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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 PARDIOSI AD	
DATE: 23 AUG 2023	DAY: WEDNESDAY
TABLED BY:	HON. KANGOGO BOWEN, MP CHAIR, COMMITTEE ON BLUE ECONOMY, W&I.
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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 Chunghwa, 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 Fifth 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.

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



23/08/2023

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

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

PROPOSED ANNEXURES

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



REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

13TH PARLIAMENT - SECOND SESSION - 2022

DEPARTMENTAL COMMITTEE ON BLUE ECONOMY, WATER AND IRRIGATION

MEMBERS ATTENDANCE SCHEDULE

DATE: 23RD AUG 2023 START: 10:30 AM END: 11:00 AM

VENUE: 4TH FLOOR CONTINENTAL

AGENDA: ADOPTION OF THE WATER (AMENDMENT) BILL, 2023

NO.	NAME	SIGNATURE
1.	Hon. Bowen David Kangogo, MP – Chairperson	
2.	Hon. Kemero Maisori Marwa Kitayama, MP – Vice- Chairperson	
3.	Hon. Chepkwony Charity Kathambi, MP	
4.	Hon. William Kamket, MP	
5.	Hon. Buyu Rozaah Akinyi, MP	
6.	Hon. Eng. Nzengu Paul Musyimi, MP	
7.	Hon. Tandaza Kassim Sawa, MP	
8.	Hon. Were Charles Ong'ondo, MP	
9.	Hon. Gachagua George, MP	
10.	Hon. Eric Mwangi Kahugu, MP	
11.	Hon. Dorothy Muthoni Ikiara, MP	
12.	Hon. Nebart Bernard Muriuki, MP	
13.	Hon. Muiruri Muthama Stanley, MP	
14.	Hon. Mnyazi Amina Laura, MP	
15.	Hon. Adow Mohamed Aden, MP	

Forwarded by:

Signed Date 23 / 08 / 2023

Mr. Nicodemus K. Maluki
Second Clerk Assistant – Committee Clerk

Approved by:

Signed.....Date.....

Mr. Peter K. Chemweno,
Director
Directorate of Departmental Committee



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
19TH PARLIAMENT - SECOND SESSION – 2022

**MINUTES OF THE 35TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON TUESDAY 1ST
AUGUST, 2023 AT THE COMMITTEE ROOM, SECOND FLOOR,
CONTINENTAL HOUSE AT 10.00 AM**

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. Chepkwony Charity Kathambi, MP | | |
| 4. Hon. William Kamket, MP | | |
| 5. Hon. Tandaza Kassim Sawa, MP | | |
| 6. Hon. Were Charles Ong'ondo, MP | | |
| 7. Hon. Gachagua George, MP | | |
| 8. Hon. Eric Mwangi Kahugu, MP | | |
| 9. Hon. Dorothy Muthoni Ikiara, MP | | |
| 10. Hon. Adow Mohamed Aden, MP | | |

APOLOGIES

1. Hon. Buyu Rozaah Akinyi, MP
2. Hon. Eng. Nzengu Paul Musyimi, MP
3. Hon. Nebart Bernard Muriuki, MP
4. Hon. Muiruri Muthama Stanley, MP
5. Hon. Mnyazi Amina Laura, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|------------------------|-------------------------|
| 1. Ms. Ivy Kageha | Third Clerk Assistant |
| 2. Ms. Lynette Otieno | Senior Legal Counsel |
| 3. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 4. Ms. Veron D. Aluoch | Research Officer III |
| 5. Ms. Lilian Mburugu | Media Relations Officer |
| 6. Ms. Joyce Wachera | Hansard Officer |
| 7. Ms. Lilian Alunga | Protocol Officer |
| 8. Mr. Cosmas Akhonya | Audio Officer |

MIN.NO.DC/ BEW&I/032/2023: PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past ten o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers
2. Preliminaries/Introductions

- i. Adoption of the Agenda
- ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration of the Water (Amendment) Bill, 2023**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/100/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/101/2023: CONSIDERATION OF THE WATER (AMENDMENT) BILL, 2023

The Legal Counsel briefed the Committee as follows:

1. The Bill seeks to provide for operationalizing public private partnership in the water sector.
2. The Bill seeks to amend **Section 2** of the principal Act by inserting a new definition of the term “**contracting authority**” and deleting and substituting the definition of “water service provider” to include **an agency, authority, state corporation** providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license
3. The Bill seeks to amend **section 32** of the principal Act by giving the Water Storage Authority the additional power to enter into a bulk water purchase agreement with an investor in accordance with Public Private Partnerships Act or a water works development agency.
4. The proposal in **Section 68** of the principal Act, seeks to provide for an addition of power and function to **water works development agency to** operate water works and provide water services through bulk water purchase agreement with an investor or as a water service provider water works development agency transfers responsibility for the operation and management of water works to a county government. However, with a **caveat that a national public water works shall not** be transferable to a county government.
5. The proposal also seeks to insert a new **Section 68A** which seeks to bring under the ambit of the Regulatory Board (WASREB) the licensing (regulation) of the power of water works development agency to operate the waterworks and provide water services as a water service provider and provision of reserve capacity for purposes of providing water services. This section also mandates WASREB to publish the standards and conditions for licensing of water works development agencies.
6. **Section 69** of the principal Act is amended by limiting waterworks development agency from entering into agreements with county government or water services provider to provide water services within whose area of jurisdiction the services are located for **national public water works. The amendment clarifies that the agreement for provision of waters services shall be between the** waterworks development agency and the county governments and not a joint committee or authority of a county government.
7. **Section 72** of the principal Act is amended by providing for an additional role of the Regulatory Board to evaluate and approve water and sewerage tariffs, bulk water

tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes. Additionally, the amendment removes the role of the Regulatory Board to accredit water services providers. Board shall only issue and set conditions for licensing water services providers.

8. **Section 75** of the principal Act is amended in subsection 1 paragraph (c) by deleting the word “accredited” and substituting therefor the word “licensed”.
9. **Section 93** of the principal Act is amended by deleting subsection (1) and substituting therefor the following new subsection which will provide for a contracting authority to enter into a public private partnership (PPP) or public partnerships for the exercise by another person some of its functions.
10. A new subsection has been inserted in **Section 100** of the principal Act seeking to limit bulk water supply services that are intended to supply water in bulk to a water services provider in a county or counties to be undertaken by waterworks development agencies

Committee Observations

Having received the Legal brief on the Bill, the Committee made the following observations:-

- i. There was need for the Ministry give a clear definition of “Bulk water” as mentioned in article 3 of the Amendment Bill. Further, a provision on the threshold of Bulk water be provided.
- ii. The Ministry should provide a definition for “National Public Water Works” which is mentioned in Article 6 of the Amendment Bill
- iii. The Ministry clarifies on the difference of the terms “accreditation” and “Licensing” and explain why the term “licensing” is being used in place of “accreditation”
- iv. The Ministry to inform the Committee on the safeguard measures for county governments with regards to the additional rules on PPP to ensure that these powers will not be misused.
- v. The Ministry to provide clarification with regards to the Bulk water tariffs in Section 72 of the principal Act.

MIN.NO.DC/ BEW&I/102/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at twenty- five minutes past eleven o'clock. The next meeting will be held on notice.

Signed.....


**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

Date.....




REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION – 2022

**MINUTES OF THE 36TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON WEDNESDAY 9TH
AUGUST, 2023 AT THE SAROVA PANAFRIC HOTEL AT 7.30 AM**

PRESENT

- | | | |
|------------------------------------|---|--------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. William Kamket, MP | | |
| 3. Hon. Were Charles Ong'ondo, MP | | |
| 4. Hon. Gachagua George, MP | | |
| 5. Hon. Eric Mwangi Kahugu, MP | | |
| 6. Hon. Dorothy Muthoni Ikiara, MP | | |

APOLOGIES

- | | | |
|---|---|--------------------------|
| 1. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 2. Hon. Chepkwony Charity Kathambi, MP | | |
| 3. Hon. Buyu Rozaah Akinyi, MP | | |
| 4. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 5. Hon. Tandaza Kassim Sawa, MP | | |
| 6. Hon. Nebart Bernard Muriuki, MP | | |
| 7. Hon. Muiruri Muthama Stanley, MP | | |
| 8. Hon. Mnyazi Amina Laura, MP | | |
| 9. Hon. Adow Mohamed Aden, MP | | |

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|-------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Ms. Veron D. Aluoch | Research Officer III |
| 6. Ms. Lilian Mburugu | Media Relations Officer |

IN- ATTENDANCE- KENYA MARITIME AUTHORITY

- | | |
|---------------------------|-------------------------|
| 1. Mr. Thomas Odongo | M.D - KIWASO |
| 2. Mr. Peter K. Biwott | M.D – ELDOWAS |
| 3. Ms. Maureen Oginya | R.M – CIMTAPS |
| 4. Ms. Loice Chepchirchir | Legal Officer – ELDOWAS |
| 5. Mr. Japheth Samoei | ADM. Officer – ELDOWAS |
| 6. CPA Mang'eli Michuo | MD – MAUWASIO |
| 7. Mr. Alex Manyasi | APHRC |
| 8. Mr. Charles Oyaya | IDIA |
| 9. Mr. Wesley Kiprono | ELDOWAS |
| 10. Ms. Betty Komen | ELDOWAS |
| 11. Ms. Joan Kimutai | ELDOWAS |

MIN.NO.DC/ BEW&I/105/2023: PRELIMINARIES

The Chairperson called the meeting to order at fifteen minutes past eight o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers
2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Meeting with Water and Sanitation Providers Association (WASPA) regarding the Water (Amendment) Bill, 2023**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/106/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/107/2023: ENGAGEMENTS WITH WATER AND SANITATION PROVIDERS ASSOCIATION (WASPA) REGARDING THE WATER (AMENDMENT) BILL, 2023

The Chief Executive Officer Water and Sanitation providers Association (WASPA) submitted to the Committee as follows:

1. 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.
2. The link between National Water Works Development Agencies (WWDAs) and WSPs in Counties is well defined by their powers and functions as stipulated in the Water Act, 2016, Sections 68 and 69.
3. The Association supports WSPs to address NRW's management to acceptable allowance of 25%. The CEO stated that this was one of the greatest challenges WSPs are facing.
4. The Association provides interventions such as developing minimum guidelines for metres, pipes, valves and pumps supported by SWAP-Bfz of Germany for quality control, establishing benchmarking platforms, they have established a center for excellence in Geographical Information Systems in Kericho so as to build capacities of WSPs in GIS etc.
5. The operations of the Association are funded through annual subscriptions from members, subsidized training services to WSPs on courses prioritized by the members, Conference registration fees, study tours and donor support
6. The CEO informed the Committee that transfer of assets had not been done. He noted that IGRTC was better placed to give the current status on this issue.

On the Water amendment Bill, National Assembly bill No. 33 of 2023, the CEO submitted as follows:

1. 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.
2. The CEO stated that the law needs 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.
3. He also recommended that clear definitions and distinctions be made between a Water Service Provider and a Bulk Water Service Provider.
4. He noted that Water and Sanitation Services Provisions is Constitutional function of the County Governments under Schedule 4 of the CoK, 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.
5. He stated 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.
6. He argued that Section 68 (c) of the amendment bill will lead to an erosion of gains made and is further unconstitutional since water service provision is a County function
7. He also opposed section 68(b)(I) predicting that WSPs will not be able to pay investors
8. He also opposed 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.

WASPA recommendations

WASPA gave the following recommendations:

1. Transfer of assets between WSPs and WWDAs should be fast tracked
2. The National Government to allocate conditional grants to WSPs for Non-Revenue Water management
3. WSPs to invest in Supervisory Control and Data Acquisition (SCADA) systems
4. Clear framework oversight of WSPs by Counties and National Government
5. Effect the Security of Tenure for BODs, MDs and Senior Managers as contemplated by the National Water Policy to bring stability in water service provision
6. Stay the implementation of Water Resources Regulations 2021 and review the water user charges from Ksh.5 (1000%) to Ksh.1 (100%)
7. Consider zero rating of water and sanitation services
8. The Government to consider a preferential electricity tariff for the water sector just like the street lighting tariff
9. National and County Governments to straighten their accounts

10. Government to consider an increase in funding to the Water and Sanitation infrastructure
11. All water projects to have a mandatory last mile connectivity, sanitation and water catchment conservation components

Committee Observations and recommendations

Having received the submissions from WASPA, the Committee made the following observations:

- i. Sanitation is not given prominence by the Ministry of Water , Sanitation and Irrigation
- ii. WDAs have taken the role of providing and managing water infrastructure
- iii. WRA and WASREB have the same role. It would be more beneficial if the two are merged to form one entity
- iv. Increase in taxes have caused a great increase in the price of water.
- v. There is a need for the Ministry give a clear definition of “Bulk water” as mentioned in article 3 of the Amendment Bill. Further, a provision on the threshold of Bulk water be provided.
- vi. The Ministry should provide a definition for “National Public Water Works” which is mentioned in Article 6 of the Amendment Bill
- vii. The Ministry clarifies on the difference of the terms “accreditation” and “Licensing” and explain why the term “licensing” is being used in place of “accreditation”
- viii. The Ministry to inform the Committee on the safeguard measures for county governments with regards to the additional rules on PPP to ensure that these powers will not be misused.
- ix. The Ministry to provide clarification with regards to the Bulk water tariffs in Section 72 of the principal Act.

MIN.NO.DC/ BEW&I/108/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at twenty- five minutes past eleven o'clock. The next meeting will be held on notice.

Signed.....

**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

Date.....



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION – 2022

**MINUTES OF THE 38TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON MONDAY 21ST
AUGUST, 2023 AT THE MAIN CHAMBER, PARLIAMENT BUILDINGS AT 10.00
AM**

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. William Kamket, MP | | |
| 4. Hon. Buyu Rozaah Akinyi, MP | | |
| 5. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 6. Hon. Tandaza Kassim Sawa, MP | | |
| 7. Hon. Were Charles Ong'ondo, MP | | |
| 8. Hon. Gachagua George, MP | | |
| 9. Hon. Eric Mwangi Kahugu, MP | | |
| 10. Hon. Dorothy Muthoni Ikiara, MP | | |
| 11. Hon. Nebart Bernard Muriuki, MP | | |
| 12. Hon. Muiruri Muthama Stanley, MP | | |

APOLOGIES

1. Hon. Chepkwony Charity Kathambi, MP
2. Hon. Mnyazi Amina Laura, MP
3. Hon. Adow Mohamed Aden, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|-----------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Mr. Eugene Apa | Research officer |
| 6. Ms. Veron D. Aluoch | Research Officer III |
| 7. Ms. Lilian Mburugu | Media Relations Officer |
| 8. Ms. Joyce Wachera | Hansard Officer |
| 9. Ms. Lilian Alunga | Protocol Officer |
| 10. Mr. Cosmas Akhonya | Audio Officer |
| 11. Mr. Wilson Angatangoria | Sergeant-At-Arms |

IN- ATTENDANCE – STATE DEPARTMENT FOR WATER AND SANITATION

- | | | |
|----------------------------|----------------------------|-------------|
| 1. Hon. Aice Wahome | Cabinet Secretary | - MWSI |
| 2. Eng. SAO Alima | Water Secretary | - MWSI |
| 3. Eng. Michael Thuita | CEO | - AWWDA |
| 4. Mr. Paul Wekesa | Senior State Counsel | - OAG & DOJ |
| 5. Ms. Rose A. O. Nyakwana | Deputy Chief State Counsel | - MWSI |

MIN.NO.DC/ BEW&I/101/2023: PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past eleven o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers
2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration of the Water (Amendment) Bill, 2023 with the State Department of Water and Sanitation**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/102/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/103/2023: CONSIDERATION OF THE WATER (AMENDMENT) BILL, 2023 WITH THE STATE DEPARTMENT OF WATER AND SANITATION

The Cabinet Secretary for Ministry of Water, Sanitation and Irrigation Hon. Alice Wahome appeared before and submitted on the Water (Amendment) Bill, 2023 as follows:-

1. The Ministry had initiated amendments to the Water Act, 2016. These amendments seek to:
 - i. Provide for operationalizing public private partnership in financing development of water works by the National Government Agencies
 - ii. Provide for operations and maintenance of water services, bulk water service provision framework by the National Government Agencies and
 - iii. Protect riparian reserves among others.
2. The Bill proposes to; make miscellaneous amendments to the Water Act, 2016, make comprehensive amendments including amendments to address governance in the water sector, incorporate Public Private partnerships as a funding option in the water sector.
3. The Cabinet Secretary noted that Kenya is classified as one of the water scarce countries. This is mainly due to the inadequate funding in the sector to ensure provision of quality and adequate water and sanitation services. To mitigate this, the Bill proposes the need to explore PPP as a funding option especially for large capital projects
4. The Ministry therefore engaged relevant stakeholders such as the AG and the PPP unit in the National Treasury to find a way of operationalizing this idea.
5. She noted that following these engagements, some inconsistent provisions were identified in the Water Act, 2016 and the PPP Act. These are:

- i. Under section 2 of the Water Act, 2016, the interpretation of Water Service Provider excludes Water Works Development agencies and other bodies
 - ii. Section 68 on the Power and functions of WWDA does not include power to enter into PPP contracts
 - iii. Section 69 Provides for WWDA to complete projects and immediately hand over to the water service providers, joint committees or authorities
 - iv. Section 72 provides for licencing of water service providers by the Water Services Regulatory Board. The Bulk Tariff is attached to the license issued to the Water Service Providers.
 - v. Section 93(1) provides for a water service provider to enter into a PPP in the discharge of its mandate
 - vi. Section 93(4) provides that licensees such as Water Service Providers may delegate their powers to supply bulk water.
 - vii. Section 100 provides that “a person shall not supply water in bulk to a water service provider without a license by the regulator WASREB”
6. The Cabinet Secretary informed the Committee that in order to align the Water Act 2016 to the PPP Act 2021;
- i. Section 2 of the Act be amended to include the definition of contracting authority at National and County Government level to mean as follows;
 - (a) At the National level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or
 - (b) At the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;
 - ii. Section 93 of the Water Act be amended to provide for Public Private Partnership as follows:
 - (a) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person of some or all of its functions as a licensee with respect to a part or the whole of its area water service provision.
 - (b) Where the person entering into an agreement with the contracting authority owns or possesses assets 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 so used.
7. The Cabinet Secretary informed the Committee that section 68 which provides for the powers of water works development agencies be amended to include the function of bulk water services provision. Further, section 69 of the Act to be amended to clearly provide that National public water works are not transferable to the counties and shall remain under the operations and maintenance of the National Government

8. She also informed the Committee that Section 72(1)(c) has also been amended to provide for licensing of water works Development Agencies by WASREB as a bulk Water Service provider. Section 100 has also been amended to provide for bulk water supply which is for purposes of PPP.
9. The Cabinet Secretary stated the following as the justifications for these amendments:
 - i. The amendments will align the Water Act, 2016 to the PPP Act, 2021
 - ii. They will help to identify and incorporate into the Law institutions that can undertake PPP in the Water sector
 - iii. They will help to enable the Water Works Development Agencies to be licensed by WASREB to provide bulk water and also a tariff to be set in that regard
 - iv. They will help to expand WASREB's mandate to provide licensing of other Water sector institutions and also set bulk water tariff and raw water tariff for irrigation

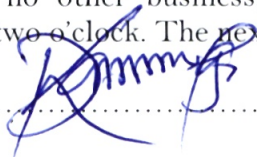
Committee Recommendations

Having received the submissions on the Bill from the Ministry, the Committee made the following observations:

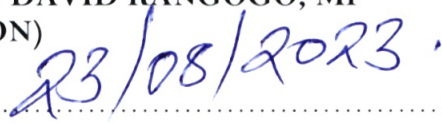
- i. There was need for the Ministry give a clear definition of “Bulk water” as mentioned in article 3 of the Amendment Bill. Further, a provision on the threshold of Bulk water be provided.
- ii. There is a need for the Water Storage Authority to be licensed by the Regulatory Board
- iii. The Ministry to inform the Committee on the safeguard measures for county governments with regards to the additional rules on PPP to ensure that these powers will not be misused.
- iv. The Ministry to provide clarification with regards to the Bulk water tariffs in Section 72 of the principal Act.

MIN.NO.DC/ BEW&I/ 104/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at seventeen minutes past two o'clock. The next meeting will be held on notice.

Signed.....


**HON. BOWEN DAVID KANGOGO, MP
 (CHAIRPERSON)**

Date.....




REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION – 2022

MINUTES OF THE 39TH SITTING OF THE DEPARTMENTAL COMMITTEE ON BLUE ECONOMY, WATER AND IRRIGATION HELD ON MONDAY 21ST AUGUST, 2023 AT THE MAIN CHAMBER, PARLIAMENT BUILDINGS AT 3.00 PM

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. William Kamket, MP | | |
| 4. Hon. Buyu Rozaah Akinyi, MP | | |
| 5. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 6. Hon. Tandaza Kassim Sawa, MP | | |
| 7. Hon. Were Charles Ong'ondo, MP | | |
| 8. Hon. Gachagua George, MP | | |
| 9. Hon. Dorothy Muthoni Ikiara, MP | | |
| 10. Hon. Nebart Bernard Muriuki, MP | | |
| 11. Hon. Muiruri Muthama Stanley, MP | | |

APOLOGIES

1. Hon. Chepkwony Charity Kathambi, MP
2. Hon. Eric Mwangi Kahugu, MP
3. Hon. Mnyazi Amina Laura, MP
4. Hon. Adow Mohamed Aden, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|-----------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Mr. Eugene Apa | Research officer |
| 6. Ms. Veron D. Aluoch | Research Officer III |
| 7. Ms. Lilian Mburugu | Media Relations Officer |
| 8. Ms. Joyce Wachera | Hansard Officer |
| 9. Ms. Lilian Alunga | Protocol Officer |
| 10. Mr. Cosmas Akhonya | Audio Officer |
| 11. Mr. Wilson Angatangoria | Sergeant-At-Arms |

**IN- ATTENDANCE – STATE DEPARTMENT FOR WATER AND SANITATION
AND THE JUDICIARY**

- | | | |
|----------------------------|----------------------------|-------------------|
| 1. Ms. Ann Asugah | Registrar Tribunals | - Judiciary |
| 2. Ken Ogutu | Legal Counsel | - Judiciary- OCRJ |
| 3. Eng. SAO Alima | Water Secretary | - MWSI |
| 4. Ms. Rose A. O. Nyakwana | Deputy Chief State Counsel | - MWSI |

MIN.NO.DC/ BEW&I/101/2023: PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past eleven o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers
2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration of the Water (Amendment) Bill, 2023 with the Judiciary**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/102/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/103/2023: CONSIDERATION OF THE WATER (AMENDMENT) BILL, 2023 WITH THE JUDICIARY

The Judiciary appeared before the committee to seek guidance and approval in respect to the Water (Amendment) Bill, 2023. Having reviewed the Water (Amendment) Bill, 2023, the Registrar in charge of Tribunals presented to the Committee as follows:

1. One of the key features of the Water Act, 2016 is the Water Tribunal which is established under Section 119 of the Act to hear appeals from the decisions or orders of the Cabinet Secretary, the Water Resources Authority and the Water Services Regulatory Board.
2. Given its mandate, the Tribunal plays a critical role in the smooth operations of the Water Sector and should therefore be empowered to discharge this statutory mandate.
3. The Registrar however noted that the Tribunal – as presently established under the Act – is composed only of a Chairperson and does not have members. Due to this, the Tribunal has not been able to operate optimally.
4. The Judiciary therefore proposed that the Water (Amendment) Bill, 2023 be revised to include a deletion of section 119 of the Principal Water Act, 2016 and replacing it with a provision permitting the Judicial Service Commission to appoint four other persons to serve as Members in the Tribunal and consequentially, include the qualifications of both the Chairperson and the members of the Tribunal as follows;
 - i. A Chairperson who shall be an advocate of the High Court of Kenya with no less than ten years' post-qualification experience; and
 - ii. Four other persons who possess a degree from a university recognized in Kenya and at least five years' experience in a relevant field.

Other additions included the terms of tenure and matters involving remuneration and allowances.

Committee Recommendations

The Committee concurred with the Judiciary to delete and include a new Section 119 with a few recommendations as seen below:

Repeal and replace Section **119 of No. 43 of 2016.**

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

119. (1) There is established a Water Tribunal.

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

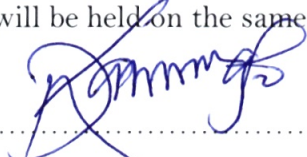
- (a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post qualification experience;
- (b) two persons who shall—
 - (i) be advocates of the High Court of Kenya with not less than ten years' post qualification experience; and
 - (ii) have experience in legal matters relating to water or have been involved in water in any capacity;
- (c) one person who possess a degree in civil engineering from a university recognized in Kenya and at least five years' experience in water works development; and
- (d) one person who possess a degree from a university recognized in Kenya and at least five years' experience in in hydrology, geology, water works development, environmental science or a related field.

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

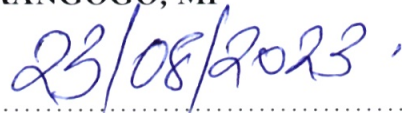
(4) The Chairperson and members of the Water Tribunal shall be paid such remuneration and allowances as the Judicial Service Commission may, in consultation with the Salaries and Remuneration Commission, determine.

MIN.NO.DC/ BEW&I/104/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at four o'clock. The next meeting will be held on the same day at fifteen minutes past four o' clock.

Signed.....


**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

Date.....




REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION - 2022

**MINUTES OF THE 40TH SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON MONDAY 21ST
AUGUST, 2023 AT THE MAIN CHAMBER, PARLIAMENT BUILDINGS AT 4.15
PM**

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. William Kamket, MP | | |
| 4. Hon. Buyu Rozaah Akinyi, MP | | |
| 5. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 6. Hon. Tandaza Kassim Sawa, MP | | |
| 7. Hon. Were Charles Ong'ondo, MP | | |
| 8. Hon. Gachagua George, MP | | |
| 9. Hon. Dorothy Muthoni Ikiara, MP | | |
| 10. Hon. Nebart Bernard Muriuki, MP | | |
| 11. Hon. Muiruri Muthama Stanley, MP | | |

APOLOGIES

1. Hon. Chepkwony Charity Kathambi, MP
2. Hon. Eric Mwangi Kahugu, MP
3. Hon. Mnyazi Amina Laura, MP
4. Hon. Adow Mohamed Aden, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|-----------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Mr. Eugene Apa | Research officer |
| 6. Ms. Veron D. Aluoch | Research Officer III |
| 7. Ms. Lilian Mburugu | Media Relations Officer |
| 8. Ms. Joyce Wachera | Hansard Officer |
| 9. Ms. Lilian Alunga | Protocol Officer |
| 10. Mr. Cosmas Akhonya | Audio Officer |
| 11. Mr. Wilson Angatangoria | Sergeant-At-Arms |

**IN- ATTENDANCE – STATE DEPARTMENT FOR WATER AND SANITATION
AND THE NATIONAL TREASURY**

- | | | | |
|----------------------------|----------------------------|---|-------------------|
| 1. Ms. Karei Mwenda | Senior State Counsel | - | National Treasury |
| 2. Eng. SAO Alima | Water Secretary | - | MWSI |
| 3. Ms. Rose A. O. Nyakwana | Deputy Chief State Counsel | - | MWSI |

MIN.NO.DC/ BEW&I/101/2023: PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past eleven o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers
2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration of the Water (Amendment) Bill, 2023 with the National Treasury**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/102/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/103/2023: CONSIDERATION OF THE WATER (AMENDMENT) BILL, 2023 WITH THE NATIONAL TREASURY

1. The National Treasury through the PPP Directorate appeared before the Committee on Monday 20th August, 2023 and informed the Committee that:
2. 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.
3. 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.
4. Acting on this directive both the Ministries developed a draft Water Purchase agreement, draft cabinet Memorandum and the draft Water Amendment Bill.
5. Based on the above the National Treasury indicated that, they were in agreed in totality with the Water Amendment Bill, 2023.
6. 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.

MIN.NO.DC/ BEW&I/104/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at fifty minutes past four o'clock. The next meeting will be held on notice.

Signed.....

**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

Date.....

[Handwritten Signature]
23/08/2023



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION – 2022

**MINUTES OF THE 41ST SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON TUESDAY 22ND
AUGUST, 2023 AT THE COMMITTEE ROOM, 4TH FLOOR, CONTINENTAL
HOUSE, PARLIAMENT BUILDINGS AT 10.20 AM**

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. William Kamket, MP | | |
| 4. Hon. Buyu Rozaah Akinyi, MP | | |
| 5. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 6. Hon. Tandaza Kassim Sawa, MP | | |
| 7. Hon. Were Charles Ong'ondo, MP | | |
| 8. Hon. Gachagua George, MP | | |
| 9. Hon. Dorothy Muthoni Ikiara, MP | | |
| 10. Hon. Nebart Bernard Muriuki, MP | | |
| 11. Hon. Muiruri Muthama Stanley, MP | | |
| 12. Hon. Mnyazi Amina Laura, MP | | |
| 13. Hon. Adow Mohamed Aden, MP | | |

APOLOGIES

1. Hon. Chepkwony Charity Kathambi, MP
2. Hon. Eric Mwangi Kahugu, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|----------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Mr. Eugene Apa | Research officer |
| 6. Ms. Veron D. Aluoch | Research Officer III |
| 7. Ms. Lilian Mburugu | Media Relations Officer |
| 8. Mr. Cosmas Akhonya | Audio Officer |
| 9. Mr. Wilson Angatangoria | Sergeant-At-Arms |

MIN.NO.DC/ BEW&I/125/2023: PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past ten o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers

2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration of the Report on the Water (Amendment) Bill, 2023**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/126/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/127/2023: CONSIDERATION OF THE WRITTEN SUBMISSIONS BY ORARO AND COMPANY ADVOCATES

The Legal Counsel took Members through the Proposed Amendments to the Water Amendment Bill, 2023 by Oraro and Company Advocates and resolved as follows:-

Clause in the Bill	Proposal	Justification	Committee Recommendations
Clause 3 Amendment of section 32 of No. 43 of 2016	We propose that a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.	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.	The Committee rejected the proposed amendment
Clause 5 Insertion of a new section 68A in No. 43 of 2016	For sub-clause (2), we propose that the standards and conditions of licensing are published in: <ol style="list-style-type: none"> a. the Kenya Gazette; and b. The Regulatory Board's website. 	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.	The Committee agreed to the amendment

<p>Clause 8 Amendment of section 75 of No. 43 of 2016</p>	<p>For sub-section (1) (a) of the Water Act, 2016, we propose the deletion of paragraph (a) and replacing it with the words “their names, telephone numbers, e-mails and postal addresses”.</p>	<p>Providing a water service provider’s telephone number and e-mail address allows customers and the public to directly contact the water service providers.</p> <p>This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.</p>	<p>The Committee agreed to the amendment.</p>
<p>Clause 10 Amendment of section 100 of No. 43 of 2016</p>	<p>We propose the deletion of this proposal.</p>	<p>Currently, Nairobi County does not pay other counties for the water it sells to consumers.</p> <p>The bill seeks to make it mandatory for counties that do not produce their own water to purchase the commodity.</p> <p>Consequently, this proposal will lead to an increase in the price of water paid by the consumers.</p> <p>To conclude, our 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)</p>	<p>The Committee rejected the proposed amendment</p>

		of the Constitution.	
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**MIN.NO.DC/ BEW&I/128/2023: CONSIDERATION OF THE COMMITTEE
STAGE AMENDMENT TO THE WATER
(AMENDMENT) BILL, 2023**

The Committee was taken through the proposed Committee Stage amendments to the Water (Amendment) Bill, 2023 and agreed as follows:-

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.

(a) by deleting paragraph (a) and substituting

- therefor the following new paragraph—
- (a) their names, telephone numbers, electronic mail and postal addresses;
 - (b) 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—

- (c) 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.

- (d) 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—

119. (1) There is established of the water tribunal.

(1) There is established Water Tribunal.

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

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 a 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.

MIN.NO.DC/ BEW&I/129/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at thirty seven minutes past eleven o'clock. The next meeting will be held on notice.

Signed.....


**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

Date.....
23/08/2023



REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY
13TH PARLIAMENT - SECOND SESSION – 2022

**MINUTES OF THE 42ND SITTING OF THE DEPARTMENTAL COMMITTEE ON
BLUE ECONOMY, WATER AND IRRIGATION HELD ON WEDNESDAY 23RD
AUGUST, 2023 AT THE COMMITTEE ROOM, 4TH FLOOR, CONTINENTAL
HOUSE, PARLIAMENT BUILDINGS AT 10.00AM**

PRESENT

- | | | |
|---|---|--------------------------|
| 1. Hon. Bowen David Kangogo, MP | - | Chairperson |
| 2. Hon. Kemero Maisori Marwa Kitayama, MP | - | Vice- Chairperson |
| 3. Hon. William Kamket, MP | | |
| 4. Hon. Buyu Rozaah Akinyi, MP | | |
| 5. Hon. Eng. Nzengu Paul Musyimi, MP | | |
| 6. Hon. Tandaza Kassim Sawa, MP | | |
| 7. Hon. Were Charles Ong'ondo, MP | | |
| 8. Hon. Gachagua George, MP | | |
| 9. Hon. Dorothy Muthoni Ikiara, MP | | |
| 10. Hon. Nebart Bernard Muriuki, MP | | |
| 11. Hon. Muiruri Muthama Stanley, MP | | |
| 12. Hon. Mnyazi Amina Laura, MP | | |
| 13. Hon. Adow Mohamed Aden, MP | | |

APOLOGIES

1. Hon. Chepkwony Charity Kathambi, MP
2. Hon. Eric Mwangi Kahugu, MP

**IN- ATTENDANCE – NATIONAL ASSEMBLY
COMMITTEE SECRETARIAT**

- | | |
|----------------------------|-------------------------|
| 1. Mr. Nicodemus Maluki | Second Clerk Assistant |
| 2. Ms. Ivy Kageha | Third Clerk Assistant |
| 3. Ms. Lynette Otieno | Senior Legal Counsel |
| 4. Dr. Benjamin Ngimor | Senior Fiscal Analyst |
| 5. Mr. Eugene Apa | Research officer |
| 6. Ms. Veron D. Aluoch | Research Officer III |
| 7. Ms. Lilian Mburugu | Media Relations Officer |
| 8. Mr. Cosmas Akhonya | Audio Officer |
| 9. Mr. Wilson Angatangoria | Sergeant-At-Arms |

MIN.NO.DC/ BEW&I/130/2023: PRELIMINARIES

The Chairperson called the meeting to order at twenty minutes past ten o'clock and prayed. He thereafter welcomed Members and the secretariat into the meeting and requested all present to make a self-introduction.

AGENDA:

The agenda of the meeting was presented as follows:

1. Prayers

2. Preliminaries/Introductions
 - i. Adoption of the Agenda
 - ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Adoption of the Report on the Water (Amendment) Bill, 2023**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN.NO.DC/ BEW&I/131/2023: CONFIRMATION OF MINUTES

This agenda item was deferred to the next meeting.

MIN.NO.DC/ BEW&I/132/2023: ADOPTION OF THE REPORT ON THE WATER (AMENDMENT) BILL, 2023

The Committee unanimously adopted its report on the Water (Amendment) Bill, 2023, (National Assembly Bill No. 33 of 2023) with the following recommendations:-

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 section 8 of
No. 43 of
2016.

8. Section 75 of the principal Act is amended in subsection (1)—

- (a) by deleting paragraph (a) and substituting therefor the following new paragraph—
 - (a) their names, telephone numbers, electronic mail and postal addresses;
- (b) 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—

(c) 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.

(d) 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.

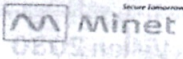
MIN.NO.DC/ BEW&I/133/2023: ADJOURNEMENT

There being no other business, the Chairperson adjourned the meeting at forty five minutes past eleven o'clock. The next meeting will be held on notice.

Signed.....


**HON. BOWEN DAVID KANGOGO, MP
(CHAIRPERSON)**

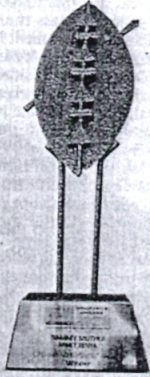
Date.....
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REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - SECOND SESSION (2023)

IN THE MATTER OF ARTICLE 118 (1)(b) OF THE CONSTITUTION AND IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF:

1. THE HIGHER EDUCATION LOANS BOARD (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 58 OF 2022);
2. THE INSURANCE (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 18 OF 2023);
3. THE NATIONAL GOVERNMENT CO-ORDINATION (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 25 OF 2023);
4. THE WATER (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL NO. 33 OF 2023); AND
5. THE VOCATIONAL TRAINING BILL (SENATE BILL NO. 3 OF 2022).

INVITATION TO SUBMIT MEMORANDA

WHEREAS, Article 118(1) (b) of the Constitution requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its Committees and Standing Order 127(3) of the National Assembly Standing Orders requires House Committees considering Bills to facilitate public participation;

AND WHEREAS, the Higher Education Loans Board (Amendment) Bill (National Assembly Bill No. 58 of 2022); the Insurance (Amendment) Bill (National Assembly Bill No. 18 of 2023); the National Government Co-ordination (Amendment) Bill (National Assembly Bill No. 25 of 2023); the Water (Amendment) Bill (National Assembly Bill No. 33 of 2023); and the Vocational Training Bill (Senate Bill No. 3 of 2022) have been read a First Time and referred to the relevant Departmental Committees for consideration and reporting to the House;

IT IS NOTIFIED that:

1. The Higher Education Loans Board (Amendment) Bill (National Assembly Bill No. 58 of 2022) is a Bill sponsored by the Hon. Joyce Kamene, MP which seeks to amend the Higher Education Loans Board Act, No. 3 of 1995 to expressly provide that the Higher Education Loans Board shall not deny loans to students who have not attained the age of eighteen years.
2. The Insurance (Amendment) Bill (National Assembly Bill No. 18 of 2023) is a Bill sponsored by the Leader of the Majority Party, the Hon. Kimani Ichung'wah, MGH, MP which seeks to enhance accountability within insurance companies and observation of fiduciary duties as well as professional responsibilities by senior managers of insurance companies by amending the Insurance Act (CAP. 487) to provide for offences and penalties relating to the management of insurance companies. The amendments seek to ensure that Insurance companies take responsibility in case an insurance company fails.
3. The National Government Co-ordination (Amendment) Bill (National Assembly Bill No. 25 of 2023) is a Bill sponsored by the Hon. Moses Malulu Injendi, MP which seeks to amend the National Government Coordination Act to recognize village elders who perform national government functions in village units. The Bill further seeks to recognize the existing village units and provide for establishment of village councils and appointment of village elders and payment of their allowances.
4. The Water (Amendment) Bill (National Assembly Bill No. 33 of 2023) is a Bill sponsored by the Leader of the Majority Party, the Hon. Kimani Ichung'wah, MGH, MP which seeks to amend the Water Act, 2016, to operationalize public private partnerships in the water sector.
5. The Vocational Training Bill (Senate Bill No. 3 of 2022) seeks to put in place a legal framework to govern the establishment and management of vocational education and training institutions in the countries.

NOW THEREFORE, in compliance with Article 118(1) (b) of the Constitution and Standing Order 127(3), the Clerk of the National Assembly hereby invites the public and stakeholders to submit memoranda on the Bills to the respective Departmental Committees listed below:

BILL	COMMITTEE
1. Higher Education Loans Board (Amendment) Bill (National Assembly Bill No. 58 of 2022)	Education
2. Insurance (Amendment) Bill (National Assembly Bill No. 18 of 2023)	Finance and National Planning
3. National Government Co-ordination (Amendment) Bill (National Assembly Bill No. 25 of 2023)	Administration and Internal Security
4. Water (Amendment) Bill (National Assembly Bill No. 33 of 2023)	Blue Economy, Water and Irrigation
5. Vocational Training Bill (Senate Bill No. 3 of 2022)	Education

Copies of the Bills are available at the National Assembly Table Office, Main Parliament Buildings or on www.parliament.go.ke/the-national-assembly/house-business/bills.

The memoranda may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi; hand-delivered to the Office of the Clerk, Main Parliament Buildings, Nairobi; or emailed to cna@parliament.go.ke to be received on or before Tuesday, 22nd August 2023 at 5.00 p.m.

S. NJOROGE
CLERK OF THE NATIONAL ASSEMBLY

8th August, 2023

For the Welfare of Society and the just Government of the People



Water & Sanitation Providers Association

Advocating for safely managed water and sanitation

Date: Thursday, July 20, 2023

MR. SAMUEL NJOROGE
CLERK OF NATIONAL ASSEMBLY
Nairobi.

Dear Sir,

**REF: REQUEST FOR NATIONAL EXECUTIVE COMMITTEE OF WASPA TO MEET THE
NATIONAL DEPARTMENTAL COMMITTEE ON BLUE ECONOMY AND IRRIGATION.**

Introduction of WASPA, WSPs and their Roles

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. Currently, there are 93 regulated WSPs according to WASREB, IMPACT REPORT No. 15 which was launched on 19th June 2023. The WSPs were created through enactment of Water Act 2002 and majority registered under the Companies Act (Cap. 486) then. The former and the latter pieces of legislation have since been *repealed and replaced* by the Water Act 2016 and Companies Act 2015 respectively. Whereas the WSPs cardinal mandate is to provide Water and Sanitation Services in their respective jurisdictions as prescribed in the license issued by the Water Services Regulatory Board (WASREB), WASPA mission is to facilitate an enabling environment for the WSPs so that they can prosecute their mandate effectively, efficiently and sustainably while paying attention to International, National and County Water and Sanitation goals as espoused by Sustainable Development Goal (SDG) No. 6, Constitution of Kenya (COK) 2010, Bottom Up Economic Transformation Agenda (BETA) of the Kenya Kwanza Government, Water Act 2016 and County Integrated Development Plans (CIDPs) across the 47 Counties in the Republic of Kenya.

Gains made through the Water Reforms

It is imperative to note that the water sector has undergone progressive reforms chaperoned under the Water Act 2002 and Water Act 2016 where the water coverage was estimated at less than 40% and a turnover of Kshs 5 billion in 2002. The water coverage is now at 62%, sanitation coverage at 29% and the sector turnover is at Kshs 24.6 billion due to improved services. Nonetheless, the sector still faces numerous challenges that will make it *difficult if not impossible* to achieve SDG No. 6 on universal access to safely managed water and sanitation by all and the Country's' Vision 2030 targets.

Challenges

These include, but not limited to the following;

1. Governance
2. High non-revenue water (NRW) due technical and commercial losses.
3. High and galloping costs of electricity.
4. Multiple taxation and levies amounting to almost 30% of the turnover.
5. High Turnover of Board of Directors and Senior Managers of WSPs
6. Low Water and Sanitation coverage in Low Income Areas (LIAs) or informal settlements
7. Weak and Ineffective Water Resource Conservation Management Framework
8. Disjointed National Sanitation Management frameworks
9. Non-Implementation of Sessional Paper No. 1 of 2021, the National Water Policy.
10. Management of Bulk Water Supply
11. Non- Cost Reflective Indexed tariff over the years.
12. High cost of production of potable water.
13. Lack of inter-governmental water sector coordination framework
14. Huge Budgetary Deficit of Kshs 100 billion annually to address the National Water and sanitation master plan.
15. Climate change that has reduced the quality and quantity of water.
16. Projects developed without last mile connectivity.
17. Porous political environment that WSPs operate in due to a myriad of political interests such as pressure for employment increasing the wage bills.
18. Increase in population rate more than water and sanitation connectivity rate.
19. Covid-19 Pandemic
20. Depreciation of the Kenyan shilling against major trading currencies

Consequently, the Association with support from the African population and Health Research Center (APHRC) wishes to engage the Departmental Committee to address some of the above challenges and more specifically in the following three areas;

1. The Draft National Sanitation Management policy to fastrack its approval and implementation
2. Development of National Sanitation Regulations to aid in implementation of the National Sanitation Management Policy
3. The Water (Amendment) Bill, 2023

We are looking forward towards your timely response.

Yours faithfully,

A handwritten signature in black ink, consisting of a series of loops and a central vertical stroke, enclosed within a large, irregular oval shape.

Antony Ambugo
CHIEF EXECUTIVE OFFICER

Cc; Hon. David Kangogo Bowen M.P, Chairperson

National Assembly Departmental Committee on Blue Economy and Irrigation
Mr. Nicodemus Maluki, Head of Secretariat
Mr. Alex Manyasi, APHRC



REPUBLIC OF KENYA

MINISTRY OF WATER SANITATION AND IRRIGATION

CABINET MEMORANDUM ON PROPOSED AMMENDMENTS TO THE WATER ACT 2016

1. OBJECTIVES OF THE MEMORANDUM

The objectives of this memorandum are to; -

- 1.1 Apprise the Cabinet on the proposed amendments to the Water Act 2016
- 1.2 Seek cabinet guidance and approval in respect of the Water Act amendments to on-board the Public Private Partnership (PPP).

2. BACKGROUND

The Ministry of Water sanitation and irrigation has initiated proposed amendments to the Water Act 2016 in order to provide for public private partnerships in financing development of water works by the national Government agencies and for operations and maintenance of water services, bulk water service provision framework by the national government agencies and the protection riparian reserves among others. The proposed amendments to the water act include critical definitions and interpretations which will open up several water sector institutions to be capable of benefitting from the PPP funding option and also to be bankable.

The Constitution of Kenya 2010 came with wide implications for the 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.; -

3. PROPOSED AMENDMENTS

The following Amendments are proposed to achieve the indicated purpose of on-boarding Public Private Partnership in the Water Sector;-

A. Aligning the Water Act 2016 to the PPP Act 2021

- i. Section 2 of the Act amended to include the definitions of a contracting authority at national and county government level.

“Contracting authority” means-

(a) at the national level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or

(b) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;

- ii. Section 93 of the Water Act 2016 be amended to provide for Public Private Partnership as follows:

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

(2) 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 so used.

Bill doesn't have this

B. Providing for WWDAs as bulk water service providers for PPP

- a. Section 68 which provides for the powers of water works development agencies be amended to include the function of bulk water services provision.
- b. Section 69 of the Act was amended to clearly provide that National public water works are not transferable to the counties and shall remain under the operations and maintenance of the National Government.
- c. Further, Section 72 (1) (c) has also been amended to provide for licensing of Water Works Development Agencies by WASREB as a bulk Water Service provider.

- d. Section 100 has also been amended to provide for bulk water supply which is for purposes of PPP.

4. JUSTIFICATION

Kenya is classified as one of the water scarce countries; this means that a lot of efforts are required in terms of funding and relevant resources to ensure quality and adequate water is served on the fifty (50) million citizens. His excellency the Head of State in his State of the Nation Address to both Houses of Parliament sometime in September 2022 emphasized the need for a Public-Private-Partnership (PPP) funding framework, particularly for large capital projects in the water sector. The proposed PPP funding option if adopted, is expected to contribute to the attainment of the target of raising Kshs. 500 billion required to increase access to water from the current 60 per cent for the regulated services to 80 per cent and increase irrigation acreage to 1.2 million acres by the year 2030.

The Ministry of Water, Sanitation and Irrigation, the National Treasury and Attorney General's Office held consultations on the best way forward to on-board Public Private Partnership funding option in the Water Sector. The outcome of the consultations is a proposal to finalise a sample Water Purchase Agreement, amendments to the Water Act no 43 of 2016, develop an outline of bankable structures for Water PPPs and tariff setting for PPP Water schemes. To this end the Ministry of Water considered the Water Act no. 43 of 2016 and identified areas for amendment to onboard the Public Private Partnership in the Water Sector. Once effected, these amendments will enable the Ministry and relevant Water Sector institutions to undertake PPP projects. This will greatly enhance the efforts of the Ministry to increase water and sewerage coverage for all by the year 2030.

5. PUBLIC PARTICIPATION

The proposed Water amendments to on-board Public Private Partnership were developed by the Ministry of Water, Sanitation and Irrigation together with the relevant Water sector institutions. The amendments have further been subjected to countrywide Public Participation. The evidence of Public Participation is herewith attached for consideration.

6. FINANCIAL IMPLICATION

The cost of Implementation of the amendments will be mainstreamed and accommodated within the normal budgetary provisions of the ministry.

7. REQUEST TO THE CABINET

The cabinet is requested to approve the amendments for transmission to the Hon Attorney General for publication.

Hon. Alice Muthoni Wahome

Cabinet Secretary Ministry of Water sanitation and Irrigation.

Signed

Date

2023

Water Act No. 43 OF 2016

(Amendment to onboard Public Private Partnership in the law)

HON. ALICE WAHOME

CABINET SECRETARY

PRESENTATION OUTLINE

- Overview of Water Sector Legal Reforms;
- Water Act no 43 of 2016;
- Proposed amendments to the Water Act;
- Introduction of PPP in the Water Sector;
- Provisions inconsistent with PPP Act 2021;
- Justification for amendments;
- Amended provisions
- Recommendation

Water sector Legal reforms

- WSRs commenced in 2002 when Cap 372 of 1952 was repealed;
- Promulgation of CoK, in the Water Sector having introduced radical changes namely devolution of the provision of water and sanitation services
- Recognising Water as a basic human right;
- Providing for sustainable management of water resources;
- Consumer protection as a mandate of the National Government.
- Hydraulic engineering and Water Resources as a mandate of the National Government.
- Use of Public Participation in decision making over public affairs;

Water Act No. 43 of 2016

- Water Act 2016 was enacted to realign the sector's institutional and legal framework to the COK 2010 ;
- WA 2016 has created several institutions with various functions and mandate;
- The implementation commenced in 2016, however there were some inconsistencies in the act;

Proposed Amendments to the Water Act 2016

- Miscellaneous amendments to the water act;
- Comprehensive amendments including amendments to address governance in the sector;
- Amendments to incorporate Public Private Partnerships as a funding option in the water sector;

Introduction of PPP (*BETA APPROACH*)

- Kenya is classified as one of the water scarce countries;
- Inadequate funding in the sector to ensure provision of quality and adequate water and sanitation services;
- Head of State in his State of the Nation Address to both Houses of Parliament in September 2022 emphasized the need for a Public-Private-Partnership (PPP) funding framework;
- Explore PPP as a funding option especially for large capital projects;
- Ministry therefore engaged relevant stakeholders like AG, PPP Unit National Treasury.
- Undertook capacity building (Sensitisation of staff)

Identifying inconsistent provisions of the Water Act 2016 with PPP ACT

- Under Section 2 the interpretation of Water service provider excludes water works development agencies and other bodies.
- Section 68 on the powers and functions of WWDA does not include power to enter into PPP contracts.
- Section 69 provides for WWDA to complete projects and immediately hand over to the water service providers, joint committees or authorities.

Identification continued

- Section 72 provides for licensing of water service providers by the water services Regulatory Board. The Bulk Tariff is attached to the license issued to the Water Service Providers.
- Sections 93(1) provides for a water service provider to enter into aPPP in the discharge of its mandate;
- Section 93(4) provides that licensees such as Water service providers may delegate their powers to supply bulk water.
- Section 100 provides that “a person shall not supply water in bulk to a water service provider without a license by the regulator WASREB”

Justification for the amendments

Align the Water act no 43 of 2016 to the PPP Act 2021

To identify and incorporate into the law institutions that can undertake PPP in the water sector;

Justification for the amendments

To enable the Water Works Development agencies to be licensed by WASREB TO provide bulk water and also a tariff to be set in that regard.

To expand mandate of WASREB to provide licensing of other Water sector institutions and also set bulk water tarrif and raw water tariff for irrigation;

NO	SECTIONS	Amendment	justification
1.	2 add definition	Definition of "Contracting Authority" and also expansion of definition of "Water Service Provider",	Definitions
2.	32 (ca) new insertion	Add to the mandate of national Water harvesting Authority to enter into a water purchase agreement, sale and distribute water	NWWSA
3	Amend 68 by inserting 68 A	Expand the Powers of regulatory board to license over water works development agencies / tariff.	WASREB
4	Delete s. 68 (b) and insert (b)	Powers and functions of WWDAs amended to include bulk water services provision	WWDAs
5	Amend S,69(1),(2) and (3) From article 189(2) of the const.	To provide clarity between functional roles of WWDAs and WSPs	WWDAs as bulk water supplier and in this regard Water Service providers .

6	Amend section 72 by deleting the entire (c) substituting with a new paragraph (b) and (c)	Proposal is to have all water service providers including the WWDAs, NIA and NWWSA licensed by WSREB in terms of the proposed Section 72 (1) b	Introducing licensing of water sector institutions which were initially not being licensed.
7	Amendment of section 93(1)	All Water service providers as per proposed definition of the Act including NWWSA, WWDAs with approval of WASREB	The mandate of undertaking PPP expanded.
8	Amend Section 100 by inserting sub section (4) and (5)	Supply of bulk water	By WWDA established under section 65.

RECOMMENDATION/PROPOSAL

Ministry approves amendments except for minor correction below.

Functions and Powers of WASREB to be moved from section 68 to Section 72 so that they are aligned as follows:

1. Licencing of WWDAs to supply bulk water; and
2. Approval of Tariffs for bulk water supply.

These two functions of WASREB need to be well captured under section 72 of the Water Act 2016 so that they are available for interpretation.

New Proposals

- To consider changing the name of 'Water Services Regulatory Board' to Water Services Regulatory Authority;
- Allow the government to undertake Last mile connectivity where the Contractor has not completed;
- Amendment of PPP act to allow components to be done by government and investor.



THANK YOU FOR LISTENING!





REPUBLIC OF KENYA



THE JUDICIARY

OFFICE OF THE CHIEF REGISTRAR OF THE JUDICIARY

Our Ref: CRJ 48

Your Ref:

Date: Aug 16, 2023

Clerk of the National Assembly
The National Assembly
Office of the Clerk
P. O. Box 41842-00100
NAIROBI

RE: WATER (AMENDMENT) BILL (NATIONAL ASSEMBLY BILL. NO. 33 OF 2023)

We refer to the call for memoranda from the public and stakeholders on the above referenced Bill, published via the daily newspapers.

We have reviewed the Bill and hereby submit the below views for the consideration of the Blue Economy and Irrigation Committee of the National Assembly.

One of the key features of the Water Act is the Water Tribunal which is established under Section 119 of the Act to hear appeals from the decisions or orders of the Cabinet Secretary, the Water Resources Authority and the Water Services Regulatory Board.

Given its mandate, 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.

Unfortunately, the Tribunal - as presently established under the Act - is composed only of a Chairperson and does not have members. Perhaps due to an oversight in the legislative process, Section 119(2) of the Act provides only for a Chairperson of the Tribunal, without any members.

The Judicial Service Commission has appointed the Chairperson of the Tribunal as required under the Act. However, the Tribunal has not been able to operate optimally due to the lack of members who can work with the Chairperson in conducting proceedings.

We are therefore writing to propose that the Water (Amendment) Bill, 2023 be revised to include an amendment to Section 119 of the Water Act permitting the Judicial Service Commission to appoint four other persons to serve as the Members of the Tribunal. We also propose that Section 119 be expanded to include the qualifications of the Chairperson and Members of the Tribunal.



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If this is acceptable, we propose that Section 119 be deleted and replaced with the following provision:

119. Establishment of the Water Tribunal

(1) *There is established a Water Tribunal.*

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

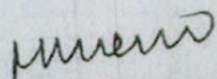
(a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post-qualification experience; and

(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.*

We thank you for your continued support and remain available to provide any clarification that the Committee may require.


ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

Copy To: Chief Justice / President,
Supreme Court of Kenya
Supreme Court Building
NAIROBI

Cabinet Secretary,
Ministry of Water, Sanitation & Irrigation
Maji House, Ngong Road
NAIROBI

Hon Ann Asugah
Registrar, Tribunals
Forodha House
NAIROBI

aaa/ko



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Justice Be Our Shield and Defender

(2) The Chief Executive Officer shall be the accounting officer of the Fund and, subject to the directions of the Fund, shall be responsible for the management of the affairs of the Fund.

(3) The Fund may appoint such officers and other staff as may be necessary for the exercise and performance of its functions, upon such terms and conditions as the Cabinet Secretary responsible for matters relating to public service on the advice of the Salaries and Remuneration Commission may determine.

PART VI – DISPUTE RESOLUTION

119. Establishment of the water tribunal

(1) There is established a Water Tribunal.

(2) There shall be a chairperson of the Water Tribunal appointed by the Judicial Service Commission on such terms and conditions as may be determined by the Judicial Service Commission.

120. Staff of the Water Tribunal

The staff of the Tribunal shall be appointed, removed from office or otherwise disciplined by the Judicial Service Commission in accordance with Article 172(1) (c) of the Constitution.

121. Jurisdiction of the Tribunal

(1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.

(2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.

122. Proceedings of the Tribunal

The Tribunal shall make Rules governing its procedures.

123. Determination of appeals and disputes

In determining an appeal, the Tribunal may affirm, quash or vary the decision or order.

124. Appeals to the Land and Environment Court

A person aggrieved by a decision of the Tribunal may, within twenty-one days from the date of that decision, appeal to the Land and Environmental Court, established under article 162(2) of the Constitution on an issue of law.

125. Decisions binding if no appeal within thirty days

A decision of a water basin organization, the Authority, the Regulatory Board or the Tribunal against which no appeal has been preferred within thirty days from the date on which the decision was made, shall be binding on all parties.



THE NATIONAL TREASURY & ECONOMIC PLANNING

PUBLIC PRIVATE PARTNERSHIPS (PPP) DIRECTORATE

INTERNAL MEMO

To: Principal Secretary/ National Treasury

From: Director General / Public Private Partnerships

Ref. No: TBA

Date: 21st August 2023

RE: **BRIEF AHEAD OF THE MEETING OF THE DEPARTMENTAL COMMITTEE ON BLUE ECONOMY, WATER, AND IRRIGATION TO DISCUSS THE WATER (AMENDMENT) BILL, NATIONAL ASSEMBLY BILL NO. 33 OF 2023**

Reference is made to the above captioned matter.

H.E. the President, in his address at the 2nd Cabinet Meeting – 2022, held on 15th November 2022, set out expectations for the Fifth Administration's transformative plan for Kenya. Some of the key deliverables required by H.E. during his term, include enhanced access to potable water as well as water for irrigation. To this end, the Head of State and Government directed the Ministry of Water, Sanitation and Irrigation (hereinafter "the Ministry") to develop a list of 100 bankable dam projects to be implemented through the Public Private Partnerships (PPP) framework. Further, it was directed that the Ministry, jointly with the National Treasury and Economic Planning and the Attorney – General develop a Water Purchase Agreement for uptake of the water harvested and stored through the PPP framework on a priority basis.

Acting on the Directives above, the Ministry and the PPP Directorate worked tirelessly to deliver:

- (a) A draft Water Purchase Agreement;
- (b) A draft Cabinet Memorandum; and
- (c) A draft Water Amendment Bill.

The above drafts were forwarded to the State Law Office and Department of Justice for review and comments. The Hon. The Attorney General on 1st December 2022 also gave preliminary comments on the draft Cabinet Memorandum. Most of the comments related to compliance with the PPP Act. The Cabinet Secretary, Ministry of Water, Sanitation and Irrigation responded to the said letter on 5th December 2022 stating that the PPP Act shall be fully complied with and thus inviting the Hon. The AG to countersign the Cabinet Memorandum.

The Constitution of Kenya 2010 came with wide implications for the 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 CoK 2010 such as devolution while also recognising that water related functions are a shared responsibility. Implementation of the Water Act, however, has been impeded by a few gaps and inconsistencies.

In keeping with the provisions of the Constitution, the Ministry of Water Sanitation, and Irrigation has institutionalised a number of measures, among them:

- I. The National Water Policy- Sessional paper No. 1 of 2021
- II. Proposed amendments to the Water Act
- III. Operationalization of the water sector regulations
- IV. Operationalisation of the water sector strategies
- V. Reform of water sector institutions

The Water Sector Reforms Project Implementation Unit (PIU) therefore convened a working group for the harmonization of the draft Water Act amendment Bill, taking into considerations proposals submitted to the Ministry.

The Ministry convened consultative workshops to deliberate on and narrow down the proposed amendments and proposals received. The workshops included representatives from the Ministry, water sector institutions and the National Treasury.

The objectives of the amendments are to:

- a) Deliberate on, and improve the draft Water Act Amendments based on input from stakeholders as follows:
 - State Corporations Advisory Committee
 - Head of public service
 - Office of the Attorney General
 - The Institute of Engineers of Kenya
- b) Discuss key elements of the emerging issues as follows:
 - i. Aligning the Water Act 2016 to the PPP Act
 - ii. Definition and inclusion of riparian reserves in the draft bill;
 - iii. Positioning WWDAs as bulk water service providers
- c) Provide guidance, legal input and comments geared towards improving the Water Amendment Bill.

4.0. RATIONALE FOR THE AMENDMENT OF THE WATER ACT

The Government of the republic of Kenya through the Ministry of water, Sanitation and Irrigation has made great strides in implementation of the water act 2016. However, there have been various challenges in the implementation which have necessitated amendments to the water act 2016. Once effected, these amendments will support the efforts of the Ministry to increase water and sewerage coverage for all.

the proposed amendments are premised on the following:

- I. Enhance governance structures in water sector institutions in line with the Mwongozo code of governance.
- II. Provide clarity on the roles of WWDAs in bulk water service provision
- III. Need to provide a licensing framework for WWDAs as water service providers
- IV. To provide for sustainable management of riparian reserves.
- V. Aligning the Water Act 2016 with the PPP Act
- VI. To implement the Presidential pronouncement on PPPs in the water sector.

Further,

The following issues arose and will require careful consideration when designing PPP projects in the sector:

- a. PPP project bankability
- b. The ownership of project funds and assets
- c. Purchase agreements between the PPP contracting authorities and WSPs
- d. Debt repayment
- e. Indexation of water tariffs
- f. Dispute resolution mechanisms
- g. PPP agreement between private equity investor and WWDAs/WSPs
- h. Debt reconciliation and;
- i. Balancing the burden on consumers

The discussions also brought to fore potential factors for the sustainability of PPPs including customer tariffs setting, cash flows and revenue streams to cover the costs of operation and investment, debt risks, purchase agreements between WWDAs and WSPs, guarantee for uptake of bulk water, readiness of WSPs in terms of infrastructure to uptake bulk water produced under PPPs, responsibilities for loan repayment among

others. It was the impression of the members that since the National government/ state corporations have a more favourable revenue stream/cash flows, it could be more dependable for WWDAs to attract private equity investments. Section 93 was amended in this regard.

- I. Section 2 of the Act amended to include the definitions of a contracting authority at national and county government level.
- II. Section 2 amended to define riparian reserve
- III. Section 2 amended to define "water service providers" to include WWDAs
- IV. Section 14;
 - 1(f) – revises the number of members appointed by the CS to three
 - Paragraph (g) inserted to introduce the AG or a designated representative into the management board.
- V. Section 17 (1) on the process of appointing the CEO edited in the draft amendments
- VI. Section 18- conditions for the removal of the Chief Executive officer; a new section on appointment of a corporation secretary inserted as 18a (1), (2) and (3) on the appointment process, qualifications and duties of the corporation secretary respectively.
- VII. Section 31 (1) inclusion of the attorney general or a designated representative in the management board added.
- VIII. Section 31 (1) (e)- revised downwards the number of other members appointed by the CS to four.
- IX. Section 33 of the Water act amended to define the process of recruiting the CEO
- X. Section 34 amended to include new sections; 34(1), 34(2) and 34(3) on the appointment process, qualifications and duties of a corporation secretary respectively
- XI. Section 66(1) amended to include representatives of National Treasury, principal secretary of matter relating to land and the attorney general as well as qualifications of the four other members of the management board.
- XII. Sections 66A (1), (2), (3), (4) and (5) inserted after section 66 to align the office of the CEO of WWDAs with public service standards
- XIII. Section 66B inserted to define grounds for the dismissal of the CEO of a WWDA
- XIV. Section 66 C (1), (2) and (3) inserted to define on the appointment process, qualifications and duties of a corporation secretary respectively
- XV. Section 68 amended by inserting a new section; 68A (1) and (2). The newly added amendment in

68A (1) included the licensing of WWDAs by the Regulatory board with respect to sections 68(a), (b) and (c) of the Act. There was concurrence among representatives of WWDAs on the removal of provision 68(a) from the new 68A (1) with respect to licensing of WWDAs to undertake development, management and maintenance of national public water works. Although the section was amended, the water services regulatory board was of a differing opinion that the section should have remained to read "... functions under section 68(a), (b) and (C) of this Act."

- XVI. Deleting and replacing section 68(b) with regards to powers and functions of WWDAs
- XVII. Section 69 amended to exclude national public water works from handover after commissioning.
- XVIII. Provisions for joint authorities and joint committees deleted from Section 69(2) and 69(3)
- XIX. Section 71(1) deleted and replaced to define the composition of the Board of the Regulatory Board to include the attorney general or a designated representative and five other members appointed by the CS; in addition to representatives of treasury and of the PS in matters relating to water.
- XX. Section 72 subsection 1 (c) and (d) amended to substantially provide for licensing of WWDAs and enhance function of the regulatory board to evaluate and approve bulk water tariffs.
- XXI. Section 72 amended by inserting section 72A (1), (2), (3) and (4) on the process of appointing, qualifications, responsibility and tenure/ reappointment of the CEO respectively.
- XXII. New Section 72 B inserted to define conditions for the removal of the CEO
- XXIII. New Section 72C (1), (2), (3) inserted to define on the appointment process, qualifications and duties of a corporation secretary respectively
- XXIV. Section 73 (1) and (2) struck out from the draft amendments
- XXV. Section 93 (1) amended to replace "water service provider" with "contracting authority". New subsections (2), (3) and (4) also inserted
- XXVI. Section 115(1), (2) and (3) recast to align the composition of the Board of the Fund to public service standards. New section; 115 A (1), (2), (3) and (4) on the process of appointing, the qualifications, responsibilities, and tenure/ reappointment of the CEO respectively inserted.
- XXVII. New section, 115B inserted to define conditions for the removal of the CEO.
- XXVIII. New section 115 C (1), (2) and (3) inserted to define on the appointment process, qualifications, and duties of a corporation secretary to the Fund respectively

The water amendment bill includes Public Private Partnerships, positioning the Water sector institutions to be contracting entities, provide bulk water services and amend the act to incorporate issues of governance and riparian reserve.

1. Provision 1 which is the short title of the water amendment act has been amended by inserting the word "laws" after the word water. The year 2020 has also been amended to read 2022. Additional words have been inserted "and shall come into force upon publication".

2. Provision 2 has been amended by inserting "The several laws specified in the first column of the schedule are amended in the provisions specified in the second column thereof, in the manner respectively specified in the third column." Marginal notes of the provision 2 have also been amended by adding "amendment of the laws".

3. Provision 3 has proposed amendments to section 2 of the water act 2016 which is on interpretation as follows:

"Contracting authority" means-

(a) at the national level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or

(b) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party;

"Riparian reserve" means the buffer of earth ecological buffer of earth surface not being the bed of a stream, river, ocean, dam, natural or artificial lake, swamp or riverine wetlands measured horizontally from the highest water mark and may include part of any land parcel situated at any within the prescribed distance from the bank provided herein, that is protected under this Act and use regulated under any other written law; and

"water service provider" means water works development agency established under section 65, a company established by the county government under section 77, public benefits organisations or any other person providing water services under and in accordance with a license issued by the regulatory board for the service areas defined by the licence.

4. Provision 9 whereby section 14(1) has been proposed for amendment to replace "three" independent appointed board members with "four" by the Cabinet Secretary to the Water Resources Board. Further insert paragraph (g); "the Attorney-General or a representative, designated in writing;"

5. Provision 14 that proposed to amend section 17(1) by inserting "The board shall through an open and transparent recruitment process, and subject to approval of the Cabinet secretary appoint a suitably qualified person to be the Chief Executive Officer." This is an amendment occasioned by the office of the president (SCAC).

6. Provision 19 has proposed amendment to section 18 on removal of the Chief Executive Officer proposing to Delete and substitute thereof the following-

"18. The Chief Executive Officer may be removed from office by the Board on any of the following grounds-

- a. Violation of the constitution or any other written law;
- b. inability to perform functions of the office arising out of physical or mental incapacity
- c. Incompetence or neglect of duty;
- d. Bankruptcy; or
- e. Conviction of an offence whose term of imprisonment exceeds six months."

7. Proposed amendment by inserting section 18 (1), (2) and (3) on Corporation Secretary. This amendment is also a proposal by the Office of the President and SCAC as follows: Insert section 18 (a) 1- "the board shall, through an open and transparent process appoint a suitably qualified person to be the Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

2 (A) A person shall be qualified for appointment as the corporation secretary if that person –

- a) Holds a degree from a university recognised in Kenya
- b) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- c) Meets the requirements of chapter six of the constitution.

3 The Secretary shall-

- a. In consultation with the Chairperson, issue notices for meetings of the Board;
- b. Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- c. Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action;
- d. Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and
- e. Perform such other duties as the Board might direct in line with the law and Mwongozo code of governance."

8. Amendment under provision 23 by deleting section 25 of the principal act Providing for basin water resources committees to operate under Authority –

- (a) By deleting subsection (3);
- (b) In subsection (4) by inserting the words "Cabinet Secretary in consultation with the" immediately before the word "Authority."

9. Amendment to Section 26(6) on providing for the Authority to manage functions of basin water resources committees. Amending Section 26(6) of the Principal Act which is hereby amended by deleting the word "activity" and substituting therefor the words "functions".

10. Further to provision 25 on Composition of a basin water resources committee, Section 26 of the Principal Act is hereby amended –

- (a) In subsection (4) by inserting the following new sub paragraph immediately after paragraph
 - (c) a representative of water users appointed through guidelines developed by the Cabinet Secretary taking into account the needs of each specific basin.

(b) in sub section (6) by deleting the word “activity” and substituting therefor the words “functions”.

(c) By inserting the following new subsection immediately after sub section (7) –

(8) The appointment of representatives of each county government under Sub-Section (1) (b) shall be undertaken within 6 months following coming into force of the Regulations made in accordance with Section 25(4), and where the required approval of a County Assembly is not provided within this time, the relevant basin water resources committee in question shall be deemed properly constituted to perform its functions.

11. Section 27 of the Principal Act is hereby amended by deleting paragraphs (g) and (i) which are expected to align water resources management functions under Schedule Four of the Constitution of Kenya 2010.

12. In Provision 27 of the working document Section 28 of the Principal Act is hereby amended as follows –

(a) In sub-section (1) by deleting the word “Authority” and substituting therefore the words “Cabinet Secretary.”

(b) By deleting subsection (2) and substituting therefor the following new subsection –

(2) The Authority shall, in consultation with the basin water resources committees and the county governments whose area of jurisdiction lies within the basin area, formulate the basin area water resources management strategy. The reason for this amendment is Preparation of basin water resources management strategy and role of county governments in implementation”

13. In Provision 28 section 29 of the Principal Act is hereby amended in subsection (4) by deleting the words “basin water resources committees” and substituting it therefore the word “Authority”. This is for purposes of rectifying error in functions of water resources users’ associations.

14. Section 31 of the Principal Act is amended by deleting subsections 1(e) and (2) and substituting it therefore with the following new subsection –

Insert the following immediately after paragraph (d)- “(c) the Attorney General; inserting “Four other members, not being public officers, appointed by the Cabinet Secretary taking into account their knowledge and experience, skills matrix, gender, disability and regional balance demonstrating experience of not less than 10 years in the following fields; “. The purpose is to align Board qualifications and appointment.

15. Provision 137 of the working document, Section 33 of the principal is amended –

By deleting sub-section (1) and substituting therefor the following new subsection – “The Board shall through an open and transparent recruitment process, and subject to approval by the Cabinet Secretary, appoint a suitably qualified person to be the Chief Executive Officer.” This is for alignment of office of Chief Executive Officer of Storage Authority with public service standards.

16. At provision 138 of the working document, section 34. (1) on Co- is inserted “The board shall, through an open and transparent process appoint a suitably qualified person to be the Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

(4) A person shall be qualified for appointment as the corporation secretary if that person –

- d) Holds a degree from a university recognised in Kenya
- e) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- f) Meets the requirements of chapter six of the constitution.

(5) The Secretary shall-

- f. In consultation with the Chairperson, issue notices for meetings of the Board;
- g. Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- h. Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action;
- i. Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and
- j. Perform such other duties as the Board might direct in line with the law and Mwongozo code of governance”

17. Provision 146 of the working document amends section 66(1) d and f by inserting a new (d) as “The Principal Secretary responsible for matters relating to land or a designated representative”. new (e) “The Attorney General or a designated representative” and a new word in (f) where by five is replaced by the word “four”.

18. Provision 147 amends the Principal act by inserting a new section 66A (1) “The Board of each waterworks development agency shall, through an open and transparent recruitment process, and subject to the approval of the Cabinet Secretary, appoint a suitably qualified person to be the Chief Executive Officer.” Section 66 (2) b) by deleting) “has a degree from a university recognized in Kenya. Deleting courses like water or civil Engineering, Hydrology, financial management or accounting, water, or environmental law.” In Section 66 A (2) d) “Is a member in good standing of the relevant professional association;” and

A new Section 66A (3) is inserted “3) stating that “The chief executive officer shall be responsible to the Board for the day-to-day management of the affairs of the Agency and for the performance of any other functions as the Board may direct and shall be the accounting officer of the Agency”.

Provision 148 of the working document a new section 66D is inserted on removal of the Chief Executive Officer as follows: “The Chief Executive Officer may be removed from office by the Board on any of the following grounds-

- (a) Violation of the constitution or any other written law;
- (b) Inability to perform functions of the office arising out of physical or mental incapacity
- (c) Incompetence or neglect of duty

- (d) Bankruptcy; or
- (e) Conviction of an offence whose term of imprisonment exceeds six months"

19. In provision 149, a new section 66C (1) is inserted on Corporation secretary. That "The board shall, through an open and transparent process appoint a suitably qualified person to be the Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

(2) A person shall be qualified for appointment as the corporation secretary if that person –

- a) Holds a degree from a university recognized in Kenya
- b) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- c) Meets the requirements of chapter six of the constitution.

(3) The Secretary shall-

- d) In consultation with the Chairperson, issue notices for meetings of the Board;
- e) Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- f) Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action;
- g) Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and perform such other duties as the Board might direct in line with the law and Mwongozo code of governance".

20. Provision 151 has amended by deleting section 68(b) on Powers and functions of WWDAs which is amended to include bulk water services provision and replaced with –

"Operate water works and provide water services as

- I. a bulk water service provider
- II. a water service provider

until such time as responsibility for the operation and management of the water works are handed over to a county government or water services providers within whose area of jurisdiction or supply the water works is located"

21. Provision 151 has amended Amend section 69- (1) to provide clarity between functional roles of WWDAs and WSPs and to read

"As soon as possible, following the commissioning of the water works other than National Public water works, the waterworks development agency shall enter into an agreement with any county government or water service provider to provide water services within whose area of jurisdiction the services are located".

(2) The agreement shall make provision for the assumption by the county government, the joint committee, authority or water services provider of the responsibility for the repayment of any loans or liabilities of the waterworks and until full repayment of the loans and discharge of any outstanding liabilities, ownership of the waterworks shall remain in the waterworks development agency. (3) In the event that the county government, the joint committee, the authority or water services provider defaults in the repayment of any outstanding loans arising from the development, rehabilitation or maintenance of the works, the waterworks development agency may petition the Regulatory Board to declare a default and order the transfer of the water services provider's functions to the waterworks development agency, to exercise such functions until full repayment of the loan."

22. Under Provision 153 of the working document, Section 71 (d) of the Principal Act is hereby amended by inserting "The Attorney General or a designated representative." and at (e) replacing six number members appointed by the Cabinet Secretary with "five "number. At 71 B is inserted "Four other members, not being public officers, appointed by the Cabinet Secretary taking into account their knowledge and experience, skills mix, gender, disability and regional balance."

24. At Provision 154 amendment is made by inserting the following section immediately after section 72- on recruitment of the Chief Executive Officer: Section 72 A (1) The Regulatory Board shall (1) through an open and transparent recruitment process and subject to the approval by the Cabinet Secretary, appoint a suitably qualified person to be the Chief Executive Officer (2) A person shall be qualified to be appointed as the Chief Executive Officer if that person-

- a) is a Kenyan citizen
- b) meets the requirements of leadership and integrity set out in chapter 6 of the constitution
- c) holds relevant academic and professional qualifications including a university degree in relevant fields and;
- d) Has at least ten years' experience in the management of a public institution, five of which should be at senior management level or is a distinguished scholar in a discipline relevant to water works.

3) The Chief Executive Officer shall be responsible to the Board for the day-to-day management of the affairs of the Board and for the performance of any other functions as the Board may direct, and shall be the accounting officer

4) The chief executive officer shall hold office for a term of three years and is eligible for reappointment for one further term."

25. The Provision 155 is on removal of the Chief Executive Officer Insert section 72 B. The Chief Executive Officer may be removed from office by the Board on any of the following grounds-

- (c) Violation of the constitution or any other written law;
- (d) Inability to perform functions of the office arising out of physical or mental incapacity
- (e) Incompetence or neglect of duty

- (f) Bankruptcy; or
- (g) Conviction of an offence whose term of imprisonment exceeds six months

At provision 156 section 72 C (1). The board shall, through an open and transparent process appoint a suitably qualified person to be the Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

(2) A person shall be qualified for appointment as the corporation secretary if that person –

- h) Holds a degree from a university recognised in Kenya
- i) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- j) Meets the requirements of chapter six of the constitution.

(3) The Secretary shall-

A In consultation with the Chairperson, issue notices for meetings of the Board;

- a. Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- b. Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action;
- c. Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and perform such other duties as the Board might direct in line with the law and Mwongozo code of governance.”

25. Provision in 157 it is Imperative that the licencing of WWDAs be provided for substantively in the provisions. In this regards Section 72 of the Principal Act is hereby amended in subsection (1) by deleting the entire paragraph (c) and substituting therefor the following new paragraph –

- C) set licence conditions and to licence Water Service Providers and Water Works Development Agencies.
- d) to evaluate and approve bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards.”

Provision 158 has proposed that the Principal Act is amended because there is need for the alignment of office of Chief Executive of Regulatory Board with public service standards. “

26. Provision 164 amends Section 93 to cater for Public Private Partnership as follows:

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

(2) The partnership shall be in writing subject to the approval of the Regulatory Board. (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 so used.

(4) A power or function conferred by a licence or otherwise conferred under this Act may be exercised or performed by another person acting under an agreement with the licensee and shall be deemed, when exercised or performed by that other person, to have been exercised or

performed by the licensee.'

"The Principal Act is amended by deleting the entire section 115 and substituting therefor the following new section –

115. (1) The Fund Shall be administered under the direction of the Board, which consists of-

- (a) a chairperson appointed by the president;
- (b) the principal secretary responsible for matters relating to finance or a representative designated in writing.
- (c) The Principal Secretary responsible for matters relating to water or a representative designated in writing.
- (d) The Attorney General or a representative designated in writing;
- (e) Five other members who shall be appointed through conventional board appointment procedures by the Cabinet Secretary in accordance with the First Schedule; and
- (f) The chief executive officers.

2) The Chief Executive Officer shall be an Ex-officio member of the Management Board with no voting rights,"

27. Provision 177 provides for amendment to Section 115 B on removal of the Chief Executive Officer-

"The Chief Executive Officer may be removed from office by the Board on any of the following grounds-

- (a) Violation of the constitution or any other written law;
- (b) Inability to perform functions of the office arising out of physical or mental incapacity
- (c) Incompetence or neglect of duty
- (d) Bankruptcy; or
- (e) Conviction of an offence whose term of imprisonment exceeds six months".

28. At Provision 178 Insert Section 115 C-

"The board shall, through an open and transparent process appoint a suitably qualified person to be the

Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

(2) A person shall be qualified for appointment as the corporation secretary if that person –

- k) Holds a degree from a university recognised in Kenya
- l) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- m) Meets the requirements of chapter six of the constitution.

(3) The Secretary shall-

- a. In consultation with the Chairperson, issue notices for meetings of the Board;
- b. Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- c. Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action;
- d) Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and
- e). perform such other duties as the Board might direct in line with the law and Mwongozo code of governance”.

29. The provision 181 has had Section 118 of the Principal Act amended by deleting the entire section and substituting therefor the following new section 118 – This is for purposes of alignment of office of Chief Executive Officer of the Fund.”

30. At provision 196 The First Schedule to the Principal Act is hereby amended as follows:

‘(1) the Chairperson and members of a Board, other than the Chief Executive Officer, shall be paid out of the funds of the relevant state corporation such sitting allowances or other remunerations as the Board may, within the scales of remuneration approved by the State Corporations Advisory Committee.

(1) A Board may, within the scales approved by the state corporations Advisory Committee, refund travelling, and other expenses incurred by the chairman or members of the Board in the performance of their duties.’ Insert the following new paragraphs immediately after paragraph 6 (1) (e)-

(f)conducts himself in a manner deemed by the appointing authority, in consultation with the Committee, to be inconsistent with membership of the Board. First Schedule paragraph 10 delete the term “the Acting Chairperson or in his or her absence”

31. Provision 197 Insert Section 6 A (1)- The Board shall through an open and transparent recruitment process and subject to the approval by the Cabinet Secretary, appoint a suitably qualified person to be the Chief Executive Officer.

(2). A person shall be qualified to be appointed as the Chief Executive Officer if that person-

- a. is a Kenyan citizen
 - b. meets the requirements of leadership and integrity set out in chapter 6 of the constitution holds relevant academic and professional³² qualifications including a university degree in relevant fields and;
 - c. Has at least ten years' experience in the management of a public institution, five of which should be at senior management level or is a distinguished scholar in a discipline relevant to water works.
3. The Chief Executive Officer shall be responsible to the Board for the day-to-day management of the affairs of the Board and for the performance of any other functions as the Board may direct and shall be the accounting officer.
 4. The chief executive officer shall hold office for a term of three years and is eligible for reappointment for one further term."

31. Provision 198 is also on the removal of the Chief Executive Officer to Insert 6B

The Chief Executive Officer may be removed from office by the Board on any of the following grounds-

- (a) Violation of the constitution or any other written law;
- (b) Inability to perform functions of the office arising out of physical or mental incapacity
- (c) Incompetence or neglect of duty
- (d) Bankruptcy; or
- (e) Conviction of an offence whose term of imprisonment exceeds six months."

Provision 199 is on Corporation Secretary as follows: Insert 6C-

"The board shall, through an open and transparent process appoint a suitably qualified person to be the Corporation secretary, in terms of the law governing the practice of public secretaries in Kenya.

(2) A person shall be qualified for appointment as the corporation secretary if that person –

- n) Holds a degree from a university recognised in Kenya
- o) Is registered as a member of the institute of certified Public Secretaries on Kenya, in good standing; and
- p) Meets the requirements of chapter six of the constitution.

(3) The Secretary shall-

- a. In consultation with the Chairperson, issue notices for meetings of the Board;

- b. Keep, in custody, the records of the deliberations, decisions and resolutions of the Board;
- c. Transmit decisions and resolutions of the Board to the Chief Executive Officer for execution, implementation and other relevant action
- d. Provide guidance to the Board on their duties and responsibilities on matters relating to governance; and perform such other duties as the Board might direct in line with the law and Mwongozo code of governance.

5.0. NEXT STEPS

- I. The zero draft be tabled before the requisite authority for consideration and approval.
- II. A standing committee to be constituted by the Ministry to expedite the proposed legislative amendments.
- III. The Ministry to request The National Treasury to sensitize contracting authorities on the PPP Act.
- IV. The Ministry to develop regulatory impact statement on the proposed amendments.
- V. The proposed amendments be subjected to stakeholder consultation.

CHRISTOPHER KIRIGUA, MBS

Encl.

Copy To: Prof. Njuguna Ndung 'u, CBS
Cabinet Secretary



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ADVOCATES

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FEEDBACK TEMPLATE FORM

REQUEST FOR VIEWS ON THE WATER (AMENDMENT) BILL, 2023

Clause in the Bill	Proposal	Justification
Clause 3 Amendment of section 32 of No. 43 of 2016	We propose that a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.	<p>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.</p> <p>Furthermore, the use of a template enhances uniformity.</p>
Clause 5 Insertion of a new section 68A in No. 43 of 2016	<p>For sub-clause (2), we propose that the standards and conditions of licensing are published in:</p> <ul style="list-style-type: none">a. the Kenya Gazette; andb. the Regulatory Board's website.	<p>Publishing in the Kenya Gazette and website provide an opportunity to reach a broad and diverse audience.</p> <p>This allows members of the public to stay informed on the latest standards and conditions of licensing developed by the Regulatory Board.</p>
Clause 8 Amendment of section 75 of No. 43 of 2016	For sub-section (1) (a) of the Water Act, 2016, we propose the deletion of paragraph (a) and replacing it with the words "their names, telephone numbers, e-mails and postal addresses".	<p>Providing a water service provider's telephone number and e-mail address allows customers and the public to directly contact the water service providers.</p> <p>This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.</p>

<p>Clause 10</p> <p>Amendment of section 100 of No. 43 of 2016</p>	<p>We propose the deletion of this proposal.</p>	<p>Currently, Nairobi County does not pay other counties for the water it sells to consumers.</p> <p>The bill seeks to make it mandatory for counties that do not produce their own water to purchase the commodity.</p> <p>Consequently, this proposal will lead to an increase in the price of water paid by the consumers.</p> <p>To conclude, our 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.</p>
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COUNCIL OF GOVERNORS

LEGISLATIVE MEMORANDUM ON THE WATER (AMENDMENT) BILL, 2023 (NATIONAL ASSEMBLY BILL NO. 33 OF 2023).

**FROM
THE COUNCIL OF GOVERNORS**

22ND AUGUST, 2023

The Council of Governors,

In recognition of Article 1(4) of the Constitution of Kenya, that sovereign power of the people is exercised at the national level and the county level;

In further recognition of Article 6 (2) that governments at the national and county levels are distinct; and

Aware of the need for coordination and consultation between the National Government and County Governments to ensure that legislation responds to the key issues facing devolution, and further reflects the spirit and objects of devolution.

A) General Comments on the Water (Amendment) Bill, 2023

The Council hereby notes as follows on the Water (Amendment) Bill, 2023;

- i. Inclusion of private water service providers (WSPs) in the water sector through the Public Private Partnerships (PPP) framework 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.
- ii. 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.
- iii. 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 as we shall highlight hereinafter.
- iv. 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.
- v. 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.

The Council presents its specific comments to the Bill as hereunder.

B) Specific Comments on the Water (Amendment) Bill, 2023

CLAUSE	PROVISION	COMMENTS	PROPOSAL
<p>Clause 5</p>	<p>Section 68 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (b): (ba)... Provided that a national public water works shall not be transferrable to a county government.</p>	<p>In the converse, the proviso does not provide for consultation between the national and county governments in designation of county waterworks as national public waterworks. We need this provision as the national government has repeatedly designated and gazetted waterworks and basin areas without the involvement and/or consultation of county governments.</p>	<p>Amend the proviso to the proposed Section 68 (ba) to:</p> <p>Provided that a national public water works shall not be transferrable to a county government; and any transfer of water works and services to the national government shall be done upon consultation of the relevant county government.</p>
<p>Clause 7</p>	<p>Section 72 is amended by in subsection (1)- (a)by inserting a new paragraph immediately after paragraph (b)- (ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes;</p>	<p>Like subsection (b), this proposed subsection (ba) purports to vest the functions of county governments in entities of or entities controlled by the national government.</p>	<p>Amend the proposed Section 72 (ba) to:</p> <p>(ba) evaluate and approve water and sewerage tariffs bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes;</p>

C) General Comments on the Water Act, 2016

In addition to the above, the Council takes the liberty to reiterate its views on the proposed review of the Water Act, 2016 presented to the Ministry of Water, Sanitation and Irrigation. Generally, the Council notes that:

- i. it vests the functions of county governments in institutions of the national government, contrary to the provisions of (inter alia) (6) (2) and 186 (1) Of the Constitution as read with the Fourth Schedule thereto;
- ii. it excludes or omits county governments in the performance of the shared functions of the two levels of government, contrary to the provisions of (inter alia) articles (6) (2) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- iii. It establishes a centralized framework for the provision of water and sanitation services, contrary to the provisions of (inter alia) articles (6) (2), (3) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- iv. it establishes a centralized framework for the protection, management and regulation of water resources, contrary to the provisions of (inter alia) articles (6) (2), (3) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- v. it diverts funds otherwise meant for sharing and/or allocation to county governments to unnecessary multiple institutions of the national government, contrary to the provisions of (inter alia) article (6) (2), 174, 202 and 203 of the Constitution as read with section 15 of the Sixth Schedule thereto;
- vi. its overall object and/or effect is inconsistent with the objects, principles and structure of devolution as set out in (inter alia) (6) (2), (3), 174, 186 (1) and 189 of the Constitution as read with the Fourth Schedule thereto;
- vii. it was enacted without adequate consultation and/or in flagrant disregard of concerns raised by county governments and members of the public, contrary to the provisions of (inter alia) article (6) (2), (3), 118, 174, 186 (41) and 189 of the Constitution;
- viii. it undermines the constitutional objective of proximate and universal access to clean, safe and adequate water, contrary to the provisions of (inter alia) articles (6) (2), (3), 43 (1) (d), 56 (e), 174, 186 (1) and 189 of the Constitution; and
- ix. the centralized approach to water, sanitation and related works and services set out in the impugned Act will;
 - leave most Kenyan citizens without access to clean, safe and adequate water;
 - leave most Kenyan citizens without access to sewerage and sanitation; and
 - expose most Kenyan citizens to the ravages of (inter alia) poverty, malnutrition and waterborne and communicable diseases

D) Specific Comments on the Water Act, 2016

CLAUSE	COMMENTS ON THE PROVISION
Section 6	<ul style="list-style-type: none"> (i) purports to transfer the mandate of the National Lands Commission to the Water Resources Authority; and (ii) Diverts funds otherwise meant for sharing and/or allocation to county governments to an unnecessary institution/ bureaucracy of the national government (i.e. the Water Resources Authority and its Board and Secretariat).
Section 8	<p>to the extent that it purports to:</p> <ul style="list-style-type: none"> (i) assigns the provision of water services, a devolved function, to the national government; (ii) assigns storm water management and water conservation, both being either devolved or shared functions, to the national government; (iii) allows the national government to designate and gazette waterworks without the involvement and/or consultation of county governments; and (iv) allows the national government to use its share of revenues to perform or duplicate the functions of county governments;
Section 12(b), (d), (e), (f), 36 to 38, 40 to 54, 57 to 62, 85 to 91, 95 to 101 and 130	<ul style="list-style-type: none"> (i) excludes or omit county governments in the management and regulation of water resources; (ii) excludes or omit county governments in the issuance of permits and licences for devolved functions; (iii) excludes or omit county governments in the levying of permit fees and licence fees in respect of devolved functions; and (iv) denies county governments potential revenue streams, through the issuance of relevant permits and licenses and the levying of relevant fees
Section 13 (c) and (d)	<p>the extent that it purports to allow the Water Resources Authority to perform and/ or micromanage the performance of the functions of county governments.</p>

Section 14 (1)	to the extent that it does not provide for the involvement and/or consultation of county governments in the appointment of the members of the Management Board of the Water Resources Authority.
Sections 22 and 23	To the extent that they vest environmental and water conservation, both being shared functions, exclusively in organs of the national government.
Section 24	to the extent that it purports to allow the Cabinet Secretary to designate and gazette basin areas without the involvement and/or consultation of county governments.
Sections 25 and 26	(i) purport to allow Basin Water Resources Committees to perform or duplicate the functions of county governments; and (ii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. Basin Water Resources Committees).
Section 27	to the extent that it purports to allow Basin Water Resources Committees to perform or duplicate the functions of county governments.
Section 29	(i) vest a devolved function, namely the establishment and regulation of water resources users associations, in the Water Resources Authority; and (ii) allow Basin Water Resources Committees to contract out a function of county governments.
Sections 30 and 32	(i) exclude or omit county governments in the performance of a shared function of the two levels of government (i.e. water harvesting and storage); (ii) exclude or omit county governments in the appointment of the members of the Water Harvesting and Storage Board; (iii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. the National Water Harvesting and Storage Authority and its Board and Secretariat).
Sections 65 and 66	the extent that they do not provide for the involvement and/or consultation of county governments in: i. the establishment of waterworks development agencies; and

	ii. the appointment of the members of waterworks development agencies;
Sections 68, 69, 72 and 74 to 78	to the extent that they purport to vest the functions of county governments in entities of or controlled by the national government.
Section 84	to the extent that it envisions the transfer of assets to county governments later than three years from the date of the first elections of county assemblies;
Section 109	(i) purports to vest a function of county governments (i.e. sewerage services) in the Water Resources Authority; and (ii) Purports to allow the Water Resources Authority to impose levies in relation to a function of county governments.
Sections 117 and 126	(i) purport to allow national government institutions to perform or duplicate the functions of county governments; and (ii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. the Water Resources Authority, the Water Sector Trust Fund, the Water Harvesting and Storage Authority, Waterworks Development agencies and their respective Boards and staff).
Sections 148 to 150	to the extent that they provide a transition involving a transfer of assets to institutions of the national government instead of county governments.
Additional Amendments	
Section 78(b) to define the county assets in context.	The Act needs to be reviewed to clarify functions of water development agencies which touch on county assets. There is need for streamlining section 69 on management of liabilities between national and county government.

Section 29, 30, 42, 26, 64 and 65	Review to ensure harmonization of functions, effective representation of county government where there are cross-cutting functions such as water service standards, basis water management, and flood management among others.
Section 74,97,98 and Sections 101,106	Amend the Act to incorporate participation of county governments in such provision and regulation of provision of water services sections 74, 97 98 as recognized under sections 101, 106 on the role of county government regarding complaints received on service provision and enforcement. Amend the Act to clarify that water service provision as captured under Section 76 and 79 and other sections of the Act is a function of County Governments.
Section 94	to comply with the duty of governments to progressively realise the right to water in rural and undeveloped areas.
Section 109 and 117	to remove the role of counties in sewerage and sanitation from the ambit of both the Regulatory Bard and the water Sector Trust Fund
Sections 87 and 92	Amend or clarify through regulations how public participation in licencing and monitoring provision of water services.

E) Conclusion

The Council concludes that there is need to:

- i. Align the Act as a whole to the Constitution, mainstreaming the principles for implementation of the Act should include chapter VI, principles of devolution, right to water and Articles 69-72 of the Constitution.
- ii. Revisit and review the establishment of the various institutions without clarity on their inter-relations as well as interplay of functions with the county government. Harmonize and mainstream the role of county governments in the entire chain of institutional framework of provision, regulation and overall management of water services.

- iii. Amend the Act to harmonize functions between national and county governments with clear demarcation and collaboration where appropriate for instance in regulation of water service providers.



KAM/10/14/rl /mb/jw/AM/2023

18th August 2023

**Samuel Njoroge
The Clerk, National Assembly
Parliament Buildings
P.O Box 41842 - 00100
NAIROBI**

Dear Sir,

RE: SUBMISSION OF KAM MEMORANDUM ON THE WATER (AMENDMENT) BILL 2023

The Kenya Association of Manufacturers (KAM) presents its compliments and appreciates the continued support.

Following the call for views on the **Water (Amendment) Bill, 2023**, we wish to submit our Memorandum.

The purpose of this letter is to therefore submit the Kenya Association of Manufacturers' Memorandum on the Water (Amendment) Bill, 2023.

Feedback may be communicated to us via our physical address and advance feedback email to ceo@kam.co.ke and on mobile to +254 722 370 446.

Your early feedback will be appreciated.

Yours sincerely,

**Anthony Mwangi
CHIEF EXECUTIVE**

Encl.



MEMORANDUM ON THE WATER (AMENDMENT) BILL, 2023

Submitted to

**THE CLERK
NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
P O BOX 41842-00100,
NAIROBI**

Presented By

**ANTHONY MWANGI, CHIEF EXECUTIVE,
KENYA ASSOCIATION OF MANUFACTURERS**

AUGUST 2023 – NAIROBI, KENYA

1.0 INTRODUCTION

Kenya Association of Manufacturers (KAM) is the leading business membership organization in East Africa that plays a key advocacy role on behalf of manufacturers in Kenya and in the region through her strong linkages with all sectors of the economy. KAM has over 950 members and represents over 40% of Kenya's manufacturing value add industries.

KAM represented Kenya's manufacturing sector interests in the East Africa Trade integration process through the design, ratification and implementation of the Customs Union, and the Common Market Protocol. The integration process in East Africa has been successful with Kenya Playing a critical role. The EAC region integration is expected to spur the manufacturing sector enhancing intra-EAC trade in value added products and thus grow the economies of the region.

KAM has a membership of manufacturers across thirteen manufacturing sectors and Service ranging from **Food and Beverage, Pharmaceutical; Automotive; Chemical and Allied; Metal and Allied; Paper and Paperboard; Leather and Apparel; Textile and Apparel; Plastics and Rubber; Timber, Wood and Furniture; Electric and Electronic; Building, Mining and Construction; Agro-Processing.**

2.0 PROPOSED AMENDMENTS TO THE WATER (AMENDMENT) BILL, 2023

In response to the call for public participation on the afore-referenced Regulations, we propose the following amendments to be considered before the draft Regulations are enacted:

3.0 General Comments

a) **Water use activities**

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. Hydrological reports indicate that the aquifers are recharged by sea water intrusion.

b) Abstraction of sea water for the purposes of salt extraction.

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.

c) 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.

d) Penalty for failure to use automated measuring device.

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.

4.0 Specific Comments (per clause)

CLAUSE	PROPOSAL	JUSTIFICATION
1. Clause 3 Amendment of section 32 of the Act to authorize the Water Storage Authority to enter into bulk water purchase agreements.	We propose the introduction of new provisions under section 100 on bulk water under the Water Act to provide for the development of regulations on bulk water and purchase agreements and a schedule to prescribe the agreement forms as follows:	The proposal is made based on the following justifications: <ul style="list-style-type: none">The proposed new provisions for bulk water purchase agreements are progressive provisions and will support industries that utilize bulk water for their operations.

	Powers and functions of the Water Storage Authority	<i>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.</i>	<ul style="list-style-type: none"> 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.
2.	Clause 5 Insertion of a new section 68A that provides for the licensing of water development agencies. Licensing of Water Works Development Agencies	<p>We propose to include in the proposed 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 follows:</p> <p><i>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.</i></p>	<p>The proposal is made based on the following justifications:</p> <ul style="list-style-type: none"> 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.
3.	Clause 8 Register of licensed water services providers New Proposed amendment to section 75(1) (a)	<p>We propose a further amendment to section 75 (1)(a) as follows:</p> <p>(1) The Regulatory Board shall maintain the register of all licensed water services providers containing — (a) their names, telephone numbers, e-mails, and postal addresses.</p>	<p>This proposal is based on the following justifications:</p> <ul style="list-style-type: none"> Providing a water service provider's telephone number and e-mail address allows customers and the public to directly contact the water service providers.

			<ul style="list-style-type: none"> This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.
4.	<p>Clause 10</p> <p>Amendment of section 100 of the Water Act 2016 to provide that all water bulk water supply services in a county shall be undertaken by waterworks development agencies.</p> <p>Section 100 - Supply of bulk water</p>	<p>We propose that counties are exempt from the requirements of the proposed amendment to ensure water remains affordable to water users within counties.</p>	<p>We make this proposal based on the following justifications:</p> <ul style="list-style-type: none"> 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.
NEW PROPOSALS			
	CLAUSE	PROPOSAL	JUSTIFICATION
5.	<p>New Provision</p> <p>Water use charges for the salt sector</p>	<p>We propose that the charges for water use for the salt sector be reduced.</p>	<p>We make this proposal based on the following justifications:</p> <ul style="list-style-type: none"> Water use charges were increased at almost 90% and the requirement is monthly. The increment has led to a huge financial implication to the salt industry as they require huge water use from boreholes. Charges on renewal of permits for bore holes have increased drastically. A single borehole increased to 90,000 shillings for the renewal permit. This has increased

			<p>the cost of doing business for the salt sector, which has contributed to the increase in the cost to the consumer.</p> <ul style="list-style-type: none">• This is further compounded by a delay in the time taken to acquire a borehole permit. Permits applied for and paid for in the past year or prior to the application of the Act have not been issued. This may negatively affect manufacturers as the Water Resource Authority may charge them at the new rates or charges.
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