**SPECIAL ISSUE** 1493

*Kenya Gazette Supplement No. 158* *14th October, 2022*

*(Legislative Supplement No. 85)*

LEGAL NOTICE NO. 191

THE ENERGY ACT

*(No. 1 of 2019)*

IN EXERCISE of the powers conferred by section 208 of the Energy Act, 2019 the Cabinet Secretary for Petroleum and Mining on the recommendation of the Authority makes the following Regulations—

THE ENERGY (PETROLEUM PRICING) (REVOCATION) REGULATIONS, 2022

1. These Regulations may be cited as the Energy (Petroleum Pricing) (Revocation) Regulations, 2022. Citation.

2. The Energy (Petroleum Pricing) Regulations, 2010 are revoked. Revocation. LN 196 of 2010

Made on the 14th October, 2022

MONICA K. JUMA,
*Cabinet Secretary for the Petroleum and Mining.*

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LEGAL NOTICE NO. 192

THE PETROLEUM ACT

*(No. 2 of 2019)*

IN EXERCISE of the powers conferred by section 101(y) of the Petroleum Act, 2019 the Cabinet Secretary for Petroleum and Mining on the recommendation of the Authority makes the following Regulations —

THE PETROLEUM (PRICING) REGULATIONS, 2022

1. These Regulations may be cited as the Petroleum (Pricing) Regulations, 2022. Citation.

2. In these Regulations, unless the context otherwise requires— Interpretation.

"Act" means the Petroleum Act; No. 2 of 2019

"Authority" means the Energy and Petroleum Regulatory Authority established under section 9 of the Energy Act; No. 1 of 2019

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for petroleum;

"consumer" means any person who is supplied or entitled to be supplied with petroleum as an end user;

"consumption" means the quantity of petroleum products consumed at any given period;

"maximum retail price" means the capped retail prices of petroleum products as set by the Authority for a particular period;

"maximum wholesale price" means the capped depot gate prices of petroleum products as set by the Authority for a particular period;

"OTS" or "open tendering system" has the same meaning assigned to it in the Act;

"petroleum products" means Premium Motor Spirit (Super Petrol), Illuminating Kerosene and Automotive Gasoil (Diesel) that meet the requirements of the Kenya Standards;

"transport" means the transportation of petroleum products from the primary import or secondary storage depots by pipeline, road, rail or in navigable waters;

"pump price" means the capped price of petroleum products to be paid by a consumer at a retail dispensing site;

"primary storage" means a petroleum bulk storage depot into which petroleum products are first received at Mombasa upon importation;

"primary transport" means the transportation of petroleum from primary storage depots to secondary storage depots;

"secondary storage" means a bulk storage depot that receives petroleum products from a primary storage depot;

"retail dispensing site" means licensed premises where petroleum products are sold to consumers; and

"wholesale depot" means a facility for petroleum bulk receipt, storage, and truck loading for onward distribution and supply.

Application.

3. (1) The Authority shall determine and publish the maximum wholesale and retail prices of petroleum products on the 14th day of every calendar month.

(2) The published prices in sub-regulation (1) shall be effective on the 15th day of the calendar month and shall remain in force until the 14th day of the following calendar month.

(3) Notwithstanding sub-regulations (1) and (2), the Authority may compute and publish wholesale and retail prices of petroleum products to take into account changes in law impacting on costs of petroleum products.

(4) Except as otherwise provided, these Regulations shall apply to —

(a) Super Petrol;

(b) Illuminating Kerosene; and

(c) Diesel.

(5) The petroleum products listed in sub-regulation (4) shall be imported through the OTS and designated for consumption in Kenya.

(6) A person licensed to undertake the business of wholesale or retail of petroleum products shall not offer for sale petroleum products at a price above the published maximum wholesale and retail price respectively.

(7) A person who contravenes sub-regulation (6) commits an offence and is liable on conviction to the fine prescribed in section 124 of the Act.

## PART II —TARIFFS ON IMPORTATION AND TRANSPORTATION OF PETROLEUM PRODUCTS

4. (1) The landed cost of imported petroleum products shall be calculated and determined using the pricing formula and cost components provided in Part I of the Second Schedule. Landed costs.

(2) The Authority may vary the cost structure in the Second Schedule upon consultation with stakeholders.

(3) Any changes in the pricing structure shall be published in the *Gazette*.

5. (1) The Authority shall approve the applicable tariffs for primary transport by pipeline. Pipeline tariff.

(2) The allowable pipeline loss to be factored in the pump price shall be the actual loss approved by the Authority.

(3) The loss in sub-regulation (2) shall be capped at 0.25% of the total throughput volume in a period defined by the Authority.

## PART III— WHOLESALE AND RETAIL COST ELEMENTS AND MARGINS

6. The landed cost of petroleum products shall be determined as follows: Wholesale price.

$$C_l = \frac{\sum(V_{irp} * C_{irp})}{\sum V_{irp}}$$

$C_l$ is the weighted average cost in Kenya shillings per litre of petroleum products imported through the OTS through a gazetted primary storage depot;

$V_{irp}$ is the volume in litres of a cargo of petroleum product imported through the OTS and discharged at the port of Mombasa from the $10^{th}$ day of the previous month to the $9^{th}$ day of the pricing month;

$C_{irp}$ is the unit cost of a cargo of petroleum product imported through the OTS and discharged at the port of Mombasa from the $10^{th}$ day of the previous month to the $9^{th}$ day of the pricing month in Kenya Shillings per litre;

(2) The maximum wholesale price of petroleum products in Kenya Shillings per litre shall be determined as the sum of the

following -

$$P_w = C_l + J_{hc} + C_p + L_{ps} + P_t + L_{pt} + C_{ss} + L_{ss} + C_f + M_w + Y + T + VAT$$

Where —

$P_w$ = the maximum wholesale price

$C_l$ = the landed cost of imported petroleum products

$J_{hc}$ = the jetty handling costs

$C_p$ = the primary storage costs

$L_{ps}$ = the allowable losses on primary storage

$P_t$ = the primary transportation costs

$L_{pt}$ = the allowable losses on primary transport

$C_{ss}$ = the secondary storage costs

$L_{ss}$ = the allowable losses on secondary storage

$C_f$= the inventory financing costs

$M_w$ = the wholesale margin

$Y$ = is any other prudently incurred cost approved by the Authority

$T$ = the applicable taxes (Excluding VAT),

VAT= Value Added Tax

(a) The landed cost of imported petroleum products $C_l$, shall be calculated and determined using the pricing formula set out in Part I of the Second Schedule;

(b) $C_p$ is the primary storage tariff at Kipevu Oil Storage Facility or any other gazetted primary storage depot;

(c) $L_{ps}$ is the allowable loss factor in Primary Storage Depots;

(d) $C_f$ is the inventory financing cost for operational stocks of petroleum products;

(e) $P_t$ is the transportation cost from Mombasa to the nearest wholesale depot, which is made up of $x$ percent of pipeline tariff ($K_{pt}$) and ($100-x$) percent of road bridging cost ($K_{rd}$) as set out in Part II of the Second Schedule;

(f) $C_{ss}$ is the secondary storage depot throughput fees;

(g) $L_{ss}$ is the allowed losses in secondary storage depots;

(h) $M_w$ is the allowed wholesale margin.

Retail pump price.

7. The maximum retail price of petroleum products shall be the sum of the following –

$$P_r = P_w + T_s + M_{ri} + M_{ro} + Z + VAT$$

Where —

(a) $P_r$ is the maximum retail price of petroleum products;

(b) $T_s$ is the cost of transporting petroleum products from a secondary storage depot to a retail dispensing site;

(c) $M_{ri}$ is the retail margin corresponding to the investments associated with a benchmark retail dispensing site;

(d) Z is any other prudently incurred cost approved by the Authority;

(e) $M_{ro}$ is the retail margin corresponding to the operating costs associated with a benchmark retail dispensing site.

Publication of cost elements and pricing areas.

8. The Authority shall publish the $J_{hc}$, $C_p$, $P_t$, $C_f$, $L_{ss}$, $L_{ps}$, $T_s$, $C_{ss}$, *x-factor*, $K_{pt}$, $K_{rd}$, $M_{ri}$, $M_{ro}$, $M_w$, and the list of pricing towns from time to time.

PART IV— GENERAL PROVISIONS

Secondary storage locations.

9. The locations of wholesale depots used as secondary storage for purposes of determining the maximum wholesale and retail prices of petroleum products are as set out in the First Schedule.

Display of petroleum prices.

10. (1) A person licensed to undertake retail of petroleum products shall at all times display the applicable retail prices.

(2) A person who contravenes sub-regulation (1) commits an offence and is liable on conviction to a fine of twenty thousand shillings.

Non-disclosure of price before release.

11. (1) A person shall not disclose prices of petroleum products set under these Regulations prior to the date that such prices are to be declared by the Authority.

(2) A person who contravenes sub-regulation (1) commits an offence and is liable on conviction to the fine prescribed in section 124 of the Act.

Price determination under emergency situations.

12. The Authority shall determine the maximum wholesale and retail price of petroleum products released from the strategic stocks.

Offences and penalties.

13. Where a person defaults or contravenes any of the provisions of these Regulations for which no fine or penalty is expressly stated in the Act, the person shall on conviction be liable to the fine set out under section 124 of the Act.

# SCHEDULES

## FIRST SCHEDULE

(*r.* 9)

## WHOLESALE DEPOT LOCATIONS

The locations of wholesale depots used as secondary storage for purposes of determining the maximum wholesale and retail prices of petroleum products are:

| *Item* | *Wholesale Depot Location* |
|---|---|
| 1. | Mombasa |
| 2. | Nairobi |
| 3. | Nakuru |
| 4. | Eldoret |
| 5. | Kisumu |

## SECOND SCHEDULE

(*r.* 4(1), 4(2), 6(a), 6(e))

## LANDED COST AND PRIMARY TRANSPORTATION COST

### PART I — LANDED COST OF PETROLEUM

The landed cost of Petroleum Imports ($C_l$) shall be calculated using the formula below and as guided by the OTS.

$$C_l = \{\frac{(FOB + FP + LC)\ X\ FX\}}{1{,}000\ X\ CF} + \{IWR + KPA + SC + OL + A + I + COC + AR + D\}$$

Where -

| | |
|---|---|
| *FOB* | Free on Board price of imported petroleum products as per the OTS Agreement in United States Dollar per metric ton |
| *FP* | Freight and Premium in United States Dollar per metric ton |
| *LC* | Letter of credit charges in United States Dollar per metric ton |
| *IWR* | Insurance and War Risk charges in Kenya Shillings per litre |
| *CF* | Conversion Factor to convert Metric Ton to Cubic Metre. |
| *FX* | Foreign Currency Exchange rate for converting the cost of imported petroleum products from United States Dollars or any other foreign currency to Kenyan Shillings and which shall be the mean selling rate of leading commercial banks or any other rate as may be determined by the Authority. |
| *COC* | Certificate of Conformity charges in Kenya Shillings per litre |
| *KPA* | Kenya Ports Authority handling fees in Kenya Shillings per litre |
| *SC* | Stevedoring Charges in Kenya Shillings per litre |
| *OL* | Ocean Losses in Kenya Shillings per litre |
| *A* | Administration Fees in Kenya Shillings per litre |
| *I* | Inspection charges in Kenya Shillings per litre |
| *AR* | Analysis and Recertification charges in Kenya Shillings per litre |
| *D* | Demurrage costs in Kenya Shillings per litre |

PART II –TRANSPORT RATES TO THE NEAREST WHOLESALE DEPOT ($P_t$)

The $P_t$ will be factored as follows:—

$$P_t = (x\% \times K_{pt}) + ((100 - x\%) \times K_{rd})$$

Where $K_{pt}$ is the Pipeline tariff, and $K_{rd}$ is the Road Bridging rate

Made on the 14th October, 2022.

MONICA K. JUMA,
*Cabinet Secretary for Petroleum and Mining.*

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# MINISTRY OF PETROLEUM AND MINING

## EXPLANATORY MEMORANDUM

THE PETROLEUM (PRICING) REGULATIONS, 2022

LN 192 of 2022

## PART I

| | |
|---|---|
| Name of the Statutory Instrument: | **Petroleum (Pricing) Regulations, 2022** |
| Name of the Parent Act: | **Petroleum Act No. 2 of 2019** |
| Enacted Pursuant to: | **Section 101 of The Petroleum Act,2019** |
| Name of the Ministry/ Department: | **Ministry of Petroleum & Mining** |
| Gazetted on: | **14th October 2022** |
| Tabled on: | |

## PART II

### 1. Purpose of the Statutory Instrument

The **Petroleum (Pricing) Regulations 2022** seeks to set the legal framework for the setting of the capped petroleum retail pump price as announced by the Energy and Petroleum Regulatory Authority (EPRA). It enumerates all the parameters necessary for the determination of the pump prices.

### 2. Legislative Context

The primary regulatory objective and justification of the proposed **Petroleum (Pricing) Regulations 2022** is to make key elements of the **Petroleum Act 2019** operational by –

(i) Regulating both the maximum wholesale price and the maximum retail price;

(ii) Unbundling the supply chain to reflect changes in the supply chain infrastructure and to achieve transparency and clarity in cost identification;

(iii) Setting up a framework for review of price determination under emergency situations as may be declared by the Cabinet Secretary in charge of Petroleum;

(iv) Provide for exigencies to ensure that price capping can continue even in extreme circumstances such as recently experience Covi-19 related travel restrictions and the Russian-Ukraine invasions and their related escalation of costs;

(v) Providing for offences and penalties related to petroleum pricing;

(vi) Ensuring security of supply through a cost-reflective petroleum formula that provides for prudently incurred costs that takes care of the consumers as well; and

(vii) Providing for the display of prices so as to ensure consumer has information on current prices; and

(viii) Ensure that the petroleum pump price regulations meet the ten (10) year statutory limit set by the Statutory Instrument Act No. 23 of 2013.

## 3. Policy Background

### 3.1. What is being done and why

The Energy (Petroleum Price) Regulations, 2010 - LN 196/2010 first set the framework of establishing capped petroleum retail pump prices in Kenya. This was done under the now repealed Energy Act No. 12 of 2006. There was an amendment to the said regulations in 2012 vide LN 24/2012 to remove components of the now dormant Kenya Petroleum Refineries Limited in the pricing formula as well as set the cargo pricing cycle. The Energy (Petroleum Price) Regulations,2010 have since been revoked by the Energy (Petroleum Pricing) (Revocation) Regulations,2022 vide LN 191/2022 gazetted on 14 October,2022

The repealed Energy Act did not provide for the capping of the wholesale prices. This caused a bit of market distortion since the wholesalers would sometimes buy products at the depot at prices close to the retail prices. Further, the penalties for non-compliance was lenient.

The Petroleum Act No. 2 of 2019 enhanced EPRA's statutory mandate in relation to the setting and enforcement of the petroleum capped prices.

### 3.2. Consolidation

These Regulations seek to ensure consistency with the Petroleum Act No. 2 of 2019. Further, it seeks to ensure that the views of various stakeholders that have been shared with EPRA over the years have been considered.

These Regulations consolidate the original (now revoked) LN 196/2010 and its amendment done vide LN 24/2012.

## 4. Consultation outcome

### 4.1. Stakeholder Mapping and Stratification

The following were identified as the key action plan partners or sponsors:

i. County Governments through the Council of Governors
ii. Energy Regulatory Commission
iii. Ministry of Energy and Petroleum
iv. The National Treasury
v. State Law Office.
vi. The Kenya Bureau of Standards
vii. The Department of Occupational Safety and Health Services
viii. The Weights and Measures Department
ix. The National Transport and Safety Authority
x. National Oil Corporation of Kenya (NOCK)
xi. KPC
xii. KPRL
xiii. NTSA
xiv. KENAS
xv. Oil Marketing Companies
xvi. PIEA
xvii. KIPEDA
xviii. KIPENDA
xix. KENEPEDA
xx. KOGA
xxi. KTA
xxii. EAPTA
xxiii. KAM
xxiv. EDA
xxv. Consumer Grassroots Networks
xxvi. COFEK

Stratification of identified stakeholders according to their views are as listed in Table 1.

*Table 1: Stakeholder stratification and views*

| | Stakeholder name/ group | Stakeholder type | Views/ Concerns | Stakeholder Role | Engagement strategy |
|---|---|---|---|---|---|
| 1 | Petroleum Institute of East Africa (PIEA) | Petroleum lobby group | Cost reflective pricing regime; profitable margins | Lobby group for the petroleum industry | Exploratory meeting and to be invited in the stakeholder forums |
| 2 | Kenya Pipeline Company (KPC) | Industry player | Cost reflective pricing regime; profitable tarrifs | Government agency for primary storage and transport | Exploratory meeting and to be invited in the stakeholder forums |

| | Stakeholder name/ group | Stakeholder type | Views/ Concerns | Stakeholder Role | Engagement strategy |
|---|---|---|---|---|---|
| 3 | Kenya Petroleum Refineries Limited (KPRL) | Industry player | Cost reflective pricing regime; profitable tariffs | Government agency for primary storage and refining | Exploratory meeting and to be invited in the stakeholder forums |
| 4 | Kenya Transporters Association | Industry player | Cost reflective pricing regime; profitable transport rates; Affordable petroleum (diesel) | Lobby group for road transporters and tanker owners | Exploratory meeting and to be invited in the stakeholder forums |
| 5 | East Africa Petroleum Transporters Association | Industry Player | Cost reflective pricing regime; profitable transport rates; Affordable petroleum (diesel) | Lobby group for road transporters and tanker owners | To be invited in the stakeholder forums |
| 6 | Office of the Attorney General | Government | Legally sound regulations | Government Attorney and Legal Advisor | Co-opted in the review exercise |
| 7 | County Governments/ Council of Governors | Devolved Government Units | Affordable petroleum prices | Devolved Government units; Consumers and | Exploratory meeting and to be invited in the stakeholder forums |
| 8 | Kenya Law Reform Commission | Government | Legally sound regulations | Government Agency | Co-opted in the review exercise |
| 9 | Consumer Federation of Kenya (COFEK) | Civil society/ consumer protection | Affordable petroleum prices | Lobby group for consumers | Invite them during public stakeholders' consultative forums |
| 10 | Institute of the Engineers of Kenya | Engineers/ expert group | Affordable petroleum prices for the manufacturing and construction industry | Professional Association for Engineers | To be invited in the stakeholder forums |
| 11 | Petroleum product importers, wholesalers and retailers | Industry players | Cost reflective pricing regime; profitable margins | Active players in the industry's supply chain | To be invited in the stakeholder forums |
| 12 | Kenya Revenue Authority (KRA) | Government | Ease of tax collection and increased Government revenues | Government agency for revenue collection | Exploratory meeting and to be invited in the stakeholder forums |
| 14 | Kenya Ports Authority (KPA) | Government | Coherent and harmonious petroleum industry operations | Government active in the facilitation of scheduling and berthing of petroleum marine vessels | Exploratory meeting and to be invited in the stakeholder forums |

| | Stakeholder name/ group | Stakeholder type | Views/ Concerns | Stakeholder Role | Engagement strategy |
|---|---|---|---|---|---|
| 17 | Kenya Association of Manufacturers (KAM) | Industry Player | Affordable petroleum prices | Lobby group for the processing and manufacturing industry | To be invited in the stakeholder forums |
| 18 | Kenya Private Sector Association | Industry Player | Affordable petroleum prices; predictable Government policies and legislative framework; Investor friendly policies | Lobby group for the private sector | To be invited in the stakeholder forums |

EPRA shared the draft regulations with key stakeholders on the key recommendations prior to approval by EPRA Board. These comments were discussed extensively in subsequent Technical Committee (TC) meetings.

Within the fourty (40) days after the draft regulations were published in the Kenya Gazette on 31st December 2020, EPRA held a public stakeholder workshop at various locations in the country namely: Nairobi, Mombasa, Kisumu, Nanyuki, Nakuru and Eldoret. The comments that were received from the public both in written and verbal were recorded reviewed in subsequent TC meetings before developing the final draft regulations.

### 4.2. Cost – Benefit Analysis (CBA)

The cost and benefits of the regulations were analysed as listed in Table 2.

*Table 2: Cost-befit analysis*

| | Aspect | Result | Effect | Impact | Management |
|---|---|---|---|---|---|
| 1. | Determination and publication of wholesale prices | Reduced cases raiding into the margins of retailers and other wholesalers along the supply chain | Positive | Transparency of costs along the supply chain. | None |
| 2. | Capping of pipeline losses | Efficiency by the pipeline operator | Positive | Reduced costs passed on to the consumer | Monitoring |
| | | Stable Operating Business Environment | Positive | Setting of petroleum prices within a specified period will assure stability of prices within that | Monitoring |

| | Aspect | Result | Effect | Impact | Management |
|---|---|---|---|---|---|
| | | | | period hence increasing predictability of business operating environment and in particular business that are dependent on petroleum products such as transport | |
| 3. | Requirement to display petroleum pump prices | More transparency and of petroleum prices | Positive | Competition amongst the players | Monitoring |
| 4. | Providing for price determination under emergency situations | Providing for security of supply | Positive | Ensures more predictable operating business environment | None |
| 5. | Unbundling of the petroleum supply chain. | Ensures only efficient players participate in a particular segment | Positive | Results in healthy competition and quality of service to consumers | Monitoring |
| | | Quality of service | Positive | The Regulations will ensure uniform petroleum prices therefore for the firms to retain competitive edge, they would be required to improve the quality of service. | |
| | | Provides clarity of the proposed cost build-up of petroleum products | Positive | Results in overall cost reduction in petroleum prices | Monitoring |

## 5. Guidance

The application of these Regulations will be guided by an approved Petroleum Pricing Model in Microsoft Excel format to be developed by EPRA and will be shared to the petroleum industry. The model will capture all the costs as stipulated in the regulations and aid in converting all the costs and parameters to Kenya Shillings per liter of the petroleum grade of interest.

## 6. Impact

There were regulations covering petroleum prices, namely the Energy (Petroleum Pricing) Regulations, 2010 - LN 196/2010 (now revoked). The changes seek to align the proposed draft regulations to the provisions of the Petroleum Act No. 2 of 2019.

### 6.1. Effect on the general public

The proposed regulations substantially mirror the Energy (Petroleum Pricing) Regulations ,2010 LN 196/2010 save for few areas where the amendments are intended to align the regulations with the Energy Act,2019 and the Petroleum Act,2019.

The Regulations will increase the level of transparency in computation of petroleum prices.

### 6.2. Effect on the private sector

The private sector will have a clearer understanding on how the regulated petroleum prices are build-up. This will help in planning and making of economic decisions.

The Regulations will ensure protection of the interests of both the consumers and investors as stipulated in the Energy Act 2019 and Petroleum Act 2019.

### 6.3. Effect on fundamental rights and freedoms

The Bill of Rights enumerates the fundamental rights and freedoms accorded to every Kenyan. There are however no anticipatable negative impacts on fundamental rights and freedoms that would be unduly effected by the passing of the proposed regulations. The regulations will provide parameters detailing fuel price components which information is relevant to the consumers as envisaged under the Constitution.

### 6.4. Statement on Regulatory and Non-Regulatory Options

#### 6.4.1. Option 1: Maintaining the Status Quo

Status quo would mean the existing Regulations remain as outlined in the Energy (Petroleum Pricing) Regulations, 2010 which have been in place for the last 10 years. However, the Statutory Instruments Act of 2013 require that Regulations should be reviewed from time to time and should not exist for more than 10 years without a review since the regulated environment is dynamic. Further, there would be inconsistency with newly enacted Petroleum Act No. 2 of 2019.
Maintaining the *status quo* is not a feasible option as it would not allow for improvements to be made to the current regulation, namely

i. Remove lack of transparency in the cost-build up;

ii. Define and demarcate business and investment segments; and

iii. Introduction of wholesale prices as required by the Petroleum Act 2019

**This therefore NOT PREFERRED OPTION.**

### 6.4.2. Option 2: Passing the Regulations

Passing the proposed pricing regulations will align the existing regulations with the *Petroleum Act 2019* and in turn provide transparent petroleum price setting methodology. Further, the Regulations will provide a stable business operating environment thereby attracting and retaining investors.

This is the **PREFERED OPTION** since it addresses the requirements listed in the Petroleum Act 2019 as addresses current and future goals of the petroleum sector.

### 6.4.3. Option 3: Other practical options

The following alternative options were considered:

#### 6.4.3.1. Alternatives to regulation

***Incentives:*** The petroleum sector has established structures, however the Cost of Supply of Service of Petroleum Products (COSSOP) study identifies inefficiencies and a lack of transparency. Therefore, interventions such as economic incentives by government prove to be difficult in realizing the desired objectives. Moreover, such interventions would need to be governed by distinct regulations and the establishment of a framework which may have additional costs.

#### 6.4.3.2. Alternative models of regulation

(i) **Self-regulation:** Industry players and stakeholders may be empowered to make their own decisions and determine the maximum wholesale and retail prices without the intervention of EPRA's recommendations and the CS. There are however potential risks to this which includes abuse and collusion. Access to information by the public may also be hampered as the ability to use such information may vary within communities and may not be accessible to all members of the public. The downside of this is that the pricing methodology is complex for the consumers, leading to extended periods of engagement.

(ii) ***Remove price-capping:*** Allow market forces to determine the prices of petroleum prices. However, there is danger of market failure such as pump prices may not mirror the trends of movements of prices in the international market. That is, prices may drop internationally, but remain high locally for a long time.

*(iii)* ***Co-regulation:*** The Government will set prices and enforcement would be done by the industry players or a professional organization and who are accredited by the Government.

On their own, the non-regulatory options would be less effective, not enforceable or result in an increased cost to government (particularly costs associated with more intensive monitoring of compliance with the Act).

**This is NOT A PREFERRED** option as weighed in the context of the need to operationalize objectives of the Petroleum Act 2019.

## 7. Monitoring and review

The costs listed in the Regulations and the business fundamentals are likely to change over the period of implementation. To ensure that the Regulations continue to meet the needs of the stakeholders, a Cost of Service for the Supply of Petroleum (COSSOP) products in Kenya has been proposed. Table 3 below shows the time for these and other interventions.

*Table 3: Monitoring and Evaluation Framework*

| | Activity | Action Party | Time | Resources |
|---|---|---|---|---|
| 1 | Comprehensive COSSOP | EPRA, petroleum Industry | Dec 2025 (once every 5 years) | KShs. 40 m |
| 2 | Consumer sensitisation campaigns | EPRA, Consumers | Annual | KShs. 5 m |
| 3 | Stakeholder Consultations | EPRA, Petroleum Industry, Consumers | Once every 2 years | KShs. 10 m |
| 4 | Enforcement of the provisions of the Regulations | EPRA | Routine | KShs. 5 m per annum |
| 5 | Publish retail and wholesale price capping | EPRA | Monthly | KShs. 500,000 per month |

It is proposed that this will be monitored annually for supplier margins and storage and distribution costs. A detailed review will be undertaken in five (5) years to ensure continued relevance of the regulations to the industry needs.

## 8. Contact

The name of the Director General of EPRA appearing below can answer anay question in relation to the Regulations

**Name:** Daniel Kiptoo Bargoria, OGW

**Agency:** Energy and Petroleum Regulatory Authority

**Tel:** +254 020 2847000/ +254 734 41433

**email:** Daniel.Kiptoo@epra.go.ke

# REGULATORY IMPACT STATEMENT (RIS)

# THE PETROLEUM (PRICING) REGULATIONS, 2022

## OCTOBER,2022

**Introduction**

The Regulatory Impact Statement for the *Petroleum (Pricing) Regulations, 2022* was prepared in accordance with the provisions of sections 6 and 7 (1) and (2) of the *Statutory Instruments Act*, 2013 (No. 23 of 2013). Section 6 of the Act requires the regulation making authority to prepare a regulatory impact statement for the proposed regulations indicating the costs and benefits of the proposed regulations on the public and stakeholders. Sections 7(1) and (2) of the Act set out the contents of a regulatory impact statement for the proposed regulations as follows:

## 1.0 A Statement of the Objectives and Reasons for the Proposed Regulations

The main objective of any regulation is to improve the environment for business, community and government that cannot be improved through existing business and social institutions and mechanisms. The primary regulatory objective and justification of the proposed *Petroleum (Pricing) Regulations 2022* is to make key elements of the *Petroleum Act 2019* operational by –

i. Regulating both the maximum wholesale price and the maximum retail price;

ii. Unbundling the supply chain to reflect changes in the supply chain infrastructure and to achieve transparency and clarity in cost identification;

iii. Specifying a review of all the cost elements and margins in the pricing formula;

iv. Specifying a review process of the pricing principles to reflect changes in the supply chain and the market;

v. Rationalization of wholesale and retail margin allocations;

vi. Justifying costs in the pricing formula thus ensuring consumer protection from possible market abuse; and

vii. Ensuring investors' returns on investments (ROIs) are reasonable.

## 2.0 Statement on the Effect of the Proposed Regulations

There are some general aspects of the current regulations, which do not allow for responsiveness to the changing industry or regulatory requirements. The current regulation is static, meaning that it has not addressed the changing shape of the petroleum sub-sector to take into account the evolved supply chain. Additionally the current regulation can be improved with regards to transparency and clarity on the true cost build-up of products. The proposed *Petroleum (Pricing) Regulations 2022* are expected to be more responsive to the changing petroleum sector environment.

### 2.1 Effect on the public sector

EPRA will have a transparent and clear framework in the build-up of the monthly wholesale and retail maximum prices.

## 2.2 Effect on the private sector

The private sector will have a clearer understanding on how the regulated petroleum prices are build up. This will help in planning and making of economic decisions.

## 2.3 Effect on fundamental rights and freedoms

The Bill of Rights enumerates the fundamental rights and freedoms accorded to every Kenyan. There are however no anticipatable negative impacts on fundamental rights and freedoms that would be unduly effected by the passing of the proposed regulations. The regulations will ensure consumers of petroleum and petroleum products have affordable, quality and safe products to consume as required in Article 46 of the Constitution.

## 3.0 Statement on Regulatory and Non-Regulatory Options

## 3.1 Option 1: Maintaining the *Status Quo*

Prior to any consideration of new interventions, it is imperative that due consideration be made as to whether the shortcomings of the current regulations could be resolved by implementing changes to practices within the existing legislative and regulatory framework and thus maintain the *status quo*. These interventions include –

(a) Making use of the current regulation;
(b) Simplifying or clarifying the current regulation; and/or
(c) Improving enforcement of the current regulation

## 3.2 Option 2: Passing the Regulations

The Ministry of Petroleum and Mining (MoPM) can achieve its policy objectives through non-monetary intervention such as regulation. Regulations facilitate the establishment of rules and helps to benefit the public, petroleum businesses and the environment, stabilizing the petroleum markets and addressing market failures to support economic growth. Regulation however can also be burdensome for petroleum businesses and the public sector. Moreover, regulations can be overused, inadequately designed or implemented, restrain competition and growth within the petroleum industry

These regulations are intended to operationalize the *Petroleum Act 2019* and provide clarity and specificity to assist in the implementation of the law. Therefore, passing the proposed *Petroleum (Pricing) Regulations 2022* will achieve the following –

i. Achieves aim of providing price setting methodology.

ii. Assist the Ministry in making policies and decisions that reflect the reality and landscape of the midstream and downstream petroleum subsector.

iii. Improves certainty of operating environment, with aligned and well understood guiding principles.

iv. Improves emphasis on long-term consumer outcomes as key guiding factor in all decisions made under the proposed legislation.

## 3.3 Option 3: Other practical options

Other alternatives to regulation may include information and education, market-based structures, co-regulation and self-regulation. Moreover, the current and existing policies could be modified without further regulation. Such approaches may be beneficial or detrimental for the petroleum business and the economy than an equivalent regulatory measure.

**1. Alternatives to regulation**

(i) *Non-intervention:* This includes the use of the current regulations, simplification or clarification to the current regulations; improving enforcement of the existing regulation thus maintaining the status quo.

(ii) *Education and Information:* Industry players and stakeholders may be empowered to make their own decisions and determine the maximum wholesale and retail prices without the intervention of EPRA's recommendations and the CS. There are however potential risks to this which includes abuse and collusion. Access to information by the public may also be hampered as the ability to use such information may vary within communities and may not be accessible to all members of the public.

(iii) *Incentives:* The petroleum sector has established structures, however the Cost of Supply of Service of Petroleum Products (COSSOP) study identifies inefficiencies and a lack of transparency. Therefore interventions such as economic incentives by government prove to be difficult in realizing the desired objectives.Moreover, such interventions would need to be governed by distinct regulations and the establishment of a framework which may have additional costs.

**2. Alternative models of regulation**

(i) *Self-regulation*: Self-regulation is a mechanism that can be used within a regulatory framework as an alternative to statutory regulation, to achieve a particular outcome through a change in behavior. It typically involves industry and/or professionals developing voluntary agreements or standards, pledges, codes of practice, certification and accreditation schemes, to regulate behavior or standards to achieve a particular outcome. Self-regulation provides an alternative to statutory regulation. It can be a more agile form of regulation in that it can be put in place faster, can be more flexible and adaptable to introduce and update, and requires a commitment from those involved.

*(ii)* *Co-regulation:* Co-regulation is an intermediate step between state-imposed and self-regulation that involves some degree of explicit MoPM/EPRA involvement where the petroleum sector may work with the MoPM/EPRA to develop a code of practice and enforcement would be by the OMCs or petroleum sector players or a professional organization and accredited by the Government.

## 4.0 Cost – Benefit Analysis (CBA)

### 4.1 Distribution of Impacts: Economic, Social and Environmental

*Economic impacts of the Regulations will include:*

i. **Price Regulation:** Regulation of prices, in line with the proposed regulations, will ensure that wholesale and retail prices will reflect the costs in the supply of petroleum products.

*Social impacts of the Regulations will include:*

i. **Transparency:** Transparency is an important tool in fighting corruption (SDG16), which widens inequality (SDG10), which is linked to higher poverty levels (SDG1), child mortality rates (SDG3), lower school-graduation rates (SDG4) and increased gender inequality (SDG5). Corruption can create additional obstacles to accessing food (SDG2) and clean water for the poorest citizens (SDG6). Corruption frequently diverts resources, increases political instability and deters foreign investment which, in turn, inhibits infrastructure development (SDG9) and creates more dangerous work environments (SDG8). It can also distort market incentives, undermining responsible production and consumption (SDG12) and subverting environmental regulations (SDG14 &15).

ii. **Increased efficiency:** Improvements in transparency in terms of tariffs and levies paid and their effect on the cost-build up to the end-consumer, government policy, decision-making and operations.

iii. **Empowerment:** Consumers empowered in regards to consumption choices (transparency and clarity of price formula, display of prices etc.), leading to improved health and welfare.

iv. **Information and Statistics:** The consumer and other stakeholders will benefit from the availability of contemporaneous data and statistical resources furnished by public and private entities.

*Environmental impacts of the Regulations will include:*

There are no anticipated impacts on the environment.

### 4.2 Administration and Compliance Cost

The Regulatory Impact Assessment (RIA) noted that the proposed regulations may result in an increase in compliance costs for public authorities and Kenyan society at large. These changes may occur in 'set-up' costs or in 'ongoing costs' associated with the changes and include the following:

i. **Administration:** MoPM and EPRA will incur costs through administration, capacity-building, education, development of implementation guides and monitoring of the proposed *Petroleum (Pricing) Regulations 2022.*

ii. **Education and Public Information:** The implementation of the proposed regulations will require stakeholders to familiarize themselves with the provisions of the regulation. Therefore the education and information awareness for the regulations to the different stakeholders in the petroleum sector and the general public at large through the development and publication of guidance material for regulated parties may be required.

iii. **Enforcement and Compliance:** EPRA will incur costs associated with enforcement such as the costs of investigations, issuance of advisory circulars, Orders and other penalties for non-compliance.

iv. **Information Disclosure:** Additional reporting costs for petroleum business licensees.

v. **Penalties:** Strict penalties for failure to comply.

### 4.3 Benefit

This RIS observes that the passing and further operationalization of the proposed *Petroleum (Pricing) Regulations 2022* will be critical in facilitating the further development of the petroleum sector with an improved level of transparency reflecting the current state of the petroleum sector. The broad potential benefits that will result from the implementation of the proposed regulations include -

i. **Efficiency:** Improved system and implementation framework for the Ministry providing more effective regulation of the pricing of petroleum and petroleum products.

ii. **Unbundling the Supply Chain:** The unbundled of the supply chain will reflect the changes that have taken place of previously vertically integrated business to the current multiple licensed players.

iii. **Predictive capabilities:** Improved predictions and forecasting from a transparent and clear pricing model will enhance the Ministry's predictive capabilities in terms of policymaking

iv. **Linkages with other proposed regulations:** The proposed regulations will streamline and organize the petroleum sector (in line with the proposed *Petroleum (Importation of Petroleum) Regulations 2022* and the *Petroleum (Operation of Common User Petroleum Logistics Facilities) Regulations 2022)* for better functioning, enhanced efficiency and development of the petroleum sector.

v. **Situational Awareness:** Increased situational awareness and response by industry players in understanding pricing trends.

vi. **Forecasting:** Improved predictions and forecasting facilitating more proactive responses by petroleum sector businesses.

vii. **Review and Currency:** Deliberate effort has been made to ensure that both the pricing formula and the pricing principles are reviewed to improve and ensure enhanced market efficiencies, transparency and the ease of doing business.

viii. **Rationalization of the wholesale and retail margins:** The balanced correction in the wholesale and retail margins will reduce the over-recovery of margins in the wholesale segment, which has been at the expense of the retail segment where the bulk of investments rests.

ix. **Compensation:** The unbundling of the supply chain i.e. splitting the Retail Margin into Retail Investments and Retail Operations will compensate for both capital and operational investments

x. Inventory financing has been introduced to cover the cost of financing of the statutory minimum operational stocks.

## 5.0 Reasons why other Regulatory Options are not Appropriate

### 5.1 Option 1: Maintaining the *Status Quo*

Maintaining the *status quo* is not a feasible option as it would not allow for improvements to be made to the current regulation: --

i. lacks transparency in the cost-build up and lacks defined and demarcated business and investment segments;

ii. does not take into account the supply chain changes from vertical business integration to the current multiple licensed players.

iii. Current regulation only regulates the maximum retail prices, the Petroleum Act 2019 allows for the regulation of both the wholesale and retail prices

**Not preferred** as does not sufficiently meet certain requirements imposed by the new *Petroleum Act 2019.*

### 5.2 Option 2: Passing the Regulations

Strong integration and alignment with Petroleum Act 2019 and support for petroleum sector policy.

**Preferred** for Petroleum Act 2019 as addresses current and future goals of the petroleum sector.

### 5.3 Option 3: Other Practical Options

On their own, the non-regulatory options would be less effective, not enforceable or result in an increased cost to government (particularly costs associated with more intensive monitoring of compliance with the Act).

**Not preferred** as weighed in the context of the need to operationalize objectives of the Petroleum Act 2019.

## 6.0 Conclusions

MoPM considered all the alternatives and sought to balance the benefits to consumers, the burden to businesses and the purposes of the Petroleum Act 2019. MoPM considers that a regulatory approach, as opposed to a non-regulatory approach, if effectively implemented through the proposed regulations, is best placed to achieve its policy objective to contribute to an improved operating environment that advances the development and stability of petroleum and petroleum product prices within the petroleum sector in Kenya.

## 7.0 Recommendation

The Regulatory Impact Assessment therefore recommends passing and operationalization of the proposed *Petroleum (Pricing) Regulations 2022*.