



IMO



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**MERCHANT SHIPPING (PREVENTION OF
MARINE POLLUTION BY DUMPING OF
WASTES AND OTHER MATTER)
REGULATIONS, 2021**

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List of Abbreviations and Acronyms

CS	Cabinet Secretary
EEZ	Exclusive Economic Zone
EMCA	Environment Management and Coordination Act
IMO	International Maritime Organization
KMA	Kenya Maritime Authority
KPA	Kenya Ports Authority
NEMA	National Environment and Management Authority
UNCLOS	United Nations Convention of the Law of the Sea

1. Historical Background of the London Convention 1972 and the London Protocol 1996

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters,¹ popularly known as the “London Convention 1972”, is an international treaty developed to protect the marine environment from pollution caused by dumping and disposal of wastes into the sea. The Convention was adopted in 1972 and came into force in 1975 and is one of the global conventions adopted to protect the marine environment from human activities.²

For a long time, oceans were used for the disposal of industrial wastes, including radioactive matter.³ This caused a lot of marine environmental pollution resulting in the marine disposal of waste being the subject of an international convention to regularize procedures and prevent activities leading to marine pollution.⁴

The issue of marine pollution particularly escalated between the 1960s and 1970s where there was an increase in oil being transported by tanker ships. The International Maritime Organization (IMO),⁵ tasked ensuring maritime safety, introduced a series of measures designed to prevent tanker accidents and minimize their consequences.⁶ It also tackled the environmental threat caused by routine operations such as the cleaning of oil cargo tanks and the disposal of engine room wastes in tonnage terms a bigger menace than accidental pollution.⁷

This disposal of industrial wastes resulting in marine environmental pollution led to the deliberations of the London Convention at the United Nations Conference on the Human

¹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (entered into force 30 August 1975) 1046 UNTS 120, [ATS] 1985 16, 11 ILM 1294 (1972), UKTS 43 (1976).

² *ibid.*

³ Kirsti-Liisa and Gordon Linsley, ‘Sea disposal of radioactive wastes: The London Convention 1972’ (1994) 30(2) Quarterly Journal of the International Atomic Energy Agency (IAEA) page number <<https://www.iaea.org/sites/default/files/publications/magazines/bulletin/bull36-2/36205981216.pdf>> accessed 15 November 2020. JAG Griffith, ‘The Common Law and the Political Constitution’ (2001) 117 LQR 42, 64

⁴ *ibid.*

⁵ Inter-Governmental Maritime Consultative Organization (IMCO) at the time.

⁶ IMO, ‘Brief History of IMO’ (2019) <<https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>> accessed 13 January 2021.

⁷ *ibid.*

Environment which was held in Stockholm in June 1972.⁸ There had been increasing concerns about the effect human activities were having on the marine environment, especially the uncontrolled dumping and disposal of wastes into the seas and oceans.⁹ The Convention was drafted in November 1972 at the Intergovernmental Conference on the Convention on the Dumping of Wastes at Sea held in London (the United Kingdom).¹⁰

The main objective of the Convention is to promote the effective control of all sources of marine pollution and to take all practicable steps to prevent pollution of the sea by the disposal and dumping of wastes and other matter.¹¹ It targets wastes, and other matter disposed at sea by vessels, aircrafts, platforms and other man-made structures at sea, as well as the deliberate disposal at sea of vessels, aircrafts, platforms and other man-made structures themselves.¹²

The Convention is divided into twenty-two (22) articles and has 3 annexes. Article I of the Convention places a general obligation on the Contracting Parties to promote the effective control of all sources of pollution of the marine environment by taking all necessary practicable steps within their ability to prevent pollution of the sea by dumping of wastes and other hazardous human activities.¹³ Article II of the Convention on the other hand, places an obligation on the Contracting Parties to take individual measures to prevent marine pollution by using their scientific, technical and economic capabilities.¹⁴

Parties to the Convention agreed to control the dumping and disposal of waste and other matter by implementing regulatory programmes to assess the need for and the potential impact of dumping.¹⁵ This was done by eliminating the dumping of certain types of wastes

⁸ EPA, 'Ocean dumping: International treaties' (28 February 2019) <<https://www.epa.gov/ocean-dumping/ocean-dumping-international-treaties>> accessed November 15, 2020.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (entered into force 30 August 1975) 1046 UNTS 120, [ATS] 1985 16, 11 ILM 1294 (1972), UKTS 43 (1976). .

¹² London Convention 1972, Article III.

¹³ London Convention 1972, Article I.

¹⁴ London Convention 1972, Article II.

¹⁵ IMO, 'The London Convention and Protocol: Their Role and Contribution to the Protection of the Marine Environment' (2012) International Maritime Organization <<https://leap.informea.org/sites/default/files/2020-09/LCLP.pdf>> accessed 15 November 2020.

and gradually made the regime more restrictive by promoting sound waste management and pollution prevention.¹⁶

Article III of the Convention provides the definition of the terms dumping and what it includes, vessels and aircraft, sea, wastes and other matter, special permit, general permit and the Organization.

Article IV of the Convention provides for wastes prohibited from disposal at sea. These wastes are divided into two categories i.e. the “black” and “gray” lists. Waste materials from the “black” list are placed in Annex I of the Convention and were prohibited unless in trace quantities.¹⁷ These include organ halogen compounds, mercury and mercury compounds, cadmium and cadmium compounds, persistent plastics and other persistent synthetic materials, crude oil and its wastes, refined petroleum products, petroleum, distillate residues, radio-active wastes or other radio-active matter, materials produce in whatever form for biological and chemical warfare among others.¹⁸

Waste materials on the “gray” list are placed in Annex II of the Convention and are subject to ‘special care’ measures to ensure their disposal does not have adverse effects on the marine environment. These materials include arsenic, beryllium, chromium, copper, lead, nickel, vanadium, zinc and their compounds, organosilicon compounds, cyanides, fluorides, pesticides and their byproducts not covered in the “black” list.¹⁹

Annex III of the Convention contains the provisions that were to be considered in establishing the criteria that governed the issuing of permits to allow dumping of waste and matter not exclusively provided for under Annexes I and II.

Article V of the Convention provides for exceptions when the provisions of article IV are not to apply. These exceptions include when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of force

¹⁶ *ibid.*

¹⁷ Kirsti-Liisa and Gordon Linsley (n 3).

¹⁸ London Convention 1972, Annex I.

¹⁹ London Convention 1972, Annex II.

majeure caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea.

Article VI provides that each contracting party to designate a special authority to ensure conformity of the provisions of the Convention while Article VII makes provision of the measures required to implement the Convention by vessels and aircraft. Article VIII makes provision for contracting parties to enter into regional agreements that are consistent with the Convention to prevent pollution especially by dumping.

Article X places a mandate on contracting parties to develop procedures for the assessment of liability and settlement of disputes regarding dumping while Article XI makes provision for contracting parties to consider appropriate procedures for dispute resolution. Article XII provides that contracting parties pledge to protect the marine environment against pollution through their specialized agencies and other international bodies.

Articles XIV and XV provide for the duties of the Secretariat of the Organization and how to conduct consultative or special meetings of the Contracting Parties. Articles XVI, XVII, XVIII, XIX, XX, XXI and XXII provide for the signature, accession, and ratification dates of the Convention.

The Convention also makes provision for an obligation of the Contracting Parties to report to the Secretariat of the Convention on dumping permits issued and amounts of waste permitted to be dumped. The Secretariat of the Convention is hosted by the IMO in London.

Over the years various amendments to the Convention were adopted so as to improve its applicability and effectiveness. In 1978, an amendment clarifying that incineration of oily wastes and organohalogen compounds was introduced as an interim solution but requiring special permission was adopted and came into force in 1979.²⁰

In 1988, a Consultative Meeting of the Contracting Parties was called for such incineration to be minimized and for a re-evaluation of the practice. The amendment to prohibit this

²⁰ Alan Simcock and Juying Wang, 'Solid waste disposal' (2016) United Nations <https://www.un.org/depts/los/global_reporting/WOA_RPROC/Chapter_24.pdf> accessed 15 November 2020.

practice was adopted in 1993 and came into force in 1994. In 1990, a resolution was passed by the Contracting Parties calling out for the phasing out of dumping of industrial waste. This resolution resulted in the ban on dumping industrial waste in 1993.²¹

In November 1996, the Contracting Parties to the Convention held a special meeting in which they deliberated and adopted the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972, popularly known as the London Protocol.²² The Protocol was adopted to modernize the Convention and eventually replace it. It entered into force in March 2006.²³ The Protocol represents a comprehensive standalone global treaty or agreement with the main objective being to provide more stringent protection of the marine environment from pollution caused by disposal and dumping of waste and other matter at sea.²⁴

The Protocol is divided into twenty-nine (29) articles and three (3) annexes. Article 1 provides for the definition of terms including dumping and what it does not include. Articles 2 and 3 provide for the objectives and general obligations of the Contracting Parties to the Protocol. Article 4 provides for the limited materials allowed for dumping as listed in Annex 1 of the Protocol.

Article 5 provides for the prohibition of incineration of wastes at sea while Article 6 prohibits the export of wastes or other matter to other countries for dumping or incineration at sea. Article 7 provides for the relation of the Protocol to internal waters of Contracting Parties. Article 8 provides for the exceptions of articles 4(1) and 5 which relate to materials listed for dumping or incineration at sea.

Article 9 deals with issuance of permits and reporting of dumping of wastes while article 10 provides for the application and enforcement of the Protocol. Article 11 creates a mandate on Contracting Parties to establish compliance procedures and mechanisms to

²¹ *ibid.*

²² IMO (n 15).

²³ *ibid.*

²⁴ Andrew Birchenough and Fredrik Haag, 'The London Convention and London Protocol and their Expanding Mandate' (2020) 34(1) *Ocean Yearbook Online* <https://brill.com/view/journals/ocyo/34/1/article-p255_11.xml> accessed 16 November 2020.

assess and promote compliance with the Protocol. Article 12 makes provision for Contracting Parties to enhance regional co-operation including entering into regional agreements that are consistent with the Protocol.

Article 13 mandates Contracting Parties to collaborate with each other to ensure technical co-operation and assistance for the prevention, reduction and elimination of pollution by dumping of waste at sea. Article 14 mandates Contracting Parties to take the appropriate measures to promote and facilitate scientific and technical research on the prevention, reduction and where practicable elimination of pollution by dumping.

Article 16 provides for settlement of disputes while Article 17 provides for international co-operation. Article 18 provides for the conduct of meetings of contracting parties while Article 19 provides for the tasks and duties of the IMO.

Article 20 reiterates the importance of the Annexes to the Protocol. Articles 21 and 22 make provision on how amendments to the Protocol and Annexes are to be made. Article 23 provides for the relationship between the Protocol and the Convention in which the Protocol supersedes the Convention. Article 24 and 25 provide for the signature, ratification, acceptance, approval, accession and entry into force of the Protocol.

Article 27 provides for how a Contracting Party can withdraw from the Protocol while Article 28 provides for the depository of the Protocol with the Secretary General. Article 29 provides for the authentic texts of the Protocol these being Arabic, Chinese, English, French, Russian and Spanish.

The Protocol provides a more restrictive approach to dumping and disposal of waste into the sea as compared to the London Convention which was said to be more permissive.²⁵ The Protocol sets a general obligation to its Contracting Parties requiring them to protect and preserve the marine environment from all sources of pollution and take all practicable

²⁵ Colin Warbrick and Dominic McGoldrick, 'Current Developments: Public International Law' (1997) 46(4) *International and Comparative Law Quarterly*, 944-953.

steps in line with their capabilities to prevent, reduce and eliminate pollution from dumping.²⁶

The Protocol prohibits all dumping of waste except a limited number of categories permitted in Annex 1 of the Protocol. This is different from the London Convention which prohibits dumping of only a specified list of substances with some requiring special permit for dumping.²⁷ The Protocol and the Convention also differ in that the Protocol incorporates more recently developed environmental approaches such as the precautionary principle and “polluter pays” principle which were not included in the London Convention.²⁸

The Convention and the Protocol also differ in their depositaries with Convention designating four depositaries namely the Government of Mexico, the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America²⁹ while the Protocol designates the Secretary-General of IMO as its sole depositary.³⁰

The definition of dumping in the London Convention includes any deliberate disposal of platforms or other man-made structures at sea but excludes the placement of matter for a purpose other than mere disposal, provided that such placement is not contrary to the aims of the Convention. Notably, this definition was later adopted in Article 1(5) of UNCLOS

The definition of dumping in the Protocol is almost the same as the one contained in the London Convention and UNCLOS, but the former also embraces “any storage of wastes or other matter in these a bed and the subsoil thereof from vessels, aircraft, platforms or other man-made structures at sea” and “any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal.”

²⁶ *ibid.* Cf. London Protocol 1996, Article 2.

²⁷ Alan Simcock and Juying Wang (n 20).

²⁸ Gi Hoon Hong and Young Joo Lee, ‘Transitional measures to combine two global ocean dumping treaties into a single treaty’ (2015) 55 *Marine Policy*, 47-56.

²⁹ *ibid.* See also the London Convention 1972, Article XVIII.

³⁰ *ibid.* See also the London Protocol 1996, Article 28.

The definition of “sea” in the Protocol is defined as all marine waters other than the internal waters of States, as in the Convention, but the Protocol also contains a separate provision on internal waters.³¹

Annex 2 of the Protocol provides for an assessment of wastes or other matter that may be considered for dumping. It provides for waste prevention audit, waste management options, characterization of wastes chemical, physical, and biological properties to be considered before dumping, action list for screening candidate wastes and their constituents, dump-site selection, assessment of potential effects, monitoring, and permit and permit conditions.³²

Annex 3 of the Protocol provides for the arbitral procedure to guide the Arbitral Tribunal established under Article 16 of the Protocol for dispute resolution between Contracting Parties.

The legal regime set forth in the Protocol is based on two main rules. First, the prohibition of all dumping at sea as provided for in Article 4 of the Protocol except for a small list of wastes specified in Annex 1.³³ This is what is called the “reverse listing system.” The second rule is the prohibition of export of wastes for dumping at sea as provided for in Article 6 of the Protocol. The rules of the London Protocol are applicable in all marine waters other than internal waters of States.³⁴

Since its adoption and entering into force, the London Protocol has undergone substantive revision and several amendments have been introduced. In 2006 an amendment was proposed to allow carbon capture and storage in subsea-bed geological formations (CCS).

³¹ *ibid.* See also the London Protocol 1996, Article 7(1).

³² London Protocol 1996, Annex 2.

³³ Jose Juste Ruiz, ‘Ocean Options for Climate Change Mitigation: Disposal of Greenhouse Gases at Sea under the 1996 London Protocol’ (2016) *eMepielan Bulletin* <<http://www.mepielan-ebulletin.gr/default.aspx?pid=18&CategoryId=4&ArticleId=236&Article=Ocean-Options-for-Climate-Change-Mitigation-Disposal-of-Greenhouse-Gases-at-Sea-under-the-1996-London-Protocol>> accessed 16 November 2020.

³⁴ Jose Juste Ruiz, ‘The 1996 Protocol Amending the London Dumping Convention of 1972’ (1997) 9(1) *IJO Newsletter*, 16-19.

The amendment added a new paragraph 1(8) in Annex 1 of the Protocol to permit and regulate the disposal of carbon dioxide streams at sea.³⁵

In 2009, an amendment to article 6 of the Protocol was proposed to allow the export of carbon dioxide streams to other countries, by both Parties and non-Parties, for disposal into sub-seabed geological formations. After heated discussions and deliberations amongst the Contracting Parties to the Protocol, the amendment was adopted.³⁶ The Contracting Parties to the Protocol also adopted the Assessment Framework for Scientific Research Involving Ocean Fertilization in 2010. This adoption emphasized the importance of consultation, notification, and reporting on transboundary situations in ocean fertilization research.³⁷

The London Protocol has been fairly successful and effective in stopping the unregulated dumping of waste and incineration activities into the sea. The Protocol has ensured that all dumping is subject to permission and is controlled by regulatory programmes designed to assess the need for and potential impact of dumping.³⁸

Currently, there are eighty-seven (87) State Parties to the London Convention 1972 and fifty-three (53) State Parties to the 1996 London Protocol.³⁹

2. Kenyan Legislative Framework on Prevention of Marine Pollution by Dumping of Wastes and other Matter

Kenya has a coastline of 536 km on the western Indian Ocean, an exclusive economic zone (EEZ) with a total area of 142,000 km², and has commenced the application process for delineation of an extended continental shelf of 103,320 km².⁴⁰

³⁵ Juste Ruiz (n 33).

³⁶ *ibid.*

³⁷ Alan Simcock and Juying Wang (n 20).

³⁸ Andrew Birchenough, 'London Convention and London Protocol: Introduction, Achievements, and Advantages of Joining' (National Workshop on the London Protocol Kiev, Ukraine, November 2017).

³⁹ London Convention 1972.

⁴⁰ Christian Bueger, Timothy Edmunds, and Robert McCabe (Eds), *Capacity Building for Maritime Security the Western Indian Ocean Experience* (Palgrave Macmillan, 2021).

Article 5 of the Constitution of Kenya states that Kenya consists of the territory and territorial waters.⁴¹ As such, when one is to consider national security, the contemplation should encompass environmental security. The import of such definition as to national security is provided for in Article 238 of the Constitution which states that national security is the protection against internal and external threats to among others, Kenya's territorial integrity and sovereignty.⁴² Therefore, it is the responsibility of the State to ensure the protection of the environment within her territory.

The sources of maritime law in Kenya are international law and municipal law. Article 42 of the Constitution provides for the right to a clean and healthy environment, which includes the right to have the environment protected for the benefit of the present and future generations.⁴³ Additionally, Article 69(1) of the Constitution obligates the State to, among other things, ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, eliminate processes and activities that are likely to endanger the environment; and utilise the environment and natural resources for the benefit of the people of Kenya.⁴⁴

In addition to the right to a clean and healthy environment, and the obligation of the State as provided for under the Constitution, the primary laws on protection of marine environment are the Environmental Management and Coordination Act,⁴⁵ the Merchant Shipping Act,⁴⁶ and the Kenya Maritime Authority Act.⁴⁷ The Kenya Maritime Authority Act establishes the Kenya Maritime Authority (KMA) responsible for monitoring, regulating, and coordinating activities in the marine industry. As regard the protection of the marine environment, the KMA is responsible for the prevention of marine source pollution, protection of the marine environment and response to marine environment incidents.⁴⁸

⁴¹ Constitution of Kenya 2010, Article 5.

⁴² Constitution of Kenya 2010, Article 238.

⁴³ Constitution of Kenya 2010, Article 42.

⁴⁴ Constitution of Kenya 2010, Article 69(1).

⁴⁵ Act No. 8 of 1999.

⁴⁶ Act No. 4 of 2009.

⁴⁷ Act No. 5 of 2006.

⁴⁸ Maritime Authority Act, Section 5(1)(o).

Therefore, the Kenya Maritime Authority Act establishes the KMA as the lead agency⁴⁹ on matters of protection of the marine environment. On the other hand, the Environmental Management and Coordination Act establishes legal and institutional frameworks for the management of the environment generally. In this regard, the Environmental Management and Coordination Act establishes the National Environment and Management Authority (NEMA) responsible for exercising general supervision and co-ordination over all matters relating to the environment and to be the principal instrument of the Government in the implementation of all policies relating to the environment.⁵⁰

On the protection of marine environment, section 42 of the Act provides for protection of rivers, lakes, seas and wetlands. The section prohibits the undertaking of certain activities, including deposit of any substance likely to have adverse environmental effects on the river, lake, sea or wetland, in relation to a river, lake, seas or wetland without prior approval of NEMA. Section 55 of the Act on the other hand provides for the protection of the coastal zone, and section 87 of the Act prohibits dangerous handling and disposal of wastes.

Whereas the Kenya Maritime Authority Act vests the functions of control and management the Kenya marine resource on KMA, the Environmental Management and Coordination Act under section 42 gives the NEMA certain powers, including the granting of the authority to dump waste, in relation to a river, lake, seas or wetland. There is, therefore, a need to clearly set out how the two institutions will perform their respective roles as regards dumping in the sea.

The Merchant Shipping Act on its part is the national legislation dealing with maritime affairs. It makes provision for, among other things, the prevention of pollution. However, this law has not set out in detail the functions of the KMA, as the lead agency, in relation the protection of marine environment. Despite this, sections 8, 410 and 450 of the Act give power to the Cabinet Secretary responsible for matters related to merchant shipping to make regulations for the protection and preservation of the marine environment.

⁴⁹ The Environmental Management and Coordination Act, section 2 defines a lead agency as ‘... any Government ministry, department, parastatal, state corporation or local authority, in which any law vests functions of control or management or any element of the environment or natural resources.’

⁵⁰ Environmental Management and Coordination Act, Section 9(1).

Specifically, the Cabinet Secretary is required to make regulations to facilitate the enforcement of any international convention or instrument relating to the Act,⁵¹ and to give effect to the London Convention.⁵²

In addition to municipal laws, the Kenyan Constitution (2010) in Article 2(5) and (6) provides that the general rules of international law, and treaties and conventions ratified by Kenya shall form part of the Kenyan law. Article 2(6) provides that “any treaty or convention ratified by Kenya shall form part of the law of Kenya”.⁵³ This therefore means that the international laws ratified by Kenya are deemed to form part of the law of Kenya in addition to Constitution and existing municipal laws.

Kenya has ratified over 327 international agreements, which includes the London Convention and its Protocol. The London Convention 1972 was adopted on 13 November 1972, and entered into force on 30 August 1975. The London Protocol on the other hand was adopted on 7 November 1996 and entered into force on 24^h March 2006. Kenya acceded to the London Convention 1972 on 7^h January 1976, and to the London Protocol on 14 January 2008.⁵⁴ In its Annual Report on Progress Made in Fulfilling the International Obligations of the Republic of Kenya,⁵⁵ the Government observed that –

The 1996, London Protocol is a modern and comprehensive waste management legal regime that places greater emphasis on marine protection as it is more restrictive. Further, it phased out the dumping of industrial wastes by 31st December, 1995, and banned the incineration at sea of industrial wastes. Some of the provisions of London Convention 1972, have been entrenched in the Kenya Maritime Authority Act, 2006, and in the Environmental Management and Coordination (Amendment) Act, 2015.

⁵¹ Merchant Shipping Act, Section 8(2)(b).

⁵² Merchant Shipping Act, Section 410(2).

⁵³ Constitution of Kenya 2010, Article 2(6).

⁵⁴ Government of Kenya, *7th Annual Report on Progress Made in Fulfilling the International Obligations of the Republic of Kenya* (Government Printer, Nairobi, 2020).

⁵⁵ *ibid.*

Kenya being a State Party to the London Convention and the Protocol does not only make the two Instruments part of Kenyan Law, it has undertaken to put into place domestic measures and legislation compatible with the State obligations and duties therein. It is in this regard that Kenya needs to take further steps to implement the London Convention and its Protocol by making regulations as provided for under the Merchant Shipping Act.

3. The Need for Regulations on Prevention of Marine Pollution by Dumping of Wastes and other Matter Regulations in Kenya

Kenya is not only a leading light at regional, continental and global arena in the effort to institutionalise the sustainable use of maritime and marine resources so as to improve the livelihood of her people, it is also geographically strategically located making it a coastal State, a port State and a flag State which supports eight countries in the region. This notwithstanding, Kenya faces many challenges and gaps in the maritime sector. These challenges include an uncoordinated legal and institutional framework that requires to be streamlined and harmonized, pollution from land-based and seabed activities, dumping and transport which alter the native biodiversity and affect human health resulting in economic costs and ecological damage.

In November 2008, Kenya hosted the world's first Blue Economy Conference. SDG 14: Life Below Water highlights on environmental change, which seeks to conserve and sustainably use the oceans, seas and marine resources for sustainable development was a critical to this conference. In particular, waste management and pollution-free oceans was a key thematic area in the Conference where emphasis was laid on the need to improve the health of the oceans, seas, lakes, and rivers and the ecosystems which are under increased threats and in decline in many countries and regions across the globe.⁵⁶ Some of the threats to sustainable Blue Economy highlighted at this Conference included climate change, pollution and waste management, illegal activities at seas such as illegal, unregulated and unreported fishing, piracy and terrorism, destruction of marine ecosystems and management of resource in areas beyond national jurisdiction.⁵⁷

⁵⁶ Report on the Global Sustainable Blue Economy Conference 26th – 28th November 2018, Nairobi, Kenya, 4.

⁵⁷ *ibid.*

Kenya has no proper designated dumping site along the Indian Ocean. Following the need for dredging on all major ports to maintain and deepen channels, at the moment, Kenya Ports Authority (KPA) is carrying out dumping of dredge spoil at a location marked on Admiralty Charts that also allowed for dumping of explosives. What is not so clear is the whether all dumping is complying with this location and the environmental impacts of the dumping.⁵⁸

Indeed, there have been disagreements regarding the dumping of dredge material where stakeholders have raised the need for a process to determine relevant mitigation, such as by designating a site farther offshore. Therefore, a compromise must always be found that enables dredging and dumping, and reduces impacts to acceptable levels

*A massive public outcry in the last two weeks resulted in stoppage of the ongoing dredging/dumping activities and a stakeholder meeting bringing together the authorities (KPA, KMA, NEMA), the project contractors (for the Kenya Oil Terminal and Phase II Container Terminal), and stakeholders from tourism and research. The cause of the outcry was a failure in confidence that dumping was being regulated AND that it is having no impact as claimed by the authorities.*⁵⁹

Kenya is currently in the process of expansion of the Port of Mombasa and about to complete the Lamu Port. It is in this regards that dredge material being dug out needs proper dumping. In 2011, following controversies around dumping practices, the multi-agency meeting on 11th July 2013, referred to in the Kenya Ports Authority public notice (of 30 March 2019), identified a new dumping location.⁶⁰ The current dredge spoil dumping site was identified using the coordinates published by KPA in the notice on 30 March 2019.⁶¹

⁵⁸ David Obura, 'Dredge-spoil dumping in Mombasa' (CORDIO East Africa, 30 March 2019) <<https://cordioea.net/environmental-assessment-kenya/dredge-spoil-dumping/>> accessed on 3 December 2020.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ Kenya Ports Authority, 'Public Statement: Dumping of Dredge Spoils in the Sea' <<https://www.kpa.co.ke/InforCenter/Environmental%20Matters%20Related%20To%20Expansion%20Project/Press-Release%20Dumping%20of%20dredge%20spoils%20in%20the%20sea.pdf>> accessed 3 December 2020.

In 2014, in the Kenya Navy-led operation, the ship known as *Al Noor* carrying about 400 kilograms of heroin to the Port of Mombasa was sunk in a zone known as Delta-16, which is a zone designated for disposal of explosives within Kenya's territorial waters. The area of the detonation is about 10 miles to the nearest point of land.⁶² Although cases of sinking vessels is permitted by KMA, however, in KMA permitting or licensing there are conditions that need to be confirmed such as that there is no oil or no floating derbies likely to pose a danger of suppression in the water.

Currently, dumping at sea, including wastes from dredging of the ports, is allowed, however, there is no mechanism to regulate and determine the type of wastes that can or cannot be dumped. In addition, the process of permitting dumping has not been spelt out including sanctions for non-compliance to the law and permit conditions. As a result of this, it is possible that wastes likely to cause harm to marine environment and to human health are being dumped within the jurisdiction of the Kenyan marine environment.

Finally, in compliance with the provisions of section 8(2)(b) of the Merchant Shipping Act, the Cabinet Secretary (CS) is obligated to make regulations for the protection and preservation of marine environment.⁶³ In particular, under section 410(2) (f) of the Merchant Shipping Act, the CS may make regulations to facilitate the enforcement of any international convention or instrument relating to the Act, and to give effect to the London Convention.⁶⁴ Further, the Protocol obligates State Parties take certain measures including prohibiting dumping of wastes, except for the exemptions provided, and designating an authority for the issuance of dumping permits.

⁶² Njeri Rugene and Mwakera Mwanjefa, 'Sh1.3bn heroin ship blown up 10 miles off Mombasa' (*Nation*, 29 August 2014) <<https://nation.africa/kenya/news/sh1-3bn-heroin-ship-blown-up-10-miles-off-mombasa-1019008?view=htmlamp>> accessed 3 December 2020.

⁶³ Section 8(2)(b) of the Merchant Shipping Act states "... the Minister may make regulations for the following purposes—the facilitation of the enforcement of any international convention or instrument relating to this Act."

⁶⁴ Section 410(2)(f) of the Merchant Shipping Act states "...the regulations on marine pollution... the regulations may give effect to any provision of the following international maritime conventions and agreements...the International Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, (LDC) 1972."

Implementing the London Convention and the London Protocol for purposes of protecting the marine environment from dumping and other new activities at sea is critical to enable Kenya achieve the Sustainable Development Goals on conserving and sustainably using the oceans, seas and marine resources; food security; and sustainable economic growth.⁶⁵

It is from the foregoing that there is need for Kenya to introduce regulations on prevention of marine pollution by dumping of wastes to prohibit all dumping of wastes and other matter, assess and issue permits for dumping of wastes, to reduce the amount of polluted materials that could end up in the sea, to provide for the prevention, mitigation and control of pollution of the sea, liability and compensation for pollution damage arising from pollution damage and for connected purposes.

The absence of a proper dumping site, clarity on the roles of the key institutions responsible for the protection of marine environment, and absence of mechanisms for regulating dumping at sea poses a grave danger to environment and marine life. It is in this regard that regulations implementing the London Convention and the Protocol are put in place to address such issues.

Given the global nature and connectedness of the marine and maritime resources, it is important that as a country, Kenya is able to manage and resolve interactions of the various players in a manner that protects the base marine resources, and reduce the regulatory burden to various economic and social agents in a safe and secure environment free from pollution.

4. How to Incorporate the Protocol into the Laws of Kenya

As discussed before, Kenya is a State Party to the London Convention and the Protocol to the London Convention. Additionally, the Merchant Shipping Act requires the CS to make regulations for the implementation of the London Convention. Therefore, the Protocol will be incorporated into the laws of Kenya through regulations to be made by the CS.

⁶⁵ IMO, 'The London Protocol What It Is and Why It Is Needed' <<https://www.wcdn.imo.org/localresources/en/OurWork/Environment/Documents/London%20Protocol%20Why%20it%20is%20needed%2020%20years.pdf>> accessed 21 March 2021.

Regarding the institutional framework as established under the Merchant Shipping Act and the Environment Management and Coordination Act (EMCA), there are two key State authorities which are responsible for the management of the marine environment. These institutions are the KMA and NEMA. This therefore means that Kenya is in compliance with Article 9 of the Protocol which requires State Parties to designate an appropriate authority to be responsible for the issuance of permits, keeping of records and monitoring the conditions of the sea.

Since the existing national law has already designated the responsible authorities, the regulations will seek to provide for details regarding dumping of wastes and other matter at sea. This will address challenges including absence of a proper dumping site, clarity on the roles of the key institutions responsible for the protection of marine environment, and absence of mechanisms for regulating dumping at sea. The regulations will provide for application to set out matters or areas they will cover. This will implement Articles 10 of the Protocol. In terms of dumping of wastes and other matter, and incineration at sea, the regulations will implement Articles 4 and 5 protocol by prohibiting the same. However, exceptions to this will be provided for as provided under Article 8 of the Protocol and a Schedule to the regulations will set out wastes or other matter that may be considered for dumping.

Regarding issuance of permits, the regulations will set out a process for application, consideration of an application including the criteria to be applied, issuance of a permit and permit conditions, and cancellation or suspension of a permit. Under the regulations, the KMA will be responsible for processing of permits and the NEMA will be responsible for conduct of an environmental impact assessment to determine suitability of issuance of a permit. A Schedule to the regulations will set out what to be considered while undertaking an environmental impact assessment. This will implement Articles 4, 8, and 9 of the Protocol, and Annex 2 to the Protocol.

To ensure compliance, the regulations will provide for inspections, offences and penalties. The KMA will be responsible for inspections, and the inspectors shall, subject to the Constitution of Kenya and the Office of the Director of Public Prosecutions, have the power

to prosecute offences⁶⁶ under the Regulation. This will implement Articles 9, 10 and 15 of the Protocol. Finally, in order to ensure co-operation and technical assistance in an effort to implement Articles 12 and 13 of the Protocol, the regulations will provide for the same and what it will cover.

In terms of hierarchy of laws in the Kenyan, regulations fall under subsidiary or secondary legislation. Its enactment will be guided by the Statutory Instruments Act.⁶⁷ Once the initial draft is prepared it will be sent to the Attorney General's Office, as the Government chief legal advisor, for comments and advice. If the Attorney General approves the draft regulation, the regulations will be published in the Kenya Gazette.⁶⁸ After publication of the regulations, the Cabinet Secretary is required to lay the regulations before parliament for consideration and approval.⁶⁹

5. Structure of the Regulations

The proposed Merchant Shipping (Prevention of Marine Pollution by Dumping of Wastes and other Matter) Regulations, 2021 (the Regulations) will consist of 24 regulations. Regulations 1, 2, 3 and 4 will provide for preliminary matters which are citation and commencement, interpretations, scope of application and the objectives of the regulations in accordance with Article 2, 3 and 10 of the Protocol.

Regulations 5 and 6 will provide for the prohibition of dumping and incineration, and export of wastes and other matter. Despite the prohibition, regulation 7 will set out the exceptions to cover wastes or other matter that may be considered for dumping, and regulation 8 will provide for designation of dump-sites.

⁶⁶ Pursuant to Article 157 of the Constitution of Kenya and The Office of the Director of Public Prosecutions Act, the Director of Public Prosecutions is responsible for instituting and undertaking criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.

⁶⁷ Statutory Instruments Act No. 23 of 2013.

⁶⁸ Statutory Instruments Act No. 23 of 2013, Section 22(1).

⁶⁹ Pursuant to Section 11 (1) of the Statutory Instruments Act No. 23 of 2013, every Cabinet Secretary responsible for a regulation-making authority shall within seven (7) sitting days after the publication of a statutory instrument, ensure that a copy of the statutory instrument is transmitted to the responsible Clerk for tabling before the relevant House of Parliament.

As regards permit and permit conditions, regulations 9 to 14 will set out the process of application, considerations, permit conditions including duration and any fees to be paid, renewal, revocation or suspension, as well as appeal against decisions of the Authority. As was indicated above, the KMA will largely be responsible for this with the exception of the environmental impact assessment which will be undertaken by the NEMA. Regulations 15 to 22 will provide for enforcement provisions. This will cover inspections or monitoring by the KMA to ensure compliance, offences, penalties and the inspectors' powers to prosecute offences. The penalties will include environmental restoration orders, fines imprisonment, forfeitures and cancellations of a permit.

Regulations 23 to 25 will provide for research and collaboration, the keeping of records including permits issued and the nature and quantities of wastes for which permits have been issued, and transition and savings to provide for authorization to dump wastes already granted.

Finally, there will be three Schedules to the regulations. Schedule 1 will set out wastes and other matter that may be considered for dumping, Schedule 2 will provide for matters to be considered when undertaking an environment impact assessment prior to issuance of a dumping permit, and Schedule 3 will provide an application form and a form of a permit to be issued.

**THE MERCHANT SHIPPING (PREVENTION OF MARINE
POLLUTION BY DUMPING OF WASTES AND OTHER MATTER)
REGULATIONS, 2021**

ARRANGEMENT OF REGULATIONS

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**THE MERCHANT SHIPPING (PREVENTION OF MARINE
POLLUTION BY DUMPING OF WASTES AND OTHER
MATTER) REGULATIONS, 2021**

PART 1 – PRELIMINARY

Short title.

1. These Regulations may be cited as the Merchant Shipping (Prevention of Marine Pollution by Dumping of Wastes and other Matter) Regulations, 2021 and shall come into force on the date of publication.

Interpretation.

2. In these Regulations —

“Act” means the Merchant Shipping Act, 2009;

“Authority” means the Kenya Maritime Authority established under section 3 of the Kenya Maritime Authority Act, 2006;

“Convention” means the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;

“dumping” means –

- (a) any deliberate disposal into the sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea;
- (b) any deliberate disposal into the sea of vessels, aircraft, platforms or other man-made structures at sea;
- (c) any storage of wastes or other matter in the seabed and the subsoil thereof from vessels, aircraft, platforms or other man-made structures at sea; or
- (d) any abandonment or toppling at site of platforms or other man-made structures at sea, for the sole purpose of deliberate disposal:

Provided that dumping does not include –

- (a) the disposal into the sea of wastes or other matter incidental to, or derived from the normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platforms or other man-made structures;
- (b) placement of matter for a purpose other than the mere disposal thereof, provided that such placement is not contrary to the aims of this Protocol; or

(c) abandonment in the sea of matter (e.g., cables, pipelines and marine research devices) placed for a purpose other than the mere disposal thereof.

“environmental impact assessment” means a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impacts on the environment;

“incineration at sea” means the combustion on board a vessel, platform or other man-made structure at sea of wastes or other matter for the purpose of their deliberate disposal by thermal destruction. Provided that incineration at sea does not include the incineration of wastes or other matter on board a vessel, platform, or other man-made structure at sea if such wastes or other matter were generated during the normal operation of that vessel, platform or other man-made structure at sea.

“inspector” means the person appointed as such under section 14 of the Kenya Maritime Authority Act, 2009;

“Kenyan waters” means the Kenyan waters as defined under section 2 of the Merchant Shipping Act, 2009;

“National Environment and Management Authority” means the Authority established under section 7 of the Environmental Management and Co-ordination Act, 1999;

“Organization” means the International Maritime Organization;

“permit” means permission granted in advance and in accordance with these Regulations to dump wastes or other matter at sea.

“pollution” means the introduction, directly or indirectly, by human activity, of wastes or other matter into the sea, which results or is likely to result in such deleterious effects as harm to living resources and marine ecosystems, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for the use of sea water and reduction of amenities.

“Protocol” means the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972;

“sea” means the sea or other waters within the seaward limits of the territorial sea of Kenya other than the internal waters of Kenya, as well as the seabed and the subsoil thereof, and it does not include sub-seabed repositories accessed only from land.

“vessels and aircraft” means a waterborne or airborne craft of any type whatsoever, and it includes air-cushioned craft and floating craft, whether self-propelled or not;

“wastes or other matter” means material and substance of any kind, form or description.

Application.

3. (1) These Regulations shall apply to –

(a) Kenyan waters;

(b) vessels and aircraft registered in Kenya or flying the Kenyan flag;

- (c) vessels and aircraft loading in Kenya wastes or other matter which are to be dumped or incinerated at sea; and
- (d) vessels, aircraft and platforms or other man-made structures believed to be engaged in dumping or incineration at sea in Kenya waters.

(2) These Regulations do not apply to the disposal or storage of wastes or other matter directly arising from, or related to the exploration, exploitation and associated off-shore processing of seabed mineral resources.

Objectives.

4. (1) The objective of these Regulations is to protect and preserve the marine environment from all sources of pollution and take effective measures to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter.

(2) In implementing these Regulations, the Authority and all other relevant stakeholders shall –

- (a) apply a precautionary approach to environmental protection from dumping of wastes or other matter whereby appropriate preventative measures are taken when there is reason to believe that wastes or other matter introduced into the marine environment are likely to cause harm even when there is no conclusive evidence to prove a causal relation between inputs and their effects.
- (b) endeavour to promote practices whereby those authorized to engage in dumping or incineration at sea bear the cost of meeting the pollution prevention and control requirements for the authorized activities, having due regard to the public interest; and
- (c) act so as not to transfer, directly or indirectly, damage or likelihood of damage from one part of the environment to another or transform one type of pollution into another.

PART II – PROHIBITION OF DUMPING AT SEA

Prohibition of dumping of wastes and other matter.

5. (1) A person shall not dump or incinerate waste or any other matter at sea.

(2) Notwithstanding paragraph (1), the Authority may grant a permit in accordance with these Regulations for the dumping or incineration of wastes or other matter provided for under the First Schedule.

Prohibition of export of wastes and other matter.

6. A vessels or an aircraft shall not load in Kenya wastes or other matter which are to be dumped or incinerated at sea outside the jurisdiction of the territory of Kenya.

Exemptions to prohibition of dumping of wastes and other matter.

7. (1) Regulation 5(1) shall not apply when it is necessary to secure the safety of human life or of vessels, aircraft, platforms or other man-made structures at sea in cases of force majeure caused by stress of weather, or in any case which constitutes a danger to human life or a real threat to vessels, aircraft, platforms or other man-made structures at sea, if dumping or incineration at sea appears to be the only way of averting the threat and if there is every probability that the damage consequent upon such dumping or incineration at sea will be less than would otherwise occur.

(2) Dumping or incineration at sea done in case of force majeure shall be conducted so as to minimize the likelihood of damage to human or marine life and shall be reported forthwith to the Authority.

(3) The Authority may issue a permit as an exception to paragraph (1) above in case of emergencies posing an unacceptable threat to human health, safety, or the marine environment and admitting of no other feasible solution.

(4) The Authority shall consult any other country that is likely to be affected and the Organization before issuing a permit under paragraph (3) above, and the Authority shall follow any recommendations by the Organisation to the maximum extent feasible consistent with the time within which action must be taken and with the general obligation to avoid damage to the marine environment and shall inform the Organization of the action taken.

Designation of dump-sites.

8. The Authority shall, after taking into account the criteria set out in the Second Schedule, designate dump-sites within Kenya waters for the dumping of wastes and other matter, or incineration of wastes and other matter in accordance with these Regulations.

PART III — APPLICATION AND ISSUANCE OF A DUMPING PERMIT

Application for a permit.

9. (1) A person who intends to dump waste or incinerate waste or other matter at sea shall apply to the Authority for a permit in Form 1 set out in the Third Schedule.

(2) An application for a permit shall be accompanied by –

(a) an environmental impact assessment conducted in accordance with the Environment Management and Co-ordination Act and the Second Schedule to these Regulations; and

(b) a non-refundable application fee as may, by notice in the Gazette, be specified by the Authority.

Consideration of an application for a permit.

10. (1) The Authority shall, within sixty days from the date of receipt of the application, approve or reject an application and shall notify the applicant of its decision together with reasons.

(2) Where the Authority approves an application for a permit or the renewal of a permit, the Authority shall, upon payment of such standard fee as it may determine, issue the applicant a permit.

Conditions of a permit.

11. A permit issued under these Regulations shall –

- (a) be in Form 2 set out in the Third Schedule;
- (b) be valid for one year and shall, in any case, expire on the 31st of December, of each year;
- (c) be limited exclusively to use by the person named in the permit and shall not be transferred to any other person without prior approval of the Authority; and
- (d) be issued upon such other conditions as may be specified by the Authority in the permit.

Renewal of a permit.

12. (1) Any person who holds a permit may apply for its renewal subject to the requirements set out under this regulation.

(2) The application under paragraph (1) shall be in Form 1 set out in the Third Schedule, and —

- (a) be made not later than sixty days before the date of expiry of the permit; and
- (b) be accompanied by a non-refundable application fee as may, by notice in the Gazette, be specified by the Authority.

(3) The Authority shall, before the expiry of sixty days from the date of lodging the application, approve or reject the application and shall notify the applicant of its decision together with reasons.

Suspension or revocation of a permit

13. (1) The Authority may suspend or revoke a permit issued under these Regulations where –

- (a) the permit holder fails to comply with the terms and conditions of the permit;
- (b) the Authority determines that the permit was irregularly obtained; and
- (c) the Authority determines so for reasons as shall be stated by the Authority.

(2) Before the Authority suspends or revokes a permit, the Authority shall –

- (a) issue the permit holder with a fourteen days' written notice of the intention to suspend or revoke its permit;
- (b) specify the reasons for the intended suspension or revoke; and
- (c) require the permit holder to respond within fourteen days from the date of receipt of the notice.

(3) Where the Authority suspends or revokes a permit, the Authority shall within fourteen days from the date of the decision notify the permit holder –

- (a) the reasons for the suspension or revocation of the permit;
- (b) in the case of suspension, the action required to be taken by the permit holder in order to comply; and
- (c) the period within which any action to remedy the violation may be undertaken.

(4) Where a permit holder fails to comply with paragraph (2) or (3), the Authority may suspend or revoke a permit.

Appeal.

14. (1) A person whose application for a permit or renewal has been rejected, or whose permit has been suspended or revoked may, within twenty-one days of receipt of the notice of such refusal, suspension or revocation, appeal to the Authority for review of the decision.

(2) The Authority shall, within thirty days from the date of receipt of the appeal consider the appeal and notify the applicant of its decision together with reasons for the decision.

(3) A person aggrieved by the decision of the Authority under paragraph (2), may within fourteen days from the date of such decision, make a further appeal to the High Court.

PART IV – ENFORCEMENT AND OFFENCES

Appointment of inspectors.

15. The Authority shall appoint inspectors or designate such person for the purpose of carrying out inspections and monitoring to ensure compliance with these Regulations.

Inspections and monitoring.

16. (1) An inspector may inspect a vessel or aircraft of any nationality in a port in Kenya or within Kenyan waters to determine whether the vessel or aircraft is complying with these Regulations.

(2) An inspector may inspect a dumpsite or survey the Kenyan waters to determine whether –

- (a) illegal dumping or incineration is taking place;
- (b) dumping or incineration is being undertaken in accordance with these Regulations; or
- (c) there is a need for review of permit conditions for prevention of marine pollution.

(3) Where an inspector finds that –

- (a) the vessel or aircraft is not complying with these Regulations or undertaking illegal dumping, the inspector shall specify in writing the non-compliance and shall detain the ship until such non-compliance is addressed in accordance with these Regulations; or
- (b) there is need for review of permit conditions for prevention of marine pollution, the inspector shall prepare a report and make recommendations to the Authority.

(4) Where any recommendations are made under this regulation, the Authority may within such time and in such manner as it shall specify, require any person concerned to implement or cause to be implemented the recommendations contained in the report of the inspector.

(5) The Authority may suspend a permit pending the implementation or for any failure to implement a requirement as contained in paragraph (4) above.

Illegal dumping.

17. A person who —

- (a) dumps waste or other matter, or incinerates waste or other matter at sea without a permit;
- (b) having been issued with a permit, dumps waste or other matter, or incinerates waste or other matter at sea in a place other than the designated dumpsite;
- (c) having been issued with a permit, dumps waste or other matter, or incinerates waste or other matter for which no permit has been issued; or
- (d) having been issued with a permit, dumps waste or other matter, or incinerates waste or other matter at sea contrary to these Regulations or any permit condition;

commits an offence and shall be liable, on conviction, to a fine not exceeding ten million shillings or to imprisonment for a term not exceeding twenty-five years or to both.

Obstruction.

18. A person who —

- (a) wilfully and without a justifiable reason obstructs or hinders the Authority in the exercise of its powers or performance of its duties under these Regulations;
- (b) furnishes information or makes a statement to the Authority which he or she knows to be false or misleading; or
- (c) wilfully and without a justifiable reason fails to implement the recommendations made pursuant to these Regulations,

commits an offence and shall be liable, on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or both.

Aiding and abetting.

19. A person who aids, abets, counsels or procures the commission of or attempts to aid, abet, counsel, or procure the commission of an offence specified in these Regulations commits an offence and is liable on

conviction to such fine or term of imprisonment or to both as if the person actually committed the offence.

Environmental restoration orders.

20. Subject to any other provisions of the law, the Authority may, in consultation with the National Environment and Management Authority, issue and serve on any person in respect of any matter relating to the management of the environment under these Regulations an environmental restoration order in terms of Part IX of the Environmental Management and Co-ordination Act.

Forfeiture, cancellation and other orders.

21. (1) The Court before which a person is charged for an offence under these Regulations may, in addition to any other order –

(a) upon the conviction of the accused; or

(b) if it is satisfied that an offence was committed notwithstanding that no person has been convicted of the offence, order that the substance, vessel, aircraft, equipment and appliance or other thing by means whereof the offence concerned was committed or which was used in the commission of the offence be forfeited to the State and be disposed of as the court may direct.

(2) In making the order to forfeit under paragraph (1) the Court may also order that the cost of disposing of the substance, vessel, aircraft, equipment, appliance or any other thing provided for in that paragraph be borne by the person convicted thereunder.

(3) The Court may further order that any permit or any authorisation given under the Act or these Regulations and to which the offence relates, be cancelled.

(4) The Court may further issue an order requiring that a convicted person restores at his own cost, the environment to as near as it may be to its original state prior to the offence in accordance with the National Environmental Management and Co-ordination Act.

Inspector's powers to prosecute.

22. Subject to the Constitution, section 29 of the Office of the Director of Public Prosecutions Act and the directions and control of the Director of Public Prosecutions, an inspector may, in any case in which he considers it desirable so to do—

(a) institute and undertake criminal proceedings against any person before a court of competent jurisdiction (other than a court martial) in respect of any offence alleged to have been committed by that person under these Regulations; and

- (b) discontinue at any stage with the approval of the Director of Public Prosecutions, before judgment is delivered any such proceedings instituted or undertaken by himself.

PART V- MISCELLANEOUS PROVISIONS

Research and collaboration.

23. (1) The Authority shall take appropriate measures to promote and facilitate scientific and technical research including observation, measurement, evaluation and analysis of pollution by scientific methods on the prevention, reduction and where practicable elimination of pollution by dumping and other sources of marine pollution relevant to these Regulations, the Convention and the Protocol.

(2) The Authority shall collaborate with the Organization, other States and stakeholders, and promote bilateral and multilateral support for the prevention, reduction and where practicable elimination of pollution caused by dumping as provided for in this Regulations, the Convention and the Protocol.

Records to be kept.

24. The Authority shall keep records and make the information available in accordance with the principles set out in the Access to Information Act, 2016. Such records shall include, records on –

- (a) dumpsites;
- (b) permits issued, including particulars of the permit holder;
- (c) revoked and suspended permits;
- (d) reports on inspections and monitoring of dumping or incineration of wastes or other matter; and
- (e) the nature and quantities of all wastes or other matter for which dumping permits have been issued and where practicable the quantities actually dumped and the location, time and method of dumping.

Savings and transition.

25. Any authorisation granted by the Authority for dumping or incineration of wastes or other matter covered under these Regulations and is in force immediately before the commencement of these Regulations shall —

- (a) be deemed to have been issued under these Regulations;
- (b) remain in force, subject to the provisions of these Regulations for a period of six months; and

- (c) the permit holder shall, within six months from the date of commencement of these Regulations, apply to the Authority for the issuance of a permit in accordance with these Regulations.

**WASTES OR OTHER MATTER THAT MAY BE CONSIDERED FOR
DUMPING**

1. The following wastes or other matter may be considered for dumping taking into account the objectives of the Regulations as set out under regulation 4.
 - 1.1. dredged material;
 - 1.2. sewage sludge;
 - 1.3. fish waste, or material resulting from industrial fish processing operations;
 - 1.4. vessels and platforms or other man-made structures at sea;
 - 1.5. inert, inorganic geological material;
 - 1.6. organic material of natural origin;
 - 1.7. bulky items primarily comprising iron, steel, concrete and similarly unharmed materials for which the concern is physical impact, and limited to those circumstances where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping; and
 - 1.8. Carbon dioxide streams from carbon dioxide capture processes for sequestration.
2. The wastes or other matter listed in paragraphs 1.4 and 1.7 may be considered for dumping, provided that material capable of creating floating debris or otherwise contributing to pollution of the marine environment has been removed to the maximum extent and provided that the material dumped poses no serious obstacle to fishing or navigation.
3. Notwithstanding the above, materials listed in paragraphs 1.1 to 1.8 containing levels of radioactivity greater than de minimis (exempt) concentrations as defined by the International Atomic Energy Agency shall not be considered eligible for dumping;
4. Carbon dioxide streams referred to in paragraph 1.8 may only be considered for dumping, if -
 - (a) disposal is into a sub-seabed geological formation; and
 - (b) they consist overwhelmingly of carbon dioxide. They may contain incidental associated substances derived from the source material and the capture and sequestration processes used; and
 - (c) no wastes or other matter are added for the purpose of disposing of those wastes or other matter.

SECOND SCHEDULE

[R. 8 & 9(2)(a)]

ASSESSMENT OF WASTES OR OTHER MATTER THAT MAY BE CONSIDERED FOR DUMPING

1. The acceptance of dumping under certain circumstances shall not remove the obligations under this Schedule to make further attempts to reduce the necessity for dumping.

Waste Prevention Audit

2. The initial stages in assessing alternatives to dumping should, as appropriate, include an evaluation of –
 - (a) types, amounts and relative hazard of wastes generated;
 - (b) details of the production process and the sources of wastes within that process; and
 - (c) feasibility of the following waste reduction/prevention techniques:
 - (i) product reformulation;
 - (ii) clean production technologies;
 - (iii) process modification;
 - (iv) input substitution; and
 - (v) on-site, closed-loop recycling.
3. In general terms, if the required audit reveals that opportunities exist for waste prevention at source, an applicant is expected to formulate and implement a waste prevention strategy, in collaboration with relevant local and national agencies, which includes specific waste reduction targets and provision for further waste prevention audits to ensure that these targets are being met. Permit issuance or renewal decisions shall assure compliance with any resulting waste reduction and prevention requirements.
4. For dredged material and sewage sludge, the goal of waste management should be to identify and control the sources of contamination. This should be achieved through implementation of waste prevention strategies and requires collaboration between the relevant local and national agencies involved with the control of point and non-point sources of pollution. Until this objective is met, the problems of contaminated dredged material may be addressed by using disposal management techniques at sea or on land.

Consideration of Waste Management Options

5. Applications to dump wastes or other matter shall demonstrate that appropriate consideration has been given to the following hierarchy of waste management options, which implies an order of increasing environmental impact –
 - (a) re-use;
 - (b) off-site recycling;
 - (c) destruction of hazardous constituents;
 - (d) treatment to reduce or remove the hazardous constituents; and
 - (e) disposal on land, into air and in water.
6. A permit to dump wastes or other matter shall be refused if the permitting authority determines that appropriate opportunities exist to re-use, recycle or treat the waste without undue risks to human health or the environment or disproportionate costs. The practical availability of other means of disposal should be considered in the light of a comparative risk assessment involving both dumping and alternatives.

Chemical, Physical and Biological Properties

7. A detailed description and characterization of the waste is an essential precondition for the consideration of alternatives and the basis for a decision as to whether a waste may be dumped. If a waste is so poorly characterized that proper assessment cannot be made of its potential impacts on human health and the environment, that waste shall not be dumped.
8. Characterization of the wastes and their constituents shall take into account:
 - (a) origin, total amount, form and average composition;
 - (b) properties: physical, chemical, biochemical and biological;
 - (c) toxicity;
 - (d) persistence: physical, chemical and biological; and
 - (e) accumulation and biotransformation in biological materials or sediments.

Action List

9. The Authority shall develop a national Action List to provide a mechanism for screening candidate wastes and their constituents on the basis of their potential effects on human health and the marine environment. In selecting substances for consideration in an Action List, priority shall be given to toxic, persistent and bioaccumulative substances from anthropogenic sources (e.g., cadmium, mercury, organohalogens, petroleum hydrocarbons, and, whenever relevant, arsenic, lead, copper, zinc, beryllium, chromium, nickel and vanadium, organosilicon compounds, cyanides,

fluorides and pesticides or their by-products other than organohalogenes). An Action List can also be used as a trigger mechanism for further waste prevention considerations.

10. An Action List shall specify an upper level and may also specify a lower level. The upper level should be set so as to avoid acute or chronic effects on human health or on sensitive marine organisms representative of the marine ecosystem. Application of an Action List will result in three possible categories of waste –
 - (a) wastes which contain specified substances, or which cause biological responses, exceeding the relevant upper level shall not be dumped, unless made acceptable for dumping through the use of management techniques or processes;
 - (b) wastes which contain specified substances, or which cause biological responses, below the relevant lower levels should be considered to be of little environmental concern in relation to dumping; and
 - (c) wastes which contain specified substances, or which cause biological responses, below the upper level but above the lower level require more detailed assessment before their suitability for dumping can be determined.

Dump-Site Selection

11. Information required to select a dump-site shall include –
 - (a) physical, chemical and biological characteristics of the water-column and the seabed;
 - (b) location of amenities, values and other uses of the sea in the area under consideration;
 - (c) assessment of the constituent fluxes associated with dumping in relation to existing fluxes of substances in the marine environment; and
 - (d) economic and operational feasibility.

Assessment of Potential Effects

12. Assessment of potential effects should lead to a concise statement of the expected consequences of the sea or land disposal options, i.e., the "Impact Hypothesis". It provides a basis for deciding whether to approve or reject the proposed disposal option and for defining environmental monitoring requirements.
13. The assessment for dumping should integrate information on waste characteristics, conditions at the proposed dump-site(s), fluxes, and proposed disposal techniques and specify the potential effects on human health, living resources, amenities and other legitimate uses of the sea. It should define the nature, temporal and spatial scales and duration of expected impacts based on reasonably conservative assumptions.

14. An analysis of each disposal option should be considered in the light of a comparative assessment of the following concerns: human health risks, environmental costs, hazards, (including accidents), economics and exclusion of future uses. If this assessment reveals that adequate information is not available to determine the likely effects of the proposed disposal option then this option should not be considered further. In addition, if the interpretation of the comparative assessment shows the dumping option to be less preferable, a permit for dumping should not be given.
15. Each assessment should conclude with a statement supporting a decision to issue or refuse a permit for dumping.

Monitoring

16. Monitoring is used to verify that permit conditions are met - compliance monitoring – and that the assumptions made during the permit review and site selection process were correct and sufficient to protect the environment and human health - field monitoring. It is essential that such monitoring programmes have clearly defined objectives.

Permit and Permit Conditions

17. A decision to issue a permit should only be made if all impact evaluations are completed and the monitoring requirements are determined. The provisions of the permit shall ensure, as far as practicable, that environmental disturbance and detriment are minimized and the benefits maximized. Any permit issued shall contain data and information specifying –
 - (a) the types and sources of materials to be dumped;
 - (b) the location of the dump-site(s);
 - (c) the method of dumping; and
 - (d) monitoring and reporting requirements.
18. Permits should be reviewed at regular intervals, taking into account the results of monitoring and the objectives of monitoring programmes. Review of monitoring results will indicate whether field programmes need to be continued, revised or terminated and will contribute to informed decisions regarding the continuance, modification or revocation of permits. This provides an important feedback mechanism for the protection of human health and the marine environment.

THIRD SCHEDULE

FORM 1

[R. 9(1)]

REPUBLIC OF KENYA

KENYA MARITIME AUTHORITY

**MERCHANT SHIPPING (PREVENTION OF MARINE POLLUTION BY
DUMPING OF WASTES AND OTHER MATTER) REGULATIONS, 2021**

APPLICATION FOR A PERMIT

I hereby apply for a permit for dumping of wastes or other matter OR incineration of wastes or other matter the vessel the particulars of which are furnished in this form.

I declare that the particulars as furnished hereunder are true and correct to the best of my knowledge and belief, true and correct:

PARTICULARS

- (a) Name of Applicant.....
- (b) Type of wastes.....
- (c) Detailed description of wastes.....
.....
.....
- (d) Expiry date of previous permit (if any)

List all the attachments

- (i)
- (ii)
- (iii).....
- (iv).....

Signature of Applicant..... Date.....

Before Me:

Commissioner for Oaths/Notary Public)
 Signature of Applicant (in case of an individual))
)
)

Company Seal and Signature of two directors or a director and the Company Secretary (in case of a company)

FOR OFFICIAL USE ONLY

Entry in Register made on

...../...../..... (DD/MM/YYYY)

At..... (time)

Issuing Officer (print name)

REPUBLIC OF KENYA

KENYA MARITIME AUTHORITY

MERCHANT SHIPPING (PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER) REGULATIONS, 2021

PERMIT

ISSUED IN ACCORDANCE WITH THE PROVISIONS OF REGULATION 11(a) OF THE MERCHANT SHIPPING (PREVENTION OF MARINE POLLUTION BY DUMPING OF WASTES AND OTHER MATTER) REGULATIONS, 2021

Name of applicant

Applicant's Address

Type of waste

Description waste

Dump-site

Any other Conditions

.....

.....

Fee Paid Date.....

.....

Director-General