

Supporting Poor-Inclusive WSS Sector Reform

Devolution in Kenya: Opportunities and Challenges for the Water Sector

September 2013

Devolution under Kenya's new 2010 Constitution has wide-ranging implications for the water sector. The Constitution recognizes that access to safe and sufficient water is a basic human right. It also assigns responsibility for water supply and sanitation provision to 47 newly established counties.

Effective implementation of the new devolved framework now requires the water sector to focus on the emerging opportunities and to address a number of challenges. This note analyses the pertinent issues and options for national government and county leadership to achieve sustainable delivery of improved water services under the new dispensation.

RAPID DEVOLUTION OF WATER SERVICES REQUIRES GREATER CLARITY AND CERTAINTY ON KEY ISSUES

The new government of Kenya elected in March 2013 committed itself to rapid transfer of devolved functions to the counties. This position, marked by an allocation of funding to counties, signaled a hastened pace of devolution compared to the earlier envisaged phased transfer of functions over a three-year period which was contingent on whether counties were deemed to have the necessary capacity to take charge of a function. Counties now need to make sure their budgets provide adequate financing for the recurrent and development costs of water service provision, in particular to personnel and operations and maintenance costs.

While phased transfer of functions may remain necessary, it will have to be based on agreement with counties about gradually developing new arrangements, rather than in a single leap. Reaching and acting upon such agreement will require a clear understanding of the respective roles of the national and county governments, and systematic attention to key aspects of the devolution framework and the process for implementing it.

KEY FINDINGS

1. Smooth devolution of water services calls for Governors and county leadership to drive reform, but without disrupting services.
2. Well-performing water companies can play an indispensable role in strengthening the legitimacy of counties.
3. Devolution of water services still requires greater clarity and certainty on pertinent issues.
4. Counties must budget for the recurrent and development costs of water service provision, ensuring adequate resources for personnel and operations and maintenance costs to sustain services.
5. The national water regulator should play a strong role in monitoring sector performance and enforcing compliance.
6. There is a need to increase funding for the water sector, including clarifying the role of domestic commercial finance, invest smartly and ensure effective financing flows.
7. Supportive policy and legislation are needed to anchor the constitutional right to water and ensure sustainable services focusing on the poor and underserved.
8. National government is mandated to support counties, and to do so in consultation with county leadership and stakeholders, focusing on clarifying role of the regional boards.

In the current scenario, devolution is likely to proceed for some time under existing legislation. Aligning legislation with the new Constitution brings to fore some important policy uncertainties, especially in three areas:

- ▶ **Definitions and what they mean for responsibilities:** The terms “national public works,” “county public works” and “public investment” used in Schedule 4 of the Constitution are not clearly defined as they apply to water services. On the other hand, the Schedule defines the respective duties and responsibilities of national and county governments for investing in and managing these services. These issues should be considered when debating a new Water Bill and when developing policies and plans for expanding capital investment.
- ▶ **Charges for water:** Some counties are under the impression that they can charge for the export of water from their counties to other counties. This false perception should be addressed and corrected as it contradicts the letter and intent of the Constitution and existing laws.
- ▶ **The future of water services boards is not clear** (See Box 1). The current government has indicated support for a merger of Water Services Boards (WSBs) into a single national body, but this has not yet been formalized and there is no consensus about the issue in the sector. There is an opposing view that the functions of WSBs should be devolved to counties. The costs and benefits of these options have yet to be analysed and considered. It is necessary to develop a clearer sense of the criteria, processes for decision-making and the full implications of all options.

The inter-governmental sector forums provide a mechanism for clarifying and resolving areas of uncertainty. In other decentralized systems like Australia and South Africa, such forums have been very helpful to ensure continuous dialogue and consensus building between the different levels of government, and the Kenyan water sector can only benefit from an effective sector forum for the national and county levels.

GROUND RULES FOR A SMOOTH DEVOLUTION PROCESS

In practice, water services were already largely devolved to the local level (through local water companies for urban areas and community schemes in rural areas). To ensure smooth transfer to counties in the new system, county leadership may want to focus on five key aspects:

- ▶ **Keep the water running.** County leadership may want to change the way water services are provided by, for example, creating county water providers and/or taking over the functions of Water Services Boards. Care should be taken in assessing the options because major institutional reforms often lead to unintended outcomes, and are therefore risky. In the interim, everyone has an

interest in ensuring that services are kept running and this should be the priority focus in the short term.

- ▶ **Enable the water sector to satisfy both the electorate and governors.** Good performance means a more reliable service and contented citizenry. Good financial performance will also contribute positively to the county. The local and international evidence is clear—water providers that are managed professionally and that are governed well (through an independent and dedicated board) mostly perform better than in-house government-run providers. Good performance can only be ascertained if it is measured against agreed benchmarks, reported on regularly and audited periodically. The national water regulator is a key ally in this process, and governors may want to clarify how they can best make use of this resource.
- ▶ **Sustainable services lead to contented customers.** County governments are required by the County Government Act to ensure that services are provided in a financially sustainable manner. A lot of progress has been made in the water sector in Kenya over the last ten years by applying principles of financial viability and sustainability. As a result, increased services have been provided to more people more reliably. There is evidence that customers can contribute to the full cost of providing services. This means that a water service provider can deliver reliable services through proper maintenance and on-going investment in the service without relying on external support. In rural areas users can cover operating costs.
- ▶ **Keep an eye on key outcomes.** Counties have a constitutional obligation to give priority to basic needs. Access to water and sanitation is one of the most important outcomes to watch with focus on ensuring access improvement for the poor while tracking gender aspects.
- ▶ **Delegate.** In the devolved counties, governors have overarching responsibilities across sectors. This implies that they should rely on dedicated political and technical teams, for example, led by a Cabinet Secretary and County Water Director to take charge of water affairs. This will free governors to focus on the strategic aspects of the water devolution process, with specialists dealing with practical operational issues. Box 2 suggests some priority water sector related tasks for county governments.

WELL-PERFORMING WATER COMPANIES CAN BE INDISPENSABLE TO COUNTIES

The sector reforms over the past decade required public water companies to be governed by boards of directors and to enter into performance contracts with Water Services Boards—the asset holder and licensing authority. Broader reforms in corporate governance sought to establish autonomous and independently registered water utilities that were governed

BOX 1: THE FUTURE OF WATER SERVICES BOARDS

The current legislation—Water Act (2002)—mandates Water Services Boards to ensure efficient and economical provision of water services under licences issued by the Water Services Regulatory Board. The new Constitution allocates that responsibility to the counties. The role and functions of WSBs therefore need to change.

The government has considered creating a single national Water Works Development Board that will develop and manage “national public works” assets (water assets of national and strategic importance and cross-county water assets).

The assets held and/or managed by existing WSBs will need to be categorized into national public works assets and county assets, and national assets moved to the National Water Works Board and counties, respectively. Past experience suggests that these processes are likely to take a long time and require support from the National Treasury: the earlier reforms initiated in 2002 that intended to transfer assets from local government to the WSBs were not completed by the time the new Constitution came into force.

There are three broad options to consider:

Option	Advantages	Disadvantages
1. Maintain status quo (regional Water Services Boards as asset holding authority with mandate to invest in water services).	<ul style="list-style-type: none"> • Continuity & stability. 	<ul style="list-style-type: none"> • Could be contested by counties as unconstitutional as the responsibility for water services has been devolved to counties. This means that Water Services Boards would need to be answerable to County governments so the governance of the WSBs would need to change.
2. Create single national entity with responsibility for “national public works” investments in water services.	<ul style="list-style-type: none"> • Places responsibility for national government investments in one agency. • Creates clarity if investment responsibilities (“national public works”) are clearly defined. • Meets constitutional requirement if investments are restricted to “national public works.” • Could provide support to counties and act as an agent of counties. 	<ul style="list-style-type: none"> • Significant institutional reform required (amalgamation of existing water boards into one). • WSB staff may fear redundancy and/or resist change. • While it would meet constitutional requirements if the Board’s role is confined to national public works, it still leaves the assignment of other functions unresolved
3. Devolve county-level investment functions (“county public works”) to county level	<ul style="list-style-type: none"> • This is necessary to meet constitutional requirements. 	<ul style="list-style-type: none"> • County governments may not have the capacity to undertake this function. They could be supported or they could request another agency to undertake the function on their behalf.

The immediate focus needs to be on continuity of services, paying attention to how water services are operated and by whom, and what happens to revenue (and liabilities). At the same time, and

in parallel, the matter of asset transfers needs to be dealt with expeditiously. Of particular importance is how investments in new infrastructure are funded.

BOX 2: PRIORITY TASKS IN COUNTY PLANNING AND BUDGETING FOR WATER SERVICES

The County Government Act requires the county to prepare an investment plan and a budget. In doing so, counties may wish to prioritize on the following tasks:

- **Understand current operations** by visiting and engaging with current service providers (urban and rural).
- **Understand the money** by understanding the budgets of existing water service providers—revenues, expenses—and capital budgets and financing arrangements (the flow of grants for capital development and loans and liabilities).
- **Understand current skills availability** in the county, noting particularly the availability of experience and skills in the water services providers that might be made available to the county on a part-time basis to support the needs of the county (for planning and budgeting, for example).
- **Understand current outcomes, sustainability and performance.** The regulator may already have a lot of this data and is a key resource.
- **Focus on operations.** Matters related to asset ownership have featured prominently, as they affect who owns them, how and when they will get transferred. However, the asset ownership debate could easily distract from more immediate issues of prudent financial and operational management. Given the urgent operational issues, these weighty issues can probably be dealt with later.
- **Prepare a county water plan and budget** as required by law. The above tasks are necessary to prepare a good plan and budget.

County governments can request support from the Ministry of Environment, Water and Natural Resources, which has a constitutional responsibility to support counties.

by a board of directors; run by professionals; overseen by a regulator; able to recover costs of operations; contribute to capital costs; and perform effectively.

By mid-2013 some 100 water services providers (65 urban and 35 rural) were providing performance-related data to the national water regulator in line with water sector reforms that were initiated a decade ago. The data shows that these water services providers have increased access to water and sanitation services and improved overall financial sustainability of the sector (see Figure 1).

In rural areas, there have been a variety of structures from community-based to government funded schemes. A careful review of these models and options for the future would be of great value at this point. County leadership should recognize water companies as valuable entities to be protected during the transition and strengthened and expanded over time. If managed well and held to account, these utilities can play a constructive role in improving services and strengthening the legitimacy of county governments.

INCOME FROM WATER SERVICES IS NEEDED TO FUND OPERATIONS, REHABILITATION AND INVESTMENTS

Providing reliable water services in a sustainable, equitable way involves a substantial investment in ongoing operations, maintenance and rehabilitation costs.

Improvements in coverage over the last 10 years have been underpinned by a regulatory framework that leaves operating revenues with water service providers, so they can use these to fund repair of pipes, extend connections, and ensure service fees are collected. Water companies, therefore, should not be seen as sources of revenue to fund other county functions.

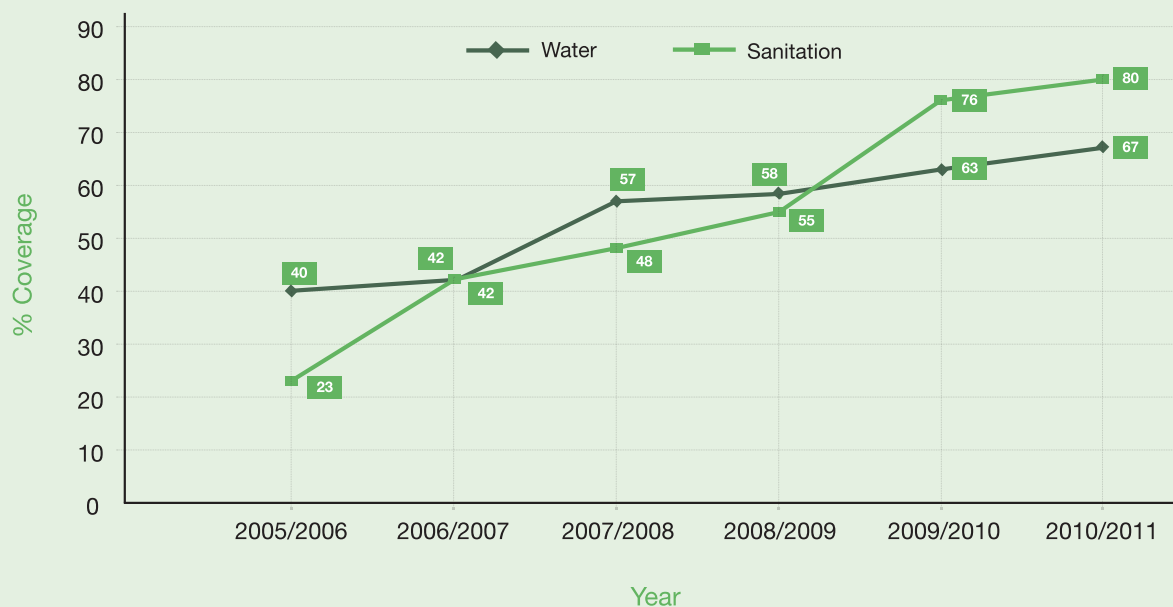
ROLE OF THE NATIONAL WATER REGULATOR

The constitutionally guaranteed right to water provides a strong basis for regulating delivery of services, especially to ensure that this right is progressively realized over time. The national government therefore has the responsibility to set minimum national standards and to monitor the following:

- allocation of funding to the sector and effective use of funds;
- adherence to minimum standards by providers of water services; and,
- provision of water services within the service area, and progress towards meeting constitutional right to water.

The Water Services Regulatory Board (WASREB), the national agency for regulating water services, has been playing an important role in monitoring sector performance. One of the key benefits of having an independent regulator to fulfill this function is the increased transparency and scrutiny of performance that results from this setup.

Harmonizing aspects of tariff setting as provided in current laws (e.g., Urban and Cities Act) with proposed new Policy and Water Act will be critical in ensuring that the role of the national regulator remains strong at the county level. The draft Water Bill envisaged that the national water regulator will directly license water service providers operating in the counties. However, clarity is needed on how licensing arrangements will work after devolution has taken place and before a new Water Act is passed.

FIGURE 1: IMPROVEMENTS IN SERVICES SINCE 2005 (SELECTED PROVIDERS)

Source: WASREB Impact Report 2012

Irrespective of how the licensing arrangements will take shape, the national regulator has an important role to play in monitoring the sector and tracking performance of water services providers.

MAINTAINING AND EXPANDING RESOURCES INVESTED INTO THE SECTOR

Water sector investments by both the government and development partners have increased substantially since 2002. Development partners fund the bulk of capital investment in the sector, followed by the national government budget and contributions from users. The gross budget for capital investments in water services was KES24 billion in 2013/2014, of which KES13.6 billion is Appropriations in Aid. In contrast, the development budget attributed to county level activity for water services in 2012/2013 was only KES0.03 billion, representing a small fraction of the national budget for water and sanitation services.

The level of investments will need to be increased and spent well. In the context of devolution, existing and new money flows for investment will have to be evaluated and agreements reached between national and county government about how these investments are reorganized. It is important that devolution of capital funding arrangements is well managed to maintain and grow the level of funding in the sector to meet the

aspiration for water to all Kenyans, and comply with Articles 212 and 213 which guide borrowing by counties.

New funding flows will depend on how existing financing arrangements are managed. There needs to be confidence in the system. Existing financing agreements need to be honored and any changes negotiated and agreed with financiers. It is unclear how funding partners will support the sector in future, although they are at liberty to channel funds to either the national or county level, or both. Reorganisation of sector financing will be a complex and time-consuming process. The process will require a champion and has to be facilitated. A County Support Unit could possibly fulfill these two roles, under the guidance of the national government and proposed County Water Forum.

SUPPORTIVE POLICY AND LEGISLATION

The water sector lacks a clear sector-specific policy and legal framework to operationalize devolution. A revised Water Policy and Water Act fully consistent with the Constitution, government policies and legislation will make the devolution process smoother, particularly on issues such as the transfer of staff and assets to counties. A new Water Act will also benefit the inevitable reforms of institutions with oversight or supervisory roles over the sector.

In the absence of a revised Water Policy and Water Act, the existing policy uncertainties identified above need to be resolved to enable devolution to proceed smoothly. The draft Water Policy and Water Bill that were under discussion shortly before the devolved system came into effect contain a number of aspects that are relevant for future development of the water sector in a way that promotes the right to water, ensures sustainable provision of water services, guides future institutional structure of the sector at the county level. Key provisions in the Water Bill are identified in Box 3.

NATIONAL GOVERNMENT MANDATED TO SUPPORT COUNTIES

National government has a duty and mandate to support county governments. The main roles of the Ministry of Environment, Water and Natural Resources are to:

- develop and oversee national sector policy and legislation
- support counties in the provision of water services
- facilitate funding for the sector (capital and subsidies)
- oversee sector coordination, strategy and planning.

In the devolved framework, it will be important for any support to be developed and finalized in consultation with the counties and in response to requests from counties. Against this background, the Ministry of Environment, Water and Natural Resources is planning and developing a framework for consultation with county governments about assistance to counties in undertaking priority tasks related to the devolution process. These include staff establishment, planning, budgeting and performance management, as well as the broader process of institutional reform. The Ministry also intends to develop practical knowledge materials (such as templates, guidelines, sample budgets and plans, and so on) geared towards staff training, knowledge exchange and dialogue.

Also under consideration is a technical assistance facility that can be used on a draw down basis by individual counties for supporting needs that are specific to individual counties (for example, assistance with issues related to institutional reforms in the country, negotiation of service agreements, and so on). Establishment of a County Water Forum could offer an important way to support learning and engagement between counties and national government.

CONCLUSION

Water services in Kenya are at an important and exciting crossroad. Devolution of the water services function has assigned responsibility for water provision to democratically elected county governments that now face the challenge of being responsive to the needs of their electorates and to honor the constitutional obligation to progressively provide water services to all people. The role of national government will

BOX 3: WHAT THE DRAFT WATER BILL PROPOSED

Right to water. The constitutional right to water is explicitly recognized.

Allocation of responsibility. County governments will be responsible for establishing water service providers or alternative provision arrangements for urban and rural areas for both the development and management of water services.

Definitions. The draft Bill distinguishes between “national public works” (water infrastructure of national or strategic importance and cross-county infrastructure) and county water infrastructure.

Transfers. Provision for the transfer of assets, rights, liabilities, obligations, agreements and other arrangements from Water Services Boards to either the County Service Providers (county infrastructure) or the proposed Water Works Development Boards (national public works infrastructure).

Licensing. Provision for the licensing of water service providers by a national regulator.

Cost-recovery and ring-fencing. Provision of water services on a cost-recovery basis wherever feasible and for ring-fencing of water revenues for purposes of operating and maintaining assets and contributing to capital costs.

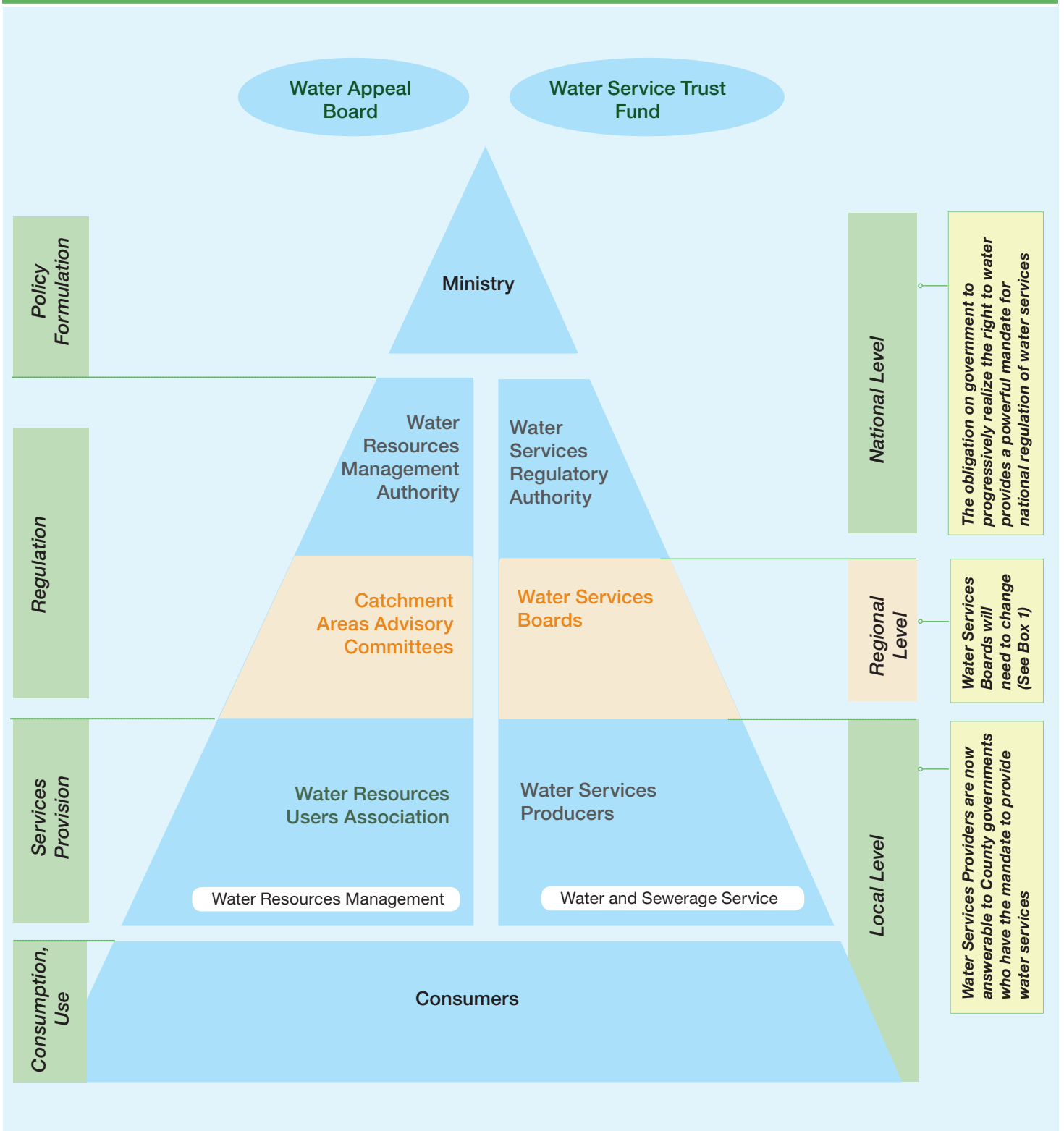
County water services providers. Formation of county-level water services providers, set up as companies under the Companies Act and the merging of multiply water companies in a county into a single county water services provider.

change to policy development, sector oversight and support (See Figure 2).

An independent regulator can play an important role to monitor progress on the right of water and ensure funds are effectively spent. The track record of water companies shows that they continue to make an important contribution in service delivery, and county governments would be well-advised to build on this momentum, rather than overhauling the system rapidly.

Understanding and addressing the challenges identified in this note can help smoothen the transition process, ensuring that services continue to be delivered and access extended while policy and institutional reforms are designed and implemented.

FIGURE 2: IMPLICATIONS OF NEW CONSTITUTION ON CURRENT WATER SECTOR INSTITUTIONAL ARRANGEMENTS



BOX 4: RELEVANT FACILITATIVE LEGISLATION

In addition to existing legislation, various laws have been enacted by Parliament to facilitate achievement of the objectives of devolution. Those relevant to the water sector include:

- Constitution of Kenya 2010
- County Government Act (No. 17 of 2012)
- County Governments Public Finance Management Transition Act (No. 8 of 2013)
- Division of Revenue Act (No. 31 of 2013)
- Intergovernmental Relations Act (No. 2 of 2012)
- National Government Co-ordination Act (No.1 of 2013)
- Public Finance Management Act (No. 18 of 2012)
- Transition County Allocation of Revenue Act (No. 6 of 2013)
- Transition to Devolved Government Act (No. 1 of 2012)
- Transition County Appropriation Act (No. 7 of 2013)
- Urban Areas and Cities Act (No. 13 of 2011)
- Water Act (No. 8 of 2002)

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WSP is a multi-donor partnership created in 1978 and administered by the World Bank to support poor people in obtaining affordable, safe, and sustainable access to water and sanitation services. WSP's donors include Australia, Austria, Canada, Denmark, Finland, France, the Bill & Melinda Gates Foundation, Ireland, Luxembourg, Netherlands, Norway, Sweden, Switzerland, United Kingdom, United States, and the World Bank.

The findings, interpretations, and conclusions expressed herein are entirely those of the author and should not be attributed to the World Bank or its affiliated organizations, or to members of the Board of Executive Directors of the World Bank or the governments they represent.

Acknowledgements

This policy note was prepared by Chris Heymans and Patrick Mwangi of WSP, and Rolfe Eberhard (WSP consultant). It was reviewed by Glenn Pearce-Oroz (WSP), Fred Owegi and Kathy Whimp of the World Bank's Kenya Accountable Devolution Program, and edited by Toni Sittoni (WSP).

About this Policy Note

The Constitution of Kenya (2010) lays out an ambitious decentralization strategy with opportunities to improve delivery of basic services, including water and sanitation. This briefing note targets the policy and advocacy audience at national government and county levels involved in the implementation of devolution under the new Constitution. The aim is to identify key transition issues, stimulate debate and inform decision-making in the water and sanitation sector.

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Design/Layout: Eric Lugaka

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