



## **COMPLIANCE AND ENFORCEMENT STRATEGY**

**November 2023**

## Table of Contents

1. PREAMBLE.....	5
1.1 Introduction.....	5
1.2 Functions of the Regulator .....	5
1.3 Function of County Governments in Water and Sanitation Services .....	6
1.4 Purpose of the Compliance and Enforcement Strategy .....	6
2. OBJECTIVES OF THE COMPLIANCE AND ENFORCEMENT .....	8
3. WASREB'S MANDATE IN COMPLIANCE AND ENFORCEMENT .....	9
4. METHODS TO ENSURE COMPLIANCE.....	11
4.1 Approach One – Informing .....	12
4.2 Approach Two – Encouraging .....	13
4.3 Approach Three – Assisting .....	13
4.4 Approach Four – Monitoring .....	14
4.5 Approach Five – Warning.....	14
4.6 Approach Six – Special Regulatory Regime .....	15
4.6.1 Appointment of Special Water Manager .....	15
4.6.2 Specifications for the Special Manager .....	15
4.6.3 Remuneration of the Special Manager .....	15
4.6.4 Duration of appointment of the Special Manager .....	16
4.6.5 Reporting.....	16
4.7 Approach Seven – Full Force of law .....	16
5. APPROACH TO COMPLIANCE AND ENFORCEMENT .....	18
6. DETERMINING AN APPROPRIATE COMPLIANCE AND ENFORCEMENT ACTION.....	19
7. KEY AREAS IN LICENSE THAT WASREB WILL MONITORING .....	21
8. PROCEDURAL FAIRNESS .....	22
9. JUSTIFICATION AND FURTHER PROCEDURE ON USE OF FULL FORCE OF LAW .....	22
9.1 Penalties set out in the License .....	22
9.2 Use of civil court action .....	25
9.3 Use of Prosecution .....	26

## Definitions

In these guidelines, except where the context otherwise requires –

“Act” means the Water Act 2016 (Act No. 43 of 2016);

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

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

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

“Customer” means a person or persons who is or are the buyer or recipient and end user of water services;

“Director” means the County Director of Water Services;

“Inspector” means a person appointed by the Regulatory Board to exercise the powers of an inspector under the Act

“License” means a license in force under the Act;

“Licensee” means a water services provider licensed by the Regulatory Board under the Act;

“Ministry” means the Ministry responsible for water affairs;

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

“Sewerage services” means the development and management of infrastructure for transport, storage, treatment of waste water originating from centralized and decentralized systems but shall not include household sanitation facilities;

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

“Water services provider” means an entity established in accordance with Section 77 of the Act;

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

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

# **1. PREAMBLE**

## **1.1 Introduction**

The constitution has created two levels of government at national and county. In distributing functions to these levels, the national government is assigned the role of consumer protection while County governments are assigned the role of managing county public services which include water and sanitation services. Articles 21 (2) of the Constitution obliges the State to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43, including the right to clean water in adequate quantities and to reasonable standards of sanitation.

In advancing the progressive realization of this right, synergy is required from various players at policy, regulatory and county levels. The national government sets a target of ensuring water and improved sanitation to all by the year 2030. Since the provision of water services is a devolved function, the responsibility of ensuring efficient and economical water services delivery is allocated to county governments.

## **1.2 Functions of the Regulator**

The Water Services Regulatory Board (WASREB) is the national regulator of water and sewerage services, having been established under the Water Act 2002, and her functions and mandate retained under section 72 of the Water Act, 2016. WASREB is the economic and quality of service regulator in the water and sewerage provision with the main mandate of protecting the interest and rights of consumers in provision of water services. The regulator discharges this mandate through issuing of licenses to the water service providers and determining applicable tariffs for water and sewerage services.

The mandate of the regulator as spelled out under the Water Act 2016, can be summarized as follows:

- Licensing water service providers;
- Determining standards for water service provision (asset development, water works, access levels, tariff levels, minimum service levels;

- Monitoring compliance with standards set;
- Enforcing the standards;
- Reporting (information database, policy advisory, public reporting); and
- Information, public engagement, and consumer redress

### **1.3 Function of County Governments in Water and Sanitation Services**

Part 2 of the Fourth Schedule of the Constitution of Kenya provides for the functions of the County Governments to include among others county public works including water and sanitation services. County governments are also required to implement specific national government policies on natural resources and environmental conservation including soil and water conservation, and forestry. Thus, counties have a direct role in the establishment and management of structures (utilities) and systems that facilitate the provision of water services.

### **1.4 Purpose of the Compliance and Enforcement Strategy**

Art. 191(3) of the constitution emphasizes the need for uniform standards and policies across the country to safeguard the gains made on water services reform on right to water and provisions of quality services and consumer protection under article 46. Considering that the provision of water services is a natural monopoly, licensees have to be monitored to ensure that services provided are efficient, affordable and sustainable.

In the discharge of its functions a licensee is accountable to various external actors with different functions which include the following:

- a) National and County Governments – The two levels of government are responsible for policy-making. This entails the setting of principles and rules that guides the management of a given service and or organization. The county government is also an owner of the utility.
- b) Regulator – This involves setting, monitoring, enforcing service standards as well as chargers for services provided.

- c) Financiers. These provide financial resources both in debt and equity. The function is normally shared by customers and governments, and sometimes with private investors and donor agencies.
- d) Customers – This group demands for Service. This role lies with the customers of the utility and also with the owner.

The degree of accountability to any actor depends on the ability of the actor to sanction for bad performance.

Through the application of this strategy, the regulator seeks to ensure that compliance and enforcement is conducted properly and fairly. The strategy describes:

- a) the objectives of the board's compliance and enforcement activities;
- b) the regulator's approach in encouraging compliance with legislation as per the Water Act 2016;
- c) the process of determining appropriate compliance and enforcement actions; and
- d) the application of a risk-based approach to compliance and enforcement activities.

In addition to protecting consumer interests, compliance and enforcement activities will aim to:

- a) Raise awareness of the benefits of complying with the legislation, and the potential consequences of non-compliance;
- b) Assist and enhance stakeholders' ability and commitment to complying with the legislation;
- c) Remove barriers to compliance (e.g. improve knowledge of on legislation or how to comply); and
- d) Overcome factors that encourage non-compliance (e.g. lack of public support, allowing non-compliance to go unchecked, or misunderstanding legislative objectives).

In dealing with non-compliance, WASREB's actions will encompass mechanisms that use a range of administrative and statutory enforcement approaches. Information on the regulator's compliance and enforcement activities and the accompanying

outcomes will be part of the reporting requirements in the annual sector performance report (Impact).

## 2. OBJECTIVES OF THE COMPLIANCE AND ENFORCEMENT

The objective of the compliance and enforcement strategy is to:

- a) Ensure conformity to the Water Act 2016, rules and regulations made there under and guidelines issued by WASREB;
- b) Prevent future violations as much as possible through voluntary effort;
- c) Improve the standards of water service delivery in a sustainable manner in the whole country;
- d) Maintain public confidence in provision of water services and enhance consumer protection; and
- e) Enhance consistency and transparency in provision of water services.

To achieve the aforementioned objectives, WASREB will undertake compliance and enforcement activities in a manner which ensures that:

- i. Any action taken is **proportionate** to specific, identified, risk or need for intervention;
- ii. It is **accountable** for its regulatory activity to all stakeholders;
- iii. Its actions are **consistent**, in that it should make similar decisions about activity in similar circumstances, as per its mandate in the Water Act 2016;
- iv. Its regulatory actions are **transparent**, by publishing information on its operations to stakeholders;
- v. All its activities are **targeted** to a specific identifiable need e.g. Limiting random inspections to specific identified compliance requirements).



### 3. WASREB'S MANDATE IN COMPLIANCE AND ENFORCEMENT

WASREB powers to ensure compliance and to enforce the law are drawn from the following sections of the Water Act 2016:

Section	Mandate
72	<ul style="list-style-type: none"><li>a) Determine and prescribe national standards for the provision of water services and asset development.</li><li>b) Evaluation, recommendation and imposition of water and sewerage tariffs.</li><li>c) Set license conditions and accredit water service providers</li><li>d) Monitor, regulate and enforce license conditions.</li><li>e) Develop a model memorandum and articles of association to be used by water companies,</li><li>f) Monitor compliance with standards of facilities for the provision of water services.</li><li>g) Advise the Cabinet Secretary on the nature, extent and conditions of financial support to be accorded to water companies</li><li>h) Monitor progress in the implementation of the water strategy and make appropriate recommendations</li><li>i) Maintain national database and information system on water services. Develop guidelines on the establishment of consumer groups and facilitate their establishment</li><li>j) Establish a mechanism for handling complaint from consumers</li><li>k) Develop guidelines on establishment of consumer groups and facilitate their establishment</li><li>l) Inspect water works and services to ensure they meet prescribed standards</li></ul>

	<p>m) Report annually to the public on issues of water supply and sewerage services and performance of relevant sectors</p> <p>n) Make regulations on water services and asset development</p> <p>o) Advice cabinet secretary on matters in connection with water services</p> <p>p) Make recommendation on how to provide water to marginalized areas.</p>
75	<ul style="list-style-type: none"> <li>• maintain the register of all licensed water services providers</li> <li>• Develop and publish guidelines to regulate conduct of WSPs</li> </ul>
76	Powers to revoke a license
82	Receive and make decisions on complaints against WSPs
85	Issue licenses
88	Performance guarantee or security required from licensee
89	Set license fees
92	Set standards for mechanism to be used in handling consumer complaints by water services provider.
93	Approve public private partnership or public partnerships entered into by a water services provider
95	Vary terms and conditions of a license
97	Permit joint provision of water services by two or more licensees. Permit transfer of a water service or a part of from one licensee to another
98	Vary area of water provision of one or more licensees
99	Direct licensee to provide water outside its jurisdiction
100	Issue bulk water license
101	Impose regulatory regime on defaulting WSP

102	Under special regime the board may: - <ul style="list-style-type: none"> <li>• Require licensee be under enhanced monitoring and reporting</li> <li>• Remove privileges</li> <li>• Revoke license and appoint special manager</li> </ul>
103	Transfer functions of licensee
105	Approve restriction or prohibition of use of water
106	Order county government to take action to enforce regulation
107	Issue consent on construction works affecting a water resource
109	The Regulatory Board may impose a services levy on all water services within the area of licensee
111	The regulatory board shall establish a national monitoring and geo referenced information system on water services.
112	Prepare annual report of activities

#### 4. METHODS TO ENSURE COMPLIANCE

The compliance and enforcement strategy of WASREB is grounded on the following methods:

1. **Education** to foster learning, inducement and self-regulation;
2. **Prevention** through selective and targeted surveillance and a graduated warning approach; and
3. **Enforcement** as a last resort using the traditional methods of coercion and deterrence.

This is because effective compliance is influenced to a large degree by the situations and attitudes of the regulated and therefore different approaches have to be used. The following **fundamental attitudes** toward compliance with the laws have been discerned in the water services sector.

1. WSPs and other water operators want to comply with the law and

- regulatory requirements and are actively complying;
2. WSPs and other water operators need more knowledge and understanding of the obligations in the regulations;
  3. WSPs are hampered by the current financial situation and human resource constraints in their capacity to comply. For small WSPs in particular, the burden of assimilating and complying with many complex and technical rules can be unreasonable and undermine confidence in WASREB and the regulatory structure. Harsh approaches to enforcement will not improve matters;
  4. WSPs and other water operators want to comply but the operating environment makes it difficult for them to comply especially catchment degradation and incomplete implementation of Transfer Plan;
  5. Some WSPs and other water operators know the regulatory requirements and choose not to comply nor show any desire to comply; and
  6. The benefits of non-compliance outweigh any benefits of compliance to the key management staff.

WASREB will use the following approaches to achieve compliance based on the underlying attitudes described previously.

#### **4.1 Approach One – Informing**

WASREB wants WSPs and other water operators and consumers to understand their responsibilities. WASREB will provide:

1. Information in a variety of formats including newsletters, publications, hotlines, front counter services and online information and services. This is where the public relations and communication strategy of WASREB is useful and
2. Information to the public at the regional and local level through those entities having hotlines, online information services, front counter services and publications on water services investment and performance.

## 4.2 Approach Two – Encouraging

WASREB will undertake a number of activities aimed at encouraging compliance. These include:

1. Targeted campaigns promoting compliance in high risk areas of water safety and infrastructure safety as well as governance;
2. Acknowledgement of compliance with rewards and incentives either built into the tariffs or through media acknowledgement and trophies;
3. Disseminate best practices within the WSPs;
4. Benchmarking of the quality of service and processes within the WSPs;
5. Creating a system of regulatory compliance grading to show which entities have systems that fully comply with the requirements of the Water Act 2002; and
6. Using the media as an avenue to encourage compliance by publicizing the commitments and obligations of the licensees.

WASREB has already started doing this through **IMPACT** and will continue to entrench the method as a system of ensuring compliance.

## 4.3 Approach Three – Assisting

WASREB will help and support WSPs and other water operators who are endeavoring to comply with regulation. This will include transfer of know-how, change of attitude and values and encourage self-regulation and reporting on non-compliances. WASREB will do this through:

1. Training by own staff or partnering with the Kenya Water Institute and other third parties to offer training;
2. Conduct or invite advisory visits to the WSPs;
3. Hold workshops to disseminate technical information and obtain feedback on compliance;
4. Issue of advisory circulars to the WSPs explaining technical aspects of guidelines.

#### **4.4 Approach Four – Monitoring**

WASREB will check whether WSPs are complying with the regulatory obligations. WASREB will use the following methods:

1. Checklists from the license obligations;
2. Proactive inspections in the WSPs targeting;
  - a) The larger and sustainable WSPs to ensure systems in those WSPs are well run and there is compliance.
  - b) Targeted surveillance on problematic WSPs to entrench compliance or areas.
1. Use of specialized part time inspectors in specialized and technical areas especially infrastructure development, finance and water quality;
2. Investigation of complaints by inquiry under section 101 of the Act, especially where there are complaints of the same nature from a license area and there seems to be no resolution;
3. Analysis of the various reports to WASREB under the license and WARIS system;
4. The position of Inspector is created under the Water Act 2016 and given powers to demand information from WSPs. Therefore, officers in WASREB who are Inspectors must abide by a Code of Conduct to be created and undergo training to deepen their understanding of their powers as stated in section 145 of the Water Act and clause 101 of the water services regulations;
5. Delegating certain aspects of monitoring to the county government as the owners of the WSPs; and
6. Use of the media to encourage the public to report and publicize issues of compliance.

#### **4.5 Approach Five – Warning**

Where appropriate after monitoring has been done:

1. WASREB will notify and caution WSPs that are not complying with their obligations and give a time frame within which there should be rectification;
2. WASREB will issue orders prohibiting the doing of particular things with immediate effect and follow through with prosecution if this is not complied with;

3. WASREB will issue cure notices instructing the WSPs to ensure non-compliance is cured within a particular time frame. If the cure notice is not complied with, WASREB will:
  - a) fine the licensee;
  - b) Use the performance guarantee to cure the problem;
  - c) Issue an order which if not complied will be followed by prosecution;  
and
  - d) Issue orders on variations of areas of supply.
4. WASREB will use the media in publicizing warnings against offenders of the Water Act 2016.

#### **4.6 Approach Six – Special Regulatory Regime**

Where the first five approaches fail and material non-compliance continue to exist

The WSP shall be put under Special Regulatory Regime (SRR) in line with Section 102 of Water Act 2016 and clause 99 of the water services regulations.

The following modalities shall apply during the duration the SRR:

##### **4.6.1 Appointment of Special Water Manager**

A special manager shall be appointed in accordance with section 102 of the Water Act.

The following shall form options of appointing a Special Manager:

- i. Direct appointment from the public sector or
- ii. Competitive recruitment.

##### **4.6.2 Specifications for the Special Manager**

The job specifications of the Special Manager shall be prescribed by WASREB in accordance with the Model HR guidelines for WSPs.

##### **4.6.3 Remuneration of the Special Manager**

The remuneration shall be determined by the caretaker committee guided by the

prevailing policies at the utility and guided by sector standards.

#### **4.6.4 Duration of appointment of the Special Manager**

The duration of the contract of the special manager shall be six (6) months or until the county government makes a new appointment.

#### **4.6.5 Reporting**

The utility shall report to WASREB in a frequency to be determined and on details to be stipulated.

#### **4.7 Approach Seven – Full Force of law**

Where the first six approaches fail and depending on the severity of the non-compliance WASREB will have to use the full force of the law- which is the traditional enforcement action in the following manner:

1. Issuing of fines under the license –clause 3.3
2. Ordering the payment of penalties by licensees to third parties aggrieved by the non-action or action of the licensee;
3. Levying of penalties for non-payment of regulatory levy under LN 36 of 2008.
4. Placing the offending WSP under SRR;
5. Prosecution of offences committed by the licensee under the Water Act or recommending of prosecution of culprits to other concerned public agencies if offence is in relation to any other Act;
6. Use of court action in judicial review proceedings;
7. Recommending to the respective county executive the removal of the top management and board of directors of the WSP if Inspection reports are not followed up by licensee; - clause 97 of the water services regulations;
8. Order the removal of top management team of WSP and board of directors under section 101 of the Water Act and clause 97 of the water services regulations;

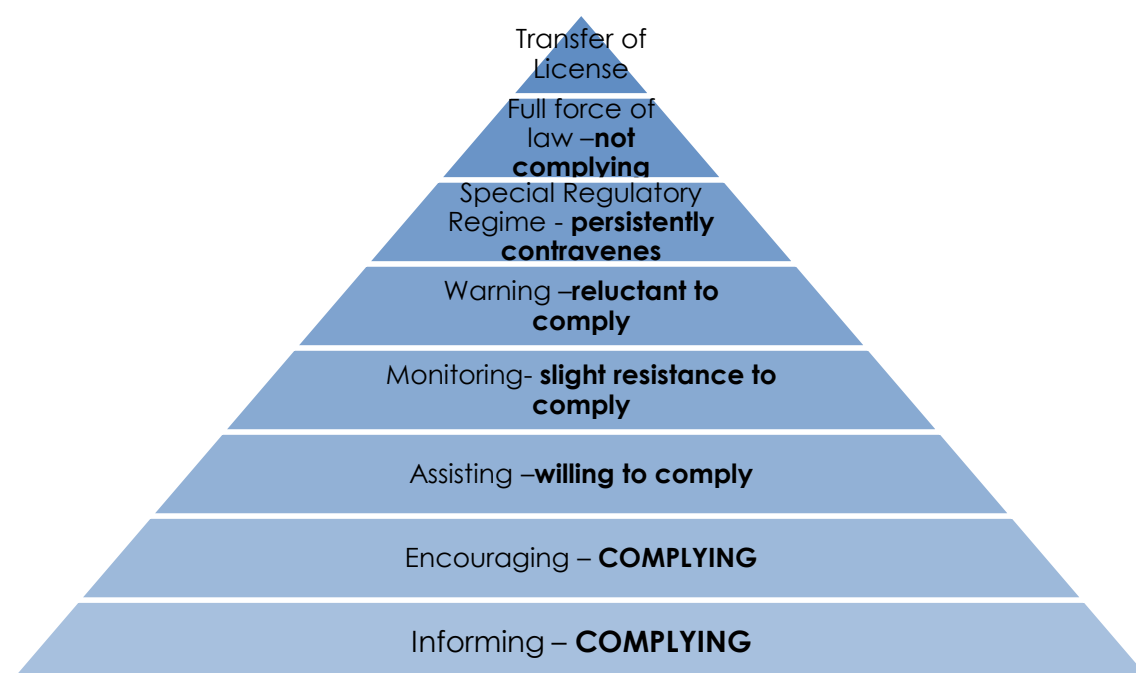


9. Cancellation of license;
10. Transfer of license to another licensee.

Where full force of the law is used, the sanctions employed by WASREB shall:

1. Aim to change the behaviour of the offender;
2. Aim to eliminate any financial gain or benefit from non-compliance;
3. Be responsive and consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma that should be associated with a criminal conviction;
4. Be proportionate to the nature of the offence and the harm caused;
5. Aim to restore the harm caused by regulatory non-compliance, where appropriate;
6. Aim to deter future non-compliance; and
7. Board of Directors ratification or resolution will always be sought.

**A pictorial description of the graduated strategy is as shown below:**



## **5. APPROACH TO COMPLIANCE AND ENFORCEMENT**

WASREB will apply a risk-based approach to compliance, whereby the level of enforcement action in a given situation is proportionate to the level of risk to the provision of water services. The risk assessment will consider the possible impacts of non-compliance to consumers and other stakeholders. The greater the risk, the higher the compliance action to be undertaken. While greater effort may go into encouragement and assistance, escalation of sanctions will apply where necessary. The concentration of activities and resources at the bottom level of the pyramid reflects WASREB's commitment to compliance through education, prevention and cooperation. In most circumstances and depending on risk, WASREB will consider enforcement measures at the middle level of the pyramid once it has been determined that efforts at the first level have been ineffective in achieving compliance. The same principle generally applies as a prerequisite to employing enforcement measures at the top level of the pyramid. While the approach concentrates most resources at the bottom of the pyramid (e.g. prevention and guidance), WASREB is committed to using the tools and processes available at all

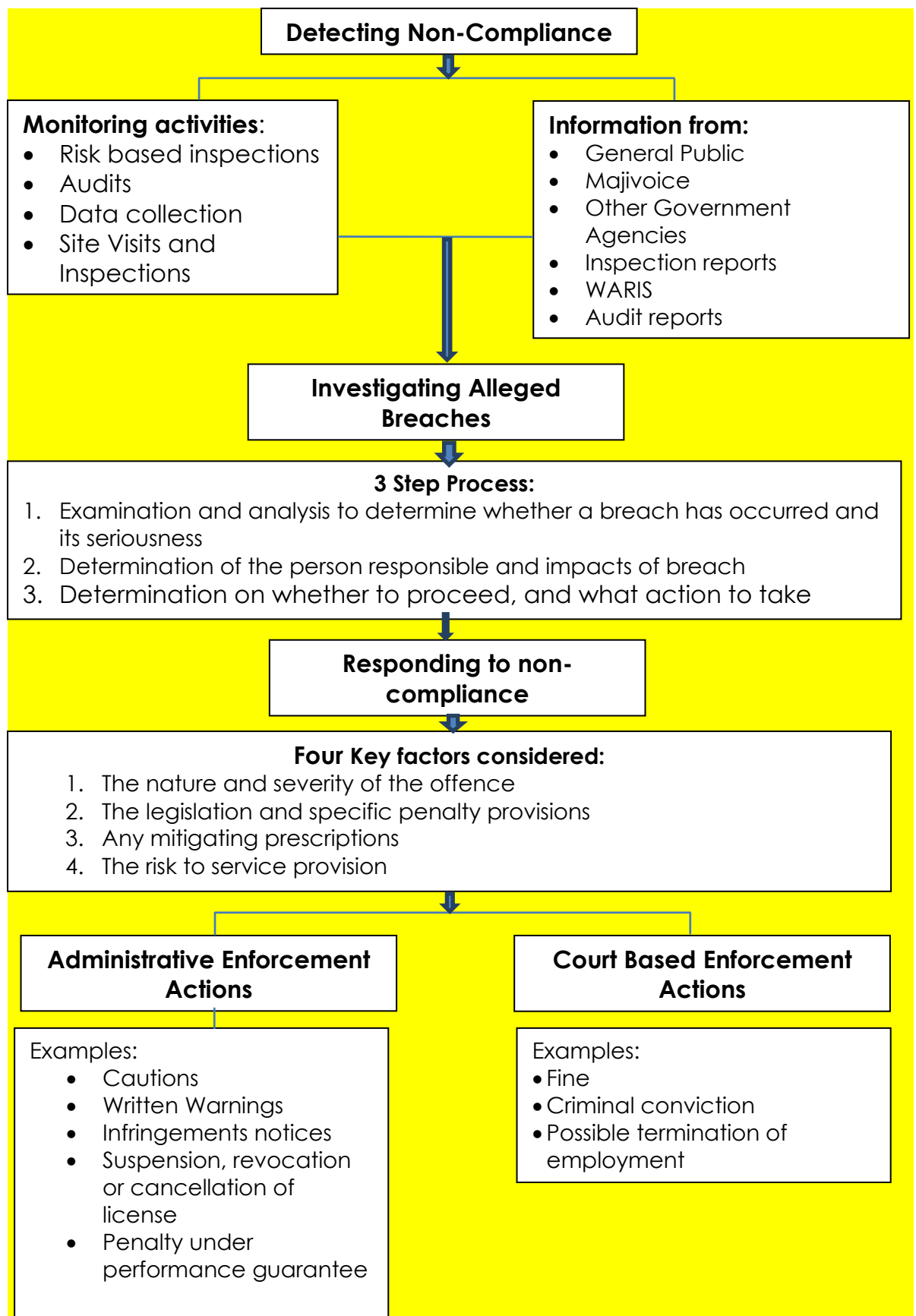
levels of the pyramid when necessary. Depending on the situation and the risk to service provision, offences may not have provisions at the bottom or middle level of the pyramid and enforcement action in the upper level of the pyramid will be undertaken.

## **6. DETERMINING AN APPROPRIATE COMPLIANCE AND ENFORCEMENT ACTION**

WASREB will investigate all detected breaches using a three-step process and then formulate a response after considering **four key factors** outlined in the flow diagram below. Compliance and enforcement decisions will be made on case by case basis and the level and type of response will depend on a number of factors including:

- a) The risk posed to the consumers and other stakeholders;
- b) The nature of the offence (including the alleged offender's history), the seriousness of the offence and how long it has continued;
- c) How effective the enforcement action will be in supporting compliance;
- d) Legal precedents, where legislation may require us to proceed directly to higher levels of the compliance pyramid; and
- e) Statutory time limits defining the time period within which enforcement action must be initiated;

The following flow diagram illustrates WASREB's compliance and enforcement mechanisms and overall approach.



## 7. KEY AREAS IN LICENSE THAT WASREB WILL MONITORING

1. The following are the key areas where WASREB will focus on in ensuring compliance by the WSPs. For each key area before the full force of the law starting with the fines in the license are issued by WASREB the staff in WASREB will have used some or all of the graduated approaches in order to have willful compliance;
2. As more guidelines are formulated these key areas will expand as guidelines according to the license are an integral part of the license;
3. According to section 88 of the Water Act on performance guarantee it may be used to pay the fine in the license or also used by WASREB to cure the non – compliance by the Licensee. The amount currently depends on the turnover of the WSP. This is attached as an **Annex ii**.

**Table 1: Key areas of focus**

Key Area	What to assess
Utility oversight and supervision	Transparency, accountability in the manner the leadership exercises its mandate and public participation in decision making.
Information and control systems	Transparency and checks and balances in operational functions and compliance to set organisational systems.
Financial management	Compliance to the financial management infrastructure in the water services sector and effectiveness in using the tools to improve performance.
Service standards	Effectiveness in serving consumers, and deploying ICT and innovation to communicate with consumers to address their complaints or suggestions.
Human resources	Adherence to the values in article 10 of the constitution especially inclusivity and adherence to the technical criteria of competence issued by WASREB by LN 137 of 2012
User consultation	Whether the community served is involved in the decision-making process and effectiveness of methods of sharing information with consumers.

The details of each of these key areas is presented in **Annex 1**.

## **8. PROCEDURAL FAIRNESS**

In line with the principles of procedural fairness, several opportunities are available to seek review of enforcement actions and/or the decisions leading to them. The methods for appealing these decisions and enforcement actions may include:

- Seeking a review of the decision by WASREB, if it was based on wrong or incomplete information.
- Challenging the action in the water tribunal.

## **9. JUSTIFICATION AND FURTHER PROCEDURE ON USE OF FULL FORCE OF LAW**

### **9.1 Penalties set out in the License**

1. The level of sanctions is a policy issue set by the Board of Directors in the license conditions, and the certainty of sanctions is an issue of the capacities and organizational effectiveness within WASREB.
2. The deterrent effect of sanctions will depend on their certainty, severity, celerity, and uniformity.
3. WASREB will:
  - a) Review the monetary penalties (fines) in the license periodically to avoid having fines devalued by inflation.
  - b) Set penalties at a senior level after review of all evidence.
  - c) Reward good behavior such as rapid correction of problems by setting lower penalties.
  - d) Adhere always to the graduated approach, with and warnings and as a first choice and prosecution and transfer of license as a last choice
4. Encouraging voluntary compliance shall always be the first step. WASREB

will support efforts to voluntarily comply, through voluntary disclosure policies especially in the technical areas of asset management and water and effluent quality. If an entity discovers violations of the regulation through the operation of its own internal compliance or self-regulatory system, and reports to WASREB those violations and the corrective action taken, the entity will not be liable for fines and penalties.

5. Voluntary compliance will depend on ensuring that non-compliers do not profit from their non-compliance. Co-operative compliance is contingent upon persuading those of goodwill that their compliance will not be exploited by free riders who will get away with the benefits of noncompliance without being held to account.
6. Deterrent and punitive sanctions will always be available in the background for use by WASREB and will be influenced further by:
  - a. The size of the WSP;
  - b. The capital and resources of the WSP;
  - c. The type and nature of irregularity; and
  - d. The compliance history of the WSP
7. In setting price limits for WSPs at a tariff review, WASREB will exclude any direct costs associated with financial penalties imposed under the Water Act 2016 i.e. investors and employees in the WSP will bear the full direct costs of the penalty.
8. Where a penalty has been imposed on a WSP this will be considered when price adjustments are made in relation to any other service-related incentive mechanism such as WASREB's overall performance assessment.
9. In considering any case in which a financial penalty might be imposed, WASREB will need to address the following questions:
  - i) The WSP has contravened or is contravening any relevant condition of its appointment or license; or
  - ii) The WSP has contravened or is contravening any statutory or other

- requirement which is enforceable under the Water Act 2002; or
  - iii) The WSP has contributed or is contributing to a contravention by another; or
  - iv) The WSP has failed to achieve any standard of performance prescribed under the service provision agreement.
10. Once satisfied that a contravention or failure of service has occurred or is occurring, WASREB will have to decide whether a financial penalty should be imposed and at what level.
11. When considering whether to impose a penalty, a penalty is more likely where:
- i. The contravention or failure has damaged the interests of customers or other market participants or damaged the environment; or
  - ii. Applying a penalty would be likely to create an incentive to comply and deter future contraventions or failures.
12. A financial penalty will be less likely to be imposed where:
- i. The contravention or failure was or is of a trivial nature; or
  - ii. The contravention or possibility of a contravention would not have been apparent to a diligent licensee or WSP undertaker.
13. To avoid double jeopardy a financial penalty will not be imposed where:
- iii. The licensee is being or has been prosecuted in respect of the failure or contravention, although a penalty might be appropriate in respect of different consequences of such a contravention or failure (e.g. for inadequate arrangements for communicating with customers in the event of an environmental or drinking water incident).
  - iv. WASREB will also take into account any potential prosecutions and will liaise with outside bodies to determine who should take enforcement action.



14. Having considered the broad level of penalty, other factors may be taken into consideration. Aggravating factors tending to lead to a higher penalty than otherwise may include, but would not necessarily be limited to:
- i. Repeated contravention or failure;
  - ii. continuation of contravention or failure or making no attempts to rectify that contravention or failure after either becoming aware of the contravention or failure or becoming aware of the start of the enforcement authority's investigation;
  - iii. The involvement of senior management in any contravention or failure;
  - iv. The absence of any evidence of internal mechanisms or procedures intended to prevent contravention or failure;
  - v. Failure to compensate those affected; and
  - vi. Any attempt to conceal the contravention or failure from the relevant enforcement authority and if so to what extent.
15. Mitigating factors tending to decrease the level of any penalty will include, but not necessarily be limited to:
- i. The extent to which the WSP or licensee had taken steps to avoid contraventions or failures, either specifically or by maintaining an appropriate compliance policy, with suitable management supervision;
  - ii. Appropriate action to remedy the contravention or failure;
  - iii. Evidence that the contravention or failure was genuinely accidental or inadvertent or outside management control;
  - iv. The extent to which the licensee had compensated those affected;
  - v. Proactive reporting of the contravention or failure to the enforcement authority; and
  - vi. Co-operation with any investigation.

## **9.2 Use of civil court action**

WASREB will include in its use court action injunctions or compelling undertakings in the WSPs. It will also use court action to recover outstanding debt due to it from

undertaking an enforcement action on behalf of a licensee or recovery of debts from outstanding levies or licensee fees. A resolution of the Board has to be obtained and the merits of the case agreed upon as the only viable method of proceeding before a court action is initiated.

Where WASREB is the defendant the matter will be reported to the Board of Director at the next meeting after WASREB has been sued.

This should be distinguished from the alternative dispute resolution mechanism in the license, which the licensee shall use to appeal an order of WASREB under the license.

### **9.3 Use of Prosecution**

Where an offence is established as against a WSP pursuant to failure by any of those entities to obey a lawful order given by WASREB and or contravening and rules and regulations made under sections 84, 142 the Act, WASREB will prosecute the offender after Board of Directors approval. The maximum penalty under the Water Act is Kshs 1, 000,000 or to a prison term not exceeding two years. (Ref. section 147 of the Act)

## Annex I: KEY AREAS THAT REQUIRE COMPLIANCE

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
1. FINANCE	Change in outstanding debt	Track payment of regulatory levy to WASREB
	Change in number of distressed WSPs	Monitor operation of revenue account
	No. of WSPs Compliance with benchmark	Monitor Capital Expenditure
	No. of WSPs meeting target	SI 4 Monitor billing for services
		SI 14 Monitor Collection Efficiency
		Monitoring % of operation and maintenance expenditure
		Monitor % of staff costs relative to total O+M costs
		Monitor % of board costs relative to total O+M costs
		Monitor loan repayment and running of contingency fund in license
		Analyse financial statements and integration of systems within the WSP
		Track payment of statutory deductions
2. ENGINEERING	No of WSPs with asset inventory	Ensure facilities inventory in licensee area
	No of WSPs with asset valuation	Ensure facilities valuation in licensee area
	Rating of efficiency in maintenance	Ensure facilities evaluation in licensee area
	Change in No. of WSPs with plans	Ensure that licensees develop and implement water assets management plans
	Change in No. of WSPs with plans	Ensure that licensees develop and implement wastewater assets management plans

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
	Change in No. of WSPS with Schedules	Ensure that licensees develop and implement water assets management / maintenance plans
	Change in No. of WSPS with Schedules	Ensure that licensees develop and implement wastewater assets management / maintenance plans
	No. of patrollers per WSP No. of illegal connections detected	Roll and schedule of water services line patrollers in licensee area
	No of Reports on compliance with standards for all capital works	Monitor and investigate implementation by licensee, of capital works plan to ensure standards of design, construction and operation are complied with.
	No of WSPs with asset planning and development function in the structure	Ensure licensees establish an asset planning and development function in the structure at the correct level
	No of WSPs with NRW function in the structure	Ensure licensees establish an NRW function in the structure at the correct level
	No. of networks mapped and digitized	Monitor and investigate the implementation of the mapping in digitized format of the WSP service areas and network systems of the WWDAs and WSPs
Water Demand Management and conservation guideline	No. of: Events publishing demand management  Technologies adopted for demand management	Ensure promotion of water demand management measures in license regulations under section 7e and regulations under section 142 of the Act.

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
3. ECONOMICS  Tariff - implementation of tariff guideline and license provisions on tariff.	No. of complete tariffs justifications received by WASREB	Monitor, investigate, design and perform analysis of tariffs
	No. of business plans analysed and amendments made	Analyse, approve and monitor implementation of business plans and service plans from licensee to ensure costs are properly allocated.
	No. of reports on follow-up actions	Monitor compliance with regulatory performance targets related to tariff adjustments.
	No. of reports on provider income and licensee remuneration	Investigation of justification of licensee remuneration and provider remuneration and any subsidies and grants in the licensee.
4. WATER QUALITY	No. of water safety plans	Monitor availability and quality of Water Safety Plans
Water and Effluent Quality Guidelines	No. of licensees in compliance with Water and effluent quality planning requirements	Availability of Sample schedules prepared for the FY based on previous year's volumes
	No. of licensees in Compliance with monthly and quarterly reporting	Availability of monthly and quarterly reports on water and effluent quality.
	No. of licensees in Compliance with annual reporting	Availability of annual reports on water and effluent quality.
	No. of noncompliance incidents self-reported	Report to WASREB for noncompliance by licensee
	No. of approvals per licensee	Monitor approvals issued to disposers of trade effluent by licensee under section 108 of the Act.

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
	No. of offenders per licensee	Monitor records of noncompliance by offenders under section 108
	Register of sludge disposal	Monitor disposal of sludge
5. LEGAL  Legalizing Water Services Operators in area	No. of Notices issued	Monitor notice of registration in service area of water operators
	No. of operators captured	Inspect register of water service operators and legal status of each
	Reports of sources and quality per operator	Monitor sources of water identified and production and quality monitored and reported on licensee
	No. of operating licenses issued	Monitor Process of and issue of annual license to very small operators
	No. of public meetings held	Monitor frequent stakeholder meetings and education on clustering.
Corporate Governance Guideline	No. of AGMs held.  % of women in leadership positions in WSPs  % of stakeholder groups in WSPs BODs	Monitor compliance by WSPs
Customer complaints - according to guideline issued and license provision	No. of available contracts	Ensure customer contracts available
	Customer service policy	Ensure licensee has a customer service policy
	Report of surveys	Ensure customer satisfaction surveys are done by licensee and reports are made public.
	No. of complaints officers	Ensure licensee has complaints officer and department / unit for complaints processing
	% of complaints resolved	Ensure there is a complaint register and resolution rate

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
	No. of hotlines working	Ensure each licensee has a functional hotline or technology for public to report leaks, sewer bursts, vandalism etc.
	No of disputes at WAB or appeals in the High Court	Institute / defend, monitor disputes from customer dissatisfaction in licensee and get advisory opinions
Water Services Regulations - Section 73	No of water cases in magistrates' courts or high court initiated by WWDA under their regulations	Institute / defend / monitor, investigate implementation by licensee of published regulations under section 73 and issue orders to ensure compliance by licensee
6. COMMUNICATION	No. of activities to WWDA, WSPs and public on compliance and enforcement strategy	Publishing of public notices, warnings, workshops, seminars, advisory, radio programmes, leaflets, booklets and annual stakeholder forums held by licensee and WSP under license
7. HUMAN RESOURCES  According to guideline	Compliance with LN 137 of 2012.	WASREB to monitor and ensure WSPs adopt the standards and guidelines in a manner that allows them to maintain the required staff rations and have the appropriate resource capacity under LN 137 of 2012.
	Adequacy of training	Monitor % of turnover spent on training as per NWSS
8. ALL  Submission of Reports	No. of reports	Annual WARIS Reports

CHECKING COMPLIANCE	INDICATOR	ASPECTS OF COMPLIANCE & ENFORCEMENT
	No. of Reports in License	Annual report under license which has: Licensee achievement report Service obligation and performance report of all the SSSPs in the WSP area Financial report - reflecting levels of tariff revenues, subsidies Capital Works Implementation Report
	No of WSPs with public information officer	Appointment of public information officer by WSP
	No of WSPs undertaking annual dissemination	Dissemination of annual achievement report of licensee to the public within the board area.



## Annex ii: GUIDE TO COMPUTATION OF PERFORMANCE GUARANTEE

Performance Guarantee for License		
No	Turnover*	Performance Guarantee Required
1	>5B	0.15% of turnover or Kshs. 10 million, whichever is higher
2	>1B-5B	0.2% of turnover or Kshs. 7.5 million, whichever is higher
3	>500M-1B	0.75% of turnover or Kshs. 5.5 million, whichever is higher
4	>200M-500M	1.1% of turnover or Kshs. 3.5 million, whichever is higher
5	>100-200M	1.75% of turnover or Kshs. 2.0 million, whichever is higher
6	>50-100M	2% of turnover or Kshs. 1.1 million, whichever is higher
7	>20-50M	2.2% of turnover or Kshs. 0.6 million, whichever is higher
8	</=20M	3% of turnover or Kshs. 0.075 million, whichever is higher

\*The turnover is for the last available audited accounts as at the time of the performance guarantee determination.