												
	High								x	x	x			
<b>Dispute Resolution</b>														
<ul style="list-style-type: none"> <li>▪ Develop guidelines on handling customer complaints</li> <li>▪ Develop guidelines on addressing disputes between WSPs and WSBs and between WSBs and WSRB.</li> </ul>	Med				x	x	x	x						
	High									x	x	x	x	
<b>Enforcement</b>														
<ul style="list-style-type: none"> <li>▪ Ensure that enforcement mechanisms and the types of sanctions that would be applied are developed for each of the regulations/rules/guidelines</li> </ul>	Med				x	x	x							
<b>Information Collections and Dissemination</b>														
<ul style="list-style-type: none"> <li>▪ Set out basic reporting requirements in the licences</li> <li>▪ Prepare guidelines on reporting</li> </ul>	Low	x												
	Med									x	x	x	x	

## Appendix A: Regulatory Map

Map of Regulatory Functions as Provided under the Water Act (2002)

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
<b>TARIFF (WATER SUPPLY)</b>					
<b>Principles and Procedures</b>	<p><i>[47(g)] – Develop guidelines for the fixing of tariffs for provision of water services</i></p> <p><b>Note:</b></p> <ul style="list-style-type: none"> <li>If the WSBs are required to adopt the WSRB guidelines, this must be expressly set out in the licence as there is currently no requirement in the Act.</li> </ul>	<p><i>[73(1)] – A licensee shall make regulations for or with respect to conditions for the provision of water services and the <u>tariffs</u> applicable (underline added)</i></p> <p><b>Note:</b></p> <ul style="list-style-type: none"> <li>Under this provision, it appears that the WSB's have the authority to make regulations for tariff setting. This power must be limited to setting the WSP remuneration and not the WSBs own remuneration</li> </ul>			<p>There is a potential conflict in setting the tariff principles and procedures. The WSRB only has the power to develop “guidelines” while the WSB can “make” regulation on tariffs.</p> <p>This implies that the WSBs could:</p> <ul style="list-style-type: none"> <li>Make their own regulations without regard for the WSRB guidelines</li> <li>Could make regulations with respect to the</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					procedures for setting their own tariffs which is clearly not advisable
<p><b>Determination</b> (Tariff ‘determination’ refers to the process for determining the allowable tariff level to be charged to consumers)</p>	<ul style="list-style-type: none"> <li>▪ WSRB does not have the authority to determine customer tariffs</li> <li>▪ <i>[57(5)] – The WSRB grants the licence which must contain <u>an acceptable tariff structure</u></i></li> </ul> <p>Note:</p> <ul style="list-style-type: none"> <li>▪ The terminology for tariffs is not defined in the Act. The definition of ‘tariff structure’ as used in the Act is not clear.</li> </ul>	<ul style="list-style-type: none"> <li>▪ The authority for the WSB to determine tariff is not clearly specified. Some role in tariff setting is inferred by the power of the WSB to issue regulations but this is not specified.</li> </ul>			<ul style="list-style-type: none"> <li>▪ The responsibility for determining the <u>tariff level</u> is not specified in the Act. This is a gap in the law and should be clarified.</li> <li>▪ Under the sector arrangements, this issue is complex because the tariff will include the costs of the WSBs and the WSPs.</li> </ul>
<b>TARIFF (SEWERAGE)</b>					
<p><b>Principles and Procedures</b></p>		<p><i>[77] .... Sewerage levy should cover a “reasonable” part of the cost of disposing the water</i></p>			<ul style="list-style-type: none"> <li>▪ Sets out the principle that the sewerage levy should cover part of the costs. It is not specified how the difference between the</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					actual cost and the “reasonable” cost will be paid for or who is responsible for bearing the costs.
<b>Determination</b>	<i>[77] RB must be “consulted” in fixing sewerage service levy</i>	<i>[77] A licensee may, in consultation with the RB and approval of Minister, fix and apply a sewerage service levy on all water services</i>	<i>[77] Ministry approval required for sewerage levy</i>		<ul style="list-style-type: none"> <li>▪ Gives Ministry authority for setting sewerage levy</li> <li>▪ It is unclear why this should be the responsibility of the Minister and not the WSRB and why setting tariffs for sewerage should be treated differently than water supply.</li> </ul>
<b>OTHER CHARGES</b>					
<b>Other Charges</b>	<i>[47(o)] In accordance with National Water Strategy, determine fees, levies, premiums, and other charges to be imposed for water services</i>				<ul style="list-style-type: none"> <li>▪ It is unclear what these “fees, levies, premium, and other charges” refer to.</li> <li>▪ The provision refers to the National Water Strategy, however, it is unlike that this time of</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					document would contain this level of detail. The draft National Strategy does not appear to address this.
<b>LICENCE</b>					
<b>Develop / Issue</b>	<p><i>[47(a)] To issue licences for the provision of water services to customers</i></p> <p><i>[57(1)] RB shall prescribe form for use in making an application</i></p> <p><i>[57(4)] RB shall determine an application for a licence by granting the licence or rejecting the application</i></p> <p><i>[57(5)] Application shall not be granted unless RB is satisfied that: WSB has technical and financial competence, presented sound plan, satisfactory performance targets and tariff structure, will work on commercial basis</i></p> <p><i>[57(6)] Application subject to</i></p>	<p><i>[57(1)] Application for a licence may be made only by a water service board, and shall be made to the RB</i></p>			<ul style="list-style-type: none"> <li>▪ The WSRB's responsibility to develop and issue licences is clear</li> <li>▪ The Act envisions that the licences will be renewed on a periodic basis (the time period is not specified). The Act envisions that during this application process the WSRB will review the technical and financial proposals of the WSB. This implies that the WSRB would review and determine issues related to tariffs and performance at this point.</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
	<i>public consultation and where applicable to EIA</i>				<ul style="list-style-type: none"> <li>▪ The entire licence should not be delayed because of the need for an EIA. The EIA requirements must be specified as being applicable to the projects developed under the licence and not to the licence itself.</li> </ul>
<b>Monitor</b>	<i>[47(e)] To monitor and regulate licences</i>				<ul style="list-style-type: none"> <li>▪ While this provision is clear, but key issue is that the service will be provided directly the WSPs</li> </ul>
<b>Enforce</b>	<i>[47(e)] To enforce licence conditions</i>				<ul style="list-style-type: none"> <li>▪ Same comment as above</li> </ul>
<b>Amend/Renewal</b>	<p><i>(renewal) [62(a)] RB may, on the application of a licence, vary the terms and conditions of a licence</i></p> <p><i>[62(2)] No variation can be made without prior public consultation (except under rules)</i></p>				<ul style="list-style-type: none"> <li>▪ It is unclear whether the licence can be amended unilaterally or requires mutually agreement.</li> <li>▪ Under the sector structure, the licence may be used to set out</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					<p>the regulatory requirements but should not be used as a short-term regulatory tool because WSB's are statutory bodies and will have significant investment responsibilities. Licences should be either indefinite or of a long-term duration (25-30 years).</p>
<b>SERVICE QUALITY/TECHNICAL STANDARDS/PERFORMANCE</b>					
<b>Develop/Issue (Gazette)</b>	<p><i>[47(b)] To determine standards for the provision of water services to customers</i></p> <p><i>[47(k)] To develop guidelines on regulations for the provision of water services to be adopted by the licences</i></p>	<p><i>[73(a)] A licensee shall make regulations for the provision of water services</i></p>			<ul style="list-style-type: none"> <li>▪ In developing standards for provision of water services, the WSRB should take into account the different categories of WSPs</li> <li>▪ The use of performance indicators is not</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					explicitly provided for in the Act. It is suggested that performance indicators be adopted under the provisions of 47(k) and specified in the licence.
<b>Monitor</b>	<i>[47(d)] Monitor compliance with established standards for the design, construction, operation and maintenance of facilities for water services</i>				<ul style="list-style-type: none"> <li>▪ The direct responsibility for monitoring should be with the WSB under the SPA</li> <li>▪ The WSRB should monitor compliance based on submissions of WSB reports and period validations as necessary.</li> </ul>
<b>Enforce</b>	<i>[47(e)] monitor and regulate licences and to enforce licence conditions</i>				<ul style="list-style-type: none"> <li>▪ The requirement to achieve the standards must be set out in the licence in order to give the WSRB the authority to enforce the standards.</li> <li>▪ However, it is noted that the WSPs will be</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					<p>the one actually responsible for the targets; therefore, the reference to the standards should be reflected in the SPA.</p> <ul style="list-style-type: none"> <li>▪ The SPA should also reflect that the WSP would be responsible for any penalties imposed on the WSB due to a failure of a WSP to meet the standards.</li> </ul>
<b>Drinking Water Quality</b>					
<b>Standards</b>	Role not specified		National Environmental Management Authority		<ul style="list-style-type: none"> <li>▪ It is understood that the standards developed by NEMA are not yet binding.</li> </ul>
<b>Monitoring / Enforcement</b>	Role not specified				<ul style="list-style-type: none"> <li>▪ It should be clarified whether this will be a responsibility of WSRB. This authority could be interpreted under 47(e)</li> <li>▪ It is again noted that</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					the WSPs will be responsible for providing water and provisions for monitoring and enforcement under the SPA.
<b>CUSTOMER MANAGEMENT</b>					
<b>Develop procedures</b>	<ul style="list-style-type: none"> <li>[47(e)] <i>To establish procedures for handling complaints made by consumers against licensees.</i></li> </ul>	<ul style="list-style-type: none"> <li>The WSBs should be required by regulation and/or in the licence to require WSPs to comply with a Customer Charter and follow customer complaints procedures.</li> </ul>			<ul style="list-style-type: none"> <li>There is little mention in the Act of customer services or customer protection</li> </ul>
<b>Monitor</b>					<ul style="list-style-type: none"> <li>No specific mention. Generally covered by 47(e)</li> </ul>
<b>Enforce</b>					<ul style="list-style-type: none"> <li>No specific mention. Generally covered by 47(e)</li> </ul>
<b>ENFORCEMENT</b>					

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
<p><b>Available enforcement options</b></p>	<ul style="list-style-type: none"> <li>▪ <i>[47(2)] The RB may, with the consent of the AG, given under the Criminal Procedure Code, undertake the prosecution of any offenses arising under this Act or in connection with the performance of its functions</i></li> </ul>			<ul style="list-style-type: none"> <li>▪ <i>[61(3)(c)] may provide that a contravention of any [rule made under the Act], or of any specified, conditions prescribed by or under this Act as conditions of licences shall constitute an offence punishable by a penalty not exceeding one hundred thousand shilling</i></li> </ul>	<ul style="list-style-type: none"> <li>▪ The options include bringing a criminal charge (requires consent of AG); imposing a penalty, or in extreme cases revoking the licence.</li> <li>▪ In most, cases the option would be to impose the penalties; however, as this is limited to 100,000 ksh per incident and the WSRB would have to lay the charge before a magistrate</li> <li>▪ Although these enforcement mechanisms are provided for in the act, they appear cumbersome to apply and not particular useful for compliance failures such as WSB failing to submit a strategic plan or a report.</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
Available penalties				[61(3)(c)] ... shall constitute an offence punishable by a penalty not exceeding one hundred thousand shilling	<ul style="list-style-type: none"> <li>This can be applied per offense.</li> </ul>
Enforcement Authority	<i>[47(2)] The RB may, with the consent of the AG, given under the Criminal Procedure Code, undertake the prosecution of any offenses arising under this Act or in connection with the performance of its functions</i>		The Attorney General must give its consent to undertake prosecution.		<ul style="list-style-type: none"> <li>The enforcement powers of WSB are not specific. These would need to be set out in the SPA</li> </ul>
Auditing	<ul style="list-style-type: none"> <li>The right to conduct audits can be interpreted as part of WRSB's authority under 47(e)</li> </ul>	<ul style="list-style-type: none"> <li>The right of WSBs to conduct audits for WSPs must be provided for in the SPA</li> </ul>			<ul style="list-style-type: none"> <li>The authority to conduct audits is not expressly provided for in the Act.. Regulations should be developed on auditing procedures.</li> </ul>
Inspections	<ul style="list-style-type: none"> <li>The right to conduct audits can be interpreted as part of WRSB's authority under 47(e)</li> </ul>	<ul style="list-style-type: none"> <li>The right of WSBs to conduct inspections for WSPs must be provided for in the SPA</li> </ul>			<ul style="list-style-type: none"> <li>The authority to conduct inspections is not expressly provided for in the Act. Regulations should be developed on inspections</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					procurements.
<b>SERVICE PROVISION AGREEMENTS</b>					
<b>Develop</b>	[47(i)] Develop model performance agreements for use between licensees and water service providers				
<b>Enter into</b>	<i>[55(2)] The arrangements with the WSP must be approved by the RB</i>	<i>[55(1)] WSB may arrange for the exercise and performance of all or any of its powers and functions under the licence by one or more agents, to be known as water service providers</i>  <i>[55(2)] Arrangement must be reduced in writing</i>			
<b>Monitor</b>	<i>[47(j)] Monitor the operation of agreements between WSB and WSB...</i>				<ul style="list-style-type: none"> <li>It is valid for the WSRB to be responsible for monitoring the functioning of the SPAs; however, it should do this an arm's length and only intervene when there</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
					is just cause
Enforce	<i>[47(i)] ...and to take appropriate action to improve their effectiveness</i>				<ul style="list-style-type: none"> <li>It is valid for the WSRB to be responsible for taking actions to improve the functioning of the SPAs; however, the powers for the WSRB to intervene without due cause should be limited.</li> </ul>
<b>DISPUTE RESOLUTION</b>					
Develop Procedures			<i>[88] The Water Appeals Board may make rules for or with respect to the lodgement, hearing and disposal of appeals and other matters before it.</i>		<ul style="list-style-type: none"> <li>The Act only provides for rules regarding appeals to the WAB and not to disputes addressed at other levels</li> </ul>
Dispute Resolution Role/Activities	<i>[57(8)] (licence application)... an applicant or objector may, if aggrieved by the decision, within thirty days after the date of notification, appeal to the WAB against the decision</i>				<ul style="list-style-type: none"> <li>The Act only provides for disputes addressed at WAB and not to disputes addressed at other levels</li> </ul>

Regulatory Function	WSRB	WSB	Ministry or Other Entity (as specified)	Responsible Institution Not Specified	Comments
<b>REPORTING</b>					
<b>To WSRB</b>	<i>[50(3)] (national monitoring and information system) RB may require by order any person, within a reasonable time or on a regular basis, to provide it with information, documents, samples or material</i>				<ul style="list-style-type: none"> <li>Information specified relates to that required for the national monitoring and information system and not for regulatory purposes.</li> </ul>
<b>To Public</b>	<i>[50(5)] RB must prepare annual report and make available to public</i>				
<b>To Minister/Other Government</b>	<i>[47(q)] Gather and maintain information on water services and from time to time publish forecast, projections and information on water services</i>				

# Appendix B: Rights and Responsibilities of Customers

## B.1 Rights of Consumers

Consumers have a right to:

- Be connected in a non-discriminatory manner to water services if such services are available within a reasonable distance from the premises at which the services are desired
- Be informed of the contractual terms and conditions under which the services will be provided
- Be informed by the service provider of all applicable tariffs and tariff options
- Receive a prompt and courteous answer to all requests for information, installations, removals, disconnections, etc.
- Receive a continuous supply of water complying with all national quality standards and at approved pressure, unless the contractual quality of service cannot be delivered for reasons beyond the reasonable control of the service provider
- Be assured that the confidentiality of the individual information be maintained, except as provided for in the law
- Have the regulatory agency review decisions by the service provider on any matter adversely affecting the customer
- Receive prior notification of planned service interruptions
- Have service promptly restored after planned or unplanned interruptions
- Be informed promptly by the service provider of events which have caused interruption of service or reduction in the quality of service
- Have their water consumption metered and the meter regularly read at the intervals specified in the terms and conditions of service
- Promptly receive written invoices for water consumed in accordance with, and at the intervals specified in, the terms and conditions of service
- Have the accuracy of the water meter checked at reasonable intervals at no direct cost to them
- Advice from the service provider on measures to optimize the efficiency and economy of water usage
- Receive compensation for damage to health, limb or property suffered as a direct result of negligence on the part of the service provider, its employees or its agents.

## **B.2 Duties of Consumers**

Consumers have a statutory duty to:

- Install, at their own cost, the plumbing required on their property according to approved safety and technical standards
- Abstain from reselling water, unless specifically authorized by the service provider
- Pay for services received and comply with their other obligations under the contractual terms and conditions of service
- Protect the property of the service provider which may be installed on their premises or otherwise legitimately placed under their care and protection
- Abstain from tampering or altering meters and other equipment owned by the service provider
- Allow the service provider's employees or agents to enter their property for the purposes of inspection or servicing of the supply facilities, including the water meter
- Settle all invoices received for water consumed within the period specified in the terms and conditions of service
- Notify the service provider if invoices are not at the scheduled times
- Promptly inform the service provider in the event of their being unable to discharge their financial obligations, or if they consider that an error has been made in the calculation of their invoices, and attempt to arrive at a mutually acceptable payment schedule
- Inform the service provider of any hazard that may jeopardize water services to themselves or other consumers.

## Appendix C: Kenya Water Sector Regulatory Board Proposed Organizational Structure

