



Republic of Kenya

Ministry of Environment and Forestry

Public Participation Consultations and Access to Climate
Change Information Regulations

DRAFT REGULATIONS

6th January 2021



Republic of Kenya
Ministry of Environment & Forestry

Office of the Cabinet Secretary, Ministry of Environment & Forestry

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REGULATIONS ABSTRACT

Context of the Regulations:

The Climate Change (Public Participation and Access to Climate Change Information) Regulations are being introduced pursuant to Section 24(3) of the Climate Change Act and Section 36(1) of the same Act, which empower the Cabinet Secretary to make necessary Regulations.

Public participation in the policy-formulation process has been a constitutional imperative since 2010. In addition, case law reinforcing the requirement for public participation has developed over the years – effectively providing strong emerging jurisprudence on the matter.

These Regulations therefore serve to give effect to the constitutional requirement for public involvement in decision making by providing for the substantive and procedural mechanisms of public participation consultations. The Regulations will also provide details on access to information on climate change and will be guided by the Access to Information Act, No. 31 of 2016.

ARRANGEMENT OF REGULATIONS

Part I: Preliminaries

This part involves the introductory elements to the Regulations – including the title, application and principles that guide the Regulations.

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| 1. | Short Title |
| 2. | Interpretation |
| 3. | Application |
| 4. | Guiding Principles |

Part II: Criteria for Public Participation Processes

This part provides an overview of the policy on public participation on climate change matters in Kenya. It includes the threshold for decisions that will require public participation as well as the timely nature that public participation should abide by.

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| 5. | Threshold of Climate Change Impact Triggering Public Participation |
| 6. | Decisions Bound by the Regulations |
| 7. | Opportunities for Public Participation |
| 8. | Timeliness of Opportunities for Public Participation |
| 9. | General Rules for Public Participation |

Part III: Procedure for Public Participation

This part details the process to be followed during the actual public participation process. It begins with guidelines on how to invite the public to participate; follows with the requirements that should be followed when inviting participation and concludes by providing for the requirement of ensuring proper record keeping to confirm compliance with the Regulations and other laws as well as to enable learning for better future public participation.

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| 10. | Call for Comments |
| 11. | Contents of a Call for Comments |

12.	Public Hearing
13.	Analysis of Participation Process and Preparation of Report
14.	Analysis of Non-Participation
15.	Record of Decision
16.	Communication of Decision
Part IV: Access to Information	
<i>This part provides details on access to information on climate change matters based on the Access to Information Act, No. 31 of 2016</i>	
17.	Access to Information Generally
18.	Access to Information Guiding Principles
19.	Access to Climate Change Information for Public Participation
Part IV: Miscellaneous Provisions	
<i>Includes paragraphs on general legislative matters and administrative issues to be addressed by the relevant entities and the responsible authorities.</i>	
20.	International Instruments
21.	Special Interest Groups
22.	Education and Awareness
23.	Capacity Development
24.	Annual Reporting and Record Keeping
SCHEDULES	
25.	Schedule 1 – Public Participation Forms for Individuals, Organizations and Responsible Authority
26.	Schedule 2 – Template for the Public Participation Report

PART I: PRELIMINARIES

Narrative	Paragraph	Provision
Short Title	1.	These regulations may be cited as the Climate Change (Public Participation Consultations and Access to Climate Change Information) Regulations, 2021.
Interpretation	2.	<p>In these Regulations unless context otherwise requires —</p> <p>“Act” means the Climate Change Act, 2016;</p> <p>“Cabinet Secretary” means the cabinet secretary for the time being responsible for climate change affairs;</p> <p>“Call for Comments” means the mandatory notice via which the public and relevant stakeholders shall be publicly invited to review and comment on a proposed action;</p> <p>“Council” means the National Climate Change Council established under section 5 of the Act;</p> <p>“Directorate” means the Climate Change Directorate established under section 9 of the Act;</p> <p>“Explanatory memorandum” has the meaning assigned to it under section 5A of the Statutory Instruments Act, No. 23 of 2013;</p> <p>“Proposed action” means any action taken or proposed to be taken by a Responsible Authority that would require public participation under these Regulations</p> <p>“Public participation” means the process by which a Responsible Authority engages the public, sector stakeholders and potential affected persons during the policy formulation process;</p> <p>“Responsible Authority” means any authority that is mandated to conduct public participation under these Regulations;</p> <p>“Climate change duties” has the meaning assigned to it under section 2 of the Act.</p>
Application	3.	<p>These Regulations shall apply to –</p> <ul style="list-style-type: none"> i) The Council; ii) The Cabinet Secretary through the Directorate; iii) Public entities at all levels of government; iv) Private entities with climate change duties under section 16 of the Act; and v) Any entity conducting activities under or subject to the Act.
Guiding Principles	4.	<ul style="list-style-type: none"> (1) The requirement to ensure public participation is derived from the Constitution of Kenya, 2010 with the expectation that citizens of Kenya have a constitutional right to participate and be involved in decision-making in matters affecting them; (2) Public participation consultations and processes as well as access to climate change information under these Regulations shall be guided by the following principles: <ul style="list-style-type: none"> a) Public participation processes shall provide fair and adequate timelines for consultations and engagements; b) Public participation shall be effective and not merely procedural;

		<p>c) Public participation shall be undertaken in a manner that ensures that the contribution of the public makes an impact on the threshold of decision making.</p> <p>(3) In this paragraph, “make an impact on the threshold of decision making” shall mean that:</p> <p>a) The public and all relevant stakeholders and entities directly affected by the regulations shall be adequately consulted during the public participation consultation process;</p> <p>b) Demonstrably sufficient amount of feedback shall be drawn from the consultations and engagements in the public participation process and;</p> <p>c) There shall be evidence that the feedback received from the process has been taken into account in developing the proposed action and/or in the eventual decision made.</p> <p>(4) In demonstrating that the feedback from the public has been adequately taken into account, the Responsible Authority shall provide evidence of a structured public participation process as per paragraph 14 of these Regulations, which process shall have adequately informed, consulted, involved and collaborated with the public and relevant stakeholders in the decision making process.</p>
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PART II: CRITERIA FOR PUBLIC PARTICIPATION PROCESSES

Threshold of Climate Change Impact Triggering Public Participation	5.	Any law, policy or instrument touching on climate change that shall have the effect of altering the conduct of citizens or operations of entities in Kenya must undergo the public participation process under this Act.
Decisions bound by the Regulations	6.	Any decision by the Ministry that will have the intention or effect of – (1) Introducing new climate change law, policy or guidelines; or (2) Varying or modifying existing climate change law, policy or guidelines; or (3) Adopting or ratifying international instruments with regard to climate change- Shall be subject to public participation consultations under these Regulations.
Opportunities for Public Participation	7.	(1) Pursuant to paragraph 5 of these Regulations, a Responsible Authority shall provide practical and meaningful opportunities for public participation. (2) Notwithstanding sub-paragraph (1) above, the Responsible Authority shall conduct public participation under these Regulations every five years during the review of the National Climate Change Action Plan.
Timelines of Opportunities for Public Participation	8.	Public participation mandates under paragraphs 5 and 7 of these Regulations shall be undertaken by the Responsible Authority in a manner that offers the public adequate time to consider, consult and respond to the contents of the proposed action or decision.
General Rules for Public Participation	9.	(1) A Responsible Authority shall ensure fair and equal access to the public participation process for all citizens and stakeholders. (2) Where a section of the intended participants are not conversant with the national languages, or are by reason of disability unable to participate in the process, the Responsible Authority shall take reasonable measures to ensure that such participants are

		<p>accommodated effectively, and such measures shall include providing interpreters for the participants to give feedback in their local language or sign language as the case may be.</p> <p>(3) The Responsible Authority shall create and maintain an accessible and simple online platform that shall enable the public to digitally access information relating to the proposed action and such platform shall also provide links and pages containing the necessary contextual information.</p> <p>(4) In addition to the online platform, the Responsible Authority shall also ensure that the required information shall be easily accessible in physical form at both at its offices and local government offices, where copies of such information shall be obtainable freely, or at a reasonable cost as the case may be.</p> <p>(5) The Responsible Authority shall apprise itself and its officers, employees and agents on the Bribery Act and the Ant-Corruption and Economic Crimes Act and abide by the provisions therein.</p> <p>(6) Before conducting a public participation programme, a Responsible Authority shall prepare a Public Participation Strategy Paper which shall outline:</p> <ol style="list-style-type: none"> a) The purpose of the engagement for participation; b) The target groups; c) The proposed length of the consultations; and <p>The means of submission of feedback – whether oral, written, video feedback or any other.</p>
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PART III: PROCEDURE FOR PUBLIC PARTICIPATION

Call for Comments	10.	<p>(1) Prior to undertaking a public participation process, a Responsible Authority shall publish a Call for Comments in accordance with Section 4(2) (f) of the Act.</p> <p>(2) The Responsible Authority shall establish a mechanism to ensure that the Call for Comments to the public attains the widest reach and may in addition to the methods stipulated under the Act, publicize the notice in one or more of the following ways:</p> <ol style="list-style-type: none"> a) Social media and other digital communication channels; b) Community engagement methods; and c) Public meetings and fora.
Contents of a Call for Comments	11.	<p>(1) A Call for Comments shall entail:</p> <ol style="list-style-type: none"> a) A statement of the proposed action; b) A statement of the basis or authority for taking the action; c) A commencement date and closing date for receipt of comments, being the ‘Comments Period’; d) A request for comments on the proposed action during the Comments Period. <p>(2) The Call for Comments shall be signed by the authorized official at the Responsible Authority.</p> <p>(3) A Responsible Authority shall not offer fewer than 30 days in total between the date of the Call for Comments and the date of closure of receipt of comments.</p>

Public Hearing and Response Processing	12.	<p>(1) Upon receiving comments pursuant to paragraph 11 of these Regulations, the Responsible Authority shall hold a public hearing for the purpose of finalizing the Comments Period of the exercise, provided that the public hearing will be subject to the prevailing health and safety laws of Kenya.</p> <p>(2) The Responsible Authority shall document the feedback received from the public hearing in accordance with the First Schedule.</p> <p>(3) Every public participation forum shall be undertaken within a realistic timeframe for consultation, allowing reasonable period for each stage of the process.</p>
Analysis of Participation Process and Preparation of Report	13.	<p>Upon conclusion of a public participation exercise under these Regulations, the Responsible Authority shall within 90 days publish a report in accordance with the Second Schedule, which report shall include:</p> <p>(1) A summary of the public participation process that was undertaken;</p> <p>(2) The results of the process;</p> <p>(3) Highlights of the major feedback;</p> <p>(4) The responses of the Responsible Authority to participants;</p> <p>(5) Challenges faced during the process;</p> <p>(6) The impact of the public participation process on the proposed action's eventual decision; and</p> <p>(7) Recommendations for improving the public participation process.</p>
Analysis of Non-Participation	14.	<p>(1) A Responsible Authority shall also conduct an analysis of non-participation, in the demographics from which public participation was requested for but was insufficient in terms of quality and quantity of responses.</p> <p>(2) The Responsible Authority shall then propose actions that may cause an improvement in subsequent public participation in the specific demographics.</p> <p>(3) A report under sub-paragraph (1) will be utilized in considering education and awareness programmes under paragraph 22.</p>
Record of Decision	15.	A Responsible Authority shall prepare an explanatory memorandum upon carrying out of any public participation exercise.
Communication of Decision	16.	<p>A Responsible Authority shall ensure that:</p> <p>a) Feedback and comments from the public and stakeholders are analyzed critically and without bias; and</p> <p>b) The final action or decision taken is communicated to the public, including the reasons for including and excluding, as the case may be, certain recommendations from the public.</p>
PART IV: ACCESS TO CLIMATE CHANGE INFORMATION		
Access to Information Generally	17.	<p>(1) In matters of climate change, the Responsible Authority for providing access to information shall be the Council and the Cabinet Secretary through the Directorate.</p> <p>(2) Climate change information referred to in sub-paragraph (1) above shall include:</p> <p>a) Information on all current laws and policies on climate change in Kenya;</p> <p>b) Information on proposed actions by the Responsible Authority or any other entity, public or private, which action is likely to affect or impact climate change, directly or indirectly; and</p> <p>c) Information on global trends in climate change law and policy, including any and all international climate change instruments</p>

		<p>ratified by Kenya.</p> <p>(3) The Council or Directorate may require the production of any information relating to climate change held by any entity, public or private, which information shall be required in a public participation exercise.</p> <p>(4) In executing the mandate under (3), the Responsible Authority shall generally be guided by the Access to Information Act, No. 31 of 2016.</p>
Access to Information Guiding Principles	18.	<p>(1) Citizens of Kenya have the constitutional right to access information reasonably held by the State or any other entity, which directly or indirectly affects them;</p> <p>(2) In ensuring proper access to information in a public participation process, the Responsible Authority shall be guided by the following principles:</p> <ol style="list-style-type: none"> a) The Responsible Authority shall ensure that relevant, current and accurate climate change information is made available to the public in a reasonably expeditious, simple and accessible manner. b) The Responsible Authority shall ensure that the required information is made available to the public for free if possible; or that copies of such information are made available at a reasonable cost taking into account the medium used.
Access to Climate Change Information necessary for Public Participation	19.	<p>(1) A Call for Comments shall be accompanied by a simple, easy-to-read and easily accessible draft document detailing the proposed action.</p> <p>(2) A Responsible Authority may provide a Call for Comments without an attached draft document as per paragraph (1) provided that the Call for Comments shall be accompanied by a guarantee that the Responsible Authority shall provide the draft document at least 21 days before the close of the Comments Period.</p> <p>(3) Subject to paragraph 9 of these Regulations, the Responsible Authority shall provide an accurate and precise statement of where the public may freely access the draft document including the contextual information such as the constitutive Act of Parliament, the Constitution and any other national or county document that would be directly required for proper contextualization of the proposed action.</p>
PART IV: MISCELLANEOUS PROVISIONS		
International Instruments	20.	Any climate change international instrument signed by Kenya shall be subject to public participation under these Regulations before its ratification.
Special Interest Groups	21.	<p>In undertaking public participation under these Regulations, a Responsible Authority shall demonstrate that it has exerted additional and significant effort in reaching out to the following groups of Kenyans:</p> <ol style="list-style-type: none"> a) Women; b) The Youth; c) Persons living with disabilities; and d) Marginalised and minority groups and communities.
Education and Awareness	22.	<p>(1) The Directorate shall be mandated to educate the public on:</p> <ol style="list-style-type: none"> a) Prevailing climate change law and policy in Kenya; and

		<p>b) The right of every citizen to participate in climate change policy-formulation.</p> <p>(2) Every two years, the Directorate shall:</p> <p>a) Provide a report to the Cabinet Secretary detailing the steps it has taken to ensure that the general public has been made aware of climate change law and policy in Kenya as well as their right to be involved in policy-formulation on climate change; and</p> <p>b) Every two years, publish a report on the steps it has taken to improve the quality of public participation in the climate change sector.</p>
Capacity Development	23.	<p>Every two years, the Directorate shall publish a Public Participation Capacity Development Report, which shall detail:</p> <p>a) The means of public participation utilized by the Directorate within the immediate past two years;</p> <p>b) The challenges faced while conducting public participation;</p> <p>c) The efforts made by the Directorate in attempting to improve its public participation processes, including:</p> <p>i) The steps taken by the Directorate to improve its internal capacity in order to conduct more effective public participation; and</p> <p>ii) Carrying out studies and comparative analyses of public participation in other jurisdictions with a view to improving public participation in climate change policy formulation.</p>
Annual Reporting and Record Keeping	24.	<p>(1) The Directorate shall submit an annual report to Parliament concerning its functions as regards public participation and access to climate change information and related functions.</p> <p>(2) The annual report shall an assessment of the state of public participation in the climate change sector, its challenges and recommendations for improvement.</p> <p>(3) Each year after the submission of the initial report, the Directorate shall include in its annual report the steps it has taken to improve the quality of public participation in Kenya.</p> <p>(4) The Directorate shall ensure that the annual report and related records are maintained effectively and are easily accessible by the public.</p>

SCHEDULE 1 –PUBLIC PARTICIPATION FORMS

FORM PP1 (To be filled by Individuals)

<p>Full Name/ Jina Kamili _____</p> <p>ID Number/ Nambari ya Kitambulisho: _____</p>	<p>Male/Mume <input type="checkbox"/></p> <p>Female/Mke <input type="checkbox"/></p>	<p>Age/Umri _____</p>
<p>Highest Level of Education Attained/ Kiwango chako cha elimu</p> <p>Primary/Shule ya msingi <input type="checkbox"/></p> <p>Secondary/Shule ya upili <input type="checkbox"/></p> <p>University or college/chuo kikuu <input type="checkbox"/></p> <p>Post-graduate/uzamili <input type="checkbox"/></p> <p>Other/Ingine <input type="checkbox"/> (Specify/taja) _____</p> <p>Religion/Dini:</p> <p>Christian/Mkristo <input type="checkbox"/></p> <p>Islam/Muislamu <input type="checkbox"/></p> <p>Hindu/Mhindi <input type="checkbox"/></p> <p>Other/Nyingine <input type="checkbox"/> (Specify/Taja): _____</p>	<p>Are you living with any disability? (Please tick)/ Una ulemavu wowote? (Tafadhali tiki)</p> <p>Yes/Ndio <input type="checkbox"/> No/La <input type="checkbox"/></p> <p>If Yes, please specify/ Kama Ndio, tafadhali taja:</p> <p>Eyes/Macho <input type="checkbox"/></p> <p>Ears/Masikio <input type="checkbox"/></p> <p>Hands/Mikono <input type="checkbox"/></p> <p>Legs/Miguu <input type="checkbox"/></p> <p>Mind/Shida ya Kiakili <input type="checkbox"/></p> <p>Skin/Ngozi <input type="checkbox"/></p> <p>Other <input type="checkbox"/> (Specify/Taja) _____</p>	
<p>Place of Residence/Mahali Unapoishi</p> <p>County/Kaunti _____</p> <p>Constituency/Eneo Bunge _____</p> <p>Location/Eneo _____</p>		
<p>Place of Engagement/ Mahali pa Majadiliano</p>	<p>Date/Tarehe</p>	
<p>How did you hear of this exercise/ Ulipataje habari kuhusu majadiliano haya?</p> <p>Radio/ Redio <input type="checkbox"/></p> <p>Television/ Runinga <input type="checkbox"/></p> <p>Newspaper/ Gazeti <input type="checkbox"/></p> <p>Government officer/Afisa wa serikali <input type="checkbox"/></p> <p>Internet/Mtandao <input type="checkbox"/></p> <p>Other/ Nyingine <input type="checkbox"/> (Please specify/ Tafadhali taja) _____</p>		
<p>What are your views on the proposed Regulations? / Una maoni yapi kuhusu kanuni hizi zilizopendekezwa?</p>		

What are your views on how this process has been conducted? / Je, maoni yako kuhusu majadiliano haya ni yapi?

Any other comments or questions. (Please state) / Je, una maoni ama maswali mengine? (Tafadhali tueleze)

Sign: _____

Feedback Received By: (For Official Use Only)

Full Name and Signature	Responsible Authority	Date

FORM PP2 (To be filled by Organizations)

Name of Organization: Place of Business:	Date:
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Nature of Organization:
 Public Company
 Private Company
 Partnership
 Society
 Non-Governmental Organization
 Other (Please Specify) _____

Sector of Operation: (e.g. oil & gas, manufacturing, civil society, law, finance, technology etc. Please be specific.)

Official(s)/ Representative(s) present:

	Name	Title/Position of Official	Contact Details (Email Address)
1.			
2.			
3.			
4.			

How did you hear/know of this exercise?
 Radio
 Television
 Newspaper
 Government officer
 Kenya Gazette
 Internet/Social Media
 Other (Please specify) _____

What are your views on the proposed Regulations?
 (You may write on a separate sheet of paper and attach firmly to this form)

What are your thoughts on how this public participation exercise has been conducted?

Do you have other comments or questions? (You may write on a separate sheet of paper and attach firmly to this form)

Sign: _____

Feedback Received By (For Official Use Only):

Full Name and Signature	Responsible Authority	Date

FORM PP3 (To be filled by the Responsible Authority)

FROM: RESPONSIBLE AUTHORITY (e.g. Climate Change Directorate)
TO: RELEVANT ENTITY e.g. National Environment Management Authority
SUBJECT: PUBLIC PARTICIPATION IN RELATION TO THE PROPOSED ACTION (e.g. any subsidiary legislation to the Climate Change Act)

I.	SUMMARY OF PUBLIC PARTICIPATION FEEDBACK (to be accompanied by a copy of the public participation report)
II.	IDENTIFICATION OF THE ISSUE REQUIRING THE RELEVANT ENTITY'S ATTENTION e.g. the proposed action will result in environmental degradation
III.	ANALYSIS OF THE POTENTIAL IMPLICATIONS NECESSITATING THE RELEVANT ENTITY'S ATTENTION
IV.	RECOMMENDATIONS (PROPOSED ACTION POINTS) e.g. the need to conduct an (additional) environmental impact assessment
V.	JUSTIFICATION FOR THE PROPOSED ACTION POINTS e.g. the proposed action will interfere with the environment and affect the livelihoods of people

Signed and stamped: _____

SCHEDULE 2

Analysis of the Public Participation Process: Template for the Report

- I. Introduction : Brief Summary of the Strategy Paper**
- II. Evidence of Sufficient Information to the Public and Stakeholders**
 1. Report on how the general public and relevant stakeholders were informed of the proposed action.
 2. Report on how the general public and relevant stakeholders were informed of the process of public participation, including the timelines given to allow for consultations and comments.
 3. Report on whether adequate information was availed to the public and stakeholders to enable them make informed contribution.
- III. Evidence of Adequate Involvement of the Public and Stakeholders**
 1. Summary of the Public participation process as it was conducted, including the Comments received through digital channels
 2. Summary of methods used in the process for collecting feedback
 3. Results of the Process
 4. Challenges faced in the process
- IV. Evidence of Adequate Consultations**
 1. Analysis of the feedback received from the participants
 2. Responses of the Responsible Authority to Participants
 3. Analysis of feedback received regarding the conduct of the process, including recommendations for improvement
 4. Analysis of Non-Participation
- V. Evidence of Collaboration - Impact of the Public Participation on Decision-Making**
 1. What feedback has been incorporated into the eventual decision?
 2. What feedback has been given to the public regarding the outcome of the process; including the reasons for excluding certain feedback from the eventual decision?
 3. What has been the overall impact of the public participation process on the proposed action's eventual decision
- VI. Recommendations on Areas for Improvement**
 1. How have the recommendations for improvement of the process received from the participants been documented or incorporated?
 2. How has the Responsible Authority ensured that the public participation process forms part of the education and awareness for subsequent processes?
 3. How has the feedback received been relevant to other government agencies e.g. NEMA –there may be need to do an Environmental Impact Assessment?
 4. How has the said information been cascaded to the said government agencies?
- VII. Conclusion**

Prepared and Submitted By:

Andrew Muma, Consultant

In Collaboration With:

Muma & Kanjama Advocates

Date:

6th January 2021