

KENYA

Kenya Urban Support Program (KUSP)

Program-for-Results (PforR) Operation

Environmental and Social Systems Assessment (ESSA)

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ABBREVIATIONS & ACRONYMS

AIDS	-	Acquired Immune Deficiency Syndrome
APA	-	Annual Performance Assessment
BP	-	Bank Policy
CEC	-	County Executive Committee
CESMP	-	Contractor Environment and Social Management Plan
CIDP	-	County Integrated Development Plan
CLB	-	Community Land Board
CoG	-	Council of Governors
CUIDS	-	County Urban Institutional Development Strategy
DLI	-	Disbursement-Linked Indicator
DOSHSS	-	Directorate of Occupational Safety and Health Services
E&S	-	Environmental and Social
EA	-	Environmental Audit
EIA	-	Environmental Impact Assessment
EMCA	-	Environmental Management and Co-ordination Act
ESIA	-	Environmental and Social Impact Assessment
ESMMP	-	Environmental and Social Management and Monitoring Plan
ESMS	-	Environmental and Social Management Systems
ESSA	-	Environmental and Social Systems Assessment
GBV	-	Gender Based Violence
GoK	-	Government of Kenya
GRM	-	Grievance Redress Mechanisms
HIV	-	Human Immune Virus
IPF	-	Investment Project Finance
KDSP	-	Kenya Devolution Support Program
KNCHR	-	Kenya National Commission on Human Rights
KUSP	-	Kenya Urban Support Program
MC	-	Minimum Condition
MTIHUD	-	Ministry of Transport, Infrastructure, Housing and Urban Development
NCA	-	National Construction Authority
NEMA	-	National Environment Management Authority
NGEC	-	National Gender Equality Commission
NLC	-	National Land Commission
NPCT	-	National Program Coordination Team
NUDP	-	National Urban Development Policy
OHS	-	Occupational Health and Safety
OP	-	Operational Policy
OSHA	-	Occupational Safety and Health Act
PAD	-	Project Appraisal Document
PAPs	-	Project Affected Persons
PforR	-	Program for Results
PID	-	Project Integrated Document
POM	-	Program Operations Manual
PPEs	-	Personal Protective Equipment

PSC	-	Program Steering Committee
PTC	-	Program Technical Committee
SDHUD	-	State Department of Housing and Urban Development
STD	-	Sexually Transmitted Diseases
ToR	-	Terms of Reference
UACA	-	Urban Areas and Cities Act
UDD	-	Urban Development Department
UDG	-	Urban Development Grant
UIG	-	Urban Institutional Grant
WB	-	World Bank
WIBA	-	Work Injury Benefits Act
World Bank OP	-	World Bank Operational Policy
www	-	World Wide Web

EXECUTIVE SUMMARY

Project Description

The proposed Program for Results (PforR) Support to the Kenya Urban Support Program (KUSP) will assist the Government of Kenya in operationalizing its National Urban Development Policy (NUDP) and achieving medium term planning goals in the urban sector. The KUSP will provide three sets of inputs (or disbursement windows).

- Window 1: Support to the national government for establishing and strengthening the institutional and policy framework for urban management, supporting the management and administration of urban finances, and providing backstopping for urban planning, urban infrastructure delivery and for the provision of basic urban services
- Window 2: Support to county governments level for the formulation of urban development plans, for the establishment and operation of urban institutional arrangements (charters, boards, administrations, and the like), and for the initial preparation of urban infrastructure investments
- Window 3: Support to urban boards and administrations (through their respective county governments) for financing infrastructure investments in urban areas. The Urban Development Grants (UDGs) would be used to finance a range of infrastructure projects, defined by an eligible investment menu as per the Project Operations Manual (POM) . Investment projects would be of a minimum size (indicatively US\$ 0.5 million), so as to maximize strategic or transformative impact and avoid fragmentation. Eligible investments would be limited to a sub-set of infrastructure items, which either underpin key urban service functions or improve connectivity and economic facilities.

The proposed menu of investments includes but not limited to the following: water and sewerage reticulation, waste management (liquid and solid), storm water drainage, connectivity (roads, non-motorized traffic and street lights), urban social and economic infrastructure, and fire and disaster management projects. Investments financed by UDGs will exclude high risks projects (projects that have significant negative environmental and social impacts that are sensitive, diverse, or unprecedented).

The ESSA Scope and Methodology

Purpose of ESSA: An Environmental and Social Systems Assessment (ESSA) was undertaken by the Bank team for the Kenya Urban Support Program, which will be financed through a hybrid of the Investment Project Financing (IPF) (for Window 1) and Program for Results (PforR) instruments (for Windows 2 & 3). The aim of the ESSA was to review the capacity of existing government systems to plan and implement effective measures for environmental and social impact management and to determine if any measures would be required to strengthen them as per the requirement of the PforR Financing Policy. The assessments were carried out through a comprehensive review of relevant government policies, legislation, institutional roles and capacities, program procedures, and assessment of the available capacity in all 47 Counties

of the Republic of Kenya to implement the existing systems consistent with Bank PforR Financing Policy.

Scope: The ESSA is undertaken to ensure consistency with the six “core principles” outlined in paragraph 8 of the World Bank’s PforR Financing Policy in order to effectively manage Program risks and promote sustainable development.

The six principles are:

- i. *Core Principle 1: General Principle of Environmental and Social Management:* 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 effects
- ii. *Core Principle 2: Natural Habitats and Physical Cultural Resources:* Avoid, minimize, or mitigate adverse impacts on natural habitats and physical cultural resources resulting from the Program
- iii. *Core Principle 3: Public and Worker Safety:* Protect public and worker safety against the potential risks associated with: (i) construction and/or operations of facilities or other operational practices under the Program; (ii) exposure to toxic chemicals, hazardous wastes, and other dangerous materials under the Program; and (iii) reconstruction or rehabilitation of infrastructure located in areas prone to natural hazards
- iv. *Core Principle 4: Land Acquisition:* 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
- v. *Core Principle 5: Indigenous Peoples and Vulnerable Groups:* 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
- vi. *Core Principle 6: Social Conflict:* Avoid exacerbating social conflict, especially in fragile states, post-conflict areas, or areas subject to territorial disputes.

In analyzing programs for consistency with the sustainability principles in Program for Results financing Policy, the ESSA is intended to ensure that Programs supported by 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.

ESSA Methodology: In order to assess the existing systems as well as analyze how these systems are applied in practice, the process of preparing the ESSA has drawn on a wide range of data. Inputs analyzed for this ESSA include the following.

- i. **Desk review of Kenya’s policies, legal framework and program documents:** The review examined the set of national policy and legal requirements related to environment and social management. The review also examined technical and implementation support documents from previous and on-going World Bank PforR programs in Kenya.
- ii. **Institutional analysis:** An institutional analysis was carried out to identify the roles, responsibilities and structure of the relevant institutions responsible for implementing the

program, including coordination between different entities at the national and County levels. Sources included existing assessments of key institutions focusing on environmental and social assessment and management processes. The Urban Development Department (UDD), (a department in the Ministry of Transport, Infrastructure, Housing and Urban Development – MTIHUD) the main entity that will be responsible for overseeing the program at the National Level was assessed. The National Environmental Management Authority (NEMA) is the administrative body that is responsible for the coordination of the various environmental management activities in Kenya. NEMA is also responsible for granting Environmental and Social Impact Assessment (ESIA) approvals and for monitoring and assessing project activities in order to ensure that the environment is not degraded by such activities.

- iii. **Field visits:** Field visits were conducted to the sampled Counties to assess the Counties' systems and capacities in implementing the program. A total of 20 out of 47 Counties were assessed during the ESSA process. Consultative meetings with County Executives Committees (CEC) Members in-charge of Land, Urban Development, Housing, Transport, Infrastructure, and other County representatives for the National Land Commission (NLC) and NEMA. The County governor of Taita Taveta was also met during the visit in Taita Taveta County.
- iv. **Stakeholder consultation process:** Consultations were also conducted with the key stakeholders that will be involved in the program: Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD), Ministry of Lands – National Land Commission (NLC), Non-Governmental Organizations (NGOs), other Development Partners in Kenya, and National Environmental Management Authority (NEMA) Headquarters.

Program Environmental and Social Risks

Considering the significant geographic dispersion of the participating counties, different scale of proposed investments, and the potential cumulative environmental and social impacts associated with the program, the overall environmental and social risk of the Program is rated as **significant**. However, the program will exclude high risks projects (projects that have significant negative environmental and social impacts that are sensitive, diverse, or unprecedented),.

Main environmental risks

The investments menu under KUSP is likely to have moderate to significant environmental impacts. The impacts will vary depending on the context and investment choices of each County, based on the type, scope and scale of works. The positive benefits are likely to include but not limited to; better and improved waste collection systems, improved air and health through reduction of dust and waterborne diseases, better sanitary conditions through improved waste management systems, lower vehicle operating costs, reduced transportation costs, fewer road accidents and reduced traffic congestion as a result of improved road conditions, improved

access to public transport services; and reduced environmental degradation through mitigations against flooding and soil erosion as a result of drainage improvements.

The adverse impacts are expected to be typical construction impacts that are site-specific and generally limited to construction phase that include air pollution from dust and vehicles 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; occupational health and safety incidents through injuries or accidents to the workers; and disruption and/or damage to public utilities such as internet cables, electricity, wastewater, and water facilities. The long term impacts during the operation phase include the solid waste and wastewater projects that can exacerbate contamination of soil and groundwater from poorly planned and managed/maintained systems, improved roads may increase road accidents given the potential for increased traffic speed in absence of adequate road safety measures, boreholes could deplete surface or groundwater sources over time particularly as climate change is expected to reduce water resources, among others.

Majority of adverse potential impacts can be prevented, are reversible and can be mitigated with standard operational procedures and good construction management practices. These procedures will be included in the technical manual, and be a standard part of environmental management plans included in bidding documents for contractors.

Environment mitigation measures

While no high-risk projects are expected under the program, the screening process will include criteria to exclude certain categories of projects as well as projects that would include high risks and significant negative impacts that are sensitive, diverse, or unprecedented on the environment and/or affected people. Such types of investments will be excluded from the Program. The screening procedure will be done during the sub-project appraisal by the county's urban teams and will be guided by the NEMA's Environment and Coordination Act (EMCA) and its amendment which will be outlined in the Project Operations Manual (POM). This exercise will be carried out by the counties in coordination with Urban Development Department (UDD) and NEMA.

Other than requiring that all project investments under the KUSP to be subjected to screening and further environmental analysis after screening, the program has developed a set of principles that will act as measures to minimize project risks at the concept level. Further, the Bank will undertake post screening audit to ensure that all the selected project meet outlined criteria. The principles that will apply to all investments as a mechanism for mitigating adverse environmental impacts shall include exclusion of projects that are likely to:

- Generate irreversible environmental impacts on affected parties and third parties;
- Impact on natural habitat;
- Impact on physical and cultural resources; and
- Cause serious occupational or health risks.

Main social risks

Activities to be supported by the Program are expected to generate socio-economic gains and have an overall positive effect. Some positive social benefits will include but not limited to:- creation of employment, improved security, reduction in crime, increased revenues for the County governments through taxes and levies, improved living conditions for the citizens, and improved service delivery of social services within the Counties.

Given the significant geographic dispersion of the participating counties, different scale of proposed investments, concentration of focus on urban areas, and the cumulative potential physical and economic displacement of persons by the program, the adverse social impacts are likely to be significant. Investments financed by UDGs will exclude high risks projects (projects that have significant negative environmental and social impacts that are sensitive, diverse, or unprecedented).

Willing buyer-willing seller will be the preferred means of land acquisition in all cases. The government's right to acquire land compulsorily will only be used where it is unavoidable. Where compulsory acquisition is to be employed, evidence must be obtained (as detailed in the POM) that attempts were made to acquire land via the marketplace. Moreover, a compelling reason why alternative land, available in the market, could not be found must be documented. Instances where compulsory acquisition may be unavoidable include, but are not limited to, road rehabilitation, construction of new roads, water and sewerage systems. Where compulsory acquisition is employed, no more than 10 households in total, both titled and untitled (informal settlers/squatters), may be physically displaced on any one sub-project. Where households are physically displaced, the municipality will provide options to the PAPs per guidance provided in the POM. Economic displacement can involve the physical relocation of informal vendors. On any given sub-project, no more than 200 informal vendors will be physically relocated. Where households and informal vendors are physically relocated, they will receive compensation as outlined in the POM. Small parcels of private residential land that do not excessively affect land use may still be subject to compulsory acquisition as they are considered economic displacement.

Land acquisition has the potential to impact land, assets, property, crops, and disrupt shared community facilities such as water points, community roads, and roadside markets. Land acquisition will be guided by the National Land Commission (NLC) procedures. Though these procedures provide for resettlement action planning for land acquisition in Kenya, there were inadequacies established by this ESSA which include poor establishment of entitlements, lack of provision for livelihood restoration, lack of avoidance of displacement, lack of adequate capacity at NLC and weak coordination of NLC and relevant ministries. Thus there were gaps identified to thus these procedures do not meet the requirements of core principle 4 on Land Acquisition. Related to the KUSP, the ESSA has identified that the implementation of the laid-out procedures for land acquisition are weak at County Urban Departments. Recommendations to bridge these gaps have been proposed in this ESSA.

The ESSA identified fourteen (14) counties defined as 'marginalized areas' (underserved) in Kenya. These counties collectively represent seventy two percent (72%) of the country's total

land area, and twenty percent (20%) of the country's population. Population densities are low and the lifestyle is predominantly pastoral and low level sedentary farming on the arid and semi-arid lands. These counties are deficient in terms of access to good roads, electricity, portable water and social services due to their remoteness from national infrastructural networks. These counties are in the North Eastern, Rift Valley, and Coast regions of Kenya and/or include specific groups of vulnerable persons that might be impacted or affected by the Program.

However, the nature of the proposed activities under KUSP does not suggest that specific vulnerable, marginalized/indigenous groups could be harmed by the Program, given its focus on urban areas. The Program aims to foster integration of vulnerable, indigenous /marginalized groups into the Program design, including consultation during project selection and monitoring, and the development of the appropriate social accountability systems as part of the urban institutions to be established with the support of the Program.

The ESSA has concluded that there is little risk on the Program itself that would be the source of social conflict. However, some cases of social conflict (such as dispute on the location/selection of the projects, project benefit sharing, labour influx, pre-existing or historical social issues in host communities, etc.), may occur during project implementation within communities or Counties. The design of the Program includes measures to minimize social conflict such as the development and/or strengthening of consultation of the vulnerable and marginalized groups and grievance redress mechanisms with the communities and Counties. The POM will include measures to be used by the National Program Coordination Team (NPCT) and the Counties to screen sub-projects on potential conflicts between the communities and counties. The program would not undertake any investments where social conflict is anticipated between or within communities or Counties.

Social mitigation measures

Temporary or permanent land take, and adverse impacts on livelihoods, including those that may occur through restriction of access to natural or physical resources will be excluded from the Program. To screen out for these exclusions, the Program will rely on existing country legislation and systems and the guidelines in the Program Operation Manual (POM), which will include a rigorous sub-project screening process to be done by the NPCT and the Counties Urban Departments. Post screening assessment will be undertaken by an independent party to ensure that all minimum standards have been met. The principles that will apply to all investments as mechanisms for mitigating adverse social impacts shall be *exclusion* of projects that:

- Where compulsory acquisition is employed, more than 10 households in total, both titled and untitled (informal settlers/squatters), physically displaced on any one sub-project.
- On any given sub-project, more than 200 informal vendors physically relocated
- Likely to adversely create or exacerbate conflict within communities or neighboring counties; and
- Have significant impacts on vulnerable and/or marginalized/indigenous groups.

Key Findings

Environmental Issues

The key findings of ESSA on environmental systems are:

- i. The national government has well developed and robust legislations and systems to manage environmental risks. However, there is weak implementation capacity and the monitoring and enforcement at the County level needs to be strengthened to address potential environmental challenges of the KUSP.
- ii. The County governments are using the national systems, because they have not developed systems or frameworks for the management of environmental risks. The KUSP will utilize the gains from the Kenya Devolution Support Program (KDSP) under World Bank PforR financing which is in the process of developing systems required at the county level to manage environmental and social impacts.
- iii. The Program's existing institutional systems needs further strengthening for environmental management along with a framework for environmental monitoring at the UDD level.
- iv. The capacity (human and financial resources) within the Counties and supporting institutions (NEMA, NCA, DOSHSS,etc) responsible for managing environmental risks needs strengthening and training.
- v. The Counties have no documented procedures and processes in place for the management of the Occupational Health and Safety (OHS). In addition, there is no specific department that is charged with the role of supervision and ensuring compliance within the Counties.

Social Issues

The key findings of ESSA on social systems are:

- i. The Constitution of Kenya, 2010, has legislations under the Land Act (2012), to manage social risks related to land acquisition. However, the County governments have not sufficiently mainstreamed the land acquisition procedures into the planning and development process. To address the potential of land acquisition challenges under the KUSP, there is need to strengthen Counties and the NLC representatives at the Counties responsible for land acquisition process.
- ii. The Counties have acquired land for their projects, but the system and processes used has been on a willing- buyer willing-seller method. The Counties rely on national systems, because they have not set up systems or frameworks for the management of land acquisition at the county level. The ESSA reveals that the counties are not very conversant with the Government compulsory land acquisition process that involves the National Land Commission; therefore, capacity building on the NLC process will be undertaken under this Program.

- iii. The Program's existing institutional systems need further strengthening to manage potential social risks along with a framework for social monitoring at the ministry and NPCT level.
- iv. The capacity within the Counties and institutions (County departments) to be responsible for managing social risks at the County levels needs strengthening and training. Existing officers at the county level, such as Gender Officers, will be involved in the management social risks of the Program.
- v. On public consultation and participation, the devolution process under the Kenya Constitution has put in place robust requirements for citizen participation in project and budget development process. Gaps were however established because of the absences of formal and documented citizen feedback and grievance redress mechanisms that allow for transparent, timely and efficient redress process.
- vi. The CoK, 2010, Article 56 on the ‘Minorities and Marginalized Groups’ provides a platform to identify the vulnerable and marginalized groups of people and communities in Kenya, however, most counties’ interpretation of this is viewed in the context of poverty and social welfare of these groups; for example reserving business and employment opportunities to Persons with Disabilities (PWD), the Youth and Women. There is lack of appreciation in ensuring that marginalized and vulnerable groups who lack political representation and economic power are able to participate effectively or access social and economic benefits from the projects carried out by the National and County governments.
- vii. There are no formal and documented systems in the management of social conflicts at the national and County systems during implementation of projects, especially to manage conflicts between Counties and labour influx issues. The systems to be used for conflict management under KUSP needs to be developed and build capacity for proper implementation.
- viii. Management of HIV/AIDs during project implementation stages which include creating awareness, prevention and management are clear at the County levels. The National system requires that HIV/AIDs awareness and prevention components are included in every contract.

Elements to Incorporate into the Program Action and Implementation Plan

The environmental and social impacts of activities under the KUSP range from low to significant. The Program provides an opportunity not only to strengthen the weaknesses in the procedures mentioned above to identify and mitigate these effects, but also to strengthen the national UDD system and counties’ urban departments systems in three areas: (i) strengthening of environmental and social management systems, (ii) ensuring implementation of good environmental and social management; and (iii) monitoring of environmental and social management.

To fill the gaps identified in the ESSA, the PCT will support specific measures to enhance the Urban Development Departments at the national and county levels environmental and social risks management system performance. These measures will be implemented through two main

areas, namely the preparation of Operation Manual and capacity building. These measures have been consolidated into the ESSA Action Plan that guides the overall formulation of the Program. Proper implementation of environmental and social procedures as contained in the Program Operation Manual forms an important part of the Program design as it will be one of the performance standards that will be measured through the APA and determine accessibility to future additional Program resources.

The implementation of some of these measures will be enhanced by their integration into the overall Program Action Plan and legally incorporated into the financing agreement of the Program. These action plans for the Program are grouped into three areas:

- i. actions to strengthen the environmental and social management systems;
- ii. actions to strengthen the implementation and monitoring of the environmental and social management systems; and
- iii. actions to build capacity to enhance environmental and social management performance.

Strengthening of environmental and social management systems

The recommended actions under this theme are:

- i. Develop Program Operation Manual (POM) incorporating environmental and social management procedures before launching of the Program.
- ii. Develop guidelines to manage social conflicts related to labour influx to be incorporated into the POM;
- iii. Assistance to develop policy and guidelines of management systems for managing E&S risks in the urban context for the Counties – including Solid Waste Management;
- iv. Establish coordination mechanisms with other institutions/entities/departments;
- v. Establishment of a Grievance Redress Mechanism;
- vi. Coordination of efforts of the actions under the KUSP with the Kenya Devolution Support Program (KDSP) project's ESMS action plan and strategies

Strengthening of implementation and monitoring of the environmental and social management system

The recommended actions under this theme are:

- i. Incorporation of environmental and social management implementation and monitoring procedures documented in the Program Operation Manual by implementing units/agencies
 - Reporting
 - GRM monitoring
 - Contractors performance against E&S issues
- ii. Develop procedures for assessing performance measures of the program on environment and social management.

Strengthening of environmental and social management capacities

The recommended actions under this theme are:

- i. Staff assigned to environmental and social management at UDD and at Urban departments at the County levels;
- ii. Training in environmental and social management in the areas of: sub-project screening and identification and management of environmental and social impacts, including criteria for involuntary resettlement and land acquisition, and matters related to livelihoods and vulnerable and marginalized groups; monitoring (including audit), etc. for technical staff at the NPCT and County officials

Conclusion

The system for environmental and social management under KUSP will be largely based on the existing legal, regulatory and institutional system for environmental and social assessment and management in Kenya, drawing on experience with implementation of safeguards instruments in other infrastructure projects.

Overall, the ESSA shows that the country's Environmental and Social systems are adequate for the Program, provided that the identified actions to address the gaps and enhance performance are conducted prior to and throughout the implementation of the Program. In particular, the County systems need to be strengthened to ensure proper management of environmental and social risks of the program.

However, although this is not part of the Program focus, and cannot be covered under the KUSP, the ESSA notes the Environmental and Social Management units at National and County levels are **not** adequately supported through budgetary allocations and provision of necessary facilities, equipment and supplies, and adequate and skilled human resources.

I. INTRODUCTION AND PROGRAM DESCRIPTION

1. This section includes a description of the scope of the proposed Kenya Urban Support Program (KUSP) and the institutional context, including: scope of the Program and activity, description of the expected physical works, policy actions, services, etc., provided under the Program.

1.1 Program Description

2. **The proposed Operation will be financed through a hybrid of the Investment Project Financing (IPF) and Program for Results (PforR) instruments.** The hybrid operation as a whole will be referred to as the “Operation” unless specified otherwise. Where necessary, the IPF element will be referred to as the “Project” and the PforR element will be referred to as the “Program”. IPF will be used to fund a wide range of institutional and capacity development interventions at the national government level. The rationale for using IPF as a financing instrument for these types of intervention arises from the lessons learned from other PforR operations in the country, which suggest the need to provide a high level of budget predictability for undertaking national government actions that are critical for the success of the Operation as a whole, in particular, county-level annual performance assessments. IPF implementation modalities also appear to be an effective way of procuring for technical assistance and institutional support activities (as opposed to good or works) in a timely and economic manner.¹ In addition, the proposed Operation involves relatively high level of unforeseeable activities that may be required to implement reforms at, or provide support to, the sub-national level over the life of the operation. A close working relationship between the national government and the World Bank through the IPF modality can facilitate better support and is also preferred by the client.

3. **The largest part of the Operation is financed through a PforR instrument, an effective mechanism for managing conditional grants to sub-national governments and strengthening their institutions and systems for the sustainable delivery of front-line infrastructure and services.** Given the proposed Program’s focus on institutional development and policy implementation at the sub-national level, a PforR modality provides a clear set of incentives to county governments by linking Program disbursements to the delivery of institutional benchmarks such as the establishment of city and municipal management systems. The PforR modalities will also provide incentives for the delivery of county-led capacity-building activities, as well as with discretion and flexibility in meeting the specific developmental needs of different urban areas and localities. Once established, the urban-level institutions will be encouraged further through a PforR framework to improve their performance as city managers and to deliver well-designed and transformative infrastructure, the exact nature of which is not fully predictable, given the fairly discretionary use that will be made of Program funding.

¹ In Kenya, other PforR operations have either encountered implementation bottlenecks in the deployment of technical assistance or consultancies (as in the case of KDSP) or relied on trust funds or other donor grants to provide technical assistance and support (as in the case of the social protection and statistics reforms PforRs).

4. **The proposed Operation builds on the lessons learned from the ongoing Kenya Devolution Support Program (KDSP) for Results but adds significant value by focusing on institutions and functions specific to urban development.** Both KDSP and the proposed KUSP provide grants to county governments, access to which is conditional on the performance of counties, measured through annual performance assessments. However, the conditional grants of the two operations are channeled to very different areas. KDSP aims to improve county government performance across the full range of county administrative and financial management functions. The proposed Program, on the other hand, aims to incentivize counties to address the specific challenges of urban governance and urban development. The two operations also differ in the expenditure focus of their grants: the grants under this Program will be earmarked for financing investments in urban areas, while KDSP grants are more unconditional and can thus be used to finance a much broader range of county-wide investments. Nonetheless, both Programs operate on similar principles and with the same long term aims of strengthening sub-national capacities and service delivery and fostering sound inter-governmental relations. Both Programs cover more or less the same counties², thus enabling the proposed Operation to systematically leverage and benefit from the capacity building support provided through KDSP. The design of the current Operation has been informed by some of the early lessons learned during KDSP implementation, particularly with regard to the need for robust inter-governmental cooperation, for full integration of conditional grants into budgetary frameworks at both the national and sub-national levels, and for prudent “ring-fencing” of Operation-critical activities, from which the proposal of a hybrid option arose. During implementation, more synergies will be created between KUSP and KDSP.

A. Government Program

5. **The government’s overall response to Kenya’s urban development challenge is articulated in the National Urban Development Policy (NUDP).** The NUDP, approved by the Cabinet in 2016, intends to contribute towards the realization of the broader development goals articulated in Vision 2030 by addressing the key challenge of urban development. It envisages secure, well-governed, competitive, and sustainable urban areas and cities, and aims to facilitate sustainable urbanization through good governance and the delivery of accessible, quality and efficient infrastructure and services. The overall objective of the NUDP is to provide a framework for sustainable urban development in Kenya by pursuing nine specific objectives.³

² KDSP provides support to all 47 counties, whilst KUSP will work with 45 counties (Nairobi and Mombasa being the only counties not covered by the proposed Operation).

³ NUDP’s specific objectives are to: (a) create mechanisms for vibrant economic growth and development in urban areas and cities, (b) build efficient financial management systems in urban areas and cities, (c) develop effective governance structures for sustainable urbanization in the country, (d) reform urban planning to drive sustainable urban development in the country, (e) ensure access to land of the right quality for urban development, (f) promote city-wide environmental planning and management as well as climate change adaptation in urban areas and cities, (g) promote the development of requisite infrastructure and services in urban areas and cities, (h) support the development of affordable housing of acceptable quality in urban areas and cities, and, (i) mainstream urban safety and disaster risk management in urban planning and development.

6. **The State Department of Housing and Urban Development (SDHUD) has designed the Kenya Urban Program (KenUP), as a vehicle to implement the NUDP.** KenUP has also been formulated in the context of the existing legislation on urban development, including the County Government Act (2012) and the UACA. Acknowledging that there are limited incentives for counties to address urban development challenges and no dedicated institutions for urban management, KenUP aims to establish effective and empowered urban planning and management systems that deliver infrastructure and supporting services, economically, efficiently and effectively based on locally determined urban integrated development plans (IDePs) and town plans.

7. **To achieve this objective, KenUP proposes a four-fold strategy (planning, implementation, performance, and research) to address urban development challenges.** In response to the lack of coordination between urban spatial and budgetary plans, KenUP aims to strengthen the links between urban spatial plans (for 10–20 years), urban integrated development plans (for five years), which includes both spatial and budgetary elements of planning, and other strategic and budgetary plans such as CIDP (for 5–10 years) and MTEF (for 3 years on a rolling basis). By integrating urban spatial planning and financing, infrastructure investment and service delivery in urban areas can be made more economic, efficient and effective. Implementation will be done through the management of performance grants on the public financing side as well as the mobilization of private financing that is guided by rigorous development control. Establishment of dedicated urban institutions, including efficient and capacitated urban boards and administration, is a prerequisite, while citizen participation is the basis for governance and service delivery. Urban research will guide the process of policy formulation and implementation by providing refined understanding of urban challenges and solutions and by promoting the importance of urbanization for Kenya’s development.

8. **Through these strategies, KenUP contributes to achieving four of the nine specific objectives contained in the NUDP, which the proposed Program ultimately aims to support.**

- a) Developing effective governance structures for sustainable urbanization in the country (NUDP chapter 2: Urban Governance), in particular:
 - i. Developing urban governance institutions;
 - ii. Strengthening citizen participation and engagement; and
 - iii. Strengthening urban management and administration.
- b) Building efficient financial management systems in urban areas and cities (NUDP chapter 3: Urban Finance).
- c) Reforming urban planning to drive sustainable urban development in the country (NUDP chapter 5: Urban Planning).
- d) Promoting the development of requisite infrastructure and services in urban areas and cities (NUDP chapter 7: Urban Infrastructure).

B. Program Development Objective (PDO) and Key Results

9. **The Program Development Objective (PDO) is to establish and strengthen urban institutions to deliver improved infrastructure and services in participating counties in Kenya.** The Program will provide direct support to all counties other than the city counties of

Nairobi and Mombasa,⁴ and to 59 potentially eligible urban areas within those counties. The primary beneficiaries of the Program are the 5.6 million residents of the 59 urban centers, half of whom are female. By achieving this PDO, the Operation is expected to contribute to the World Bank’s over-arching goals of ending extreme poverty and promoting shared prosperity by delivering improved urban infrastructure on an inclusive basis and in ways that enhance economic growth and development in participating counties. Achievement of this PDO will also make a significant contribution to attaining SDG 11 (sustainable cities and communities).

10. The proposed key Program results indicators are:

- Number of urban areas that meet the MCs for UDGs.
- Urban areas with approved charters and established boards and urban managers (measures establishment of urban institutions).
- Counties that utilize at least 50 percent of the budget intended for their urban investments.
- Score in the APA for achievement of urban planning, infrastructure, and service delivery targets by counties/urban areas, averaged across all urban areas.

C. Program Scope

11. The proposed Program will finance key parts of the KenUP across its six thematic areas, including urban institutions, governance, management, finance, planning, and infrastructure and service delivery. It does so through three separate, but inter-related, windows.

Table 1:: Objectives of KenUP and KUSP

KUSP Objectives	KenUP Objectives					
	Urban Institutions	Urban Citizen Participation	Urban Management/ Admin	Urban Finance	Urban Planning [Development Control]	Urban infrastr. and service delivery
National level interventions (Window 1)						
1: Support for the establishment, operationalization and strengthening of the institutional framework for urban management						
1.1 Support the establishment, operational. and strengthening of urban boards and administrations	X	X	X			
1.2 Support strengthening UDD: Policy, legislative review, and research	X					
1.3 Program Management of KUSP	X					
2: Strengthening management and administration of urban finances (including conditional grants)						
2.1 - Management of annual performance assessments (APA) for all eligible county governments				X		

⁴ It is anticipated that separate interventions will support Nairobi and Mombasa, both of which have the status of city counties and will require separate interventions.

2.2 - Budgeting and administration of conditional grants to county governments (UIG, UDG)				X		
2.3 – Support strengthening of urban financial management				X		
3: Provision of support for planning, urban infrastructure, and service delivery						
3.1 Planning and development controls					X	
3.2 Infrastructure delivery						X
3.3 Basic service delivery						X
County level interventions (Window 2)						
4: County Governments Address Urban Development And Management Issues	X	X	X	X	X	X
Urban-level interventions (Window 3)						
5: Urban institutions are established and operational (UDG minimum conditions are achieved)	X	X	X	X	X	X
6: Urban institutions are performing effectively in delivering urban infrastructure and services (UDG performance standards are achieved)	X	X	X	X	X	X

Window 1: National level support

12. **Window 1 will support national government in fulfilling its urban development functions.** Through three sub-components, the national government will undertake activities aimed at: (a) establishing and strengthening the institutional and policy framework for urban management program management; (b) supporting the management and administration of urban finances (including the management of APAs and conditional grants); and (c) providing backstopping for urban planning, urban infrastructure delivery and for the provision of basic urban services. All of these window 1 activities will be led or coordinated by the UDD of the SDHUD within the Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHU).

13. **National government support aimed at strengthening the institutional and policy framework for urban development will focus on three areas.** Firstly, UDD will ensure that counties are provided with guidance and capacity building to enable them to establish and operate urban management institutions for their urban areas. This will include the provision of templates for municipal charters, training for urban boards, procedural guidelines on municipal management, and the like. Secondly, UDD will conduct reviews of policy and legislation, as well as coordinate policy on a variety of urban development issues. Thirdly, UDD will ensure sound Program management.

14. **UDD will also take on the management of conditional grants earmarked for urban development and oversee the Annual Performance Assessment (APA) process that underlies the allocation of Urban Institutional Grants (UIGs) and Urban Development Grants (UDGs) to eligible counties and urban areas.** APAs will assess the extent to which counties and their urban institutions have met with Minimum Conditions and Performance Standards and will therefore be of critical importance in determining the allocation of UIGs and UDGs to eligible counties and urban areas. In addition, UDD will ensure that such grants are fully and properly integrated into national-level budget processes and into the annual national budget calendar. UDD will also be responsible for authorizing the timely release of UIGs and

UDGs to county governments by the National Treasury. Finally, UDD will provide counties and urban institutions with guidance and capacity development support for managing urban finances.

15. UDD will assist urban institutions by providing guidelines and capacity building support in planning, infrastructure delivery and service provision. Capacity building and institutional strengthening activities are based on experience gained and lessons learned from the KMP, under which counties have often requested operational guidelines, on-the-job training, and assistance with quality control. UDD's capacity building support will include developing with other government agencies (such as the Kenya Urban Roads Authority) and disseminating technical standards for infrastructure, providing training on and technical assistance for urban planning, and developing a series of guidelines to aid the process of implementing sub-projects, including simplified procurement, contract management, participatory planning and prioritization of investments, and environmental and social screening and management of sub-projects.

Window 2: County level support (UIGs)

16. Window 2 will provide support to county governments for the formulation of urban development plans, for the establishment and operation of urban institutional arrangements (charters, boards, administrations, and the like), and for the initial preparation of urban infrastructure investments. Program support for window 2 will take the form of urban institutional grants (UIGs) to county governments, which will be accessed by counties provided that they meet basic minimum conditions (MCs). The most important MC to be met by counties will be the preparation of a county urban institutional development strategy (CUIDS), to be annexed to the county integrated development plan (CIDP). The CUIDS will specify how the county intends to address urban management issues and will include an annual action plan and budget outlining the proposed use of the UIG. Through the provision of UIGs to counties, window 2 will enable county governments to promote urban development within their jurisdictions, by establishing and strengthening urban institutions (for example, municipal boards, municipal administrations) and by integrating urban development challenges and opportunities into county-wide development strategies and plans. In addition, UIGs will thus provide counties (and their urban institutions) with some of the financial resources needed to meet the MCs and performance standards (PSs) for accessing UDGs and to thus obtain funding for urban infrastructure and service delivery.

17. Counties will be able to use their UIGs to finance a range of eligible expenditures, including costs related to capacity building, some incremental operating costs, hiring consultants, and the purchase of office equipment. Provided that MCs are met, UIGs will be allocated to all eligible and qualified counties on an equal shares basis of US\$500,000 per county, disbursed in three annual tranches. IDA funds for window 2 will be disbursed through PforR financing modalities and will be an integral part of county government budgets. All 45 counties other than the City Counties of Nairobi and Mombasa are eligible for the Program's UIG allocations.

Window 3: Urban board level support (UDGs)

18. Window 3 will provide support to urban boards and administrations (through their respective county governments) for financing infrastructure investments in urban areas. This support will take the form of UDGs, conditional grants budgeted for by the national government

and transferred to the sub-national level and earmarked for financing investments in specific urban areas. Annual UDGs will be made available to eligible urban areas provided that they meet MCs and as a function of their performance. MCs for UDGs will be focused on compliance with: (a) institutional benchmarks, such as the granting of a municipal charter to the urban area in question, the appointment of a municipal board/administration and the inclusion of a separate urban area vote in the county budget; and (b) program-specific benchmarks and requirements (such as performance in procurement, compliance with investment menu, and the like). PSs will be focused on urban area governance (such as citizen participation and public disclosure of urban finances); and urban area planning, infrastructure, and service delivery benchmarks (such as implementation performance, plan formulation, and actual provision of basic urban services). UDG funds will be used by qualifying urban institutions to finance a broad range of infrastructure investments. Eligible investments will include waste management, drainage, connectivity infrastructure, urban economic infrastructure, and fire and disaster management. The prioritization and selection of urban investments will take into account: (i) citizen participation; (ii) social inclusion requirements, (including gender and disability considerations; (iii) climate change and disaster adaptation; and (iv) economic viability.⁵ Ineligible investments include projects with significant negative environmental and social impacts, as well as a range of sector-specific projects.⁶

19. The size of the indicative (maximum) UDG annual grant pool is US\$114.65 million, based on an allocation of US\$20 per urban resident and a minimum allocation of US\$500,000 (per urban area) to ensure that all urban areas are able to make significant investments. On average (and assuming that MCs and PSs are fully met) annual UDGs will amount to about US\$2.5 million per county or about US\$1.95 million per urban area, with the most urbanized counties and the most populous urban areas being eligible for the largest UDG allocations. The actual level of total UDG allocations each year will depend on the achievement of MCs and PSs, and may therefore vary between zero (in the event that no urban areas qualify) to \$114.65 million (in the event that all urban areas qualify for their maximum UDG allocations). When counties and their urban areas comply with all MCs, they will qualify for 50 percent of their indicative UDG allocations; meeting PSs will result in qualification for between 0–50 percent of the remaining indicative UDG allocations. IDA funds for Window 3 will be financed through the PforR instrument.

20. **UDG investment/expenditure menu, ineligible expenditures and procurement requirements.** An urban board will be able to use its UDG to finance investments in five key areas of urban infrastructure and service delivery, based on the board's prioritization of urban needs. These are: (a) waste management (liquid and solid), (b) storm water drainage, (c) roads, non-motorized transport facilities, and street lights), (d) urban economic infrastructure, and (e) fire and disaster management. All of these eligible expenditures are commonly understood as

⁵ Details of and procedures for the use of investment project prioritization and selection criteria will be included in the POM.

⁶ The eligible and non-eligible investment menu for UDGs is based on prior experience in other World Bank urban programs in Kenya, especially KMP.

typically municipal and are consistent with the provisions of the UAC Act.⁷ There are a number of investments and expenditures that cannot be financed out of UDGs. Table 1.4 below provides a summary of the UDG eligible and non-eligible investment/-expenditure menu. Counties and urban areas will be expected to adhere strictly to the UDG eligible and ineligible investment/expenditure menu. Failure to adhere to these investment menus will result in non-compliance with UDG MCs, preventing an urban area from accessing UDG in the following year. In addition, the prioritization and selection of urban investments will take into account: (i) citizen participation; (ii) social inclusion requirements, (including gender and disability considerations; (iii) climate change and disaster adaptation; and (iv) economic viability.

Table 2: UDG eligible and ineligible investment/expenditure menu

UDGs: ELIGIBLE INVESTMENTS & EXPENDITURES	
Urban functional area	Indicative investments
1. Waste management (liquid and solid)	Solid waste: collection equipment, collection bins, transfer stations, collection points (construction of sanitary landfill excluded) Liquid waste: sludge ponds, community septic tanks, vacuum trucks, vacuum handcarts, and others
2. Storm water drainage	Urban drainage systems; flood control systems
3. Connectivity (roads, non-motorized transport facilities, and street and security lights)	Urban roads, pedestrian walkways and bicycle paths, street and security lights, road signs, <i>boda boda</i> sheds, <i>matutu</i> and bus stages.
4. Urban economic infrastructure	Markets; slaughter houses/abattoirs; bus/taxi/lorry parks; urban greenery and public parks, playgrounds, and the like.
5. Fire and disaster management	Fire control stations and disaster management equipment (firefighting trucks, rehabilitation and/or construction of new firefighting station and facilities)
General	
(a) Proposed investments must be included in the annual Urban Area Investment Plan (b) Investments can include both rehabilitation and construction of new infrastructure and capital investments (c) To avoid the fragmentation of urban investments (and limit procurement efforts), investment projects are subject to a <u>minimum</u> investment of Kshs 50 million (US\$500,000) This requirement is subject to the following two exceptions: a. Municipalities shall be permitted to combine a number of related urban infrastructure items in the same geographic area into a single procurement in order to reach the relevant minimum investment/procurement size for a single area-based development initiative. b. If the UDG allocation is less than Kshs 50 million (US\$500,000), their minimum investment/procurement amount will be correspondingly lowered to the UDG allocation amount. (d) At least 80 percent of the UDG shall be spent on <u>non</u> -moveable infrastructure assets. (e) In order to finance investment preparation costs, municipalities shall be permitted to spend part of their UDG allocations on the design, costing and supervision of investment projects.	
UDGs: NON-ELIGIBLE INVESTMENTS & EXPENDITURES	
a) Any investment projects that significant environmental and social negative impacts. b) The following types of investment: a. Power plants b. Dams c. Highways	

⁷ Investments in water supply infrastructure are not included in the eligible investment menu because water and sanitation companies are responsible for these activities.

d. Urban metro systems
e. Railways and ports
f. Engineered landfills
g. Office buildings.
c) Less than 20 percent of the UDG spent on moveable assets (for example, vehicles, equipment);
d) Investment projects not included in the urban IDeP or urban spatial plan.

21. UDGs: MCs and PSs. UDG MCs and PSs are scored on a 100 point scale, with 50 points awarded for achieving all the MCs, and the remaining 50 points awarded based on the achievement of PSs. The annual assessment of compliance with UDG MCs and achievement of UDG PSs will be conducted as an integral part of the overall APA.

22. **UDGs are allocated to specific and eligible urban areas within counties, provided that all relevant MCs are met.** Where all UDG MCs are met, the urban area in question will achieve a score of 50 (out of 100) and thus qualify for 50 percent of its indicative (maximum) UDG allocation. Once MCs have been met, the urban area in question can then qualify for additional percentages of its indicative (maximum) UDG allocation depending on the extent to which it meets the PSs.

23. **Overall, the KUSP represents a significant slice of the KenUP.** The total KenUP budget is estimated at US\$1 billion. Of this, KUSP will provide US\$300 million dollars or 30 percent of the total KenUP funding budget. The Program will be implemented over a period of six years. IDA funds will be allocated to the three windows, as shown in table 3 below. The majority of the Program’s funds will be used to finance sub-national activities (windows 2 and 3).

Table 3: IDA allocations

Window/level	Expenditure Areas	Amount (US\$ millions)	Amount (%)
Window 1: National government	<ul style="list-style-type: none"> Policy development and urban management. Capacity development for urban institutions. Program coordination of UIGs and UDGs. 	30.3	10.0
Window 2: County governments	<ul style="list-style-type: none"> Sub-national urban development and planning. Institutional and capacity development. Technical and institutional support for urban infrastructure and service delivery. 	22.2	7.5
Window 3: Urban boards (county government agencies)	<ul style="list-style-type: none"> Infrastructure and service delivery. 	247.5	82.5
Total		300.0	100.0

24. A number of Kenya’s development partners are currently engaged (or intend to engage) in urban development interventions in Kenya. Development partners currently active in the area of urban development include, among others, DFID, AFD, SIDA, JICA and UN-Habitat. Although no development partners have formally committed to providing specific support to KenUP, the Government intends to integrate any such support into its wider program or ensure that it is fully aligned with program objectives and implementation modalities.

D. Disbursement Linked Indicators and Verification Protocols

25. Program funds for sub-national activities will be disbursed on the basis of three DLIs.⁸ The first DLI provides funds to counties that choose to opt in to the Program and which qualify with UIG MCs. The second DLI aims to encourage counties to establish and make operational urban institutional frameworks. The third DLI focuses on strengthening urban planning, infrastructure, and service delivery. Together, the three DLIs provide strong incentives for improved management of urban areas. Table 4 below provides a summary of the content and funding for the DLIs. Annex 3 contains the detailed DLI matrix.

Table 4: Program DLIs

Window	Results area	DLIs	Approximate disbursement amount (US\$ million)	% of total IDA (PforR) amount
Window 2: County governments	County governments commit to address urban development and management issues	DLI 1: County governments have met <u>UIG</u> MCs.	22.2	8.2
Window 3: Urban boards and counties	Institutional framework established and operational	DLI 2: County governments have met <u>UDG</u> MCs	171.4	63.6
	Urban planning, infrastructure and service delivery	DLI 3: County governments and urban area institutions have met <u>UDG</u> PSs	76.1	28.2
Total IDA PforR finance			269.7	100.0

26. DLI 1 for window 2 triggers the UIG when county governments commit to address urban development and management issues and is intended to provide incentives for county governments to address urban challenges. The UIGs made available through meeting this DLI will also provide county governments with the resources needed to establish urban boards to manage urban areas within their jurisdictions. Counties qualify for an UIG by complying with the UIG MCs, which are: (a) signing a Participation Agreement specifying the county's intention to participate in the Program, (b) drafting (year 1) and then implementing (years 2–6) county-level urban institutional development strategies. Compliance of each of the 45 eligible counties with these MCs will be assessed on an annual basis through the APA process.

⁸ Program activities at the national level are financed through the IPF instrument and therefore do not rely on DLIs.

27. DLI2 is designed to provide county governments with incentives to establish appropriate institutional arrangements for those urban areas within their jurisdictions that are eligible to be classified as municipalities or cities (on the basis of population thresholds defined in the UACA). DLI2 triggers Program disbursements that will finance UDGs. Each county can access 50 percent of the indicative UDG allocation for each of its urban areas by meeting UDG MCs. UDG MCs (for eligible urban areas) are related to: (a) granting municipal charters (b) establishing urban boards and administrations; (c) ensuring adequate public financial managements (budget votes, reporting); (d) demonstrating readiness to implement urban investment projects; (e) adhering to the environmental and social requirements; and (f) adhering to Program-related fiduciary and procedural requirements. All such MCs (for a given urban area) must be met in order to unlock 50 percent of the UDG for the eligible urban area. Compliance of each of the 59 eligible urban areas (and their 45 counties) with these MCs will be assessed on an annual basis through the APA process.

28. DLI3 is designed to provide urban institutions with incentives to: (a) manage their urban areas in an accountable, participatory and transparent manner; (b) undertake effectively planning, infrastructure delivery and basic service provision and (c) adhere to the environmental and social requirements. The extent to which urban institutions do so will be measured by the degree to which they achieve the ten UDG PSs. PSs are assessed only if the urban area in question has met UDG MCs. Achievement of each performance standard will trigger an additional 5 percent of the total indicative UDG allocation for the urban area. Achieving all ten PSs will trigger 50 percent of the indicative allocation for the urban area, in addition to the 50 percent that is triggered for meeting the UDG MCs. The extent to which each of the 59 eligible urban areas meets PSs will be assessed on an each year through the APA process.

29. All Program DLIs are based on the results of annual performance assessments (APAs), undertaken through window 1 and managed by UDD. APAs will be carried out by an independent consulting firm, contracted by UDD. The APA process will include field assessments, sensitization and final verification of compliance with MCs and achievement of PSs. APA results will determine UIG and UDG allocations for all eligible counties and urban areas and will be made available on a timely basis.

30. Given that these DLIs directly measure the future (and thus somewhat unpredictable) performance of county governments and urban boards, the level of disbursement can be higher or lower than expected in a given year. Thus, if counties and urban boards are assessed as performing better than expected, annual disbursements will be increased. Conversely, if performance is not as good as expected, then annual disbursements will be reduced. In the event that counties and urban boards perform consistently better than expected, additional financing will be required.

31. The achievement of all three DLIs will be verified on an annual basis by the Program Technical Committee (PTC) and endorsed by the Program Steering Committee (PSC). Once the results of the annual performance assessment are verified by the PTC, the PSC will review and endorse the verification results by June 15 every year. The PSC-endorsed results will be submitted by the UDD to the Bank for its clearance (by the Practice Manager and the Country

Director) by July 31 of a given year. The task team sends the cleared results to the disbursement team at the Bank to release the funds of the amount determined by the assessment to the National Treasury.

32. **The Bank will retain the right to make the final decision on whether a DLI has been achieved or not.** In addition, the Bank may undertake regular independent quality assurance checks of the APAs to ensure continued robustness of the system. The Bank will hire a quality assurance review consultant to provide a third party review of the accuracy of the findings presented in the APAs. The quality assurance review consultant should be on board by the time of the draft APA reports to allow the consultant time to sample and validate the results.

E. Capacity Building and Institutional Strengthening

33. **Capacity building and institutional strengthening activities will be undertaken at both national and sub-national levels.** Such activities will include: (a) policy and regulatory reviews and guidance; (b) developing and disseminating manuals, templates and standards; and (c) providing capacity building support through orientation, training, peer learning events and on-the-job training.

34. **National level capacity building and institutional strengthening will be delivered through window 1.** UDD will be responsible for managing and coordinating these activities. Where necessary and appropriate, UDD will out-source activities to consultants or other national level agencies. In the case of policy development and regulatory activities, UDD will work closely with other national government agencies (for example, the National Environmental Management Authority (NEMA) for environmental safeguards issues, the Kenya Urban Roads Authority for urban roads standards, and the like). All such activities will be discussed during the annual Program review, included in the window 1 annual work plan, and covered by the annual procurement plan.

35. At the sub-national level, capacity building and institutional strengthening will be undertaken by counties, which will be able to use UIGs to finance some such activities. On an annual basis, county governments will draw up urban institutional development strategies and plans, identifying appropriate activities aimed at either meeting UDG MCs or at incorporating urban development issues into county-wide plans and programs.

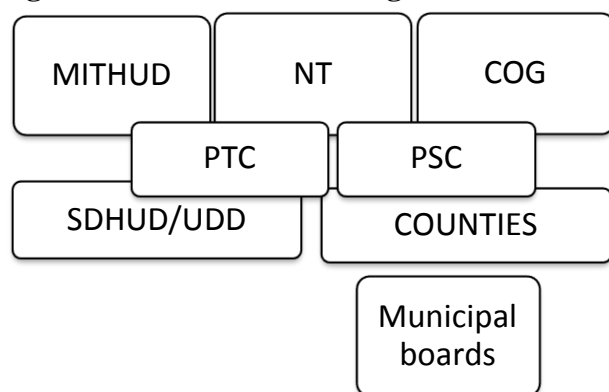
1.2 PROGRAM IMPLEMENTATION

F. Institutional and Implementation Arrangements

36. **The Program will be implemented through institutional arrangements at the national level, county level, and urban board level.** The division of responsibilities between the three levels is laid out in the 2010 constitution and in the UACA. The 2010 constitution stipulates that the national and county governments should conduct their affairs in consultation and with coordination. It confers the higher authority to formulate national policies on the national government, in which context the national government spearheaded the development of the NUDP, while the implementation of the policy as well as of core urban planning and development functions are devolved to the sub-national level. The UACA stipulates the

relationships between county governments and urban boards, including the level of authority to be conferred and types of functions to be delegated by county governments.

Figure 1: Institutional arrangements for KUSP



37. **The SDHUD has the overall responsibility for the Operation and the UDD will provide technical leadership and support.** The SDHUD will be in charge of planning, budgeting, and disbursement of funds to the eligible county governments and municipal boards. Further, the SDHUD will regularly consolidate accounts, financial reports, and progress reports. Through an efficient management of conditional grants, the SDHUD will provide incentive to county governments to implement the NUDP and the UACA. In particular, the UDD plays a core role in technical coordination, capacity building and backstopping. For the day-to-day management of KUSP, the UDD will establish a Program Implementation Support Unit (PISU), consisting of: (a) a Program coordinator, two planners, an engineer, an institutional capacity building specialist, a monitoring and evaluation specialist, a financial management specialist, a procurement specialist, a public finance advisor, and an environmental and social safeguards specialist. The UDD will seek to fill these positions from within the ministry. If it cannot, it is expected to fill the positions with consultants.

38. **At the sub-national level, county governments will play a pivotal role in implementation of the Program.** Their responsibilities include: (a) establishing urban institutions for effective urban management; (b) capacity building and technical backstopping of municipal boards/administrations; (c) supporting and guiding municipal boards/administrations in preparing budgets and forwarding them for approval by the county assembly; (d) managing the flow of Program funds at this level, and consolidating the fiscal reporting from municipal boards for onward submission to the National Treasury; (e) and generally exercising oversight on the performance of the municipal boards. To facilitate within-county coordination and coordination with the national government, a Program Implementation Team (PIT) will be formed in the county government, under the overall responsibility of the county executive committee (CEC) member responsible for urban development, with the Director of Urban Development (or equivalent) as a coordinator and a chief officer providing an oversight. Other members of the PIT include: a municipal administrator (once appointed), an engineer, an accountant, county environment and social officers, and an economist for monitoring and evaluation.

39. Municipal boards and municipal administrations are new entities to be established by county governments and will implement the Program’s window 3 activities. Municipal boards and administrations will be responsible for investment planning, budgeting and implementation, and for day-to-day implementation of activities funded under the Program. They will also be responsible for compliance of operations with all financial management, procurement, and environmental and social safeguards and regulations.

40. **To ensure high level inter-sector and inter-governmental oversight, a Program Steering Committee (PSC) will provide policy guidance, strategic leadership, and broad oversight of the Operation.** One of the PSC’s major functions will be to endorse APA results.⁹ The Principal Secretary of the SDHUD and the chair the urban development committee of the Council of Governors (CoG) will jointly chair the steering committee. Other members of the committee will include representatives (at the chief executive/Principal Secretary level) of the National Treasury, Ministry of Devolution and Planning, Controller of Budget, and the chief executive of the CoG, the chair of the CECs responsible for urban development, and any other appropriate representatives identified and appointed by the committee. The committee will meet twice a year. UDD and the secretariat of the CoG will provide joint secretariat services to the committee.

41. **In addition, a Program Technical Committee (PTC) will be established.** The technical committee will be responsible for reviewing and verifying APA reports¹⁰, addressing any cross-cutting technical issues and challenges in implementation of the Operation, reviewing progress reports, accounting and financial management, providing technical guidance on implementation, and escalating to the steering committee any evolving policy issues.¹¹ The director of the UDD and the secretary to the urban committee of the CoG will co-chair the technical committee. Its members will include three CEC members representing the county governments participating in the Program (to be identified by the CoG), all deputy directors in UDD, the head of the PISU at the UDD, and representatives from the National Treasury and the Ministry of Devolution and Planning (at the director level or above), and others as appointed by the technical committee. UDD and the Secretariat of the CoG will provide joint secretariat services to the committee.

G. Results Monitoring and Evaluation

42. Given the Operation’s focus on policy and institutional strengthening, it is critical to generate timely and relevant feedback on implementation progress and outcomes. This will enable the stakeholder to address issues as quickly as possible once they arise and to revise the Operation’s parameters to adjust to the evolving conditions. To facilitate this process, the

⁹ Endorsement of APA results will be a crucial operational function of the PSC and will be a major incentive for the PSC to meet at least once per year. As such, the KUSP PSC will be somewhat different from steering committees for other programs or projects, in which they tend to play a non-operational role.

¹⁰ The PTC will be responsible for ensuring that the APA is consistent with the APA ToRS, checking that it is comprehensive (covering all eligible counties and urban areas and all MCs/PSs), and that APA results are internally consistent. Terms of Reference for both the PTC and PSC will be included in the POM>

¹¹ The need for a PTC is grounded in the experience of the Bank-financed Uganda Support to Municipal Infrastructure Program, in which the PTC has played a useful and important role in ensuring cross-sectoral and inter-departmental policy coordination and harmonization.

Operation will finance regular training of monitoring and evaluation (M&E) specialists, technical assistance, and other capacity support required to establish and operate an effective M&E system.

43. **Monitoring and reporting will take place at both national and county levels of government.** M&E specialists from within participating county governments will be part of the county-level PIT. They will be responsible for collecting from the relevant county/urban board departments to report on Program implementation, and to capture data on urban governance, urban infrastructure, and services delivered by using Program funds. They will facilitate access to key data required for the APA, the findings of which will be the key source of information to track the indicators presented in the results framework. They will also prepare progress reports twice a year (a midyear report and an annual report) containing agreed data and transmit them to the SDHUD. M&E specialists at the SDHUD will consolidate such input into a single progress report for presentation to the PSC, PTC, and the World Bank for review and comment. The M&E specialists at the SDHUD will also provide training and back-stopping support to staff at the county/urban levels to ensure that the reports are timely, comprehensive, and accurate.

44. **The data to track many of the key performance indicators will come primarily from the government's own systems,** as tracked by the SDHUD and the county governments/urban boards and administrations. The table below summarizes the various inter-linked tools which will be used to monitor and report on the Program.

Table 5: Data generation and collection

Type of information	Means	Frequency
Implementation performance, governance performance, physical progress and outputs, technical aspects of the Program, and achievement of the key performance indicators.	Counties/urban boards and administrations, and SDHUD, each with responsibilities as described above.	Two reports a year, with the content specified in the POM.
	APA	Annually
Achievements of targets for urban infrastructure and services	APA	Annually
Financial reporting (use of funds, expenditure composition, and the like)	Annual financial statements, semiannual financial reports, internal audit reports, annual external audit reports.	Twice a year
Review of implementation experience, achievement of the key performance indicators, and progress towards the PDOs.	Annual progress report and APA	Annually
Detailed review of implementation experience, achievement of the key performance indicators, and progress towards the PDOs.	Midterm review	Once in the Program (2020)

45. **The midyear Program report will cover the following issues:**

- Summary of aggregate Program expenditures and Program infrastructure delivered by counties/urban boards and administrations.
- Execution of SDHUD capacity building plan.
- Summary of aggregate capacity building activities undertaken by counties/urban boards and administrations.

- Summary of aggregate environmental and social performance reports from each counties/urban boards and administrations, including information on grievances.
- Summary of progress against Program’s performance indicators.

46. **The annual Program report will include all the above, plus:**

- Summary of the assessment results, including the performance of Program counties/urban boards and administrations and the disbursed amounts.
- Summary of aggregate information on procurement grievances.
- Summary of aggregate information on fraud and corruption issues.

H. Disbursement Arrangements

47. **For the Project (window 1), disbursement arrangements will be based on procedures that are consistent with IPF modalities.** The initial IDA disbursement for window 1 will be made after receiving a withdrawal application with a six-month cash flow forecast. This withdrawal application should be prepared within one month after Operation effectiveness. Thereafter, IDA disbursements will be made into the respective Designated Account based on quarterly Interim Financial Reports (IFRs) which would provide actual expenditure for the preceding quarter (three months) and cash flow projections for the next two quarters (six months). The Bank’s financial management specialist will review the IFR together with the withdrawal application. The task team leader will approve the request for disbursement, which will be processed by the Bank’s Loan Department.

48. **Disbursements under the Program (windows 2 and 3) are subject to PforR procedures.** Windows 2 and 3 disbursements from the Bank are scalable, will be based on the achievement of annual DLI targets, and will be made in a single tranche every year. DLIs 1, 2 and 3 are all scalable and amounts to be disbursed are determined on the basis of APA results and the subsequent estimate of annual UIG and IDG allocations for counties and their urban institutions. DLIs will be verified by technical committee at the end of June each year. The steering committee and the Bank will endorse the results by July 31 of each year. Disbursements for DLIs 1, 2 and 3 will be made before August 15 of each year and will need to have been fully taken into account in national government budget framework, in the annual County Allocation of Revenues Act (CARA) and in county government budgets.

49. **Relationship between APAs in KUSP and KDSP.** Counties are subject to an APA process under both KUSP and KDSP. However, the performance assessments to be conducted under KUSP will not cover the same areas as are to be included in the KDSP APAs. KDSP APAs focus on a wide range of county-level management issues, such as overall public financial management, county-wide planning and budgeting, the transparency of county governance, and the like. The APAs for the current Operation, on the other hand, will focus entirely on county performance with respect to urban development, urban institutional arrangements, and the provision of urban planning, infrastructure, and services.

1.3 ENVIRONMENTAL AND SOCIAL RISKS OF THE PROGRAM

50. This section presents the anticipated environmental and social impacts, benefits, risks and opportunities of the Program. The risks have been identified by looking at existing and possible impacts in the environmental and social context, the Program strategy and sustainability, the institutional complexity and capacity. The risks associated with the program can be mitigated through capacity building of implementing entities and partners to enhance inclusion, participation, and strengthening mechanisms on accountability and grievance redress mechanisms.

Main Environmental Risks of the Program

51. While the investments under KUSP are discretionary based on County priorities, the Counties can choose from an “investment menu” of small- to medium-scale civil works that includes upgrading of existing roads, transportation infrastructure such as bus and truck parking, markets, storm water drains, and recreational parks, and rehabilitation and expansion of water and wastewater facilities. Sub-projects to be financed under KUSP range from a minimum indicative total allocation per urban area of Kshs 50 million (or US\$500,000) to a maximum allocation of around Kshs 774 million (or US\$ 7.7 million) in case of Kisumu, which has the largest urban population among the eligible urban areas. The allocation for investments will however be based on the counties meeting the MCs and APA thresholds for the program.

52. Based on the scope and scale of projects to be financed under KUSP, environmental and social impacts are expected to be low to significant in scale, with most adverse impacts limited to the construction phase and being site-specific and temporary. All investments will undergo an environmental and social impact screening and assessment process as per the country’s environmental and social systems requirements. These procedures are outlined in the Program Operation Manual (POM), which has been prepared for the Program, with technical guidance from the Bank, and consultations with relevant technical staff at UDD, and other Program stakeholders the national and county levels.

53. The investments under KUSP are intended to have substantial positive impacts through improved service delivery in the selected urban areas. The benefits will vary by the urban area depending on the context and investment choices, but potential benefits are likely to include but not limited to;

- better sanitary conditions through improved waste management systems;
- lower vehicle operating costs;
- reduced transportation costs;
- fewer road accidents and reduced traffic congestion as a result of improved road conditions;
- better and improved waste collection systems;
- improved health through reduction of dust and waterborne diseases;
- improved air quality through reduction of dust;
- improved access to public transport services;
- reduced risk of flooding, and
- reduced soil erosion as a result of drainage improvements.

54. Potential adverse environmental effects include, but not limited to;
- air pollution from dust and exhaust;
 - nuisances such as noise,
 - water and soil pollution from the accidental spillage of fuels or other materials associated with construction works,
 - solid and liquid wastes from construction sites and worker campsites;
 - disruption and/or damage to public utilities;
 - traffic interruptions and accidents;
 - spread of sexually transmitted diseases (including HIV/AIDS) and other communicable diseases such as tuberculosis due to workers influx; and
 - occupational health and safety incidents through injuries or accidents to the workers at construction sites and workers camps

Environment mitigation measures

55. Other than requiring that all project investments under the KUSP to be subjected to screening and further environmental analysis after screening, the program has developed a set of principles and minimum standards that will act as measures to minimize project risks at the concept level. The principles that will apply to all investments as a mechanism for mitigating adverse environmental impacts shall include;

- a) A project shall not be eligible if it is likely to have significant adverse environmental impacts that are sensitive (i.e. if it may be irreversible (e.g., 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 will not be eligible if it would affect an area broader than the sites or facilities subject to physical works.
- b) Projects involving activities that would significantly convert natural habitats or significantly alter potentially important biodiversity and/or cultural resource areas, shall be ineligible.
- c) Projects that generate significant (irreversible) environmental impact that will probably affect third parties (e.g. local community neighbours) shall not be eligible.
- d) Projects that are likely to have an impact on natural forests, heritage property (e.g. religious or archaeological sites), protected natural habitats or areas with high biological diversity (e.g. wetlands, coral reefs, mangroves), international waterways, shall not be eligible.
- e) Projects that are likely to cause serious occupational or health risks shall not be eligible.
- f) Projects that are likely to adversely affect water supply in a given County and/or neighbouring Counties shall not be eligible.
- g) The Project Operation Manual will incorporate contractual responsibilities and obligations with appropriate mechanisms for addressing non-compliance of environmental issues of the sub-projects (by the contractor and the client)

Main Social Risks of the Program

56. Given that the types of activities that the KUSP intends to support include social issues, the overall effect of the program investments should be socially beneficial. The anticipated potential positive impacts include but not limited to:

- creation of employment;
- improved security and reduction in crime;
- increased revenues for the County governments through taxes and levies;
- improved living conditions for the citizens; and
- improved service delivery of social services within the Counties

57. Depending on the type, scope and extent of eligible work under the KUSP, negative social impacts are likely those that are typically related and limited to the construction phase, and are generally work site-specific. Negative impacts are expected to be of a low magnitude and may be related to temporary disturbances caused by construction works. This includes but is not limited to:

- disturbance of livelihoods due to land acquisition or involuntary resettlement;
- disruption of access, traffic deviations, noise, vibration, dust, etc., that could generate disturbances in normal activities in neighborhoods;
- disruption and/or damage to public utilities such as electricity, wastewater, and water facilities;
- social conflicts may arise between the local community(ies) and the influx of construction workers, which may be related to religious, cultural or ethnic differences, or based on competition for local resources;
- the influx of workers and service providers into communities may increase the rate of crimes and/or a perception of insecurity by the local community;
- additional demand for the provision of public services, such as water, electricity, medical services, transport, education and social services;
- Gender based violence and sexual exploitation of women and girls; and
- Child labour and abuse.

Social mitigation measures

58. In addition to screening, the Program has developed a set of principles and minimum standards that will act as measures to minimize project risks at the concept level. The principles that will apply to all investments as a mechanism for mitigating adverse social impacts shall include but not limited to;

- a) Willing buyer-willing seller will be the preferred means of land acquisition in all cases. The government's right to acquire land compulsorily will only be used where it is unavoidable. Where compulsory acquisition is to be employed, evidence must be obtained (as detailed in the POM) that attempts were made to acquire land via the marketplace. Moreover, a compelling reason why alternative land, available in the market, could not be found must be documented. Instances where compulsory acquisition may be unavoidable include, but are not limited to, road rehabilitation, construction of new roads, water and sewerage systems. Where compulsory acquisition is employed, no more than 10 households in total, both titled and untitled (informal settlers/squatters), may be physically displaced on any one sub-project.

Where households are physically displaced, the municipality will provide options to the PAPs guidance provided in the POM. Economic displacement can and will involve the physical relocation of informal vendors. On any given sub-project, no more than 200 informal vendors will be physically relocated. Where informal vendors are physically relocated, they will receive compensation as outlined in the POM. Small parcels of private residential land that do not excessively affect land use may still be subject to compulsory acquisition as they are considered economic displacement.

- b) Projects likely to create or exacerbate social conflict within communities or Counties will not be eligible;
- c) All projects that are likely to have impacts on vulnerable and/or marginalized/indigenous groups must give due consideration to the cultural appropriateness of, and equitable access to Program benefits, giving special attention to the needs or concerns of vulnerable groups and to the rights and interests of these groups of peoples;
- d) The POM will incorporate contractual responsibilities and obligations with appropriate mechanisms for addressing non-compliance of social issues of the sub-projects (by the contractor and the client).

II. OBJECTIVE, SCOPE AND METHODOLOGY OF ESSA

2.1 Objective and Scope of ESSA

Objective

59. An Environmental and Social Systems Assessment (ESSA) was undertaken by the Bank team for the Program as per the requirement set forth under Program for Results Financing. The aim of the ESSA was to review the capacity of existing government (national and county) systems to plan and implement effective measures for environmental and social impact management of the program, including determining if any measures would be required to strengthen them.

60. Specific objectives of ESSA are as follows:

- (a) to identify the potential environmental and social impacts/risks applicable to the Program interventions,
- (b) to review the policy and legal frameworks related to management of environmental and social impacts of the Program interventions,
- (c) to assess the institutional capacity for environmental and social impact management within the Program system,
- (d) to assess the Program system performance with respect to the core principles of the PforR instrument and identify gaps in the Program's performance,
- (e) to include assessment of M&E systems for environment and social issues,
- (f) to describe actions to fill the gaps that will input into the Operation Action Plan to strengthen the Program's performance with respect to the core principles of the PforR instrument.

Scope

61. The ESSA is undertaken to ensure consistency with the six “core principles” outlined in paragraph 8 of the World Bank’s policy on Program-for-Results Financing in order to effectively manage Program risks and promote sustainable development. The six core principles are:

- i. *Core Principle 1: General Principle of Environmental and Social Management:* 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
- ii. *Core Principle 2: Natural Habitats and Physical Cultural Resources:* Avoid, minimize, or mitigate adverse impacts on natural habitats and physical cultural resources resulting from the Program
- iii. *Core Principle 3: Public and Worker Safety:* Protect public and worker safety against the potential risks associated with: (i) construction and/or operations of facilities or other operational practices under the Program; (ii) exposure to toxic chemicals, hazardous wastes, and other dangerous materials under the Program; and (iii) reconstruction or rehabilitation of infrastructure located in areas prone to natural hazards
- iv. *Safety Core Principle 4: Land Acquisition:* 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
- v. *Core Principle 5: Indigenous Peoples and Vulnerable Groups:* 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
- vi. *Core Principle 6: Social Conflict:* Avoid exacerbating social conflict, especially in fragile states, post-conflict areas, or areas subject to territorial disputes.

2.2 Methodology of ESSA

Methodology Overview

62. The assessments were carried out through a comprehensive review of relevant government (national and county) policies, legislation, institutional roles and capacities, program procedures, and assessment of the available capacity in all the forty seven Counties of the Republic of Kenya to implement the existing systems consistent with Bank Program for Results Financing. A structured questionnaire prepared by the ESSA team was used to guide discussions and data collection at the national and county level agencies/units that will be involved in the project implementation of KUSP. This information collected was used to understand the key institutions/strategies, stakeholder’s perspective about social and environmental aspects, and the feedback mechanisms in place to assess the social and environmental risks and impacts.

Methodology

63. In order to assess the existing systems as well as analyze how these systems are applied in practice, the process of preparing the ESSA were drawn on a wide range of data. Inputs analyzed for this ESSA included the following.

- i. ***Desk review of policies, legal framework and program documents:*** The review examined the set of policies and legal requirements related to environment and social management at the national and county government level. The review also examined technical and implementation support documents from previous and ongoing World Bank projects and programs in Kenya. This included but not limited to;

Policies and Legislative Documents

- Environmental Management and Coordination Act(Amendment), 2015
- Constitution of Kenya, 2010
- Land Act, 2012
- National Land Commission Act, 2012
- Community Land Bill, 2016
- Environmental Impact Assessment and Audit Regulations, 2003
- The Environmental Management Coordination (Waste Management) Regulations): Legal Notice 121
- Constitutional provision for vulnerable and marginalized groups.
- Sexual Offenses Act 2012
- Child Rights Act 2012
- Labour Relations Act 2012
- Matrimonial Property Act No 49 of 2013
- Constitutional Provisions and Disability
- HIV/AIDS Prevention and control Act (Act No. 14 of 2006
- Other Acts related to Occupational Health and Safety, HIV/AIDs, Labour Laws among others

World Bank Related Documents

- Project Aide Memoire
- Project Concept Note
- Draft Project Appraisal Document
- Relevant reports and ESSA report for Kenya Devolution Support PforR
- Other ESSAs under World Bank financing

- ii. ***Institutional analysis:*** An institutional analysis was carried out to identify the roles, responsibilities and structure of the relevant institutions responsible for implementing the program, including coordination between different entities at the national and County levels. Sources included existing assessments of key institutions focusing on environmental and social assessment and management processes. The Urban Development Department (UDD), the main entity that will be responsible for overseeing the program at the National Level was also assessed. The National Environmental Management Authority (NEMA), which has the overall mandate in enforcing

environmental and social impact assessment (ESIA) at the national and county levels were also assessed.

- iii. ***Field visits and stakeholders' consultations:*** Field visits were conducted to the sampled Counties to assess the Counties' systems and capacities in implementing the program. A total of 20 out of 47 counties were assessed during the ESSA process. The bank team held meetings with County Executives Committee (CEC) Members in-charge of Land, Urban Development, Housing, Transport, Infrastructure, and other representatives of national government agencies at the County levels which included the National Land Commission (NLC) and NEMA. The governor of Taita Taveta County was also met during the visits. Consultations were also conducted to the key stakeholders that will be involved in the program: Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD) and, National Land Commission under the Ministry of Lands and Physical Planning (MoLPP), and NEMA headquarters. Other stakeholders consulted included NGOs, and development partners such as DFID, JICA, DFID, SIDA, although no development partners have formally committed to providing specific support to KenUP. Consultations were done using a structured questionnaire the bank team prepared, in view of the core principles of the Program for Results (PforR). See Annex 1 and 2 for the questionnaire and list of stakeholders consulted.

Selection of Counties

64. The performance grants and capacity building grants will be available to 66 cities and municipalities; which include all the County headquarters. Nairobi and Mombasa Cities will be excluded from the Program. A total of 20 out of the 66 towns and municipalities in Kenya were selected for the ESSA assessment study from the list of the County headquarters as given by the County Governments (Amendments) Act, 2016. According to the Act, municipalities have been defined as an area with a population of at least 250,000 residents.

65. ***Purposive selection of cities, urban centers and municipalities:*** Five cities that have already established the Urban Committees or town boards were purposively selected for the project. These were:

- Kakamega Town
- Kitui Town
- Nakuru Town
- Eldoret Town
- Kisumu City

66. ***Stratification of cities and municipalities by regions:*** All the 66 cities and municipalities were stratified into the following regional blocks, formerly the provinces of Kenya:

- Rift Valley Region
- Western Region
- Nyanza Region
- Eastern Region
- Coastal Region
- North Eastern Region

- Central Region
- Nairobi Region (excluded from selection)

67. **Random Sampling:** Through simple random sampling, a total of 15 cities and municipalities were selected from the regions above. In addition to the 5 urban areas that have already formed Town Committees, a total of 20 urban areas were selected. This represents about 30% of the total number of urban areas and is statistically acceptable considering the rule of thumb in determining a sample size. The selected urban areas were as follows:

S/N	Region	Counties	City
1.	Rift Valley Region	Trans Nzoia	Kitale Urban Area
2.		West Pokot	Kapenguria Urban Area
3.		Nandi	Kapsabet Urban Area
4.		Uasin Gishu	Eldoret Urban Area
5.		Kajiado	Kajiado Urban Area
6.		Nakuru	Nakuru Urban Area
7.	Nyanza Region	Migori	Migori Urban Area
8.		Kisumu	Kisumu City
9.		Kisii	Kisii Urban Area
10.		Homa Bay	Homa Bay Urban Area
11.	Western Region	Vihiga	Vihiga Urban Area
12.		Kakamega	Kakamega Urban Area
13.	Eastern Region	Machakos	Machakos Urban Area
14.		Meru	Meru Urban Area
15.		Kitui	Kitui Urban Area
16.	Coastal Region	Kilifi	Kilifi Urban Area
17.		Taita Taveta	Wundanyi Urban Area
18.	North Eastern Region	Garrissa	Garissa Urban Area
19.		Mandera	Mandera Urban Area
20.	Central Region	Nyeri	Nyeri Urban Area

Analysis

68. The ESSA analysis essentially follows Strengths, Weaknesses, Opportunities and Risks approach. The sections that follow in this document provides further information: details of Program activities, institutions involved and the implementing agency's past experience in implementing similar projects, the potential environmental and social benefits, risks/impacts of the Program, the Country and Counties existing environmental and social management systems, assessment of the adequacy of the existing systems, and identification of gaps. Based on this analysis, actions to address the identified risks and gaps are identified and proposed.

Validation and Disclosure

69. Validation and disclosure of ESSA has been done at the national and County levels, with invitations of all the County representatives and other relevant stakeholders such as NGOs and developments partners to discuss the draft report. Although not obliged, the final ESSA incorporating comments from stakeholders' validation workshop(s) consultations shall be disclosed on the client's website before appraisal of the program. The World Bank will also disclose the ESSA report on the Bank's Infoshop.

III. DESCRIPTION OF KENYA’S ENVIRONMENTAL AND SOCIAL MANAGEMENT SYSTEMS

3.1 Introduction

70. This section describes the existing legal and regulatory framework, relevant laws and institutions responsible for environmental and social management in Kenya. The assessment of how these systems function as written, is presented in Section 4 along with a structured analysis that identifies the strengths, weaknesses, opportunities and risks of the systems in relation to the six core principles as per the requirements Program for Results Policy.

71. Program for Results Policy requires that all PforR operations “Operate within an adequate legal and regulatory framework to guide environmental and social impact assessment at the program level”. The management of environment and social impacts for investments financed by the KUSP will be based on the Kenyan legal and regulatory framework, and therefore the focus on this ESSA is on these country frameworks. In order to assess the adequacy of these frameworks, relevant laws and institutions for impact management are summarized below, as well as the roles and responsibilities of institutions involved in the environment and management process in Kenya. A gap analysis then summarizes inconsistencies between this framework and the requirements of Program for Results Policy.

72. Further, the institutional responsibilities, which include the division of responsibilities among different levels of government, for implementing environmental management, including carrying out environmental and social analysis; internal review and clearance procedures such as licensing; consultation processes required; information disclosure; grievance redress mechanisms; supervision and oversight, monitoring, evaluation, and so on; and the relevant rules and procedures and, as needed relevant regulatory framework, applicable to the Program are outlined in this section.

73. Finally, institutional responsibilities for implementing social management, which include the roles and responsibilities for areas applicable to the Program which could include resettlement/land acquisition; eligibility for compensation under resettlement and land acquisition programs; consultation requirement; stakeholder involvement in planning and implementation; social, gender and labour issues; information disclosure strategies; grievance redress mechanisms; oversight and monitoring, including indicators; funding of resettlement; and supervision, have been outlined.

3.2 The Legal, Regulatory and Policy Framework

3.2.1 Country Environmental Management Systems

Constitution of Kenya, 2010

74. 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.

Environmental Management and Coordination Act, 1999 and Amended in 2015

75. 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.

Environmental Impact Assessment and Audit Regulations, 2003

76. 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.

3.2.2 Country Social Management Systems

77. 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 summarizes the social legislations in Kenya that are relevant to this Program.

Table 6 Legal Framework Summary

Legal Framework	Functional Relationship to Resettlement
Constitution of Kenya 2010 Article 40,47, 66	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 Urban Areas and Cities Act 2011	The objects and purposes of this Act are to establish a legislative framework for— a) classification of areas as urban areas or cities; b) governance and management of urban areas and cities; c) participation by the residents in the governance of urban areas and cities; and d) other matters for the attainment of the objects provided for in paragraphs (a) to (c).
The County Government Act, 2012	The Act provides the management and governance of a city or municipality within the county. The Act also empowers the county government to be in charge of planning by coordinating integrated development planning within the county, ensuring and coordinating the public participation, and control of air pollution, noise pollution, other public nuisances.
The Land Act 2012	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 Land Act 2012 in the project area.
National Land Commission Act 2012	The act establishes the National Land Commission with the purpose of managing public land and carrying out compulsory acquisition of land for specified public purposes.
The Land Adjudication Act Chapter 95	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 Board
Constitutional provision for vulnerable and marginalized groups.	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 (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya
Sexual Offences Act 2012	An Act of Parliament that makes provision about sexual offences, aims at prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes. Section 15, 17 and 18 below are mainly focused on sexual offenses on minor (children)
Child Rights Act 2012	This Act of Parliament makes provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. It also makes provision for the administration of children's institutions, gives effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Section 15 states that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.
Labour Relations Act 2012	An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratization of trade unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. This Act in Section II Part 6 provides for freedom of employees to associate; section 7 provides for protection of rights of employees; Part 9 provides for adjudication of disputes and Part 10 provides for protection of the employees to hold strikes and lock outs
Matrimonial Property Act No 49 of 2013	Ownership of matrimonial property Part III (clause 7), States that: Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either

	spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. This also includes assets like land.
Constitutional Provisions and Disability	<p>The COK 2010, (chapter 4, part III), Application of Rights (clause 54) states: A person with any disability is entitled: -</p> <p>(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (c) to reasonable access to all places, public transport and information; (d) to use Sign language, Braille or other appropriate means of communication; and (e) to access materials and devices to overcome constraint arising from the person's disability.</p> <p>(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.</p>
HIV/AIDS Prevention and control Act (Act No. 14 of 2006)	<p>Part 11, Section 7 of the Act requires that HIV and AIDs education be carried out at the work-place. The government is expected to ensure the provision of basic information and instruction on HIV and Aids prevention and control to: -</p> <p>(I) Employees of all government ministries, departments, Authorities, and other agencies and employees of private and informal sectors.</p> <p>(ii) The information on HIV/AIDS is expected to be treated with confidentiality at the work place and positive attitude towards infected employees.</p> <p>The Contractors will offer training on HIV/AIDs awareness, prevention and management to the workers as provided by law.</p>

The Constitution of Kenya, 2010

78. The Constitution of Kenya, 2010,¹² protects the sanctity of private property rights and states that no property can be compulsorily acquired by the Government except in accordance with law.¹³ 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*

¹² The Constitution of Kenya, 2010, was adopted by the Government of Kenya on 27 August 2010. The full text is available at http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Constitution/Constitution_of_Kenya2010.pdf, accessed May 25, 2011.

¹³ Constitution of Kenya, art. 40.

(ii) Allows any person who has an interest in or right over, that property a right of access to a court of law.¹⁴

79. The Constitution empowers the state to exercise the authority of compulsory acquisition. Land Act, 2012 designates the NLC as the institution empowered to compulsorily acquire land.¹⁵ 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.

80. 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.¹⁶ 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.¹⁷

81. 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 in accordance with security of land rights, sound conservation and protection of ecologically sensitive areas.¹⁸ These principles must be implemented through a national land policy reviewed regularly by the national government and through legislation.¹⁹

The Urban Areas and Cities Act, 2011

82. The Urban Areas and Cities Act, 2011 Act, passed in 2011 provides legal basis for classification of urban areas (City) when the population exceeds 500,000; a municipality when it exceeds 250,000; and a town when it exceeds 10,000) and requires the city and municipality to formulate County Integrated Development Plan (Article 36 of the Act). Under Article 36, the integrated development plan so developed is required to be the central pillar in public administration of the city or municipality this forming the basis for:

- the preparation of environmental management; preparation of valuation rolls for property taxation plans;
- provision of physical and social infrastructure and transportation;
- preparation of annual strategic plans for a city or municipality;
- disaster preparedness and response;

¹⁴ Id.

¹⁵ The Land Act, 2012 The Government of Kenya, Section 8.

¹⁶ Constitution of Kenya. Id. at art. 40(5).

¹⁷ Constitution of Kenya. Id. at art. 40(6).

¹⁸ Id. at art. 60.

¹⁹ Id. at art. 60(2).

- overall delivery of service including provision of water, electricity, health, telecommunications and solid waste management; and
- The preparation of a geographic information system for a city or municipality.

83. The strategy plan as stated above denotes an annual plan to be adopted in the county assembly following the integrated development plan, and the Act requires the board of town committee to formulate the strategy plan soon after the adoption of the integrated development plan (Article 39).

84. The integrated development plan as stipulated in the Act has to reflect:

- i. vision for the long term development of the city or urban area;
- ii. An assessment of the existing level of development;
- iii. Any affirmative action measures to be applied; development priorities and objectives;
- iv. Development strategies which shall be aligned with any national or county sectoral plans and planning requirements;
- v. A spatial development framework;
- vi. Operational strategies; and
- vii. Applicable disaster management plans;
- viii. A regulated city and municipal agricultural plan;
- ix. A financial plan and;
- x. X. the key performance indicators and performance targets (Article 40).

85. The integrated development plan thus formulated has to be submitted to the county executive committee, and the committee has to submit the plan to the county assembly with an opinion within 30 days (Article 41). The Urban Areas and Cities Act is thus a powerful strategic tool designed to inject order into the planning and management of urban areas.

County Government Act, 2012

86. The County Government Act, 2012 has been adapted to the Constitution's State and County structure in relation to devolution. In particular, the management and governance of a city and municipality shall be vested in the county government (Article 12, Urban Areas and Cities Act).

87. The Act empowers the county government to be in charge of planning by coordinating integrated development planning within the county; and ensuring integrated planning within the county Act provides for the following;

- The Constitution confers powers on the County Assemblies to receive and approve plans and policies. These plans and policies affect the management and exploitation of the county's resources, and development and management of its infrastructure and institutions.
- Ensuring and coordinating the participation of communities and locations in governance at the local level and assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers and participation in governance at the local level.

- Control of air pollution, noise pollution, and other public nuisances

Land Act, 2012

88. The Land Act ²⁰ is the Kenya’s framework legislation regulating compulsory acquisition of land (i.e. land, houses, easements etc.). The LA was adopted on 2nd 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. ²¹ Under the current Constitution, ²² the LA 2012 empowers the NLC (under the guidance of Cabinet Secretary for Lands) to exercise the power of compulsory acquisition on behalf of the State ²³.

The National Land Policy

89. The National Land Policy (“NLP” or “Policy”)²⁴ 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.²⁵ 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.”²⁶ According to the NLP, the exercise of compulsory acquisition in the past has been conducted with abuses and irregularities²⁷.

The Land Tenure System in Kenya

90. Land tenure in Kenya is classified as public, community or private.²⁸ Public land consists of government forests (other than those “lawfully held, managed or used by specific communities as community forest, grazing areas or shrines”²⁹), government game reserves, water catchment areas, national parks, government animal sanctuaries and specially protected areas.³⁰

Customary Land Tenure

91. 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

²⁰ Land Act, 2012.

²¹ The Constitution of Kenya, 2010 recognizes prompt and just compensation when compulsory acquisition of land is made.

²² The Constitution of Kenya, 1963, was replaced in 2010

²³ Land Act, § 6, 2012

²⁴ *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, accessed May 25, 2011.

²⁵ 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.

²⁶ *Sessional Paper No. 3 of 2009 on National Land Policy*, § 45.

²⁷ *Id.* at Chapter 3.2.1.1, article. 46.

²⁸ *Id.* at art. 61.

²⁹ *Id.* at art. 63(d)(i).

³⁰ *Id.* at art. 62(g).

customary tenure systems, which vary mainly due to different agricultural practices, climatic conditions and cultural practices.

Public Tenure

92. This is where land owned by the Government for her own purpose and 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 Land Act 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

93. 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.

94. 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 CLBs³¹.

Freehold Tenure

95. 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. Freehold land is governed by the Land Registration Act, 2012. The Act provides that the registration of a 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

³¹ Community Land Bill 2011

96. 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 e.g. relating to developments and usage.

Land Acquisition Process in Kenya

Proof that compulsory possession is for public good

97. It is very explicit in the Land Act, 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 Land Act 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

98. The respective Cabinet Secretary or Government agency or the County Executive Committee 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. But at the same time 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

99. 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 acquiring authority intending to acquire land.

Publication of Notice of Intention to acquire

100. Upon approval, NLC shall publish a notice of intention to acquire the land in the *Kenya Gazette and County Gazette*.³² It will then serve a copy of the notice to every person interested in the land and deposit the same copy to the Registrar.³³ 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

³² The *Kenya Gazette* is the official government journal in Kenya published by the Government Printing Press.

³³ Land Act, 2012, 107

body.³⁴ 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

101. 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.³⁵

Holding of a Public Hearing

102. 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.³⁶

103. 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.

Valuation of the Land

104. Part III of the Land Act 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

³⁴ 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.

³⁵ Land Act, 2012 (112).

³⁶ *Id.* at article 112.

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:

105. Market value of the property, which is determined at the date of the publication of the acquisition notice.³⁷ Determination of the value has to take into consideration the conditions of the title and the regulations that classify the land use e.g. agricultural, residential, commercial or industrial.

Award of Compensation

106. Under the Land Act 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.³⁸ The law stipulates that any dispossessed person shall be awarded the market value of the land.³⁹ The new law is silent on relocation support or disturbance allowance support.

107. Upon the conclusion of the inquiry, and once the National Land Commission (NLC) has determined the amount of compensation, the NLC prepares and serves a written award of compensation to each legitimate claimant.⁴⁰ 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.⁴¹ 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

108. 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” to all persons interested in land⁴² 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.”⁴³ Where such amount is not paid on or before the taking of the land, the NLC

³⁷ *Id.* at article 112 and article 111.

³⁸ *Land Act*, 117.

³⁹ *Land Act*, Schedule

⁴⁰ *Land Act*, 115

⁴¹ *Land Act*, 115

⁴² *Land Act*, This language reflects the language of the Kenya Constitution, 1963.

⁴³ *Land Act*, 119

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.⁴⁴

109. 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

110. 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.⁴⁵

Temporary Possession

111. 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

112. The Kenya Constitution establishes Environment and Land Court⁴⁶. 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 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 alternative dispute resolution (ADR), including traditional dispute resolution mechanisms.

113. 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*

⁴⁴ *Land Act 115.*

⁴⁵ *Land Act, 115 and 116*

⁴⁶ *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.*⁴⁷

114. Parties will pay fees as determined by Environment and Land Court, which may waive them completely or in part on grounds of financial hardship.⁴⁸

115. The willing buyer and willing seller process of land acquisition is consistent with the above process however, the intention to buy land by government agencies is advertised in the local dailies and willing person apply to be considered. This is in line with international good practice and does not involve coercion.

Vulnerable and Marginalized Groups (VMGs)

116. The Constitution of Kenya (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 Organizations (IPOs), were explicitly aware of the need to address the problem of escalating inequalities and marginalization of many ethnic communities and groups.

117. In practice other vulnerability is also considered are women, persons with disability, persons living with terminal illness, child headed households and the elderly.

118. Accordingly, while the constitution does not specifically use the term Indigenous Peoples (IP), 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.

119. 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 (i) nomadic; or (ii) 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 whole⁴⁹.

⁴⁷ *Land Acquisition Act*, at article 29(7).

⁴⁸ *Land Acquisition Act* at article 43.

⁴⁹ Ditto

120. 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.

121. 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 programmes 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 of certain segments of the Kenyan population that deserve special attention in order to bring them to par with the rest of the country.

122. 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).

123. Sexual Offences **Act 2012**: An Act of Parliament that makes provision about sexual offences, aims at prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes. Section 15, 17 and 18 below are mainly focused on sexual offenses on minor (children). Under Section 15 it is an offence for Any person who –

- a. knowingly permits any child to remain in any premises, for the purposes of causing such child to be sexually abused or to participate in any form of sexual activity or in any obscene or indecent exhibition or show;
- b. acts as a procurer of a child for the purposes of sexual intercourse or for any form of sexual abuse or indecent exhibition or show;
- c. induces a person to be a client of a child for sexual intercourse or for any form of sexual abuse or indecent exhibition or show, by means of print or other media, oral advertisements or other similar means;
- d. takes advantage of his influence over, or his relationship to a child, to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;

- e. threatens or uses violence towards a child to procure the child for sexual intercourse or any form of sexual abuse or indecent exhibition or show;
- f. intentionally or knowingly owns, leases, rents, manages, occupies or has control of any movable or immovable property used for purposes of the commission of any offence under this law

Under Section 17 it is an offence for Any person who -

- a. intentionally causes or incites another person to become a prostitute; and
- b. intentionally controls any of the activities of another person relating to that persons prostitution; and does so for or in expectation of gain for him or herself or a third person, is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than five years or to a fine of five hundred thousand shillings or to both.

Under Section 18 it is an offence for Any person who -

(1) Any person who intentionally or knowingly arranges or facilitates travel within or across the borders of Kenya by another person and either -

(a) intends to do anything to or in respect of the person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act; or

(b) believes that another person is likely to do something to or in respect of the other person during or after the journey in any part of the world, which if done will involve the commission of an offence under this Act, is guilty of an offence of trafficking for sexual exploitation.

(2) A person guilty of an offence under this section is liable upon conviction, to imprisonment for a term of not less than fifteen years or to a fine of not less than two million shillings or to both.

124. ***Child Rights Act 2012*** : This Act of Parliament makes provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children. It also makes provision for the administration of children's institutions, gives effect to the principles of the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Section 15 states that a child shall be protected from sexual exploitation and use in prostitution, inducement or coercion to engage in any sexual activity, and exposure to obscene materials.

125. ***Labour Relations Act 2012*** : An Act of Parliament to consolidate the law relating to trade unions and trade disputes, to provide for the registration, regulation, management and democratization of trade unions and employers organizations or federations, to promote sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development and for connected purposes. This Act in Section II Part 6 provides for freedom of employees to associate; section 7 provides for protection of rights of employees; Part 9 provides for adjudication of disputes and Part 10 provides for protection of the employees to hold strikes and lock outs.

126. **Matrimonial Property Act No 49 of 2013** : Ownership of matrimonial property Part III (clause 7), States that: Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. This also includes assets like land.

127. **Constitutional Provisions and Disability** The COK 2010, (chapter 4, part III), Application of Rights (clause 54) states: A person with any disability is entitled: -

(a) to be treated with dignity and respect and to be addressed and referred to in a manner that is not demeaning; (b) to access educational institutions and facilities for persons with disabilities that are integrated into society to the extent compatible with the interests of the person; (c) to reasonable access to all places, public transport and information; (d) to use Sign language, Braille or other appropriate means of communication; and (e) to access materials and devices to overcome constraint arising from the person's disability.

(2) The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.

128. **HIV/AIDS Prevention and control Act (Act No. 14 of 2006)** Part 11, Section 7 of the Act requires that HIV and AIDs education be carried out at the work-place. The government is expected to ensure the provision of basic information and instruction on HIV and Aids prevention and control to: -

(I) Employees of all government ministries, departments, Authorities, and other agencies and employees of private and informal sectors.

(ii) The information on HIV/AIDS is expected to be treated with confidentiality at the work place and positive attitude towards infected employees.

The Contractors will offer training on HIV/AIDs awareness, prevention and management to the workers as provided by law.

3.3 Institutional Framework for Environmental and Social Systems

3.3.1 Institutional Responsibilities for Environmental Systems

Ministry of Environment and Natural Resources

129. The Ministry of Environment and Natural Resources (MENR) is responsible for the environment at policy level. The Ministry of Environment and Natural Resources (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.

130. 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 National Environment Management Authority.

National Environment Management Authority (NEMA)

131. NEMA is the principal instrument 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 granting Environmental and Social Impact Assessment (ESIA) approvals and for monitoring and assessing activities in order to ensure that the environment is not degraded by such project activities.

County Environmental Committees

132. The County Environmental Committees also contribute to decentralized environmental management and enable the participation of local communities. These environmental committees are to be constituted by the governor and are responsible for the proper management of the environment within the County for which it is appointed.

National Environmental Complaints Committee

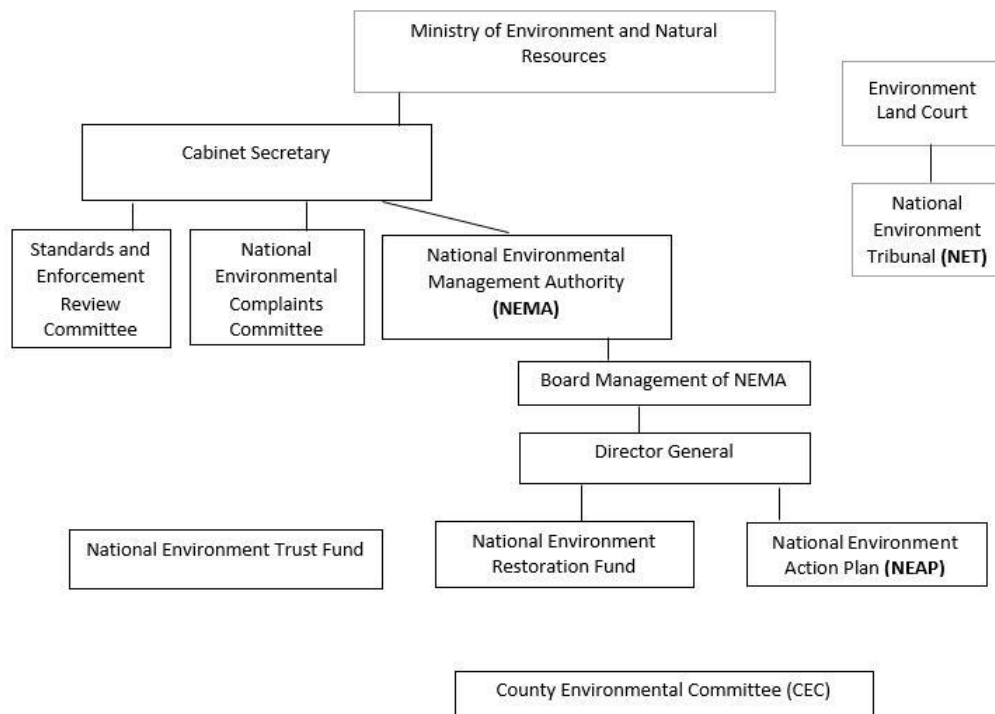
133. The National Environmental Complaints Committee (NECC) is established under Section 31 of EMCA. The NECC is concerned with the investigation of complaints relating to environmental damage and degradation generally. The NECC has powers to investigate complaints against any person or even against NEMA or on its own motion investigate any suspected case of environmental degradation. The NECC is required by law to submit reports of its findings and recommendations to NEMA.

Standard and Enforcement Review Committee (SERC)

134. SERC key function is to advise NEMA on the criteria and procedures for the measurement of environmental standards including but not limited to water quality, effluent discharge, air quality and noise quality, etc. Figure 2 below shows the summary of environmental management systems in Kenya.

**Figure 2 Summary of the administration of the environment in Kenya
Environmental and Social Impact Assessment Process in Kenya**

135. The Environmental Impact Assessment (EIA) is a process and management technique,



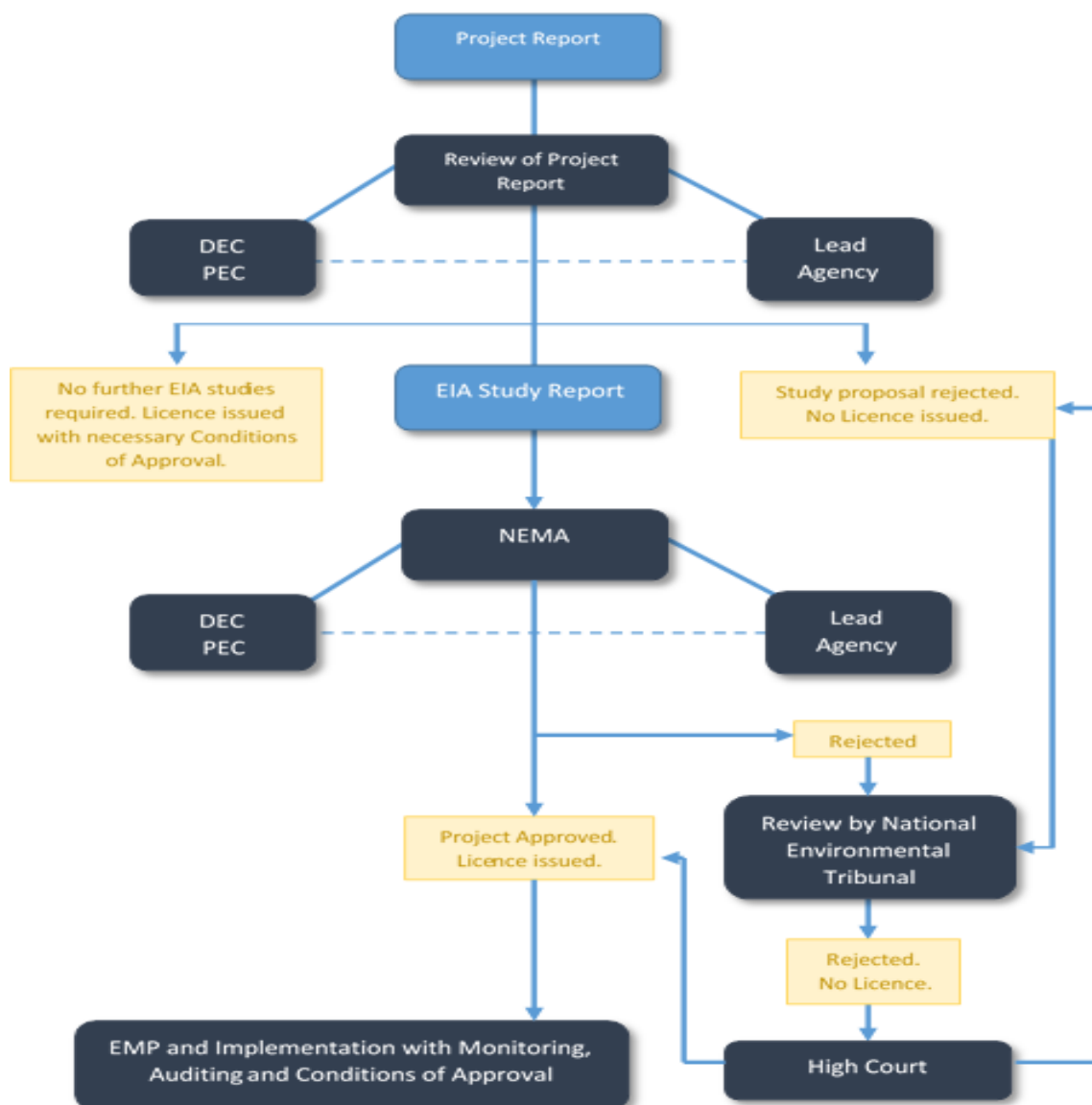
which allows consideration of the likely environmental and social impacts of a development prior to it proceeding. This provides an opportunity to ensure that the design is optimized in an integrated manner, minimizing negative environmental and social impacts and maximizing positive impacts. The EIA process in Kenya is shown schematically in

136.

137.

138. **Figure 3** below.

Figure 3: EIA Process in Kenya



3.3.2 Institutional Responsibilities for Social Systems

139. The constitution provides for a number of institutions to address social issues related to land, vulnerable and marginalized groups, and grievance redress mechanisms. Key constitutional mechanisms for redress of social issues include among others the (a) National Land Commission; (b) the Office of the Ombudsman; and (c) the Committee on Revenue Allocation.

The Commission on Administrative Justice (CAJ) – the Ombudsman is the Public Feedback and Grievance Redress Mechanism

140. Kenya now 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: (i) Citizen against State/public officers and institutions; (ii) Public Officers against fellow public officers; and, (iii) Public Institutions against other public institutions. Table 7 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 7: 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"> • Complaint is assessed for compliance with CAJ Mandate; • If within mandate, CAJ commences inquiries and complainant is issued with copy of communication – CAJ 2 [Sec. 43]; • If NOT within CAJ mandate, Complainant is advised accordingly and/or referred to appropriate government agencies; • 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; • If no response is received after this, a final reminder of 7 days is sent; • If there is still no response after 28 days, summonses are issued to the respondent in line with [Sec. 27(a)].
Step 2	<p>If after the summonses the respondent still fails to comply, the Ombudsman proceeds to:</p> <ul style="list-style-type: none"> • Determines the complaint in the absence of the respondent; • Institutes legal proceedings against the respondent [according to Sec. 52]; • 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;
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"> • Conduct investigations according to articles [A.59 (2)(i)] [Sec 8 b)] [A.252(1)(g)] [Sec. 53 (1)]; • Demand and obtain information or documents [S.26 (d)]; • Conduct an inquiry [A.252(1)(g)] • Undertake mediation, negotiation and conciliation [A.252 (1) (b)]; • Constitute a hearing panel;

	<ul style="list-style-type: none"> • Invite or summon any person or persons to attend to the Commission [S.26 (f)]; • Obtain orders from the Court authorizing Searches or Seizures [Sec.26 (e)]. • Obtain warrants of arrest for breach of any summons or orders of the Commission.
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141. *The Office of the Ombudsman is yet to be devolved to the County and grassroots levels and is not well known.* The custodians of the public FGHM are not accessible to the public as they are not devolved yet, and the public, in particular, the civil society, including IPOs, still need to become more familiar with the constitutional provisions and to know where to seek information from the appropriate bodies.

The National Land Commission

142. The National Land Commission (NLC) is an independent commission tasked with registering land transfers, resolving land disputes and addressing historical land injustices. The National Land Commission is tasked with facilitating and increasing access to fair and equitable mechanisms for resolving land and natural resource based disputes and conflicts⁵⁰.

143. National Land Commission 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;
- 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.

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)

⁵⁰National Land Commission Act 2012, Land Act 2012, Land registration Act 2012 applicable laws and Sessional paper No. 3 (209) on the National Land Policy.

144. 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 CRA⁵¹ includes to: (i) Recommend on equitable sharing of revenues between National and County Governments and among Counties; (ii) Recommend on financing and financial management of County Governments; and to (iii) 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 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 III-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 CoK 2010 establishes an Equalization Fund which is one half per cent (0.5%) of all the revenue collected by the national government each year.

Opportunity for Appeal

145. The Kenya Constitution established an Environment and Land Court⁴³, 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.

146. 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 land⁵²

⁵¹ 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)).*

⁵² *Land Acquisition Act*, at article 29(7)

Parties will pay fees as determined by Environment and Land Court, which may waive them completely or in part on grounds of financial hardship⁵³.

147. *Several challenges remain related to land management structures:* While many former land management institutions or structures such as District 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 (CLMB), were abolished in 2016. The setting up of a full functioning NLC is central to the land agenda, including land for the vulnerable and marginalized communities.

National Gender Equality Commission

148. National Gender Equality Commission (NGEC) 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. NGEC derives its mandate from Articles 27, 43, and Chapter Fifteen of the Constitution; and section 8 of NGEC Act (Cap. 15) of 2011, with the objectives of promoting gender equality and freedom from discrimination.

149. The over-arching goal for NGEC 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

State Department of Gender Affairs

150. The state department of Gender affairs, under the Ministry of Public Service, Youth and Gender Affairs was created from the Ministry of Devolution and Planning in November 2015, to promote gender mainstreaming in national development processes and champion and socio-economic empowerment of women. The department promotes gender equality and the empowerment of women as an effective way to combat poverty, hunger and disease, and to stimulate development that is sustainable. Gender rights and gender equality are entrenched in the Constitution of Kenya 2010, and the department has the responsibility of ensuring equality in gender representation. Gender concerns are anchored in Article 27 (3) of the Constitution which states that “women and men have the right to equal opportunities in political, economic, cultural and social spheres”.

151. The relevant functions related to the Program the department is in-charge includes:- promotion of equitable socio economic development between women and men; monitoring of 30% access to government procurement opportunities for women, youth and persons with disabilities; establishment and implementation of gender management system; and coordination of programmes for the reduction of gender based violence (GBV). The department will be used to ensure gender mainstreaming and reduction of GBV is complied with during the Program implementation.

⁵³ *Land Acquisition Act* at article 43

Kenya National Commission on Human Rights

152. 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.

153. 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.

The National Construction Authority (NCA)

154. The object for which the Authority is established is to oversee the construction industry and coordinate its development. The Authority is in-charge of, among others; (i)accrediting and registering contractors and regulate their professional undertakings; (ii)accredit and certify skilled construction workers and construction site supervisors; (iii) develop and publish a code of conduct for the construction industry. Although not directly involved in environment and social management, the authority has the oversight for the management of construction sites including safety aspects of the projects. The authority will issue licenses for any construction projects under KUSP, and will also have supervision roles as part of their mandate to manage quality assurance in the construction industry.

Directorate of Occupational Safety and Health Services (DOSHS)

155. The Directorate of Occupational Safety and Health Services (DOSHS) is one of the departments within the Ministry of Labour and East African Community Affairs, whose primary objective is to ensure safety, health and welfare of all workers in all workplaces. DOHSS is mandated to develop and implement effective systems for the prevention of workplace diseases, ill health and accidents in order to reduce damage to property and work injury compensation claims for improved productivity. The Directorate enforces Occupational Safety and Health Act, 2007 (OSHA, 2007) with its subsidiary legislation which aims at prevention of accidents and diseases at work. It also administers the Work Injury Benefits Act, 2007 (WIBA, 2007) which provides for compensation of workers who have been injured or have suffered a disease out of and in the course of employment. The Directorate is also the lead agent in implementing the National Policy on Occupational Safety and Health. In fulfillment of its responsibility of identifying hazards at workplaces and assessment of risks with a view of preventing accidents, diseases and damage to property, the Directorate will play a key role in the KUSP by inspecting and auditing of workplaces to promote best practices and ensure compliance with safety and health standards as set out in OSHA, 2007 and its subsidiary legislations.

State Department of Labour

156. The Labour Department under the Ministry of Labour and East African Community Affairs responsible for the implementation of the three major laws namely;

- The Employment Act, 2007
- The Labour Institutions Act, 2007
- The Labour Relations Act, 2007.

157. This is done through formulation and implementation of the National Labour Legislation and policy through the National Labour Board and sectoral wages councils as well as the National Tripartite Consultative Council. The Department is also responsible for operationalizing the tripartite mechanism in handling labour issues through a tripartite dialogue process which involves consultation between workers, employers and government representatives. The Labour Department will be responsible for ensuring the labour laws and other legislations under its mandate are addressed under the Program.

3.4 Management of Environmental and Social Procedures

158. 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.

159. The social management systems in Kenya are not as well developed as those for Environmental management except in the context of land acquisition. Since the social management procedures are not explicit in the EMCA, the social risks of the projects are supposed to be analyzed and reported as part of the EIA process of the project, together with their mitigation measures.

3.4.1 EIA Stages in Kenya

160. EMCA makes provision for EIA in sections 58 and 59 thereof. 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 at his own cost. 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. At the end of the environmental impact assessment process, undergoes through the below stages, an environmental impact assessment study report is produced.

Screening

161. Screening determines which projects or developments require a full or partial impact assessment. Screening will be undertaken for all project regardless of the category of risk.

Terms of reference

162. An EIA study must be conducted in accordance with terms of reference 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 terms of reference for the impact assessment. The terms of reference 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

163. An EIA study is to be conducted in accordance with the general environmental impact assessment guidelines and sector EIA guidelines set out in the Third Schedule to the Regulations.

164. An environmental impact assessment 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.

The Environmental Impact Assessment Study Report

165. After an EIA study has been conducted, the proponent submits to the NEMA the 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;

166. The environmental impact assessment 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 environmental impact assessment experts involved in its preparation.

Public participation

167. Public participation is at the centre of EIA. During the process of conducting an environmental impact assessment 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;

- 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;
- 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;
- 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
- 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

168. After NEMA has received the Report, the agency submits a copy thereof to any relevant lead agencies for their comments. Lead agencies review the report to ensure that it complies with the terms of reference 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

169. 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.

170. 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 Environmental Impact Assessment Study Report and issue an EIA License under Regulation 24.

EIA and Monitoring

171. 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. Unlike prior EIA, 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 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;

- i. The quality of the environment and each of its compartments;
- ii. Activities or natural and anthropogenic inputs which may affect the quality of the environment; and
- iii. The effects of such activities.

Environmental Audit

172. 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 such as ongoing projects commenced prior to the coming into force of the regulations or new projects undertaken after completion of an environmental impact assessment 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 KUSP Investments as part project preparation

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

- i. Full ESIA
- ii. A stand-alone ESMP or
- iii. No further environmental study

3.5.1 Project Screening

174. NEMA is the institution designated to make a decision on whether a full scale ESIA is necessary for proposed investments or otherwise. To make this determination, a project report must be submitted to NEMA in order to make a determination and this is part of the screening.

175. Project reports for proposed investments under KUSP will be prepared by environmental and social County focal points in beneficiary Counties with support from NEMA registered Lead EIA and audit experts then submitted to the NEMA for further determination. It is proposed under the KUSP that each County benefiting from the program will designate an environmental and social County focal point to provide this function.

176. It must be noted that the KUSP will not support projects of high risks as categorized under the amended EMCA (2015), often projects under Schedule 2. However, some projects under Schedule 2 may not require an EIA, for example roads infrastructure projects that are simple and require less machinery and intensive civil works and are related to rehabilitation, re-carpeting and so forth. NEMA can allow Counties to go ahead with the civil works without a full EIA study if there are no major environmental or other economic or socio-cultural impacts expected. 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

177. 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.

178. 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 8: The NEMA Process for Approving Investment Project Reports

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

179. Typical outcomes of review of Project Reports from NEMA are likely to be as shown in Table 9 below. These are as follows:

Table 9: 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	

180. 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.

3.6 Overall Project Compliance and Reporting

181. Table 10 provides a summary of the stages and institutional responsibilities for the screening, preparation, assessment, approval and implementation of the KUSP activities.

Table 10: Screening Responsibilities

No.	Stage	Institutional responsibility	Implementation responsibility
1.	Screening of Environmental and Social Infrastructure Project to assist in project formulation using checklist	County Government, Implementing Agency, NPCT	Environmental and Social Officer (ESO) in respective Counties, Environment and Social Specialist at NPCT
2.	Statutory Environmental Registration of sub projects	County Government, Implementing Agency, NPCT	Environmental and Social Officer (ESO) in respective Counties, Environment and Social Specialist at NPCT
3.	Determination of appropriate environmental assessment level/ category	NEMA	Follow up by County
4.	If ESIA is necessary, reject the investments	County Government, NPCT	NPCT, NEMA

IV. PROGRAM CAPACITY AND PERFORMANCE ASSESSMENT

182. This section analyses the implementation related performance of key implementing institutions associated with the environmental and social legal/regulatory framework for the KUSP program. The section also highlights the challenges of this institutional framework along with an assessment of their current capacities. The section then goes on to analyze the processes of planning monitoring and decision making in the program, the strategy adopted by the country and county, and the current grievance redress systems in place; all from an environmental and social perspective.

183. The ESSA team assessed the quality and efficacy of environment and social management system, particularly focusing on institutional capacity, structure, practices, procedures, mechanisms and effectiveness of implementation at the National and County levels. Consultations with NEMA representatives in the Counties visited were done to understand their program administration, planning, and design, implementation, and monitoring functions within the Counties. The team also visited NEMA head office to understand their role in the implementation of this program. The assessment was reviewed based on previous engagements of the systems at national and county levels, and their performance records on bank funded projects.

184. Broadly, the assessment indicates that there is a robust environmental and social management system, as it exists and designed at the national level. However, there is unevenness in implementation of environment and social risks mitigation measures, which can be traced to either lack of capacity or lack of technical knowledge for effective implementation at the national and County levels. Therefore, implementation of the environmental and social systems for KUSP will largely rely on capacity building at the national and county levels for personnel that will be involved in project implementation.

4.1 National Environment Management Authority

Policy and Legislative Framework Support

185. Kenya has a fairly robust legal framework for environmental management, known as the Environmental Management and Coordination Act (EMCA), which provided the legal ground for the establishment of NEMA 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 are aimed at ensuring that projects are subjected to environmental analysis to determine likely adverse impacts before commencement. NEMA is mandated by Environmental Management and Coordination Act (EMCA 1999, Amended 2015) to commit resources and implement actions necessary for effective environmental and social management.

186. NEMA is charged with enforcing EMCA's provisions as well other subsidiary legislation that has been passed over the last decade. The subsidiary legislations include water quality, waste management, controlled substances, biodiversity, wetland, river and seashore, and environmental impact assessment (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 project proponent, authority or ministry to comply with existing environmental regulations.

187. 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
- National sand harvesting guidelines
- Strategic Environmental Assessment guidelines
- E-waste guidelines

Organization and Program Structure

188. The EMCA, 1999, was amended in 2015 with the objective of aligning it to the 2010 Constitution of Kenya, which led to devolved governance, including governance of some environmental aspects by the Counties. NEMA has established a County Office in all the 47 Counties and is headed by a County Environmental Director.

Human Resources (County Levels)

189. The NEMA officers at the County level are fairly qualified and possess the requisite skills necessary for ensuring management of environmental and social safeguards. The County Environmental Directors (CED) and their assistants possess undergraduate and post graduate qualifications in environment and natural resources with practical years of experience. However, all NEMA offices visited at the County level are understaffed, with the capacity assessment findings revealing that most County NEMA Offices have a maximum of two environmental officers, with additional help of a few interns. This has made it difficult for the staff to handle the workload of EIA reports reviews, monitoring for compliance and enforcement for County projects.

190. Certain Counties are large in terms of landmass and therefore further limit the capacity of NEMA to supervise all on-going projects and enforce compliance through on site monitoring. NEMA officers therefore focus mostly on the review and monitoring of high-risk projects at the expense of other projects. Yet, small projects could have sizeable adverse impacts, e.g. a small waste disposal site. 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. This is a concern for the KUSP, because the proposed investments under KUSP might not get enough

attention in terms of enforcement and supervision by NEMA officers, due to their fairly small size and low risk on environmental and social impacts.

191. NEMA's lack of resources creates a situation where projects with possibly huge 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.

Budget Resources/Financial Capacity

192. NEMA's average annual budget is about 560 million KSh (approximately \$6.6 million) (Opondo 2012). Much of the funding comes from licensing fees, while the remainder is made up of funding from the Government of Kenya (GoK). 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 \$6.6 million for an annual budget, NEMA is stretched so thin that it is unable to carry out its auditing and monitoring mandate. It must review, on average, 1600 EIA reports per year (*Ibid.*).

193. 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. This explains human resource deficit and reasons why NEMA Officers at the County level are forced to take up multiple roles such as accounting, technical tasks and administrative tasks.

Capacity Building Recommendations

194. The training and capacity building efforts proposed for the County officers should also include NEMA in order to familiarize them with the ESSA and their roles and responsibilities in the KUSP.

4.2 County Governments

195. The recipients of the KUSP performance grants will be the Urban Boards through the County Governments in Kenya. The passing of the current constitution in 2010 ushered Kenya into a new system of governance, replacing the old centralized system with a new devolved system of governance. The new system consists of a national government and 47 County governments.

County institutional capacity

196. Counties have established County Executive Committees (CEC), who head County departments of Environment, Transport and Infrastructure, Urban Development, Housing, Natural Resources, Lands, Water, Agriculture, Health, Education, Gender and Social Service, among others. The CEC for the Environment docket is in charge of environmental aspects within the County.

197. All the Counties visited indicated they have inadequate number of staff to support the management of environment issues, ensure compliance of environmental regulations and provide

required support to on-going County projects. In addition, the available staff lacks necessary competencies, with little or no training to manage, supervise and monitor the environmental and social risks on project implemented by the Counties, including handling tasks such as the EIA process.

County Budget Resources/Financial Capacity

198. The average annual budget allocation for the environment department in the Counties was below Kshs 100 million. The environmental and social management units at 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.

Environmental Capacity and Performance Assessment

Organization and program structure on environmental management

199. The main role of County Governments in EIA process includes;
- i. Preparation of project reports for submission to NEMA in cases where they are the project proponent
 - ii. Procure qualified EIA consultants to prepare EIA reports for investments determined to require full EIA
 - iii. Undertake monitoring as per the EMP during project investment implementation
 - iv. Prepare Annual Environmental Audit Reports for submission to NEMA

200. The County governments according to the EIA/EA regulations are responsible for monitoring and implementation of Environmental and Social Management Plans (ESMP) for projects within their County. None of the Counties visited have prepared and operationalized an environmental and social policy; however, most Counties have established ministries or departments that handle environmental issues. Also, none of the Counties visited have gazetted the County Environmental Committees as required by EMCA, 2015, which could act as coordination forum for environmental issues in the Counties.

201. ***Preparation and Implementation of the Environmental Social Impact Assessment (ESIA)***: Since the commencement of the devolved units, a number of infrastructure related projects have been or are being executed by the County Governments. However, most of the projects have not prepared the necessary instruments such as the ESIA to comply with relevant country systems and procedures due to poor planning, ignorance, and sometimes lack of awareness. The Counties also indicated that the implementation of environmental aspects of projects is weak due to poor coordination and transparency between different agencies/ministries within the Counties that are responsible for the role of enforcement and compliance.

202. ***Public and Worker Safety***: The Counties indicated they have no procedures and documentation in place for the management of the Occupational Health and Safety (OHS), with no specific department charged with the supervision and compliance on OHS issues. The County Governments depend of the National Construction Authority (NCA) to oversee training of

contractors and quality assurance on specific project sites. Also, NEMA does support the Counties in the ensuring compliance of the contractors as per the ESMP at the project sites.

Social Capacity and Assessment

203. Analysis of the Kenyan regulatory system shows that the social management systems are not as well developed as those for environmental management except in the context of land acquisition. Although the Counties have Social Welfare departments, the social management is usually handled by individual ministries/departments executing the projects, without any involvement of the Social Departments. The understanding of social aspects and management is however weak, and not well understood in comparison to the needs of the PforR principles.

204. **Land acquisition and Involuntary Resettlement:** Some Counties have in the past acquired land for use on their projects on a willing seller willing buyer principle. There are no dedicated Social Units or Directorates with mandates to manage involuntary land acquisition and compensation for projects within the Counties; the respective ministries undertaking projects that require land acquisition take lead in the sensitization, land acquisition, and compensation process. The Counties are not clear on considerations of involuntary resettlement and livelihood restoration procedures due to disruptions of businesses or services to Project Affected Persons (PAPs). In particular, the management of social risks by Counties in the management of projects is poorly addressed, with the few available social staff scattered in different administrative units within the County government have no experience or capacities to support social safeguards.

205. **Social Conflicts and management:** Some Counties have experienced a number of social conflicts, as result of inadequate consultations with communities. Among the projects that have resulted in social conflicts include; water abstraction from neighbouring Counties, expansion of roads and markets within the urban areas and selection of solid waste dumpsites or sewer treatment plants locations. The Counties have engaged the communities through their leaders to resolve the contentious issues amicably or suspended the projects all together. No social conflicts were reported on post-conflict areas or in areas of territorial disputes.

206. **Vulnerable and Marginalized Groups:** The Counties indicated that they consider the women, youth and the disabled persons as a category of vulnerable and marginalized groups and have initiated special targeted opportunities in employment and businesses. However, there was lack of appreciation in ensuring that minority groups who lack political representation and economic power within the Counties are able to participate or access social and economic benefits of projects.

207. **Public Participation, citizen engagement and Grievance Redress Mechanisms:** As part of the devolution process, the Counties have formalized mechanism for public participation in the budget making and policy preparation process. However, in implementation of projects within the Counties, there are no formalized and documented public participation, citizen feedback mechanism or grievance redress mechanism that enable the citizens or project affected persons to channel their grievances.

4.3 Implementing Agency – Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD)

208. The Ministry of Transport, Infrastructure, Housing and Urban Development (MTIHUD) is the executing *ministry* for KUSP at national level and therefore provides oversight of all Program activities to be funded. The Urban Development Department (UDD) under MTIHUD will be the key implementing agency of the KUSP program. UDD will be in-charge of the overall project implementation of the KUSP performance grants to be managed by the Urban Boards under the County Governments. UDD will be responsible for oversight of all related matters including policy guidance, supervision and monitoring, organization and program structure on environmental and social management

209. The main *role* of the Implementing Agency in environmental and social management process of the KUSP will include;

- i. Preparation of project operation manuals for environment and social management process
- ii. Procure qualified consultants to prepare EIA/ESIA reports for investments determined to require full EIA/ESIA
- iii. Undertake supervision and monitoring of environmental and social aspects during project investment implementation
- iv. Prepare quarterly environmental and social management project progress reports

UDD institutional capacity and staffing

210. The NPCT at UDD has past experience in carrying out implementation of World Bank funded projects, and are also aware of the country requirements on the management of environmental and social risks of the projects. UDD has established a structure under the KUSP NPCT that is in charge of the project activities, with one staff offering the environment and social services. However, the key risk is that the assigned specialist in the NPCT is also in charge of other assignments within UDD, and might not be able to handle the workload under the KUSP taking into consideration the scope of work in all the Counties.

Budget Resources/Financial Capacity

211. The environmental and social management units at NPCT level is not adequately supported through budgetary allocations and provision of necessary facilities, equipment and supplies.

4.4 Analysis of Land Acquisition Practices

212. “**Just**” compensation has been determined in Kenyan courts as compensation that is quantified in accordance with the market value of the land being acquired. Under the principle of equivalence, Kenya courts have held that claimants should be paid compensation which is no more or no less than the loss resulting from the compulsory acquisition of their land. Legislation often requires that compensation amounts be determined in relation to “market value.” The NLC is required, under section 112 (2) of the Land Act, to formulate regulations governing the

calculation of compensation in the context of compulsory land acquisition. However, since as the regulations are yet to be effected, the provisions of the schedule to the Land Acquisition Act continue to apply. The Land Acquisition Act⁵⁴ defines the term “market value” of the land to be acquired as “the market value of the land at the date of publication in the Gazette of the notice of intention to acquire the land” and lays out the principles to guide the compensation of land using market value⁵⁵.

213. **Valuation in Kenya is guided by the Valuers Act, 2012 (Cap 532).** Agencies acquiring land engage the services of a registered valuer to determine the types and amount of compensation triggered by the acquisition process. According to the Valuers Act, which regulates the valuation profession and practice in Kenya, only a registered valuer whose name appears in the register can prepare and submit a valuation report (clause 21 of the Act). A valuation report prepared by a person or firm not registered under the provision of Clause 21 is invalid and cannot be used for the bases of compensation. The valuation report is submitted to the NLC who send its own valuers to countercheck the proposed values. Sometimes the values proposed by private valuers may be higher than those of the government valuers, and this is one cause of disputes in land acquisition.

214. **Standards on how to value land and other property differ internationally** and some governments provide compensation for intangible elements. In Kenya two other principles regulate the compensation payable in compulsory land acquisition. The principle of injurious affection requires compensation if the remaining property (moveable or immovable) of the affected person is made less valuable by the land acquisition. Compensation for disturbance⁵⁶, also known as solarium, is also required and is assessed at 15% of the market value of the property and added to the award for compensation made by the NLC. In addition, courts in Kenya have tended to take into account the nearness of the land in question to the main town and its nearness to the road access in assessing the compensation payable.^{57 58}

⁵⁴ As mentioned in Section 2, the regulations to the repealed Land Acquisition Act continue to remain in force until the regulations of the newer 2012 Acts are put in place.

⁵⁵ In addition, in assessing compensation, Courts have defined “market value” as “the price which a willing seller might be expected to obtain from a willing purchaser, the purchaser may be a speculator, but a reasonable one...In determining the amount of compensation which ought to be paid the court should take into account comparable sales and awards on other acquisition of land of similar character” (*Kanini Farm Ltd v Commissioner of Lands (1986) KLR 310 and Petition 613 of 2014 Patrick Musimba v NLC & 4 Other*).

⁵⁶ Costs incurred by the affected persons that are not directly related to the land lost but are incurred due to the acquisition. Typical disturbance costs include relocation costs, legal costs and valuation fees incurred in connection with the acquisition, stamp duty paid when purchasing land for relocation, etc.

⁵⁷ *Limo v Commissioner of Lands KLR (E&L) 175*

⁵⁸ In determining the compensation payable, the following matters are not considered in Kenya: the urgency necessitating the acquisition; reluctance of the owner of the land to part with the land; damage sustained by the person interested which, if caused by a private person, would not be a good cause of action; damage likely to be caused to the land after publication of the notice of intention to acquire the land or in consequence of the use to which the land will be put; increase in the actual value of the land likely to accrue from the use to which the land will be put when acquired; any outlay on additions or improvements to the land, incurred after the date of publication in the Gazette of the notice of intention to acquire the land, unless the additions or improvements were necessary for the maintenance of any building in a proper state of repair.

215. **These standards approximate international norms for “replacement cost”.** Under international norms, “replacement cost” is the appropriate benchmark for valuation of assets. The focus is on calculating the full cost of replacing the lost asset (s) and international practice determines that the replacement cost value is the market value plus any transaction costs. In comparison, compensation costs under Kenyan regulations constitute not only compensation of the land and the developments on the land, but also adds 15% disturbance allowance and provides for compensation for any loss in the value of the remaining land due to the acquisition. Thus, Kenya’s valuation of compensation approximates international practice of determining the replacement cost value.

216. **Affected parties are also entitled to prompt payment according to the Constitution (Article 40 (3)).** International practice determines prompt payment as that which is made without undue delay and it should be in the form of currency, land, or other goods/services that the recipient can readily make use of and that serve to put the recipient in at least as good a position as he or she was in prior to the expropriation. The Constitution of Kenya (Article 40 (3)) requires prompt payment in full to the affected party once land has been compulsorily acquired. No further definitions of prompt payment are made in the legislation⁵⁹.

217. **Restoration of livelihoods is an important aspect of “fair” compensation but has been neglected in the Kenyan legislation.** The overarching objective of livelihood restoration is to enhance, or at least restore, the livelihoods of all displaced people in real terms relative to pre-project levels and to improve the standards of living of the displaced poor and other vulnerable groups. A recent World Bank study notes that only a few countries have legal frameworks and procedures aimed at ensuring that land acquisition and involuntary resettlement go beyond compensating for lost assets, requiring that affected livelihoods be restored or even improved⁶⁰.

218. **Restoration of livelihoods needs legislation support.** Restoration of livelihoods is established **through** resettlement action planning which is required should any population displacement be anticipated in the land acquisition. As mentioned in Section 2, both the NLC process for submitting a land acquisition request and the ESIA preparation require RAP preparation. However, the resettlement planning process should be guided by legislation, similar to the preparation of the ESIA that is regulated by the EMCA (2003) and the consequent Environment (Impact Assessment and Audit) Regulations, 2003.

219. **Requirements for Consultation are supported by the Constitution and Multiple Court Rulings:** A participatory consultative process is extremely important in cases of involuntary land acquisition. Land owners need to be identified; their extent of their rights clarified; as well as their understanding of the value of their property. The Constitution assigns the responsibility to ensure, facilitate and build capacity of the public to participate in the governance to the county government through function 14 (Schedule 4 Part 2). As such, county governments are required to:

⁵⁹ The Commission is tasked with the development of the rules for the assessment of just compensation.

⁶⁰ Roquet, V., L. Bornholdt, K. Sirker and J. Lukic, “Urban Land Acquisition and Involuntary Resettlement: Linking Innovation and Local Benefits” (2015) World Bank: Washington, DC, March, p. 5.

- a) Create mechanisms of engagement by ensuring and coordinating the participation of communities and locations in governance; and
- b) Build capacity by assisting communities and locations to develop the administrative capacity for the effective exercise of the functions and powers.

220. **Public participation is provided in the Constitution and supported by a Supreme Court Opinion.** The Supreme Court in its binding Advisory Opinion (*Number 2 of 2014*), and using cases touching on the environment and natural resources, reiterated the duty placed upon State organs to consult the people, and to engage communities and stakeholders, before making decisions affecting the environment. The cases used were decided before and after the 2010 Constitution was promulgated, and the Courts have held that state organs that made or make decisions without consulting or engaging the people, the community or other interested stakeholders, acted or act outside their powers and such actions stand to be quashed⁶¹. The EMCA also mandates consultations in the process of land acquisition during the process of developing ESIA's.

221. Identifying the Legitimate Rights' Holders of the Land is a Persistent Challenge. In Kenya, as in many countries, people who have lived on and used land for long periods of time will not have any formal documentation of their rights. This is especially the case for people who hold secondary and tertiary rights – including women (who often control but do not own parcels for food production); those (men and women) who own trees, but not land; those (men and women) who have rights to use water sources or pastures but only at certain times of the year; those (men and women) who may collect forest products, etc. According to international statutes, these users of the land are considered legitimate rights' holders due for compensation. In some countries, their legitimate customary rights are recognized under the formal law; in other cases they are not recognized.

222. These legitimate rights' holders are recognized in the Kenya legislation but can be difficult to conclusively determine who is eligible and their compensation dues. The Constitution of Kenya 2010 provides for compensation for *occupants in good faith who may not hold title to land that is subsequently compulsorily acquired*. Based on this provision, compensation in Kenya is not linked to ownership of registered interests in land and squatters and other occupiers in good faith are entitled to some form of compensation. For this reason, agencies acquiring land must perform the due diligence required to identify these occupants, a process which lacks guidelines. Further, the repealed Land Acquisition Act allows compensation to title-holders only which, as long as regulations for the 2012 Land Laws have not been gazetted, will remain a stipulation contradictory to the Constitution.

223. **In addition, poor land records management systems have made it difficult to find even the formal rights' holders of the land.** Confusing laws and procedures for land registration have resulted in registries of poor integrity, which may be marred by false ownership claims or replete with inaccurate or outdated ownership information. This has undercut trust in

⁶¹ (see *Meza Galana and 3 Others v. AG and 2 Others* HCCC No. 341 of 1993; [2007] eKLR, *Hassan and 4 Others v. KWS* [1996] 1 KLR (E&L) 214; *Mada Holdings Ltd t/a Fig Tree Camp v. County Council of Narok* High Court Judicial Review No. 122 of 2011; [2012] eKLR; and *Republic v. Minister of Forestry and Wildlife and 2 Others ex parte Charles Oduor Okello and 5 Others* HC Miscellaneous Application No. 55 of 2010)

the registries and in this case, contributed to an incomplete compensation process. A common issue with compensating formal title-holders is when succession takes place without transfer of the formal rights. The titles are therefore often still in the name of the deceased.

224. The Land Laws (Amendment) Act 2016 presents another hurdle to identifying legitimate rights' holders. In an apparent contradiction to the constitutional provision for compensation of occupants in good faith, the Land Laws (Amendment) Act prohibits unlawful occupation of public and private land. The Constitution allows forced evictions to take place under certain conditions but mandates the passing of legislation to guide the procedures guiding forced evictions. The procedure to be followed during eviction have been included in the Land Laws (Amendment) Act (2016) and stipulates that certain measures are to be taken into account during evictions but does not explicitly mention compensation as one such measure. **The new amendment to the Land Act 2016, criminalization of unlawful occupation of land**

- a) A new section in the Land Act prohibits unlawful occupation of public, private or public land
- b) An unlawful occupant of all classes of land shall be evicted in accordance with the Act
- c) Unlawful occupants are entitled to notice prior to eviction.
- d) The following eviction procedure shall be followed -
 - prior identification of all person participating in the eviction
 - prior presentation of formal authorization for the action
 - where groups of people are being evicted, government officials or their representatives be present during the eviction
 - be carried out in a manner that respects the dignity, right to life and security of those affected
 - include special measures to ensure effective protection of the rights of vulnerable groups
 - include measures to ensure that there is no arbitrary deprivation of property or possession as a result of the eviction
 - include mechanisms to protect property and possessions left behind involuntarily from destruction
 - respect the principles of necessity and proportional use of force
 - give affected person first priority to demolish and salvage property

225. Provisions for Due Process Standards and Judicial Review are clear but Resolutions Take Long: Courts in Kenya have stressed strict adherence to due process⁶² and fair procedure. Using the specific provisions for land acquisition in Article 40 of the Constitution and Sections 107 and 133 of the Land Act, courts have often stressed the need to follow the stipulated procedure on compulsory acquisition by acquiring bodies. Even where title to the land has been acquired by unlawful means, due process must be followed to invalidate and acquire the land⁶³.

⁶² Mutungi J. in *Virenda Ramji Gudka and 3 Other v Attorney General* [2014] eKLR

⁶³ Other principles regulating due process are: that due process should be defined in law with specified time limits so that people can understand and meet important deadlines; procedures should be transparent and flexible, and undertaken in good faith; notice should be clear in written and oral form, translated into appropriate languages, with procedures clearly explained and advice about where to get help; assistance should be provided so owners and occupants can participate effectively in negotiations on valuation and compensation; the process should be

226. Multiple provisions are made in Kenya to allow aggrieved parties to practice their right to due process and right to appeal in case of disputes. The Constitution states that the process of inquiry is to be fair, equitable, transparent and accountable. Two avenues for grievance redress are provided namely (a) the public inquiry and (b) provision for recourse to courts of law. The 2012 Land Act (section 112) mandates the NLC to hold an inquiry where anyone with interest in the land and who feels aggrieved by the acquisition process can lodge a complaint. The public inquiry stage is critical as it provides for an open grievance redress mechanism. The notice of the Inquiry must be advertised in the Gazette 15 days before the date. In addition, the NLC must proactively seek out any persons of interest in the land and hand them this Notice of Inquiry. Any disputes brought forward must be resolved within the period of the Inquiry. Accessibility of these inquiries to the most vulnerable is provided for as the hearings are held on site. In addition, the Constitution of Kenya 2010 provides for aggrieved parties access to a court of law. Aggrieved parties may file a court case in addition to, or instead of, using the Inquiry set up by the NLC. The Environment and Land Court was established to focus on disputes arising from land or the environment has exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Land Act, 2012.

227. **Land dispute cases in Kenyan courts take time to be resolved.** The time cost of land disputes filed in court is significant and this severely affects project implementation. A case audit carried out in 2013 revealed that 66% percent (5,782) of the cases filed in the Environment and Land Court (ELC) had been ongoing for more than a year, and of those nearly half had been going on for over 60 months. While these cases may include issues of land disputes outside public investment and projects, at best, there would only a 33% chance of any dispute of this kind filed in the ELC will be concluded within 12 months.

228. **Any lodging of an appeal results in suspension of project works.** The Environment Management and Co-ordination Act provides for automatic stay of implementation of development projects upon lodging of an appeal. This provision is intended to ensure that due process is carried out. Given the backlog of cases in the Land and Environment Court, however, the automatic stay can result in project delays and cost overruns.

229. Analysis **indicates** that the legal framework in Kenya related to land acquisition has strengths but contains important gaps when compared against World Bank Standards. Restoration of livelihoods need to be considered as an element of compensation, the RAP process while guided through existing processes needs legislative support, and the emerging contradiction brought on by the Land Laws (Amendment) Act 2016 as far as eligibility for legitimate rights' holders needs clarification. The legislation is, however, strong on laying out clear standards for determining property valuation and compensation, supporting requirements related to stakeholder engagement and consultation with affected individuals and groups, and providing the right to due process and appeal in an independent forum in cases of dispute.

supervised and monitored to ensure that the acquiring agency is accountable for its actions and personal discretion is limited; and the government should take possession of the land after owners and occupants have been paid at least partial compensation, accompanied by clearly defined compensation guarantees.

Environmental Capacity and Performance Assessment

230. ***Preparation and Implementation of the Environmental and Social Impact Assessment (ESIA)***: UDD has in the **past** prepared and successfully implemented the necessary instruments such as the ESIA to comply with relevant country systems and procedure for projects funded by the Bank and the Government of Kenya. The agency has also been responsible for implementing the Environmental and Social Management Plan (ESMP) for the projects in different Counties. However, poor compliance of the contractors has been noted due to weak enforcement by the implementing agency on some projects, especially on dust control and solid waste management.

231. ***Public and Worker Safety***: The implementing agency has been involved in diverse projects where it had oversight role on Occupational Health and Safety (OHS) as part of the ESMP. However, previous performance assessment indicates that the agency has been encountering challenges of adherence to the OHS provisions by the contractors due to poor supervision and enforcement by the supervising consultants. Lack of clauses in the contracts to assign responsibilities and enhance enforcement to the contractors has been missing.

Social Capacity and Assessment

232. ***Land Acquisition and Involuntary Resettlement***: The agency, in coordination with the National Land Commission (NLC) has in the past acquired land for projects, including involuntary resettlement of PAPs, where RAP was prepared and implemented. The agency is well versed with involuntary resettlement and livelihood restoration procedures in accordance to the national guidelines. However, there are no dedicated Social Units or Directorates with mandates to manage involuntary land acquisition and compensation for projects within the agency; but consultants have been used to undertake the RAP studies for the projects.

233. ***Social Conflicts and management***: The agency has encountered a project which had some social conflicts, the Garissa storm water drainage project. The key issue of concern by the local people was an open drain along the road which they claimed poses danger to the pedestrians and motorists. They also claimed public consultation was not adequately done on the project. The agency has handled the conflict through consultations and engaging the complainants to resolve the issues raised. No social conflicts were reported on post-conflict areas or in areas of territorial disputes.

234. ***Labour Influx***: Labour influx impacts have historically been addressed in the ESMP, but on a narrow scope, and not given the required attention. Since the impacts have not been well identified, it is difficult to conclude that there has not been any issues related to labour influx in the previous projects handled by the agency.

Vulnerable and Marginalized Groups: Most of the projects undertaken by the agency under Kenya Municipal Program (KMP) had components that considered vulnerable groups but none of the projects had considerations of marginalized groups. These projects encouraged the contractors to consider participation of the women, youth and the disabled persons on the projects by targeting these special groups for opportunities in employment and businesses.

235. The ESSA identified that there are 14 counties that are defined as ‘marginalized areas’ (underserved) in Kenya. The counties collectively represent 72% of the country’s total land area, and 20% of the country’s population. Population densities are low and the lifestyle is predominantly pastoral and low level sedentary farming on the arid and semi-arid lands. These counties are deficient in terms of access to good roads, electricity, portable water and social services due to their remoteness from national infrastructural networks. These counties are found in the North Eastern, Rift Valley, and Coast regions of Kenya and/or specific groups of vulnerable persons that might be impacted or affected by the Program

236. ***Public Participation, citizen engagement and Grievance Redress Mechanisms:*** All projects under KMP had formalized mechanism for public participation and citizen engagement as part of the project process, especially through the Counties that where the projects were located. However, in implementation of projects the grievance redress mechanisms were weak and not well structured.

V. ASSESSMENT OF PROGRAM SYSTEM

237. This *section* summarizes the assessment of the capacity of Program institutions to effectively implement the Program environmental and social management system as defined in various rules, procedures, and implementing guidelines consistent with the core principles of *Program for Results Financing*. The section assesses the applicability of the core principles, Strengths, Weaknesses, Opportunities and Risks with respect to the policy and legal framework, the institutional context, and existing environment and social management procedures against these core principles.

5.1 Assessment of Environmental Program Systems

Core Principle # 1: General Principle of Environmental and Social Management <i>Environmental and social management procedures and processes are designed to (a) promote environmental and social sustainability in the program design; (b) avoid, minimize, or mitigate against adverse impacts; and (c) promote informed decision-making relating to a program's environmental and social effects</i>	
<p>Program procedures will;</p> <ul style="list-style-type: none"> • Operate within an adequate legal and regulatory framework to guide environmental and social impact assessments at the Program level • Incorporate recognized elements of environmental and social assessment good practice, including (a) early screening of potential effects of all the projects; (b) consideration of strategic, technical, and site alternatives (including the “no action” alternative); (c) explicit assessment of 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 	
Applicability – FULLY APPLICABLE <p>Core Principle 1 is considered in terms of environmental and social management for the urban sector, as a key component of good service delivery. The principle becomes more relevant because the Program includes civil works related to construction and extension of new infrastructural services.</p>	
STRENGTHS <ul style="list-style-type: none"> • The Government has solid environmental legal and policy framework in place to protect, conserve and mitigate adverse impacts. • Existing legislation also help minimize or mitigate possible adverse impacts on the natural habitats, archaeological sites and cultural resources. • There is also a well-defined policy framework to enhance transparency of the development projects. 	WEAKNESSES <ul style="list-style-type: none"> • The implementation of the existing legal/regulatory provisions faces challenges due to lack of enough and qualified human capacity within the implementing agencies and at County levels to support Environmental and Social Systems (ESS) • Insufficient capacity building activities on implementing agency, county organizational structures, and nodal environmental officers to ensure compliance to required environmental standards during project implementation

	<ul style="list-style-type: none"> • Weak coordination among the various implementers and inadequate attention to environmental and social concerns, particularly within the County level. • Low budget allocation by NEMA and County governments for Environmental and Social management • Lack of voice by stakeholders in debating and engaging meaningfully on safeguard issues, especially during project implementation
OPPORTUNITIES <ul style="list-style-type: none"> • The implementing agency has past experience in implementing bank funded projects • Development of County environmental and social policy frameworks • Development of appropriate guidelines, checklists, technical options and manuals to ensure compliance with environment and social legislation within the Program • Strengthening of Country and County systems to manage environmental and social risks 	RISKS <ul style="list-style-type: none"> • Poor implementation or mainstreaming of existing environmental and social management regulations in program guidelines • Addressing the environmental management needs and challenges depends on capacity building of the key sector organizations both in terms of human resources and training, and strong monitoring. <p>LEVEL OF RISK - SIGNIFICANT</p>

Core Principle # 2: Natural Habitats and Physical Cultural Resources

Environmental and social management procedures and processes are designed to avoid, minimize and mitigate against adverse effects on natural habitats and physical cultural resources resulting from program.

As relevant, the program to be supported:

- Includes appropriate measures for early identification and screening of potentially important biodiversity and cultural resource areas.
- 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 activities.
- Takes into account potential adverse effects on physical cultural property and, as warranted, provides adequate measures to avoid, minimize, or mitigate such effects.

Applicability – APPLICABLE

- KUSP activities will not likely generate significant adverse impact on natural habitats, physical and cultural resources since civil works will only be limited to urban areas and confined to a small geographical location.
- In addition, the subprojects are expected to have a smaller physical footprint, and therefore preventive approach will be used in siting the

<p>proposed infrastructures to avoid adverse impacts on natural habitats and any chance finds</p> <ul style="list-style-type: none"> Construction of some infrastructures such as location of solid waste disposal facilities and road construction could pose some risk to natural habitats and physical cultural resources if not sited appropriately and if chance finds procedures are not embedded in general construction contracts and supervised appropriately 	
<p>STRENGTHS</p> <ul style="list-style-type: none"> The existing legislation for Kenya ESIA process considers physical cultural resources, including screening for archaeological, historical and cultural sites to ensure environmental and social sustainability. The assessment incorporates in program design and implementation appropriate measures to minimize or mitigate possible adverse impacts on the natural habitats, archaeological sites and cultural resources, with involvement from strong institutions such as NEMA and National Museums of Kenya. 	<p>WEAKNESSES</p> <p>The weaknesses identified for Core Principle # 1 are applicable to Core Principle # 2.</p>
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> The opportunities and actions identified for strengthening the system for Core Principle # 1 are applicable to Core Principle # 2. 	<p>RISKS</p> <p>The risks identified for Core Principle # 1 are applicable to Core Principle # 2.</p> <p>LEVEL OF RISK - MODERATE</p>

<p>Core Principle # 3: Public and Worker Safety</p>
<p><i>Environmental and social management procedures and processes are designed to protect public and worker safety against the potential risks associated with (a) operations of facilities or other operational practices developed or promoted under the program; and (b) exposure to toxic chemicals, hazardous wastes, and otherwise dangerous materials.</i></p>
<p>As relevant, the program to be supported;</p> <ul style="list-style-type: none"> 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. Promotes the use of recognized good practice in the production, management, storage, transport, 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. 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>Applicability – FULLY APPLICABLE</p> <p>The provisions in Core Principle # 3 are considered as part of the ESIA process analyzed under Core Principle # 1. Review found that Core</p>

Principle # 3 is fully applicable to the Program, as there will be physical infrastructure development involved in the Program, which involves construction activities.	
STRENGTHS <ul style="list-style-type: none"> The government's contract conditions for contractors include provisions for public and worker safety (for example, regulations on use of explosives, provision of barricades at construction site, use of personal protection gear by workers, disposal of construction debris and waste water, preventing creation of conditions conducive to disease vectors, etc.). The country systems have guidelines/regulations through agencies such as DOHSS and NCA on aspects concerning management of construction sites, including public and worker safety risks from construction/operation of facilities. 	WEAKNESSES <ul style="list-style-type: none"> Weak capacities to ensure compliance to required national standards within the implementing agency and Counties Weak coordination among the various implementers and inadequate attention to OHS concerns, particularly at the County level. There is general lack of awareness on public health and safety issues, particularly in relation to exposure to workplace safety aspects in hazard prone areas etc There is poor maintenance of infrastructures by implementing agencies after completion, eg storm water drainage systems
OPPORTUNITIES <ul style="list-style-type: none"> Strengthening of Country and County systems to manage OHS risks Strengthening capacities to enforce OHS implementation The Program also provides an opportunity to create good procedures for (i) construction site management, (ii) post construction site rehabilitation, and (iii) disposal of hazardous waste (eg asbestos, PCB transformers, etc). There are also opportunities to strengthen guidelines to address safe management and disposal of hazardous, solid and liquid waste, and create capacities at the County level for the management of such waste. 	RISKS <ul style="list-style-type: none"> Systematic implementation of OHS provisions requires enhanced awareness in the key sector organizations and strengthened monitoring. Inability to ensure public and worker safety can result in physical injuries, including loss of life to the workers and public at construction sites. Improper management of solid and liquid waste can pose serious health risks if institutional capacity is lacking, eg at campsites, construction sites, etc These risks arise mainly from lack of human and other resources (including finances) availability for implementation of the ESMP. <p>LEVEL OF RISK – SIGNIFICANT</p>

5.2 Assessment of Social Program Systems

Core Principle # 4: Land Acquisition

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.

As relevant, the program to be supported;

- Avoids or minimizes land acquisition and related adverse impacts;
- Identifies and addresses economic and social impacts caused by land acquisition or loss of access to natural resources, including those affecting people who may lack full legal rights to assets or resources they use or occupy;
- 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;
- Provides supplemental livelihood improvement or restoration measures if taking of land causes loss of income-generating opportunity (e.g., loss of crop production or employment); and
- Restores or replaces public infrastructure and community services that may be adversely affected.

Applicability – PARTIALLY APPLICABLE

There is potential development of some physical infrastructure for some sub-projects (eg widening of roads, storm water drainage, etc) that might require land acquisition and involuntary resettlement, resulting in minimal relocation and loss of livelihoods. Investments financed by UDGs will exclude high risks projects (projects that have significant negative environmental and social impacts that are sensitive, diverse, or unprecedented). Willing buyer-willing seller will be the preferred means of land acquisition in all cases. The government's right to acquire land compulsorily will only be used where it is unavoidable. Where compulsory acquisition is to be employed, evidence must be obtained (as detailed in the POM) that attempts were made to acquire land via the marketplace. Moreover, a compelling reason why alternative land, available in the market, could not be found must be documented. Instances where compulsory acquisition may be unavoidable include, but are not limited to, road rehabilitation, construction of new roads, water and sewerage systems. Where compulsory acquisition is employed, no more than 10 households in total, both titled and untitled (informal settlers/squatters), may be physically displaced on any one sub-project. Where households are physically displaced, the municipality will provide options to the PAPs per guidance provided in the POM. Economic displacement can involve the physical relocation of informal vendors. On any given sub-project, no more than 200 informal vendors will be physically relocated. Where households and informal vendors are physically relocated, they will receive compensation as outlined in the POM. Small parcels of private residential land that do not excessively affect land use may still be subject to compulsory acquisition as they are considered economic displacement.

STRENGTHS

- The National laws have developed legislations under the Constitution, 2010, and the Land Act, 2012 to manage social risks under the land acquisition.
- The NLC has representation at the county levels that can be utilized for land acquisition process

WEAKNESSES

- Weak capacities to ensure compliance to required national standards within the implementing agency and Counties
- The Land Act does not clearly defines the rights of those occupying public land and their entitlement, especially on livelihood restoration
- The Law does not stipulate that resettlement should be avoided wherever possible; on the contrary, as long as a project is for public

	<p>interest, involuntary resettlement is considered to be inevitable</p> <ul style="list-style-type: none"> • Lack of human capacity at NLC to handle multiple land acquisition for different projects at the same time • Weak coordination among the various implementers (NLC and relevant ministries) and inadequate attention to livelihood restoration concerns, particularly within the County level.
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> • Strengthening of country and County systems to manage and implement land acquisition process and associated risks to acceptable standards • Strengthening capacities to enforce Land acquisition implementation 	<p>RISKS</p> <ul style="list-style-type: none"> • Systematic implementation of land acquisition procedures as required by the WB policies due to weaknesses of the local policies • Potential involuntary resettlement without compensation to informal settlers occupying public land illegally • Delay of land acquisition due to lack of capacity at the NLC • Lack of financial resources within the Counties for land acquisition for the program <p>LEVEL OF RISK – MODERATE</p>

Core Principle # 5: Cultural Appropriateness and Equitable Access to Program Benefits

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

As relevant, the program to be supported;

- 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.
- Ensures that Indigenous Peoples can participate in devising opportunities to benefit from exploitation of customary resources or indigenous knowledge, the latter (indigenous knowledge) to include the consent of the Indigenous Peoples.
- 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.

Applicability –APPLICABLE

While the Program seeks to improve the conditions of the poor and vulnerable groups within the urban areas in all Counties in Kenya, if adverse impacts are not well-managed, it is possible that these vulnerable groups could be impacted negatively.

<p>STRENGTHS</p> <ul style="list-style-type: none"> • The National laws have developed legislations under the CoK, 2010 has recognized marginalized groups. • The County and County systems have clearly articulated the minimum requirements for equitable access and benefits for the disabled, women and the youth in its programs • The government systems have also embedded in the constitution the citizen engagement through Consultation and Public Participation (CPP) requirements on all County programs as part of the devolution process 	<p>WEAKNESSES</p> <ul style="list-style-type: none"> • There is no specific legislation governing Indigenous Peoples in Kenya. The provisions in the CoK, 2010, however, specifically includes minority, traditional, indigenous and pastoral communities among the groups of communities that are defined as <i>marginalized communities</i>. • Weak capacities to ensure compliance to required national standards on equitable access within the implementing agency and Counties • Poor commitment to reduce inequity at the national and County levels • No annual monitoring system to measure progress of equitable access and CPP programs. • Weak systems to curb corruption in the County and country systems involved in equitable programs • Weak capacity to disseminate information to promote social accountability and grievance redress mechanisms at national and County levels
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> • There is a commitment at the national and County levels to reduce inequity poverty to vulnerable groups (disabled, women, and youth) which is accompanied by adequate funding through other programs • Improved staff management and training on applicability of this principles to the program • Development of robust stakeholder management strategies within the systems as part of the current CPP programs to strengthen and systematize projects consultation processes and grievance redress mechanisms 	<p>RISKS</p> <ul style="list-style-type: none"> • Weak procurement processes and procedures for equitable access to program benefits by the vulnerable groups • Barriers that hinder progress towards achieving the objective of increased equity brought about by corruption, cultural, ethnic and gender disparities <p>LEVEL OF RISK – MODERATE</p>

<p>Core Principle # 6: Social Conflict</p>
<p><i>Avoid exacerbating social conflict, especially in fragile states, post-conflict areas, or areas subject to territorial disputes</i></p>
<p>As relevant, the program to be supported;</p> <ul style="list-style-type: none"> • Considers conflict risks, including distributional equity and cultural sensitivities
<p>Applicability –APPLICABLE</p> <p>The KUSP program is designed to yield significant social benefits to all citizens and to improve distributional equity within select urban areas.</p>

<p>ESSA findings indicate that there have been some conflicts between Counties in the past, mainly on issues pertaining to water abstraction on rivers between Counties, and not on projects in urban areas. The program will not undertake projects that will cause or exacerbate social conflict in fragile states, post-conflict areas or areas subject to territorial disputes, or cause social conflict or impact distributional equity or associated cultural sensitivities</p> <p>On the other hand, the principle is applicable due to social conflicts that may arise due to labour influx in the project areas such as gender based violence, increased risk of illicit behaviour and crime, increased burden and competition on public resources, increased risk of communicable diseases, among others</p>	
<p>STRENGTHS</p> <ul style="list-style-type: none"> • The National laws have developed legislations under the CoK, 2010 has recognized marginalized groups. • The country and County systems have clearly articulated the minimum requirements for equitable access and benefits for the disabled, women and the youth in its programs • The government systems have embedded in the constitution the citizen engagement through Consultation and Public Participation (CPP) requirements on all County programs as part of the devolution process 	<p>WEAKNESSES</p> <ul style="list-style-type: none"> • There is little attention given on preventative measures to address social conflicts across the country, including public debate or policy discourse on crime and violence prevention • Weak grievance mechanisms to manage social conflicts at the National and County levels • Lack of reliable data to identify causes of social conflicts, e.g crime and violence in urban areas • Weak capacities to ensure compliance at the implementing agency and the law enforcement • Weak systems to disseminate information and mechanisms to reduce social conflicts at national and County levels
<p>OPPORTUNITIES</p> <ul style="list-style-type: none"> • There is a commitment at the national and County levels to encourage utilization of local labour to empower the local communities during program implementation • Training on applicability of this principles to the program • Development of robust stakeholder management strategies within the systems as part of the current Public Participation programs to strengthen and systematize projects consultation processes and grievance redress mechanisms • Integrate contractual obligations in the legal agreements and contracts for contractors to take responsibilities of the social risks, with appropriate mechanisms for addressing compliance • Incorporate Crime Prevention through Environmental Design (CPTED) training to be used as an approach in the prioritization of urban infrastructure 	<p>RISKS</p> <ul style="list-style-type: none"> • Lack of identification of social risks brought about by social conflict, including prevalence of gender-based violence • Contractors with weak E&S capacity to manage social risks • Unavailability of local labour leading to a high ratio of labor influx vis-à-vis host population • Pre-existence and recurrence of social conflicts or tensions in project locations • Political interference that exacerbate social conflicts <p>LEVEL OF RISK – MODERATE</p>

VI. ENVIRONMENTAL AND SOCIAL RISKS RATINGS

238. Based on the findings of the ESSA analysis, this section discusses the risks identified, and the proposed measures to mitigate those risks. These are included in the Program's integrated risk assessment. Because of the significant geographic dispersion of the participating Counties, different scale of proposed investments, and the potential environmental and social impacts associated with each project in the program, the ESSA has determined that the overall risk of the program is rated as *significant*.

Main environmental risks

239. The investments menu under KUSP is likely to have moderate to significant environmental impacts. The impacts will vary depending on the context and investment choices by each County, based on the type, scope and scale of works. The positive benefits are likely to include but not limited to; reduced environmental degradation and sanitary conditions through improved waste management systems; lower vehicle operating costs, reduced transportation costs, fewer road accidents and reduced traffic congestion as a result of improved road conditions and improved access to public transport services; and reduced risk of flooding and soil erosion as a result of drainage improvements.

240. The adverse impacts are expected to be typical construction impacts that are site-specific temporary, and generally limited to the construction phase. Potential adverse environmental effects include air pollution from dust and exhaust; nuisances such as noise, 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; occupational health and safety through injuries or accidents to the workers; and disruption and/or damage to infrastructure such as electric, wastewater, and water facilities.

241. Experience from implementation of similar types of urban works in Kenya indicates that short-term construction impacts 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 technical manual, and be a standard part of environmental management plans included in bidding documents for contractors.

242. The major weaknesses identified in the management of environmental impacts is in weak capacity at the county levels, and risk of poor adherence by the contractors due to poor supervision.

243. Given the above and the past experience of projects in the urban sector under the same PCT, the risk of foreseeable environmental impacts on the program is considered significant.

Environment mitigation measures

244. While no large-scale or high-risk projects are expected, the screening process for the proposed investments will include criteria to exclude certain categories of projects as well as projects of a scale that would include significant negative impacts that are sensitive, diverse, or unprecedented on the environment and/or affected people. Such types of investments are excluded from the Program. The screening procedure will be guided by the Environment and Coordination Act and its amendment and the Country practice which will be outlined in the POM. In addition to screening for significant impacts, the following exclusionary criteria apply to works financed with the KUSP:

- New landfills or waste water treatment plants;
- Activities that would significantly convert natural habitats or significantly alter potentially important biodiversity and/or cultural resource areas.

245. Other than requiring that all project investments under the KUSP to be subjected to screening and determination of further environmental analysis after screening, the program has developed a set of principles and minimum standards that will act as measures to minimize project risks at the concept level. The principles that will apply to all investments as a mechanism for mitigating adverse environmental impacts shall include exclusion of projects that are likely to;

- Generate irreversible environmental impacts on affected parties and third parties;
- Impacts on Natural habitat
- Impacts on Physical and natural resources
- Cause serious occupational or health risks
- Likely to adversely cause conflict within communities or neighbouring Counties

246. In addition to the above, the program has proposed measures as part of the Program Action Plan to strengthen the implementation and monitoring of the environmental management systems for the program to close the gaps in areas of weak capacity and other risks associated with project implementation, especially during construction and operation phases.

Main social risks

247. Activities to be supported by the Program are expected to generate socio-economic gains and have an overall positive effect. Adverse social impacts are likely to be low. Given the scope of activities under KUSP it is highly unlikely that large-scale resettlement would occur, although land acquisition is likely for the construction of infrastructure works, for example in widening roads in the existing rights of- way or acquiring land for new market areas. This has the potential to impact land, assets, property, crops, and shared community facilities such as water points, community roads, and roadside markets.

248. Consultations with the Counties confirmed that they do not have adequate experience with involuntary resettlement and land acquisition, in addition to their limited capacity to manage this social risk. Given the Counties' lacks this experience, sub-projects involving involuntary resettlement and land acquisition will be screened during sub-project selection using exclusionary criteria to minimize the social risk involved with relocation due to land

acquisition. The exclusion will cover sub-projects involving relocation of households, temporary or permanent land take, impacts on livelihoods, including those that may occur through restriction of access to resources.

249. Sub-projects construction activities can disrupt socio-economic activity, blocking access paths, create loss of income for those affected, harm or injure, and restrict access to homes, shops and other public institutions (schools, clinics, etc.). Based on the previous experience of other projects undertaken by the implementing agency (KISIP and KMP), there has been some complains and issues on this type of impacts in the past. Although these social impacts are likely to be small and not widespread, they must be documented and managed accordingly during sub-project design and construction to avoid and mitigate them well in advance.

250. The ESSA identified that there are 14 counties that are defined as ‘marginalized areas’ (underserved) in Kenya. The counties collectively represent 72% of the country’s total land area, and 20% of the country’s population. Population densities are low and the lifestyle is predominantly pastoral and low level sedentary farming on the arid and semi-arid lands. These counties are deficient in terms of access to good roads, electricity, portable water and social services due to their remoteness from national infrastructural networks. These counties are found in the North Eastern, Rift Valley, and Coast regions of Kenya and/or specific groups of vulnerable persons that might be impacted or affected by the Program.

251. The nature of the proposed activities in KUSP does not suggest that specific vulnerable, marginalized/indigenous groups could be harmed by the Program. The design of the Program aims to foster integration of vulnerable, indigenous /marginalized groups into the Program design, including consultation during project selection and monitoring, and the development of the appropriate social accountability systems.

252. The ESSA has concluded that there is little risk on the Program itself that would be the source of social conflict. However, some cases of social conflict (such as dispute on the location/selection of the projects, project benefit sharing, labour influx, pre-existing or historical social issues in host communities, etc), may occur during project implementation within communities or Counties. The design of the program aims to minimize social conflict through the development of appropriate mechanisms for consultations and grievance mechanisms with the communities and Counties. The program would not undertake any investment where social conflict would be anticipated between or within communities or Counties.

Social mitigation measures

253. Willing buyer-willing seller will be the preferred means of land acquisition in all cases. The government's right to acquire land compulsorily will only be used where it is unavoidable. Where compulsory acquisition is to be employed, evidence must be obtained (as detailed in the POM) that attempts were made to acquire land via the marketplace. Moreover, a compelling reason why alternative land, available in the market, could not be found must be documented. Instances where compulsory acquisition may be unavoidable include, but are not limited to, road rehabilitation, construction of new roads, water and sewerage systems. Where compulsory acquisition is employed, no more than 10 households in total, both titled and untitled (informal

settlers/squatters), may be physically displaced on any one sub-project. Where households are physically displaced, the municipality will provide options to the PAPs per guidance provided in the POM. Economic displacement can involve the physical relocation of informal vendors. On any given sub-project, no more than 200 informal vendors will be physically relocated. Where households and informal vendors are physically relocated, they will receive compensation as outlined in the POM. Small parcels of private residential land that do not excessively affect land use may still be subject to compulsory acquisition as they are considered economic displacement. To screen out for these exclusions, the Program will rely on existing country legislation and systems and the guidelines in the Program Operation Manual (POM), which will include a rigorous sub-project screening process to be done by the NPCT and the Counties. The principles that will apply to all investments as mechanisms for mitigating adverse social impacts shall include exclusion of projects that:

- Where compulsory acquisition is employed, more than 10 households in total, both titled and untitled (informal settlers/squatters), physically displaced on any one sub-project.
- On any given sub-project, more than 200 informal vendors physically relocated
- .
- Likely to adversely create or exacerbate conflict within communities or neighboring counties.
- Have significant impacts on vulnerable and/or marginalized/indigenous groups.

254. To screen out for these exclusions, the Program will rely on the guidelines in the operation manual, which will include a rigorous sub-project screening process to be done by the local County governments, with the assistance of the NPCT. It is important to note that Kenya legislation on land – the Land Act, does not *clearly* make any references to the rights of squatters or users of public or state lands. 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 what needs to be compensated to these settlers, including those who illegally acquired land. Therefore, the sub-project screening process will be applied to exclude land with squatters or occupied public land so as to meet the requirement of OP 9.0 to manage this risk.

255. In cases where the Counties may purchase land through a willing-seller willing-buyer approach or in cases of voluntary land donation, the Counties will need to document the agreement between the two parties. Land issues should be resolved and must have no encumbrances for any sub-project under this program. During consultations, the County governments expressed the need for clear guidelines and training related to the process of land acquisition and resolving issues involving land occupied informally or formally.

256. The responsibility of the Contractor should be clearly defined in the contract clauses to ensure any damage to people and property during the performance of execution of the civil works is borne by him.

257. Given the above and the past experience of projects under the NPCT, the risk of foreseeable social impacts on the program is considered **moderate**.

258. The table below summarizes the potential risks related to environmental and social impacts of the Program and suggests risk management measures for each risk.

Risk Description	Risk Management	Risk Rating
<i>Identification of Impacts:</i> Potential environmental and social impacts of infrastructure projects are not identified, mitigated, and monitored	Environmental and Social Management Manual prepared by KUSP to define system and provide guidance to Counties that is consistent with Kenya systems and bridges gaps with Program for Results Financing principles. Technical staff at UDD and Counties will be required to have training on the manual. Monitoring and supervision of due diligence measures related to environmental and social issues will be a part of the capacity building component of the program	Significant
<i>Occupational Health and Safety:</i> Occupational health and safety measures are poorly implemented and monitored.	Counties should incorporate in the sub-project contracts strict clauses for OHS for implementation by the contractor. The program will also be required to work closely with the Ministry of Labor – Department of Occupational Safety and Health Services (DOSHS) to improve implementation of occupational health and safety issues of the sub-projects.	Significant
<i>Resettlement Action Plan:</i> RAPs 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 the Bank's Program for Results Financing will be included in the operation manual and included in training for KUSP. 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.	Significant
<i>Loss of Income and Livelihoods:</i> Risks of loss of income and livelihood for project affected people due to inadequate Land acquisition, resettlement and compensation	Sub-projects will be excluded involving large amount of relocation of households, temporary or permanent land take, impacts on livelihoods, including those that may occur through restriction of access to resources. To screen out for these exclusions, the Program will rely on the guidelines in the environment and social operation manual, which will include a rigorous sub-project screening process to be done by UDD and the Counties	Moderate

Risk Description	Risk Management	Risk Rating
	Compensation plans to show evidence of consultation, consensus and availability of funds for compensation.	
Consultation and Public Consultation: Poor Consultations are held for specific subprojects.	The program will undertake inclusive on-going consultations with stakeholders and a training program will be developed for implementers.	Moderate
Labour Influx: Social conflict due to labour influx	The program will undertake a risk profile of the labour influx, which will govern the requirements for mitigation measures, and to be part of the contractual obligations during program implementation	Moderate
Grievance Redress Mechanisms: There is a formalized complaint mechanism at the local (County) level but its effectiveness is hampered by lack of awareness	The program will carry out dissemination and awareness raising activities amongst the implementing agency and the Counties about the work of the grievance mechanisms. As necessary, funds from the technical assistance component will be used for this process.	Moderate
Lack of capacity for environmental and social management: Capacity gaps (staffing and skills mix) at NEMA, UDD, and County levels may lead to a weak planning, implementation and monitoring of environmental and social management plan of the investments.	KUSP will assess capacity needs in depth for environmental and social management in Counties and ensure that all Counties have adequate staff with all necessary skills. The program will develop Environment and Social Development Units with trained environment and social development specialists in all implementing entities.	Significant
Budget Allocation: 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 condition to achieve the program objectives and access the KUSP. Training on costing EIA/ESIA and resettlement compensation will be included in capacity building program.	Moderate
Audit: Annual Performance Audit does not include technical expertise to assess environmental and social management performance	Terms of Reference for annual capacity and performance assessment will ensure that adequate skills are present to assess environmental and social management systems.	Low
Approval Process:	Bottlenecks in the approvals process of EIA/ESIA	Low

Risk Description	Risk Management	Risk Rating
Environmental and resettlement compensation approvals processes delay project implementation.	will be further defined during program preparation. Consultations with relevant authorities (NEMA, NLC etc) to streamline approvals processes while maintaining oversight.	

VII. INPUTS TO THE PROGRAM ACTION AND IMPLEMENTATION PLANS

259. Based on the above assessment and findings, this section outlines key findings and recommended actions for improving the social and environmental management systems required for mitigating/minimizing those risks and gaps/challenges, where appropriate during the planning and implementation stages. These options for improvement of the environmental and social management system (ESMS) will be enhanced further with the implementing agencies during further consultations and disclosure.

Key Findings

Environmental Issues

260. The key findings of ESSA on environmental systems are:

- i. The national government has well developed and robust legislations and systems to manage environmental risks. However, the monitoring and enforcement at the County level needs to be strengthened to address potential environmental challenges of the KUSP.
- ii. The County governments are using the national systems, because they have not developed systems or frameworks for the management of environmental risks in their respective Counties. The KUSP will utilize the gains from the Kenya Devolution Support Program (KDSP) under World Bank PforR financing which has developed systems required at the county level to manage environmental and social impacts.
- iii. The Program's existing institutional systems needs further strengthening for environmental management along with a framework for environmental monitoring at the UDD level.
- iv. The capacity (human and financial resources) within the Counties and supporting institutions (NEMA, NCA, DOSHSS,etc) responsible for managing environmental risks needs strengthening and training.
- v. The Counties have no documented procedures and processes in place for the management of the Occupational Health and Safety (OHS). In addition, there is no specific department that is charged with the role of supervision and ensuring compliance within the Counties.

Social Issues

261. The key findings of ESSA on social systems are:

- i. The Constitution of Kenya, 2010, has legislations under the Land Act (2012), to manage social risks related to land acquisition. However, the County governments have not sufficiently mainstreamed the land acquisition procedures into the planning

- and development process. To address the potential of land acquisition challenges under the KUSP, there is need to strengthen Counties and the NLC representatives at the Counties responsible for land acquisition process.
- ii. The Counties have acquired land for their projects, but the system and processes used has been on a willing- buyer willing-seller method. The Counties are using the national systems, because they have not set up systems or frameworks for the management of land acquisition at the county level. However, the ESSA reveals that the counties are not very conversant with the Government compulsory land acquisition process that involves the National Land Commission; therefore, capacity building on the NLC process will be undertaken under this Program.
 - iii. The Program's existing institutional systems need further strengthening to manage potential social risks along with a framework for social monitoring at the ministry and NPCT level.
 - iv. The capacity within the Counties and institutions (County departments) to be responsible for managing social risks at the County levels needs strengthening and training. Existing officers at the county level, such as Gender Officers, can be involved further for managing social risks of the Program.
 - v. On public consultation and participation, the devolution process under the Kenya Constitution has put in place robust requirements for citizen participation in project and budget development process. However, in implementation of projects within the Counties, there is no formalized and documented citizen feedback and grievance redress mechanisms that allow for transparent, timely and efficient redress process.
 - vi. The CoK, 2010, Article 56 on the 'Minorities and Marginalized Groups' provides a platform to identify the vulnerable and marginalized groups of people and communities in Kenya, however, most counties' interpretation of this is viewed in the context of poverty and social welfare of these groups; for example reserving business and employment opportunities to Persons with Disabilities (PWD), the Youth and Women. There is lack of appreciation in ensuring that marginalized and vulnerable groups who lack political representation and economic power are able to participate effectively or access social and economic benefits from the projects carried out by the National and County governments.
 - vii. There are no formal and documented systems in the management of social conflicts at the national and County systems during implementation of projects, especially to manage conflicts between Counties and labour influx issues. The systems to be used for conflict management under KUSP program needs to be developed and build capacity for proper implementation.
 - viii. Management of HIV/AIDs during project implementation stages which include creating awareness, prevention and management are clear at the County levels.. The

National system requires that HIV/AIDs awareness and prevention components are included in every contract.

Elements to Incorporate into the Program Action Plan

262. Although the environmental and social impacts of activities under the KUSP are ranked from low to significant, the Program provides an opportunity not only to strengthen the weaknesses in the procedures mentioned above to identify and mitigate these effects, but also to strengthen the country and County systems in three areas: (i) strengthening of environmental and social management systems, (ii) ensuring implementation and monitoring of good environmental and social management; and (iii) building capacity for environmental and social management.

263. To fill the gaps identified in the ESSA, the UDD will support specific measures to enhance the country's and Counties' environmental and social management system and performance. These measures will be implemented through two main areas, namely; (a) the preparation of the Program Operation Manual and (b) capacity building. These measures have been consolidated into the ESSA Action Plan that guides the overall formulation of the Program. Implementation by the UDD and the applicable County Government ministries of environmental and social procedures contained in the Program Operation Manual will be one of the performance criteria in the Program's Evaluation System that will be implemented for the KUSP.

264. The implementation of some of these measures will be enhanced by their integration into the overall Program Action Plan and legally incorporated into the financing agreement of the Program. These action plans for the Program are grouped into three areas:

- i. actions to strengthen the environmental and social management systems;
- ii. actions to strengthen the implementation and monitoring of the environmental and social management systems; and
- iii. actions to build capacity to enhance environmental and social management performance.

Strengthening of environmental and social management system

265. The recommended actions under this theme are:

- i. Develop Program Operation Manual (POM) incorporating environmental and social management procedures before launching of the Program;
- ii. Develop guidelines to manage social conflicts related to labour influx to be incorporated into the POM;
- iii. Assistance to develop policy and guidelines of management systems for managing E&S risks in the urban context for the Counties – including Solid Waste Management;
- iv. Establish coordination mechanisms with other institutions/entities/departments;
- v. Establishment of a Grievance Redress Mechanism;
- vi. Coordination of efforts of the actions under the KUSP with the Kenya Devolution Support Program (KDSP) project's ESMS action plan and strategies

Strengthening of implementation and monitoring of the environmental and social management system

266. The recommended actions under this theme are:
- i. Incorporation of environmental and social management implementation and monitoring procedures documented in the Program Operation Manual by implementing units/agencies for:
 - Reporting
 - GRM monitoring
 - Monitoring contractor performance in terms of E&S issues
 - ii. Develop procedures for assessing performance of the program on environment and social management.

Strengthening of environmental and social management capacities

267. The recommended actions under this theme are:
- i. Staff assigned to environmental and social management at the UDD and at County levels;
 - ii. Training in environmental and social management in the areas of: sub-project screening and identification of environmental and social impacts, including criteria for involuntary resettlement and land acquisition, and matters related to livelihoods and vulnerable and marginalized groups; monitoring (including audit), etc for technical staff at the NPCT and County officials

ANNEXES

ANNEX 1 – ENVIRONMENTAL AND SOCIAL ACTION PLAN

Issue/Risk Description	Action/Completion	Timeframe	Responsible Party	Instrument
Weak and poorly coordinated environmental and social management systems (especially at sub-national levels)	KUSP POM to include: ❖ full description of <u>environmental and social management processes and procedures</u> for <u>urban</u> investment projects (screening, appraisal, assessments, mitigation measures, etc.) ❖ guidelines for management of social conflicts related to <u>labor influxes</u> ❖	By negotiations	SDHUD	POM (dated covenant)
	UDD guidance notes, guidelines and technical standards on urban infrastructure and urban services to include environmental and social management issues	Continuous	SDHUD	Window 1 actions
	Within-county <u>coordination mechanisms</u> for environmental and social management (6-monthly meetings led by CEC Environment and CEC Urban)	Continuous	County governments	
Inadequate <u>implementation</u> of environmental and social management system	Include in UDG MC/PS system ❖ Incentives for inclusion of ESSM processes/procedures in investment project preparations (UDG MC7 on investment project preparation) ❖ Incentives for application of ESSM processes/procedures in implementation of urban investments (UDG PS7 on completed investment projects)	Continuous	SDHUD	MCs/PSs and APA process DLIs 2 and 3

Issue/Risk Description	Action/Completion	Timeframe	Responsible Party	Instrument
	County and municipal reporting requirements to include reporting on ESSM issues	By negotiations	SDHUD	POM
Insufficient staffing, knowledge and skills for managing environmental and social issues	Staff assigned to coordinate environmental and social management in UDD	By negotiations (POM) By effectiveness (recruitment or second-ment)	SDHUD	POM (program management and ESSM sections and ToRs)
	Staff assigned to environmental and social management in Counties ❖ Role and responsibilities of safeguards specialists defined ❖ Environmental and social safeguards specialist assigned to CEC Urban	By negotiations (POM) By effectiveness (recruitment or second-ment)	SDHUD(for POM) County governments	POM (ESSM section and ToRs) Covenant
	Training in environmental and social management issues for technical staff at the national, county and municipal levels	Continuous	SDHUD KSG and NEMA?	Window 1 activities
Lack of grievance redress mechanisms	Establishment of a Grievance Redress Mechanism (will be part of the overall GRM for the program)	By negotiations	SDHUD	POM
Lack of Program coordination	Coordination of efforts of the actions under the KUSP program with the Kenya Devolution Support Program (KDSP) project's ESMS action plan and strategies	Continuous	SDHUD and World Bank	Window 1 activities

ANNEX 2 – QUESTIONNAIRE USED FOR CONSULTATION

Kenya Secondary Cities Services Improvement Program

Environmental and Social Systems Analysis (ESSA) – County/Entity Assessment Tool

County/Entity _____ Date _____

Core Principle 1: General Principle of Environmental and Social Impact Assessment and Management

Environmental and social management procedures and processes are designed to (a) promote environmental and social sustainability in Program design; (b) avoid, minimize or mitigate against adverse impacts; and (c) promote informed decision-making relating to a program’s environmental and social effects.

Program procedures will:

- Operate within an adequate legal and regulatory framework to guide environmental and social impact assessments at the program level.
- 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 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.

Core Principle 2: Environmental Considerations – Natural Habitats and Physical Cultural Resources

Environmental and social management procedures and processes are designed to avoid, minimize and mitigate against adverse effects on natural habitats and physical cultural resources resulting from program.

As relevant, the program to be supported:

- Includes appropriate measures for early identification and screening of potentially important biodiversity and cultural resource areas.
- 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 activities.
- Takes into account potential adverse effects on physical cultural property and, as warranted, provides adequate measures to avoid, minimize, or mitigate such effects.

Check	Response/Remarks/Comments
Does the County/Entity have different Environmental and Social Management Systems/Frameworks or use the existing National government systems/frameworks for screening and mitigating effects from project activities? Eg NEMA	

Does the County/Entity have a stand-alone Environmental and Social Policy document?	
Who is in charge of E&S Safeguards Compliance (Is there an Organizational Chart at the County/Entity level?)?	
Does the County government/Entity have adequate skilled staff/personnel for ESS management? What are the numbers, qualifications and competency levels? Environmental Section Social Section	
How does the County government/Entity coordinate with other agencies in ESS management on its projects? (NEMA, KFS, WARMA, Water Companies)	
Is the County/Entity department in charge of the compliance and enforcement of ESS or the responsibility lies with other agencies? What areas of enforcement are under the County government/Entity?	
Does the county/Entity structure promote credibility and accountability of environmental and social management, through independent review of project plans, external monitoring of implementation, or other forms of oversight by other agencies such as NEMA?	
Does the County/Entity system consider the environmental and social implications of all proposed Projects activities prior to their implementation? <i>Is there any screening, or ESIA/ESMP done for the county projects? Any licenses from NEMA?</i>	
How has/is the County/Entity managed/managing ESS in its closed/current projects? Who has been/is responsible for it?	

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Core Principle 3: Environmental Considerations – Public and Worker Safety

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 developed or promoted under the program; (b) exposure to toxic chemicals, hazardous wastes, and otherwise dangerous materials; and (c) reconstruction or rehabilitation of infrastructure located in areas prone to natural hazards.

ESS Capacity Assessment Tool

Check	Response/Remarks/Comments
How is the county managing (current and past) OH&S in its projects and those carried out by other agencies? Is there any Health and Safety Department within the county that manage OHS issues within the county? Any enforcement of OHS on projects handled by the national government? Is there any documentation on OH&S management?	
Has the county handled any project dealing with Hazardous materials/waste? (eg oil spills, asbestos etc) How was it managed? Any third party involvement? What documentation was done?	

Core Principle 4: Social Considerations – Land Acquisition

Land acquisition and loss of access to natural resources are managed in a way that avoids or minimizes displacement, and affected people are assisted in improving, or at least restoring, their livelihoods and living standards.

As relevant, the program to be supported:

- Avoids or minimizes land acquisition and related adverse impacts;
- Identifies and addresses economic and social impacts caused by land acquisition or loss of access to natural resources, including those affecting people who may lack full legal rights to assets or resources they use or occupy;
- 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;
- Provides supplemental livelihood improvement or restoration measures if taking of land causes loss of income-generating opportunity (e.g., loss of crop production or employment); and

- Restores or replaces public infrastructure and community services that may be adversely affected

Check	Response/Remarks/Comments
Has the county/Entity acquired any land for the project it has carried out? If YES, how many people were affected? What kind of livelihood/income restoration was carried out?	
If NO, who is responsible for acquiring land for county projects?	
If YES/NO, What process would you use to carry out land acquisition process for a county project? What kind of documentation would you do?	

Core Principle 5: Social Considerations – Indigenous Peoples and Vulnerable Groups

Due consideration is given to cultural appropriateness of, and equitable access to, program benefits giving special attention to rights and interests of Indigenous Peoples and to the needs or concerns of vulnerable groups.

- 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.
- Ensures that Indigenous Peoples can participate in devising opportunities to benefit from exploitation of customary resources or indigenous knowledge, the latter (indigenous knowledge) to include the consent of the Indigenous Peoples.
- 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.

Check	Response/Remarks/Comments
In planning and designing of county/entity projects, do you recognize marginalized / vulnerable persons?	
How do you engage /consult them?	
What support do you provide the	

Vulnerable/marginalized persons at the county level?	
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Notes**Core Principle 6: Social Considerations – Social Conflict**

Avoid exacerbating social conflict, especially in fragile states, post-conflict areas, or areas subject to territorial disputes.

Considers conflict risks, including distributional equity and cultural sensitivities.

Check	Response/Remarks/Comments
Have you encountered any social conflicts during planning or implementation of county projects (eg with other counties or groups)? How did/do you manage/resolve the conflict?	

Notes**Other Information**

Check	Response/Remarks/Comments
What have been/are the key challenges facing the management of E&S issues in the County/Entity?	
What citizen engagement and participation mechanisms are in place at the County/Entity and how effective are they?	
What feedback and grievance redress mechanisms are in place at the County/Entity and how effective are they?	
How does the County/Entity handle grievances/issues relating to projects from the members of the public? Who handles the grievances	

Notes

ANNEX 3 – LIST OF STAKEHOLDERS CONSULTED

S.No	Name	Designation	Email	Tel. Contacts
Kisii County				
1	Moses Onderi	CEC- Land Urban	Moses.onderi@gmail.com	0721448899
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Migori County				
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11	Joseph Kamau	NEMA	migori@nema.co.ke	0713041092
12	Henry Ondara	County Coordinator –National Land Commission	ondarahenry@gmail.com	0791575745

Homabay County				
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Kitui County				
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Machakos County				
25	Ruth Mutua	CEC – Min of Agriculture, Livestock, and Urban Planning	Rmutua2007@yahoo.co.uk	0721695375
Kakamega County				
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