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REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT – SECOND SESSION – 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES
DEPARTMENTAL COMMITTEE ON BLUE ECONOMY, WATER AND
IRRIGATION

REPORT ON THE CONSIDERATION OF THE WATER (AMENDMENT) BILL
(NATIONAL ASSEMBLY BILLS NO. 33 OF 2023)

CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEES
PARLIAMENT BUILDINGS
NAIROBI

AUGUST, 2023

THE NATIONAL ASSEMBLY	
DATE: 23 AUG 2023 WEDNESDAY	
TABLED BY:	HON. KANGOGO BOWEN, MP
CHARGE:	CHAIR, COMMITTEE ON BLUE ECONOMY, W & I.
CHECKED BY:	

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LIST OF ABBREVIATIONS AND ACRONYMS

DBOT	-	Design-Build-Finance-Operate-Transfer
JKIA	-	Jomo Kenyatta International Airport
MDAs	-	Ministries, Department and Agencies
PPP	-	Public Private Partnership
WASPA	-	Water & Sanitation Providers Association
WSPs	-	Water Service Providers
WWDAs	-	Water Works Development Agencies
COG	-	Council Of Governors
KAM	-	Kenya Association of Manufacturers

LIST OF ANNEXURES

1. Report adoption Schedule
2. Minutes
3. Copy of the newspaper advertisement on public participation
4. Letter inviting stakeholders for meetings with the Committee
5. Stakeholder submissions

CHAIRPERSON'S FOREWORD

This report contains proceedings of the Departmental Committee on Blue Economy, Water and Irrigation on its consideration of the Water (Amendment) Bill (*National Assembly Bills No. 33 of 2023*) which was published on 4th July, 2023. The Bill went through the First Reading on Thursday 26th July, 2023 and was thereafter committed to the Departmental Committee on Blue Economy, Water and Irrigation for consideration and reporting to the House pursuant to the provision of Standing Order 127.

Following placement of advertisements in the print media on Tuesday 8th August, 2023 seeking public and stakeholder views on the Bill pursuant to Article 118(1) (b) of the Constitution and Standing Order 127(3), the Committee received five (5) memoranda from the Ministry of Water, Sanitation and Irrigation; the Judiciary; the National Treasury; the Water & Sanitation Providers Association (WASPA) and Oraro & Company Advocates.

The Committee also invited stakeholders vide letter REF: NA/DDC/BEW& I/2023/027 dated 17th August, 2023 for a stakeholders' engagement meeting on the Bill which was held in the Main Chamber, Parliament Buildings on 20th August, 2023 with four (4) stakeholders making oral presentations before the Committee. All the stakeholders were in support of the proposed amendments to the Water Act, 2016 indicating that once effected, these amendments will support the effort of the Ministry to increase water and sewerage coverage for all.

The Bill has ten (10) clauses and its principal objective is amend the Water Act, 2016 for the purpose of operationalizing Public-Private-Partnership (PPP) in the water sector

In considering the Bill, Members observed that the legislation was timely because Kenya is classified as a water scarce country but it lacked adequate funding to ensure quality and adequate water and sanitation services are provided to its citizens. The Head of State in his State of the Nation address to both Houses of Parliament in September 2022 emphasized on the need to explore PPP as a funding option especially for large capital projects in the water sector.

The Committee is grateful to the Offices of the Speaker and the Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank the sponsor of the Bill, Hon. Kimani Ichung'wah, MP, Leader of the Majority Party, and all stakeholders who submitted their comments on the Bill. Finally, I wish to express my appreciation to the Honorable Members of the Committee and Secretariat who made useful contributions towards consideration of the Bill and production of this report.

On behalf of the Departmental Committee on Blue Economy, Water and Irrigation and pursuant to provisions of Standing Order 199 (6), it is my pleasant privilege and honour to present to this House the Report of the Committee on its consideration of the Water Amendment Bill (*National Assembly Bill No. 33 of 2023*) with recommendation that the Bill be **approved with amendments as reported by the Committee.**

Hon. Bowen David Kangogo, M.P.
Chairperson, Departmental Committee on Blue Economy, Water and Irrigation

PART ONE

PREFACE

1.0 Establishment of the Committee

1. The Departmental Committee on Blue Economy and Irrigation is one of the twenty Departmental Committees of the National Assembly established under **Standing Order 216** whose mandates pursuant to the **Standing Order 216 (5)** are as follows:
 - i. *To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
 - ii. *To study the programme and policy objectives of ministries and departments and the effectiveness of the implementation;*
 - iii. *On a quarterly basis, monitor and report on the implementation of the national budget in respect of its mandate;*
 - iv. *To study and review all legislation referred to it;*
 - v. *To study, assess and analyze the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;*
 - vi. *To investigate and inquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;*
 - vii. *To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
 - viii. *To examine treaties, agreements and conventions;*
 - ix. *To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
 - x. *To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
 - xi. *To examine any questions raised by Members on a matter within its mandate.*

1.1 Subject of the Committee

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider matters of: use and regulation of water resources, irrigation, fisheries development including promotion of aquaculture, fish farming, marine fisheries, the sustainable use of ocean resources for economic growth and improved livelihoods, except seaports and marine transport.
3. In executing its mandate, the Committee oversees the following government ministries and departments and agencies (MDAs), namely:
 - i. The State Department for Water and Sanitation
 - ii. The State Department for Irrigation
 - iii. The State Department for Blue Economy and Fisheries

1.2 Committee Membership

4. The Departmental Committee on Blue Economy and Irrigation was constituted by the House on 27th October, 2022 and comprises of the following Members:

Chairperson

Hon. Bowen David Kangogo, MP - **Chairperson**
Marakwet East Constituency
United Democratic Alliance Party

Vice- Chairperson

Hon. Kemero Maisori Marwa, MP - **Vice- Chairperson**
Kuria East Constituency
United Democratic Alliance Party

Hon. Stanley Muiruri Muthama, MP
Lamu West Constituency
Jubilee Party

Hon. Tandaza Kassim Sawa, MP
Matuga Constituency
Amani National Congress

Hon. Chepkwony Charity Kathambi, MP
Njoro Constituency
United Democratic Alliance Party

Hon. William Kamket, MP
Tiaty Constituency
Kenya African National Union

Hon. Buyu Rozaah Akinyi, MP
Kisumu West Constituency
Orange Democratic Party

Hon. Eng. Paul Nzengu, MP
Mwingi North Constituency
Wiper Democratic Party

Hon. Were Charles Ong'ondo, MP
Kasipul Constituency
Orange Democratic Party

Hon. Dorothy Muthoni Ikiara, MP
Nominated
United Democratic Alliance Party

Hon. Nebart Bernard Muriuki, MP
Mbeere South Constituency
Independent Member

Hon. Mnyazi Amina Laura, MP
Malindi Constituency
Orange Democratic Movement

Hon. Adow Mohamed Aden, MP
Wajir South Constituency
Orange Democratic Party

Hon. Eric Mwangi Kahugu, MP
Mathira Constituency
United Democratic Alliance Party

Hon. George Gachagua, MP
Ndaragwa Constituency
United Democratic Alliance Party

1.3 Committee Secretariat

5. The Committee is facilitated by the following staff:

Mr. Nicodemus K. Maluki
Clerk Assistant II/Head of Secretariat

Ms. Ivy Kageha
Clerk Assistant III

Dr. Benjamin Ngimor
Senior Fiscal Analyst

Ms. Lynette Otieno
Senior Legal Counsel

Mr. Apaa Eugene
Research Officer II

Ms. Veron D. Aluoch
Research Officer III

Mr. Bernard Omondi
Senior Sergeant-At-Arms

Mr. Wilson Angatangoria
Sergeant At Arms

Ms. Lilian Mburugu
Media Relations Officer

Mr. Cosmas Akhoye
Audio Officer

PART TWO

2.0 BACKGROUND INFORMATION ON THE PUBLIC PRIVATE PARTNERSHIPS

2.1 Introduction

6. Public-Private Partnership (PPP) is a legally binding contractual agreement between a private sector corporation or consortia and a public sector organization, like a government agency or municipality. Depending on the country, region, and nature of the project, the private partner takes part in designing, completing, implementing, funding, and maintaining the project for a set amount of time. The private partner is compensated by user fees, availability payments, or a combination of both and has significant duties and liabilities related to the project. In some situations, risks are distributed through a process of negotiation between the public and private partners. On the other hand, the public partner concentrates on defining and overseeing compliance with the objectives.
7. The aim of a PPP is to leverage the expertise, efficiency, and financial resources of the private sector to deliver public infrastructure projects or services more effectively and efficiently than traditional procurement models. To ensure that public interests, rights of citizens and value for money is balanced, careful planning, transparent procurement processes, appropriate risk allocation, and effective monitoring and regulation is conducted. PPPs in Kenya are regulated by the PPP Act, 2021.

2.2 Situational analysis in the Kenya

8. Public-Private Partnerships (PPPs) have gained significant attention and momentum in Kenya as a means to drive economic development and infrastructure projects. The government of Kenya has been actively promoting and implementing PPPs across various sectors. These partnerships aim to leverage the strengths and resources of both the public and private sectors to deliver essential services and infrastructure projects efficiently and effectively.
9. One of the prominent PPP projects completed in Kenya is the Nairobi Expressway which is a 27.1 km Class A dual-carriageway road developed under a Design-Build-Finance-Operate-Transfer (DBOT) PPP model. It starts Westlands in the western edge of the city and ends after Jomo Kenyatta International Airport (JKIA) in the eastern end of the city. It is being implemented through a PPP arrangement between the Kenyan government and private investors. It was successfully completed in 18 months, 6 months ahead of schedule.

PART THREE

3.0 OVERVIEW OF THE WATER (AMENDMENT) BILL (*NATIONAL ASSEMBLY BILL NO. 33 OF 2023*)

3.1 Introduction

10. The **Water (Amendment) Bill (*National Assembly Bill No. 33 of 2023*)** is sponsored by the **Leader of the Majority Party**, Hon. Kimani Chungghwa, MGH, MP. The Bill was published on 4th July, 2023 and read a First Reading on Thursday 26th July, 2023 pursuant to Standing Order 127(3) and committed to the Departmental Committee on Blue Economy, Water and Irrigation for consideration and reporting back to the House.

3.2 Review of the Bill

11. The principal object of the Bill is to amend the Water Act, 2016 for the purpose of operationalizing public private partnership in the water sector.
12. The Water (Amendment) Bill, 2023 (National Assembly Bill No. 33 of 2023) has 10 Clauses and has the following provisions
 - i. **Clause 1** of the Bill provides for short title of the Act.
 - ii. **Clause 2** of the Bill proposes the amendment of section 2 of the Act to provide for new definitions used in the Act.
 - iii. **Clause 3** of the Bill proposes the amendment of section 32 of the Act to provide for additional powers of the National Water Harvesting and Storage Authority.
 - iv. **Clause 4** of the Bill proposes the amendment of section 68 of the Act to provide for additional functions of the waterworks development agencies.
 - v. **Clause 5** of the Bill proposes the insertion of anew section 68A to the Act to provide for licensing of waterworks development agencies by the Water Services Regulatory Board.
 - vi. **Clause 6** of the Bill proposes the amendment of section 69 of the Act to provide for clarity between the roles of waterworks development agencies and water service providers.
 - vii. **Clause 7** of the Bill proposes the amendment to section 72 of the Act to provide for additional functions of the Regulatory Board and to remove the Water Services Regulatory Boards power to accredit water services providers.
 - viii. **Clause 8** of the Bill proposes the amendment of section 75 to remove the requirement of accreditation of water services providers.
 - ix. **Clause 9** of the Bill proposes the amendment of section 93 of the Act to provide that a contracting authority may enter into public private partnerships agreements. This is for purposes of aligning the Water Act to the PPP Act No. 14 of 2021.
 - x. **Clause 10** of the Bill proposes the amendment of section 100 of the Act to provide for supply of bulk water in the Counties by waterworks development agencies established under the Act.

PART FOUR

4 PUBLIC PARTICIPATION/ STAKEHOLDERS CONSULTATIONS

13. Following the call for memoranda from the public through the placement of adverts in the print media on **Tuesday 8th August, 2023** and vide a letter REF: NA/DDC/BEW/1/2023/027 dated **Thursday 17th August, 2023** inviting stakeholders for a meeting, the Committee received memoranda from the following stakeholders
 - i. The Ministry of Water, Sanitation and Irrigation
 - ii. The Judiciary
 - iii. The National Treasury
 - iv. Water & Sanitation Providers Association
 - v. Oraro Company Advocates
 - vi. Kenya Association of Manufacturers
 - vii. Council of Governors

4.1 THE MINISTRY OF WATER, SANITATION AND IRRIGATION

14. The Cabinet Secretary for Water, Sanitation and Irrigation Hon. Alice Wahome appeared before the Committee on Monday 21st August, 2023 and submitted on the proposed Water Amendment Bill, 2023 that;
15. The Ministry of Water, Sanitation and Irrigation had initiated the proposed amendments to the Water Act, 2016 with a view to provide for public private partnerships in financing development of water works by National Government agencies and for operations and maintenance of water services, bulk water services provision framework by the National Government agencies and protection of riparian reserves amongst others.
16. The proposed amendments to the Water Act, 2016 include critical definitions and interpretations which will open up several water sector institutions to be capable of benefiting from PPP funding option and also to be bankable.
17. The Constitution of Kenya came with a wide implications for water sector. Primarily, it acknowledged the right to access to clean and safe water as a basic human right. The Water Act, 2016 came into force in April, 2016, aligning the Water sector with objectives of the Constitution 2010 such as devolution while also recognising that water related functions are a shared responsibility between the National and County Governments.
18. To achieve the above indicated purpose the Ministry proposed amendments for the purpose of bringing in PPP in the Water sector. This could only be achieved by aligning the water Act, 2016 to the PPP Act, 2021 and providing for Water Works Development Agencies (WWDAs) as bulk water service providers for PPP.
19. Kenya is classified as one of the water scarce Countries, which means that a lot of efforts is required in terms of funding and relevant resources to ensure quality and adequate water is served on the fifty (50) million citizens.

20. The President in his address to both Houses of Parliament in September, 2022 emphasized the need for a PPP funding framework, particularly for large capital projects in the water sector.
21. The proposed PPP funding option if adopted, is expected to contribute to attainment of the target of raising Kshs. 500 billion required to increase access to water from current 60 per cent for regulated services to 80 per cent and increase irrigation acreage to 1.2million acres by the year 2030.
22. The Ministry of Water, Sanitation and Irrigation, National Treasury and Attorney General 's Office held consultations on the best way forward to bring on board the PPP funding option in the water sector. The outcome of the consultations was a proposal to finalize a sample water purchase Agreement, amendments to the Water Act, 2016, develop an outline of bankable structure for Water PPPs and tariff setting for PPP water schemes.
23. To this end the Ministry of Water, Sanitation and Irrigation considered the Water Act, 2016 and identified areas for amendment to bring on board the PPP in the water sector and proposed the further following amendments.

CLAUSE 2

24. **THAT**, clause 2 of the Bill be amended by inserting the following new paragraph immediately after paragraph (a)—

(aa) by deleting the definition of “bulk water” and substituting therefor with the following new definition—

“Bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority to water service providers for retail;

Justification

The proposal amendment in Bill make reference to “bulk water” in this regard it is important to clarify what is “bulk water”.

Committee Observation

The Committee agreed with the proposal.

CLAUSE 5

THAT, clause 5 of the Bill be amended in the proposed new section 68A in subsection (1)by deleting the expression “68(b) and (c)” and substituting therefor the expression “68(ba)”; and

Justification

There was a cross-referencing error, in terms of regulation and licensing the Regulatory Board is to regulate the bulk water purchase agreement.

Committee Observations

The Committee agreed with the proposal.

CLAUSE 9

25. THAT Section 93 of the principal Act is amended by deleting clause 9 and substituting therefor the following new clause—

(a) deleting subsection (1) and substituting therefor the following new subsection—

(1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.

(b) deleting subsection (3) and substituting therefor the following new subsection—

(3) Where the person entering into an agreement with the contracting authority owns or possesses assets or infrastructure used for the provision of water services, the agreement shall set out the terms and conditions under which the assets may continue to be used.

Justification

The amendment is a clean-up, as the Bill had erroneously left out an amendment to subsection (3).

Committee Observations

The Committee agreed with the proposal.

CLAUSE 10

26. THAT, the Bill be amended by inserting the following new clauses immediately after clause 10—

11. Section 114 of the principal Act is amended in the opening statement by inserting the words “or any water works development agency” immediately after the word “counties”.

Justification

The amendment seeks to enable water works development agency to benefit from the Waster Sector Trust Fund in the performance of the objects for which the Fund is established.

Committee Observations

The Committee agreed with the proposal.

4.2 THE JUDICIARY

27. The Judiciary appeared before the Committee on Monday 21st August, 2023 and submitted on the Water Amendment Bill, 2023 as follows: -

CLAUSE 119

28. Amend the Clause to read as follows:

(1) There is established a Water Tribunal.

(2) The Water Tribunal shall consist of the following members appointed by the Judicial Service Commission —

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(b) four other persons who possess a degree from a university recognized in Kenya and at least five years' experience in a relevant field.

(3) The Chairperson and members of the Tribunal shall be appointed for a term of five years and shall be eligible for reappointment for one further term of five years.

(4) The Chairperson and members of the Tribunal shall be paid such remuneration and allowances as the Judicial Service Commission may, in consultation with the Salaries and Remuneration Commission, determine.

Justification

The Tribunal plays a critical role in the smooth operations of the water sector, and should therefore be empowered to discharge this statutory mandate. Indeed, the Cabinet Secretary for Water, Sanitation & Irrigation recently handed over the Tribunal to the Judiciary as part of the ongoing transition of Tribunals from the Executive to the Judiciary. Following this hand over, the Judiciary has put in place measures to fully operationalise the Tribunal.

Committee Observations

The Committee agrees with the proposal with further amendments to specify qualifications of some of the members of the Tribunal.

4.3 THE NATIONAL TREASURY

29. The National Treasury through the PPP Directorate appeared before the Committee on Monday 20th August, 2023 and informed the Committee that:
30. The President in his address at the 2nd Cabinet meeting held on 15th November, 2022, set out expectations for the Firth Administration's transformative plan for the country. Some of the key deliverables required by the President during this term include enhanced access to portable water as well as for irrigation.
31. The President directed both the Ministry of Water, Sanitation and Irrigation, National Treasury and the Office of Attorney General to jointly develop a Water Purchase Agreement for uptake of the water harvested and stored through PPP framework on a priority basis.
32. Acting on this directive both the Ministries developed a draft Water Purchase agreement, draft cabinet Memorandum and the draft Water Amendment Bill.
33. Based on the above the National Treasury indicated that, they agreed in totality with the Water Amendment Bill, 2023.

34. The National Treasury noted that, the Government through the Ministry of Water Sanitation and irrigation had made great strides in implementation of the Water Act, 2016. However, there have been various challenges in implementation which have necessitated amendments to the water Act, 2016. Once effected, these amendments will support the effort of the Ministry to increase water and sewerage coverage for all.

4.4 WATER & SANITATION PROVIDERS ASSOCIATION

35. The Water and Sanitation Providers Association appeared before the Committee on Monday 9th August, 2023 and informed the Committee that:

36. The Water and Sanitation Providers Association (WASPA) was established and registered on 4th November, 2002 under the Societies Act (Cap 108) of the Laws of Kenya as the Premier Umbrella body of all regulated Water Service Providers (WSPs) in Kenya.

37. That the Bill will enhance the powers and functions of WWDAs as Section 68 (b) provides that WWDAs can operate the water works and provide water services as a water service provider, until such a time as responsibility for the operation and management of water works are handed over to a county Government.

38. There was need to improve in the definitions of words used in the Bill to be clear and avoid ambiguity, where proposals use words like “until such a time” as this will give room for endless management of assets and resources. There is need for clear definitions and distinctions between a Water Service Provider and a Bulk Water Service Provider.

39. The Water and Sanitation Services Provisions is Constitutional function of the County Governments under Schedule 4 of the Constitution of Kenya, 2010 hence licensing a National Institution such as a WWDA as a Water Service Provider as contemplated by Section 100 of the amendment Bill is an affront to the Constitution of Kenya, 2010.

40. That engaging WWDAs in Water Service Provision has been implemented before through the National Water Corporation and Coast Water Works Development agency and it failed.

41. The organization was opposed to Section 100 of the Bill stating that giving WASREB power to issue licenses to any service providers such as WWDAs to supply bulk water is unconstitutional as it takes away the functions of the water service provision from County Governments.

4.5 ORARO & COMPANY ADVOCATES

42. Submitted written submission proposing the following amendments

CLAUSE 3

43. Amend section 32 to add a template of a bulk water purchase agreement to the Schedule or subsidiary legislation of this Bill.

Justification

A template ensures consistency in formatting and structure across multiple documents. This makes the document easier to read and reduces the risk of errors and omissions. Furthermore, the use of a template enhances uniformity

Committee Observation

PPPs are contractual in nature and may the format may not be standard for all contracts, further parties should have discretion on the format of the agreement. Moreover, PPPs are regulated by the Public Private Partnership Act, 2021 which in the Third Schedule enumerates the minimum provision that should be provided in a PPP agreement.

The Committee therefore does not agree with the proposal.

CLAUSE 5

44. Insert new section 68A for sub-clause (2), to bring in standards and conditions of licensing which are published in the Kenya Gazette and the Regulatory Board's website

Justification

Publishing in the Kenya Gazette and website provide an opportunity to reach a broad and diverse audience. This allows members of the public to stay informed on the latest standards and conditions of licensing developed by the Regulatory Board.

Committee Observation

The Committee agreed with the proposal

CLAUSE 8

45. Amend section 75 sub-section (1) (a) by deletion of paragraph (a) and replacing it with the words "their names, telephone numbers, e-mails and postal addresses".

Justification

Providing a water service provider's telephone number and e-mail address allows customers and the public to directly contact the water service providers. This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.

Committee Observation

The Committee agreed with the proposal

CLAUSE 10

46. Amendment to delete Section 100

Justification

Currently, Nairobi County does not pay other counties for the water it sells to consumers. The bill seeks to make it mandatory for counties that do not produce their own water to purchase the commodity. Consequently, this proposal will lead to an increase in the price of water paid by the consumers.

The proposal is for counties like Nairobi County to not pay for the water it sells to its residents. This will ensure the price of water does not increase and therefore, makes water affordable to residents. Furthermore, the right to clean and safe water in adequate quantities is an economic and social right under article 43 (1) (d) of the Constitution.

Committee Observation

The Committee does not agree with the proposal as the amendment makes no mandatory provision for counties that do not produce their own water to purchase the commodity.

4.6 COUNCIL OF GOVERNORS

47. The Council of governors submitted written submission to the Committee on Tuesday 22nd August, 2023 with the following General comments on the Water Amendment Bill, 2023
48. Inclusion of private water service providers (WSPs) in the water sector through the Public Private Partnerships (PPP) presents the risk of running county water service providers (WSPs) out of business due to economies of scale. This presents the need to balance the interests of private WSPs and county WSPs for equitability of opportunities.
49. The Bill presents the need for a balance between opportunities for bulk water supply given to WDAs and private WSPs/investors in order to operationalize the PPP framework in the water sector. Clause 10 of the Bill for instance seems to prioritize water development agencies (WWDAs) as WSPs in inter-county bulk water supply.
50. The Bill raises the need for consultation between the national and county governments in designation of county waterworks as national public waterworks. In fact, various provisions in the Act allow the national government to designate and gazette waterworks and basin areas without the involvement and/or consultation of county governments.
51. Licensing of WDAs by the Water Services Regulatory Board (WASREB) under Clause 5 of the Bill presents the need for robust checks and balances to prevent potential conflict of interest in WASREB discharging this function to ensure quality water services.
52. The Bill needs to provide for inclusion of county governments/WSPs in discussions for PPP agreements entered into for national public works since the WWDAs will not only be serving national functions but water service provision is a county function
53. The Council of Governors proposed the following amendments:

CLAUSE 5

54. Amend Section 68 (ba) to read: Provided that a national public water works shall not be transferrable to county government; and any transfer of water works and service to the national government shall be done upon consultation of the relevant county government.

Justification

This provision is need as the national government has repeatedly designated and gazetted water works and basin areas without the involvement and / or consultation of the county governments

Committee Observations

Article 187 (1) of Constitution provides that-

(1) A function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—

(a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

In this regard, the Constitution contemplate consultation between the national government and county governments in the transfer of works. The proposal in the Bill relates to national public water works and not the transfer of water works and services by the County Government

The Committee therefore does not agree with the proposal.

CLAUSE 7

55. Amend Section 72 (ba) to read evaluate and approve bulk water tariffs and approve the consumer protection standards for use of water for domestic commercial and irrigation purpose;

Justification

Like subsection (b) this proposed subsection (ba) purports to vest the functions of or entities controlled by the national government.

Committee Observation

The current sect 72 (1)(b) of the Act enables the Regulatory Board to evaluate and recommend water and sewerage tariffs, which is similar to the proposal in the Bill and does seek to vest the functions of county governments on a national entity. This functions is only with regards to regulation of tariffs and not performance of functions by the county government.

The Committee therefore does not agree with the proposal.

4.7 KENYA ASSOCIATION OF MANUFACTURERS

56. The Kenya Association of Manufacturers (KAM) submitted their written comments and proposal to the Water Amendment Bill, 2023 on Tuesday 22nd August, 2023 as follows:
57. In considering the category into which a water use activity falls, the difference associated with the characteristics of the catchment areas should be a key consideration or basin in which the water resources is located and the particular circumstances of each location. This is because, for catchment areas along the salt belt, the ground water that they extract rises and goes with the tides of the sea. Most of the boreholes are also dug alongside a creek. Therefore, the water being abstracted is basically sea water in unconfined aquifer and cannot be reasonably grouped in the same category as confined aquifers of fresh water.
58. Salt companies extract salt from the sea water and do not consume or repackage the water. It evaporates back to the atmosphere as fresh water. Only 3.5% of this water goes into our value chain. Therefore, there is need to have a fair approach in the manner with which the water used is charged.
59. Water use charges Water consumers are required to pay, in addition to the water use charge, a levy amounting to 5 percent of the monthly water use charge as a water conservation levy. It is our proposal that this levy take into account the efforts of the contributors who have invested heavily in water conservation such as water harvesting and black water treatment plants. Transparency and accountability in terms of the structure for disbursement and usage of these funds between the Authority and County Governments should be clear.
60. In many instances, the Authority estimates the water consumption levels for salt extraction companies, and it is affixed in the permit application. It is contradictory that they would again charge penalties for lack of a meter. We propose that salt extraction companies be exempt from any such penalty as there is already a provision that the Authority shall estimate the abstraction levels. In any case, the companies use water for brine and there is no meter that can sustainably be installed in such a highly saline condition.
61. The Association submitted the following proposals for consideration :-

CLAUSE 3

Amend section 100 to provide for the development of regulations on bulk water and purchase agreements and schedule to prescribe the agreement form as follows:

Section 100 (3) The Cabinet Secretary shall make Regulations for better carrying into effect provisions on bulk water purchase agreements and prescribed agreement forms for bulk water purchase.

Justification

The proposed new provisions for bulk water purchase agreements are progressive provisions and will support industries that utilize bulk water for their operations.

There is a need to develop regulations to further expand on the new provisions and allow for schedules to be included to outline items such as templates to guide agreements. Furthermore, the use of a template enhances uniformity.

Committee Observation

PPPs are contractual in nature and may the format may not be standard for all contracts, further parties should have discretion on the format of the agreement. Moreover, PPPs are regulated by the Public Private Partnership Act, 2021 which in the Third Schedule enumerates the minimum provision that should be provided in a PPP agreement.

The Committee therefore does not agree with the proposal.

CLAUSE 5

Proposal to include in the sub clause (2) the requirement to publish the standards and conditions of licensing in the Kenya Gazette and the Regulatory Board's website to read as to read:

The Regulatory Board shall upon commencement of this Act and as may be necessary thereafter and with the approval of the Cabinet Secretary, publish the standards and conditions for licensing of water works development agencies under this section and publish in the Kenya Gazette and website of the Water Resources Authority

Justification

The licensing of water work agencies will support the regulation of the agencies. The inclusion of additional information to the clause to require the same to be published in the Kenya Gazette and website to provide an opportunity to allow members of the public and businesses to be aware of the standards and conditions of licensing required of water works development agencies.

Committee Observation

The Committee agreed with the proposal with amendments to have publication of standards in the gazette and website of regulatory Board

CLAUSE 8

62. Amend section 75 sub-section (1) (a) by deletion of paragraph (a) and replacing it with the words “their names, telephone numbers, e-mails and postal addresses”.

Justification

Providing a water service provider’s telephone number and e-mail address allows customers and the public to directly contact the water service providers. This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.

Committee Observation

The Committee agreed with the proposal

CLAUSE 10

63. Amendment to Section 100 to exempt counties from the requirements of the proposed amendment to ensure water remains affordable to water users within counties.

Justification

There is a need for the cost of water supplied to residents and businesses in a county to be maintained at a low level, to ensure it remains affordable. This will ensure that Kenya attains the right to clean and safe water in adequate quantities is an economic and social right under Article 43 (1) (d) of the Constitution.

Committee Observation

The Committee does not agree with the proposal as the amendment makes no mandatory provision for counties that do not produce their own water to purchase the commodity.

PART FIVE

5 COMMITTEE OBSERVATIONS

64. Having considered the Bill the Committee observed as follows: -
- i. The Ministry of Water, Sanitation and Irrigation initiated the proposed amendments to the Water Act, 2016 in order to provide for public private partnerships in financing development of water works and align it to the PPP act.
 - ii. The proposed amendments to the Water Act include critical definitions and interpretations which will open up several water sector institutions to be capable of benefiting from the PPP funding option and be bankable.
 - iii. The additional amendments to the bill by the Ministry of Water, Sanitation and Irrigation on clarification of the definition of “bulk water”, the cross-referencing error in terms of regulation and licensing of Water Works Development Agencies by the Regulatory Board, and that which enables water works development agency to benefit from the Waster Sector Trust Fund were very important for the effective implementation of PPPs and should be considered.
 - iv. The additional amendment to the bill by the Judiciary to fully operationalize the Tribunal was also very important since it will be essential in addressing any disputes emerging in the water sector. However, the Committee noted that the proposed composition of the Tribunal needed to be relooked so as to ensure an adequate number of experts in the water sector are part of the Tribunal.
 - v. The additional amendments to the bill by the Oraro & Company Advocates and Kenya Association of Manufacturers were enlightening. It agreed with the proposal to publish the standards and conditions of licenses in the Kenya Gazette, since this allows members of the public to stay informed on the latest standards and conditions of licensing, and the inclusion of telephone numbers and emails when the Regulatory Board publishes their names and addresses of water service providers since this facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback. However, the Committee did not agree with the proposal to include a template for bulk water purchase agreements since this was already provided in the PPP Act, 2021 and the proposal for the deletion of the Clause 10 of the bill since the amendment makes no mandatory provision for counties that do not produce their own water to purchase the commodity.
65. The additional amendments to the bill by the Council of Governors to provide for consultation when transferring any water works and service to the national government was not agreed to since the Constitution already provides for such consultation. It also did not agree to the proposal to amend Section 72 since the proposal did not infringe on the functions of county governments as raised by the Council of Governors.

PART SIX

6 COMMITTEE RECOMMENDATIONS

Having considered the Bill, the Committee approves it with the following amendments:

CLAUSE 2

THAT, clause 2 of the Bill be amended by inserting the following new paragraph immediately after paragraph (a)—

(aa)by deleting the definition of “bulk water” and substituting therefor with the following new definition—

“bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority to water service providers for retail;

CLAUSE 5

THAT, clause 5 of the Bill be amended in the proposed new section 68A—

(a) in subsection (1)by deleting the expression “68(b) and (c)” and substituting therefor the expression “68(ba)”; and

(b) in subsection (2)by inserting the word “in the *Gazette* and on its website” immediately after the word “publish”.

CLAUSE 8

THAT, the Bill be amended by deleting clause 8 and substituting therefor the following new clause—

Amendment of 8. Section 75 of the principal Act is amended in section 8 of No. subsection (1)—
43 of 2016.

(c) by deleting paragraph (a) and substituting therefor the following new paragraph—

(a)their names, telephone numbers, electronic mail and postal addresses;

(d) in paragraph (c) by deleting the word “accredited” and substituting therefor the word “licensed”.

CLAUSE 9

THAT, the Bill be amended by deleting clause 9 and substituting therefor the following new clause—

Amendment of section 93 of No. 43 of 2016.

9. Section 93 of the principal Act is amended by—

(e) deleting subsection (1) and substituting therefor the following new subsection—

(1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.

(f) deleting subsection (3) and substituting therefor the following new subsection—

(3) Where the person entering into an agreement with the contracting authority owns or possesses assets or infrastructure used for the provision of water services, the agreement shall set out the terms and conditions under which the assets may continue to be used.

INSERTION OF NEW CLAUSE

THAT, the Bill be amended by inserting the following new clauses immediately after clause 10—

Amendment of section 114 of No. 43 of 2016.

11. Section 114 of the principal Act is amended in the opening statement by inserting the words “or any water works development agency” immediately after the word “counties”.

Repeal and replacement of section 119 of No. 43 of 2016.

12. The principal Act is amended by deleting section 119 and substituting therefor the following new section—

Establishment of the water tribunal. **119.** (1) There is established a Water Tribunal.

(2) The Water Tribunal shall consist of the following members appointed by the Judicial Service Commission—

(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post qualification

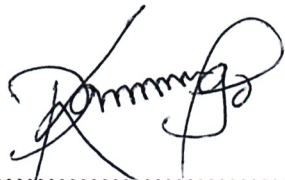
experience;

(b) two persons one of whom shall be a registered civil engineer and the other a registered water engineer, with at least ten years' experience; and

(c) two persons who possess a degree from university recognized in Kenya and at least five years' experience in a relevant field.

(3)The Chairperson and members of the Water Tribunal shall be appointed for a term of three years and shall be eligible for reappointment for one further term of three years.


(4)The Chairperson and members of the Water Tribunal shall be paid such remuneration and allowances as the Judicial Service Commission may, in consultation with the Salaries and Remuneration Commission, determine.



23/08/2023

SIGNED..... DATE.....

HON. DAVID BOWEN KANGOGO, M.P.
CHAIRPERSON, DEPARTMENTAL COMMITTEE ON BLUE ECONOMY,
WATER AND IRRIGATION

THE NATIONAL ASSEMBLY	
DATE: 23 AUG 2023 WEDNESDAY	
TABLED BY:	Hon KANGOGO BOWEN, MP CHAIR COMMITTEE ON BLUE ECONOMY, W&I
CLEAR AT THE TABLE:	

PROPOSED ANNEXURES

- 1. Adoption List**
- 2. Minutes**
- 3. Presentations**