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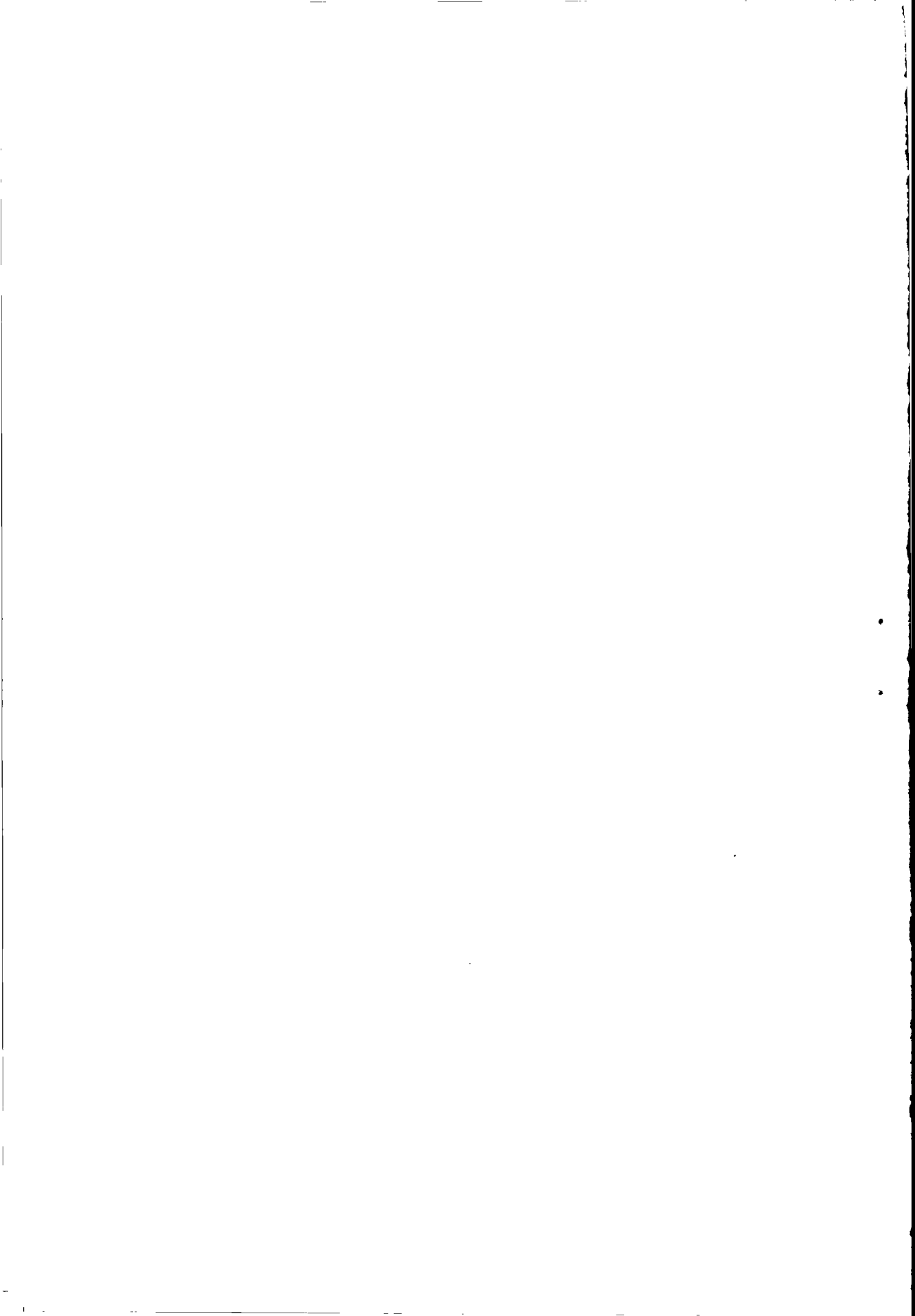
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THE WATER ACT

No. 43 of 2016

Date of Assent: 13th September, 2016

Date of Commencement: By Notice

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THE WATER ACT, 2016

AN ACT of Parliament to provide for the regulation, management and development of water resources, water and sewerage services; and for other connected purposes

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

1. This Act may be cited as the Water Act, 2016 and shall come into operation on such a date as the Cabinet Secretary responsible for matters relating to water may, by notice in the *Gazette*, appoint, and different dates may be appointed for the coming into operation of different provisions.

Short title and commencement.

2. (1) In this Act, unless the context otherwise requires—

Interpretation.

“Authority” means the Water Resources Authority established under section 11;

“aquifer” means an underground geological formation able to store and yield water;

“basin area” means an area designated as such under section 24;

“basin water resources committee” means a water basin organization established under section 25;

“bulk water” means water supplied to a water services provider by the water services provider making the supply;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to water;

“catchment area” means an area that is part of a basin designated as such under section 22;

“charges”, in relation to the use of water from a water resource, includes fees, levies and premiums of any kind;

“county government” means a county government as provided for under Chapter 11 of the Constitution of Kenya;

“county government executive” means the county executive committee member responsible for matters relating to water;

“cross-county water services provider” means a water

services provider providing water services to more than one county;

“easement” means the right to occupy so much of the land of another as may be necessary for or incidental to the construction or maintenance of works authorised, or the exercise of rights conferred by a permit;

“Equalisation Fund” means the Equalisation Fund provided for in Article 204 of the Constitution;

“Fund” means the Water Sector Trust Fund established in section 113;

“ground water” means the water of underground streams, channels, artesian basins, reservoirs, lakes and other bodies of water in the ground, and includes water in interstices below the water table;

“inspector” means a person appointed by the Cabinet Secretary, the Authority, a water basin resources committee, or the Regulatory Board, to exercise the powers of an inspector under this Act;

“in-stream habitat” includes the physical structure of a water resource and the associated vegetation in relation to the bed of the water course;

“international waters” means the ocean water beyond territorial waters;

“Land and Environment Court” means the Land and Environment Court as established under article 162 (2) of the Constitution;

“landholder”, in relation to land, means the registered owner of the land or the person in whom the land is otherwise vested by law, and includes—

- (a) any person who by any established right, custom or estate is entitled to be the holder or possessor of land;
- (b) any person lawfully holding or occupying land in accordance with the provisions of any law empowering the allotment of land upon the promise of title, subject to the fulfilment by the allottee of prescribed conditions; and
- (c) any person to whom a mining lease or mining location has been granted under the Mining Act, 2016;

“licence” means a licence in force under this Act;

“licensee” means a water service provider licensed by the Regulatory Board under this Act;

“limits of supply”, in relation to a water undertaking, means the limits within which the licensee is for the time being authorised to supply water;

“Management Board” means the Board of the Authority established under section 14;

“management of water resources” means the development, augmentation, conservation or protection of a water resource;

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“peri-urban water services” means services provided in peri-urban areas as shall be defined by the Regulatory Board from time to time;

“permit” means a permit for the time being in force under this Act;

“person” includes a company, association or other body of persons whether incorporated or unincorporated;

“pollution”, in relation to a water resource, means any direct or indirect alteration of the physical, thermal, chemical or biological properties of the water resource so as to make it—

- (a) less fit for any beneficial purpose for which it is or is reasonably be expected to be used; or
- (b) harmful or potentially harmful to—
 - (i) the welfare, health or safety of human beings;
 - (ii) any aquatic or non-aquatic life or property; or
 - (iii) the environment;

“public consultation”, in relation to any application made, or action proposed to be taken under this Act, has the meaning assigned to it in section 139;

“reasonable water use” means the use of water without wastage;

“Regulatory Board” means the Water Services Regulatory Board established under section 70;

“reserve”, in relation to a water resource, means that quantity and quality of water required—

- (a) to satisfy basic human needs for all people who

are or may be supplied from the water resource;
and

- (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the water resource;

“resource quality”, in relation to a water resource, means the quality of all the aspects of a water resource including—

- (a) the water quality stipulated for the reserve;
- (b) the quantity, pattern, timing, water level and assurance of in-stream flow;
- (c) the physical, chemical and biological characteristics of the water;
- (d) the character and condition of the in-stream and riparian habitat; and
- (e) the characteristics, condition and distribution of the aquatic biota;

“resource quality objectives”, in relation to a water resource, means the level to be achieved and maintained in each aspect of resource quality for the water resource;

“riparian habitat” means the dynamic complex of plant, animal and micro-organism communities and their non-living environment adjacent to and associated with a watercourse;

“rural water services” means services provided in rural areas as shall be defined by the Regulatory Board;

“Salaries and Remuneration Commission” means the Salaries and Remuneration Commission established under Article 230 of the Constitution;

“sanitation” means the provision of on-site sanitation services including latrines, septic tanks and conservancies including the associated exhauster services;

“sector wide approach” means coordinated development in the sector to achieve national goals, effectiveness of funds and ownership of government institutions including sector wide planning and coordination, national monitoring and information and national implementation concepts;

“sewerage services” means the development and management of infrastructure for transport, storage,

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treatment waste water originating from centralized and decentralized systems but shall not include household sanitation facilities;

“spring” means water emerging from beneath the surface of the ground other than as a result of drilling or excavation operations;

“state organ” has the meaning assigned in Article 260 of the Constitution;

“stream” means the water contained in a watercourse, and includes a river;

“supply of water in bulk” means a supply of water to a licensee for distribution by or on behalf of the licensee taking the supply;

“swamp” means any shallow depression in which water collects either intermittently or permanently and where there is a small depth of surface water or a shallow depth of ground water and a slight range of fluctuation either in the surface level of the water or of the ground water level so as to permit the growth of aquatic vegetation;

“transboundary waters” means water resources shared between Kenya and another State;

“urban water services” means services provided in urban areas as shall be defined by the Regulatory Board from time to time;

“use of water”, in relation to a water resource includes, without any limitation to—

- (a) abstraction, obstruction, impoundment or diversion of water forming part of a water resource;
- (b) the discharge of materials or substances into a water resource; or
- (c) any activity of a kind prescribed by Regulations under this Act, in relation to a water resource;

“watercourse” means any natural channel or depression in which water flows regularly or intermittently, unless declared not to be a watercourse under this Act;

“water resource” means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above

or below the ground, and includes sea water and transboundary waters within the territorial jurisdiction of Kenya;

“water right” means the right to have access to water through a water permit;

“water resource management” means the conservation, including soil and water conservation, protection, development and utilization of water resources; and

“water services” means any services of or incidental to the supply or storage of water and includes the provision of sewerage services;

“water services provider” means a company, public benefits organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence;

“water storage” means a location or structure where water is stored for future use;

“Water Storage Authority” means the National Water Harvesting and Storage Authority established in section 30;

“Water Storage Board” means the Board of the National Water Harvesting and Storage Authority established under section 31;

“Water Strategy” means the Integrated National Water Services Strategy formulated by the Cabinet Secretary in section 64;

“water table” means—

- (a) impervious granular or detrital material, the upper surface of the body of free water which fills all openings in material that is sufficiently pervious to permit percolation; and
- (b) in fractured impervious rocks and in solution openings, the surface at the contact between the water body in the openings and the overlying ground air;

“water user” means a person using water from a water resource;

“water works development agencies” means the agencies of the national government established under

section 65:

“works” means any structure, apparatus, contrivance, device or thing for storing, recharging, treating, carrying, conducting, providing or utilizing water or liquid waste, but does not include hand utensils or such other contrivances as may be prescribed by Regulations made under this Act.

3. The purpose of this Act is to provide for the regulation, management and development of water resources and water and sewerage services in line with the Constitution.

Purpose of the Act.

4. The Cabinet Secretary, the Authority, the Regulatory Board, county governments and any person administering or applying this Act shall be guided by the principles and values set out in Articles 10, 43, 60 and 232 of the Constitution.

Principles

PART II—OWNERSHIP, USE AND MANAGEMENT OF WATER RESOURCES

5. Every water resource is vested in and held by the national government in trust for the people of Kenya.

Ownership of water resources

6. The Authority established in section 11 shall serve as an agent of the national government and regulate the management and use of water resources

Regulation of the management and use of water resources

7. Upon the commencement of this Act, no conveyance, lease or other instrument shall convey, assure, demise, transfer or vest in any person any property, right, interest or privilege in respect of any water resource except as may be prescribed under this Act.

Rights to water resources

8. (1) A national public water works means a water works which has been designated by the Cabinet Secretary, by notice published in the *Gazette*, as a national public water works based on the fact that—

National Public Water Works.

- (a) the water resource on which it depends is of a cross county in nature;
- (b) it is financed out of the national government’s share of national revenue pursuant to the provisions of the Public Finance Management Act, 2012;
- (c) it is intended to serve a function of the national government; or

No 18 of 2012

(d) it is intended to serve a function which, by agreement between the national and county government, has been transferred to the national government.

(2) National public water works include—

(a) water storage;

(b) water works for bulk distribution and provision of water services;

(c) inter-basin water transfer facilities; and

(d) reservoirs for impounding surface run-off and for regulating stream flows to synchronize them with water demand patterns which are of strategic or national importance.

No. 6 of 2012.

(3) A national public water works for domestic use shall, subject to the acquisition of a permit from the Authority in case of inter basin water transfer, take precedence over all other water works for the use of water or the drainage of land.

(4) Subject to the Land Act, 2012, land required for national public water works may be acquired in any manner provided by law for the acquisition of land for public purposes.

(5) The Cabinet Secretary may, after reasonable notice to any landholder concerned, cause to be constructed and maintained upon any land such works as the Cabinet Secretary may consider necessary for the purposes of any national public water works.

(6) Compensation on just terms shall be payable by the Government to the owner of the land on which any such works are constructed, but in assessing the amount of compensation payable, the Cabinet Secretary shall take into consideration any benefit accruing to the land by the construction of the works and any adverse effect on the land caused by the works, as the case may be.

(7) The Cabinet Secretary shall make Regulations for the better carrying into effect of subsections (5) and (6).

9. Every person has the right to access water resources, whose administration is the function of the

Administration of
National Water
Resources.

national government as stipulated in the Fourth Schedule to the Constitution.

10. (1) The Cabinet Secretary shall, within one year of the commencement of this Act and every five years thereafter, following public participation, formulate a National Water Resource Strategy.

National Water
Resource
Strategy

(2) The object of the National Water Resource Strategy shall be to provide the Government's plans and programs for the protection, conservation, control and management of water resources.

(3) The National Water Resource Strategy shall contain, among other things, details of—

- (a) existing water resources and their defined riparian areas;
- (a) measures for the protection, conservation, control and management of water resources and approved land use for the riparian area;
- (b) minimum water reserve levels at national and county levels;
- (c) institutional capacity for water research and technological development;
- (d) functional responsibility for national and county governments in relation to water resources management; and
- (e) any other matters the Cabinet Secretary considers necessary.

(4) The Cabinet Secretary shall—

- (a) prepare and issue an annual report on the state of national water resource strategies in Kenya; and
- (b) may direct any lead agency to prepare and submit to it a report on the state of national water resources under the administration of that lead agency.

(5) The Cabinet Secretary shall review the National Water Resource Strategy every three years.

PART III—REGULATION OF THE MANAGEMENT AND USE OF WATER RESOURCES

Water Resources Authority

11. (1) There is established the Water Resources Authority.

Establishment of
the Authority.

(2) The Authority is a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of—

- (a) suing and being sued;
- (b) taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property; and
- (c) doing or performing all such other things or acts for the proper discharge of its functions under this Act and any other written law as may be lawfully done or performed by a body corporate.

12. The functions of the Authority are to—

Functions of the Authority.

- (a) formulate and enforce standards, procedures and Regulations for the management and use of water resources and flood mitigation;
- (b) regulate the management and use of water resources;
- (c) enforce Regulations made under this Act;
- (d) receive water permit applications for water abstraction, water use and recharge and determine, issue, vary water permits; and enforce the conditions of those permits;
- (e) collect water permit fees and water use charges;
- (f) determine and set permit and water use fees;
- (g) provide information and advice to the Cabinet Secretary for formulation of policy on national water resource management, water storage and flood control strategies;
- (h) coordinate with other regional, national and international bodies for the better regulation of the management and use of water resources; and
- (i) advise the Cabinet Secretary generally on the management and use of water resources.

13. (1) The Authority shall have all the powers necessary for the execution of its functions under this Act.

Powers of the Authority.

(2) Without prejudice to the generality of subsection (1), the Authority shall have the power to—

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- (a) source and receive funding for the activities of the Authority;
- (b) collect, analyze and disseminate information on water resources;
- (c) monitor compliance by water users with the conditions of permits and the requirements of the Act;
- (d) issue permits for inter-basin water transfer; and
- (e) delegate regulatory functions to the basin water resource committees provided for under section 25.

14. (1) The powers and functions of the Authority shall be exercised and performed under the direction of a Management Board, which consists of—

Management Board.

- (a) a chairperson, who shall be appointed by the President; and
- (b) the Principal Secretary responsible for matters relating to finance or his representative;
- (c) the Principal Secretary responsible for matters relating to water or his representative;
- (d) the Principal Secretary responsible for matters relating to the environment or his representative;
- (e) the Principal Secretary responsible for matters relating to land or his representative;
- (f) four other members, who shall be appointed by the Cabinet Secretary; and
- (c) the Chief Executive Officer.

(2) The Chief Executive Officer shall be an *ex officio* member of the Management Board with no voting rights.

(3) The chairperson and members of the Management Board shall hold relevant professional qualifications and experience and shall be appointed following an open and competitive recruitment process.

(4) The First Schedule has effect with respect to the membership and procedure of the Management Board.

15. The Management Board shall be responsible for overseeing the operations of the Authority with the goal of—

General duties and responsibilities of the Management Board.

- (a) securing continuing improvements of performance;
- (b) protecting the long term viability of the Authority; and
- (c) ensuring fiscal discipline of the Authority.

16. (1) The Management Board shall have all powers necessary for the proper performance of the functions of the Authority under this Act.

Powers of the Management Board.

(2) Without prejudice to the generality of the foregoing, the Management Board shall have power to—

- (a) administer the assets of the Authority in such manner as best promotes the purpose for which the Authority is established;
- (b) ensure protection, where necessary, of the assets and developments of the Authority;
- (c) determine the provisions to be made for capital and recurrent expenditure and for the reserves of the Authority;
- (d) receive any grants, gifts, donations or endowments and make legitimate disbursements there from;
- (e) invest any funds of the Authority not immediately required for its purposes;
- (f) delegate any of its powers; and
- (g) undertake any activity necessary for the fulfillment of any of the functions of the Authority.

17. (1) The Cabinet Secretary shall, on the recommendation of the Management Board, appoint a Chief Executive Officer of the Authority on such terms and conditions as may be specified in the instrument of appointment.

Chief Executive Officer.

(2) A person is qualified for appointment as Chief Executive Officer if that person—

- (a) is a citizen of Kenya;
- (b) holds a degree from a university recognized in Kenya;
- (c) has at least ten years relevant work experience with at least five years in a senior management position either in a public service or private sector organization; and

(d) meets the requirements of leadership and integrity set out in Chapter Six of the Constitution.

(3) The Chief Executive Officer is the accounting officer of the Authority.

(4) The Chief Executive Officer is subject to the direction of the Management Board and is responsible to it for the—

(a) implementation of the decisions of the Management Board;

(b) day to day management of the affairs of the Management Board;

(c) organization and management of the employees; and

(d) any other function that may be assigned by the Management Board.

(5) The Chief Executive Officer shall hold office for a term of five years and is eligible for re-appointment for one further term upon exemplary performance.

18. The Chief Executive Officer may be removed from office by the Cabinet Secretary on the recommendation of the Management Board, in accordance with the terms and conditions of service.

Removal of the Chief Executive Officer.

19. (1) The Authority may appoint such other employees as it may consider necessary for the performance of its functions under this Act.

Employees of the Authority

(2) The terms and conditions of service of the employees of the Authority shall be determined by the Cabinet Secretary responsible for public service on the advice of the Salaries and Remuneration Commission.

20. (1) The Authority shall prescribe the criteria for classifying water resources for the purpose of determining water resources quality objectives for each class of water resource.

Classification of water resources and determination of quality objectives.

(2) The prescribed classification criteria shall take into account—

(a) trans-boundary considerations;

(b) strategic functions served by the water resource;