

KENYA

PROGRAM-FOR-RESULTS

KENYA DEVOLUTION SUPPORT PROGRAM  
**ENVIRONMENTAL AND SOCIAL SYSTEMS  
ASSESSMENT**

**(ESSA)**

FINAL

World Bank  
December 22, 2015

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## LIST OF ACRONYMS

ADR	Alternative Dispute Resolution
CAJ	Commission on Administrative Justice
CEC	County Executive Committee
CLB	Community Land Board
CoB	Controller of Budget
CRA	Commission on Revenue Allocation
DLI	Disbursement Link Indicator
EIA	Environmental Impact Assessment
EMCA	Environmental Management and Coordination Act
ESIA	Environment Social Impact Assessment
ESMP	Environmental and Social Management Plans
ESSA	Environmental and Social Systems Assessment
GoK	Government of Kenya
IFMIS	Integrated Financial Management Information System
KDSP	Kenya Devolution Support Program
KSG	Kenya School of Government
LA	Land Act
LAC	Land Administration Committees
MENR	Ministry of Environment and Natural Resources
MoDP	Ministry of Devolution and Planning
NLMB	National Land Management Board
NCBF	National Capacity Building Framework
NEMA	National Environment Management Authority
NLC	National Land Commission
NLP	National Land Policy
PFM	Public Finance Management
RAP	Resettlement Action Plan
ToR	Terms of Reference

# EXECUTIVE SUMMARY

## Introduction

The World Bank is working with the Government of Kenya (GoK) to prepare the Kenya Devolution Support Program (KDSP), which will use the Program-for-Results (PforR) financing instrument. The PforR instrument innovatively links the disbursement of funds directly to the delivery of defined results and strengthens government program systems.

KDSP will support Kenya's Ministry of Devolution and Planning (MoDP), National Treasury, and new county governments to strengthen devolution-related capacities in all five key results areas (KRAs) under the Government's National Capacity Building Framework Medium-Term Interventions (NCBF-MTI):

- KRA 1 - Public Financial Management (PFM)
- KRA 2 - M&E and Planning
- KRA 3 - Human Resource Management
- KRA 4 - Devolution and Inter-Governmental Relations
- KRA 5 - Civic Education and Public Participation

For each KRA, PforR operation will support both national level and county-level results. Disbursements to national government and to county governments will be based on the achievement of agreed results – a monetary value will be attached to the achievement of each result. These two level of results will include:

- **National Government Results**, including improved county audits, assessments of county capacity, and enhanced provision of policies, systems, guidelines, training modules, and technical assistance that counties require to strengthen their PFM, HRM, M&E, and citizen engagement systems mechanisms. (US\$40m)
- **County-level Capacity Results**, including improved county systems and capacities for PFM, HRM, M&E, citizen engagement, and investment management. (US\$160m)

The KDSP will be implemented using the existing intergovernmental architecture as enshrined in the Kenya Constitution 2010. At the national government level, MoDP will be responsible for the overall management of Program activities, ensuring coordination and providing technical support to the Program county governments. County governments will be responsible for implementing investment and institutional strengthening activities as well as fiduciary and reporting requirements.

## Program-for-Results Environmental and Social Requirements

For each proposed PforR operation, the World Bank requires a comprehensive assessment of the government systems in place for managing environmental and social effects (including benefits, impacts and risks) against the World Bank Policy, Program-for-Results Financing. This Policy sets out core principles and key planning elements intended to ensure that PforR operations are designed and implemented in a manner that maximizes potential environmental and social benefits while avoiding, minimizing or otherwise mitigating environmental and social harm.

This report was prepared by World Bank staff and consultants through a combination of reviews of existing program materials and available technical literature, interviews with government staff, and consultations with key stakeholders and experts. Findings of the assessment will be used in the formulation of an overall Program Action Plan with key measures to improve environmental and social management outcomes of the Program. The findings, conclusions, and opinions expressed in the Environmental and Social Systems Assessment (ESSA) are those of the World Bank. The recommendations contained in the analysis will be discussed and finalized with the GoK counterparts.

## Methodology and Consultation

The ESSA was prepared in collaboration with relevant officials and technical staff members of GoK implementing agencies. The methodology included:

- (a) a desk review of current environmental and social regulations and policies;
- (b) field visits and consultations with 12 of the 47 county governments and consultations with key stakeholders

The preparation of the ESSA has been carried out in a participatory manner involving feedback and inputs from a number of key stakeholders, including national and county government and civil society. A consultation workshop with civil society organizations (CSOs), National Environment Management Authority (NEMA) county office officials, National Land Commission (NLC), Commission on Revenue Allocation (CRA), National Gender and Equality Commission (NGEC), Commission for Administration of Justice (CAJ) and relevant national Ministry officials was conducted in Nairobi on December 4, 2015. Before the consultations the ESSA was disclosed on the World Bank Infoshop.

## Findings

In sum, the ESSA finds the Program environmental and social management system adequate for Program-for-Results Financing, as per the World Bank's Policy. Kenya's legal and institutional framework is fairly robust and addresses many of the most important challenges facing environmental and social management in a modern state. This review provides a summary of the findings.

The ESSA documents that Kenya's legal, policy, and regulatory framework and existing national level systems for managing environmental and social impacts are relatively robust, and that the existing systems for screening projects, ensuring that adequate environmental and social assessment are conducted for major projects, for holding public consultations on projects and their impacts, and gathering feedback and complaints are fairly well developed. The ESSA found that the GoK's current laws and processes are quite similar to the Bank's own social and environmental policies, with a few exceptions including the involuntary acquisition of communal lands, acquisition of encroached public land for GoK investments and the treatment of vulnerable and marginalised groups.

The ESSA also found that the responsible national government agencies, for example, NEMA, already have significant capacity to manage these risks appropriately. The existing NEMA system for screening is quite robust, even at the county level. If an Environmental Impact Assessment (EIA) is required, counties must by law contract a certified firm to conduct an EIA study, which is then reviewed by NEMA. Counties routinely provide project reports on proposed investments – before project implementation begins - to the County NEMA office, which then advises on whether an EIA is required. The ESSA found that if a county were to embark on a project listed in schedule 2 of the Environmental Management and Coordination Act (EMCA) without conducting a full EIA, it would be unlikely to proceed without being flagged by NEMA. Nonetheless, once an EIA is conducted, the assessment found that the capacity of counties and local NEMA offices to ensure compliance with national laws and policies is limited.

For national government-executed capacity building activities, the ESSA found a low risk that the Program could cause significant environmental or social impacts. These capacity building activities are expected to include the development and roll-out of policies, regulations, guidelines; training curricula and modules to build county capacity in the four KRAs (planning, PFM, HRM, and civic engagement). Activities may also include the roll-out and expansion of systems for county PFM; and HRM that may entail procurement and installation of computer systems (for example, integrated financial management information system – IFMIS, HRMIS).

The investments under the proposed KSDP are expected to have many positive environmental and social impacts. Strengthening planning, financing, M&E and public participation systems can improve county ability to deliver development results, demonstrate responsiveness and achievements to citizens, and increase their ability to mobilize other development resources.

The ESSA determined that under the KDSP there are no activities likely to have significant adverse impacts that are sensitive, diverse or unprecedented and that may affect an area broader than the sites subject to physical works. There is a moderate risk that the Program will support activities or investments that will lead to major environmental or social impacts.



## Specific Environmental and Social Issues and Recommendations

The ESSA concluded that the existing environmental and social management procedures of the counties and NEMA are adequate for use under the KDSP. Nevertheless, the ESSA identified potential issues related to the capacity of County government and NEMA at the county level; and construction and operational phases of proposed projects including potential resettlement.

For county government-executed capacity activities, the ESSA found that while existing systems and the Program design are adequate to manage environmental and social impacts associated with the planned Capacity and Performance Grants (CPG), there are some issues relating to staffing and capacity at the county level. Based on consultations with county representatives from 12 of the 47 counties, the ESSA found that the county capacity to manage social and environmental risks is nascent and quite variable. In addition, the ESSA found that while both county government staff and NEMA staff at the county level tend to possess adequate or basic qualifications, both NEMA and county governments are currently too short-staffed and under-funded to handle the current volume of projects.

With regard to county government investment projects supported by grants, the Program intends to support the construction and or rehabilitation, maintenance, and upgrading of key facilities in various sectors, which are likely to lead to construction and operation impacts on the environment. Potential adverse impacts during construction and operations include among others, air pollution from dust and exhaust emissions; nuisances such as noise, blocking access paths; water and soil pollution from the accidental spillage of fuels or other materials associated with construction works, as well as solid and liquid wastes from construction sites and worker campsites; traffic interruptions and accidents among others.

These types of impacts, however, are generally site-specific, and limited in scope and magnitude. These impacts are and can be for the most part can be prevented or mitigated with standard operational procedures and good construction management practices. These procedures will be included in the Program Operational Manual (POM), and be a standard part of environmental management plans included in bidding documents for contractors. The proposed investments may adversely affect the environment during the operational phase as a result of activities and process. Impacts are likely to include waste generation and air emissions among others.

KDSP will not support investments that lead to significant displacement of people causing impacts on property and livelihoods. Nevertheless, proposed investments may lead to limited displacement (economic and physical), which could be temporary or permanent as well. An abbreviated resettlement action plan (RAP) will be required for any investment with a likelihood of displacement, and investments displacing over 200 people will be excluded from KDSP support. Other mitigation measures to minimise displacements include a requirement that whenever possible, investments be located in public land and within Right of Way for investments that are linear in nature.

Resettlement and environmental degradation tend to disproportionately impact vulnerable and marginalised groups. While the Program seeks to improve conditions, if impacts are not well-managed it is possible that assets and livelihoods of vulnerable and marginalised groups could be negatively impacted. Guidelines for screening and mitigating social impacts will be included in the POM, and guidelines for resettlement will include considerations for vulnerable groups.

## Mitigation Measures

Several features built into the PforR design further limit the risk of grant-funded county projects having significant environmental and social impacts.

**First**, the size of the expected grants will be relatively small, averaging around US\$1.5 million per county per year, up to around US\$5 million in a given year for a large county, and accounting for a maximum of around 20 percent of a county's overall development spending. The grants will be unlikely to fund major infrastructure or other projects with significant impacts.

**Second**, counties will need to satisfy basic minimum conditions of environmental capacity before they can qualify for a Level 2 grant (for investments). County governments will identify focal persons to handle environmental and social issues arising from KDSP investments and eventually for county wide investments including allocation of sufficient budget to achieve desired objectives and actions.

**Third**, the investment menu of eligible uses for the grants excludes county projects that require EIA studies, based on NEMA's review of Schedule 2 projects, or that will result in the relocation of more than 200 people. KDSP will undertake investments in undisputed public and private land/areas where maximum **200 people** or less are displaced for as long as the country systems for land acquisition is followed including preparation of an adequate and acceptable RAP. However, a KDSP investment will apply on undisputed communal lands if unanimous consensus has been achieved with all people to be displaced, and there has been a public consultation, and engagement of all the relevant land acquisition institutions and in accordance to the legal framework on land in Kenya. KDSP investments will be implemented in communal land only in circumstances when free, prior and informed consultation and broad consensus is demonstrated to have taken place with affected communities unanimously agreeing to have the land used for that investment without compensation. The consultations would have to be properly documented, including attendee list (also absentees), dates, photos, minutes of meeting, issues raised, agreements reached, mode of consensus building, and so on. Any agreements of land gift should be endorsed by all and better still thumb printed or signed or notarized.

All communal land identified and determined to have issues related to historical injustices (for example, historical claims over land) will be excluded from any KDSP investment. The NLC and National Land Management Boards (NLMBs) established in all Counties have a register of all land with historical land injustices claims. Hence the county will ensure that this is complied with in such cases before such investments take

place. Hence a screening of this will have to take part prior to the finalisation of the planning process jointly with NLC and NLMB to determine ownership of all land public, private and communal.

All public land encroached by communities will be ineligible for implementing a KDSP investment until and unless the County governments duly compensate the encroachers for losses of assets.

EMCA regulations enforced by NEMA require the promotion of environmental and social sustainability in Program designs so as to avoid, minimize, or mitigate adverse impacts, and promote informed decision-making relating to the Program's environmental and social impacts. EMCA, requires that all projects listed in the Schedule 2, be subjected to full EIA studies. In recognition that certain projects may not require full EIA, the EMCA gives NEMA the power to direct a project proponent to forego the submission of an EIA report in certain cases if there are no major environmental and social impacts.

**Fourth**, compliance with this investment menu is a “minimum condition” for counties to access grants for investments. The annual capacity and performance assessment will review whether each county has followed the investment menu; if a county has not, it will be excluded from competing for grants in the following year.

**Fifth**, despite limited county capacity, the government's overall capacity to screen proposed projects and require EIAs of projects with significant risks is quite robust. The ESSA found that excluding projects that require EIAs would effectively limit most of the possible environment and social risks.

**Finally**, the PforR is designed to annually assess and gradually strengthen county capacity to manage social and environmental risks. The annual assessment of counties will measure key aspects of county social and environmental management capacity. Additional measures based on the ESSA of the capacity of implementing institutions for environmental and social management will be incorporated into the Program Action Plan (PAP). During the Program implementation phase, the borrower will monitor program effectiveness and share monitoring information with the Bank task team. This will include monitoring Program capacity-strengthening measures as well as the effectiveness of any agreed impact mitigation measures identified in the PAP.

# I PROGRAM DESCRIPTION

## I.1 Background and Context

Kenya's 2010 Constitution represents a fundamental shift in the country's policy and institutional framework—one that seeks to rebalance accountabilities and increase the responsiveness, inclusiveness, and efficiency of government service delivery. Although Kenya has maintained a good track record in macroeconomic management, with economic growth rebounded after the 2009 crisis and has remained robust in the range of 5 percent, prevailing levels of growth (around 2 percent growth in income per person) have not been sufficient to make a significant dent on poverty currently estimated at about 43 percent. The high level of income inequality and inequitable access to basic services also undermine the progress in poverty reduction. Kenya's gini coefficient is estimated at about 0.45, one of the highest in the East African Community region. Kenya's on-going devolution process, one of the most ambitious reforms in the Constitution, seeks to address these challenges and provide the stimulus for growth and shared prosperity in the coming years.

## I.2 The Government Program – the National Capacity Building Framework

**In response to the major capacity challenges posed by devolution, the national and county government launched the National Capacity Building Framework (NCBF) in 2013 to guide the establishment of necessary capacities for devolved government.** The overall objective of the NCBF is “to ensure the devolution process is smooth and seamless to safeguard the delivery of quality services to the citizenry”. The NCBF has five pillars: Training and Induction; Technical Assistance to Counties; Inter-governmental Sectoral Forums; Civic Education and Public Awareness; and Institutional Support and Strengthening. During the first two years of devolution, under the NCBF, the national government put in place multiple new laws and policies, rolled out systems (for example, the IFMIS), designed and rolled out induction trainings for large numbers of new county staff from different levels of county government, and initiated medium-term capacity initiatives focused on the new counties.

Following a review of early NCBF implementation, the government has developed the NCBF-MTI, a results focused implementation program and expenditure framework for the NCBF covering the period FY14/15 – FY17/18. The NCBF-MTI defines priority objectives, outputs, activities and budgets for devolution capacity across 5 Key Results Areas (KRAs):

- (a) KRA 1: Public Finance Management
- (b) KRA 2: Planning, Monitoring, and Evaluation
- (c) KRA 3: Human Resources and Performance Management

(d) KRA 4: Devolution and Inter-Governmental Relations

(e) KRA 5: Civic Education and Public Participation

For each of these KRAs, the NCBF-MTI defines both national and county level results, as well as key outputs and activities. Many of the priority capacity results under the NCBF program will depend on counties to take specific implementation measures. Global and Kenyan experience, including experience under the NCBF, have highlighted that centrally executed capacity building programs, although they provide critical inputs, by themselves may not be adequate to catalyse sub-national government capacity results. Supporting and incentivizing counties to achieve these results is equally or more important.

Therefore, the government intends to introduce new fiscal transfers from the central government to counties. The 2015 Budget Policy Statement (BPS) states that the Government will design a performance grant (PG) framework to support county governments as the centres for service delivery and economic expansion, especially in the areas of PFM, good governance practices and supporting the counties to be fully operational, as well as to enhance fiscal responsibility principles. Performance and capacity grants to counties are thus envisioned to be a key part of devolution CB – by helping to define key capacity results at the county level, rigorously monitor whether they have been achieved, and build incentives for counties to achieve these results. In turn, counties that achieve these intermediate results will be better equipped to achieve their development objectives and to manage other development financing including the Equitable Share.

**These government-executed activities are complemented by multiple development partners** providing devolution capacity building support under the NCBF. The three largest programs are supported by the United Nations Development Program (UNDP), the European Union (EU), and United States Agency for International Development (USAID) as well as by the WB's Kenya Accountable Devolution Program (KADP), which is provided via a multi-donor trust fund (MDTF) financed by DfID, Danida, the EU, Finland, Sweden, and USAID. Together, these programs will provide more than US\$100 million in devolution capacity building support over the coming 4 to 5 years. Via the Devolution Sector Working Group, discussions are underway with partners on how to align activities around the NCBF-MTI, as well as on how the new fiscal transfers and annual capacity and performance assessment can reinforce and be complemented by capacity building supported directly by external partners at the county level.

## **I.3 KDSP Program Description**

### **I.3.1 Program Scope**

The KDSP **will support implementation of the NCBF-MTI**. It will finance results around the strengthened capacity of national and county institutions in all five key results areas (KRAs) under the NCBF-MTI:

- **KRA 1 - Public Financial Management** including improved county budgeting, revenue management; use of IFMIS; financial accounting, recording and reporting, procurement, internal and external audit performance
- **KRA 2 - M&E and Planning** including improved county planning, annual progress reports, monitoring and evaluation, and linkages between county plans and budgets.
- **KRA 3 - Human Resource Management** including development of county staffing plans, HR competency frameworks, appraisal and performance contracting systems. *[to be refined once GoK Capacity Assessment and Rationalization of the Public Service (CARPS) is finalized.]*
- **KRA 4 - Devolution and Inter-Governmental Relations:** including introduction of performance-based conditional grant.
- **KRA 5 - Civic Education and Public Participation:** enhanced rollout of civic education and county civic education units; greater number of counties that meet County Government Act (CGA) requirements for public participation and transparency.

**For each KRA, the PforR will support both national-level and county-level results.** Essentially, the PforR will support and incentivize national government to provide improved capacity building support to counties in each KRA, while simultaneously supporting counties to make system and capacity improvements. These two levels of results will include:

- **National Government Results**, including improved county audits, assessments of county capacity, and enhanced provision of policies, systems, guidelines, training modules, and technical assistance that counties require to strengthen their PFM, HRM, M&E, and citizen engagement systems mechanisms. (US\$40 million)
- **County-level Capacity Results**, including improved county systems and capacities for PFM, HRM, M&E, citizen engagement, and investment management. (US\$160 million)

### **I.3.2 National Government Results**

**The National Government Results supported by the PforR** will include improved county audits, assessments of county capacity, and enhanced provision of policies, systems, guidelines, training modules, and technical assistance that counties require to strengthen their PFM, HRM, M&E, and citizen engagement systems. These will include the following results at the national government level:



**Result 1: Improved timeliness and quality of county audits.** The Office of the Auditor General (OAG)’s annual audits of county financial statements are a critical measure of county financial management (FM) performance. These audits play an important role in assessing overall county fiduciary capacity and governance, and they will also provide a key measure in determining how much a county can receive through the new grants. As it adapts to new responsibilities, OAG completed the first set of county audits more than six months after the statutory deadline. The Program will therefore include support to the OAG to conduct these audits in a timely fashion aligned with the grant disbursement cycle.

**Result 2: County capacity in the NCBF KRAs is assessed annually.** The NCBF Status Review found that implementation of the NCBF has been hindered by the lack of a framework of results measuring county institutional capacity, combined with a regular assessment of progress. Although significant capacity building resources have been mobilized by government and external partners, it has proven quite difficult to measure the effectiveness of the inputs provided, as well as to make sure that capacity building resources are channeled to where they are most needed. Frequently, capacity building is driven less by results (which are not systematically measured) than it is by other incentives. The Program will introduce an assessment methodology, called an Annual Capacity and Performance Assessment, which combines self-assessment with an external assessment conducted by an independent firm. Self-assessment will help counties become familiar with, and design capacity building interventions which address the unique needs of each county; external assessment will be conducted annually to ensure objectivity in monitoring progress, especially as funding will be linked to performance as detailed below. The ACPA methodology is based on a year-long design process that has included detailed field testing in several counties. To ensure objectivity, the assessment will be conducted by an independent firm that is hired through a competitive procurement process, with results independently verified. County representatives will be involved in determining the terms of reference (ToRs) and overseeing the procurement process, as part of the Technical Committee (TC).

**Result 3: Improved nationally-executed capacity support to counties in PFM, HR, M&E, and citizen engagement.** Based on the results of the ACPA, the National Treasury (NT), MoDP, Department of Public Service Management<sup>1</sup> (DPSM), and Kenya School of Government (KSG) will enhance the quantity and quality of their capacity building support for counties on PFM, HRM, planning and M&E, and public participation. This support will accelerate and deepen support that national Ministries and KSG provide to counties. In each KRA, the Program will accelerate the design and rollout of:

- **National guidelines, regulations, and systems** that counties need to strengthen their institutional capacity.

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<sup>1</sup> At the time of Appraisal, DPSM is a department within MoDP. However, a Presidential Executive Order is expected to be issued shortly reorganizing MoPD. This will include separating DPSM into a new Ministry for Public Service, Youth and Gender Affairs. The Program is flexible to this institutional change, in that the results to be achieved by DPSM will be relevant whatever the broader organizational structure.

- **Structured learning** (classroom training) including uncompleted county training curricula and modules in the four KRAs (PFM, HRM; M&E; civic education).
- **Technical assistance and on-the-job learning** to help county staff apply and master new responsibilities in each KRA.
- **New learning modalities and knowledge exchange platforms**, incorporated into national and county-executed capacity building, including: (a) systematic capturing of devolution experiences; and (b) platforms for exchange and learning between counties.

**Result 4: New performance-based grant (PBG) system is established** that measures and rewards counties for improving core systems in PFM, HRM, M&E, and citizen engagement. The government has designed a new Capacity and Performance Grant (CPG) framework that will support and incentivize counties to achieve key capacity improvements targeted under the NCBF-MTI. Based on their results in the ACPA (result 2), counties will be awarded CPGs to make capacity improvements as well as to expand county investments. As noted above, the grants will become part of Kenya's inter-governmental fiscal architecture. While these grants will focus on core capacities that are necessary for effective county institutions to deliver services, they will also provide a foundation that can be expanded to incentivize and support sub-national performance on a range of topics.

### 1.3.3 County Government Results

At the county level, the CPGs will finance and support county capacity building activities, investments, and create incentives for improved performance. The magnitude of these grants will average about US\$1.8 million per qualifying county per year. The grants will flow through normal government systems as a conditional transfer from national to county governments. All counties that qualify to access the CPG will receive grants for capacity building. Starting in year two, all counties that meet more rigorous conditions will be eligible to receive larger grants to fund part of their investment program.

**Result 5:** Increased number of counties have basic fiduciary, procurement, environmental and social management, grievance redress systems and staff in place. Because only counties that meet minimum fiduciary, environment, and social management standards will be eligible to compete for the grants, the grants will incentivize counties to ensure that basic measures, systems, and staff are in place. Meeting these minimum conditions will enable counties to compete for the grants, but more importantly it will also strengthen core county systems to effectively and equitably manage other resources to achieve priority county results.

**Result 6: Improved performance of participating counties in PFM, HRM, Planning and M&E, and public participation.** Counties that meet the minimum conditions will then be able to receive larger grants to supplement county investments under their County

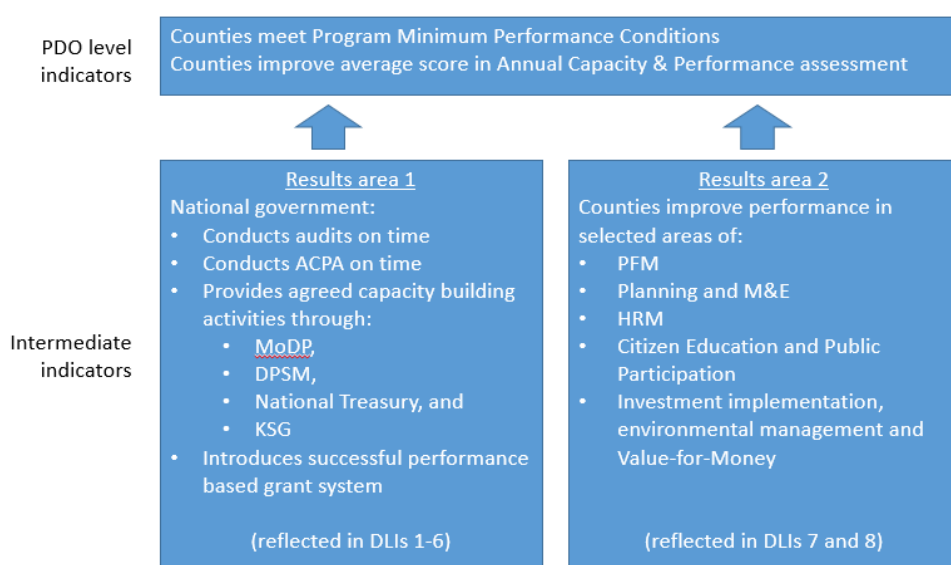


Integrated Development Plans (CIDPs). The ACPA will each year assess county capacity on approximately 35 performance measures of PFM (up to 30 points), human resource management (12 points), planning and M&E (20 points), citizen engagement (18 points) and investment and social/environmental management (20 points) capacity. County scores (between 1–100) will determine county grant allocations for the coming fiscal year.

### I.3.4 Program Development Objective (PDO)

The Program Development Objective is strengthen capacity of core national and county institutions to improve delivery of devolved services at the county level. The Program's results framework has two PDO level indicators, supported by intermediate results that are categorized into two results areas, as follows:

**Figure 1. PDO Level Indicators and Intermediate Indicators**



The Program Disbursement-Linked Indicators (DLIs) are structured to reflect achievement of these PDO level and intermediate results. All of the DLIs focus on strengthening institutional performance. The first set of DLIs aim to strengthen the monitoring and assessment of county performance and the provision and coordination of CB by national government level agencies. They contribute to the PDO level indicators by improving the effectiveness of support to county capacity through better monitoring of capacity improvements and strengthened CB activities. The second set of DLIs aim to strengthen county institutions in performing functions critical to infrastructure provision and service delivery. The DLIs contribute towards Program results primarily by strengthening the incentive structure around county performance.

**Table 1. DLIs – National Government Results and County Government Results**

	DLI summary	Amount (US\$, million)
National	1: Office of the Auditor General conducts county audits on time	5

	<b>DLI summary</b>	<b>Amount (US\$, million)</b>
Government Results	2: Timely implementation of the Annual Capacity and Performance Assessment	10
	3: MoDP delivers capacity building support (KRAs 2, 4 and 5)	7.5
	4: Department of Public Service Management delivers capacity building support (KRA 3)	2.5
	5: National Treasury delivers capacity building support (KRA 1)	10
	6: KSG delivers capacity building support (all KRAs)	5
County Government Results	7: Counties meet Minimum Access conditions	33
	8: Counties meet Minimum Performance Conditions	127

### **I.3.5 National Government Results**

**DLIs focusing on monitoring and assessment.** A total of US\$15 million has been allocated for these DLIs to support monitoring and oversight of county performance to better inform planning and delivery of capacity building activities.

- DLI 1: OAG submits audit reports on time and in compliance with the International Standards of Supreme Audit Institutions (ISSAI) for all counties that have submitted financial statements in compliance with the PFM Act (PFMA) and prevailing accounting standards.
- DLI 2: Introduction and timely implementation of ACPA by MoDP.
- These funds will be disbursed upon timely completion of monitoring and assessment activities.

**DLIs focusing on national government capacity building activities.** A total of US\$25 million has been allocated for these DLIs, which will support national government results by providing incentives to national government agencies to implement a well-coordinated, financed, strategically relevant set of capacity building activities for counties. The DLIs incentivise both the planning and coordination of activities, including linkages to budgets and departmental work plans, and also the degree of implementation of these plans. The submission of the prioritized annual work plans conforming to the agreed processes and format set out in the Program Operational Manual (POM) will trigger the disbursement of funds in year 1. Subsequently, disbursement will be based on a points system that considers the timely submission of annual work plans and the completion rate against annual work plan targets.

- DLI 3: MoDP implements annual planned activities to strengthen countrywide frameworks and systems and to address county capacity gaps.
- DLI 4: DPSM implements annual planned activities to strengthen countrywide frameworks and systems and to address county capacity gaps.
- DLI 5: NT implements annual planned activities to strengthen countrywide frameworks and systems and to address county capacity gaps.

- DLI 6: KSG implements annual planned activities to address county capacity gaps.

### **I.3.6 County Level Results**

**DLIs focusing on counties.** A total of US\$160 million has been allocated to these DLIs, which will support county-level results by increasing incentives for county capacity and performance improvements. DLI 7 supports counties to improve the planning and delivery of their own capacity building activities. The Program will disburse upon allocation of funding to qualifying counties by national government for implementing an approved capacity building plan. DLI 8 supports counties to meet MPCs and to improve performance against a range of performance indicators. The allocation received by each county will depend on their relative performance. Therefore, incentives will be focussed at the individual county level, rather than across all counties.

- DLI 7: Counties have participated in an annual assessment of performance and met MACs.
- DLI 8: Counties have participated in an annual assessment of performance, met MACs and MPCs for grant funding and implemented projects according to Program requirements.

**The Program will support Capacity Building and systems strengthening both at national and county levels.** At the national level, the Program will support: (a) capacity of the OAG to conduct timely county audits; (b) functioning of the ACPA Secretariat/MoDP to manage and coordinate the administrative aspects of the process including annual ACPA; (c) enhancing the planning, delivery, financing of capacity building activities provided by MoDP, DPSM, NT and KSG, and better coordinating and monitoring the effectiveness of these interventions. At the county level, the ACPA measures improvements in counties' capacity and system strength. This Assessment informs the majority of Program activities, including the allocation of the CPG grant, the prioritization of county-executed capacity building activities, and the supply of Program supported nationally executed capacity building.

## **I.4 Program Institutional and Implementation Arrangements**

The Program will be implemented using the existing intergovernmental architecture as enshrined in the Kenya Constitution 2010. The majority of Program funds will be ultimately executed at the county level. Program Grant funds will be disbursed to the County Revenue Fund. County Treasuries (CT) will apply to the Controller of Budget (CoB) for release of funds from the County Revenue Fund to county operating accounts. Counties will spend funds according to national laws and regulations, including those relating to environmental and social management and complaints handling. All expenditures will be recorded in IFMIS. CTs will also submit quarterly budget implementation reports to the CoB, which will identify use of Program grants.

The counties will be responsible for planning, budgeting, implementing and reporting on Program-funded activities, consistent with their mandate under the County Act. The county secretary will be the focal person, responsible for implementing and reporting on Program activities and the contact point for example, the ACPA and other interventions. Counties will be represented on the JSC and TC. Counties will also be invited to be represented on the opening and evaluation Committees for procurement of the ACPA assessment teams.

County governments will also be responsible for implementing activities to improve capacity in NCBF KRAs, as measured by the ACPA. Counties will complete Annual Capacity Building Plans (ACBP), based on needs assessments informed by ACPA. Counties will execute these plans and report on progress towards plan objectives. Counties will also complete and submit an annual capacity self-assessment, and will facilitate the independent assessment teams in verification of the capacity assessments.

**Several national government entities will support program implementation.** MoDP will be responsible for overall Program Management, while NT will be responsible for Program financial management. Both NT and MoDP, as well as DPSM and KSG, will provide capacity building support to counties in the Program KRAs. The OAG will be responsible for all Program audits. The CoB and the NEMA will also support Program implementation. The DSWG, which has overall responsibility for the NCBF, will share information on the government program that will influence KDSP.

A small dedicated Secretariat/Unit will be established within MoDP to support the operations of the new grant scheme, related capacity building support and the coordination of the ACPA. The KDSP Secretariat will be placed within the Directorate of the MoDP responsible for capacity building and will report, through the relevant Director, to the Principal Secretary (PS) Devolution in the MoDP, and will provide reports and secretariat functions to the JTC and TC.

## 2 METHODOLOGY AND CONSULTATION

### 2.1 Detailed and In-depth Literature Review

In preparing this ESSA, a review of relevant literature material was undertaken and helped in gaining a deeper understanding of environmental and social management procedures, standards and institutional responsibilities that will apply to the proposed Program

The literature review covered existing regulations and policies and analyzed their legal and practical applicability at the Program level, and the effectiveness of implementation in practice. These legislative documents included among others:

- EMCA 1999
- Constitution of Kenya, 2010
- Land Act (LA), 2012
- The National Land Policy (NLP)
- NLC Act
- EIA and Audit Regulations, 2003

### 2.2 Stakeholder Consultations

Stakeholder consultation formed part of the methodology in preparing this ESSA. The first round of consultations targeted county government representatives to determine the existing capacity for effective environment and social management at the county level. Consultative field visits were conducted with representatives from 12 of the 47 county governments of Busia, Kajiado, Kakamega, Kiambu, Kilifi, Kisumu, Kwale, Machakos, Meru, Nyeri, Siaya, and Trans Nzoia. The 12 counties were selected in an attempt to ensure representation according to the former province system in Kenya.

A consultation workshop was held at the KSG on December 4 2015 and attended by representatives from the NEMA national and county offices, Ministry of Water, various government entities, and civil society organizations.

More detailed information about the consultations is reflected in Annex 1.

## 3 DESCRIPTION OF KENYA'S ENVIRONMENTAL AND SOCIAL MANAGEMENT SYSTEMS

### 3.1 The Legal, Regulatory, and Policy Framework

#### 3.1.1 Constitution of Kenya, 2010

The Constitution of Kenya (CoK) 2010 is the supreme law of the Republic and binds all persons and all State organs at all levels of government. In relation to the environment, Article 42 of Chapter four, *The Bill of Rights*, confers to every person the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of present and future generations through legislative measures, particularly those contemplated in Article 69, and to have obligations relating to the environment fulfilled under Article 70. Section 69 (2) every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources. Section 70 provides for enforcement of environmental rights.

#### 3.1.2 Environmental Management and Coordination Act, 1999 and Amended in 2015

The EMCA of 1999 amended in 2015 is an act of Parliament that provides for the establishment of an appropriate legal and institutional framework for the management of the environment. This Act provides for the establishment of an appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. Part II of the Act states that every person in Kenya is entitled to a clean and healthy environment and has the duty to safeguard and enhance the environment. Part VI of the Act directs that any new program, activity or operation should undergo EIA and a report prepared for submission to the NEMA, who in turn may issue a license as appropriate.

#### 3.1.3 Environmental Impact Assessment and Audit Regulations, 2003

This regulation provides guidelines for conducting EIA and Audits. It offers guidance on field study and outlines the structure of EIA and Audit reports. The legislation further explains the legal consequences of partial or non-compliance to the provisions of the Act.

### 3.2 Country Social Management Systems

Involuntary resettlement, if left unmitigated, normally gives rise to severe economic, social, and environmental risks. People face impoverishment when their productive assets or income sources are lost and social networks are weakened. Some of the impacts of resettlement, if not mitigated, include landlessness, joblessness, homelessness, marginalization, increased morbidity and mortality, food insecurity, educational loss, loss

of access to common property, and social displacement. The table below summarises the social legislations in Kenya that are relevant to this Program.

**Table 2. Legal Framework Summary**

<b>Legal Framework</b>	<b>Functional Relationship to Resettlement</b>
Constitution of Kenya, 2010	Constitution of Kenya 2010 recognizes individuals' right to acquire and own property provided they are citizens of the country in article 40. However, Article 66 of the same provides for the State to regulate the manner in which these rights may be curtailed for the benefit of the general public. Article 47 of the Constitution provides for administrative action to override the individual rights but the victim has to be given written reason for the action taken that undermines the right.
The LA 2012 Laws of Kenya	It is the substantive law governing land in Kenya and provides legal regime over administration of public and private lands. It also provides for the acquisition of land for public benefit. The government has the powers under this Act to acquire land for projects, which are intended to benefit the general public. The projects requiring resettlement are under the provision of this Act.
Land Registration Act, 2012	The law provides for the registration of absolute proprietorship interests over land (exclusive rights) that has been adjudicated or any other leasehold ownership interest on the land. Such land can be acquired by the state under the LA 2012 in the project area.
NLC Act, 2012	The act establishes the NLC with the purpose of managing public land and carrying out compulsory acquisition of land for specified public purposes.
The Land Adjudication Act Chapter 95 Laws of Kenya	Provides for ascertainment of interests prior to land registrations under the Land Registration Act 2012 through an adjudication committee that works in liaison with adjudication officers.
The Valuers Act 532	The act establishes valuers registration board, which has the responsibility of regulating the activities and conduct of registered valuers in accordance with the provision of the act.
Environment and Land Court Act, 2011	This act establishes Environment and Land Court, a court with status of high court, which shall facilitate the just, expeditious, proportionate, and accessible resolution of disputes related to land and environment, including compulsory land acquisition, land tenure, titles, boundaries, compensation, valuations, rates, land use and environmental planning.
Community Land Bill, 2011	Provides for allocation, management and administration of community land. Establishes Land Allocation Committees and Community Land Management Board



### 3.2.1 The Constitution of Kenya

The Constitution of Kenya, 2010,<sup>2</sup> protects the sanctity of private property rights and states that no property can be compulsorily acquired by the government except in accordance with law.<sup>3</sup> Article 40(3) states:

*“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation” –*

(a) *Results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or*

(b) *Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that –*

*(i) Requires prompt payment in full, of just compensation to the person; and*

*(ii) Allows any person who has an interest in or right over, that property a right of access to a court of law.<sup>4</sup>*

The Constitution empowers the state to exercise the authority of compulsory acquisition. LA, 2012 designates the NLC as the institution empowered to compulsorily acquire land.<sup>5</sup> Article 40 of the Constitution provides that the state may deprive owners of property only if the deprivation is "for a public purpose or in the public interest," but neither the Constitution nor any law provides an exclusive list of permissible public purposes or interests. The state's exercise of this power is left at the discretion of NLC, and requires the state to make full and prompt payment of "just compensation" and an opportunity for appeal to court.

Article 40(3)(a) refers to acquisition and conversion of all kinds of land in Kenya (private, public, community land and foreign interests in land). The Constitution further provides that payment of compensation shall be made to “occupants in good faith” of land acquired by the state who do not hold title for such land.<sup>6</sup> An occupant in good faith is a “bona fide” occupant. On the other hand, under the Constitution, those who have acquired land illegally are not regarded as deserving any compensation.<sup>7</sup>

In addition to Article 40, Chapter 5 of the Constitution is relevant to compulsory acquisition. This chapter, entitled "Land and Environment," is divided into two parts. Part 1 deals with land, and Part 2 deals with environment and natural resources. Part 1 of Chapter 5, articles 60 – 68, describes the principles of land policy. Land should be held, used and managed in a manner that is equitable, efficient, productive and sustainable and

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<sup>2</sup> The Constitution of Kenya, 2010, was adopted by the GoK on 27 August 2010. The full text is available at [http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution/Constitution\\_of\\_Kenya2010.pdf](http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution/Constitution_of_Kenya2010.pdf), accessed May 25, 2011.

<sup>3</sup> Constitution of Kenya, art. 40.

<sup>4</sup> Id.

<sup>5</sup> The Land Act, 2012 The Government of Kenya, Section 8.

<sup>6</sup> Constitution of Kenya. Id. at art. 40(5).

<sup>7</sup> Constitution of Kenya. Id. at art. 40(6).



in accordance with security of land rights, sound conservation and protection of ecologically sensitive areas.<sup>8</sup> These principles must be implemented through a NLP reviewed regularly by the national government and through legislation.<sup>9</sup>

### **3.2.2 Land Act 2012**

The LA <sup>10</sup> is the Kenya's framework legislation regulating compulsory acquisition of land (that is, land, houses, easements and so on). The LA was adopted on 2<sup>nd</sup> May 2012 and provides for sustainable administration and management of land and land based resources including compulsory acquisition. The Act is based on the 2010 Constitution that recognizes the rights of the landowner and the necessity for fair and just compensation.<sup>11</sup> Under the current Constitution,<sup>12</sup> the LA 2012 empowers the NLC (under the guidance of Minister for Lands) to exercise the power of compulsory acquisition on behalf of the State.<sup>13</sup>

### **3.2.3 The National Land Policy**

The NLP or "Policy"<sup>14</sup> was adopted in August 2009 with the aim of providing an overall framework for new legislation and defining key measures required to address critical issues such as land administration, access to land, land use, and restitution related to historical injustices and an out dated legal framework. The NLP addresses constitutional issues such as compulsory acquisition and development control.<sup>15</sup> Section 45 of the NLP defines compulsory acquisition as "the power of the State to extinguish or acquire any title or other interest in land for a public purpose, subject to prompt payment of compensation."<sup>16</sup> The NLP empowers the NLC to compulsorily acquire land.<sup>17</sup>

### **3.2.4 Land Tenure System in Kenya**

Land tenure in Kenya is classified as public, community or private.<sup>18</sup> Public land consists of government forests (other than those "lawfully held, managed or used by specific communities as community forest, grazing areas or shrines"<sup>19</sup>), government game

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<sup>8</sup> Id. at art. 60.

<sup>9</sup> Id. at art. 60(2).

<sup>10</sup> Land Act, 2012.

<sup>11</sup> The Constitution of Kenya, 2010 recognizes prompt and just compensation when compulsory acquisition of land is made.

<sup>12</sup> The Constitution of Kenya, 1963, was replaced in 2010.

<sup>13</sup> Land Act, § 6, 2012.

<sup>14</sup> *Sessional Paper No. 3 of 2009 on National Land Policy* (referred to as the "National Land Policy" in this report) was adopted in August 2009 by the Ministry of Lands. Available at [http://www.lands.go.ke/index.php?option=com\\_content&task=view&id=238&Itemid=48](http://www.lands.go.ke/index.php?option=com_content&task=view&id=238&Itemid=48), accessed May 25, 2011.

<sup>15</sup> Development control is the power of the State to regulate the property rights in urban and rural areas and is derived from the State's responsibility to ensure that the use of land promotes the public interest.

<sup>16</sup> *Sessional Paper No. 3 of 2009 on National Land Policy*, § 45.

<sup>17</sup> *Sessional Paper No. 3 of 2009 on National Land Policy*. §233(d).

<sup>18</sup> Id. at art. 61.

<sup>19</sup> Id. at art. 63(d)(i).

reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas.<sup>20</sup>

### **Customary Tenure**

This refers to unwritten land ownership practices by certain communities under customary law. Kenya being a diverse country in terms of its ethnic composition has multiple customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices.

### **Public Tenure**

Land owned by the Government for its own purpose, which includes unutilized or un-alienated government land reserved for future use by the Government itself or may be available to the general public for various uses. The land is administered under the LA 2012. Categories of government land include forest reserves, other government reserves, alienated and un-alienated government land, national parks, townships, and other urban centers and open water bodies.’

### **Community Land**

Community Land in Kenya is governed by Community Land Bill 2011 and this regulation provides for the allocation, management, and administration of community land. Community land follows a tenure system that defines land owned by traditional community, identified on the basis of ethnicity, culture or similar community of interests. This law establishes Land Administration Committees (LAC) to allocate customary land rights to community members. However, LACs are subject to the jurisdiction of the Community Land Board (CLB). The CLB exercises control over the allocation and the cancellation of customary land rights by the LAC. CLB also established and maintains a register and a system of registration for recording the allocation, transfer and cancellation of customary land rights and rights of leasehold. The CLB also holds and manages community land on behalf of those communities to regulate all transactions relating to community land and to facilitate the recording and issuance of title in community land. The LAC on other hand allocates the right in respect to the specific portion of land to community members by agreement with notification of the CLB for registration. They also determine the size of the portion and the boundaries of the portion of land in respect of which the right is allocated. LACs have the powers of cancellation of rights with approval of CLBs<sup>21</sup>.

### **Freehold Tenure**

This tenure confers the greatest interest in land called absolute right of ownership or possession of land for an indefinite period of time, or in perpetuity. The Land Registration Act, 2012, governs freehold land. The Act provides that the registration of a

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<sup>20</sup> *Id.* at art. 62(g).

<sup>21</sup> Community Land Bill 2011

person as the proprietor of the land vests in that person the absolute ownership of that land together with all rights, privileges relating thereto.

### **Leasehold Tenure**

Leasehold is an interest in land for a definite term of years and may be granted by a freeholder usually subject to the payment of a fee or rent and is subject also to certain conditions which must be observed, for example, relating to developments and usage.

### **3.2.5 Land Acquisition Process in Kenya**

#### **Proof that Compulsory Possession is for Public Good**

It is explicit in the LA, 2012, Section 107, that whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110 of LA 2012. The possession of the land must be necessary for public purpose or public interest, such as, in the interests of public defence, public safety, public order, public morality, public health, urban and planning, or the development or utilization of any property in such manner as to promote the public benefit; and the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having right over the property, and so certifies in writing, possession of such land may be taken.

#### **Respective Government Agency or Cabinet must Seek Approval of NLC**

The respective Cabinet Secretary or Government agency or the County Executive Committee (CEC) Member must submit a request for acquisition of private land to the NLC to acquire the land on its behalf. The NLC will prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. The NLC may reject a request of an acquiring authority to undertake an acquisition if it establishes that the request does not meet the requirements prescribed.

#### **Inspection of Land to be Acquired**

NLC may physically ascertain or satisfy itself whether the intended land is suitable for the public purpose that the applying authority intends to use as specified. If it certifies that indeed the land is required for public purpose, it shall express the satisfaction in writing and serve necessary notices to land owners and or approve the request made by the authority intending to acquire land.

#### **Publication of Notice of Intention to Acquire**

Upon approval, NLC shall publish a notice of intention to acquire the land in the *Kenya Gazette and County Gazette*.<sup>22</sup> It will then serve a copy of the notice to every person

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<sup>22</sup> The *Kenya Gazette* is the official government journal in Kenya published by the Government Printing Press.

interested in the land and deposit the same copy to the Registrar<sup>23</sup> The courts have strictly interpreted this provision, requiring that the notice include the description of the land, indicate the public purpose for which the land is being acquired and state the name of the acquiring public body.<sup>24</sup> NLC will therefore be required to make a comprehensive notice that includes description of land, public purpose for which the land is acquired and the acquiring public body. The Land Registrar shall then make entry in the master register on the intention to acquire as the office responsible for survey, at both national and county level, geo-references the land intended for acquisition.

### **Serve the Notice of Inquiry**

Thirty days after the publication of the Notice of Intention to Acquire, the NLC then schedules a hearing for public inquiry. NLC must publish notice of this hearing in the *Kenya Gazette* and *County gazette* 15 days before the inquiry meeting and serve the notice on every person interested in the land to be acquired. Such notice must instruct those interested in the land to deliver to the NLC, no later than the date of the inquiry, a written claim for compensation.<sup>25</sup>

### **Holding of a Public Hearing**

The NLC convenes a public hearing not earlier than 30 days after publication of the Notice of Intention to Acquire. On the date of the hearing, the NLC must conduct a full inquiry to determine the number of individuals who have legitimate claims on the land, the land value and the amount of compensation payable to each legitimate claimant.<sup>26</sup>

Besides, at the hearing, the Commission shall make full inquiry into and determine who are the persons interested in the land; and receive written claims of compensation from those interested in the land. For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the NLC of documents of title to the land. The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry. It will also provide opportunity to those interested in the land to hear the justification of the public authority in laying claims to acquire the land.

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<sup>23</sup> Land Act, 2012, 107

<sup>24</sup> Government of Kenya 1994. Coastal Aquaculture Limited v. The Commissioner of Lands and Settlement and the Minister of Lands and Settlements. Mombasa H.C. Misc. Appl., No. 55 of 1994, [http://www.kenyalaw.org/CaseSearch/case\\_download.php?go=97115264151454584840489&link=,](http://www.kenyalaw.org/CaseSearch/case_download.php?go=97115264151454584840489&link=,) accessed May 25, 2011. This ruling was upheld by the Court of Appeal. Coastal Aquaculture Limited v. the Commissioner of Lands and Settlement and the Minister of Lands and Settlements. Nairobi. No. 252 of 1996, [http://www.kenyalaw.org/CaseSearch/view\\_preview1.php?link=49186237036025529910634,](http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=49186237036025529910634,) accessed May 25, 2011.

<sup>25</sup> Land Act, 2012 (112).

<sup>26</sup> *Id.* at article 112.

## Valuation of the Land

Part III of the LA 2012, section 113 (2a) states that “*the Commission shall determine the value of conclusive evidence of (i) the size of land to be acquired; (ii) the value, in the opinion of the Commission, of the land; (iii) the amount of compensation payable, whether the persons interested in the land have or have not appeared at the inquiry.*” This can be interpreted that NLC must determine the value of the land accordingly and pay appropriate just compensation in accordance with the principles and formulae stipulated that it will develop. The final award on the value of the land shall be determined by NLC and shall not be invalidated by reason of discrepancy, which may be found to exist in the area.

## Matters to be Considered in Determining Compensation

Market value of the property, which is determined at the date of the publication of the acquisition notice.<sup>27</sup> Determination of the value has to take into consideration the conditions of the title and the regulations that classify the land use, for example, agricultural, residential, commercial or industrial.

## Award of Compensation

Under the LA 2012 section 117, the State may award a grant of land in lieu of money compensation (“land for land”), upon agreement, and provided the value of the land awarded does not exceed the value of the money compensation that would have been allowable.<sup>28</sup> The law stipulates that any dispossessed person shall be awarded the market value of the land.<sup>29</sup> The new law is silent on relocation support or disturbance allowance support.

Upon the conclusion of the inquiry, and once the NLC has determined the amount of compensation, the NLC prepares and serves a written award of compensation to each legitimate claimant.<sup>30</sup> The NLC will publish these awards, which will be considered “final and conclusive evidence” of the area of the land to be acquired, the value of the land and the amount payable as compensation.<sup>31</sup> LA, Section 115 further stipulates that an award shall not be invalidated by reason only of a discrepancy between the area specified in the award and the actual area of the land. Compensation cannot include attorney’s fees, costs of obtaining advice, and costs incurred in preparing and submitting written claims.

## Payment of Compensation

A notice of award and offer of compensation shall be served to each person by the Commission. Section 120 provides that “first offer compensation shall be paid promptly”

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<sup>27</sup> *Id.* at article 112 and article 111.

<sup>28</sup> *Land Act*, 117.

<sup>29</sup> *Land Act*, Schedule

<sup>30</sup> *Land Act*, 115

<sup>31</sup> *Land Act*, 115

to all persons interested in land<sup>32</sup> before a notice of acquisition is issued. Section 119 provides a supplementary condition and states that if the size of land is greater than the size of land in respect of which the award has been made, then NLC shall compensate for excess size “as soon as practicable.”<sup>33</sup> Where such amount is not paid on or before the taking of the land, the NLC must pay interest on the awarded amount at the market rate yearly, calculated from the date the State takes possession until the date of the payment.<sup>34</sup>

In cases of dispute, the Commission may at any time pay the amount of the compensation into a special compensation account held by the Commission, notifying any persons interested accordingly. If the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest on the amount awarded at the rate prevailing bank rates from the time of taking possession until the time of payment.

### **Transfer of Possession and Ownership to the State**

Once first offer payment has been awarded, the NLC serves notice to all persons with interest in the property indicating the date the Government will take possession. Upon taking possession of land, the commission shall ensure payment of just compensation in full. When this has been done, NLC removes the ownership of private land from the register of private ownership and the land is vested in the national or county Government as public land free from any encumbrances.<sup>35</sup>

### **Temporary Possession**

The Commission has also the power to obtain temporary occupation of land. However, the commission shall as soon as is practicable, before taking possession, pay full and just compensation to all persons interested in the land.

### **Opportunity for Appeal**

The Kenya Constitution establishes Environment and Land Court<sup>36</sup>. Article 162 of the constitution provides for the creation of specialized courts to handle all matters on land and the environment. Such a court will have the status and powers of a High Court in every respect. Article 159 on the principles of judicial authority, indicates that courts will endeavor to encourage application of alternative dispute resolution (ADR) mechanisms, including traditional ones, so long as they are consistent with the constitution. Section 20, of the *Environment and Land Court Act, 2011* empowers the Environment and Land Court, on its own motion, or on application of the parties to a dispute, to direct the application of ADR, including traditional dispute resolution mechanisms.

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<sup>32</sup> *Land Act*, This language reflects the language of the Kenya Constitution, 1963.

<sup>33</sup> *Land Act*, 119

<sup>34</sup> *Land Act 115*.

<sup>35</sup> *Land Act, 115 and 116*

<sup>36</sup> *Land Act 2012, Section 128*

Any person whose land has been compulsorily acquired may petition the Environment and Land Court for redress with respect to:

- The determination of such person's right over the land;
- The amount offered in compensation; and
- The amount offered in compensation for damages for temporary dispossession in the case of the Government's withdrawal of its acquisition of the land.<sup>37</sup>

Parties will pay fees as determined by Environment and Land Court, which may waive them completely or in part on grounds of financial hardship.<sup>38</sup>

### **3.2.6 Vulnerable and Marginalized Groups**

The CoK, 2010 also recognizes and defines social exclusion, vulnerability and marginalization: During the long process of constitution making in Kenya, legal experts and other stakeholders, including Indigenous Peoples Organisations, were explicitly aware of the need to address the problem of escalating inequalities and marginalization of many ethnic communities and groups.

Accordingly, while the CoK, 2010, does not specifically use the term indigenous people, it is nevertheless robust in articles that define vulnerability and marginalization, including issues that VMGs cite as the reasons for their self-identification. It also addresses social exclusion in general. Most important, the Constitution now underscores measures for mitigating social exclusion, vulnerability and marginalization by specifically providing for affirmative action as a strategy for facilitating and fast tracking inclusion of the hitherto groups who felt excluded for the mainstream economic and political processes of the country.

In line with the recognition of marginalized groups by the CoK, 2010, Article 260 of the Constitution defines a “marginalized community” as: (a) a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;(b) a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are (a) nomadic; or (b) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole<sup>39</sup>.

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<sup>37</sup> *Land Acquisition Act*, at article 29(7).

<sup>38</sup> *Land Acquisition Act* at article 43.

<sup>39</sup> Ditto



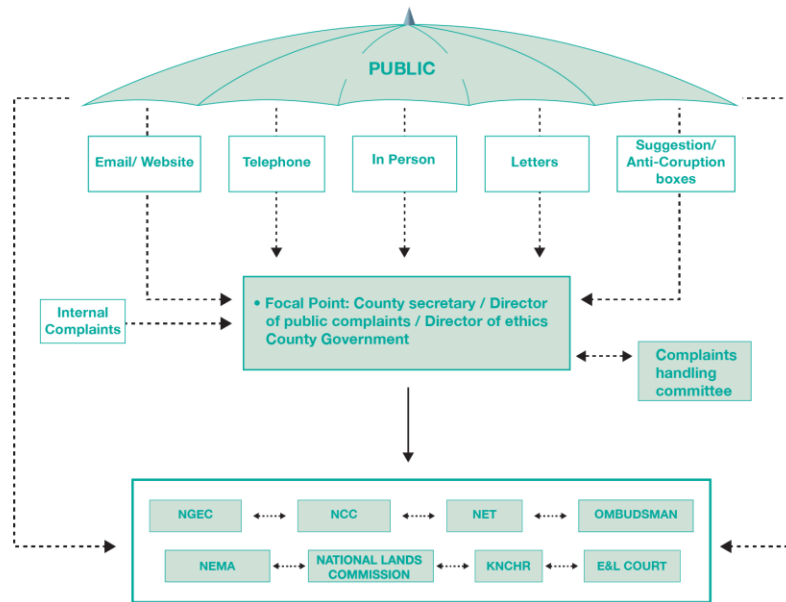
Similarly, the CoK, 2010, defines ‘marginalized group’ as: a group of people who, because of laws or practices, on, or after the effective date, were or are disadvantaged by discrimination on one or more of the grounds in Article 27 (4) which prohibits discrimination on the basis of ethnic or social origin, religion, conscience, belief, culture, dress or language. In addition, article 27(6) calls on the state to undertake, ‘legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination’. This article prohibits both direct and indirect discrimination.

Articles 56 and 260 of the Constitution are a clear demonstration of the intentions of the country to deal with the concerns of minority and marginalized groups: The definition of marginalized communities and groups by the CoK, 2010, and the provisions for affirmative action programs for minority and marginalized groups are efforts to clearly provide a legal framework for the inclusion of minority and marginalized groups into mainstream development of the country. These articles present the minority and marginalized groups as a unique category of certain segments of the Kenyan population that deserve special attention in order to bring them to par with the rest of the country.

The Constitution of Kenya requires the State to address the needs of vulnerable groups, including “minority or marginalized” and “particular ethnic, religious or cultural communities” (*Article 21.3*): The specific provisions of the Constitution include: affirmative action programs and policies for minorities and marginalized groups (Articles 27.6 and 56); rights of “cultural or linguistic” communities to maintain their culture and language (Articles 7, 44.2 and 56); protection of community land, including land that is “lawfully held, managed or used by specific communities as community forests, grazing areas or shrines,” and “ancestral lands and lands traditionally occupied by hunter-gatherer communities” (Article 63); promotion of representation in Parliament of “...(d) ethnic and other minorities; and (e) marginalized communities” (Article 100); and an equalization fund to provide basic services to marginalized areas (Article 204).

## **Figure 2. Complaint Handling Mechanism**





### 3.3 Institutional Framework for Environmental and Social Management

#### 3.3.1 Institutional Responsibilities with Respect to Environmental Management

##### Ministry of Environment and Natural Resources

The Ministry of Environment and Natural Resources (MENR) is responsible for the environment at policy level. MENR mission statement and key objective is to facilitate good governance in the protection, restoration, conservation, development and management of the environment, water and natural resources for equitable and sustainable development. The mandate of the Ministry is to monitor, protect, conserve and manage the environment and natural resources through sustainable exploitation for socio-economic development aimed at eradication of poverty, improving living standards and ensuring that a clean environment is sustained now and in the future. The ministry comprises of various divisions at the headquarters and the following parastatals and departments including the NEMA.

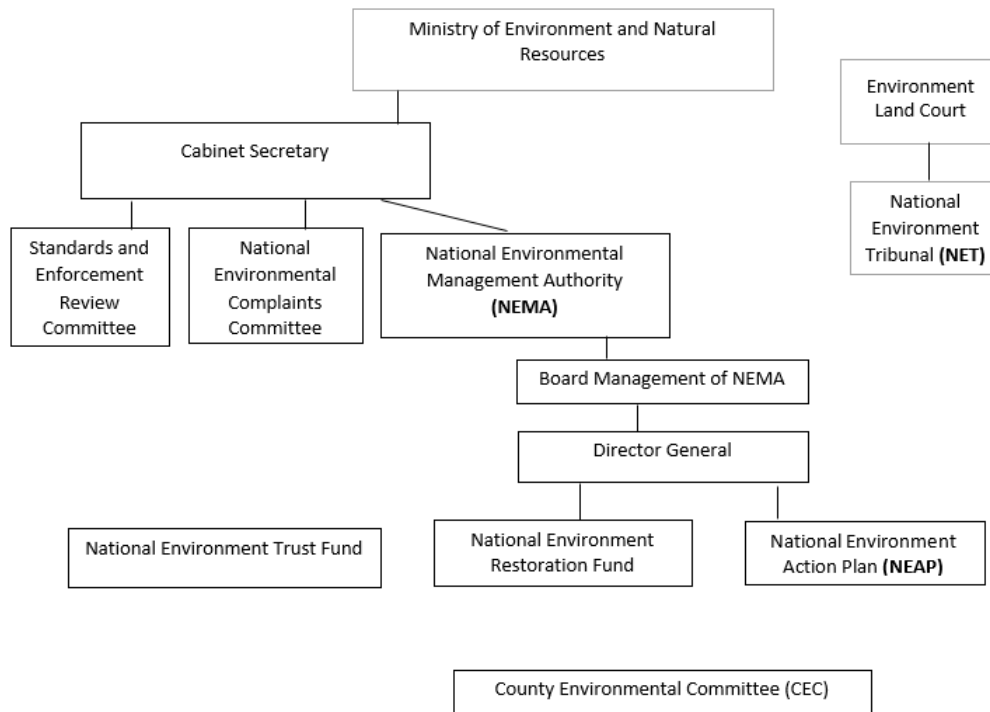
##### National Environment Management Authority (NEMA)

NEMA is the principal authority of Government in the implementation of all policies relating to the environment. NEMA is the administrative body that is responsible for the coordination of the various environmental management activities in Kenya. NEMA is also responsible for reviewing project reports and making a determination as to whether a full EIA is required or not as well as granting EIA licenses and for monitoring and assessing activities in order to ensure that the environment is not degraded by such project activities.

### **National Environment Complaints Committee (NECC)**

The NECC investigates allegations and complaints of suspected cases of environmental degradation. The Committee also prepares and submits to the Cabinet Secretary periodic reports of its activities.

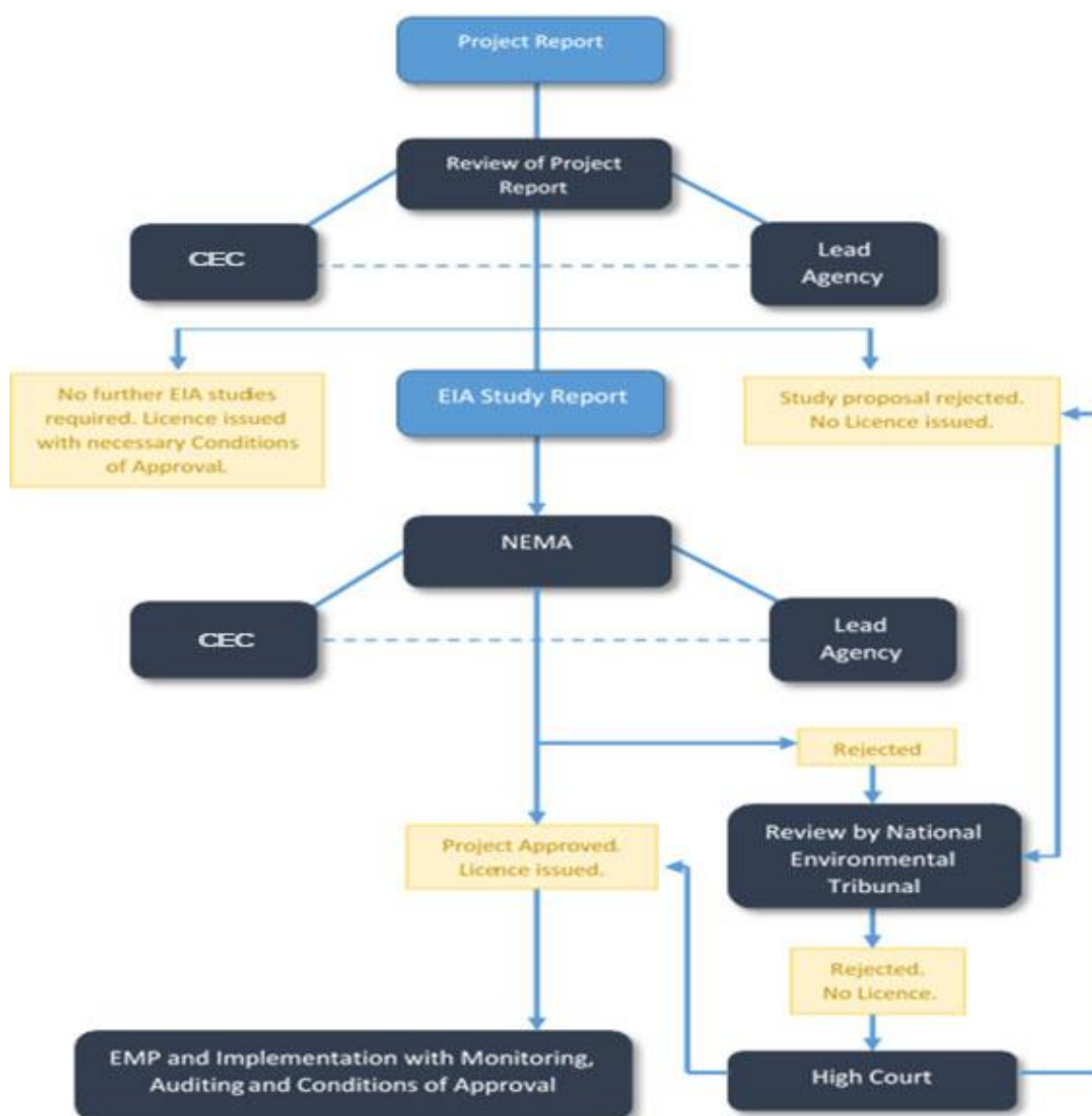
**Figure 3. Summary of the Administration of the Environment in Kenya**



### Environmental and Social Impact Assessment Process in Kenya

The EIA is a process and management technique, which allows consideration of the likely environmental and social impacts of a development prior to it proceeding. This provides an opportunity to ensure that the design is optimised in an integrated manner, minimising negative environmental and social impacts and maximising positive impacts. The EIA process in Kenya is shown schematically in **Figure 4** below.

**Figure 4. EIA Process in Kenya**



### 3.3.2 Institutional Responsibilities with Respect to Social Issues

The constitution provides for a number of institutions to address issues of vulnerable and marginalised groups including grievance redress mechanisms. Key constitutional mechanisms for redress of issues related to marginalization include the (a) CAJ - Office of the Ombudsman; (b) NLC; and (c) Committee on Revenue Allocation.

#### The Commission on Administrative Justice – Office of the Ombudsman

Kenya has a formal Feedback and Complaints Handling Mechanism. The Commission is the national/constitutional stakeholder instrument for grievance redress. Its mandate is to receive and address complaints against public officers and public institutions to improve service delivery. Three types of complaints can be made to the office of the Ombudsman

including: (a) Citizen against State/public officers and institutions; (b) Public officers against fellow public officers; and, (c) Public institutions against other public institutions. **Table 3** below provides the steps and process for feedback and complaints redress by the Ombudsman. The Ombudsman has a three step and time bound mechanism for feedback and grievance redress, as shown below.

**Table 3. Feedback and Complaints Redress by the CAJ (the Ombudsman)**

Step 1	<p>Complainant fills in a Complaint Form</p> <ul style="list-style-type: none"> <li>• Complaint is assessed for compliance with CAJ Mandate;</li> <li>• If within mandate, CAJ commences inquiries and complainant is issued with copy of communication – CAJ 2 [Sec. 43];</li> <li>• If NOT within CAJ mandate, Complainant is advised accordingly and/or referred to appropriate government agencies;</li> <li>• If a response is not received from the respondent after 14 working days, CAJ sends a first reminder giving the respondent 7 days to comply;</li> <li>• If no response is received after this, a final reminder of 7 days is sent;</li> <li>• If there is still no response after 28 days, summonses are issued to the respondent in line with [Sec. 27(a)].</li> </ul>
Step 2	<p>If after the summonses the respondent still fails to comply, the Ombudsman proceeds to:</p> <ul style="list-style-type: none"> <li>• Determines the complaint in the absence of the respondent;</li> <li>• Institutes legal proceedings against the respondent [according to Sec. 52];</li> <li>• Cites the respondent as an unresponsive State or Public Office or Officer, and/or declares such State or Public Officer to be unfit to serve in the Public Service;</li> </ul>
Step 3	<p><i>How the Ombudsman undertakes grievance redress action:</i> In resolving a complaint, the Ombudsman may:</p> <ul style="list-style-type: none"> <li>• Conduct investigations according to articles [A.59 (2)(i)] [Sec 8 b)] [A.252(1)(g)] [Sec. 53 (1)];</li> <li>• Demand and obtain information or documents [S.26 (d)];</li> <li>• Conduct an inquiry [A.252(1)(g)]</li> <li>• Undertake mediation, negotiation and conciliation [A.252 (1) (b)];</li> <li>• Constitute a hearing panel;</li> <li>• Invite or summon any person or persons to attend to the Commission [S.26 (f)];</li> <li>• Obtain orders from the Court authorizing Searches or Seizures [Sec.26 (e)].</li> <li>• Obtain warrants of arrest for breach of any summons or orders of the Commission.</li> </ul>

## The National Land Commission (NLC)

**The NLC is an independent commission tasked with registering land transfers, resolving land disputes and addressing historical land injustices.** NLC is tasked with facilitating and increasing access to fair and equitable mechanisms for resolving land and natural resource-based disputes and conflicts<sup>40</sup>.

NLC Act, 2012 specifies the role of NLC as:

- To identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;

<sup>40</sup>National Land Commission Act 2012, Land Act 2012, Land registration Act 2012 applicable laws and Sessional paper No. 3 (209) on the National Land Policy.

- Evaluate all parcels of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning; and
- Acquire land for public purposes
- Solve land disputes and deal with historical land injustices
- Share data with the public and relevant institutions in order to discharge their respective functions and powers under this Act; or
- May require the land to be used for specified purposes and subject to such conditions, covenants, encumbrances or reservations as are specified in the relevant order or other instrument.

### **County Land Management Boards (CLMB)**

County Land Management Boards are established by the NLC in consultation and cooperation with the national and county governments. Among the 3 and not more than seven members of the CLMB appointed by the NLC there shall be a physical planner or a surveyor who shall be nominated by the county executive member and appointed by the county governor. The Boards' mandates cover the processing of applications for allocation of land, change and extension of user, subdivision of public land and renewal of leases. They may also perform any other functions assigned by the NLC.

### **Environmental and Land Court (ELC)**

Article 162 (2) (b) of the Constitution established the ELC, a superior court with jurisdiction throughout Kenya to hear and determine disputes relating to the environment and the use of and occupation of, and title to, land.

### **The Commission on Revenue Allocation**

CRA is the CoK, 2010's mechanism for bringing the marginalized communities and regions of Kenya into the country's mainstream development agenda. The mandate of CRA<sup>41</sup> includes to: (a) Recommend on equitable sharing of revenues between National and County Governments and among Counties; (b) Recommend on financing and financial management of County Governments; and to (c) Determine, publish and regularly review a policy which sets out the criteria by which to identify the marginalized areas. The constitution has further established the Equalization Fund as the instrument

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<sup>41</sup>The mandate of CRA as spelt out in the Constitution include: (i) Recommend on equitable sharing of revenues between National and County Governments; and among Counties, Article 216 (1)(b)); (ii) Recommend on financing and financial management of County Governments (Article 216 (2)); (iii) Define and enhance revenue sources of National Government and County Governments (Art. 216 (3) (b)); (iv) Encourage fiscal responsibility by National and County Governments (Article 216 (3) (c)); and (v) Determine, publish and regularly review a policy in which it sets out the criteria by which to identify the marginalized areas for the purposes of Article 204 (2) (Article 216 (4)).

with which CRA it to achieve its mandate. The objective of the equalization fund is to eradicate marginalization and other forms of economic inequalities in Kenya and to bring all groups into mainstream development within 20 years from the date of promulgation of the CoK, 2010. There is clear overlap between the counties designated as marginalized by the CRA and the location of marginalized groups.

**Box 1. The Role of the Equalization Fund in Reducing Exclusion and Marginalization**

According to article 204 (2) “The National Government shall use the Equalization Fund only to provide basic services including water roads, health facilities and electricity to marginalized areas to the extent necessary to bring the quality of those services in those areas to the level generally enjoyed by the rest of the nation”. The GoK 2010 establishes an Equalization Fund which is one half percent (0.5 percent) of all the revenue collected by the national government each year.

## **National Gender Equality Commission**

National Gender Equality Commission is a constitutional Commission established by an Act of Parliament in August 2011, as a successor commission to the Kenya National Human Rights and Equality Commission pursuant to Article 59 of the Constitution. NGECE derives its mandate from Articles 27, 43, and Chapter Fifteen of the Constitution; and section 8 of NGECE Act (Cap. 15) of 2011, with the objectives of promoting gender equality and freedom from discrimination.

The over-arching goal for NGECE is to contribute to the reduction of gender inequalities and the discrimination against all; women, men, persons with disabilities, the youth, children, the elderly, minorities and marginalized communities

## **Kenya National Commission on Human Rights**

The Kenya National Commission on Human Rights (KNCHR) is an autonomous national Human rights institution established under article 59 of the Constitution of Kenya 2010 with the core mandate of furthering the promotion and protection of human rights in Kenya. The Commission plays two key broad mandates;

- It acts as a watch-dog over the Government in the area of human rights.
- Provides key leadership in moving the country towards a human rights state.

The main goal of KNCHR is to investigate and provide redress for human rights violations, to research and monitor the compliance of human rights norms and standards, to conduct human rights education, to facilitate training, campaigns and advocacy on human rights as well as collaborate with other stakeholders in Kenya.

To date the following legislation on land has been adopted or drafted:

- **The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012**, (Jan. 4 2013). Specifies rights of Internally Displaced Persons including forest evictees, and responsibilities of Government.

- **The Environment and Land Court Act (2011).** The Act was to establish a superior court that will hear and determine disputes relating to the environment and the use and occupation of land.
- **The Eviction and Resettlement Guidelines (2010):** The guidelines explicitly allude to international law, denounce the problem of land insecurity and squatters, and acknowledge international standards in their general principles citing the case of the Sengwer and Endorois evictions.
- **The Land Bill (2011)** on the sustainable administration and management of land and land-based resources and for connected purposes.
- **The Land Registration Bill (2011)** on the registration of title to land, dealings in registered land, and for connected purposes.
- **The National Policy on Land** has provisions for protecting collective community lands<sup>42</sup> and for addressing historical injustices and the land rights of minority and marginalized groups.

Several challenges remain related to land management structures. While many former land management institutions or structures such as Land Tribunal are no longer recognized in the new constitutional dispensation, the new structures meant to assume these functions, such as the County Land Management Boards, are yet to be constituted in most of the Counties. The setting up of a full functioning NLC is central to the land agenda of vulnerable and marginalised communities.

### Opportunity for Appeal

The Kenya Constitution established an Environment and Land Court<sup>43</sup>, which is a Superior Court that has the same status of a High Court. Article 162 of the constitution provides for the creation of specialized courts to handle all matters on land and the environment. Article 159 on the principles of judicial authority, indicates that courts will endeavor to encourage application of ADR mechanisms, including traditional ones, so long as they are consistent with the constitution. Section 20, of the *Environment and Land Court Act, 2011* empowers the Environment and Land Court, on its own motion, or on application of the parties to a dispute, to direct the application of ADR, including traditional dispute resolution mechanisms.

Any person whose land has been compulsorily acquired may petition the Environment and Land Court for redress with respect to:

- The determination of such person's right over the land;
- The amount offered in compensation; and

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<sup>42</sup>National land Policy 2009 Chapter 3 and Chapter 5

<sup>43</sup> Land Act 2012, Section 128



- The amount offered in compensation for damages for temporary dispossession in the case of the Government's withdrawal of its acquisition of the land.<sup>44</sup>

Parties will pay fees as determined by Environment and Land Court, which may waive them completely or in part on grounds of financial hardship.<sup>45</sup>

### 3.4 Institutional Responsibilities for Implementing Environmental and Social Management

Section 58 of the EMCA has been amended and directs that proponent of any project specified in the second schedule shall undertake a full EIA study prepared by a registered and licensed EIA and audit expert and submit the EIA study report to NEMA prior to being issued with any licence. In recognition that certain projects may not require full EIA, the EMCA, gives NEMA the power to direct a project proponent to forego the submission of EIA report in certain cases.

Projects funded by the C&PG will undergo the same screening as any other projects in accordance with the rules and procedures as described in the EMCA (amendment) 2015. For each project to be funded by the C&PG, Counties will prepare a brief project description of the development project(s) and submit these to NEMA for review. For very small projects with very little impact, NEMA typically instructs the proponent to proceed – no license required. If NEMA finds that, based on this report, the project falls under their second schedule of the Act, as it poses a significant risk, they will require EIA study preparation. However, for some projects that fall under schedule 2 but have very little risk of significant impact (for example, in some cases resurfacing a paved road) NEMA may in these cases waive the requirement for EIA. If NEMA determines that EIA is not required, they will issue a license for the project.

All projects, which require full EIA study, will be excluded from the grant investment menu due to the risks associated with these types of projects. Because NEMA will require full EIA study for projects that carry substantial risks, any project that does not require EIA should meet the principles of the Bank Policy. Any project that will relocate more than 200 people would be excluded, even if NEMA did not require a full-scale EIA study.

#### 3.4.1 EIA Stages in Kenya

EMCA makes provision for EIA in sections 58 and 59 thereof. Section 58 among others obliges the proponent of a project to undertake or cause to be undertaken at his own expense an EIA study and prepare a report thereof. A proponent must not implement a project likely to have a negative environmental impact or for which an EIA is required under the Act or Regulations unless an EIA has been concluded and approved by NEMA.

<sup>44</sup> *Land Acquisition Act*, at article 29(7).

<sup>45</sup> *Land Acquisition Act* at article 43.

At the end of the EIA study process, an EIA study report is produced. An EIA undergoes through the following stages:

### **Screening**

Screening determines which projects or developments require a full or partial impact assessment study.

### **Terms of Reference (ToR)**

An EIA study must be conducted in accordance with ToRs developed during the scoping exercise by the proponent and approved by NEMA. *Scoping* is identification of the potential impacts that are relevant to assess and to derive ToRs for the impact assessment. The ToRs include matters required to be considered in the making of an EIA including;

- Ecological considerations that is the impact of project on biological diversity, sustainable use and ecosystem maintenance.
- Social considerations including economic impacts, social cohesion or disruption, effect on human health, immigration or emigration, communication and effects on culture and objects of culture value.
  - Landscape
  - Land uses
  - Water: impacts of the proposal on water sources and drainage patterns/drainage systems.

### **Environmental Impact Assessment Study**

An EIA study is to be conducted in accordance with the general EIA guidelines and sector EIA guidelines set out in the EIA/EA regulations. The EIA study report to be submitted to NEMA for scrutiny shall be prepared by registered and licensed EIA and audit experts. An EIA study must take into account environmental, social, cultural, economic, and legal considerations, and shall:

- Identify the anticipated environmental impacts of the project and the scale of the impacts;
- Identify and analyze alternatives to the proposed project;
- Propose mitigation measures to be taken during and after the implementation of the project; and
- Develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance, which shall include the cost of mitigation measures and the time frame of

implementing the measures.

### **Environmental Impact Assessment Study Report**

After an EIA study has been conducted the proponent submits to the Authority an EIA Study Report incorporating but not limited to the following information:

- The proposed location of the project;
- A concise description of the national environmental legislative and regulatory framework, baseline information, and any other relevant information related to the project; the objectives of the project;
- The technology, procedures and processes to be used, in the implementation of the project;
- The materials to be used in the construction and implementation of the project;
- The products, by-products and waste to be generated by the project;
- A description of the potentially affected environment;
- The environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative, irreversible, short-term and long-term effects anticipated;
- Alternative technologies and processes available and reasons for preferring the chosen technology and processes;
- Analysis of alternatives including project site, design and technologies and reasons for preferring the proposed site, design and technologies.
- An environmental management plan proposing the measures for eliminating, minimizing or mitigating adverse impacts on the environment; including the cost, time frame and responsibility to implement the measures;
- Provision of an action plan for the prevention and management of foreseeable accidents and hazardous activities in the course of carrying out activities or major industrial and other development projects;

The EIA study report must also be accompanied by a non-technical summary outlining the key findings, conclusions and recommendations of the study and must be signed by the proponent and EIA experts involved in its preparation.

### **Public Participation**

Public participation is at the center of EIA. During the process of conducting an EIA study the proponent must in consultation with NEMA seek the views of persons who may be affected by the project. After the approval of the EIA Report by NEMA, the proponent must:

- (a) Publicize the project and its anticipated effects and benefits by:
  - Posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
  - Publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and
  - Making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks;
- (b) Hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
- (c) Ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
- (d) Ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

### **Comments from Lead Agencies**

After NEMA has received the Report, has to submit a copy thereof to any relevant lead agencies for their comments. Lead agencies review the report to ensure that it complies with the ToRs under Regulation 11 and that it is comprehensive. They thereafter send their comments to NEMA on the report within 30 days or such extended time as the Authority may specify. If no comments are received from the Lead Agencies the Authority may proceed with the determination of the application for the implementation of the project.

### **Submission of Comments and Public Hearing**

Regulation 21 obligates NEMA to invite the public to make oral or written comments on the report. The invitation for public comments shall state;

- The nature of the project;

- The location of the project;
- The anticipated impacts of the project and the proposed mitigation measures to respond to the impacts;
- The times and place where the full report can be inspected; and
- The period within which the Authority shall receive comments.

Upon receipt of both oral and written comments the Authority may hold a public hearing. On conclusion of the hearing, the presiding officer shall compile a report of the views presented at the public hearing and submit a report to the Director General of NEMA within 14 days from the date of the public hearing. The Authority may then approve the EIA Study Report and issue an EIA Licence under Regulation 24.

### **EIA and Monitoring**

Monitoring has been defined as a process whereby states observe, measure, evaluate and analyze by recognized scientific methods the risks or effects” of pollution or environmental harm. It is a continuous or periodic determination of actual and potential effects of any activity or phenomenon of the environment whether short-term or long-term. Monitoring is generally undertaken after the project has begun, to check initial EIA predictions and determine whether further measures are needed in order to abate or avoid pollution or environmental harm. It is also done for the purposes of conducting research or identifying patterns and trends, which reflect the state of the environment. Under Article 1 of the 1992 OSPAR Convention, monitoring has been defined as the “repeated measurement” of the following three factors:

- (a) The quality of the environment and each of its compartments;
- (b) Activities or natural and anthropogenic inputs which may affect the quality of the environment; and
- (c) The effects of such activities.

### **Environmental Audit**

Section 68 of EMCA obligates NEMA with the responsibility of carrying out environmental audit of all activities that are likely to have significant effect on the environment. An environmental audit study must be undertaken on development activities likely to have adverse environmental impacts such as on-going projects commenced prior to the coming into force of the regulations or new projects undertaken after completion of an EIA study report. In carrying out an environmental audit study the auditor must carry out an appraisal of all the project activities including the production of goods and services; give adequate consideration to environmental regulatory frameworks, environmental health and safety measures and sustainable use of resources. The principles applicable to EIA are also relevant in an environmental audit.

### 3.5 Screening of Proposed KDSP Investments as Part of Investment Project Preparation

Screening of KDSP investments will commence right at the project inception phase as soon as the specific investment project details are known including nature and scope, proposed location and area among other parameters. The screening process could result in any of the following determinations:

1. Full EIA
2. A stand-alone Environmental and Social Management Plans (ESMP) /Project Report or
3. No further environmental study

#### 3.5.1 Project Screening

NEMA is the institution designated to make a decision on whether a full scale EIA study is necessary for proposed investments and is mandate by law to do so. To make this determination, a project report must be submitted to NEMA and this is part of the screening.

Project reports for proposed investments under KDSP will be prepared by environmental and social county focal points in beneficiary counties with support from NEMA registered EIA and audit then submitted to the NEMA for further determination. It is proposed under the KDSP, each county benefiting from the grants will designate an environmental and social county focal point from offices of CECs, for example, environment, water and natural resources and so forth to provide this function.

It must be noted that the KDSP will not support projects that require EIA under the amended EMCA (2015). These projects will often be projects under Schedule 2, but some projects under Schedule 2 may not require an EIA, for example roads infrastructure projects with respect to rehabilitation, re-carpeting and so forth. NEMA can allow counties to go ahead without a full EIA study if there are no major environmental or other economic or socio-cultural impacts. EIA regulations allow for approval of proposed projects at the project report stage and have been effectively used by NEMA to grant EIA license to low/medium risk projects without requiring a full EIA study to be done.

#### 3.5.2 Statutory Content of Project Reports

Regulation 7 (1) of Legal Notice 101 stipulates content of Project Reports to include the following:

- The nature of the project;
- The location of the project including the physical area that may be affected by the project's activities;

- The activities that shall be undertaken during the project construction, operation, and decommissioning phases;
- The design of the project;
- The materials to be used, products, by-products, including waste to be generated by the project and the methods of disposal;
- The potential environmental impacts of the project and the mitigation measures to be taken during and after implementation;
- An action plan for the prevention and management of possible accidents during the project cycle;
- A plan to ensure the health and safety of the workers and neighbouring communities;
- The economic and socio-cultural impacts to the local community and the nation in general;
- The project budget;
- Any other information that the Authority may require.

Project Reports are normally prepared as a means of informing NEMA of the proposed development such that after review of the report, NEMA advises on the need or otherwise for EIA. The EIA regulations allow for approval of proposed projects at the Project Report Stage and have been effectively used by NEMA to grant Environmental Licenses to small projects without requiring EIA.

**Table 4. The NEMA Process for Approving Investment Project Reports**

Steps	Action	Actor	Time requirement
<b>One</b>	Submission of Project Report to NEMA. NEMA receives Project Report, issues a receipt and acknowledgement.	County Governments	Immediately upon submission of acceptable project report with required processing and review fee
<b>Two</b>	NEMA mails Project Report to Lead Agencies	NEMA	7 days assuming all requirements are fulfilled
<b>Three</b>	Lead agencies review Project Report and issue comments	Lead Agencies	21 days (minimum) after receipt of Project Report from NEMA.
<b>Four</b>	Review of Project Report by NEMA	NEMA	30 days after receipt of Project Report.
<b>Five</b>	Communication of findings from NEMA review	NEMA	45 days after receipt of Project Report

Typical outcomes of review of Project Reports from NEMA are likely to be as shown in **Table 5** below. These are as follows:



**Project investment is approved.** Where NEMA and lead agencies ascertain that a project report has disclosed adequate mitigation for identified impacts, NEMA approves the project upon which, conditions attached to grant of an environmental license are issued. Once these are fulfilled, an environmental license is also issued subject to conditions, which will be specific to the investment in question.

**Table 5. Possible Outcomes of NEMA Review of Project Reports**

Outcome	Recommendation	Important precautions
Project found to have no significant social and environmental impacts or Project Report discloses sufficient mitigation measures	An Environmental License will be issued by NEMA	Project report must disclose adequate mitigation measures and show proof of comprehensive consultations within the area of influence.
Significant adverse social and environmental impacts found or Project Report fails to disclose adequate mitigation measures.	A full cycle EIA will be required by NEMA	As above
A proponent is dissatisfied with the outcome of the NEMA review.	An Appeal is provided for	

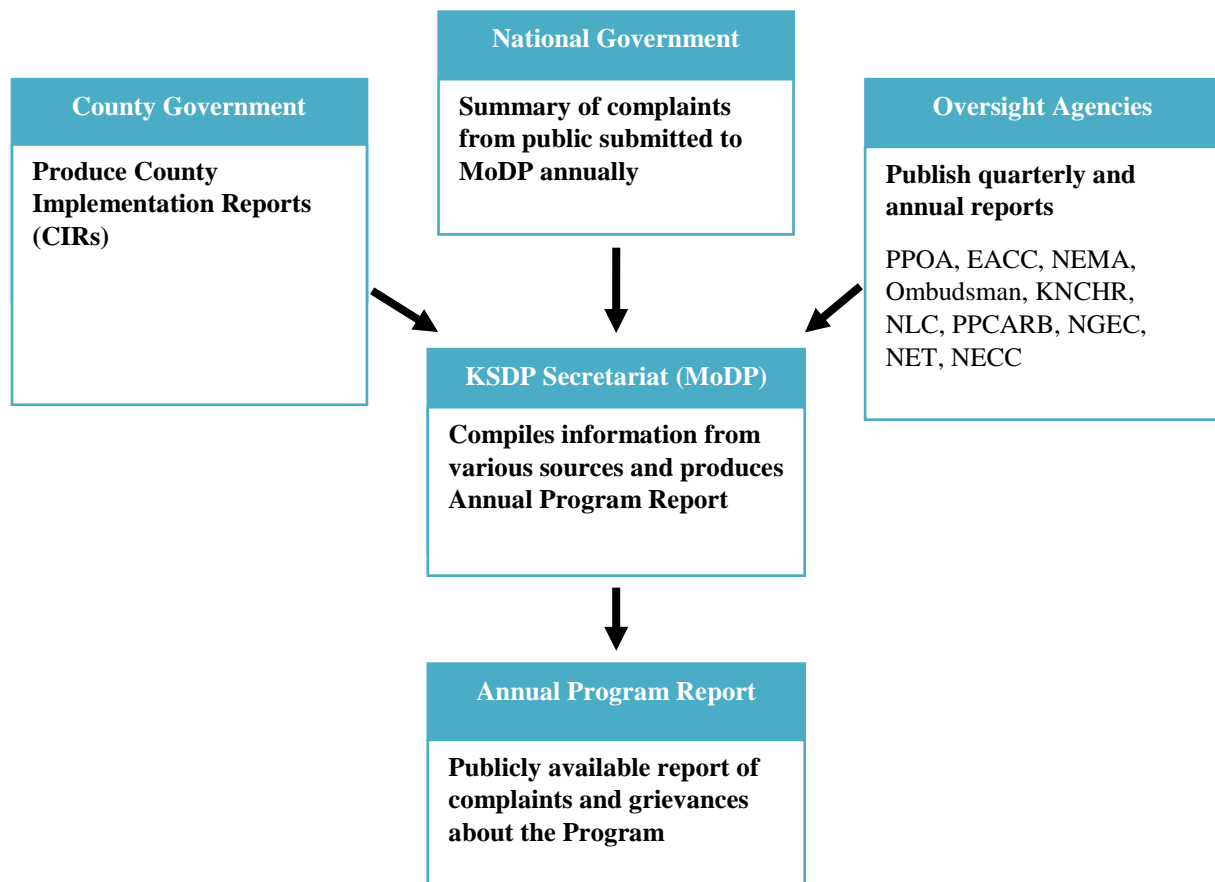
### 3.6 Overall Program Compliance and Reporting

**Table 6** provides a summary of the stages and institutional responsibilities for the screening, preparation, assessment, approval and implementation of the KDSP activities.

**Table 6. Screening Responsibilities**

No.	Stage	Institutional responsibility	Implementation responsibility
1.	Screening of Environmental and Social Infrastructure Project to assist in project formulation using checklist	County Governments	Environmental and Social Officer (ESO) in respective Counties
2.	Statutory Environmental Registration of projects	County Governments	Environmental and Social Officer (ESO) in respective Counties
3.	Determination of appropriate environmental assessment level/ category	NEMA	(County to follow-up)
4.	If full EIA is needed, reject the investments	County Government and NEMA	County Government and NEMA

**Figure 5. KDSP Grievance and Complaint Reporting Process**



**National Government.** Public reports any complaints on nationally executed activities to National Government Focal Points relating to fraud and corruption, procurement, environment and land. A summary of complaints received and actions taken on them (format to be described in the POM) submitted to the MoDP annually.

1. **County Government.** County government produces County Implementation Reports (CIRs). Part of these reports includes information on complaints and grievances handled by counties in relation to Fraud and Corruption, Procurement, Environment, and Land. Scope and format of including complaints and grievances will be detailed in the Program Operational Manual (POM).
2. **Oversight Agencies.** National Agencies (PPOA, EACC, NEMA, Ombudsman, KNCHR, NLC, PPCARB, NGEC, NET, NECC) publish quarterly and annual reports on handling of complaints.
3. **Ministry of Devolution and Planning (MoDP).** Based on information sources (1)–(3) above, the MoDP will compile aggregate information on complaints and grievances, which will be included in the annual program report, which will be available to the public.

## 4 DETERMINATION OF POTENTIAL ENVIRONMENT AND SOCIAL IMPACTS

### 4.1 Adverse Environmental Impacts

The Program intends to support the construction and or rehabilitation, maintenance, upgrading of key facilities in various sectors, which are likely to lead to construction and operation impacts.

#### 4.1.1 Construction Impacts

Most negative impacts associated with the types of works to be funded by the KDSP are associated with the construction and or operation phase. Potential adverse impacts include air pollution from dust and exhaust; nuisances such as noise, traffic interruptions, and blocking access paths; water and soil pollution from the accidental spillage of fuels or other materials associated with construction works, as well as solid and liquid wastes from construction sites and worker campsites; traffic interruptions and accidents; and accidental damage to infrastructure such as electric, wastewater, and water facilities.

These types of impacts, however, are generally site-specific, reversible, limited in scope and magnitude and in most instances temporary in nature. These impacts are and can be for the most part can be prevented or mitigated with standard operational procedures and good construction management practices. These procedures will be included in the Program Operational Manual, and be a standard part of environmental management plans included in bidding documents for contractors.

**Natural Habitats:** Significant impacts on sensitive natural habitats and biodiversity are unlikely owing to the nature and scale of investments under the KDSP. However, given the rural hinterlands some impacts on water ecosystems are possible if construction impacts are not well managed, for example erosion. Natural habitats could be altered as a result of borrow pits for aggregate materials. Land clearance for works could result in clearance of grass and trees, and road widening works could have similar impacts as well as displacing substantial amounts of soils. If not properly managed, borrow pits for construction materials pose perhaps the greatest potential negative impacts on natural habitats and land degradation if abandoned without proper reclamation.

**Borrow Pits:** Some projects will require borrow pits to quarry for aggregate materials for construction such as sand and stone. Borrow pits, if improperly sited, maintained, and reclaimed once inactive, can impact natural habitats, degrade land (for example, through topsoil removal), and water quality (through erosion and siltation of waterways). An indirect health impact from abandoned borrow pits that are not properly reclaimed are the formation of artificial ponds and lakes that breed mosquitos or harbour water-borne diseases. Impacts are generally mitigated by preparing borrow pit management plans that

identify locations, specify amounts to be removed from each site, and provide specific instructions for reclamation at each site.

**Vegetation:** Construction of public facilities could entail clearing vegetated areas and tree felling. Mitigation measures would consist of re-vegetation and tree planting after construction. Reforestation, afforestation and grass replanting in project areas and at time tree nurseries are some of the proposed mitigation measures.

**Physical Cultural Resources and Sacred Sites:** All investment projects will be screened for impacts on physical cultural resources with mitigation measures included in either EMPs or RAPs, depending on the type of impact.

### 4.1.2 Operational Impacts

The proposed investments are likely to adversely affect the environment during the operational phase as a result of activities and process. Activities such like support to hotels and camps, jua-kali sheds and craft centres, processing plants (value additions), support to medical facilities among others will lead to among others;

**Waste Generation/Hazards:** Craft centres, processing plants, tourist facilities, public facilities and health facilities are likely to generate solid and liquid wastes which could include those that are hazardous in nature especially from health care facilities and processing plants. Poor waste management practises during construction and operation phases of implementation of investments could adversely affect the environment.

**Electronic Waste:** Electronic wastes may present a challenge if the proposed investments include procurement of laptops for schools under the education sector investments.

**Pesticide Use:** Similarly, support to irrigation projects may entail the use of pesticides, which could be harmful to the environment in absence of proper pesticide management approaches.

**Communicable Diseases:** Road improvements increase communication among rural and urban populations and between urban areas – this in turn can increase the potential for exposure to sexually transmitted diseases (including HIV/AIDS) and other communicable diseases such as tuberculosis. Road construction crews are often the first sources of such infections in an area under construction. Mitigation measures typically include awareness and prevention campaigns.

## 4.2 Adverse Social Impacts

### 4.2.1 Resettlement Impacts

The KDSP will not support investments that lead to significant displacement of people causing impacts on property and livelihoods.

### 4.2.2 Vulnerable and Marginalised Groups

Resettlement and environmental degradation tend to disproportionately impact the vulnerable and marginalised groups. While the Program seeks to improve conditions, if impacts are not well-managed it is possible that assets and livelihoods could be negatively impacted. Screening and mitigating social impacts will be included in the Program Operational manual, and guidelines for resettlement will include considerations for vulnerable groups.

## 4.3 Adopted Mitigation Measures

The KDSP has adopted a number of principles that will apply to all projects as a mechanism for mitigating adverse environmental and social impacts. Other than requiring that all project investments under the KDSP, be subjected to screening and that all projects listed under the second schedule of EMCA as requiring **full EIA** study will not be supported by KDSP grants, the Program has developed a set of principles and minimum standards that will act as measures to minimise project risks at the concept level. The principles will apply to all investments as a mechanism for mitigating adverse environmental and social impacts. Several features built into the PforR design further limit the risk of grant-funded county projects having significant environmental and social impacts.

**First**, the size of the expected grants will be relatively small, averaging around US\$1.5 million per county per year, up to a maximum amount of around US\$5 million in a given year for a large county, and accounting for a maximum of around 20 percent of a county's overall development spending. The grants will be unlikely to fund major infrastructure or other projects with significant impacts.

**Second**, counties will need to satisfy basic minimum conditions of environmental capacity before they can qualify for a Level 2 grant (for investments). County governments will identify focal persons to handle environmental and social issues arising from KDSP investments and eventually for county wide investments including allocation of sufficient budget to achieve desired objectives and actions.

**Third**, the investment menu of eligible uses for the grants excludes county projects that require EIA studies, based on NEMA's review of Schedule 2 projects, or that will result in the relocation of more than 200 people. KDSP will undertake investments in undisputed public and private land/areas where maximum **200 people** or less are displaced for as long as the country systems for land acquisition is followed including preparation of an adequate and acceptable Abbreviated RAP. However, a KDSP investment will apply on undisputed communal lands if unanimous consensus has been achieved with all people to be displaced, and there has been a public consultation, and engagement of all the relevant land acquisition institutions and in accordance to the legal framework on land in Kenya. KDSP investments will be implemented in communal land only in circumstances when free, prior and informed consultation and broad consensus is demonstrated to have taken place with affected communities unanimously agreeing to have the land used for that investment without compensation. The consultations would

have to be properly documented, including attendee list (also absentees), dates, photos, minutes of meeting, issues raised, agreements reached, mode of consensus building, and so on. Any agreements of land gift should be endorsed by all and better still thumb printed or signed or notarized.

All communal land identified and determined to have issues related to historical injustices (for example, historical claims over land) will not have KDSP investments implemented on such land. The NLC and NLMB established in all Counties have a register of all land with historical land injustices claims. Hence the county will ensure that this is complied with in such cases before such investments take place. Hence a screening of this will have to take part prior to the finalisation of the planning process jointly with NLC and NLMB to determine ownership of all land public, private and communal. All public land encroached by communities will be ineligible for implementing a KDSP investment until and unless the County governments duly compensate the encroachers for losses of assets.

**Fourth**, compliance with this investment menu is a “minimum condition” for counties to access grants for investments. The annual capacity and performance assessment will review whether each county has followed the investment menu; if a county has not, it will be excluded from competing for grants in the following year.

**Fifth**, despite limited county capacity, the government’s overall capacity to screen proposed projects and require full EIA studies of projects with significant risks is quite robust. The ESSA team’s assessment is that excluding projects that require full EIA studies will effectively limit most of the possible environment and social risks.

**Finally**, the PforR is designed to annually assess and gradually strengthen county capacity to manage social and environmental risks. In addition to the above features, the annual assessment of counties will measure key aspects of county social and environmental capacity. Additional measures based on the ESSA of the capacity of implementing institutions for environmental and social management will be incorporated into the overall PAP. During the Program implementation phase, the borrower will monitor program effectiveness and share monitoring information with the Bank task team. This will include monitoring against Program capacity-strengthening measures as well as the effectiveness of any agreed impact mitigation measures identified in the PAP.

Complaints and grievances submitted at the county level, will be received by the focal environmental and social officers and then channeled to the relevant grievance redress and complaints handling mechanism according to existing GoK procedures.

### **KDSP Environmental and Social Management Principles**

The environmental and social management principles are general principles, which counties will have to adhere to as they implement the sub projects and they complement the minimum access and performance conditions.

1. Small-scale infrastructure projects shall be considered provided these sub-projects are part of an eligible main project.

2. A project shall not be eligible if it is likely to have significant adverse environmental impacts that are sensitive (that is, if it may be irreversible (for example, lead to loss of a major natural habitat), affect vulnerable groups or ethnic minorities, involve involuntary displacement and resettlement, or affect significant cultural heritage sites), diverse, or unprecedented. A project is not eligible if it would affect an area broader than the sites or facilities subject to physical works.
3. All projects that may require significant relocation of 200 people or commercial activities and/or activities that would require significant involuntary land acquisition will be ineligible
4. Projects involving activities that would significantly convert natural habitats or significantly alter potentially important biodiversity and/or cultural resource areas shall be ineligible.
5. Projects that generate significant (irreversible) environmental impact that will probably affect third parties (for example, local community, neighbours) shall not be eligible.
6. Projects that are likely to have an impact on virgin forests, heritage property (for example, religious or archaeological sites), protected natural habitats or areas with high biological diversity (for example, wetlands, coral reefs, mangroves), international waterways, shall not be eligible.
7. Projects that are likely to adversely affect water supply in a given county and/or neighbouring counties shall not be eligible.
8. Projects that are likely to involve involuntary resettlement of communities or families and/or impact on indigenous peoples shall not be eligible.
9. Projects that are likely to pose serious occupational or health risks shall not be eligible for KDSP grants.
10. All projects must adhere to the EMCA, 1999, read with EMCA (Amended) 2015 and its subsidiary legislations.



## 5 CAPACITY AND PERFORMANCE ASSESSMENT

This section summarizes the assessment of the capacity of the Counties in Kenya and NEMA to effectively implement the Program environmental and social management system. The KDSP will follow the existing procedures including institutional mechanism for environmental and social management currently in use in Kenya and as stipulated by the relevant legislations.

### 5.1 National Environment Management Authority

#### 5.1.1 Policy and Legislative Framework Support

Kenya has a fairly robust legal framework for environmental management, known as the EMCA, which provided for the establishment of NEMA in 2002 as well as other institutions responsible for the protection and management of the environment. Several guidelines and regulations have also been prepared by NEMA including EIA/EA regulations, which aim at ensuring that projects are subjected to environmental analysis to determine likely adverse impacts before commencement.

#### 5.1.2 Organization and Program Structure

##### Policy and Legal Review

NEMA is mandated to commit resources and implement actions necessary for effective environmental and social management. NEMA has established county offices in all 47 counties, which are headed by County Directors of Environment (CDE). A total of 14 counties were visited as part of the capacity assessment and the following can be summarized with respect to staffing, skills, qualifications, and number of personnel for program administration, planning, and design, implementation, and monitoring functions.

NEMA has extensive experience in environmental assessment and management capacity (including monitoring and enforcement) as provided for by the EMCA. NEMA has developed several regulations and guidelines that are relevant for this Program including:

- Noise regulations
- Wetland
- Water quality
- Waste management
- Controlled substances
- Air Quality
- Biodiversity

- Controlled substances
- National sand harvesting guidelines
- Strategic Environmental Assessment guidelines
- Electronic waste guidelines

### **Staffing (County Levels)**

All of the NEMA offices visited at the county level were understaffed, with the capacity assessment findings revealing that most county offices have a maximum of two environmental officers and in certain instances a few interns. This has made it difficult for the staff to handle the workload of EIA reports reviews, compliance, and enforcement for county projects. Certain counties are huge in terms of size and therefore the role of NEMA officers is fairly limited and constrained with officers indicating that they are unable to supervise all on-going projects in order to enforce compliance through monitoring. NEMA officers therefore focus mostly on the review of and monitoring of high-risk projects at the expense of other projects. This is a concern for the KDSP, because the proposed investments under KDSP are fairly small in size and low impact, which could lead to very little enforcement and supervision by NEMA officers.

### **Qualifications and Skills**

The NEMA officers at the county level are fairly qualified and possess the requisite skills necessary for ensuring environmental and social management. County Directors of Environment (CDE) and their assistants' hold undergraduate and post-graduate qualifications in environment and natural resources with over seven years of experience.

### **Budget Resources/Financial Capacity**

NEMA is charged with enforcing EMCA's provisions as well as the subsidiary legislation that has been passed over the last decade. The subsidiary legislation includes water quality, waste management, controlled substances, biodiversity, wetland, river and seashore, and EIA regulations. Most of the provisions contained in EMCA, as well as the subsidiary legislation, are intended to provide regulations for the usage and type of allowable activity in the different ecosystems and habitats of Kenya. Thus, NEMA's main task is to review and grant licenses to proponents that plan to change land-use. To complete this task, EMCA grants NEMA the power to compel any authority or ministry to comply with existing environmental regulations.

It is important to note that NEMA's review process is handicapped by a lack of adequate funding for the scale of its mandate. With only US\$6.6 million for an annual budget, NEMA is stretched so thin that it is unable to carry out its auditing and monitoring mandate.

NEMA staff rarely visit projects in isolated and hard to reach areas due to resource limitations. Additionally, smaller projects do not attract the same scrutiny as larger

projects because of the assumption that the associated impacts are lesser overall. Yet, a small waste disposal site could have a sizeable adverse impact. Moreover, the combination of a number of small developments in one area can lead to large impacts, each contributing to a part of the overall harm to the environment.

In both instances, NEMA's lack of resources creates a situation where projects with sizeable impacts on the environment are not sufficiently audited or monitored to ensure that they are complying with regulations, or implementing mitigation techniques. In the end monitoring is often left to the proponent of a project with little oversight from NEMA to ensure accuracy of findings.

Funds are disbursed from NEMA headquarters in Nairobi and most of the officials could not provide the current financial year budget allocation for the county, even though they were of the opinion that the funds allocated were insufficient. NEMA Officers at County are forced to take up multiple roles such as accounting, technical tasks and administrative tasks.

### **Capacity Building Recommendations**

The training and capacity building efforts proposed for the County officers should also include NEMA.

## **5.2 County Governments**

The recipients of the capacity and performance grants are the county governments in Kenya, which have been recently formed following the promulgation of the new constitution in 2012, which provided for a devolved system of governance. The new system consists of a national government and 47 county governments.

The creation of devolved units of government means that services and self-governance have been brought closer to the people. However, for citizens to effectively engage with the county governments, they need to understand the structure of the county government and the role and functions created under this new system.

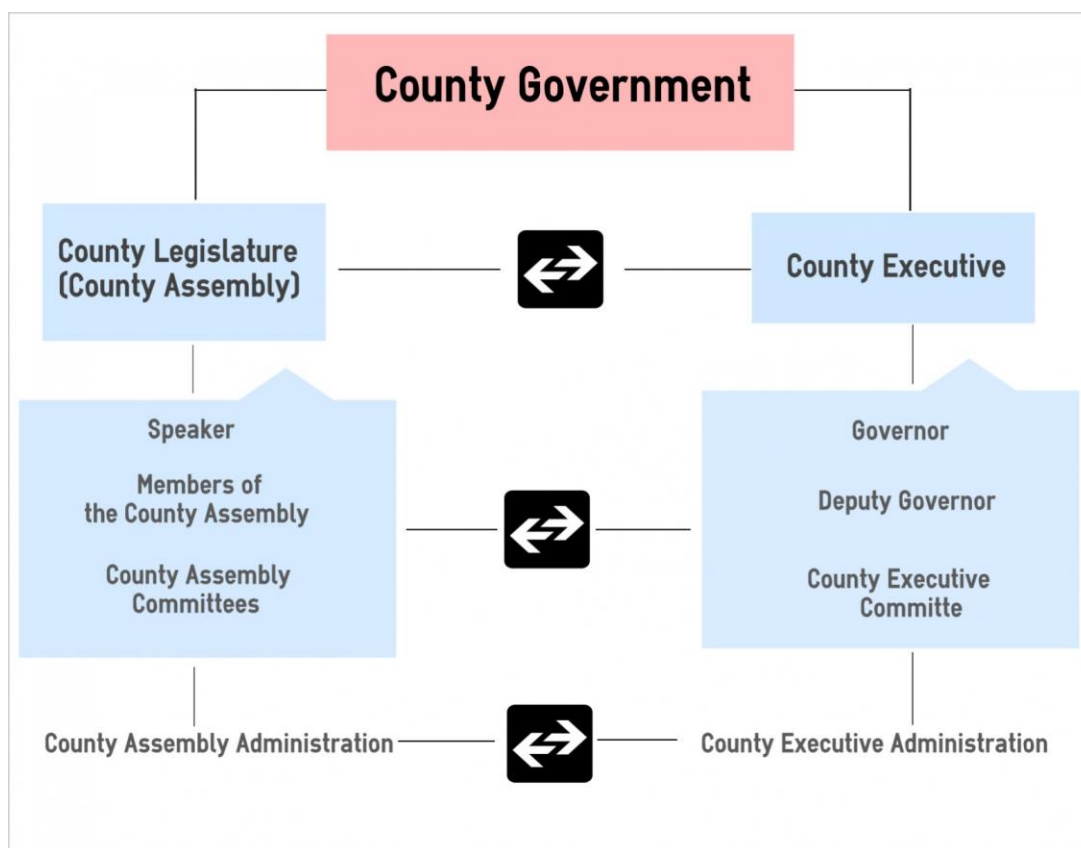
### **Organization and Program Structure**

Devolution is the statutory granting of powers from the central government of a sovereign state to a government at a subnational level, such as a regional, local, or state level. It is a form of decentralisation. In order for devolution to function as expected, there are several structures that have been set up including the office of the Governor, the CEC, County Assembly, County Public Service Board, the Senate, and Women Representatives. It is important for citizens to understand the roles and functions of these structures at the county level if they are to play an oversight role as envisaged by the Constitution.

The main role of county governments in EIA process includes:

1. Preparation of project reports for submission to NEMA in cases where they are the project proponent
2. Procure qualified and NEMA registered EIA consultants to prepare EIA/RAP reports for investments determined to require full EIA
3. Undertake monitoring as per the ESMP during project investment implementation
4. Prepare Annual Environmental Audit Reports for submission to NEMA

**Figure 6. Model County Government Structure**



## Staffing

Counties have established CEC, which are like Ministries and generally they include Environment, Natural Resources, Lands, Water, Agriculture, Health, Education, Gender and Social Services among others. CEC Members head the CECs.

The staffing capacity in counties with respect to CECs and Administrators with focus on environmental and social issues is relatively inadequate with the capacity assessment findings showing that most counties are under staffed in environmental and social sectors when compared to other sectors. In addition, most of the personnel in charge of the environment department lack technical skills to manage the departments adequately.

Therefore it can be concluded that most counties are not adequately staffed, in terms of skills, qualifications, and number of personnel for program administration, planning, and design, implementation, and monitoring functions and the KDSP should build sufficient in-house capacity to ensure the same.

### **Qualifications and Skills**

Qualifications of staff at the county level with respect to CECs responsible for environmental and social aspects, indicate that majority have undergraduate qualifications and above with most of the staff formerly working for municipal or county councils.

The county governments according to the EIA/EA regulations are responsible for monitoring and implementation of ESMP. While this remains a key task, the analysis confirmed that county staff are adequately qualified to handle tasks such as the EIA process. In most cases, given the lack of a budget resource the responsibilities tend to be added on rather than having dedicated staff.

### **Budget Resources/Financial Capacity**

The average budget allocation for the environment department in the counties was below KSh100 million. The environmental and social management units at the county level are not adequately supported through budgetary allocations and provision of necessary facilities, equipment and supplies and there is need for supplementary support for the same.

## 6 ASSESSMENT OF PROGRAM SYSTEM IN RELATION TO ESSA CORE PRINCIPLES

This section provides an assessment of the extent to which the applicable systems are consistent with the core principles of Bank Policy, Program-for-Results Financing and key planning elements. This section provides an assessment of where the Program system is inconsistent with relevant core principles and the significance of these gaps.

Overall, the existing system in Kenya is consistent with the core principles of Bank Policy. This section presents the environmental and social benefits, risks and impacts of the Program.

**Table 7. Environmental and Social Assessment and Management Matrix**

<b>Core Principle 1: Environmental and social management procedures and processes are designed to: promote environmental and social sustainability in the Program design; avoid, minimize, or mitigate adverse impacts, and promote informed decision-making relating to the Program's environmental and social impacts</b>			
<b>Key Planning Elements</b>	<b>Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements</b>	<b>Key Findings</b>	<b>Recommendations</b>
<p>Whether for design of new programs or program activities, or for support to existing programs or activities, the Bank will confirm that, as relevant, Program procedures do the following:</p> <p>Operate within an adequate legal and regulatory framework to guide environmental and social impact assessments at the Program level.</p> <p>Incorporate recognized elements of environmental and social assessment good practice, including (a) early screening of potential effects; (b) consideration of strategic, technical, and site alternatives (including the “no action” alternative); (c) explicit assessment of</p>	<p>EIA system provides a comprehensive framework for environmental and social impact assessment broadly consistent with the core principles outlined in Bank Policy.</p> <p>NEMA has established offices in every county to ensure compliance with EIA regulations.</p> <p>Existence of comprehensive standards and guidelines for construction management.</p> <p>Legislation on environmental screening and regulatory oversight exist.</p> <p>Both require screening of sub project investments in order to determine if further environmental analysis is needed.</p> <p>The Bank requires that stakeholder consultations be undertaken during planning, implementation and operation phases of the project, which is equivalent to the EMCA requirements.</p> <p>Counties have established CECs, which are like Ministries and include sectors Environment, Natural</p>	<p>Kenya has extensive experience in implementing and incorporating Bank environmental and social policies in projects and has applied these policies in several sectors where the Bank is actively lending.</p> <p>At the county level, NEMA faces capacity challenges that may impact the implementation of the KDSP including limited human and financial resources for monitoring and enforcement, especially for small investments. Implementation and enforcement of environmental and social policies is at times inadequate as personnel lack resources (for example, to make site inspection visits, or to adequately carry out consultations).</p> <p>Risk that NEMA may direct a project proponent to forgo the submission of EIA study report in certain cases that may lead to certain</p>	<p>The Program provides an avenue to scale up capacity development in environmental and social management.</p> <p>NEMA has the responsibility of building the capacity including raising the awareness of lead agencies (including county governments) on environmental legislation but limited funds have compromised its ability to do so. Funding for capacity building from World Bank Trust Fund to NEMA could be leveraged to improve the inadequate capacity in NEMA.</p> <p>KDSP should build sufficient in-house capacity to improve county capacity in terms of skills, qualifications, and the number of personnel needed</p>

potential induced, cumulative, and trans-boundary impacts; (d) identification of measures to mitigate adverse environmental or social impacts that cannot be otherwise avoided or minimized; (e) clear articulation of institutional responsibilities and resources to support implementation of plans; and (f) responsiveness and accountability through stakeholder consultation, timely dissemination of program information, and responsive grievance redress measures.	Resources, Lands, Water, Agriculture, Health, Education, Gender and Social Services among others	<p>KDSP investments likely to have adverse impacts on the environment being overlooked.</p> <p>CECs staffing capacity with focus on environmental and social issues is relatively inadequate. Most counties are under staffed in environmental and social sectors compared to other sectors. Most of the personnel in charge of the environment department lack technical skills to manage the departments adequately. The level of awareness by CECs and administrators with respect to their roles and responsibilities in accordance to the EMCA is limited.</p>	for program administration, planning, design, implementation, and monitoring functions.
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**Core Principle 2: Environmental and social management procedures and processes are designed to: to avoid, minimize, and mitigate against adverse impacts on natural habitats and physical cultural resources resulting from the Program.**

Key Planning Elements	Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements	Key Findings	Recommendations
<p>As relevant, the Program to be supported:</p> <p>Includes appropriate measures for early identification and screening of potentially important biodiversity and cultural resource areas.</p> <p>Supports and promotes the conservation, maintenance, and rehabilitation of natural habitats; avoids the significant conversion or degradation of critical natural habitats, and if avoiding the significant conversion of natural habitats is not technically feasible, includes measures to mitigate or offset impacts or program</p>	<p>EIA system provides a comprehensive framework for environmental and social impact assessment broadly consistent with the core principles outlined in Bank Policy</p> <p>The Bank requires that stakeholder consultations be undertaken during planning, implementation and operation phases of the project, which is equivalent to the EMCA requirements.</p> <p>NEMA has several guidelines and regulations including EIA/EA regulations, which aim at ensuring that projects are subjected to environmental analysis to determine likely adverse impacts before commencement.</p> <p>EIA procedures in Kenya apply to all projects likely to have adverse impacts on natural habitats including physical cultural resources. EMCA contains in schedule 2, a list of project activities that must be subjected to full</p>	<p>Overall, no significant inconsistencies between Bank Policy and Kenya's policies, laws, and regulations related to natural habitats and physical cultural resources.</p> <p>Activities and investments under KDSP will not be located in natural habitats or archeologically important sites. Such sites are under the control and mandate of Kenya Wildlife Service (KWS), and National Museums of Kenya (NMK).</p> <p>No risk with respect to the investments affecting locations considered ecologically and culturally sensitive in nature. Risk is deemed to be minor if the Borrower</p>	<p>The system strengthening actions identified for Core Principle 1 are applicable to Core Principle 2.</p> <p>All projects will be screened to determine locations with respect to natural habitats and or cultural sensitive sites.</p>



<p>activities.</p> <p>Takes into account potential adverse impacts on physical cultural property and, as warranted, provides adequate measures to avoid, minimize, or mitigate such effects.</p>	<p>EIA and in this list, projects affecting natural habitats and physical-cultural resources are prominently outlined. Both Bank and NEMA require screening of sub project investments in order to determine if further environmental analysis (EIAs) is needed.</p> <p>NEMA has established offices in every county, which are headed by Country Director of Environment to ensure compliance with EIA regulations.</p> <p>Existence of comprehensive standards and guidelines for construction management. Legislation on environmental screening and regulatory oversight exist.</p> <p>Ministry of Sports and Culture has procedures and mechanisms related to chances finds for archaeological and cultural resources. Under the Ministry all physical and cultural sites have been adequately mapped and have a special protection status preventing degradation or damage.</p>	<p>applies appropriate site scoping and screening procedures in the early screening practices for site selection.</p> <p>The general gaps in the environmental and social management system apply.</p> <p>Additionally, statutory annual environmental audits are required by EMCA.</p>	
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**Core Principle 3: Environmental and social management procedures and processes are designed to: protect public and worker safety against the potential risks associated with: (a) construction and/or operations of facilities or other operational practices under the Program; (b) exposure to toxic chemicals, hazardous wastes, and other dangerous materials under the Program; and (c) reconstruction or rehabilitation of infrastructure located in areas prone to natural hazards;**

Key Planning Elements	Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements	Key Findings	Recommendations
<p>Promotes community, individual, and worker safety through the safe design, construction, operation, and maintenance of physical infrastructure, or in carrying out activities that may be dependent on such infrastructure with safety measures, inspections, or remedial works incorporated as needed.</p> <p>Promotes the use of recognized good practice in the production, management, storage, transport,</p>	<p>Kenya has Occupational Health and Safety Act (OSHA), which dictates the need for workers health and safety during any form of construction.</p> <p>National Construction Authority (NCA) is charged with ensuring workers health and safety.</p> <p>Public and worker safety are adequately covered in the EMCA and OSHA regulations and the NCA, and no major inconsistencies between the system and Core Principle 3.</p> <p>Kenya has several policies, which aim at protecting the environment from all forms of pollution by chemicals across different sectors including industrial and</p>	<p>Inability to ensure public and worker safety can result in avoidable accidents and fatalities leading to loss of productive days and life.</p> <p>Given the limited scope of investment activities, these risks are deemed to be moderate to significant. Some types of investments, require better attention to implementation of occupation health and safety issues during construction.</p> <p>Such risks could be mitigated</p>	<p>ESSA recommends that screening criteria include vulnerability of project sites to natural hazards such as flooding, which is not included in EMCA project brief screening.</p>

<p>and disposal of hazardous materials generated through program construction or operations; and promotes the use of integrated pest management practices to manage or reduce pests or disease vectors; and provides training for workers involved in the production, procurement, storage, transport, use, and disposal of hazardous chemicals in accordance with international guidelines and conventions.</p> <p>Includes measures to avoid, minimize, or mitigate community, individual, and worker risks when program activities are located within areas prone to natural hazards such as floods, hurricanes, earthquakes, or other severe weather or climate events.</p>	<p>agricultural.</p>	<p>through inclusion of appropriate requirements in civil works contracts. All such measures will require monitoring by implementing agencies at the city, regional, and central government level.</p>	
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**Core Principle 4: Environmental and social management procedures and processes are designed to: manage land acquisition and loss of access to natural resources in a way that avoids or minimizes displacement, and assist the affected people in improving, or at the minimum restoring, their livelihoods and living standards;**

Key Planning Elements	Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements	Key Findings	Recommendations
<p>As relevant, the Program to be supported:</p> <p>Avoids or minimizes land acquisition and related adverse impacts;</p> <p>Identifies and addresses economic and social impacts caused by land acquisition or loss of access to natural resources, including those affecting people who may</p>	<p>GoK has a robust and proactive land legislation that provides for just compensation for land and other assets lost as a result of resettlement in accordance to market rates and replacement costs.</p> <p>According to Kenyan Legislation, involuntary resettlement may occur as a result of projects implemented in public interest.</p> <p>The LA, 2012 Act outlines procedures for sensitizing the affected population to the project and for consultation on implications and grievance procedures. The LA 2012 guarantees the right to fair and just compensation in case of</p>	<p>Community land acquisition and compensation still remain a major challenge in Kenya with the lack of a community LA to provide guidance on acquisition of community land. The LA does not also provide entitlement for encroachers or those having illegal ownership of land.</p> <p>The Law does not stipulate that resettlement should be avoided wherever possible; on the contrary, as long as a project is for public interest,</p>	<p>For each of the subproject, ensure that resettlement issues are considered at the design stage of the project in order to avoid/ minimize resettlement.</p> <p>Implement consultation procedures as outlined in Kenyan legislation, including NLC requirements for free, prior and informed consultation and broad consensus for</p>

<p>lack full legal rights to assets or resources they use or occupy;</p> <p>Provides compensation sufficient to purchase replacement assets of equivalent value and to meet any necessary transitional expenses, paid prior to taking of land or restricting access;</p> <p>Provides supplemental livelihood improvement or restoration measures if taking of land causes loss of income-generating opportunity (for example, loss of crop production or employment); and</p> <p>Restores or replaces public infrastructure and community services that may be adversely affected.</p>	<p>relocation.</p> <p>GoK has a valuers act guiding valuation practice.</p> <p>The LA outlines procedures for consultation with affected population by the NLC and grievance management procedures.</p> <p>LA 2012 clearly outline the steps and process for grievance redress that includes ADR, re-negotiation with NLC and is backed by the judicial system through Environmental and Land Court</p> <p>The LA 2012 provides that written and unwritten official or customary land right are recognized as valid land right. The Law provides that people eligible for compensation are those holding land tenure rights</p> <p>LA also recognizes those who have interest or some claim in the land such pastoralist or who use the land for their livelihood.</p> <p>The constitution recognizes ‘occupants of land even if they do not have titles’ and payment made in good faith to those occupants of land. However, this does not include those who illegally acquired land.</p> <p>LA 2012 provides for census through NLC inspection and valuation process.</p> <p>Legislation provides for land for land compensation but the LA 2012 does not state whether preference should granted to land to land compensation.</p> <p>LA 2012 appears to prefer mode of compensation by the Government to the affected population.</p> <p>LA talks of prompt, just and full compensation before the acquisition of land. However, interpretation of just compensation is yet to be clearly outlined through a specific schedule defining just and fair compensation has not been put in place.</p>	<p>involuntary resettlement is considered to be inevitable.</p> <p>Implementation of investments in areas where land is considered community land presents a risk to the KDSP and is likely to cause tension if local communities claim ownership over communal land. There is a risk associated with poor preparation of RAPs by experts, which may lead to incorrect valuation of assets and census survey. The GoK has a tendency to forcefully evict illegal occupiers of land/encroachers without regard for human rights concerns.</p> <p>Just and fair compensation as outlined in the LA 2012 is not clear and can only be determined by NLC, which can be subjective. It is does not talk about improving livelihood or restoring them to pre-project status.</p> <p>Kenya’s Land Law defines eligibility as both formal (legal) and informal (customary) owners of expropriated land. However, it does not specifically recognize all users of the land to be compensated.</p> <p>The constitution of Kenya on the other hand recognizes ‘occupants of land’ who do not have title and who the state has an obligation to pay in good faith when compulsory acquisition is made.</p> <p>Land for Land provided for in the LA but act not specific on when it should applied except when the affected person choses to receive land to land</p>	<p>community and public land</p> <p>Ensure ALL users (including illegal squatters, labourers, rights of access) of affected lands are included in the census survey or are paid ..</p> <p>Ensure that all alternative options are considered in preference to providing cash compensation (as outlined in the Entitlement Matrix).</p> <p>Implement prompt and effective compensation at full replacement cost for the losses of the assets.</p> <p>KDSP to develop procedures on policy on Attorney’s fees.</p> <p>Ensure that ALL resettlement options are agreed on with PAPs and put in place BEFORE displacement of affected persons.</p> <p>Avoid all land with historical injustices claims</p> <p>Use Land regulations and</p>
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	<p>Attorney's fees, cost of obtaining advice or cost incurred in preparing and making written claim not included in just compensation.</p> <p>The Act is does not outright stipulate assistance for relocation but we can interpret that relocation cost will be included in just compensation.</p> <p>Valuation is covered by the LA 2012 and stipulates, as already mentioned, that the affected person receive fair and just compensation from NLC, as determined by NLC. Valuers Act stipulates that a residual amount of 0.5% of the total valuation of an asset is expected to pay the valuer.</p> <p>LA 2012 talks of fair and just compensation for the lost assets but it is not specific of the exact amount or procedures on the same.</p> <p>The LA 2012 stipulates just and fair compensation.</p>	<p>award.</p> <p>Cash-based compensation seems to be the preferred mode of awarding compensation to the affected population by GoK.</p> <p>Just compensation as stipulated in the LA not yet specifically defined.</p> <p>LA very clear on attorney fees that it is not included.</p> <p>Interpretation of just and fair compensation not clear.</p>	<p>mechanisms for valuation and compensation</p>
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**Core Principle 5: Environmental and social management procedures and processes are designed to: give due consideration to the cultural appropriateness of, and equitable access to, Program benefits, giving special attention to the rights and interests of the Indigenous Peoples and to the needs or concerns of vulnerable groups**

Key Planning Elements	Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements	Key Findings	Recommendations
<p>Undertakes free, prior, and informed consultations if Indigenous Peoples are potentially affected (positively or negatively) to determine whether there is broad community support for the program.</p> <p>Ensures that Indigenous Peoples can participate in devising opportunities to benefit from exploitation of customary resources or indigenous knowledge, the</p>	<p>To date, although there is no specific legislation governing indigenous peoples in Kenya the CoK 2010 has sufficient provisions:</p> <p>CoK, 2010, however, specifically includes minority, traditional, indigenous and pastoral communities among the groups of communities that are defined as marginalized community. This broad definition of marginalized groups thus encompasses most of the groups that self-identify as indigenous peoples.</p> <p>CoK, 2010, provides a rich and complex array of civil and political rights, socio-economic rights and collective rights that are of relevance to VMGs.</p>	<p>CoK, 2010, is in tandem with the international definitions of VMGs in general .</p> <p>CoK 2010 captures the disadvantaged position of VMGs vis-à-vis other dominant communities in Kenya.</p> <p>The legal and regulatory system is robust enough to promote decentralized planning, implementation and social accountability. Kenya has a formal feedback and complaints handling mechanism. Complaints can be made</p>	<p>Equalization funds are opportunities that the KDSP should embrace in order to increase transparency and accountability.</p>

<p>latter (indigenous knowledge) to include the consent of the Indigenous Peoples.</p> <p>Gives attention to groups vulnerable to hardship or disadvantage, including as relevant the poor, the disabled, women and children, the elderly, or marginalized ethnic groups. If necessary, special measures are taken to promote equitable access to program benefits.</p>	<p>CRA is the CoK, 2010's mechanism for bringing the marginalized communities and regions of Kenya into the country's mainstream development agenda.</p> <p>The NLC is an independent commission tasked with registering land transfers, resolving land disputes, addressing historical land injustices, facilitating and increasing access to fair and equitable mechanisms for resolving land and natural resource-based disputes and conflicts.</p>	<p>to the Office of the Ombudsman.</p> <p>Weak capacity to implement legal, policy, and regulatory provisions and lack of system to disseminate information, promote social accountability and address grievances at village level.</p> <p>In 2015, only 14 out of the 47 counties will benefit from the Sh3 billion Equalisation Fund for the next three years. According to the criteria for identifying marginalised areas for the purposes of the Equalization Fund released by the CRA, Turkana County will take the lion's share of Sh271 million while Lamu County will receive the least amount of Sh186 million. CRA chairman Micah Cheserem said other counties that will receive development resources derived from the 0.5 percent of the total national revenue include Mandera (KSh249m), Wajir (KSh240m), Marsabit (KSh228m), Samburu (KSh224m), West Pokot (KSh223m), Tana River (KSh221m), Narok (KSh208m), Kwale (KSh205m), Garissa (KSh202m), Kilifi (KSh197m), Taita Taveta (KSh194m) and Isiolo (KSh192m).</p> <p>If the gaps identified and opportunities presented above are not addressed, the Program would be at risk of not generating the desired environmental and social effects and would remain inconsistent with the guiding principles of Bank Policy.</p>	
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**Core Principle 6: Environmental and social management procedures and processes are designed to: avoid exacerbating social conflict, especially in fragile states, post-conflict areas, or areas subject to territorial disputes.**

<b>Key Planning Elements</b>	<b>Consistency of Applicable Kenya Systems with Core Principles and Key Planning Elements</b>	<b>Key Findings</b>	<b>Recommendations</b>
n.a.	<p>There are no conflicts or territorial disputes in the Kenya. The KDSP will not cause social conflict in fragile states, post-conflict areas, or areas subject to territorial disputes, or impact distributional equity or associated cultural sensitivities.</p> <p>Distributional equity and cultural sensitivities are covered under the analysis of system with respect to the main considerations of Core Principle 5.</p>	ESSA did not consider the Program with regards to Core Principle 6 beyond the initial risk screening exercise that confirmed that this Core principle and key element are not applicable to the operation.	NA

## 7 ENVIRONMENTAL AND SOCIAL RISK RATINGS

Based on the findings of the ESSA, the following table aggregates the risks discussed above, and proposed measures to mitigate those risks. These are included in the Program's integrated risk assessment.

The overall risk rating for the KDSP from the environmental and social perspective is **moderate**.

**Table 8. Environmental and Social Risk Rating For KDSP**

<b>Risk Description</b>	<b>Risk Management</b>
Potential environmental and social impacts of infrastructure projects are not identified, mitigated, and monitored	Program Operations Management Manual for KDSP to provide guidance to counties that is consistent with Kenya systems and with Bank Policy principles. Technical staff in Counties will be required to have training on the manual.
Resettlement actions do not include all Project Affected People that should be identified per the Bank's definition of eligibility.	Eligibility criteria for resettlement and compensation consistent with Bank Policy will be included in the Program Operational Manual and included in training for KDSP. There will be a limit on the number of people who can undergo resettlement as part of the demarcation of eligible investments, and this will be a minimum performance condition for access to grants.
Environmental and resettlement compensation approvals processes delay project implementation.	Bottlenecks in the approvals process will be further defined during program preparation. Consultations with relevant authorities (NLC) to streamline approvals processes while maintaining oversight.
Staffing and skills mix at the County levels is inadequate to handle environmental and social management of scope and scale of investments.	KDSP will assess capacity needs for environmental and social management in Counties and ensure that all Counties have adequate staff as part of the Annual Capacity and Performance Assessment (ACPA). County Governments will appoint focal points to prepare project reports and undertake screening in order to facilitate determination of whether the investment is in the second schedule and hence requires EIA study.
Inadequate budget allocated to environmental and social management, including compensation payments.	County Governments will be incentivized to provide adequate resources to environmental and social management as performance is a minimum performance condition to access the KDSP. Training on costing EIA and resettlement compensation will be included in capacity building program. If counties perform well they will be rewarded through the performance measures and related allocation system.
Annual Performance Audit does not include technical expertise to assess environmental and	ToRs for the new annual capacity and performance assessment will ensure that adequate skills are



<b>Risk Description</b>	<b>Risk Management</b>
social management performance	present to assess environmental and social management systems.

# ANNEX I. STAKEHOLDERS CONSULTED

Lists of individuals consulted during field visits to counties.

Name	Department/Organization
<b>NYERI COUNTY</b>	
Eng T Ngunyangi	CEC, Ministry of Water, Environment and Natural Resources (MWENR), Nyeri County
Stephen Githinji	Chief Officer, (MWENR),
Eng Esther Mbugua	Director, MWENR
Samuel M Kamau	Director, MWENR
Aggrey Maumo	KWS
F Mathinnje	KFS
Stephen Njoka	NEMA County Officer, Nyeri County
<b>KIAMBU COUNTY</b>	
Eng Esther Njuguna	CEC, Ministry of Health, Environment and Natural Resources
Njoki Mukiri	NEMA, Kiambu county
Anastacia Vyalu	NEMA, Kiambu county
<b>MERU COUNTY</b>	
Mary Mwiti	CEC, Ministry of Water (MoW), Meru County
Geoffrey Kimathi	CEC, MENR, Meru County
Bashir Salim	NEMA, Meru County
<b>MACHAKOS COUNTY</b>	
Nancy Mutie	CEC, Ministry of Health, Environment and Sanitation
Stephen Kioko	Senior Public Health Officer
Jackline Malavo	Environmental Officer
Kennedy Odihiambo	NEMA, Machakos County
Dr M Nzuki	Chief Superintendent, Machakos Hospital
<b>KILIFI COUNTY</b>	
Kiringi Mwachitu	CEC, Ministry of Water, Environment and Sanitation
Andrew Makoti	Chief Environmental Officer
Oras Muriithi	NEMA, Kilifi County
Samuel Lopo	NEMA, Kilifi County
<b>KWALE COUNTY</b>	
Dr Mohammed Pakia	CEC, Ministry of Land, Environment and Natural Resources
Dr Chiguzo Chumanyae	CEC, Ministry of Health and Sanitation
George Oyoo	NEMA, Kwale County
<b>KISUMU COUNTY</b>	
Mrs Louise Omoro	Ministry of Water, Environment and Natural Resources, Chief Officer, Kisumu County
Mr. Thomas Sweta	Director of Environmental Department, Municipal Council of Kisumu, Kisumu County
Mr. Anthony Saisi	County Director, NEMA office, Kisumu County
<b>KAKAMEGA COUNTY</b>	
Mr. Peter Mathia	Chief Officer, Ministry of Water, Environment and Natural
Mr. Alfred Mudamba	Officer, Ministry of Water, Environment and

	Natural Resources, Kakamega County
Mr. Shamala Jacob	Officer, Waste Management Compliance, Ministry of Water, Environment and Natural Resources, Kakamega County
Mr. Samuel Nyaga	Deputy Director, NEMA office, Kakamega County
<b>SIAYA COUNTY</b>	
S. Salome Ondego	CEC, Ministry of water, environment and natural resources, Siaya County
Mr. Leornard Ofula	County Director of Environment, NEMA Office, Siaya County
<b>BUSIA COUNTY</b>	
Mr. Oriko	Ministry of water, environment and natural resources, Busia County
Ms. Daisy Maina	Environmental Officer, NEMA Busia County
<b>KAJIADO COUNTY</b>	
Jonathan Oseur	Environment Officer, Kajiado Ministry of Water, Environment and Natural Resources
Ms. Mwikali John	Environment Officer (NEMA), Kajiado County
<b>TRANS NZOIA COUNTY</b>	
Godfrey Wekesa	Environment Officer Ministry of Water, Environment and Natural Resources, Trans Nzoia County
Ms. Catherine Adwongo	Environment Officer, NEMA Office, Trans Nzoia County

**Summary of Consultation Workshop in Nairobi on the Environmental and Social  
Systems Assessment for the Proposed Program-for-Results (PforR) Operation  
Kenya Devolution Support Program (KDSP)  
December 4, 2015**

## **Introduction**

The World Bank and the MoDP conducted an ESSA consultation on December 4, 2015 for the KDSP. The purpose of the consultation was to (a) brief participants on the ESSA approach under the proposed Program-for-Results operation and (b) solicit feedback on the key findings and recommendations of the ESSA. According to policy guidance, this consultation note was prepared to document and summarize the presentation and discussion during each session. This note will also be used to update the ESSA prepared under the PforR operation.

The ESSA was prepared in English and posted on the website of the World Bank. Prior to the workshop, the link to the document was shared in email invitations to stakeholders. Hard copies of the document and a summary PowerPoint presentation were also shared with participants during the event.

The MoDP and the World Bank team facilitated the presentation. Participants represented a diverse group of stakeholder with representation from the NEMA national and county offices, Ministry of Water, various government entities and civil society organizations (see end of annex 1 for full list of participants).

## **Presentation**

The workshop was divided into segments of presentation and discussion. The MoDP representative provided an overview of the proposed KDSP (that is the program objective, program design) and information about the Program-for-Results Financing instrument. The World Bank team focused on the ESSA (rationale, design, findings and mitigation measures including presentation of additional the mitigation measures). This segment emphasized that the government program systems were adequate for managing environmental and social issues under the KDSP and the proposed mitigation measures address the system and capacity weaknesses identified by the ESSA. During this consultation the Bank presented the additional mitigation measures specifically for land acquisition aspects reflected in chapter 4.3 of this report.

## **Discussion and Findings**

Following the presentations, the World Bank team had an opportunity to get feedback from the participants. In general, participants expressed their interest in learning more about KDSP, how the proposed operation would benefit counties and how they could become more involved in the Program, especially those from the NEMA county offices. Some questions/concerns specifically related to the Program and ESSA were raised, as described below.

Participants agreed that county capacity building was needed and asked how KDSP supports this area. In addition, they raised concerns about the distribution of projects and

funding at the county level, disparities between counties that benefit from current capacity building efforts by UNDP and USAID, and counties with low capacity. The World Bank team clarified how Program grants will support capacity building and noted that training, monitoring, and assessment tools will support counties in the Program. Citing experience from similar operations in other countries, the Bank team answered that counties that have been historically disadvantaged have an added incentive to improve and often improve faster.

Some participants from CSOs asked how the Program would address indigenous people. The Bank team replied that the ESSA has a section on vulnerable and marginalized groups, which details measures in place with regard to land acquisition and resettlement and the Program will likely benefit them because of the emphasis on improved service provision. On a similar note, questions were raised about civic education and public participation.

A few participants expressed their concerns about NEMA being a central actor in the Program without additional support financial support. Moreover, some participants commented on the investment project screening process and ineligibility of investments that require an EIA. One participant remarked, if the goal is to strengthen NEMA's capacity, the Program should look at the extent to which projects that are being implemented conform to the rules rather than confine support to those with little risk. The Bank team noted it was still awaiting concrete proposals from NEMA on how to develop capacity building for county and NEMA staff and mentioned there is another World Bank grant that is designed to support NEMA.

There were some additional questions about the purpose of the consultation, the role of CSOs, performance measures for financing, and the criteria for the selection of counties that participated in pretesting. A few participants also provided recommendations on additional grievance redress institutions and laws that should be considered in the assessment.

### **Observations and Lessons Learned**

- Some expectations and questions suggested that participants were confused about ESSA and the PforR instrument. For example, a number of participants asked how they could apply the ESSA and the linkages between the EIA and Strategic Environmental Assessment (SEA).
- Additional forms of presentation materials might be beneficial. Perhaps a small executive summary could be sent along with the ESSA (even though one is in the ESSA) and the presentation ahead of time to help participants process the information being presented.

### **Next Steps**

The updated ESSA will be made available on the World Bank InfoShop subsequent to Program appraisal December 2015.



## List of Participants

No.	Name	Organisation
1	Veronic Kegode	KEGODE Advocates
2	Sophie Mutemi	NEMA
3	Joan Kebenei	PACJA
4	Kennedy Odhiambo	NEMA
5	Johana Reuben Ouma	NEMA
6	Richard Kering	NEMA
7	Patrick Lekenit	NEMA
8	Fenuel Mosego	NEMA
9	Richard Maina	NEMA
10	Siasa Juma	NEMA
11	Bob Munoko	Ombudsman
12	Dr. Hama Saado	Kenya Red Cross Society
13	Kennedy Abong'o	CRA
14	Kanani Wanjohi	NEMA
15	Palapala Muteshi	NEMA
16	Rop J. Kipkoech	NEMA
17	Margaret Muthee	National Gender and Equality Commission
18	Marrian Kioko	NEMA
19	Reagan Awino	NEMA
20	Oyoo George	NEMA
21	Simon Weru	NEMA
22	Stephen Kitunga	NEMA
23	Jusper Omwenga	NEMA
24	Jane Njihia	NEMA
25	Dunstan Ngumo	NEMA
26	Henry Kuria	ACT Kenya
27	Daniel Mututho	NEMA
28	Lynnete Cheruiyot	NEMA
29	Monicah Kingori	Kiambu County Environment
30	Micheal Wahome	NEMA
31	Boniface Birichi	NEMA
32	Stanley Ambasa	NEMA
33	Pius Kasusya	NEMA
34	Stephen Kimutu	NEMA
35	Samuel Nyaga	NEMA
36	Antonela Khoboso	NEMA
37	Paul Gacheni	Nature Kenya
38	Edith Kalo	NEMA
39	Leonard Ofula	NEMA

40	Mahat Sheikh	Graissa County
41	Barnabas Sang	Uasin Gishu County
42	David Marie Kosgey	Nandi County
43	James Yatich	Ministry of Water and Irrigation
44	Martin Anyango	MoDP
45	Barnabas Kibet Birech	Nandi County
46	Samwel Lopokoityit	NEMA - Kilifi
47	Siasa James	NEMA Nakuru
48	Solimon Chengecha	Nyeri County Government
49	Julius K. Mwangi	Muranga County
50	Francis Kamau Irungu	NEMA
51	Tom Togo	NEMA
52	Kennedy Omeerera	Nyamira County Government
53	Valentine Lala	NEMA
64	Juliana Manthe	MLHUD -MP&C
55	Christopher Muchiri	NEMA
56	Lawrence Ole Mbelati	MPIDO
57	Cliff Barkatch	NEMA
58	Dennis Wafula	NEMA
59	Sadrack Sambai	Uasin Gishu County
60	Julie Mulonga	Wetlands International
61	Charles Okola	Nyamira County Government
62	Philip Kilonzo	Action Aid Kenya
63	Christopher Muteti	NEMA
64	Jessicah Kahura	NEMA
65	Kibos S. J	NEMA
66	G. Magut	NEMA
67	Chris M. Gthogo	Nyeri County Government - Finance & Economic Planning
68	Wilson Sawe	Uasin Gishu County
69	Juliana Jerop	Nandi County
70	Ezekiel Moseri	NEMA
71	Robert Wild	IUCN
72	Robert Papa	Busia County Government
73	Pauline Odongo	Siaya County Government
74	Elizabeth Wandaka	NLC