Tool 1c: Red Flags to Assess and Monitor Capture Risks

A red flag is a warning of a possible hazard. "Capture" can be understood to occur when discretionary decision-making or policy processes become systematically distorted or biased in favor of some interests over others due to structured imbalances in power and influence.

Captured legal frameworks, regulatory agencies, and policy processes serve **vested interests** but with the power, permanence, and legitimacy associated with government. The resulting effects are therefore quickly established in a given system and may be difficult to revoke.

Tool	An illustrative list of red flags is provided to help **WSI participants** identify and respond to WSI-specific hazards relating to organizations unduly dominating a policymaking process, or otherwise capturing public resources or institutions for private benefit.
Related Key Activity	Assess likelihood of capture risks and establish mechanisms for monitoring and oversight.
Purpose	Help to scan an initiative to avoid capture risks: ✓ Know when a WSI diverts public resources and priorities. ✓ Prevent misuse of the WSI as a platform for undue influence over the water sector.
Possible Users	**WSI initiators**, funders, watch dogs, and other interested parties, **WSI participants**, and **affected stakeholders**.
Level of Effort	Scanning by individual participants of red flags to a participatory analysis.
WSI Phase	2: Formalization.

Depending on the applicable laws under which they are established, companies and their management have varying degrees of legal duty to serve the interests of owners or shareholders.[1] This may bias decisions, debate, and action relating to water resources in favor of corporate over **public interests**. Precedent shows that the threat of capture is real, and guarding against actual or perceived corporate capture is therefore critical to integrity management of WSIs. If not handled carefully, perceived or actual capture risks can derail the WSI and cause reputational harm for all **WSI participants**.

Which contextual factors increase capture risks?

- Political imperatives to attract investment, masking associated environmental or social trade-offs
- Insufficiently resourced public sector
- Weak public, parliamentary, and media oversight
- Opaque decision-making processes and organizational functioning

Why is it hard to discern and guard against capture risks?

- The boundaries between legitimate lobbying and nefarious capture are blurred.
- Capture tends to work through subtle rather than mechanistic processes.
- Capture operates along a sliding scale of influence rather than in a binary state.
- Capture is not necessarily conscious and intended.
- Related guidance or academic study is sparse.

[1] Peter Newborne and Nathaniel Mason, "The Private Sector's Contribution to Water Management: Re-examining corporate purposes and company roles," *Water Alternatives* 5 (2012): 603–618.

The inference is that capture, or the perception of capture, is a particular risk in developing countries, where poverty and lack of resources introduce numerous power imbalances between disparate stakeholders and government. The often much greater level of access to resources, information, and influence enjoyed by the private sector and donor agencies over both government and other stakeholders predisposes policy engagement in developing countries toward capture.

To identify capture risks, practitioners need to examine how their WSIs could be misused as a platform to mislead representatives of public institutions or divert the attention of public officials in favor of **vested interests** instead of acting in the **public interest**. A review of the potential red flags listed in Table 4 suggests that most WSIs pose structural risks of capture. This is not to infer that these WSIs should not be pursued, but instead that all participants should be clear about capture risks and that locally appropriate strategies to counter **policy capture** need to be prioritized. Avoiding **policy capture** requires proactive strategies and on-going management. Because of the wide diversity and complexity of capture risks, mitigation is a nonstandard task and requires an interpretive, context-specific response.

Guidance for implementation

The red flags listed in Table 4 can be used in different ways:

- Individual **WSI participants** and **affected stakeholders** can use the red flags as an orientation to scan an initiative for capture risks.
- The red flags can be discussed pro-actively within a WSI to raise awareness of capture risks and to engage in a dialogue on what constitutes capture in a given WSI and how it can be mitigated.
- The red flags can be used to thoroughly assess capture risks as part of an integrity risk assessment (see Tool 1a) or a wider risk management effort.

To address the subjective nature of capture risks, a collective analysis by a balanced group of stakeholders increases the reliability of the results. Information from a detailed context analysis (see Tool 5) can provide additional information to evaluate capture risks.

The four steps laid out below provide an outline for a participatory approach to address capture risks in a WSI.

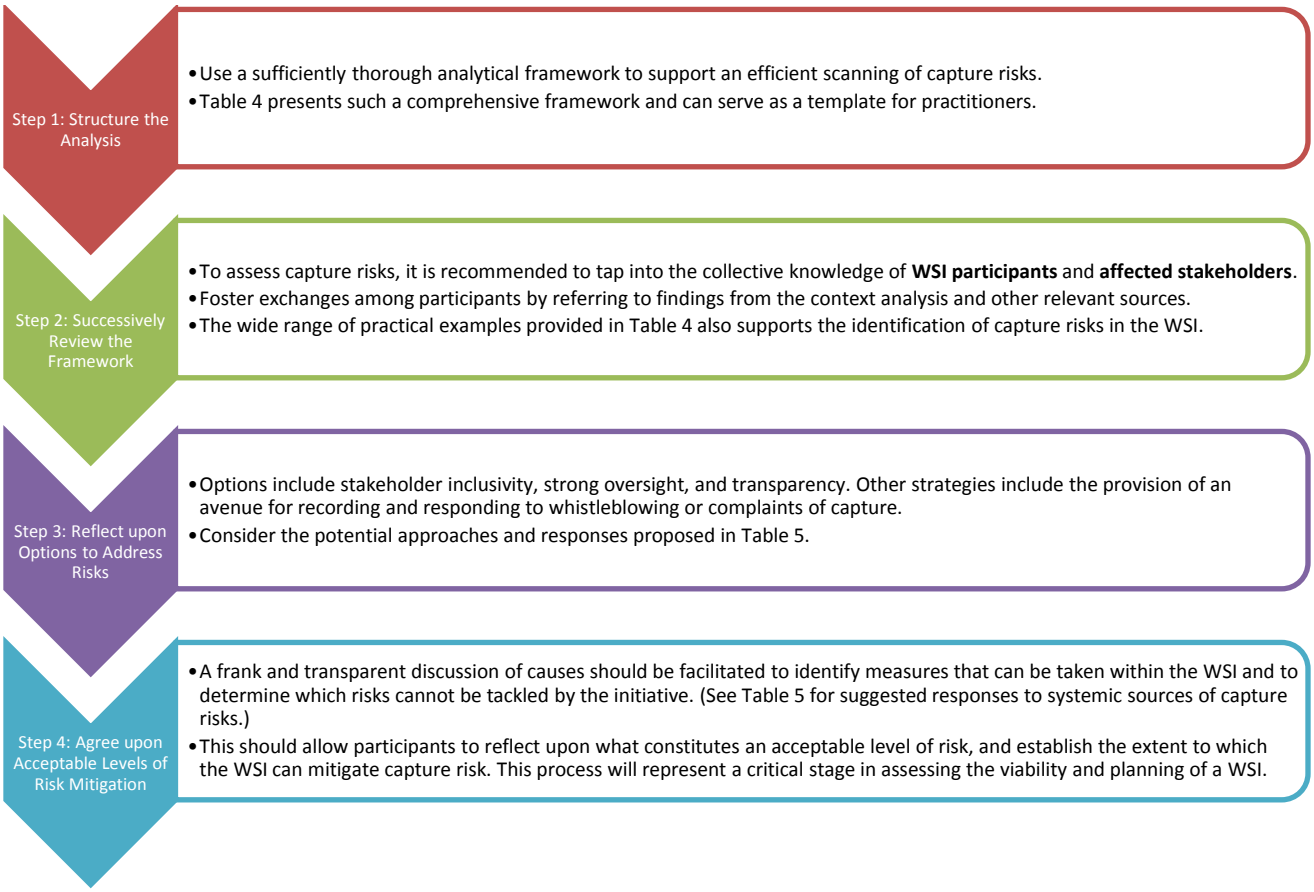

Table 1: Capture Red Flags for WSIs

Type of capture	Description	Capture Red flags — WSI vulnerabilities
Policy and legislative capture	**Policy and legislative capture** exist where private organizations unduly dominate a policy or law-making process, excluding or shadowing other stakeholder's views, and resulting in policy formulations or legal provisions that favor **vested interests** to the detriment of the **public interest**. Changing related advocacy objectives will depend on interests represented in the WSI and its composition. There is a risk that they promote private rather than societal benefits, and result in preferential treatment for companies.	WSIs: •Engaged with policy and/or law-makers •Convening on water policy and governance •Involved in policy analysis and advocacy •Conducting research and developing statutory, policy, or financial models and frameworks.
Regulatory capture	**Regulatory capture** occurs where the agency responsible for regulation is unduly influenced by or unduly favors the interests of certain stakeholders. This can result in favorable handling, such as failure to vigorously enforce regulations, or inconsistent, nonproportional, or selective enforcement. Unconscious **regulatory capture** — or undermining of regulatory rigor — may also result from WSIs that lobby for improved regulatory processes, which can result in an	WSIs that: •Concern the establishment of rules for resource use •Concern the enforcement of environmental (or other related) law •Raise funds, debate, and advocate on regulatory performance •Build capacity, mobilize, or transfer

	incomplete or fast-tracked determination of regulatory permissions.	resources to regulatory bodies •Frequently see regulators in person and draw up regular association or cooperative agreements.
Public resource capture	**Public resource capture** occurs where public resources — whether civil servant staff time, political or organizational attention, or departmental budgets — are diverted to serve a narrow group of interests at the expense of the wider societal or **public interest**. For example, concerns voiced by powerful WSIs about potential public infrastructure investments with limited public benefit may divert limited budgets away from pre-existing priorities such as the less visible water access, sanitation, and hygiene (WASH) needs of the poorest communities. **Public resource capture** would also prevail where a WSI negotiates the disproportionate use of public funds to deal with the externalities or costs associated with water use by a private interest (e.g., in negotiating investment in the treatment of private wastewater, contaminated land, or mine water).	WSIs that: •Deplete the time, energy, and resources of an overstretched public agency (or civil society group) to address an issue of primarily private interest that has little consequence for the wider public •Result in government expenditure or local budgets •Concern investment, development, and/or operation and maintenance of infrastructure •Involve or directly influence the workload of senior or mid-level civil servants.
Organizational capture	Organizational capture occurs where the functions or effectiveness of a legitimate organization with a key role in resource management or governance is undermined or dominated by an intervention and engagement with a WSI or its participants. Organizational capture can be real or perceived, and can undermine the credibility and effectiveness of institutions in the long term. For example, a water user association or basin council established with support from a company may be seen to be "bought" or biased.	WSIs that: •Establish or bring together groups of stakeholders in any organized format, particularly where this is in parallel to pre-existing entities •Fund, sponsor, or support the establishment of an organization, association, council, committee, or other grouping.
Process capture	Process capture concerns the undue influence or control of certain interests in deciding and designing "how things are done" with the end result that outcomes are skewed and distorted toward the needs or perspectives of narrow particular or private interests versus wider **public interest**. Process capture is about how things are done, the questions asked, who is in the room, how decisions are made, and the degree of control handed to those who are funding the initiative: "He who pays the piper calls the tune." Process capture can also stem from sheer contrasts in stakeholders' capacities to negotiate WSI rules and effectively participate in WSI processes, and thus depends on the extent to which the	In WSIs whose: •Engagement is by invitation only or involves an element of "pay-to-play" or pre-selection in membership •Governance group is self-selecting and unbalanced in representation or perspectives •Stakeholder participation in developing the WSI, framing the issues, decision-making, stakeholder composition, and process design is weak •Financing is dominated by individuals or a small number of interest groups.

	WSI strives to build such capacities in all participants (e.g., partners' representatives) from the onset.	
Narrative or ideational capture	Narrative or ideational capture refers to the subtle power exerted through influence on the way things are portrayed or described and the development of concepts, theories, and ways of looking at the world. For example the "shared risk" narrative around WSIs plays down the disparities in vulnerability, power, and access among water-using interests. Narratives around water pricing and allocating water toward the highest monetized value uses is a further example of ideational power that can result in legitimizing or advancing private interests ahead of the **public interest**, because it is difficult to assign a monetary value to cultural, social, and environmental values.	WSIs that: •Finance or develop research and conceptual development •Involve "awareness raising," training, capacity building, and outreach •Promote potentially inappropriate or controversial approaches to **water governance** such as offsetting or net impact, water trading, pricing, charging and allocation reform, water funds, large-scale rainwater harvesting or groundwater recharge, large-scale infrastructure, and payment for ecosystem services.
Human resource capture	The "brain drain" is where the most qualified and capable local, national, or regional practitioners and staff are employed or seconded into NGOs, donors, and corporations engaged in WSIs in duties peripheral to water management, rather than into water management agencies in government, because of better pay and conditions or allowances. Human resource capture also involves the creation of loyalties and privileged relationships between private interests and government staff by offering professional opportunities, secondments, training, and other inducements. The payment of per diems and other allowances is an example that erodes the independence and neutrality of civil servants. One of the greatest limiting factors for good **water governance** and **sustainable water management** is the availability of suitably experienced and motivated personnel. Although involving government staff in WSIs can help build capacity, human resource capture is a primary concern relating to WSIs.	WSIs that: •Employ or second staff and experts from the public sector •Provide attractive professional opportunities such as training and overseas missions •Pay participants allowances and inducements for their involvement.
Water resource capture	The most basic form of capture involves acquisition of additional or privileged access to the water resource itself. As a result of other forms of capture, there is a risk that private interests negotiate or seize water resource access and use, undermining the ability of other users — the public or the environment — to meet their own needs, particularly in times of shortage, conflict, or drought. A good example may result from private investment in public water infrastructure based on conditional agreements around	WSIs focusing on: • Investment, development, operation, and maintenance of infrastructure • Water offsetting, compensation, net impact, Payment for Ecosystem Services; • Water use planning and allocation regimes.

	the continuation of supply during times of drought. Another example may be the long-term establishment of offsetting provisions in law that effectively allow water access to be bought by those able to pay, thereby undermining the principle of water allocation based on greatest public benefit.	

Table 2: Approaches to Mitigating Capture Risk

Potential responses to tackle red flags
1. Participatory and inclusive WSI initiation, development, and integrity risk assessment processes that include the full range of stakeholder interests with adequately diverse perspectives and experience to identify potential risks.
2. A carefully developed and clearly articulated development path or **theory of change** for the WSI that transparently sets out its intended impacts, outcomes, outputs, and roles of **WSI participants**, against which progress is publicly tracked and communicated.
3. Diverse representation at a governance and senior decision-making level of WSIs and avoidance of **stakeholder engagement** that is either selective or discretionary, or that requires payment or significant resources to participate.
4. Cognizance of and adherence to mutually agreed public and private roles within the initiative.
5. Sufficient strategic alignment so that public sector involvement in the WSI is derived from public funds and pre-existing budgets rather than sourced by the private or NGO sectors.
6. Clearly benchmarked and communicated policies for remuneration or payments of costs and allowance, with the latter based on reimbursement of real and receipted expenditure.
7. Independent oversight or scrutiny of the WSI by a credible and legitimate organization or body.
Addressing systemic sources of capture risk
1. Publicly accessible and auditable codification and guidance for the application of statutory powers (e.g., an enforcement policy that sets out factors used to determine proportional and consistent responses to non-compliance; water allocation and permit application determination processes).
2. Investment in water policy literacy in the media and wider public.
3. Independent and untied funding sources for civil society and academic engagement in **water stewardship**, and investment in social accountability monitoring.
4. Strengthening the separation of powers and checks and balances among judiciary, executive, and legislature and the oversight role of parliamentary committees.
5. Human resourcing strategies within donor, NGO, and private sector actors in developing countries that recognize and respond to the hazards of draining public sector expertise.
6. Nurturing professional retention and workplace motivation through new forms of capacity building.

Further reading:

- CEO Water Mandate. November 2010. *Guide to Responsible Business Engagement with Water Policy*. http://ceowatermandate.org/files/Guide_Responsible_Business_Engagement_Water_Policy.pdf .

- Integrity Vice Presidency. (no date). *Fraud and Corruption Awareness Handbook — How it works and what to look for: A handbook for staff*. Washington DC: The World Bank Group. http://siteresources.worldbank.org/INTDOII/Resources/INT_inside_fraud_text_090909.pdf.