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

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

.....

REPORT

ON

CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 OF 2022)

PARLIAMENT OF KENYA LIBRARY

THE NATIONAL ASSEMBLY
DATE: 07 DEC 2023
DAY: Thursday
TABLED BY: Hon. Charles Kamuren, MP Vice Chairperson
CLERK-AT THE-TABLE: A. Shibuka

DIRECTORATE OF DEPARTMENTAL COMMITTEES,
CLERK'S CHAMBERS,
PARLIAMENT BUILDINGS,
NAIROBI.

DECEMBER, 2023

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LIST OF ABBREVIATIONS AND ACRONYMS

UDA	-	United Democratic Alliance
ODM	-	Orange Democratic Movement
WDP	-	Wiper Democratic Party
KUP	-	Kenya Union Party
UPIA	-	United Party of Independent Alliance
ESAK	-	Electricity Sector Association of Kenya
PARAAN	-	Pastoralists Alliance for Resilience and Adaptation Across Nations
KEMSA	-	Kenya Private Sector Alliance
KWS	-	Kenya Wildlife Service
KFS	-	Kenya Forest Service

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 Committees on Environment, Forestry and Mining on its consideration of the Natural Resources (Benefits Sharing) Bill, (Senate Bill No. 6 of 2022) which was published on 8th November 2022 and passed by Senate with amendments on 1st August 2023. The Bill went through the First Reading on 17th August 2023 and was thereafter committed to the Departmental Committee on Environment, Forestry and Mining for consideration and reporting to the House pursuant to the provision of the National Assembly Standing Order 143.

The Bill which is sponsored by Sen. Danson Buya Mungatana, **MGH,** has forty-three (43) clauses and *seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities.*

The Bill concerns county governments in terms of Article 110 (1) (a) of the Constitution.

Following placement of advertisements in the print media on Tuesday, 22nd 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 thirteen (13) memoranda from the following institutions and individuals:

i. Council of Governors
ii. Kenya Private Sector Alliance
iii. Kenya Wildlife Conservancy Association
iv. North Eastern Conservancy Association
v. Kenya Oil and Gas Working Group
vi. Nature Kenya
vii. Samburu Women Trust
viii. Peace-Net Kenya
ix. PARAAN
x. Conservation International
xi. Centre for Minority Rights Development
xii. Electricity Sector Association of Kenya
xiii. Wildlife Works

The Committee also invited the following MDAs vide a letter **REF: NA/DDC/EF&M/2023/045** dated **27th September, 2023** for their comments and proposals on the Bill:

i. Ministry of Environment, Climate Change and Forestry
ii. The National Treasury
iii. State Department for Mining
iv. State Department for Energy
v. State Department for Petroleum
vi. State Department for Wildlife

The Committee also invited stakeholders for a stakeholders' engagement retreat on the Bill vide letter REF: NA/DDC/EF&M/2023/044 dated 27th August 2023 which was held at Hilton Garden Inn Hotel, Machakos County on 6th and 7th September 2023 with the thirteen (13) stakeholders and the MDAs making oral presentations before the Committee.

In considering the Bill, the Committee applied itself to the provisions of Articles 109(5) and 114 of the Constitution of Kenya which relate to the origination and definition of a 'Money Bill', by seeking determination as to whether the Bill was a money bill from the Parliamentary Budget Office.

The Committee having considered the Natural resources (Benefit Sharing) Bill, 2022, recommends that the House **REJECTS** the Bill since it is a 'Money Bill' pursuant to Article 114 of the Constitution and as such it can only be introduced in the National Assembly pursuant to Article 109(5) of the Constitution.

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, Sen. Danson Mungatana, MP. 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 Environment, Forestry and Mining 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 Natural Resources (Benefits Sharing) Bill, (Senate Bill No. 6 of 2022).

Hon. Gikaria David, M.P.
Chairperson, Departmental Committee on Environment, Forestry and Mining

PART ONE

1.0 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Environment, Forestry and Mining is one of the twenty Departmental Committees of the National Assembly established under **Standing Order 216** whose mandate pursuant to the **Standing Order 216 (5)** is 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 their 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 the legislation referred to it;***
   v. *To study, assess and analyse 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.*

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule to the Standing Orders, the Committee is mandated to consider matters related to Climate change, environment management and conservation, forestry, mining and natural, pollution, waste management.

3. In executing its mandate, the Committee oversees the Ministry of Environment, Climate Change and Forestry, and the State Department for Mining.

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Environment, Forestry and Mining was constituted by the House on 27th October 2022 and comprises of the following Members:

Chairperson
Hon. David Gikaria, MP
Nakuru Town East Constituency
UDA Party

Vice-Chairperson
Hon. Charles Kamuren, MP
Baringo South Constituency
UDA Party

Members

Hon. Mbalu Jessica Nduku Kiko, CBS, MP
Kibwezi East Constituency
WDP Party

Hon. Mwanyanje Gertrude Mbeyu, MP
Kilifi County
ODM Party

Hon. Hiribae Said Buya, MP
Galole Constituency
ODM Party

Hon. Salim Feisal Bader, MP
Msambweni Constituency
UDA Party

Hon. Emathe Joseph Namuar, MP
Turkana Central Constituency
UDA Party

Hon. Joseph Wainaina Iraya, MP
Nominated
UDA Party

Hon. Kemei Beatrice Chepngeno, MP
Kericho County
UDA Party

Hon. Kururia Elijah Njore Njoroge, MP
Gatundu North Constituency
Independent Member

Hon. Masito Fatuma Hamisi, MP
Kwale County
ODM Party

Hon. Nguro Onesmus Ngogoyo, MP
Kajiado North Constituency
UDA Party

Hon. Titus Lotee, MP
Kachaliba Constituency
KUP Party

Hon. Mohamed Tubi Bidu, MP
Isiolo South Constituency
Jubilee Party

Hon. Yakub Adow Kuno, MP
Bura Constituency
UPIA Party

1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following staff:

Mr. Fredrick O. Otieno
Clerk Assistant II/Head of Secretariat

Ms. Mercy Wanyonyi
Senior Legal Counsel

Dr. Joseph Kuria
Research Officer III

Ms. Catherine Wangui
Senior Sergeant-At-Arms

Ms. Maryan Gabow
Public Communications Officer III

Mr. Boniface Mushila
Sergeant-At-Arms

Mr. Hamdi Hassan Mohamed
Clerk Assistant III

Ms. Nancy Chamunga
Fiscal Analyst III

Ms. Edith Chepngeno
Media Relations Officer III

Ms. Lydia Shallon
Research Officer III

Mr. Muchiri Mwangi
Audio Recording Officer

PART TWO

2.0 BACKGROUND OF NATURAL RESOURCE BENEFIT SHARING IN KENYA

2.1 INTRODUCTION

6. Natural resources are finite and non-renewable aspects which require maximisation of their benefits balanced with the need to attract and retain exploration capital necessary to sustain such benefits for as long as possible. It is for this reason that the Constitution of Kenya mandates Parliament to enact legislation on the exploitation of natural resources.

7. Benefit Sharing commitments as far as natural resources are concerned, are captured through mutually negotiated agreements based on a consultation process on proposed natural resource extraction with the potential of impacting the rights of the local host community. They generally include revenue sharing, project support, social and environmental impact and development terms, etc., including residual benefits from infrastructural and industrial developments arising out of natural resource extraction and exploitation projects.

8. **"Benefit-sharing"** originates from a program of work under the Convention on Biodiversity (CBD) aiming to distribute financial results from the development of genetic resources to local inhabitants from whose lands such resources were taken.

9. The Bill is applicable in the following natural resources: sunlight, surface and underground water, forests, biodiversity and genetic resources, wildlife resources, industrial fishing, wind, geothermal resources, minerals, and petroleum.

10. Countries such as Ghana, Nigeria and Liberia have made efforts in developing mechanisms for benefit sharing.

2.2 SITUATIONAL ANALYSIS

11. Kenya's natural resources include sunlight, surface and groundwater, forests, biodiversity and genetic resources and rocks, minerals, fossil fuels and other sources of energy under Article 60 of the Constitution of Kenya.

12. The issue of benefit sharing has been a great challenge as far as natural resource exploitation is concerned as many factors hinder communities from achieving an equitable share of the benefits that accrue from natural resource exploitation. This has largely been attributed to improper and ineffective management.

13. The Kenyan government has made efforts to enhance transparency and accountability in the mining sector. A good example is the decision on mapping of resources, whereby the Ministry of Mining shall cooperate with the Regional Centre for Mapping of Resources for Development (RCMRD).

14. In Kenya there are various examples that enhance sustainable exploitation and promote equitable benefit sharing.

2.2.1 THE KASIAGU CORRIDOR REDD+ PROJECT IN SOUTHERN KENYA

15. The Kasigau Corridor REDD+ (Reducing Deforestation and Forest Degradation) project is the first carbon offset project in Eastern Africa under the voluntary carbon market and Wildlife Works Ltd has been implementing it since 1998. The Kasigau corridor which covers 500,000 ha is a very important

wildlife hotspot. It links Tsavo East and West national parks, which are Kenya's largest wildlife refuges. Wildlife Works through the negotiated Carbon Rights Agreements with the neighboring communities engage in Carbon trading under voluntary carbon markets. The revenues are shared among three groups with 1/3 of the revenue going to Wildlife Works to cover administrative costs, reimbursement for donors, verification fees, payments for rangers, another 1/3 of the revenue to the shareholders of the land in cash as dividends (paid 4 times in a year) and 1/3 for the communities through budget allocation to community groups for the management of the income generating activities.

16. Wildlife Works uses an established revenue sharing mechanism defined as a system for distributing both monetary and non-monetary gains generated through the implementation of the projects. Monetary revenue sharing is defined as sharing monetary flows generated from the project's credit sales with the community partners directly while non-monetary investments are the project activities paid by the project within its operating costs that fund livelihood enhancement, community development, capacity building, economic opportunities, or climate adaptation. The project targets 50% or more of project revenue to go directly to community partners and their development activities, and for 70% or more of project revenue to stay the in-country.

17. Communities' payment comes in the form of unprecedented funding for jobs and infrastructure, and direct revenue for social programs, health care, education, and other forest and wildlife friendly development.

2.2.2 GREENBELT MOVEMENT

18. The Green Belt Movement (GBM) works at the grassroots, national, and international levels to promote environmental conservation; to build climate resilience and empower communities, especially women and girls; to foster democratic space and sustainable livelihoods.

19. It has four main areas of activity tree Planting and Water Harvesting, Climate Change, Mainstream Advocacy, Gender Livelihood and Advocacy. The largest numbers of participants in the Green Belt Movement (GBM) are women and they have made tree planting an income generating activity, where GBM gives a financial compensation (US 10 cents) to nursery groups for every tree seedling that is planted and survives. That money is used to meet the needs of families; to pay for food, clothing, school fees and domestic utensils. GBM also trains communities on other income generating activities (IGAs) they can start with their tree planting compensation funds.

2.3 EXISTING LEGAL AND POLICY FRAMEWORK ON NATURAL RESOURCES

20. Article 69 of the Constitution of Kenya states that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits and the utilization of the environment and natural resources for the benefit of the people of Kenya.

21. Further, Article 174 states that the object of devolving government is to ensure equitable sharing of National and local resources in the Country.

2.3.1 THE MINING ACT, 2016

22. The Mining Act, 2016 provides a legal framework for prospecting, mining, processing, refining, treatment, transport, and any dealings in minerals. **Section 183** of the Act stipulates that the holder of a mineral right shall pay royalties to the State in respect of the various mineral classes won by virtue of the mineral right which shall be distributed as follows 70% to the National Government, 20% to the

County Government and 10% to the community where the mining operations occur. **Section 186** of the Act further states that all fees, charges, and royalties payable by the mining rights holder shall be paid into the designated account of the State department responsible for collecting royalties.

2.3.2 THE ENERGY ACT, 2019

23. The Energy Act, 2019 emphasizes the importance of energy sources such as wind, solar, and geothermal. **Section 85** of the Act provides that any **royalty** received by the **National Government** from geothermal energy shall be paid into the National Treasury and apportioned between the **National Government, County Government and the local community** as follows;- the **County government's** share shall be equivalent to **20%** of the royalties, the L**ocal community's** share shall be equivalent to **5%** of the royalties and shall be payable through a trust fund managed by a board of trustees established by the local community and the remaining **75%** shall be treated as National revenue.

24. Where the resource is being exploited in one or more counties the Cabinet Secretary shall, in consultation with the Commission for Revenue Allocation, determine the rate of apportionment of the county share between the counties.

2.3.3 THE PETROLEUM ACT, 2019

25. The Petroleum Act, 2019 provides for a legislative framework for the contracting, exploration, development, and production of petroleum; cessation of upstream petroleum operations; to give effect to relevant articles of the Constitution in so far as they apply to upstream petroleum operations, regulation of midstream and downstream petroleum operations. **Section 58** of the Act states that the **national government's** share of the profits derived from upstream petroleum operations shall be apportioned between the national **government, the county government, and the local community**. The **county government's** share shall be equivalent to **20%** of the national government's share. The **local community's** share shall be equivalent to 5% of the national government share and shall be payable to a trust fund managed by a board of trustees established by the county government in consultation with the local community.

2.3.4 THE WILDLIFE CONSERVATION AND MANAGEMENT ACT, 2013

26. The Wildlife Conservation and Management Act, 2013 provides for the protection, conservation, sustainable use, and management of wildlife in Kenya. Section 18 of the Act establishes the Community Wildlife Conservation Committees whose function among others is to review and recommend payment of compensation on claims resulting from loss or damage caused by wildlife.

27. Section 22 (5) any applicant who wishes to engage in bio-prospecting must enter into a benefit-sharing agreement that provides for sharing by the community in any future benefits that may be derived from the relevant bio-prospecting.

28. Section 23 of the Act establishes the Wildlife Conservation Trust Fund where payments of environmental services by beneficiaries in productive and service sectors are paid into. The purpose of the fund among others is to facilitate community-based wildlife initiatives.

2.3.5 THE FOREST CONSERVATION AND MANAGEMENT ACT, 2016

29. The Forest Conservation and Management Act, 2016 provides for the development and sustainable management, including conservation and rational utilization of all forest resources for the socio-economic development of the country and for connected purposes.

30. In addition, Section 7 of the Act establishes the Kenya Forest Service whose function, inter alia, is to establish and implement benefit sharing arrangements. Further, the Act under Section 27, establishes the Forest Conservation and Management Trust Fund. The Fund shall nurture, promote, support innovations and best practices in forest conservation and development including support of community forestry programmes. Section 53 of the Act stipulates that investors in forests shall share the benefits of their investments with local communities through various options such as infrastructure, education, employment, and social amenities. Lastly, the Act states under Section 32 that the management of community forests shall be vested in the community.

2.3.6 THE CLIMATE CHANGE ACT, 2016

31. Section 23E of the Act provides for sharing of social and environmental benefits sharing for carbon credit projects. Section 23E (5) provides that the community development agreements shall include provisions on benefit sharing as follows:
    i. in land-based projects, the contribution shall be at least 40% of the aggregate earnings; and
    ii. in non-land-based projects, the contribution shall be at least 25% of the aggregate earnings.

2.3.7 THE NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING

32. The Nagoya Protocol on Access to Genetic resources and Benefit Sharing main objective is the sharing of benefits arising from the utilization of genetic resources in a fair and equitable way thereby contributing to the conservation and sustainable use of biodiversity.

33. The Protocol under Article 5 emphasizes that the benefits from the utilization of generic resources include the monetary and non-monetary benefits, and they shall be shared based on the mutually agreed terms.

34. The Nagoya Protocol sets out core obligations for its contracting Parties to take measures in relation to access to genetic resources, benefit-sharing and compliance. They include:
    i. Creating legal certainty, clarity, and transparency.
    ii. Providing fair and non-arbitrary rules and procedures.
    iii. Establishing clear rules and procedures for prior informed consent and mutually agreed terms.
    iv. Providing for issuance of a permit or equivalent when access is granted.
    v. Creating conditions to promote and encourage research contributing to biodiversity conservation and sustainable use.

2.4 COMPARATIVE ANALYSIS

2.4.1 GHANA

35. Article 267 of the Constitution of Ghana, 1992 provides for a formula in benefit sharing in relation to Stool and Skin lands. 10% of all revenue accruing from these lands has to be paid to the Office of the Administrator of Stool Lands (OASL) to cover administrative expenses. The remaining revenue has to be disbursed between the following constitutional beneficiaries: stool (25%), traditional authority (20%) and district assembly (55%).

36. Currently, there are four different forms of benefit sharing arrangements in Ghana's forest sector. These include, Constitutional Timber Revenue benefit sharing, Modified Taungya System benefit sharing, Commercial Plantation benefit sharing and Community Resource Management Area (CREMA) benefit sharing.

37. Ghana best practice on the government's distribution of a proportion of mining rents to mining affected communities. In Ghana's mining sector the distribution by and large through royalties from gold mining. Royalty agreements are set between 3% and 6% paid directly to the government on a quarterly basis.

38. The mine revenue is paid to the Large Tax Unit of the Ghana Revenue Authority, which then dispenses the money into the Consolidated Fund. Of this, 80% is retained by the Government and used for general budget support. 10% is put into the Mineral Development Fund (MDF), which is ostensibly used to help fund public mining sector institutions and ad-hoc flagship projects in mining communities as compensation for mining affected communities.

39. The remaining 10% of mining revenue is transferred on a quarterly basis to the Office of the Administrator of Stool Lands, which dispenses the money directly to beneficiaries at the grassroots, according to a formula outlined in Section 267(6) of the Minerals and Mining Act 2006.

40. The Act stipulates that the office retains 10% of the monies awarded to cover administrative expenses, 25% is provided to the traditional authority for the maintenance of the stool, 20% to the traditional authority himself, and 55% to the District Assembly located within the area of authority of the stool lands.

2.4.2 NIGERIA

41. The Nigerian Constitution provides that the State shall protect and improve the environment and safeguard the water, air and land, forest, and wildlife of Nigeria.

42. The Forest Commission of Cross River State is a benefit sharing arrangement in Nigeria. In this instance, revenues from fees derived from forest products are shared with the forest dwelling communities who are the custodians of the forests in the State.

43. The benefits are shared as follows: communities get 70% of revenues obtained from community forests; the remaining 30% goes to the commission; while in plantation forests the sharing is 50% to communities and 50% to the Commission. The financial benefits are used to finance various community projects and payouts to vulnerable groups in the community.

44. In addition, Nigeria is listed as one of the leading oil producers in the world. It is estimated that oil accounts for more than 90% of the country's exports, 25% of the Gross Domestic Product (GDP), and 80% of government total revenues. In Nigeria, oil revenues are divided between the three tiers of government: federal which gets 50% of the revenues, the state which gets 25% and local governments which gets 20% of the revenues. The remaining 5% goes to special funds.

2.4.3 AUSTRALIA

45. Section 171 of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) provides for regulations to be made for the control of access to biological resources in Commonwealth areas of Australia, including the equitable sharing of benefits arising from the use of the biological resources in Commonwealth areas.

46. Part 8A of the Environment Protection and Biodiversity Conservation Regulations 2000 (EPBC Regulations) require an applicant for a permit to access biological resources for commercial purposes or potential commercial purposes to enter into a benefit-sharing agreement with each access provider

for the resources. The Commonwealth is the access provider for biological resources in Commonwealth areas, as defined in the EPBC Act.

47. The Deed: constitutes a benefit sharing agreement for the purposes of Part 8A of the EPBC Regulations. The Deed, in conjunction with an access permit issued under Part 8A of the EPBC Regulations, allows the access party to take biological resources of native species (from a specified access area) for research and development on any genetic resources or biochemical compounds, comprising or contained in the biological resources.

48. The Secretary of State is required to seek and take into account the advice of the Committee and consult those likely to be affected by the regulation.

49. Where the gross Exploitation Revenue received by the Access Party in a calendar year falls within the relevant threshold range, the Access Party will pay to the Commonwealth the corresponding percentage of gross Exploitation Revenue (Threshold Payments).

50. Threshold payments is paid annually by the Access Party within 28 days after receipt of a correctly tendered tax invoice.

2.4.4 LIBERIA

51. Liberia's forests are under pressure from forest activities such as mining, logging, and agriculture. Communities surrounding these forests are incentivized to mitigate deforestation and forest degradation through fair and equitable distribution of benefits.

52. Community benefit-sharing mechanisms (CBSM), refers to transformation of funds from forest resources into fair and equitably allocated benefits with additional and permanent outcomes for communities.

53. Types of benefits include productive and non-productive, monetary and non-monetary and performance and input-based benefits. Through effective distribution of benefits the forests are used to their full potential: to mitigate climate change, spur sustainable economic development and empowering the surrounding communities.

54. The National Forestry Reform Law (2006) establishes a transparent framework for the use, management, and protection of forest resources that balances the commercial, community, and conservation priorities of the Republic.

55. The law requires that communities (represented by Community Forest Development Committees) affected by logging concessions granted by the government to receive two financial payments;
    i. One is a fee per cubic meter of logged forest, which goes directly to communities and the amount is specified in Social Agreements. The minimum cubic meter fees set by law is $1.50 (USD).
    ii. The second is a land rental fee that companies pay to the government, who should pass it on to the multi-stakeholder National Benefit Sharing Trust Board, to which communities can apply for community projects.

56. Chapter 14 of the National Forestry Reform Law (2006) provides that forest communities dependent on forests under Forest Management Contracts are entitled to 30% of the Land Rental Fees paid by logging companies into the National Benefit Sharing Trust to improve livelihoods and infrastructure, 30% to Counties and 40% to the Central Government. Through participatory community consultations, Development Committees create project proposals which are forwarded to the National

Trust Board for review. The Board then selects the community developments projects and disburses the funds to the Development Committees to implement the selected projects.

57. The National Forestry Reform Law (2006) establishes the National Benefit Sharing Trust and The Community Forestry Development Committees. The Board is composed of 14 members to among other functions, disburse funds to Community Forestry Development Committees for the approved Community projects.

58. Social Agreements are negotiated between logging companies and communities. They include provisions such as maintenance and building of infrastructure including roads, provisions on workers' rights, housing, and social service and are implemented directly by the companies.

PART THREE

3.0 OVERVIEW OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 OF 2022)

3.1 INTRODUCTION

59. Kenya's natural resources include sunlight, surface and groundwater, forests, biodiversity and genetic resources and rocks, minerals, fossil fuels and other sources of energy under Article 60 of the Constitution of Kenya.

60. The issue of benefit sharing has been a great challenge as far as natural resource exploitation is concerned as many factors hinder communities from achieving an equitable share of the benefits that accrue from natural resource exploitation. This has largely been attributed to improper and ineffective management.

61. The Natural Resources (Benefit Sharing) Bill (*Senate Bills No. 6 of 2022*) is a Senate Bill sponsored by Sen. Danson Buya Mungatana, MGH, seeking to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities.

3.2 REVIEW OF THE BILL

62. The principal object of the Bill is to provide a legal framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the National Government, county governments and local communities

63. **Part I** of the Bill provides for preliminary provisions that is the short title, interpretation of terms as used in the Bill, application of the Act and the guiding principles of benefit sharing.

64. The Act is to apply to the following natural resources-sunlight; water resources; forests, biodiversity and genetic resources; wildlife resources; industrial fishing; and wind.

65. Some of the critical terms defined in the Bill include—
"affected entity" means an organization or person involved in the exploitation of a natural resource to which this Act applies;
"Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to finance;
"local community" means—
(a) people living in a ward within which a natural resource is situated; and
(b) people displaced to make way for the exploitation of a natural resource
"royalties" includes fees or payments by whatever name, paid by an affected entity for the exploitation or exploration of a natural resource in Kenya;

66. The guiding principles of benefit sharing are transparency and inclusivity; revenue maximization and adequacy; efficiency and equity; accountability and participation of the people; rule of law and

respect for human rights of the people; sustainable natural resources management and environmental protection and restoration.

67. **Part II Clauses 5-23** of the Bill provides for the establishment of the Benefit Sharing Authority as a corporate body with perpetual succession. The functions of the Authority include to—
    a) co-ordinate the preparation of benefit sharing agreements between an affected county and an affected entity;
    b) review, and where appropriate, determine the royalties payable by an affected entity engaged in natural resource exploitation;
    c) identify counties that are required to enter into a benefit sharing agreement under this Act in consultation with the respective county governments;
    d) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement;
    e) facilitate and monitor the implementation of a benefit sharing agreement entered into between a county government and an affected entity;
    f) determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements;
    g) oversee the establishment of benefit sharing committees and forums; and
    h) ensure the proper and timely payment of funds to counties and local communities as provided under this Act;

68. **Clause 5** provides for the management of the Authority which shall vest in a Board comprising of—
    a) a chairperson appointed by the President with the approval of Parliament;
    b) the Principal Secretary responsible for finance or a designated representative;
    c) the Principal Secretary responsible for mining or a designated representative;
    d) the Principal Secretary responsible for petroleum or a designated representative;
    e) the Principal Secretary responsible for energy or a designated representative;
    f) two persons of opposite gender nominated by the Council of County Governors to represent such communities as the Council shall determine;
    g) one person nominated by a registered association representing a majority of members of county assemblies to represent local communities;
    h) one person nominated by an umbrella body representing the interests of the private sector in Kenya; and
    i) the Director-General appointed by the Board.

69. A person is qualified for appointment as the chairperson, member of the Board or Director –General of the Authority if that person holds a degree from a university recognized in Kenya and has at least seven years' experience (ten years for the Director General) in law, environmental management, economics, public finance, mining, community development or any other related field.

70. **Clauses 6-17** provides for the composition of the Board, the terms of appointment of its members and vacation of office. The powers of the Board in performing its functions and the conduct of its business. It establishes committees of the Board, the power of the Board to delegate functions and remuneration of Board members.

71. The Bill also establishes the office of the Chief Executive Officer as an *ex-officio* member of the Board, appointment of staff of the Board and their protection from personal liability in the performance of their duties.

72. **Clause 24** of the Bill provides that the Authority shall, in consultation with the Council of County Governors and relevant national government entities and upon conducting public participation, determine and review the amount of royalties and fees payable by affected entities in respect of a particular sector where a written law does not prescribe the royalties or fees.

73. In making a determination the Authority shall take into account—
    a) the total capital investment of the affected entity;
    b) the prevailing international market value of the commodity from which royalty is payable;
    c) the commercial viability of the natural resource being exploited; the impact of the exploitation on the local community, the affected county and the environment; and
    d) obligations of the affected entity under any existing benefit sharing agreement with the affected county.

74. Where a written law prescribes the royalty, fees, payments or benefit sharing in a particular natural resource sector, the relevant written law shall apply with respect to that sector.

75. **Clause 25** of the Bill provides that the Kenya Revenue Authority shall collect royalties as determined by the Authority from affected entities and any other payment of royalties from natural resource exploitation undertaken under any other written law. The Kenya Revenue Authority is required to declare and pay monies collected to the Consolidated Fund and also account to the Authority the total sum collected from affected entities with respect to each natural resource. The provisions of this section are to supersede the provisions of any law with respect to the collection of royalties and fees charged for the exploitation of natural resources in Kenya.

76. **Clause 26** of the Bill provides for the revenue sharing ratio. The revenue collected under the Act shall be shared between the National Government and respective county governments in the ratio of sixty percent to the National Government and forty percent to the county governments.

77. Additionally, at least sixty per cent of the revenue assigned to the county governments shall be utilized to implement local community projects and forty percent of that revenue shall be utilized for the benefit of the entire county.

78. Where natural resources are shared by two or more counties, the Authority shall determine the ratio of sharing the retained revenue amongst the affected counties in consultation with the affected counties. In determining the ratio of sharing the retained revenue amongst counties sharing a resource, the Authority shall take into account the contribution of each affected county in relation to the resource; the inconvenience caused to the county in the exploitation of the natural resource; and any existing benefit sharing agreement with an affected entity.

79. Additionally, the Authority is required, in consultation with the lead agencies with respect to each natural resource, to review the revenue sharing ratio after every five years and present its recommendations to Parliament for approval.

80. **Clauses 27-31** of the Bill provide for benefit sharing agreements. Clause 27 provides that every affected entity shall enter into a benefit sharing agreement with the relevant county government before the exploitation of a natural resource in the affected county. The benefit sharing agreement

shall include non monetary benefits that may accrue to the county and the contribution of the affected entity in realizing the same.

81. Additionally, **Clause 28** of the Bill provides that each county that has a natural resource is required to establish a County Benefit Sharing Committee consisting of –-
    a) the county executive committee member responsible for finance;
    b) the county executive committee member responsible for matters relating to natural resources;
    c) two technical officers of the relevant county departments, appointed by the county executive committee member in consultation with the county executive committee member responsible for the respective natural resources; and
    d) five persons, two of whom shall be of the opposite gender, elected by the local communities where the natural resource is found and representing the areas with the main natural resources within the county.(They are to hold office for a single term of five years)

82. **Clause 29** the functions of each County Benefit Sharing Committee include to —
    a) in consultation with the respective local community and upon conducting public participation, negotiate the terms of a benefit sharing agreement with an affected entity on behalf of the county government;
    b) monitor the implementation of projects required to be undertaken in the county pursuant to a benefit sharing agreement;
    c) determine the amount of money to be allocated to each local community from monies that accrue under a benefit sharing agreement under this Act;
    d) convene public forums to facilitate public participation with regard to proposed benefit sharing agreements during negotiations prior to execution by the county government;
    e) convene public forums for the purpose of facilitating public participation with regard to community projects proposed to be undertaken using monies that accrue to a county government pursuant to this Act; and
    f) make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act.

83. **Pursuant to Clause 30** of the Bill, every benefit sharing agreement is to be approved by the respective county assembly prior to the execution of the agreement by the respective county government and further deposited with the Authority within thirty days of its execution and a copy shall simultaneously be submitted to the Senate.

84. **Clauses 31** of the Bill provides for the establishment by each affected local community a Local Benefit Sharing Forum comprising of five persons, two of whom shall be of the opposite gender, elected by the residents of the local community. A public officer shall not be eligible for election as a member of a local community benefit sharing forum.

85. **The Local Benefit Sharing Forum** is to ensure that that the respective local community benefits from the exploitation of natural resources and shall—
    a) collect and collate the views of the local community and represent the interests of the local community in the negotiations with the respective County Benefit Sharing Committee and in the implementation of a Benefit Sharing Agreement;

b) in consultation with the local community, identify local community projects to be supported by money allocated to the local community by the County Benefit Sharing Committee under this Act; and
c) oversee the implementation of projects undertaken in the relevant local community using funds devolved under the Act.

86. **Clauses 32-35** of the Bill contains provisions on funds of the Authority outlining monies considered to comprise funds of the Authority which include money as may be provided by the National Assembly. The provisions also provide for the financial year, preparation of annual estimate before the commencement of a financial year, records and audit of accounts and preparation of annual report on operations of the Authority to be submitted to the President and Parliament.

87. **Clauses 36-43** provides for uses of retained funds, offences, transition and consequential amendments.

88. **Clause 36** provides that monies distributed to counties under the Act shall be utilized for projects that are prioritized by the County Benefit Sharing Committee; are prioritized by the local community benefit sharing forum; meet the socio-economic needs of the residents of the County or local community; and are of public interest and are community-based in order to ensure that the prospective benefits are available to a widespread cross-section of the inhabitants of a particular area.

89. **Clause 37** provides for the offences of failure to furnish information required to be furnished to the Authority under the Act or knowingly making a false statement. The penalties prescribed in the case of a natural person, is a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment and in the case of a body corporate, to a fine not exceeding five million shillings.

90. **Clause 38** provides for transition. An affected entity that, immediately before the commencement of the Act, was lawfully authorized to exploit a natural resource shall be deemed to be authorized to conduct such exploitation and comply within two years of the commencement of the Act.

91. **Clause 39** provides for provides for the powers of the cabinet secretary to make regulations for the better carrying out of the provisions of the Act including prescribing the fees in respect of anything required to be done under this Act; prescribing the mode for the payment of royalties under the Act and prescribing the revenue sharing formula between counties that share a natural resource.

92. **Clauses 40-43** are on the consequential amendments to various statutes

PART FOUR

4.0 PUBLIC PARTICIPATION/STAKEHOLDERS CONSULTATION

93. Following the call for memoranda from the public through placement of adverts in the print media on Wednesday, 16th August 2023 and vide a letter REF: NA/DDC/ EF&M/2023/037 dated 17th August 2023 inviting stakeholders for a meeting, the Committee received memoranda from the following stakeholders:
    i. Council of Governors
    ii. Kenya Private Sector Alliance
    iii. Kenya Wildlife Conservancy Association
    iv. North Eastern Conservancy Association
    v. Kenya Oil and Gas Working Group
    vi. Nature Kenya
    vii. Samburu Women Trust
    viii. Peace-Net Kenya
    ix. PARAAN
    x. Conservation International
    xi. Centre for Minority Rights Development
    xii. Electricity Sector Association of Kenya
    xiii. Wildlife Works

94. The Committee also invited the following MDAs vide a letter **REF: NA/DDC/EF&M/2023/045** dated **27th September, 2023** for their comments and proposals on the Bill:
    i. Ministry of Environment, Climate Change and Forestry
    ii. The National Treasury
    iii. State Department for Mining
    iv. State Department for Energy
    v. State Department for Petroleum
    vi. State Department for Wildlife

95. The stakeholders submitted as follows:

4.1 KENYA PRIVATE SECTOR ALLIANCE

In a meeting with the Committee held on Saturday, 7th October 2023, representatives from KEPSA proposed the following amendments to the Bill:

Clause 1

96. To read as *AN ACT of Parliament to establish a system of benefit sharing in resource utilization between resource utilizers, the national government, county governments and local communities; and for connected purposes.*

Justification:

The kind of activities described in the Bill entail making use of natural resources, as opposed to 'exploitation'. It aligns with environmental law concept of sustainable development or sustainable use.

Clause 2 on Definitions

97. **"benefit sharing agreement"** means an agreement on the manner in which a **royalty** accruing from natural resources shall be shared out between an, affected entity and a county;

Justification:
The law should be specific it is the royalty that is paid out by the affected entity, the revenue obtained from utilization of a natural resource belongs to the affected entity.

98. **'utilization'** means the extraction or use of a natural resource for commercial benefit, **for the avoidance of doubt utilization does not include access to a natural resource for noncommercial purposes;**

Justification:
Sunlight and wind resources are utilized to generate electricity. The definition should capture the fact that the commercial benefit only accrues when there is actual generation, and not before that is, where feasibility studies are being carried out.

Clause 24 (1)

99. Delete clause 24(1)

Justification:
The payment of royalties and fees will mean additional costs to investors. This will be besides the already existing county charges being paid by businesses.

The clause introduces a provision that is likely to be abused especially when it comes to surface and underground water, forests, biodiversity and genetic resources as per Clause 3 (b & c) to which the Act shall be applicable. This is because it has been left at the liberty of the Authority to prescribe royalties or fees towards these thematic areas.

There should be regulations prescribing what shall be applicable to each thematic area that has no existing law.

Clause 24 (3)

100. Align clause 24(3) with Clause 40, 41, 2 & 43

Justification:
The clause independently will create confusion in implementation of the law especially when it comes to matters royalties and fees. To streamline the inconsistency clauses 40,41,42 & 43 should be aligned. The Petroleum Act envisages that royalties, fees or payments are prescribed in a petroleum agreement, therefore this Bill would not apply to the determination and review of such monies. This will promote local content.

Clause 26 (1)

101. To retain the subsisting Legal Revenue sharing formula under the Mining Act, 2016 at Section 183 (5) that states "The royalties payable under subsection (1) shall be distributed as follows-

Seventy percent to the National Government, Twenty percent to the County Government; and Ten percent to the community where the mining operations occur.

Justification:
To ensure clarity and consistency in implementation, it is that the proposed 60/40 percent ratio sharing in the Bill is harmonized with the Mining Act that proposes a 70/20/10 percent ratio sharing.

Doing away with the direct payments to the community creates a potential risk to the investor because in the event that the County Government fails to meet its obligations, the community may resort to operation sabotage.

Clause 26 (5)

102. The Commission shall, in consultation with the lead agencies with respect to each natural resource, county governments, local communities and stakeholders; review the revenue sharing ration after every five years and present its recommendations to Parliament for approval.

***Justification*:**
The review should be subject to public participation as required by Article 201 (a) of the Constitution and Section 87 of the County Governments Act (2012).

Clause 27 (1)

103. Deletion of Clause 27 (1)

Justification:
The affected entities have already fulfilled their royalty and fees obligations to KRA, and thus, it should be the responsibility of the National Government co engage in benefit Sharing Agreements with the Counties.

Clause 28 (7)

104. The Cabinet Secretary Mining in consultation with the Cabinet Secretary in charge of Energy shall make Regulations for the conduct for the affairs of the County Benefit Sharing Committees.

Clause 30 (1)

105. That Clause 30 (l) be amended by rephrasing it to-

Every benefit sharing agreement shall be approved by the respective County Governor prior to the execution of the agreement by the respective county government"

Justification:
The Bill should be cognizant of the political economy and devise ways to ensure MCAs do not politicize economic issues leading to minimal or no gain to their constituent. A case of Karede mines where the political economy led to delays in economic gains for the people can be used as a reference study.

Clause 37(2)(a) and (b)

106. Additional provision 37(2)(c) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

Justification:
Restitution of stolen funds through an additional 'mandatory fine' is a remedy under the Bribery Act (2016) and the Anti-corruption and Economic Crimes Act (2003).

Clause 43

107. The Clause should be harmonized with the Petroleum Act which enacts Government share of 75% while this clause proposes 60%.

Justification:
The purported amendment of the Petroleum Act provisions will run into headwinds as it reduces GOR overall share under the Petroleum Act from 750/0 ^{0}/0. to 600/0 and increases the County Government to 40.

New Clause

108. The Commission shall take appropriate steps to resolve any disputes or differences in connection negotiation and performance of benefit sharing agreements.

109. The County and Affected Entity shall explore options for alternative dispute resolution such as mediation and Arbitration.

Justification:
The Bill should also create a dispute resolution mechanism for benefit sharing contracts.

4.2 NORTH EASTERN CONSERVANCY ASSOCIATION

In a meeting with the committee held on Friday, 6th October 2023, **Mr. Sharmake Mohamed Sheikh**, Chairperson, North Eastern Conservancies Association submitted the following recommendations on the Bill:

110. Exclusion of wildlife from the Bill. Wildlife is an integral component of Kenya's natural heritage. It should not be categorized as an "**extractive natural resource**."

111. Factor in **conservation costs**. It is paramount to factor in the cost of wildlife conservation when determining the benefit-sharing ratio for wildlife resources. This will provide a more accurate representation of the financial challenges and commitments faced by stakeholders involved in conservation efforts especially community conservation.

112. Consideration of **land ownership**. The Bill should give explicit consideration to land ownership, notably the distinction between national parks, reserves, private, and community conservancies. The benefits accrued from these areas should be apportioned in line with ownership and the contributions made by respective stakeholders.

113. Maintain **section 76 of the Wildlife Conservation and Management Act** (WMCA). Section 76 of the Wildlife Conservation and Management Act (WCMA) provides vital incentives for wildlife conservation.

114. Alignment with the Community Land Act, 2016. The Bill should be reconciled and aligned with the provisions of the Community Land Act, 2016 to ensure **that community rights and interests** are adequately protected and championed.

115. **Community participation in decision making**. To foster a sense of ownership and responsibility, local communities should be actively involved in decision-making processes regarding the exploitation and management of natural resources within their jurisdictions.

116. **Environmental Impact Assessments**. Any exploitation of natural resources should be preceded by comprehensive Environmental Impact Assessments (EIA) to ensure that activities are sustainable and will not lead to irreversible environmental degradation.

117. Revenue **reinvestment**. A percentage of the revenues generated from natural resource exploitation should be reinvested in environmental conservation and community development projects to ensure sustainability and enhance community welfare.

4.3 KENYA OIL AND GAS WORKING GROUP

In a meeting with the Committee held on Friday, 6th October 2023, Mr. Muturi Kamau, National Network Coordinator, Kenya Oil and Gas Working Group proposed the following amendments to the Bill:

118. The Bill needs to be **harmonized with existing laws** that govern natural resources including Mining Act, 2016, Petroleum Act 2019, Energy Act 2019 and Fisheries (Management and Development) Act 2016, Natural Resources (Classes of transactions subject to ratification) Act No. 14 of 2016, Environmental Management and Coordination Act 2013, Community Land Act 2016. In order to avoid conflict between the Bill and already enacted laws.

119. **Access to information** is critical for enhancing participation of citizens in decision making processes that affect them including the management of natural resources. Access to information including contracts and benefit sharing agreements entered into will also help enhance transparency and accountability among the duty bearers.

120. Inclusion of a **local benefit sharing agreement** in addition to the county benefit sharing agreement or an elaborate guidance on how local communities' interests will be reflected in the county benefit sharing agreement.

121. The Bill should propose a **model benefit sharing agreement** to be included as an Appendix, outlining basic provisions including rights and obligations that must be contained in benefit sharing agreements.

122. **Transition provisions should provide for timelines** for the establishment of the various Funds referenced under the Bill.

123. The Bill should incorporate provisions specifying **transparency and accountability** criteria for the allocation of investment of the benefits.

124. The Bill does not clearly bring out the element of **public participation**. It is not clear at what point in the benefit sharing cycle the public should be involved. The public/local community should have power to negotiate.

125. Parliament to fast-track the enactment of the Sovereign Wealth Fund Bill, 2019 in order to operationalize the Futures Fund and the Natural Resources Fund proposed.

4.4 KENYA WILDLIFE CONSERVANCY ASSOCIATION

In a meeting with the Committee held on Friday, 6th October 2023, Ms. Gladys Werigia, Policy Lead, submitted the following recommendations on behalf of the KWCA:

126. **Exempt benefit sharing of wildlife and forest resources occurring on community and private lands from application in the Bill.** Communities and landowners with wildlife on their land directly and largely bear the management and operations costs of wildlife. Subjecting the benefit sharing of extraction interventions on community and private lands to a national benefit sharing structure and formula, and which further allocates a low percentage of benefit to communities, not only serves as an **dis-incentive to uptake of conservation** on these lands but also threatens the well-being of wildlife, majority of which is outside National Parks and National Reserves.

127. The Bill ought to **factor the unique aspects of each resource;** the difference between **renewable and non-renewables/extractive resources**; and the **different governing principles** of benefit sharing including consideration of the party that bears the cost of maintaining or conserving the resource, especially the non-extractives like wildlife.

4.5 THE SAMBURU WOMEN TRUST

In a meeting with the committee held on Friday, 6th October 2023, Ms. Jane Meriwas, Executive Director, Samburu Women Trust submitted the following recommendations on the Bill:

128. Review the removal of **National Wealth Sovereign Fund and National Royalties Fund** considered in the previous versions of the Bill with a view of including a sustainability national fund into which the country can save into for the common good of tomorrow and the future generations. Natural resources do get depleted.

4.6 NATURE KENYA

In a meeting with the Committee held on Friday, 6th October 2023, Ms. Emily Mateche, Policy & Advocacy Manager, Nature Kenya submitted the following recommendations on the Bill:

129. In addition to "exploitation" of natural resources, the Bill needs to factor in management and conservation of natural resources. The cost incurred by management agencies e.g mandated government agencies, national Non-Governmental Organizations and Civil Society Organizations,

Community based organizations such as Water Resource Users Associations, community Forest Associations and Site Support Groups and others who can demonstrate their contribution in conservation and management of natural resources. need to be met before sharing of benefits accrued

4.7 PASTORALISTS ALLIANCE FOR RESILIENCE AND ADAPTATION ACROSS NATIONS-PARAAN

In a meeting with the Committee held on Friday, 6th October 2023, Mr. Liban Golicha submitted the following recommendation on the Bill:

130. The Bill to have clear provision for free prior informed consent as provided in the law.

4.8 PEACE AND DEVELOPMENT NETWORK TRUST (PEACE-NET KENYA)

In a meeting with the Committee held on Friday, 6th October 2023, Mr. Mohamed Sharif, Peace-Net representative made the following submissions on the Bill:

Clause 3

131. Amend clause 3 by deleting Section 3 (B) of the proposed Bill or amend it to exclude benefit sharing from water for subsistence farming and livestock use.

Justification: along the border areas between Garissa and Tana River Counties, conflict have persisted arising out of contested boarders and territories, access to resources such water and pasture and competing resource uses such land and water particularly between pastoralist and farmers.

Clause 28

132. Amend clause 28 (2d) and include youth in the membership of the Committee

Clause 29

133. Amend clause 15 sub-section 8 should read as the *County Chief Officers responsible for matters relating to natural resources in the respective counties shall serve as joint secretaries to the Committee.*

4.9 CONSERVATION INTERNATIONAL

In a meeting with the Committee held on Friday, 6th October 2023, Ms. Clarice Wambua, External Legal Counsel, Conservation International made the following submissions on the Bill:

134. The Bill ought to be rectified prior to enactment to align its content with international best practice on benefit sharing in the context of carbon projects, and to ensure it fits national circumstances and Kenya's development goals and aspirations. To avoid these unintended consequences, the Bill should not be passed in its current form, but to be amended to uphold property rights and interests by focusing only on public forests and activities on public land, and also to exclude from its scope of application activities directly causing a net conservation or enhancement of natural resources and reduction of greenhouse gas emissions, and in effect carve out carbon projects from its ambit.

4.10 CENTRE FOR MINORITY RIGHTS DEVELOPMENT

In a meeting with the Committee held on Saturday, 7th October 2023, Mr. Nyang'ori Ohenjo, Chief Executive Officer made the following submissions on the Bill:

Clause 2 on Definitions and Interpretation;

135. Amend by including indigenous peoples and local communities.

Justification:
Indigenous and local communities are also hugely affected by natural resource exploitation.

136. Propose a listing of indigenous peoples as key stakeholders in natural resource benefits sharing with a clear definition of who indigenous peoples are.

137. Provide a provision with a clear definition of public participation of indigenous peoples in resource benefits sharing.

138. Add an amendment of Section 6, (k) and (m) to include indigenous peoples

Justification:
In cognizant of Kenya NCCAP 2018-22 that recognizes the importance of enhancing the climate resilience of vulnerable groups including children, women, youth, persons with disabilities, and marginalized and minority communities.

Clause 7

139. Propose nomination of 3 persons to represent indigenous peoples and local communities, who are from indigenous and local communities (pastoralist, forest and fisher communities) with demonstrable expertise in indigenous and local communities' rights.

Justification:
The bill should recognize indigenous peoples and their rights, as this will provide for the need for consultation and consent in the implementation of climate change projects, in line with Article 56 and 260, together with several policies and legal frameworks, including relevant international treaties that Kenya is party to.

Clause 26 (1)

140. Amend by making provision of an annual social contribution of at least twenty five percent (25%) of the aggregate earnings of the previous year to the community, to be managed and disbursed for the benefit of the community.

Justification:
The National Guidelines for Free Prior and Informed Consent (FPIC), Kenya seek to reverse historical trends of excluding Indigenous Peoples and Local Communities from meaningfully participating, contributing to and enjoying benefits from national development initiatives, especially within the natural resource sector, and correct and halt the perpetuation of stereotyped narratives and attitudes reflected in policies, laws and practice that Indigenous Peoples and Local Communities destroy the

environment. Several Court decisions have pounced themselves on the question of Indigenous Peoples and benefits sharing.

4.11 ELECTRICITY SECTOR ASSOCIATION OF KENYA- ESAK

In a meeting with the Committee held on Saturday, 7th October 2023, Mr. George Aluru, Chief Executive Officer, ESAK made the following submissions on the Bill:

Clause 2

141. Amend clause 2 to read as "exploitation" means the use of natural resources for large scale commercial benefit.

Justification:

The provision as is may be interpreted to encompass all users of natural resources, some who do not qualify to pay royalties.

Clause 6

142. Amend as follows; *Determine appeals arising out of conflicts regarding preparation of benefit sharing agreement for determination in the first instance. Any person who is dissatisfied with the decision of the Authority may appeal to the High Court.*

Justification:

Need for further clarity for dispute resolution in preparation of benefit sharing agreement and other instances where conflict may arise. Working with the assumption that the Benefit sharing agreement will provide for dispute resolution for executed contracts the same may not be outlined in the Bill.

143. Amend to add paragraph (q) ensure safe keeping and recording of all benefit sharing agreements that would be availed to the public upon request.

Justification:

Promote the right of access to information that affects the public.

4.12 WILDLIFE WORKS

In a meeting with the Committee held on Friday, 6th October 2023, Ms. Olivia Odhiambo, Climate Policy Director Wildlife Works made the following submissions on the Bill:

144. The new Bill should be clear that conservation and nature positive projects do not qualify under the definition of *exploitation.* The definition is unclear, as it refers to the use of natural resources. This could encompass conservation or even projects which uplift biodiversity.

145. Refer to Climate Change 2016 for all carbon related benefit sharing requirements, so as not to double tax or confuse.

146. Further, remove reference to Wildlife Conservation and Management Act at Article 41. The inclusion of Natural Resources (Benefit Sharing) Bill 2022 in the WCMA will disincentivize wildlife and biodiversity conservation, making it more difficult for Kenya to achieve its sustainability targets.

4.13 COUNCIL OF GOVERNORS

In a meeting with the Committee held on Saturday, 7th October 2023, Mr. Ken Owoch, Technical Lead Tourism, Wildlife & NRM made the following submissions on the Bill:

147. The Benefit Sharing Authority is mandated to oversee the benefit sharing with respect to natural resources already governed by other Acts of Parliament, that is, minerals, petroleum, forests, wildlife and energy resources including wind and geothermal resources. There is **need to rationalize and harmonize these functions to avoid a potential overlap in the function of the Authority to review and determine royalties payable in natural resource exploitation and the mandate of the institutions under the relevant Acts of Parliament**.

148. There is need for **clarity in the Bill on the convergence between "local community projects" as used in the Bill and "county projects".** All projects implemented in the county offer benefits to the local community.

149. There is need for **the project identification process in counties to be aligned with the budget cycle of the county government**. To ensure timely availability of resources and effective use thereof.

4.14 MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND FORESTRY

In a meeting with the Committee held on Tuesday, 24th October 2023, Eng. Festus Ng'eno, Principal Secretary, State Department for Environment and Climate Change made the following submissions on the Bill on behalf of the Ministry:

150. The natural resources sector does not need a stand-alone law to govern benefit sharing since **benefit sharing is very specific to a sector and also to a project**. Several Acts of Parliament governing natural resources have already set out benefit sharing frameworks e.g the Climate Change Act, 2016 for carbon projects.

151. **Forest management and development** is adequately provided for in the Forest Conservation and Management Act, 2016 including the development of participatory Transition Implementation Plans (TIPS) to support uptake of devolved forestry functions to the county level which prioritizes forestry matters in county financial planning as it is adequate.

152. There are major **overlaps in the Bill with the existing Forest Conservation and Management Act, 2016** especially on dealing with community participation; obligations of a forest association; assignment of forest user rights; termination or variation of a management agreement; forest conservation and management and customary rights.

153. Proposal is to have **each sector of natural resources deal with benefit sharing in their framework laws or in the alternative delete clause 3(c)** of the Bill.

4.15 STATE DEPARTMENT FOR MINING

In a meeting with the Committee held on Saturday, 7th October 2023, Mr. Elijah Mwangi, Principal Secretary State Department for Mining made the following submissions on the Bill:

154. **Benefit Sharing should be left to each sector specific law to govern**. Several Acts of Parliament governing natural resources have already set out benefit sharing frameworks which are being implemented in accordance with these Laws. There is no need for a stand-alone law to govern Benefit Sharing since benefit sharing is very specific to a sector and also to a project.

155. The proposed **Bill is largely inclined to County Governments and seeks to assume key mandates of the Ministry (State Department for Mining).** Mining and minerals are a reserve of the National Government. This is well established in the Constitution and detailed in the Mining Act, 2016.

156. **Royalties are fiscal instruments and need to be determined upfront** as they provide a basis for determining economic viability of resources. The Mining Act has provided for this which creates stability for the sector.

157. The creation of a new entity, the Benefit Sharing Authority presents **additional costs of governance** of natural resources and potential overlap with other government agencies with mandate to manage and license use of the natural resources.

158. The Bill presents **constitutional and administrative implementation challenges.** This is by assigning the development of benefit sharing agreements to County Governments, with minimal regard to distribution of functions between national and county governments in relation to the various natural resources under application by the Bill.

159. A **common benefit sharing ratio for renewable and non-renewable/extractive resources is inequitable** by failing to-

(a) Take into account the unique nature of each resource;

(b) Recognize the effort and additionality by respective landowners (Government, community and private) on which the natural resource occurs, where non-renewable resources do not require additionality. This dis-incentivizes conservation efforts of wildlife and forests among other non-renewable resources by communities and landowners.

160. Recognize the limitation for community, private and investments in the natural resources.

4.16 STATE DEPARTMENT FOR WILDLIFE

In a meeting with the Committee held on Tuesday, 24th October 2023, Dr. Alfred Mutua EGH, Cabinet Secretary, Ministry of Tourism and Wildlife and Ms. Silvia Museiya, Principal Secretary for State Department for Wildlife made the following submissions on the Bill:

161. The creation of a new entity, the Benefit Sharing Authority presents **additional costs of governance** of natural resources and potential overlap with other government agencies with mandate to manage and license use of the natural resources.

162. The Bill presents constitutional and administrative implementation challenges. This is by assigning the development of benefit sharing agreements to county governments, with minimal regard to distribution of functions between nation and county governments in relation to the various natural resources under application by the Bill.

163. A common benefit sharing ratio for renewable and non-renewable/extractive resources is inequitable as it fails to—

(a) Take into account the unique nature of each resource;
(b) Recognize the effort and additionality by respective land owners (Government, community and private) on which the natural resource occurs, where non-renewable resource does not require additionality. This dis-incentivizes conservation efforts of wildlife and forests among other non-renewable resources by communities and landowners; and
(c) Recognize the limitation for community, private and investments in the natural resources.

4.17 STATE DEPARTMENT FOR ENERGY

In a meeting with the Committee held on Tuesday, 24th October 2023, Mr. Mohamed Liban, Principal Secretary for State Department for Petroleum made the following submissions on the Bill on behalf of the Ministry:

164. The Bill should have been preceded by a Policy as policy framework gives a forward-looking long-term view of the problem and provides guidance and direction for decision-making and action in a particular area. A policy outlines the goals, objectives, and strategies for achieving those goals, as well as the roles and responsibilities of different stakeholders involved in implementing the policy.

165. It is therefore recommended that before the Bill is formulated, there should be a policy preceding it.

166. There is need to be alive to the fact that there may be possible conflicts on projects that will be prioritized by County Committee, local community, socio-economic needs of the community and public interest. People will require a forum to appeal the decisions of the Authority such as tribunal as mentioned above.

167. It is important to consider the existing laws in the relevant sector and ensure contextualization and customization which involves adapting the Bill to fit the specific needs and circumstances of the sector or area it is intended to govern. This will depend on the specific context and objectives of the law, it will involve extensive research, consultation with stakeholders, and consideration of legal and policy implications.

168. Additionally, each resource has its own unique processes for exploration, exploitation and licensing. This requires recognizing the processes and investments that go into the realization of each project depending on the nature of resource being explored and exploited and includes acknowledging

the nature of contracting for each sector, financing models for the project and the length of concessions among others.

169. It is therefore proposed that stakeholder engagement should be individualized to each sector and enable the drafters of this Bill appreciate the basis of each sector setting the distribution of revenue, benefits or royalties as set out in the sector specific laws.

4.18 STATE DEPARTMENT FOR PETROLEUM

170. This Act should be preceded by a Policy on Natural Resources Benefit Sharing. There is lack of a Policy on Natural Resources Benefit Sharing. The Policy will give Policy direction on this subject. It will articulate the aspirations to be achieved by the ensuing legislation.

171. The Bill should take a more inclusive approach by providing the roles of other State Agencies.

172. The Bill is silent on the roles of State Agencies such as Energy and Petroleum Regulatory Authority, National Mining Corporation, Kenya Marine Authority, KWS, KFS etc. These Agencies are also charged with the overall management of the natural resources within their dockets.

173. Align the appointment of the chairperson and members of the Board to existing public governance practices/provisions. Chairpersons of other boards of state corporations are usually appointed by the President without subsequent approvals. The State Corporations Act and Mwongozo Code of Governance prescribe the appointment modalities.

174. The Act should be clear on what *"non-monetary benefits"* means. A clear list to be provided as well as methodologies for sharing the same.

175. There appears to be a duplication of roles which will bring about conflict in performance of functions of County Benefit Sharing Committee and the Government Agencies.

176. Delete section 29(c) which stipulates that the County Sharing Committee will determine the amount of money to be allocated to each local community from the money accrued under the benefit agreement. This is unnecessary as the Bill in Section 26 has set the formula for this determination.

4.19 THE NATIONAL TREASURY AND ECONOMIC PLANNING

The National Treasury and Economic Planning made the following submissions on the Bill:

177. The Bill provides for a system of sharing benefit in exploitation of all natural resources. Given the uniqueness in exploitation of different natural resources, **the unique circumstances of each sector should be taken into account to identify the impact to the national government, county government and the local communities necessary in determining the benefit sharing to the different players**.

178. The Bill has been amended to eliminate creation of the Sovereign Wealth Fund. The revenue sharing ratios imply that the Bill is **focusing more on sharing of benefits as opposed to sustainable use of natural resources. Some of these natural resources are finite and will be depleted**. The funding arising from the exploitation will therefore come to an end at some time in future. When this

happens gaps will be left in budgets of the concerned government institutions. Recommend that the Government should consider redirecting the amount set aside for budget financing and instead accumulate a significant portion in a **Sovereign Wealth fund** to finance budgets for National and County Governments when there are shortfalls in revenues raised nationally and build a savings base for future generations when mineral resources are exhausted.

179. The Fourth Schedule of the Constitution assigns the **responsibility of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development to the National Government.** Resources should therefore be allocated to the National Government to effectively undertake this mandate.

180. The Bill does not take into account **the principle of equity** since counties are not equally endowed with natural resources. It is our considered view that this is the spirit protected by Article 202(1) of the Constitution which provides that revenue raised nationally shall be shared equitably among the national and county governments.

181. The Bill is silent on the share of **revenue to the community who may require compensation in case of displacement or destruction of their source of livelihood in the course of extraction of the resources.** There are no efforts to ring-fence the share of the money to communities. In this regard, there is a huge probability that the funds for communities will not be utilized for the benefit of the communities affected by the exploitation of natural resources within their localities.

182. According to the Bill, the **Benefit Sharing Authority** would be an entity of the National government. **It is not clear how it would oversee the administration of funds set aside for the community while these funds are part of the share allocated to the County Government**. Such funds will be budgeted for and administered by the respective County Government. The law may consider separating community funds from county funds. Once the criteria for sharing revenues is determined by Parliament in law there is a weak case for establishing an Authority.

183. The objective of the Act can be achieved by **amending various legislations which have addressed the sectors and sub-sectors mentioned**. Any gaps identified can be reviewed and amended in the existing legislations. It is therefore our considered opinion that this Bill may not be necessary.

184. The Bill is not clear on **how funds meant to implement local community projects will be budgeted, accounted and reported for** separate from the revenue assigned to County Governments to be utilized for the benefits of the entire country.

185. Most of the functions assigned to the Benefit Sharing Authority will result to **the Authority undertaking functions of the National Government entities** which includes policy formulation and research. Establishment of the Authority will therefore result into duplication of functions of the National Government entities. The resources to this Authority may be saved by addressing any gaps which exist through the respective National Government entities other than creating parallel structures which have financial implications.

PART FIVE

5.0 COMMITTEE OBSERVATIONS

Having considered the Bill, the Committee made the following observations:

1. The Bill meets the criteria required to define it as a 'Money Bill' pursuant to Article 114(3) (b) & (c) of the Constitution. As such, the National Assembly is required to take into consideration the recommendations of the Budget and Appropriations Committee when debating the Bill. Further, a 'Money Bill' can only be introduced in the National Assembly pursuant to Article 109(5) of the Constitution. Therefore, the Bill should have been first introduced in the National Assembly and not in the Senate;

2. The Bill needs to be harmonized with existing laws that govern natural resources including the Mining Act, 2016, Petroleum Act, 2019, Energy Act, 2019 and Fisheries Management and Development Act 2016, Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016, Environmental Management and Coordination Act, 1999, Climate Change Act, 2016 and the Wildlife Conservation and Management Act, 2013 in order to avoid conflict between the Bill and already enacted laws and to further avoid potential overlap in the mandate of various government agencies which manage and licence the use of natural resources;

3. The Bill provides for a system of sharing benefit in exploitation of all natural resources. Given the uniqueness in exploitation of different natural resources, the unique circumstances of each sector should be taken into account to identify the impact to the national government, county government and the local communities necessary in determining the benefit sharing to the different players;

4. The Bill presents constitutional and administrative implementation challenges. This is by assigning the development of benefit sharing agreements to county governments, with minimal regard to distribution of functions between nation and county governments in relation to the various natural resources under application by the Bill;

5. The Bill is silent on the share of revenue to the community who may require compensation in case of displacement or destruction of their source of livelihood in the course of extraction of the resources as the Bill has not clearly stipulated how the share of the money to communities will be ring-fenced. In this regard, there is a huge probability that the funds for communities will not be utilized for the benefit of the communities affected by the exploitation of natural resources within their localities;

6. The Bill is not clear on how funds meant to implement local community projects will be budgeted, accounted and reported for separate from the revenue assigned to County Governments to be utilized for the benefits of the entire country.

PART SIX

6.0 COMMITTEE RECOMMENDATION

186. **The Committee having considered the Natural Resources (Benefit Sharing) Bill, 2022, by Sen. Danson Buya Mungatana, MGH, the stakeholders' comments and from the above observations recommends that the House REJECTS the Bill in its entirety.**

PART SEVEN

7.0 SCHEDULE OF PROPOSED AMENDMENTS

The Committee proposed the following amendments to be considered by the House at the Committee Stage—

187. Clause1: Delete

188. Clause 2: Delete

189. Clause 3: Delete

190. Clause 4: Delete

191. Clause 5: Delete

192. Clause 6: Delete

193. Clause 7: Delete

194. Clause 8: Delete

195. Clause 9: Delete

196. Clause 10: Delete

197. Clause 11: Delete

198. Clause 12: Delete

199. Clause 13: Delete

200. Clause 14: Delete

201. Clause 15: Delete

202. Clause 16: Delete

203. Clause 17: Delete

204. Clause 18: Delete

205. Clause 19: Delete

206. Clause 20: Delete

207. Clause 21: Delete

208. Clause 22: Delete

209. Clause 23: Delete

210. Clause 24: Delete

211. Clause 25: Delete

212. Clause 26: Delete

213. Clause 27: Delete

214. Clause 28: Delete

215. Clause 29: Delete

216. Clause 30: Delete

217. Clause 31: Delete

218. Clause 32: Delete

219. Clause 33: Delete

220. Clause 34: Delete

221. Clause 35: Delete

222. Clause 36: Delete

223. Clause 37: Delete

224. Clause 38: Delete

225. Clause 39: Delete

226. Clause 40: Delete

227. Clause 41: Delete

228. Clause 42: Delete

229. Clause 43: Delete

SIGNED..... **DATE**.....6. 12. 2023

HON. GIKARIA DAVID, MP
CHAIRPERSON,
DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

Report adoption Schedule

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT – SECOND SESSION, 2023

DIRECTORATE OF DEPARTMENTAL COMMITTEES

DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

ADOPTION OF THE REPORT ON CONSIDERATION OF THE NATURAL RESOURCE (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 OF 2022)

We, the undersigned Honorable Members of the Departmental Committee on Environment, Forestry and Mining today Wednesday, 6th December 2023 do hereby affix our signatures to the following Report on consideration of Natural Resource (Benefit Sharing) Bill (Senate Bills No. 6 of 2022) to affirm our approval and confirm its accuracy, validity and authenticity.

NO.	NAME	SIGNATURE
1.	The Hon. Gikaria David, MP - **Chairperson**	
2.	The Hon. Charles Kamuren, MP - **Vice-Chairperson**	
3.	The Hon. Mbalu Jessica Nduku Kiko, CBS, MP.	
4.	The Hon. Mwanyanje Gertrude Mbeyu, MP.	
5.	The Hon. Hiribae Said Buya, MP.	
6.	The Hon. Salim Feisal Bader, MP.	
7.	The Hon. Emathe Joseph Namuer, MP.	
8.	The Hon. Joseph Wainaina Iraya, MP.	
9.	The Hon. Kemei Beatrice Chepngeno, MP.	
10.	The Hon. Kururia Elijah Njore Njoroge, MP.	
11.	The Hon. Masito Fatuma Hamisi, MP.	
12.	The Hon. Mohamed Tubi Bidu, MP.	
13.	The Hon. Nguro Onesmus Ngogoyo, MP.	
14.	The Hon. Yakub Adow Kuno, MP.	
15.	The Hon. Titus Lotee, MP.	

Minutes

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 48TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD IN THE COMMITTEE ROOM 12, NEW WING, MAIN PARLIAMENT BUILDING ON WEDNESDAY, 6TH DECEMBER 2023 AT 11:00AM.

PRESENT.

1. **The Hon. Gikaria David, MP.** **-Chairperson**
2. **The Hon. Charles Kamuren, MP** **-Vice-Chairperson**
3. The Hon. Emathe Joseph Namuar, MP
4. The Hon. Yakub Adow Kuno, MP
5. The Hon. Masito Fatuma Hamisi, MP
6. The Hon. Kemei, Beatrice Chepngeno, MP
7. The Hon. Tubi Bidu Mohamed, MP
8. The Hon. Elijah Njore Njoroge, MP

APOLOGY

1. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
2. The Hon. Mwanyanje Gertrude Mbeyu, MP
3. The Hon. Salim Feisal Bader, MP
4. The Hon. Joseph Wainaina Iraya, MP
5. The Hon. Onesmus Ngogoyo Nguro, MP
6. The Hon. Titus Lotee, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE: COMMITTEE SECRETARIAT

1.	Mr. Fredrick Otieno	-	Clerk Assistant I
2.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
3.	Ms. Mercy Kinyua	-	Legal Counsel
4.	Ms. Nancy Chamunga	-	Fiscal analyst III
5.	Ms. Lydia Shallom	-	Research Officer III

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Consideration and Adoption of the Report on the Natural Resources (benefit Sharing) Bill (Senate Bill No. 6 of 2022).**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/289/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at five minutes past eleven O'clock followed by a prayer said by the Hon. Yakub Adow, MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Mohamed Tubi Bidu, MP and the Hon. Yakub Adow, MP respectively.

MIN/NO.NA/DC/EF&M/290/2023: CONFIRMATION OF THE MINUTES OF THE PREVIOUS SITTINGS.

The minutes of previous sitting were confirmed as follows:

1. The Minutes of the 44th Sitting held on Thursday, 9th November 2023 were confirmed as a true record of the proceedings having been proposed by the Hon. Mohamed Tubi, MP and seconded by the Hon. Joseph Emathe, MP;

2. The Minutes of the 45th Sitting held on Tuesday, 21st November 2023 were confirmed as a true record of the proceedings having been proposed by the Hon. Mohamed Tubi, MP and seconded by the Hon. Fatuma Masito, MP;

3. The Minutes of the 46th Sitting held on Thursday, 23rd November 2023 were confirmed as a true record of the proceedings having been proposed by the Hon. Mohamed Tubi, MP and seconded by the Hon. Fatuma Masito, MP; and

4. The Minutes of the 47th Sitting held on Tuesday, 28th November 2023 were confirmed as a true record of the proceedings having been proposed by the Hon. Joseph Emathe, MP and seconded by the Hon. Fatuma Masito, MP.

MIN/NO.NA/DC/EF&M/291/2023: CONSIDERATION AND ADOPTION OF THE REPORT ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

The Committee considered the Report and made the following observations and recommendation:

Observations:

1. That, the Bill meets the criteria required to define it as a 'Money Bill' pursuant to Article 114(3) (b) & (c) of the Constitution. As such, the National Assembly is required to take into consideration the recommendations of the Budget and Appropriations Committee when debating the Bill. Further, a 'Money Bill' can only be introduced in the National Assembly pursuant to Article 109(5) of the Constitution. Therefore, the Bill should have been first introduced in the National Assembly and not in the Senate;
2. That, the Bill needs to be harmonized with existing laws that govern natural resources including the Mining Act, 2016, Petroleum Act, 2019, Energy Act, 2019 and Fisheries Management and Development Act 2016, Natural Resources (Classes of Transactions Subject to Ratification) Act No. 41 of 2016, Environmental Management and Coordination Act, 1999, Climate Change Act, 2016 and the Wildlife Conservation and Management Act, 2013 in order to avoid conflict between the Bill and already enacted laws and to further avoid potential overlap in the mandate of various government agencies which manage and license the use of natural resources;

3. That, the Bill provides for a system of sharing benefit in exploitation of all-natural resources. Given the uniqueness in exploitation of different natural resources, the unique circumstances of each sector should be considered to identify the impact to the national government, county government and the local communities necessary in determining the benefit sharing to the different players;
4. That, the Bill presents constitutional and administrative implementation challenges. This is by assigning the development of benefit sharing agreements to county governments, with minimal regard to distribution of functions between nation and county governments in relation to the various natural resources under application by the Bill;
5. That. the Bill is silent on the share of revenue to the community who may require compensation in case of displacement or destruction of their source of livelihood in the course of extraction of the resources as the Bill has not clearly stipulated how the share of the money to communities will be ring-fenced. In this regard, there is a huge probability that the funds for communities will not be utilized for the benefit of the communities affected by the exploitation of natural resources within their localities; and
6. That, the Bill is not clear on how funds meant to implement local community projects will be budgeted, accounted and reported for separate from the revenue assigned to County Governments to be utilized for the benefits of the entire country.

Recommendation:
The Committee having considered the Natural Resources (Benefit Sharing) Bill, 2022, by Sen. Danson Buya Mungatana, MGH, the stakeholders' comments and from the above observations, recommends that the House REJECTS the Bill in its entirety.

MIN.NO.NA/DC/EF&M/292/2023 ADOPTION OF THE REPORT ON CONSIDERATION OF THE NATURAL RESOURCE (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022).
The Committee considered and unanimously adopted the Report having been proposed and seconded by the Hon. Mohamed Tubi, MP and the Hon. Joseph Emathe, MP respectively.

MIN.NO.NA/DC/EF&M/293/2023: ANY OTHER BUSINESS.
The Members were informed that the Committee will conduct public hearing exercise on the following Bills in some selected counties at the beginning of next session:
1. **The Mining (Amendment) Bill (National Assembly Bill No. 51 of 2023)**
2. **The Gold Processing Bill (National Assembly Bill No. 46 of 2023)**

MIN.NO.NA/DC/EF&M/294/2023: ADJOURNMENT AND DATE OF NEXT SITTING.
There being no other business, the meeting was adjourned at 12:10 hours. The next meeting is to be held on notice.

Signed..... **Date**....6/12/2023.....

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 39TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD IN WESTON HOTEL, LANGATA ROAD ON TUESDAY, 24TH OCTOBER 2023 AT 9:30 AM.

PRESENT.

1. **The Hon. Gikaria David, MP.** -**Chairperson**
2. **The Hon. Charles Kamuren, MP** -**Vice-Chairperson**
3. The Hon. Salim Feisal Bader, MP
4. The Hon. Joseph Wainaina Iraya, MP
5. The Hon. Masito Fatuma Hamisi, MP
6. The Hon. Elijah Njore Njoroge, MP
7. The Hon. Tubi Bidu Mohamed, MP

APOLOGY

1. The Hon. Mwanyanje Gertrude Mbeyu, MP
2. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
3. The Hon. Yakub Adow Kuno, MP
4. The Hon. Emathe Joseph Namuar, MP
5. The Hon. Onesmus Ngogoyo Nguro, MP
6. The Hon. Titus Lotee, MP
7. The Hon. Kemei, Beatrice Chepngeno, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE:

SECRETARIAT

1.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
2.	Ms. Marcy Wanyonyi	-	Senior Legal Counsel
3.	Ms. Nancy Chamunga	-	Fiscal analyst
4.	Ms. Lydia Shallon	-	Research Officer
5.	Mr. Boniface Mushila	-	Serjeant-At-Arm
6.	Ms. Mercy Mayende	-	Media Relations Officer
7.	Ms. Maryan Gabow	-	Public Relations Officer

MINISTRIES

1.	Dr. Alfred Mutua, EGH	-	Cabinet Secretary, Ministry of Tourism and Wildlife
2.	Ms. Silvia Museiya	-	Principal Secretary, State Department Wildlife
3.	Eng. F.K Ng'eno	-	Principal Secretary, State Department of Environment and Climate Change
4.	Mr. Mohamed Liban	-	Principal Secretary, State Department for Petroleum
5.	Dr. Richael Chepkwony	-	D-PHWC, State Department Wildlife

6. Mr. Emmanuel Jumo - Director, Media, Ministry of Tourism and Wildlife
7. Mr. Gichuhi - PA/PS, State Department Wildlife
8. Mr. Kennedy Thiong'o - Deputy Director, Kenya Meteorological Department
9. Mr. Chris Ng'etich - PM, Kenya Meteorological Department
10. Mr. Patrick Mbithi - P. A/ CS Ministry of Tourism and Wildlife
11. Ms. Jacinta Wanjiku - Security, State Department Wildlife
12. Ms. Faith Sarah - Intern State Department Wildlife
13. Mr. Nehemiah Morunge - Principal Parliamentary Affairs Officer, SDPA-OPCS
14. Mr. Fidel Salach - Principal Parliamentary Affairs Officer, SDPA-OPCS
15. Kennedy Thiong'o - D. Director, KMD
16. Ms. Zipporah Torotich - DCCF, KFS
17. Mr. Fredrick Namusende - SFO, MECC & F
18. Ms. Ruth Jeptoo - Parliamentary Liaison Officer, MECC & F
19. Ms. Margret Maina - Communications, MECC & F
20. Mr. Victor Mudachi - CP (AG), MOEP
21. Mr. Joseph Otieno - SPSG, MOEP
22. Mr. Zakaria Somo - Legal Counsel, MOEP
23. Ms. Naomi Githui - DCSC MOEP
24. Mr. Dennis Mutiso - Senior Deputy Secretary, State Department of Energy
25. Ms. Magdaline Wachira - Senior State Counsel, State Department of Energy
26. Mr. Mabwa K. Elvis - PA/PS, State Department of E&CC
27. Hon. Neto Agostino - Technical Officer, State Department for E&CC
28. Ms. Linda Koshei - Director, E&CC
29. Ms. Josephine Mutai - NEMA Legal Officer
30. Mr. Rodney Omari - PLO Ministry of Environment, Climate Change and Forestry

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Public hearings/ Stakeholders' engagement on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/239/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at twenty-five minutes past nine O'clock followed by a prayer said by Hon. Fatuma Masito, MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Charles Kamuren,

MP and the Hon. Mohamed Tubi, MP respectively. Then everyone presents introduced themselves.

The Chairperson expressed his pleasure to the Office of the Prime Cabinet Secretary for sending representatives to the sittings of the Committee.

The Chairperson thereafter welcomed the MDAs and acknowledged their commitment to appear before the Committee.

MIN/NO.NA/DC/EF&M/240/2023: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.

The confirmation of the Minutes of the previous sitting was deferred to the next meeting.

MIN/NO.NA/DC/EF&M/241/2023: SUBMISSIONS BY THE MINISTRIES ON THE BILL

A. Ministry of Tourism and Wildlife.

In a meeting with the Committee held on Thursday, 24th October, 2023, Dr. Alfred Mutua EGH, Cabinet Secretary, Ministry of Tourism and Wildlife and Ms. Silvia Museiya, Principal Secretary for State Department for Wildlife, submitted the following proposals on Bill:

Key Issues arising from the Bill:

1. The creation of a new entity, the Benefit Sharing Authority presents additional cost for governance of natural resources and potential overlap with other government agencies with mandate to manage and license use of the natural resources.
2. The Bill presents Constitutional and administrative implementation challenges. This is by assigning the development of benefit sharing agreements to County Governments, with minimal regard to distribution of function between national and county government in relation to the various natural resources under application by the Bill.
3. A common benefit sharing ratio for renewable and non-renewable/extractive resources as inequitable, by failing to:
   a) Considering the unique nature of each resource;
   b) Recognize the effort and additionality by respective landowner (Government, Community and Private) on which the natural resource occurs, where non-renewable resource does not require additionality. This dis-incentivizes conservation efforts of wildlife and forests among other non-renewable resources by communities and landowners.
   c) Recognize the limitation for community, private and investments in the natural resources.

B. Ministry of Energy and Petroleum.

Mr. Mohamed Liban, Principal Secretary for State Department for Petroleum, submitted the following proposals on the Bill on behalf of the State Department and the State Department for Energy:

i. Submissions by the State Department for Energy.

Under Clause 2 *Definition of Benefit.*

The Bill defines 'Benefit' as any gains, proceeds or profits from exploitation of natural resources. The Bill does not include provisions for non-monetary benefits, such as the provision of preferential rates, discounted bills, co- ownership of the assets, electrification of

local social amenities at no cost, employment opportunities. Additionally, requirements such as local content are also important in ensuring sustainable promotion of local industry, facilitation of technology transfer, development of professional, skilled and unskilled labour.

Justification:
These benefits are equally important benefits often aimed at promoting sustainable development and poverty reduction, while minimizing negative impacts on the environment and engagement of local communities.

Under Clause 6 (g)
There should be a mechanism to enable appeal against the decisions of the Authority. There is need to be alive to the fact that there may be possible conflicts on projects that will be prioritized by County Committee, local community, socio- economic needs of the community and public interest.

Justification:
It is good practice that where an authority is given authority to resolve disputes, the parties are given a forum to appeal such decisions usually through quasi-judicial systems such as tribunal. People will require a forum to appeal the decisions of the Authority such as tribunal as mentioned above.

Under 6 (b),6 (3)(a), 26 and 29 (c)
These provisions are in conflict with each other. On one-part section 6 (b) states that review and where appropriate determine royalties payable by an affected entity while section 26 provides the breakdown of the percentages. This conflict with section 6 (3) (b) which states that the Authority shall have regard to all existing law regulating natural resources in Kenya.

Justification:
There is need for clarity to avoid a situation where different laws or regulations apply to natural resources. If this is not addressed there may be conflict of laws when it comes to compliance and enforcement.

Under Clause 9 & 16.
The qualification for appointment as the chairperson or member of the board to include engineering, geologist or geophysicists Experts in these areas have vast knowledge on natural resources. The composition of the board should not be limited to the expertise listed under the section that should also include a mix of competencies to ensure effective leadership of the organization for example part 1.1 of the *Mwongozo* paragraph 6 states that at least one board member should be a financial expert.

Justification:
Ensure compliance with the *Mwongozo* and the State Corporations Act and ensure effective leadership of the Authority. Experts in these areas have vast knowledge on natural resources

Under clause 11
Board of Directors plays a critical role in the governance of the Authority and not the day to day running of the Authority.

Justification:
The role of the Board is to provide strategic direction of the Authority, oversee management, ensure accountability and protecting the interests of stakeholders. The Board is responsible

for making major decisions that affect the Authority, such as approving budgets, appointing senior executives and monitoring performance.

Under clause 29 and 31(6)
The Bill outlines sharing benefits derived from exploitation of natural resources without placing certain responsibilities on the local community.

Justification:
It is imperative that this is protected under the law to ensure that there is peace and security in the area, protecting the environment, and promoting sustainable development including being receptive to the projects that are fronted. The idea behind this approach is to encourage local communities to take an active role in the management of natural resources and to ensure that they have a stake in the benefits derived from such resources. However, any responsibilities placed on the local community should be reasonable and proportionate to their capacity and resources.

Under clause 40, 41, 42 and 43
Apportioning of funds paid into the Consolidated Fund may need to considered under the purview of Article 114 (3) (c) noting that the National Assembly is the house of Parliament that deals with money Bills.

Justification:
By dint of Article 114 (3) (c) of the Constitution, 2010 and section 2 (appropriation and Appropriation Act) of the Public Finance Management Act, it is important to determine whether such amendments can be proposed through this Bill considering the fact that this is not a National Assembly Bill but a Senate Bill.

ii. Submissions by the State Department for Petroleum.
Policy formulation

i. This Act should be preceded by a Policy on Natural Resources benefit Sharing.
ii. There is lack of a Policy on Natural Resources Benefit Sharing.

Justifications:
a. The Policy will give Policy direction on this subject.
b. It will articulate the aspirations to be achieved by the ensuing legislation.
c. This approach is in line with best practices of legislative formulation

State Agencies.
The Bill should take a more inclusive approach by providing the roles of other State Agencies.

Justification:
The Bill is silent on the roles of State Agencies such as Energy and Petroleum Regulatory Authority, National Mining Corporation, Kenya Marine Authority, KWS, KFS, Kenya Water Towers and state agencies. These Agencies are also charged with the overall management of the natural resources within their dockets.

Under clause 2
The definition of "benefits' is very general/ open.

There is possibility of some benefits being non- revenue/non-monetary, thus difficult to quantify.

Under Clause 7-Board of the Authority.
Align the appointment of the Chairperson and Members of the Board to existing public governance practices/provisions. Chairpersons of other Boards of state corporations are usually appointed by the President without subsequent approvals. The State Corporations Act and Mwongozo Code of Governance prescribe the appointment modalities.

Under clause 11-Poweers of the Board
The powers of the Board should be not be operational. Rather, the Board should provide overall stewardship of the Authority. The powers accorded to the Board may not be enforceable noting that the Board is not established as a body corporate.

Under clause 27(2)- Benefit Sharing Agreement
It is not clear what "'non-monetary' benefits" means. The Act should be clear on what these 'non- monetary benefits" means. A clear list to be provided as well as methodologies for sharing the same.

Under clause 28(1&2)
There appears to be a duplication of roles as follows:

a. The Kenya wildlife Service under section 7 (f) of the Wildlife (Conservation and Management Act) 2013 has been charged with developing mechanisms for benefit sharing with communities living in wildlife areas.
b. The Kenya Forest Service under Section 8 (d) of the Forest Conservation and Management Act,2016 is mandated to establish and implement benefit sharing arrangements.
c. The Bill is silent on whether there will be representation of these agencies in the committee.

This will result a duplication of roles which will bring about a conflict in performance of functions of this Committee and the Government Agencies.

Under clause 28(2)
The Committee to have representations from the National Government (relevant ministries depending on the subject resource) and Authority. This will professionalize the committee.

Under clause 28(3)
The committee to have a term of office of 3 years non-renewable. The section to provide also for the grounds of removal of a committee member. This should be provided in this law and not subject to the regulations to be made the Cabinet Secretary.

Under clause 29(c).
Delete section 29(c) which stipulates that the County Sharing Committee will determine the amount of money to be allocated to each local community from the money accrued under the benefit agreement.

Justification:
This is unnecessary as the Bill in Section 26 has set the formula for this determination.

Under clause 31

This section to be deleted in its entirety.

Justification:

a. The functions of this forum can be discharged by the County Benefits Sharing Committee. It is expected that the Committee will engage the relevant stakeholders when executing its mandate. Such engagements shall be held as and when needed
b. This will remove the possibility of mis- understanding between the Committee and the Forum which may lead to a stalemate.

Under clause 36. Uses of retained funds.

Here there is a conflict as to the projects prioritized by the County Benefit Sharing Committee and those prioritized by the Local Community Benefit Sharing Forums, there needs to be a way to determine which projects takes precedence.

Justification:

a. This will clearly determine which projects are prioritized and implemented to avoid underutilization of funds hence denying the communities from the accrual benefits.
b. The clause on Local Community Benefit Sharing Forum to be deleted in its entirety.

Under clause 37- Offences

The Act provides for offences in relation to the "affected entities". It should also provide for offences likely to be committed by the County Benefits Sharing Committee or its Members. The Bill is silent on these offences.

Under clauses 40,41,42 and 43.

To be deleted entirely

Justifications:

It is proper for such amendments to go through the Finance Bill or Miscellaneous Amendment Bill as the case may be.

C. Submissions by the State Department for Environment and Climate Change.

Eng. Festus Nge'no, Principal Secretary, State Department for Environment and Climate Change, submitted the following proposals on behalf of the of the Ministry of Environment, Climate Change and Forestry;

It is the view of the Ministry that the Natural Resources sector does not need a stand-alone law to govern Benefit Sharing since benefit sharing is very specific to a sector and also to a project.

Benefit Sharing should be left to each sector specific law to govern. Several Acts of Parliament governing natural resources have already set out benefit sharing frameworks which are being implemented in accordance with these Laws.

Example:

1. The Climate Change (Amendment) Act, 2023 has set out the benefit sharing mechanism in the Act for communities which will be in the Community Development Agreement (CDAs) for benefit sharing in Carbon projects.

The Carbon Market Laws under this Ministry have provided for very specific Community Agreements that have benefit sharing component specific to the Carbon Projects. Community Development Committees have also been established for governance under the CDAs with membership from the county government. Revenue sharing to the Government has also been captured by this Law.

2. Forest management and development is adequately provided for in the Forest Conservation and Management Act, 2016 including the development of participatory Transition Implementation Plans (TIPs) to support uptake of devolved forestry functions to the county level which prioritizes forestry matters in county financial planning as it is adequate.

3. There are major overlaps in this Bill with the existing FCMA, 2016. especially on dealing with community participation clearly spells out in: application for community participation; obligations of a forest association; assignment of forest user rights; termination or variation of a management agreement; forest conservation and management, and customary rights.

The Ministry therefore proposes the following:

a. Have each sector of Natural resources deal with benefit sharing in their framework laws; Or in the alternative,
b. Delete section 3(C) of the proposed Bill.

MIN/NO.NA/DC/EF&M/242/2023: THE MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND FORESTRY AFFORESTATION PLANS DURING THE ELNINO RAINS.

Eng. Festus Ngen'o, Principal Secretary, State Department for Environment and Climate Change on behalf of the Principal Secretary, State Department for Forestry informed the Committee that other than the possible adverse effects of the impeding rains, the Ministry of Environment Climate Change and Forestry would wish to use the occurrence of the rains as an opportunity to enhance its National landscape and ecosystem restoration programme towards the growing of 15 Billion trees.

The short rains are here and for this period between October and December, 2023, the Ministry will mobilize the country to plant 500 Million trees. Various stakeholders and Partners across the country have been mapped. So far 150 Million Plantable seedlings have been mapped by counties. Ongoing Mapping of plantable seedlings is taking place and the Ministry is confident to reach the 500 Million Mark.

Further, the National Landscape and Ecosystem Restoration Programme has been divided into eleven (11) intervention areas and seven (7) ecosystems.

The Ministry together with stakeholders has also developed a national calender based on regional economic blocks, as attached that will be used to roll out the Tree growing campaign.

That, a national launch of the short rains planting season is expected on a day that will be specifically gazetted for tree growing and working with the Presidency on a date. The venue

has however been agreed to be the Enapuiyapuyi Wetlands in the Mau Forest given the importance of the Ecosystem.

Finally, the ministry is working on a coordinated approach to ensure the National Landscape and Ecosystem Restoration program takes a Whole of Government, Whole of Society approach.

MIN/NO.NA/DC/EF&M/243/2023: KENYA METEOROLOGICAL DEPARTMENT RESPONSE ON THE PREPAREDNESS OF THE GOVERNMENT IN MITIGATING THE EFFECTS OF THE ANTICIPATED EL-NINO RAINS.

Dr. Kennedy Thiong'o, the Deputy Director-General, KMD apprised the Committee on the state of preparedness by Government on the anticipated El-nino rains as follows:

THAT, KMD issued the national October- November- December (OND) 2023 seasonal forecast on 30th August 2023. The forecast indicated that most parts of the country were expected to receive above average (enhanced) rainfall driven by El-Nino conditions and a positive Indian Ocean Dipole (IOD).

THAT, El Nino is characterized by warmer than average Sea Surface Temperatures (SSTs) over the central and eastern equatorial Pacific Ocean and cooler than average SSTs over the western Pacific Ocean. IOD is characterized by warmer than average SSTS over the western equatorial Indian Ocean and cooler than average SSTs over the eastern Indian Ocean. These two phenomena are associated with enhanced rainfall in East Africa.

THAT, the release of the forecast was preceded by the National Climate Outlook Forum (NCOF) from 28th to 30th August in Serena hotel, Nairobi where the different climate sensitive sectors were invited to discuss and co-develop sector-based advisories to mitigate against the OND 2023 climate scenarios. NCOF brings together the following sectors to develop advisories: Agriculture and livestock/food security, Water, Energy, Disaster risk management, Health, Transport and Environment and forestry.

THAT, the sectors were expected to use the developed advisories for the purpose of planning and decision making in view of mitigating the risks associated with the expected enhanced rainfall in their respective sectors.

THAT, this activity was replicated at the county level where the County Meteorological offices convened County Climate Outlook Forums (CCOFs) commonly referred to as Participatory Scenario Planning (PSPs). The PSPs brought together communities, county climate sensitive sectors and stakeholders to create awareness and co-develop relevant advisories for various sectors.

THAT the national and county impacts and advisories were disseminated through various channels including TV and Radio talk shows, KMD website, Ministries, Departments and Agencies (MDAs), email, social media, print media, local administration, extension officers and community barazas, thus enhancing public awareness both at the national and county level.

THAT, KMD continues to issue updates on the expected conditions at monthly, weekly, and daily timescales both at the national and county level. KMD is constantly monitoring weather

conditions and in case extreme weather is expected, KMD will issue and disseminate alerts, advisories, and warnings promptly to stakeholders and users for disaster risk preparedness.

THAT, KMD is also working closely and sharing updates with the El Nino Preparedness and Response Initiative domiciled at the office of the Deputy President and other disaster risk management agencies.

THAT, KMD will continue to issue regular weather updates for coordinated preparedness and mitigation of the expected rainfall and associated impacts. However, KMD faces a number of challenges in reaching the relevant communities due to staff shortage at the county level and also inadequate resources in mobilization, dissemination and movement.

Further, it is expected that key sector leads and committees which have already been constituted at the national and county level will develop and coordinate mitigation measures based on the OND 2023 seasonal forecast, regular updates and the co-developed advisories.

MIN/NO.NA/DC/EF&M/244/2023: ANY OTHER BUSINES.

Ministry of Environment, Climate Change and Forestry invited the Committee to participate in the upcoming 28th Conference of the Parties to the UNFCCC (COP28) that will take place between 30th November and 12th December, 2023 in Dubai.

Further, the Committee acceded to the invite and agreed to nominate representatives in the next sitting.

MIN/NO.NA/DC/EF&M/245/2023: ADJOURNMENT AND DATE OF THE NEXT SITTING.

There being no other business, the meeting was adjourned at 2.45pm. The next meeting is to be held on notice.

Signed..... **Date**.....9/11/2023.....

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 38TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD AT HILTON GARDEN INN HOTEL, MACHAKOS COUNTY ON SATURDAY, 7TH OCTOBER 2023 AT 2:30 PM.

PRESENT.

1. **The Hon. Gikaria David, MP.** -**Chairperson**
2. **The Hon. Charles Kamuren, MP** -**Vice-Chairperson**
3. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
4. The Hon. Mwanyanje Gertrude Mbeyu, MP
5. The Hon. Salim Feisal Bader, MP
6. The Hon. Onesmus Ngogoyo Nguro, MP
7. The Hon. Joseph Wainaina Iraya, MP
8. The Hon. Emathe Joseph Namuar, MP
9. The Hon. Masito Fatuma Hamisi, MP
10. The Hon. Elijah Njore Njoroge, MP
11. The Hon. Tubi Bidu Mohamed, MP
12. The Hon. Titus Lotee, MP
13. The Hon. Yakub Adow Kuno, MP

APOLOGY

1. The Hon. Kemei, Beatrice Chepngeno, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE:

SECRETARIAT

1.	Mr. Fredrick Otieno	-	Clerk Assistant I
2.	Ms. Marcy Wanyonyi	-	Senior Legal Counsel
3.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
4.	Dr. Joseph Kuria	-	Research Officer
5.	Ms. Catherine Mukunyi	-	Serjeant-At-Arm
6.	Ms. Edith Chepngeno	-	Media Relations Officer

STAKEHOLHERS.

1.	Mr. Elijah Mwangi	-	Principal Secretary, State Department for Mining
2.	Mr. Gregory Kituku	-	DOM – SDM
3.	Mr. Ayub Komonde	-	SSIM – SDM
4.	Ms. Patricia C. Mobil	-	SSC- SDM
5.	Ms. Lynette C. Bunei	-	SSC- SDM
6.	Mr. Muhia Kagwi	-	PA PS, SDM
7.	Ms. Ruth Jeptoo	-	PLO – SDF
8.	Mr. Fidel Salach	-	PPAO – OPCS
9.	Mr. Mamo B. Mamo	-	DG, NEMA

10. Mr. Rodney Omari - PLO, MECC&F
11. Dr. Musingo T.E. Mbuvi - Deputy Director, Kenya Forestry Research Institute
12. Ms. Carolyne Chilango - DIR. Parliamentary Affairs – Office of Prime CS & CS Min Foreign Affairs
13. Ms. Annie Syombua - DCSC – MECCF
14. Ms. Zipporah Toroitich - DCCF – KFS
15. Mr. Ken Owoch - Technical lead Tourism, Wildlife & NRM, Council of Governors
16. Mr. Brian Mwithaka - Technical lead water, env, Council of Governors

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Public hearings/ Stakeholders' engagement on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/235/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at twenty minutes past two O'clock followed by a prayer said by Hon. Charles Kamuren, MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Onesmus Ngogoyo, MP and the Hon. Titus Lotee, MP respectively. Then everyone presents introduced themselves.

The chairperson thereafter welcomed the stakeholders and acknowledged their commitment to appear before the Committee.

MIN/NO.NA/DC/EF&M/236/2023: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.

The confirmation of the Minutes of the previous sitting was deferred to the next meeting.

MIN/NO.NA/DC/EF&M/237/2023 SUBMISSIONS BY STAKEHOLDERS.

a. Submissions by the Council of Governors.

Mr. Ken Owoch, Technical Lead Tourism, Wildlife & NRM appeared before the Committee and made the following proposals on the Bill:

Under Clause 3 - Application of the Act

Proposed an amendment to *Clause 3* to include the following natural resources as part of the application of the Act:

(a) Fossil fuels;
(b) Marine resources; and
(c) Sand.

Justification:

The clause provides for a narrow definition of the term natural resources. As such, it does not conform to the Constitutional definition under Article 260 of 'natural resources' which includes all resources on or under the surface of the earth.

Under Clause 6. Functions of Benefit Sharing Authority.

i) Delete this sub-clause (d)

Justification:

This provision is in conflict with the functions of county governments of coordinating participation of communities in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution.

ii) Amend (e) to:

(d) include technical assistance to governments in the implementation of a benefit sharing agreements;

Justification:

The framework for monitoring implementation of projects and agreements is an exclusive function of the County Governments and provided for in the county planning function as per Schedule 4 of the Constitution.

iii) Amend sub-clause (j) to:

(j) ensure the proper and timely payment of funds to counties as provided under this Act;

Justification:

County governments possess the mandate of coordinating participation of communities in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution. They receive such funds and should therefore ensure payment of the same to local communities in the county.

iii) Amend sub-clause (k) to: build the capacity of county governments to assist local communities in negotiations for benefit sharing and implementation of related

Justification:

This provision is in conflict with the function of county governments to develop the administrative capacity of communities to effectively participate in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution.

v) Amend sub-clause (n) to:

(n) provide assistance to county governments to promote value addition in natural resources

Justification:

This provision is in conflict with the function of county governments to develop the administrative capacity of communities to effectively participate in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution. Further, value addition is implied through other functions and powers of the county including agriculture and trade development.

vi) Amend paragraph (a) to:

(a) all existing law regulating the natural resources sector in Kenya and the distribution of functions between the national government and county governments;

Justification:

Regard for the distribution of functions in the Constitution is important to prevent any claw backs on the powers of county governments as highlighted above.

Under Clause 7; Board of the Authority
Delete paragraph (g) and Amend (f) to:

(f) three persons nominated by the Council of County Governors represent the interests of counties as the Council shall determine;

Justification:
Good practice is to exclude legislative bodies from participating in executive functions. The Council of County Governors can therefore nominate three people to the Board to represent the interests of counties.

Under Clause 25 (5) Kenya Revenue Authority to collect royalties

Amend the clause sub-section 5 to read as follows:

(5) The Authority shall submit to the respective county government declarations received from the Kenya Revenue Authority under Subsection (4) within twenty-one days of receipt.

Justification:
There is need for the county governments to be regularly apprised of the revenues generated by the resources since they are responsible for maintaining most of them.

Under Clause 26 (1) Revenue Sharing ratio
Amend the clause sub-section b to read as follows:

(1) The revenue collected under this Act shall, subject to Subsection (2), be shared between the National Government and respective county governments in the ratio of forty per cent to the National Government and sixty per cent to the county governments.
(2) At forty percent of 'the revenue assigned to county governments under subsection (1) shall be used to implement community projects and sixty percent of that revenue shall be utilized for the benefit of the entire county.

Justification:
The revenue sharing ratio for County Governments needs to be increased because it is to be apportioned between local community projects and those meant for the benefit of the county. Most of the said resources are in direct control and management of County governments. The bearer of the cost of maintenance should get a significant amount of benefit.

Further, 40% of the revenue should be used for implementing community-specific projects with the county government retaining 60% for the benefit of the larger county.

Under Clause 28 Establishment of a County Benefit Sharing Committee

Amend sub-clause (2) to:

(a) the chief officer responsible for finance who shall be the chairperson;

(b) the chief officer responsible for natural resources;

(c) the chief officer responsible for community development or social services

(d) the director responsible for natural resources who shall be the secretary;

Under Clause 28 (5) and (6) Establishment of a County Benefit Sharing Committee

Delete the sub-clauses (5) and (6)

Justification:
This is to align to our proposals under subclause 10 (2)

Under Clause 31

Delete Clause 31.

Justification:
Public participation is a constitutional requirement and there is no need for an entity to carry this out. Section 102 of the County Governments Act provides the principles of planning and development in a county and these are sufficient to inform the use of benefits derived from exploitation of natural resources in counties. However, a project implementation committee can be formed to oversee project implementation.

Under Clause 36
Amend to add a paragraph (c) on:

(c) are provided for in the County integrated development plan and the county annual development plan;

Justification:
This is to ensure the use of these funds for approved projects is aligned with the county budget process.

General comments

a) The Benefit Sharing Authority is mandated to oversee the benefit sharing with respect to natural resources already governed by other Acts of Parliament, that is, minerals, petroleum, forests, wildlife and energy resources including wind and geothermal resources.

Justification:
There is need to rationalize and harmonize these functions to avoid a potential overlap in the function of the Authority to review and determine royalties payable in natural resource exploitation and the mandate of the institutions under the relevant Acts of Parliament.

b) There is need for clarity in the Bill on the convergence between "local community projects" as used in the Bill and "county projects"

Justification:
All projects implemented in the county offer benefits to the local community.

c) There is need for the project identification process in counties to be aligned with the budget cycle of the county government.

Justification:
To ensure timely availability of resources and effective use thereof.

b. Submissions by State Department for Mining.
Mr. Elijah Mwangi, Principal Secretary, State Department for Mining appeared before the Committee and made the following proposals on the Bill:

Under Clause 2 on Definitions
a) The legal framework on benefits sharing under the Mining Act is sufficient

Justification:
The Mining Act provides a framework for sharing of royalties between the National Government, County Government and the Community.

b) **'Cabinet Secretary'** means the Cabinet Secretary responsible for matters related to **Mining.**

Justification:
Wind, sunlight, water resources (for energy production) fall under the CS Energy.

Under Clause 2 -Interpretation "Royalty"
The Mining Act sufficiently covers what royalties are and on what basis they are charged.

According to the Mining Act Section 182 and 183, Fees and charges are different from royalties.

Fees and charges include: application filing fees, annual ground rent, report filing fees, fees for access of geological data and fees to access public registers.

Royalties on the other hand are payable in respect of the various mineral classes won/extracted by virtue of the mineral right. They are prescribed rates by the Cabinet Secretary in charge of Mining.

Justification:
The general nature of the definition of royalty in the proposed bill contradicts the provision of the Mining Act where Royalty is charged at a prescribed rate on the value of the exploited mineral resource.

Also, a portion of the monies are utilized to fund the Ministry's regulatory and operational activities in appropriations-in-aid (A-in-A) and are therefore not remitted to the Consolidated Fund.

The proposed definition of royalty includes fees and charges even in the exploration stage. This is not tenable considering that an entity at this point has yet to establish the resource's presence, value, and extent.

Under Clause 3 - Application of the Act
Delete "minerals" in Regulation 3.

As is it is sufficiently regulated under the existing Mining Act.

Justification:
The Constitution under Article 60, 62 (1) (f), 66 (2), 69 and 71 and the Mining Act Section 6 vests the ownership of minerals to the people of Kenya to be held in trust by the National Government.

Since the enactment of the Mining Act, in 2016, the National Government has highly invested in its implementation through the establishment of institutions and formulation of the following requisite regulations.

Under Clause 6 – Functions of Benefit Sharing Authority.
a) Section 183 (5) of the Mining Act provides a benefit sharing framework.

The draft Mining (Community sharing) Regulations provide a benefit sharing framework between communities as per section 183(5) (c)

Justification:
The Mining Act under section 183 (5) has already provided a benefit sharing framework that allows for the National Government, County Government and community to benefit. This includes developing regulations that are awaiting publication on the framework for sharing 10% to the community.

b) This function is currently being undertaken by the State Department and should remain with the Department as it has the expertise, resources, and capacity invested over years. Further it has professionals whose functions are covered under the organizational structure of the State Department for Mining.
One of the functions Director of Geological Survey under Section 21 (1) (i) of the Mining Act is maintaining a laboratory, library and record facilities as may be necessary for the discharge of the functions in the Act.

Justification:
In order to determine the royalty rates payable, there is the process of determining the mineral first which entails testing of the minerals in a laboratory by professionals who include gemologists, laboratory technicians and metallurgists on the basis of the quality and quantity.

c) Functions of the Director of Geological Survey under section 21 (1) (c) is undertaking geological, geophysical, geochemical, seismological and hydro-geological surveys, investigations and mapping aimed at defining -the character and distribution of rocks and superficial deposits and determining the mineral potential of Kenya;

Justification:
The function of undertaking geological, geophysical, geochemical surveys, investigations, mapping and determining the mineral potential of Kenya is a function of the Director of Geological Survey.

The Ministry has heavily invested in geophysical surveys where 970 anomalies were detected. Further, the ministry is ongoing with the ground truthing process to confirm the presence of the minerals in all counties. The Ministry is also a custodian of all geological data across the 47 countries.

d) The Mining (Community Development Agreement) Regulations, L.N No. 148 of 2017. The draft Mining (Mineral Royalty) Regulations awaiting publication.

Justification:
The Ministry has through regulations provided oversight and administrative mechanisms for ensuring that any benefits accruing to communities are rightfully administered.

e) The State Department for Mining to continue exercising the monitoring and compliance functions under the Mining Act by gazetted inspectors.

Justification:
The Director of Mines under section 20 of the Mining Act has the mandate to promote the effective and efficient management and development of mineral resources, and the mining sector, exercise regulatory administration and supervision of overall operations related to mining, ensure compliance with conditions relating to mineral rights which includes inspections to ensure payment of royalties by gazetted inspectors.

f) This function of the Authority as proposed in the bill, should remain a function of the State Department for Mining as the Authority may lack the technical capacity to carry out this

mandate. The Mining and Minerals Policy, 2016 Further Seeks to establish the National Mining Institute as a center of excellence in research of mining operations.

Justification:
The mandate of conducting research regarding the exploitation and development of minerals in Kenya lies squarely under the functions of the Director of Geological Surveys as provided by the Mining Act.

The Authority therefore creates an overlap of powers with those of the Ministry through the Directorate of Geological Surveys.

g) The advisory function on policy matters relating to minerals and mining should remain the core mandate of the ministry. Under section 20 (1) (o) of the Mining Act, the Director of Mines advises on the development of policy to ensure compliance with international conventions and national policies relating to the sustainable development of the mineral resources and ensure that mining operations consider local and community values.

Justification:
The Executive Order No. 1 of 2023 gives the functions of policy formulation for the extractive industry, Mineral exploration and mining policy management to the State Department for Mines. Currently, the SDM is in the advanced stage of formulating the draft Mining Royalty Sharing regulations, addressing the 10% allocated to the community under the formula 70:20:10.

h) Regulation 9 of the draft Mining (Mineral Royalty Sharing) Regulations, 2023 and Regulation 7 of Legal Notice 148 of 2017 The Mining (Community Development Agreement) Regulations 2017 establish committees to deal with the local community benefits.

Justification:
The proposed regulations deal with the benefits accruing to the local community.
Further, formalization of Artisanal Miners into cooperatives ensures that they are incentivized and their capacity is built, which is a function of the State Department for Mining.

i) Functions of the Director of Mines under section 20 (1) (n) promoting cooperation among state agencies, county governments, the private sector, research bodies, non-governmental organizations and other organizations which are engaged in programmes related to mining and activities to enhance the administration and operation of this Act;

Justification:
State Department for Mining in collaboration with the National Treasury, office of Council of Governors and office of the Attorney General has developed the draft Mining (Mineral Royalty Sharing) Regulations, 2023 that were subjected to nationwide public participation exercise in September 2023. Further the royalty sharing framework provided under the Mining Act was determined following wide consultations before the enactment of the Act.

j) Under section 171(5) the Cabinet Secretary is required to make Regulations to govern value addition on minerals. The mandate of the State Department for Mining under Executive Order No. 1 of 2023 includes Capacity Development and Value Addition.

Justification:
Value addition of minerals is under the powers of the Cabinet Secretary as provided for by the Mining Act and the Executive Order.

The Ministry is currently developing the Mineral Value Addition and Processing policy. The Ministry has developed the Voi Gemstone Value Addition Centre and initiated Mineral Value Addition Centers, including: Kakamega Gold Refinery, Granite Processing Plant, and Revival Fluorspar Factory.

k) Mining Act Section 124. (1) A person shall not be granted or be entitled to hold or acquire an artisanal mining permit, a prospecting permit or a mining permit under this Part unless that person is - a citizen of Kenya; or a body corporate, where no less than sixty percent of the shareholding is held by citizens of Kenya.

Justification:
The Mining Act already promotes local content initiatives on mining and mineral exploration by limiting foreigner's participation in small scale operations.

Furthermore, the Act also requires large scale mineral right holders to promote local content initiatives through the Community Development Agreements, Preferential Employment & Training of Kenyans, use of local Goods and Services, listing of at least twenty percent shares in local stock exchange. Proposal by the bill therefore will overlap with the provisions of the Act.

l) The Ministry has sufficient and well documented procedures on restoration of the environment after mineral extraction and inspectors who ensure compliance with the requirements.

Environmental restoration after exploitation of minerals is already provided for in the Mining Act under the different mineral rights. It is a requirement by the holder to ensure the restoration of the environment. To ensure this is achieved, the Act provides for payment of Environmental Protection Bond by mineral right holders to act as a security for restoration of the environment.

The bill does not provide clear guidelines as to how the Authority will promote the restoration of the environment after exploitation.

Under Clause 24 (1) – Imposition of royalties and fees.
Proposal: Prescription of royalties to remain a national function and the same to be exercised by the Cabinet Secretary as provided by the Mining Act.

183. (1) The holder of a mineral right shall pay royalties to the State in respect of the various mineral classes won by virtue of the mineral right.

(2) The Cabinet Secretary shall prescribe the rates payable under subsection (1).

Justification:
Mining is a national function and not a devolved function. The Mining Act ensures that the national government works in collaboration with the County government in the management of the resource without an overlap of powers.

The proposed bill seeks to impose royalties in consultation with the County government and relevant national government, however, the onus to impose royalties on minerals is on the national government and that function is exercised by the Cabinet Secretary for Mining as per the Mining Act.

Under Clause 24 (2) Imposition of royalties and fees.
The Mining Act Section 183 requires a mineral license holder to pay royalties upon winning/extraction of any mineral resource.

Justification:

Royalties should be based on the value of the mineral resource and should not consider the cost of investment. This is necessary to prevent mineral curse.

Under Clause 25 (1 & 2) Kenya Revenue Authority to collect royalties
Section 186 (1) of the Mining

Act states that all fees, charges and royalties' payable by the holder to the State under this Act shall be paid by the holder into a designated account of the State department responsible for collecting royalties.

Justification:
The proposed provision in the Bill to assign the mandate of royalty collection to KRA contradicts Section 186 of the Mining Act.

Further, enforcement of payment of royalty among other payments, is a compliance function which is one of the Ministry's mandates. Also, Section 185(3) of the Mining Act provides for the Ministry (State Department for Mining) to inspect and examine mineral samples, books, records, and accounts to ascertain the quantity, quality, grade or value of minerals or mineral products for the purpose of charging and collecting royalties' dues after the sale of minerals. Therefore, this function cannot be reassigned to the KRA as proposed in the bill.

Under Clause 25 (3) Kenya Revenue Authority to collect royalties
Proposal: The Constitution and the Mining Act have sufficiently provided for the management of minerals in Kenya including the prescription of royalties, management, monitoring, value addition and development of the mining sector. The Ministry should be allowed to continue undertaking the function in order to create stability.

The mandate to govern the mining sector in Kenya is well provided by the Executive Order No. 1 of 2023, the Constitution and the Mining Act.

This is a function of the Cabinet Secretary for Mining, Blue Economy and Maritime Affairs through the State Department for Mining.

Justification:
The State Department for Mining collects fees and charges which are used in appropriation in aid for the overall management of the mining sector. Further the Department is at an advanced stage of introducing the Mineral Development Levy which seeks to promote mineral resource development in Kenya.

Under Clause 25 (4,5 & 6)
Section 186 of the Mining Act provides that (1) All fees, charges, and royalties payable by the holder to the State under this Act shall be paid by the royalties holder into the designated account of the State Department responsible for collecting royalties.

(2) A payment shall be accompanied by a statement from the holder stating-

(a) details of the mineral or mineral product; (b) the relevant point of sale; and

(c) the date and the amount of royalty paid.

(3) A copy of the statement shall be delivered to the Mining Cadaster Office.

(4) A mineral right holder shall report the royalty liability for each month by the fifth business day of the month.

(5) Upon receipt of a royalty payment the State the department responsible for collecting royalties shall issue a receipt.

Justification:
Currently, the Ministry is in the process of procuring and installing a Royalty Management System which will be integrated with the Mining Cadaster Portal to enhance the collection, mineral source tracking, and allocations to relevant counties and communities.

Further, the Ministry in collaboration with the National Treasury, Council of Governors, Ministry of Industrialization, Trade, and Innovation, Commission of Revenue Allocation, and Attorney General has developed draft regulations on Mineral Royalty sharing for the County Government and Communities.

The Attorney General advised that the County Government has an existing legal instrument for the distribution of the 20% royalty share through the County Government Additional Allocation Act 2022.

Under Clause 26 (1) Revenue Sharing ratio
The Mining Act under Section 183(5) already provides for the royalty sharing arrangement of 70%, 20% and 10% for the National Government, County Government and community respectively.

Justification:
The proposed mineral royalty sharing arrangement as contained in the Bill has REDUCED the royalty share to the National Government from 70% to 60%. Reduction of the revenue sharing to the National Government could hinder sustainable mineral resource development. Regulation of the entire mining sector and policy formulation to promote investment in mining is a prerogative of the National Government and a higher percentage to the national government ensures efficacy in the same.

The bill proposes that 60% of the 40% for County Governments will be utilized in local community projects.

Under Clause 27 (1) Benefit Sharing Agreement
The Mining Act under Section 117, grants the Cabinet Secretary the power to enter into mineral agreements with holders of mining license.

Justification:
The proposed Bill under Section 27 contradicts the Mining Act which grants the Cabinet Secretary the mandate to grant rights to exploit mineral resources.

Under Clause 27 (2) Benefit Sharing Agreement.

The regulations attendant to the Mining Act provide for non-monetary benefits to communities and counties.

Section 50 Preference for local goods

Section 61 (1) (c) reconnaissance license applicants to provide proposal for procurement of local goods 61 (d) Local employment plan for training of Kenyan citizens

Attached to mineral right applications is the requirement to promote local content.

Justification:
The Mining Act and subsidiary legislations provide for promotion of local content. These regulations include;

Mining (Community Development Agreement) regulations

Mining (Use of Local Goods and Services)

Mining (Employment and training) regulations

Mining (Mine support services regulations)

Mining (Use of Assets) Regulations

The Mining Act has sufficiently catered for non-monetary benefits in its provisions and implementation of the same should be allowed.

New Clause 38(3)
The active rights that existed prior to the enactment of this act should continue being in force until expiration by passage of time without the need to enter into different regulatory regimes for the management of royalties.

Justification:
This provision may open up affected entities to civil litigation cases on account of change of terms or contracts entered into by dint of the provisions of the Mining Act.

Under Clause 40
Amendment: Delete Section (5).

Replace with "the royalty received by the State under this section shall be paid in the Consolidated Fund and appropriated in accordance with Section 26 of this bill.

The Mining Act Section 183(5) states that the royalties payable under sub-section (1) shall

be distributed as follows—

(a) seventy percent to the National Government;

(b) twenty percent to the County Government; and

(c) ten percent to the community where the mining operations occur.

Justification:
The proposed Bill under Section 40 seeks to delete the existing royalty-sharing framework amongst the National Government, County Government, and the Community. This move will make the administration and implementation of the Mining Act difficult.

General comments
The proposed Bill is largely inclined to County Governments and seeks to assume key mandates of the Ministry (State Department for Mining). Mining and minerals are a reserve of the National Government. This is well established in the Constitution and detailed in the Mining Act.

Royalties are fiscal instruments and need to be determined upfront as they provide a basis for determining economic viability of resources. The Mining Act has provided for this which creates stability for the sector.

MIN.NO.NA/DC/EF&M/238/2023: ADJOURNMENT AND DATE OF THE NEXT SITTING.

There being no other business, the meeting was adjourned at 3.40p.m. The next meeting is to be held on notice.

Signed..... **Date**.....9/11/2023.....

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 37TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD AT HILTON GARDEN INN HOTEL, MACHAKOS COUNTY ON SATURDAY, 7TH OCTOBER 2023 AT 9:00 AM.

PRESENT.

1. **The Hon. Gikaria David, MP.** -**Chairperson**
2. **The Hon. Charles Kamuren, MP** -**Vice-Chairperson**
3. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
4. The Hon. Mwanyanje Gertrude Mbeyu, MP
5. The Hon. Salim Feisal Bader, MP
6. The Hon. Onesmus Ngogoyo Nguro, MP
7. The Hon. Joseph Wainaina Iraya, MP
8. The Hon. Emathe Joseph Namuar, MP
9. The Hon. Masito Fatuma Hamisi, MP
10. The Hon. Elijah Njore Njoroge, MP
11. The Hon. Tubi Bidu Mohamed, MP
12. The Hon. Titus Lotee, MP
13. The Hon. Yakub Adow Kuno, MP

APOLOGY

1. The Hon. Kemei, Beatrice Chepngeno, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE:

SECRETARIAT

1.	Mr. Fredrick Otieno	-	Clerk Assistant I
2.	Ms. Marcy Wanyonyi	-	Senior Legal Counsel
3.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
4.	Dr. Joseph Kuria	-	Research Officer
5.	Ms. Catherine Mukunyi	-	Serjeant-At-Arm
6.	Ms. Edith Chepngeno	-	Media Relations Officer

STAKEHOLHERS.

1. Eng. James Mwangi – Board Director - KEPSA
2. Mr. George Aluru, CEO, ESAK
3. Dennis Mwingi - AWIEK
4. Joyner Okoyo – Legal Counsel - KEPSA
5. Patience Karaya- PPD Assistant- KEPSA
6. Bernard Osawa – Member- ESAK
7. Carolyne Chilango- Director Parliamentary Affairs- Office of Prime Cabinet Secretary & MFA
8. Grace Kananu – Media and Communications – CEMIRIDE

9. Nyangori Ohenjo – CEO – CEMIRIDE

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Public hearings/ Stakeholders' engagement on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/231/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at twenty minutes past nine O'clock followed by a prayer said by Hon. Charles Kamuren, MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Feisal Salim Bader, MP and the Hon. Yakub Adow Kuno, MP respectively. Then everyone presents introduced themselves.

The chairperson thereafter welcomed the stakeholders and acknowledged their commitment to appear before the Committee.

MIN/NO.NA/DC/EF&M/232/2023: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.

The confirmation of the Minutes of the previous sitting was deferred to the next meeting.

MIN/NO.NA/DC/EF&M/233/2023 SUBMISSIONS BY STAKEHOLDERS.

a. Submissions by the Electricity Sector Association of Kenya- ESAK.

Mr. George Aluru, Chief Executive Officer, ESAK appeared before the Committee and made the following proposals on behalf of ESAK.

Under Clause 2 on Definitions

Proposed an amendment to the Clause to read as "exploitation" means the use of natural resources for large scale commercial benefit.

Justification:

The provision as is may be interpreted to encompass all users of natural resources, some who do not qualify to pay royalties.

Under Clause 6. Functions of Benefit Sharing Authority.

a) Amend as follows;

Determine appeals arising out of conflicts regarding preparation of benefit sharing agreement for determination in the first instance. Any person who is dissatisfied with the decision of the Authority may appeal to the High Court.

Justification:

Need for further clarity for dispute resolution in preparation of benefit sharing agreement and other instances where conflict may arise. Working with the assumption that the Benefit sharing

agreement will provide for dispute resolution for executed contracts the same may not be outlined in the Bill.

b) Amend to add paragraph (q) ensure safe keeping and recording of all benefit sharing agreements that would be availed to the public upon request.

Justification:
Promote the right of access to information that affects the public.

b. Submissions by Centre for Minority Rights Development.
In a meeting with the Committee held on Saturday, 7th October, 2023, Mr. Nyang'ori Ohenjo, Chief Executive Officer made the following proposals on behalf of CEMIRIDE.

Under clause 2 on Definitions;

Amend by including indigenous peoples and local communities.

Justification:
Indigenous and local communities are also hugely affected by natural resource exploitation.

Under clause 2 -Interpretation
Propose a listing of indigenous peoples as key stakeholders in natural resource benefits sharing with a clear definition of who indigenous peoples are.

Provide a provision with a clear definition of public participation of indigenous peoples in resource benefits sharing.

Add an amendment of Section 6, (k) and (m) to include indigenous peoples

Justification:
In cognizant of Kenya NCCAP 2018-22 that recognizes the importance of enhancing the climate resilience of vulnerable groups including children, women, youth, persons with disabilities, and marginalized and minority communities.

Under clause 7 Board of the Authority
Proposal: We also propose nomination of 3 persons to represent indigenous peoples and local communities, who are from indigenous and local communities (pastoralist, forest and fisher communities) with demonstrable expertise in indigenous and local communities' rights.

Justification:
The bill should recognize indigenous peoples and their rights, as this will provide for the need for consultation and consent in the implementation of climate change projects, in line with Article 56 and 260, together with several policies and legal frameworks, including relevant international treaties that Kenya is party to.

Under clause 26 (1) Revenue Sharing ratio
Amend by making provision of an annual social contribution of at least twenty five percent (25%) of the aggregate earnings of the previous year to the community, to be managed and disbursed for the benefit of the community.

Justification:
The National Guidelines for Free Prior and Informed Consent (FPIC), Kenya seek to reverse historical trends of excluding Indigenous Peoples and Local Communities from meaningfully participating, contributing to and enjoying benefits from national development initiatives, especially within the natural resource sector, and correct and halt the perpetuation of stereotyped narratives and attitudes reflected in policies, laws and practice that Indigenous Peoples and Local Communities destroy the environment. Several Court decisions have pounced themselves on the question of Indigenous Peoples and benefits sharing.

c. Submissions Kenya Private Sector Alliance-KEPSA.

Eng. James Mwangi, Board Director, KEPSA appeared before the Committee and made the following proposals on behalf of KEPSA.

Under clause 1;

To read as *AN ACT of Parliament to establish a system of benefit sharing in resource utilization between resource utilizers, the national government, county governments and local communities; and for connected purposes.*

Justification:
The kind of activities described in the Bill entail making use of natural resources, as opposed to 'exploitation'. It aligns with environmental law concept of sustainable development or sustainable use.

Under clause 2 on Definitions;

"**benefit sharing agreement**" means an agreement on the manner in which a **royalty** accruing from natural resources shall be shared out between an, affected entity and a county;

Justification:
The law should be specific it is the royalty that is paid out by the affected entity, the revenue obtained from utilization of a natural resource belongs to the affected entity.

Under clause 2 on Definitions;

'utilization' means the extraction or use of a natural resource for commercial benefit, **for the avoidance of doubt utilization does not include access to a natural resource for noncommercial purposes;**

Justification:
Sunlight and wind resources are utilized to generate electricity. The definition should capture the fact that the commercial benefit only accrues when there is actual generation, and not before that is, where feasibility studies are being carried out.

Under clause 24 (1) – Imposition of royalties and fees

Delete clause 24(1)

Justification:
The payment of royalties and fees will mean additional costs to investors. This will be besides the already existing county charges being paid by businesses.

The clause introduces a provision that is likely to be abused especially when it comes to surface and underground water, forests, biodiversity and genetic resources as per Clause 3 (b & c) to

which the Act shall be applicable. This is because it has been left at the liberty of the Authority to prescribe royalties or fees towards these thematic areas.

There should be regulations prescribing what shall be applicable to each thematic area that has no existing law.

Under clause 24 (3) – Imposition of royalties and fees

Align clause 24(3) with Clause 40, 41, 2 & 43

Justification:
The clause independently will create confusion in implementation of the law especially when it comes to matters royalties and fees. To streamline the inconsistency clauses 40,41,42 & 43 should be aligned. The Petroleum Act envisages that royalties, fees or payments are prescribed in a petroleum agreement, therefore this Bill would not apply to the determination and review of such monies.

This will promote local content.

Under clause 26 (1) Revenue Sharing ratio

To retain the subsisting Legal Revenue sharing formula under the Mining Act, 2016 at Section 183 (5) that states "The royalties payable under subsection (1) shall be distributed as follows-

Seventy percent to the National Government, Twenty percent to the County Government; and Ten percent to the community where the mining operations occur.

Justification:
To ensure clarity and consistency in implementation, it is that the proposed 60/40 percent ratio sharing in the Bill is harmonized with the Mining Act that proposes a 70/20/10 percent ratio sharing.

Doing away with the direct payments to the community creates a potential risk to the investor because in the event that the County Government fails to meet its obligations, the community may resort to operation sabotage.

Under Clause 26 (5)- Revenue Sharing ratio

The Commission shall, in consultation with the lead agencies with respect to each natural resource, county governments, local communities and stakeholders; review the revenue sharing ration after every five years and present its recommendations to Parliament for approval.

***Justification*:**
The review should be subject to public participation as required by Article 201 (a) of the Constitution and Section 87 of the County Governments Act (2012).

Under Clause 27 (1) Benefit Sharing Agreement

Deletion of Clause 27 (1)

Justification:
The affected entities have already fulfilled their royalty and fees obligations to KRA, and thus, it should be the responsibility of the National Government co engage in benefit Sharing Agreements with the Counties.

Under Clause 28 (7) Establishment of a County Benefit Sharing Committee

The Cabinet Secretary Mining in consultation with the Cabinet Secretary in charge of Energy shall make Regulations for the conduct for the affairs of the County Benefit Sharing Committees.

Under Clause 30 (1)

That Clause 30 (l) be amended by rephrasing it to-

Every benefit sharing agreement shall be approved by the respective County Governor prior to the execution of the agreement by the respective county government"

Justification:
The Bill should be cognizant of the political economy and devise ways to ensure MCAs do not politicize economic issues leading to minimal or no gain to their constituent. A case of Karede mines where the political economy led to delays in economic gains for the people can be used as a reference study.

Under Clause 37(2)(a) and (b)
Additional provision 37(2)(c) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

Justification:
Restitution of stolen funds through an additional 'mandatory fine' is a remedy under the Bribery Act (2016) and the Anti-corruption and Economic Crimes Act (2003).

Under Clause 43
The Clause should be harmonized with the Petroleum Act which enacts Government share of 75% while this clause proposes 60%.

Justification:
The purported amendment of the Petroleum Act provisions will run into headwinds as it reduces GOR overall share under the Petroleum Act from 750/0 ^{0}/0. to 600/0 and increases the County Government to 40.

New Clause
The Commission shall take appropriate steps to resolve any disputes or differences in connection negotiation and performance of benefit sharing agreements.

The County and Affected Entity shall explore options for alternative dispute resolution such as mediation and Arbitration.

Justification:
The Bill should also create a dispute resolution mechanism for benefit sharing contracts.

MIN/NO.NA/DC/EF&M/234/2023: ADJOURNMENT AND DATE OF THE NEXT SITTING.

The meeting was adjourned half past noon for a heath break and to be resumed at 2.30p.m. at the same venue.

Signed..... **Date**.....9/11/2023.....

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 36TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD AT HILTON GARDEN INN HOTEL, MACHAKOS COUNTY ON FRIDAY, 6TH OCTOBER 2023 AT 3:00 PM.

PRESENT.

1. **The Hon. Gikaria David, MP.** -**Chairperson**
2. **The Hon. Charles Kamuren, MP** -**Vice-Chairperson**
3. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
4. The Hon. Mwanyanje Gertrude Mbeyu, MP
5. The Hon. Salim Feisal Bader, MP
6. The Hon. Onesmus Ngogoyo Nguro, MP
7. The Hon. Joseph Wainaina Iraya, MP
8. The Hon. Emathe Joseph Namuar, MP
9. The Hon. Masito Fatuma Hamisi, MP
10. The Hon. Elijah Njore Njoroge, MP
11. The Hon. Tubi Bidu Mohamed, MP
12. The Hon. Titus Lotee, MP
13. The Hon. Yakub Adow Kuno, MP

APOLOGY

1. The Hon. Kemei, Beatrice Chepngeno, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE:

SECRETARIAT

1.	Mr. Fredrick Otieno	-	Clerk Assistant I
2.	Ms. Marcy Wanyonyi	-	Senior Legal Counsel
3.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
4.	Dr. Joseph Kuria	-	Research Officer
5.	Ms. Catherine Mukunyi	-	Serjeant-At-Arm
6.	Ms. Edith Chepngeno	-	Media Relations Officer

STAKEHOLHERS.

1. Mr. Sharmake Mohamed – Chairperson - NCEA
2. Ms. Clarice Wambua – External Legal Counsel - Conservation international
3. Ms. Cecilia Githaiga – Managing Partner/ Advocate - Wangari Githaiga & Co. Advocate
4. Mr. Gitahi Githuku – Human Relation - Samburu Women Trust
5. Ms. Jane Meriwas – Executive Director – Samburu Women Trust
6. Ms. Mercy Mumbu – Advocate - Samburu Women Trust

7. Mr. Steve Itela – CEO - Conservation Alliance of Kenya
8. Ms. Olivia Adhiambo – Climate Policy Director- Wildlife Works Carbon
9. Mr. Muturi Kamau – national Network Coordinator- Kenya Oil & Gas Working Group
10. Mr. Ray Kaur – Extractives P.O - Oxfam
11. Ms. Bilach Jimale – Program Manager/Coordinator DLCI/PPG
12. Mr. Enock Ole Kimitia - Executive Officer- KENAWRUA
13. Mr. Fidel Salach - Principal Parliamentary Officer – Office of the Prime CS
14. Ms. Emily Mateche – Policy & Advocacy Manager – Nature Kenya
15. Mr. Nathans Browne – International Policy Research
16. Mr. Sharif Mohamed – Center Regional Coordinator – Peace and Development
17. Ms. Warigia – Policy Manager – Kenya Wildlife Conservancies Association
18. Ms. Carolyne Chilango- Director Parliamentary Affairs- Office of Prime Cabinet Secretary & MFA
19. Mr. Ken Owoch – Technical lead Tourism, Wildlife & NRM – Council of Governors
20. Mr. Brian Mwithaka – Technical lead water, env, Council of Governors

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Public hearings/ Stakeholders' engagement on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/227/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at twenty minutes past three O'clock followed by a prayer said by Hon. Fatuma Masito, MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Mohamed Tubi, MP and the Hon. Gertrude Mbeyu, MP respectively. Then everyone presents introduced themselves.

The chairperson thereafter welcomed the stakeholders and acknowledged their commitment to appear before the Committee.

MIN/NO.NA/DC/EF&M/228/2023: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.

The confirmation of the Minutes of the previous sitting was to deferred to the next meeting.

MIN/NO.NA/DC/EF&M/229/2023 SUBMISSIONS BY STAKEHOLDERS

(a) Submissions by Oil and Gas Working Group.

Mr. Muturi Kamau, National Network Coordinator, Kenya Oil and Gas Working Group representing 14 other organization under the Natural Resources of Kenya Working Group, submitted the following proposals on behalf of the working groups;

Under clause 2 on Definitions

a) Proposed an amendment to revise the definition to include both monetary and non-monetary proceeds from exploitation of natural resources.

Justification:
This definition will be holistic and thus prevent limiting the Benefit Sharing Agreements to revenues shortly.

b) Amend and replace the term revenues with monetary and non-monetary benefits.

Justification:
The provisions Benefit Sharing Agreement are inclusive of both monetary and non-monetary benefits. Important in the harmonization of the definition with the provision under the section.

Under clause 2 -Interpretation

a) Proposed an amendment to ensure that the word used is "or" and not "and" to ensure that the communities that are not displaced but are found near a natural resource benefit from the natural resource.

Justification:
The definition of a local community bars communities who are affected by the exploitation of natural resources in other ways other than displacement from falling under the definition of a local community.

b) Amend the term revenue to be defined as anchored in the Kenya Revenue Authority Act, 2012.

Justification:
The term "revenue" is applicable differently in sectors covered by the Act

Under clause 2 -Interpretation "Royalty"

a) Amend and replace the term "royalties" with the definition of Revenues from section 2 of the Kenya Revenue Authority Act, 2012.

Justification:
There is need for the bill to adopt a more comprehensive definition which Includes taxes, duties, fees, levies, penalties, or other monies collected by government from an affected entity.

b) Need for the Bill to retain the Sovereign Wealth Fund. This is factoring the principle of inter-generational equity and consideration of present exploitation and exploration of future generations.

c) There is need to adopt the definition under the Wildlife Conservation and Management Act.

Justification:
Genetic resources are unique and expensive despite the fact that there is no legal framework governing the same such as snake anti-venom

d) Amend and include definition to the provided in the Constitution of Kenya 2010.

Under Clause 3 - Application of the Act

Amend and Include a schedule that incorporates all-natural resources.
Amend Clause 3(d) and replace with wildlife resources in national parks.

Justification:
This will allow leeway for the Bill to legislate natural resources sectors not outlines under section 3.

The issue of land ownership in wildlife conservation and management ought to be considered in benefit sharing regimes. This is because the cost of conservation is borne by the host of wildlife, only as a land use (Land Act) whether private or community conservancies. It is therefore not justifiable that the same regime is applied for public lands vis-à-vis private and community lands.

Under Clause 4-Guiding principles of benefit sharing.

Inclusion of inter-generational equity.

Justification:
This will take into consideration of present exploitation of natural resources that can benefit future generations.

Under Clause 6. Functions of Benefit Sharing Authority.

a) Deletion of this sub-clause and the inclusion of a separate provision in the Bill which provides that appeals arising out of conflicts be heard and determined by the Cabinet Secretary.

Further appeals from decisions of the Cabinet Secretary can be made to the High Court all the way to the Court of Appeal whose decision shall be final.

Justification:
As the body responsible for overseeing the implementation of the provisions of this Bill, appeals arising out of conflicts relating to benefit sharing agreements should be lodged with and determined by a different independent body. This is because it is likely that such conflicts may not only arise between parties to the benefit sharing agreement but also arise out of certain actions and decisions of the Commission.

b) Inclusion of regulations on local content

Justification:
Due to lack of an existing law on local content, affected entities may take advantage hence the Authority should oversee, coordinate and manage development of local content. Affected entities should be mandated to submit to the Authority local content plans.

Under Clause 24 (3) – Imposition of royalties and fees.

(3) Where a written law prescribes the royalty, fees, payments or benefit sharing in a particular natural resource sector, the relevant written law shall apply with respect to that sector.

Provided that, where the terms under the provisions of this Act conflict with terms under the relevant written law referred to above, the provisions of the law with terms that best promotes local content and the trickling down of benefits to local communities shall prevail.

Alternatively, this Part be amended to make the Bill the primary statutory framework on benefit sharing.

Justification:
Where the aim of the Bill is to supersede existing legislative frameworks governing benefit sharing in other sectors, it can be to harmonize various fragmented sectoral provisions on benefit sharing into a single and authoritative benefit sharing framework applicable across sectors.

Under Clause 25(1)— Kenya Revenue Authority to collect royalties

Inclusion of fees after the word royalties.

Justification:
To ensure consistency with section 24(1) that covers both royalties and fees.

Under Clause 27 (2) Benefit Sharing Agreement

Inclusion of monetary benefits as well as non-monetary which will accrue to the county.

Justification:
Need to harmonize the Bill in ensuring that benefits are monetary and non-monetary.

Under Clause 28 Establishment of a County Benefit Sharing Committee

Add person with disability and youth representative

Justification:
Inclusiveness and equal opportunities to persons with disabilities and youth.

Under Clause 30 (1)
Add sections in line with the right to access to information, Section 30(3)

Subject to Article 35 of the Constitution of Kenya and section 4 of the Access to Information Act, 2016 and any other written law and regulations.

Justification:
Access to information is a constitutional right.

Under Clause 30(2)
The Section should be revised to read,

"Each benefit sharing agreement shall be deposited with the authority within twenty one days of its execution and a copy shall simultaneously be submitted to the Senate.

Justification:
21 days provide adequate time for the Benefit Sharing Agreement to be deposited with the Authority.

Under Clause 31

a) Delete the term affected.

Justification:
All-natural resources are on land hence the justification to use community land Act 2016 which provides a holistic and comprehensive definition of local community.

b) Delete section 31(3)

Justification:
Contradicts section 31 (1) which provides that the members of the local community benefit sharing forum shall be elected by the members of the local community. This clause provides for democracy in the election as opposed to section 31 (3) that may be subject to manipulation and interest by the respective County Executive Committee.

Under Clause 41

Revision of clause to read Section 76 of the Wildlife Conservation and Management Act is amended by;

(a) Deleting the following words in subsection (1) "in consultation with the Commission on Revenue Allocation, formulate guidelines regarding benefit sharing, and the nature and manner which the same distributed"

(b) Inserting subsection (1B) 'The revenues received by the National Government from wildlife in National

(c) Parks shall be paid into the National Treasury and apportioned in accordance with section 26 of the Natural Resources (Benefit Sharing) Act

Justification:
Incentives in wildlife conservation is a key aspect that needs to be retained in law. There is therefore need to retain the aspect of incentives in section 76(1)

(b) Submissions by The Kenya Wildlife Conservancies Association (KWCA)
Ms. Gladys Warigia, Policy Manager KWCA submitted the following proposals on behalf of the Association:

Under clause 2 -Interpretation
Amend and delete part (b) of the interpretation of local community. "**Local community**" has been defined under (b) to include "people displaced to make way for the exploitation of a natural resource".

Justification:
This **presents human rights concerns** and may encourage exploitation that is based on displacing communities

Under clause 3 - Application of the Act

Proposed an amendment by Substituting 3(d) with *Wildlife resources in National Parks and National Reserves*

Amend and Insert the following new paragraph immediately after Section 3:

3A-Wildlife-based investments on community and private lands shall benefit local communities and investors shall provide such benefits by applying various options including infrastructure, education and social amenities

Justification:

The broad application of the Bill to wildlife resources overlooks land ownership in wildlife conservation and management, which is critical a consideration in benefit sharing regimes. 65% of wildlife occurs on community and private lands, who bear the highest cost of conservation. It is paramount that the benefit sharing for wildlife in the Bill applies only to wildlife on public land- National Parks and National Reserves

Under Clause 4-Guiding principles of benefit sharing.

Amend and Insert the following new paragraph immediately after Section 4(g); 4(h) Intra and Inter-generational equity

Justification:
To include the principle of inter-generational equity, which will promote exploitation of natural resources that takes into consideration that present exploitation of natural resources benefits future generations.

Under clause 6. Functions of Benefit Sharing Authority.

Amend and Substitute Section 6(b) with the following new paragraph:

"review and, where appropriate determine royalties payable by an affected entity in consultation with the respective agency with the national mandate to manage a natural resource".

Justification:
The section ***excludes the need for the Authority to consult with respective agency with the national mandate to manage a natural resource*** in undertaking the function of reviewing and determining royalties payable by an affected entity. Such consultation will ensure that all factors that inform the review are considered, including the status of the resource. And the prevailing circumstances in the conservation of the resource.

Under clause 7 Board of the Authority

Insert the following new paragraphs within Section 7(1):

a. *Principal Secretary responsible for **Wildlife** or a designated representative;*
b. *Principal Secretary responsible for **Water** or a designated representative;*
c. *Principal Secretary responsible for **Forestry** or a designated representative.*

Under clause 28 and 31
Provide the source of funds to facilitate administrative costs of the County Benefit Sharing Committees and Local Community Benefit Sharing Forum, including payment of the allowances.

Justification:
The Bill is silent on source of funds to cover the administrative costs of the County Benefit Sharing Committee and the Local Community Benefit Sharing Forum. Lessons drawn from the County Wildlife Conservation and Compensation
Committees established under the Wildlife Act 2013, include the need for clear source of funds to support functions of a committee.

Under clause 30
Amend the Section to provide a less bureaucratic process for benefit sharing with no requirement for approval by County Assembly, unless it is for general community benefit; and no requirement to deposit agreement with Senate.

Justification:
The process of developing benefit sharing agreement is highly bureaucratic, requiring approval by county assembly prior to execution.

The requirement to deposit copy of the executed agreement with Senate, is redundant, since role of Senate in relation to benefit sharing is to develop legislation and not be custodian of benefit sharing agreements.

Under Clause 31

Replace local community forums with relevant existing local community institutions, including representation by community land management committees for registered community lands within a ward area.

Justification:
Local Community Benefit Sharing Forums lack independence; their election, meetings and allowances are facilitated by the county government; the forum allegiance shall then be to the County governments and not the local communities they represent

New Clause: General Recommendations:

1. ***Exempt benefit sharing of wildlife and forest resources occurring on community and private lands from application in the Bill.*** Communities and landowners with wildlife on their land directly and largely bear the management and operations costs of wildlife. Subjecting the benefit sharing of extraction interventions on community and private lands to a national benefit sharing structure and formula, and which further allocates a low percentage of benefit to communities, not only serves as an dis-incentive to uptake of conservation on these lands but also threatens the well-being of wildlife, majority of which is outside National Parks and National Reserves.

2. ***In the afore going, include a provision in the Bill that wildlife-based investments on community and private lands shall benefit local communities and investors shall provide such benefits*** by applying various options including infrastructure, education and social amenities.

The Bill ought to ***factor the unique aspects of each resource;*** the difference between renewable and non-renewables/extractive resources; and the different governing principles of benefit sharing including consideration of the party that bears the cost of maintaining or conserving the resource, especially the non-extractives like wildlife.

(c) Submissions by Nature Kenya.

Ms. Emily Mateche, Policy & Advocacy Manager, Nature Kenya made the following proposals on behalf of the Organization:

Under Clause 2 on Definitions

Proposed the following amendments:

a) **"affected entity"** means an organization or person involved in the **conservation, management** or exploitation of a natural resource"

Amend the definition of benefit to read as follows;

b) **"benefit"** means any gains, proceeds or profits from the exploitation of natural resources that are determined not to lead to the following risks:
   (a) Reduction of returns on green projects thus reducing the incentive to invest in green economy projects.

(b) Increase in the cost of solar power which will discourage people from installing solar panels and drive some users back to fossil fuels such as kerosene.
(c) Increase the cost of wind power, keeping electricity bills high and driving up inflation.

Increase cost of exploiting water legally, driving people to continue illegal abstraction.

c) Amend the definition of benefit sharing to read as follows—
"benefit sharing" means the sharing of any benefits arising from the exploitation of natural resources in a fair and equitable manner **where the costs accruing to communities conserving the resource as the most important custodians are offset for local communities to see net benefits from natural resources projects in order to preserve the natural resources.**

Under Clause 3 - Application of the Act

Proposed an amend to include the following natural resources:

(g) soil and sand; and

(h) ecosystem services whose value is yet to be determined.

Justification:
The Bill needs to recognize that there are natural resources whose value today is yet to be determined.

The ecosystem services offered by the resources need to have a value. These services include clean air, rainfall, clean water, shelter, carbon sequestration and medicinal values.

Under clause 6(1)-Functions of the Authority
Amend Clause 6(1) by adding the words "relevant stakeholders and communities" after the word "entity";

Under clause 8
Amend the definition of benefit to read as follows—

The monies paid into the sovereign wealth fund under subsection (1)(a) shall be paid as follows into the following funds constituting the sovereign wealth fund—

(a) Two per cent shall be paid into a futures fund; and
Ninety-eight per cent shall be paid into a functional natural resources fund, to be used for natural resource conservation, rehabilitation of depleted natural resources and economic development of communities.

Justification:
Nature is undergoing serious degradation and urgent action is needed. The best investment for the future generation is intact natural resource base.

Under clause 26 (1) Revenue Sharing ratio

Amend to increase the percentage for community projects from 40% to 60% to read as follows:

"60% of the revenue assigned to the county Government shall be utilized to implement local community projects geared towards protecting, conserving and promoting sustainable use of natural resources while 40% shall be utilized for the benefit of the entire county."

Justification:
Communities bear the greatest responsibility and costs towards protection and conservation of natural resources.

The Bill needs to provide for adequate incentives.

General comment

In addition to "exploitation" of natural resources, the Bill needs to factor in management and conservation of natural resources.

(d) Submissions by Worldlife Works.
Ms. Olivia Odhiambo, Climate Policy Director Wildlife Works submitted the following proposals on behalf of the Organization:

Proposed that the new Bill to make clear that conservation and nature positive projects do not qualify under the definition of *exploitation.* The definition is unclear, as it refers to the use of natural resources. This could encompass conservation or even projects which uplift biodiversity.

Refer to Climate Change (amendment) Bill 2023for all carbon related benefit sharing requirements, so as not to double tax or confuse.

Further, they proposed to remove reference to wildlife Conservation and Management Act at Article 41. The inclusion of Natural Resources (Benefit Sharing) Bill 2022 in the WCMA will disincentivize wildlife and biodiversity conservation, making it more difficult for Kenya to achieve its sustainability targets.

MIN/NO.NA/DC/EF&M/230/2023: ADJOURNMENT AND DATE OF THE NEXT SITTING.

There being no other business, the meeting was adjourned at 4.50pm. The next meeting is to be held on notice.

Signed..... **Date**.....

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - SECOND SESSION, 2023
DIRECTORATE OF DEPARTMENTAL COMMITTEES

MINUTES OF THE 35TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY, AND MINING HELD IN HILTON GARDEN INN HOTEL, MACHAKOS COUNTY ON FRIDAY, 6TH OCTOBER 2023 AT 9:30 AM.

PRESENT.

1. **The Hon. Gikaria David, MP.** -**Chairperson**
2. **The Hon. Charles Kamuren, MP** -**Vice-Chairperson**
3. The Hon. Mbalu, Jessica Nduku Kiko, CBS, MP
4. The Hon. Mwanyanje Gertrude Mbeyu, MP
5. The Hon. Salim Feisal Bader, MP
6. The Hon. Onesmus Ngogoyo Nguro, MP
7. The Hon. Joseph Wainaina Iraya, MP
8. The Hon. Emathe Joseph Namuar, MP
9. The Hon. Masito Fatuma Hamisi, MP
10. The Hon. Elijah Njore Njoroge, MP
11. The Hon. Tubi Bidu Mohamed, MP
12. The Hon. Titus Lotee, MP
13. The Hon. Yakub Adow Kuno, MP

APOLOGY

1. The Hon. Kemei, Beatrice Chepngeno, MP

ABSENT

The Hon. Hiribae Said Buya, MP.

IN-ATTENDANCE: SECRETARIAT

1.	Mr. Fredrick Otieno	-	Clerk Assistant I
2.	Ms. Marcy Wanyonyi	-	Senior Legal Counsel
3.	Mr. Hamdi H. Mohamed	-	Clerk Assistant III
4.	Dr. Joseph Kuria	-	Research Officer
5.	Ms. Catherine Mukunyi	-	Serjeant-At-Arm
6.	Ms. Edith Chepngeno	-	Media Relations Officer

STAKEHOLHERS.

1. Mr. Sharmake Mohamed – Chairperson - NCEA
2. Ms. Clarice Wambua – External Legal Counsel - Conservation international
3. Ms. Cecilia Githaiga – Managing Partner/ Advocate - Wangari Githaiga & Co. Advocate
4. Mr. Gitahi Githuku – Human Relation - Samburu Women Trust
5. Ms. Jane Meriwas – Executive Director – Samburu Women Trust
6. Ms. Mercy Mumbu – Advocate - Samburu Women Trust

7. Mr. Steve Itela – CEO - Conservation Alliance of Kenya
8. Ms. Olivia Adhiambo – Climate Policy Director- Wildlife Works Carbon
9. Mr. Muturi Kamau – national Network Coordinator- Kenya Oil & Gas Working Group
10. Mr. Ray Kaur – Extractives P.O - Oxfam
11. Ms. Bilach Jimale – Program Manager/Coordinator DLCI/PPG
12. Mr. Enock Ole Kimitia - Executive Officer- KENAWRUA
13. Mr. Fidel Salach - Principal Parliamentary Officer – Office of the Prime CS
14. Ms. Emily Mateche – Policy & Advocacy Manager – Nature Kenya
15. Ms. Nathans Browne – International Policy Research
16. Mr. Sharif Mohamed – Center Regional Coordinator – Peace and Development
17. Mr. Liban Golicha – Coordinator – PARAAN

AGENDA:

1. Prayers
2. Preliminaries/Introductions
   i. Adoption of the Agenda
   ii. Remarks by the Chairperson
3. Confirmation of Minutes/Matters Arising
4. **Public hearings/ Stakeholders' engagement on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)**
5. Any other Business
6. Adjournment/Date of the next meeting

MIN/NO.NA/DC/EF&M/223/2023: PRELIMINARIES & ADOPTION OF AGENDA

The Chairperson called the meeting to order at forty minutes past nine O'clock followed by a prayer said by Hon. Feisal Salim Bader MP. The agenda of the meeting was adopted as listed above having been proposed and seconded by the Hon. Yakub Adow, MP and the Hon. Fatuma Masito, MP respectively. Then everyone presents introduced themselves.

The chairperson thereafter welcomed the stakeholders and acknowledged their commitment to appear before the Committee.

MIN/NO.NA/DC/EF&M/224/2023: CONFIRMATION OF MINUTES OF THE PREVIOUS SITTING.

The confirmation of the Minutes of the previous sitting was to deferred to the next meeting.

MIN/NO.NA/DC/EF&M/225/2023 SUBMISSIONS BY STAKEHOLDERS

Various stakeholders appeared before the Committee during its public hearing on the Natural Resources (Benefit Sharing) Bill, 2022 and made the following submissions:

(a) Submissions by Peace and Development Network Trust (Peace-Net Kenya

In a meeting with the committee held on Friday, 6th October 2023, Mr. Mohamed Sharif, Peace-Net representative made the following submissions on the Bill:

Under Clause 3

Amend clause 3 by deleting Section 3 (B) of the proposed Bill or amend it to exclude benefit sharing from water for subsistence farming and livestock use.

Justification: along the border areas between Garissa and Tana River Counties, conflict have persisted arising out of contested boarders and territories, access to resources such water and pasture and competing resource uses such land and water particularly between pastoralist and farmers.

Under Clause 28

Amend clause 28 (2d) and include youth in the membership of the Committee

Under Clause 29

Amend clause 15 sub-section 8 should read as the *County Chief Officers responsible for matters relating to natural resources in the respective counties shall serve as joint secretaries to the Committee.*

(b) Submissions by Conservation International.

Ms. Clarice Wambua, External Legal Counsel, Conservation International made the following submissions on the Bill:

Under Clause 2

Proposes an amendment to the following words be interpreted as follows:

"affected entity" means. **any for-profit** organization or person involved in the exploitation of a natural resource to which this Act applies

Amend as follows—

"affected entity" means an organization or person involved in the **conservation, management** or exploitation of a natural resource"

Justification: The Bill's scope of application should only extend to for-profit entities and should exclude non-profit entities whose activities are intended to promote social benefits such as relief of poverty and environmental preservation.

"exploitation" means the extraction or non-renewable use of a natural resource for commercial benefit and excludes activities directly causing a net conservation or enhancement of natural resources.

Justification: This new definition is necessary in conformity with Kenya's sustainable development priorities and climate policies. It is essential for example for promoting conservation activities related to forests as well as the use public goods such as the "Use" of "sunlight" and "wind" for good and not environmentally harmful, which as currently drafted under the Bill cannot be "used" for commercial benefit without being deemed exploitation. No costs should be imposed on such activities and only environmentally destructive activities, as opposed to measures that promote their conservation or net climate mitigation should be penalized.

"local community" means people, including marginalized communities in accordance with the provisions of Article 260 of the Constitution, living within or nearby an area where a natural resource is situated, who are displaced to make way for the exploitation of a natural resource or whose livelihood is directly or indirectly affected by the exploitation of that natural resource.

Justification: The proposed definition of local community should be expanded to reference marginalized communities and the effect of natural resource exploitation should be broadened to over more than just displacement of a local community.

"non-monetary benefits" means any benefit, other than monetary such as job creation improved community infrastructure for health, education and social amenities, among others.

Justification: The term non-monetary benefits have not been defined in the Bill despite being used in Section 27.

There is need to define this term in order to bring clarity to Section 27 which calls for the inclusion of non-monetary benefits in the benefit sharing agreement between affected entities and county governments

"stakeholders" means any affected entities, affected counties, local communities and national government entities directly involved in the exploitation of a natural resource.

Justification: The term "stakeholders" has been used in Section 6(1) of the Bill. It therefore needs to be defined in order to lay out he various stakeholders engaged in the exploitation of natural resources and entitled to benefits from the project, for clarity.

Under Clause 3
This Act shall apply to the following natural resources where the exploitation is on land defined as public land under Article 62 of the Constitution;

a sunlight,
b service and underground water,
c Forests, biodiversity and genetic resources,
d Wildlife resources
e industrial fishing,
f wind,
g Geothermal resources
h Minerals and;
i Petroleum

Justification: The bill does not take cognizance of the fact that not all exploitation is public owned.

Under Clause 4
Amend clause 4 and insert paragraph (h) which read *incentivization of environmental conservation activities.*

Justification: This addition is necessary to emphasize that all actions carried out under the Bill shall be underpinned by the use of economic and tax policy to encourage, as opposed to discourage, environmentally friendly activities, such as climate mitigation and adaptation and natural resource conservation.

Under Clause 6

Amend clause 6 by deleting paragraph (g). Instead, proposes the inclusion of a new separate dispute resolution clause that enables access to independent mechanisms for resolving conflict.

Justification: Section 6(1)(g) of the current Bill provides that the Authority should determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements.

This is despite the fact that the Authority co-ordinates the preparation of the agreements.

Section 6(1)(g) should therefore be deleted to comply with the natural justice principle that means "no person can judge a case in which they have an interest"

On Clause 6(3) (C), obligations imposed on Kenya under any international treaty or agreement relating to the exploitation of natural resources, their conservation, environmental protection, including but not limited to the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change and any protocol or agreement thereto.

Justification: Kenya has committed itself to a variety of international environmental law treaties or agreements that promote natural resource conservation and climate mitigation. Such obligations should also be considered beyond traditional "exploitation."

Under Clause 7

Amend clause 7(2) (a) in that the Chairperson shall be competitively recruited by the Public Service Commission and appointed by the President by notice in the Gazette. (b) The Chairperson shall perform the following functions:

(i) chairing and leading board meetings;
(ii) ensuring that meetings are conducted in an orderly and efficient manner;
(iii) coordinating the recruitment and selection of members of the Authority; and
(iv) managing the relationships between the Authority, the public and all relevant stakeholders.

Justification: The functions of the chairperson have not been outlined in the Bill. It is important to state the functions to in order to distinguish the roles from the Chairperson from those of the Director-

General (DG) who is the Chief Executive Officer of the Authority and secretary to the Board. While the roles of the DG are enumerated, those of the Chairperson are not.

Under Clause 24

Recommending the modification of Section 24(1)(e) and adding a new section (f) as follows:

(a) obligations of the affected entity under any existing benefit sharing agreement with the affected county, any community development agreement with impacted communities, any agreement with other relevant stakeholders, or obligations imposed by existing laws and regulations.
(b) The activity's positive contribution to the environment as a justification for reduced or zero royalties or fees.

Justification: Section 24(2) (e) has been modified in the proposed recommendation in recognition of the fact that existing benefit-sharing agreements are not usually made just between affected entities and county governments. On the contrary, there usually exist other parties such as individuals, community organizations, government entities and many others, that impose obligations on the affected entity. In fact,

the Climate Change (Amendment) Bill, 2023, already requires project proponents to enter into a "community development agreement" with impacted communities.
Sub-section (f) is added to ensure the positive contribution of an activity is considered when determining royalties as a means of incentivizing more of such projects.

Proposed an amendment to Section 24(c)(d) to *include the benefits enjoyed and costs incurred by each in the exploitation of the natural resource and* any existing benefit sharing agreement with an affected entity

Justification: This is necessary because communities are contributing on the growth and development of the forest resources through participating in forest management and or establishment.

Forestry unlike other natural resources has to be developed by the communities through planting, managing, protection and harvesting.

Under clause 27
The proposed Bill under Section 27 contradicts the Mining Act which grants the Cabinet Secretary mandate to grant rights to exploit mineral resources.

New clause; 27(3)

Insert a new section 27(3) stating as follows:

The following shall be exempt from the requirement to enter into benefit sharing agreement under this section

(a) An affected entity conducting environmentally beneficial activities; or
(b) An affected entity already subject to benefit sharing under an existing written law.

Where any dispute arises on whether an affected entity is conducting environmentally beneficial activities under subsection (a), this dispute shall be settled in accordance with the dispute resolution provisions set out in section 44.

Under clause 30 (1)

Insert *and the county assembly shall review and approve the benefit sharing agreement within thirty days of receipt of the agreement, failure of which the agreement shall be deemed as approved* immediately after County government.

Justification:
The Bill should be cognizant of the political economy and devise ways to ensure MCAs do not politicize economic issues leading to minimal or no gain to their constituent. A case of Karede mines where the political economy led to delays in economic gains for the people can be used as a reference study.

Under clause 31
Delete sub-section (3)

Justification:
Sub-section 3 of this section is unreasonable. The sub-section aims to impose criminal liability on every officer corporation regardless of knowledge or intent and should be truck off. Such punitive punishments ill only discourage project proponents rom investing in Kenya.

Further, amend sub-section (4) as follows:

An affected entity that continues to be in breach of this Act that is convicted of an offence within this Act, may be liable to the cancellation of its licence.

Justification:
Sub-section 4 is vague, unclear and creates an opportunity for negative exploitation. It is not clear what breach of this Act means, there is need for clarity on what would possibly warrant an affected entity's loss of its license.

Insert the following new sub-section (8) *The County Government shall facilitate and ensure the unrestricted access to information necessary for the Local Community Benefit Sharing Forum to carry its functions, within the limits of any written law.*

Clause 37(2)(a) and (b)

Add new clause 37(2)(c) an additional mandatory of fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

Justification:
Restitution of stolen funds through an additional 'mandatory fine' is a remedy under the Bribery Act (2016) and the Anti-corruption and Economic Crimes Act (2003).

Under Clause 43
The Clause should be harmonized with the Petroleum Act which enacts Government share of 75% while this clause proposes 60%.

Justification:
The purported amendment of the Petroleum Act provisions will run into headwinds as it reduces GOR overall share under the Petroleum Act from 750/0 ^{0}/0. to 600/0 and increases the County Government to 40.

New Clause
Add new Clause 44(1) that states*: The Commission shall take appropriate steps to resolve any disputes or differences in connection negotiation and performance of benefit sharing agreements.*

(2) The County and affected entity shall explore options for alternative dispute resolution such as mediation and Arbitration.

Justification:
The Bill should also create a dispute resolution mechanism for benefit sharing contracts.

New Clause 38(3)
Add a new sub-clause 38(3) that states; Where *an affected entity has prior to the commencement of the Act already entered into a benefit sharing agreement for an ongoing project, the terms agreed shall continue to apply between the parties until their contractual expiry.*

New Clause;
Insert new **section 44** on dispute resolution

44(1) that states a*ny dispute arising under this Bill shall be subject in the first instance to the dispute resolution mechanism set out in the benefit sharing agreement within thirty days from the date the dispute is raised.*

(2) *Where a dispute is not resolvable in accordance with subsection (1) as a benefit sharing agreement is not yet in force; the benefit sharing agreement does not contain a dispute resolution mechanism clause; or the dispute is not resolved within thirty days as required, the dispute shall be referred to the National Environmental Tribunal.*

(c) Submissions by Pastoralists Alliance for Resilience and Adaptation Across Nations-PARAAN
Mr. Liban Golicha, PARAAN, Member Organizations submitted the following:

1. THAT, the concerned authority be compelled to allocate more time for comprehensive public participation to ensure that the voice of all concerned were heard as required the law.
2. The invitations for public participation in the bill to be made through local radio FMS to ens[illegible]e wider audiences and participation.
3. The benefit sharing rations out of revenues generated by the action of concerned entity be clearly quantified in the provision of the bill; by indicating what percent of the total revenue to be given out by affected entity as benefit other concerned parties.
4. The bill to have clear provision for free prior informed consent as provided in the law.
5. The concerned authority in this and any other matter of this nature to be compelled to observe the rule of law.
6. The bill to be accompanied by an explicit by-law that states clear procedures of resource exploitation and benefit sharing.
7. The concerned authority to look into rightful selection processes for community representatives (especially in the case of extremely marginalized communities) and into their protection of the rightfully appointed community members from other interest groups.

(d) Submissions by Samburu Women Trust
Ms. Jane Meriwas, Executive Director, Samburu Women Trust submitted the following on behalf of the SWT:

Under Clause 3
Amend Clause 3 to include "land" as a natural resource and as part of the application of the Act:

Justification: The question of Land as a natural resource is not incorporated here.

Under Clause 4
Insert a sub-clause that states *"the guiding principles shall be interpreted in a manner that permits and advances the rights and interests of the host communities"*

Justification: To include the rights and interests of the local communities.

Under clause 6
Include an appeal framework against some decisions of the Authority is required/necessary

Under clause 7
Propose an amendment for a review of the various theme sectors identified to rationalize or reduce them. They are too many and other pertinent ones such as fishing and wildlife are not even included.

Under clause 28
Membership of the committees should ensure that social and ethnic minorities are represented in the committees.

Under Section 29(c) and (f)

Delete (c) and (f)

New Clause
Review the removal of National Wealth Sovereign Fund and National Royalties Fund considered in the previous versions of this law with a view of including a sustainability national fund into which the country can save into for the common good of tomorrow and the future generations.

Further, this section can give guidance in encouraging corporate social responsibility programs of willing investors in the affected areas and encourage compensations into community initiatives for common good. An example would be where mass technology transfer initiatives would be suggested as some of the benefit sharing models by the investors.

Justification: Natural resources do get depleted and it is only critical to reconsider this anomaly with the law.

(e) **Submissions by North Eastern Conservancies Association (NECA).**
Mr. Sharmake Mohamed Sheikh, Chairperson, North Eastern Conservancies Association submitted the following proposals on behalf of the NECA:

Exclusion of wildlife from the Bill.

Justification: Wildlife is an integral component of our natural heritage. It should not be categorized as an "extractive natural resource."

Factor in conservation costs.

Justification: It is paramount to factor in the cost of wildlife conservation when determining the benefit-sharing ratio for wildlife resources. This will provide a more accurate representation of the financial challenges and commitments faced by stakeholders involved in conservation efforts. Especially community conservation.

Consideration of land ownership

Justification: The bill should consider land ownership, notably the distinction between national parks, reserves, private, and community conservancies. The benefits accrued from these areas should be apportioned in line with ownership and the contributions made by respective stakeholders.

Maintain section 76 of the Wildlife Conservation and Management Act (WMCA)

Justification: Section 76 of the Wildlife Conservation and Management Act (WCMA) provides vital incentives for wildlife conservation. We strongly advocate for its retention as it is essential for incentivizing and promoting conservation efforts.

Alignment with the Community Lands Act 2016

Justification: The bill should be reconciled and aligned with the provisions of the Community Lands Act of 2016 to ensure that community rights and interests are adequately protected and championed.

Community participation in decision making

Justification: To foster a sense of ownership and responsibility, local communities should be actively involved in decision-making processes regarding the exploitation and management of natural resources within their jurisdictions.

Environmental Impact Assessments.

Justification: Any exploitation of natural resources should be preceded by comprehensive Environmental Impact Assessments (EIA) to ensure that activities are sustainable and will not lead to irreversible environmental degradation.

Revenue reinvestment.

Justification: A percentage of the revenues generated from natural resource exploitation should be reinvested in environmental conservation and community development projects to ensure sustainability and enhance community welfare.

MIN/NO.NA/DC/EF&M/226/2023: ADJOURNMENT AND DATE OF THE NEXT SITTING.

The meeting was adjourned half past one o'clock for a heath break and to be resumed at three o'clock at the same venue.

Signed..... **Date:** 9/11/23

(HON. GIKARIA DAVID, M.P. CHAIRPERSON)

Letter inviting stakeholders for meetings with the Committee

THE NATIONAL ASSEMBLY
OFFICE OF THE CLERK

P. O. Box 41842-00100
Nairobi, Kenya
Main Parliament Buildings

Telephone: +254202848000 ext. 3300
Email: cna@parliament.go.ke
www.parliament.go.ke/the-national-assembly

When replying, please quote

REF: NA/DDC/EF&M/2023/044 **28th September, 2023**

Ms. Mary Mwiti
Chief Executive Officer,
Council of Governors,
Westlands Delta House 2nd Floor, Waiyaki Way,
P.O. Box 40401-00100,
NAIROBI.

Ms. Carole Kariuki
Chief Executive Officer,
Kenya Private Sector Alliance,
5th Floor, Shelter Afrique House, Mamlaka Rd.
P.O. Box 3556-00100
NAIROBI.

Mr. Sharmake Mohamed Sheikh
Chairperson,
North Eastern Conservancies Association,
P.O. Box 1774-70100,
GARISSA.

Mr. Dickson Kaello
Chief Executive Officer
Kenya wildlife Conservancy Association (KWCA)
Seminary Road, Off Magadi Rd, Karen,
NAIROBI.

Mr. Muturi Kamau
National Network Coordinator
Kenya Oil and Gas Working Group
P.O. Box 76668-00508,
NAIROBI.

Mr. Paul Matiku
Executive Director,
Nature Kenya,
National Museums of Kenya, Museum Hill

P.O. Box 44486-00100,
NAIROBI.

Ms. Jane Meriwas
Executive Director,
Samburu Women Trust,
Gefro Imani Building, Park Road, 3rd floor, Rm 16,
P.O. Box 1763-10400.
NANYUKI.

Mr. Mohamed Sharif Abdi
Coordinator,
Peace-Net Kenya,
Norther Region,
P.O. Box 498706-00100.
NAIROBI.

Mr. Liban Golicha
Membership Coordinator,
PARAAN,
Kimathi Road, KIO Plaza, 2nd floor, Rm 207,
P.O. Box 94-100400.
NANYUKI.

Mr. Shalom M. Ndiku
Policy Director, Africa
Conservation International,
Africa Regional Office,
P.O. Box 1963-00502.
NAIROBI.

Mr. Nyang'ori Ohenjo
Chief Executive Officer
Centre for Minority Rights Development,
Kisamis Town, Magadi Rd,
P.O. Box 379-00511.
ONGATA RONGAI.

Mr. George Aluru
Chief Executive Officer
Electricity Sector Association of Kenya (ESAK)
The Address Building, 7th floor Workstyle,
Muthangari Drive, Waiyaki Way,
NAIROBI.

Mr. Mike Korchinsky

Chief Executive Officer
Wildlife Works,
Mombasa Road,
P.O. Box 310-80300,
VOI.

Dear Ms Hamdi

RE: CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 OF 2022) BY THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

The Departmental Committee on Environment, Forestry and Mining is established pursuant to National Assembly Standing Order 216, and is mandated to, *inter alia, **"study and review all legislation referred to it".***

The National Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022); was read a First Time on **Thursday, 17th August 2023** and thereafter referred to the Committee for consideration and reporting to the House.

Pursuant to Article 118 (1) (b) of the Constitution and Standing Order 127 (3), the Committee on 22nd August 2023 placed an advertisement in the print media and parliamentary website inviting the public to submit memoranda on the Bill. In this regard, the Committee has scheduled a public hearing and stakeholders engagement retreat on **Friday, 6th and Saturday, 7th October 2023** at **Hilton Garden Inn Hotel, Mombasa Road, Machakos County.**

The Committee is pleased to invite your institution/organization to the retreat to make submissions on the Bill. A copy of the retreat programme is attached. It is expected that each institution/organization/individual will cater for their own expenses.

The officers responsible for the coordination of this activity are **Mr. Fredrick Otieno** who may be contacted on **Tel. No. 0724 561517** or email address fredrick.otieno@parliament.go.ke, and **Mr. Hamdi Mohamed, Tel. No. 0724742973** or email address hamdi.mohamed@parliament.go.ke.

Yours

JEREMIAH W. NDOMBI, MBS
For: CLERK OF THE NATIONAL ASSEMBLY

THE NATIONAL ASSEMBLY
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When replying, please quote

REF: NA/DDC/EF&M/2023/052 **18th October, 2023**

Eng. Festus Kipkoech Ngéno
Principal Secretary
State Department for Environment and Climate Change
NHIF Building, Ragati Road, Upperhill
P.O. Box 30126-00100
NAIROBI

Mr. Gitonga Mugambi, EBS
Principal Secretary
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Mr. Alex Kamau Wachira
Principal Secretary
State Department for Energy
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Kawi House
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Mr. Mohamed Liban
Principal Secretary
State Department for Petroleum
Ministry of Energy and Petroleum
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Ms. Silvia Museiya Kihoro
Principal Secretary
State Department for Wildlife
Ministry of Tourism, Wildlife and Heritage
NSSF Building, Block A, 20th Floor
P.O. Box 30430-00100
NAIROBI

Dear M. Wachira

RE: CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

Reference is made to our letter **Ref: NA/DDC/EF&M/2023/049** dated **11th October 2023** on the above subject matter (*copy attached*).

Due to some unforeseen circumstances, the Committee resolved to reschedule the meeting to **Tuesday, 24th October 2023**. The meeting will take place at **Weston Hotel, Langata Road** at **10.00 am.** Any inconvenience caused by the change is regretted.

The officers responsible for the coordination of this activity are **Mr. Fredrick Otieno** who may be contacted on **Tel. No. 0724 561517** or email address fredrick.otieno@parliament.go.ke, **Mr. Hamdi Mohamed, Tel. No. 0724742973** or email address hamdi.mohamed@parliament.go.ke.

Yours

JEREMIAH W. NDOMBI, MBS
For: CLERK OF THE NATIONAL ASSEMBLY

Copy to:

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Ms. Aurelia Rono
Principal Secretary for Parliamentary Affairs
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REF: NA/DDC/EF&M/2023/049 **11th October, 2023**

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Ministry of Tourism, Wildlife and Heritage
NSSF Building, Block A, 20th Floor
P.O. Box 30430-00100
NAIROBI

Dear

RE: CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

Reference is made to our earlier letter **Ref: NA/DDC/EF&M/2023/045** dated **27th September, 2023** and the replies by the Ministry of Environment, Climate Change and Forestry through letter **Ref. MEF/CS/015/2018** dated **5th October, 2023** and the Ministry of

Tourism, Wildlife and Heritage through letter **Ref. SDW/1/47/1** dated **3rd October, 2023** on the above subject matter.

The Committee considered your request and acceded to reschedule the meeting to consider the **Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022)** to **Tuesday, 17th October, 2023 at 10.00 am.** The venue of the meeting will be communicated.

In addition to the agenda, the Ministry of Environment, Climate Change and Forestry will be expected to apprise the Committee on the status of preparedness and measures put in place by the Government to address challenges and opportunities expected from the El Niño rains.

This is therefore to invite the Cabinet Secretaries for the meeting who may be accompanied by a maximum of five (5) key technical officers from each State Department to assist in briefing the Committee in the course of the proceedings.

The officers responsible for the coordination of this Activity are **Mr. Fredrick Otieno** who may be contacted on **Tel. No. 0724 561517** or email address fredrick.otieno@parliament.go.ke, **Mr. Hamdi Mohamed**, **Tel. No. 0724742973** or email address hamdi.mohamed@parliament.go.ke.

Yours

JEREMIAH W. NDOMBI, MBS
For: CLERK OF THE NATIONAL ASSEMBLY

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Mrs. Peninah Malonza, OGW
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Ms. Aurelia Rono
Principal Secretary for Parliamentary Affairs
Office of the Prime Cabinet Secretary
National Treasury Building
NAIROBI

Copy of the newspaper advertisement on public participation

REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - SECOND SESSION

IN THE MATTER OF ARTICLE 118(1) (B) OF THE CONSTITUTION AND IN THE MATTER OF CONSIDERATION BY THE NATIONAL ASSEMBLY OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 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 Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022) was read a First Time on **Thursday, 17th August 2023** and thereafter referred to the Departmental Committee on Environment, Forestry and Mining for consideration and reporting to the House;

IT IS NOTIFIED that **the Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022)** is a Bill originating from the Senate sponsored by **Sen. Danson Mungatana,** which seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the National Government, county governments and local communities and to that end provides that the Commission for Revenue Allocation oversees the same.

NOW THEREFORE, in compliance with Article 118(1) (b) of the Constitution and Standing Order 127(3) of the National Assembly Standing Orders, the Clerk of the National Assembly hereby invites the public and stakeholders to submit memoranda on the Bill to the Departmental Committee on Environment, Forestry and Mining.

Copies of the Bill is 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 **Monday, 4th September 2023** at **5.00 p.m.**

S. NJOROGE
CLERK OF THE NATIONAL ASSEMBLY

(22nd August 2023)

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

22/08/23 17:35

Stakeholder submissions

REPUBLIC OF KENYA

MINISTRY OF ENVIRONMENT, CLIMATE CHANGE AND FORESTRY

SUBMISSION ON THE NATIONAL RESOURCES (BENEFIT SHARING) BILL, 2022

It is the view of the Ministry that the Natural Resources sector does not need a stand-alone law to govern Benefit Sharing since benefit sharing is very specific to a sector and also to a project.

Benefit Sharing should be left to each sector specific law to govern. Several Acts of Parliament governing natural resources have already set out benefit sharing frameworks which are being implemented in accordance with these Laws.

Example:

1. The Climate Change (Amendment) Act, 2023 has set out the benefit sharing mechanism in the Act for communities which will be in the Community Development Agreement (CDAs) for benefit sharing in Carbon projects.

The Carbon Market Laws under this Ministry have provided for very specific Community Agreements that have benefit sharing component specific to the Carbon Projects. Community Development Committees have also been established for governance under the CDAs with membership from the county government. Revenue sharing to the Government has also been captured by this Law.

2. Forest management and development is adequately provided for in the Forest Conservation and Management Act, 2016 including the development of participatory Transition Implementation Plans (TIPs) to

support uptake of devolved forestry functions to the county level which prioritizes forestry matters in county financial planning as it is adequate.

3. There are major overlaps in this Bill with the existing FCMA, 2016. especially on dealing with community participation clearly spells out in: application for community participation; obligations of a forest association; assignment of forest user rights; termination or variation of a management agreement; forest conservation and management, and customary rights.

Our proposal therefore is as follows:

a) Have each sector of Natural resources deal with benefit sharing in their framework laws

Or in the alternative,

b) Delete section 3(C) of the proposed Bill

HONORABLE MEMBERS OF THE DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

The Ministry of Mining, Blue Economy and Maritime Affairs is honored by the invitation to submit comments on the Proposed Natural Resources (Benefit Sharing) Bill, 2022 (hereinafter referred to as the **proposed bill**). This is in appreciating that the Ministry is directly concerned with matters of Natural Resources Benefit Sharing and the fact that minerals have been captured under section 3 of the proposed bill. The Ministry will therefore address the issues through the attached matrix.

Background

In 2018, a Natural Resource Benefit Sharing Bill was developed and presented to the then Ministry of Petroleum and Mining to submit comments on the said Bill. The Ministry presented its submissions explaining the overlap of functions and generally, that minerals be excluded from the Natural Resource Benefit Sharing bill. The Ministry's recommendations were considered and subsequently, minerals were removed from the schedule of the natural resources to be covered by the then-proposed bill and for good measure.

(Attached is a copy of the Bill)

However, despite the Ministry's memoranda and explanation that the Mining Act has provided for a comprehensive revenue-sharing Framework under Section 183 (5) of the Mining Act and provisions for royalty setting by the Cabinet Secretary under section 183 (2) of the Mining Act, the Ministry finds itself in the initial position hence our submissions.

STATE DEPARTMENT FOR MINING COMMENTS ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

S No.	Clause of the Natural Resource (Benefit Sharing) Bill, 2022	Marginal Note/Provision Natural Resource (Benefit Sharing) Bill, 2022	Section and Provision of the Mining Act, 2016	COMMENTS AND RECOMMENDATIONS
INTERPRETATION OF TERMS				
1.	Clause 2. Interpretation: "Royalty"	Reads…. "Includes fees or payments by whatever name, paid by an entity for the exploitation or exploration of a natural resource in Kenya"	According to the Mining Act Section 182 and 183, Fees and charges are different from royalties. Fees and charges include: application filing fees, annual ground rent, report filing fees, fees for access of geological data and fees to access public registers. Royalties on the other hand are payable in respect of the various mineral classes won/extracted by virtue of the mineral right. They are prescribed rates by the Cabinet Secretary in charge of Mining.	The general nature of the definition of royalty in the proposed bill contradicts the provision of the Mining Act where Royalty is charged at a prescribed rate on the value of the exploited mineral resource. Also, this Ministry's concern with the proposal is that a portion of the monies are utilized to fund the Ministry's regulatory and operational activities in appropriations-in-aid (A-in-A) and are therefore not remitted to the Consolidated Fund. The proposed definition of royalty includes fees and charges even in the exploration stage. This is not tenable considering that an entity at this point has yet to establish the resource's presence, value, and extent. **Proposal:** The Mining Act sufficiently covers what royalties are and on what basis they are charged.
2.	Clause 2. Benefit Sharing Agreement	"benefit sharing agreement" means an agreement on the manner in which revenue accruing from	Section 183(5) of the Mining Act has provided a royalty sharing framework; that royalties payable will be distributed as follows— seventy percent to the National Government; twenty percent to the County Government; and ten percent to the	The Mining Act provides a framework for sharing of royalties between the National Government, County Government and the Community. **Proposal:** The legal framework on benefits sharing under the

		the exploitation of natural resources shall be shared out between an affected entity and a county;	County Government; and ten percent to the community where the mining operations occur.	**Proposal:** The legal framework on benefits sharing under the Mining Act is sufficient.
3.	Clause 2. Interpretation: "Local community"	Reads… "(a) people living in a ward within which a natural resource is located, (b) people displaced to make way for exploitation of natural resources."	According to the Mining Act Section 4 "community" means a group of people living around an exploration and mining operations area; or a group of people who may be displaced from land intended for exploration and mining operations;	The proposed definition of community in the bill is limiting, in that the effects of large-scale mineral resource exploitation usually affect people in more than one ward, who need a consideration based on the extent of the impact. The Mining Act has provided for this flexibility. Further the Mining Act has provided for the establishment of Community Development Agreement (CDA) between the large-scale miners and the community. Therefore, this proposed change of the definition affects the implementation of the already existing Community Development Agreements. **Proposal:** The Ministry has prepared regulations which are hinged on the definition of community according to the Mining Act. The committees have been constituted and gazetted per the Mining Act.
4.	Clause 3 (h). Application of the Act.	Inclusion of "minerals"	The Constitution under Article 60, 62 (1) (f), 66 (2), 69 and 71 and the Mining Act Section 6 vests the ownership of minerals to the people of Kenya to be held in trust by the National Government.	Section 6 (3) states that the national government's control over the minerals shall be in accordance with the Mining Act 2016. The Cabinet secretary for Mining is given the general administrative powers of the act under section 12 of the Mining Act. To effectively manage the mineral resources, the mining act established the following directorates and institutions. 1. Directorate of Mines 2. Directorate of Geological Surveys 3. Mineral Rights Board 4. National Mining Cooperation 5. Geologists Registration Board

				Since the enactment of the Mining Act, in 2016, the National Government has highly invested in its implementation through the establishment of institutions and formulation of the following requisite regulations 1. The Mining (Licence and Permit) Regulations, 2017 2. The Mining (Community Development Agreement) Regulations, 2017 3. The Mining (Dealing in Minerals) Regulations, 2017 4. The Mining (Employment and Training) Regulations, 2017 5. The Mining (Mine Support Service) Regulations, 2017 6. The Mining (National Mining Corporation) Regulations, 2017 7. The Mining (Reporting of Mining and Mineral Related Activities) Regulations, 2017 8. The Mining (State Participation) Regulations, 2017 9. The Mining (Award of Mineral Rights by Tender) Regulations, 2017 10. The Mining (Use of Assets) Regulations, 2017 11. The Mining (Strategic Minerals) Regulations, 2017 12. The Mining (Use of Local Goods and Services) Regulations, 2017 13. The Mining (Work Programs and Exploration Reports) Regulations, 2017 14. The Mining (Community Mineral Royalty Sharing) Regulations, 2023 (Draft) 15. The Mining (Mineral Royalty Sharing) Regulations, 2023 (Draft) **Proposal**: Delete "minerals" in Regulation 3. As is it is sufficiently regulated under the existing Mining Act.

FUNCTIONS OF THE BENEFIT SHARING AUTHORITY				
5.	Clause 6. Functions of Benefit Sharing Authority.	a)coordinate the preparation of benefit sharing agreements between an affected county and an affected entity;	Section 183 (5) of the Mining Act provides a benefit sharing framework. The draft Mining (Community sharing) Regulations provide a benefit sharing framework between communities as per section 183(5) (c)s	The Mining Act under section 183 (5) has already provided a benefit sharing framework that allows for the National Government, County Government and community to benefit. This includes developing regulations that are awaiting publication on the framework for sharing 10% to the community.
6.	Clause 6. Functions of Benefit Sharing Authority.	(b) review and, where appropriate, determine the royalties payable by an affected entity engaged in natural resource exploitation;	Functions of the Director of Geological Survey. One of the functions under Section 21 (1) (i) is maintaining a laboratory, library and record facilities as may be necessary for the discharge of the functions in the Act;	In order to determine the royalty rates payable, there is the process of determining the mineral first which entails testing of the minerals in a laboratory by professionals who include gemologists, laboratory technicians and metallurgists on the basis of the quality and quantity. **Proposal:**This function is currently being undertaken by the State Department and should remain with the Department as it has the expertise, resources, and capacity invested over years. Further it has professionals whose functions are covered under the organizational structure of the State Department for Mining.
7.	Clause 6. Functions of Benefit Sharing Authority.	(c) identify counties that are required to enter into a benefit sharing agreement under this Act in consultation with the respective county governments;	Functions of the Director of Geological Survey under section 21 (1) © is undertaking geological, geophysical, geochemical, seismological and hydro-geological surveys, investigations and mapping aimed at defining -the character and distribution of rocks and superficial deposits and determining the mineral potential of Kenya;	The function of undertaking geological, geophysical, geochemical surveys, investigations, mapping and determining the mineral potential of Kenya is a function of the Director of Geological Survey. The Ministry has heavily invested in geophysical surveys where 970 anomalies were detected. Further, the ministry is ongoing with the ground truthing process to confirm the presence of the minerals in all counties. The Ministry is also a custodian of all geological data across the 47 countries.

8.	Clause 6. Functions of Benefit Sharing Authority.	(d) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement;	The Mining (Community Development Agreement) Regulations, L.N No. 148 of 2017 The draft Mining (Mineral Royalty) Regulations awaiting publication.	The Ministry has through regulations provided oversight and administrative mechanisms for ensuring that any benefits accruing to communities are rightfully administered. These are the Community Development Agreement Committee and the draft Mineral Royalty Sharing Management Committee established by regulations.
9.	Clause 6. Functions of Benefit Sharing Authority.	(e) facilitate and monitor the implementation of a benefit sharing agreement entered into between a county government and an affected entity;	Section 20. (1) The Director of Mines shall, through the Functions of the Director of Principal Secretary, be responsible to the Cabinet Secretary Mines. for - promoting the effective and efficient management and the development of mineral resources, and the mining sector; exercising regulatory administration and supervision over all prospecting, mining, processing, refining and treatment operations, transport and any dealings in minerals, including import and export of minerals; ensuring compliance with conditions relating to mineral rights; ensuring compliance with the requirements of this Act;	The Director of Mines under section 20 of the Mining Act has the mandate to promote the effective and efficient management and development of mineral resources, and the mining sector, exercise regulatory administration and supervision of overall operations related to mining, ensure compliance with conditions relating to mineral rights which includes inspections to ensure payment of royalties by gazetted inspectors. **Proposals:** The State Department for Mining to continue exercising the monitoring and compliance functions under the Mining Act by gazetted inspectors.
10.	Clause 6. Functions of Benefit Sharing Authority.	(f) conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya;	Functions of the Directorate of Geological Survey. Section 21 ((1) (f) (g) includes conducting geological analysis and valuations; and developing a national repository of geo-science information through the compilation, publication and dissemination of information and data concerning the geology and mineral resources of Kenya and facilitate access to this information by the general public; The Mining and Minerals Policy, 2016 Further Seeks to establish the National Mining Institute as a center of excellence in research of mining operations.	The mandate of conducting research regarding the exploitation and development of minerals in Kenya lies squarely under the functions of the Director of Geological Surveys as provided by the Mining Act. The Authority therefore creates an overlap of powers with those of the Ministry through the Directorate of Geological Surveys. **Proposal**: This function of the Authority as proposed in the bill, should remain a function of the State Department for Mining as the Authority may lack the technical capacity to carry out this mandate.

11.	Clause 6. Functions of Benefit Sharing Authority.	(h) advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation;	Under section 20 (1) (o) of the Mining Act, the Director of Mines advises on the development of policy to ensure compliance with international conventions and national policies relating to the sustainable development of the mineral resources and ensure that mining operations take into account local and community values	The Executive Order No. 1 of 2023 gives the functions of polic formulation for the extractive industry, Mineral exploration an mining policy management to the State Department for Mines Currently, the SDM is in the advanced stage of formulating th draft Mining Royalty Sharing regulations, addressing the 10% allocated to the community under the formula 70:20:10. **Proposal**: The advisory function on policy matters relating t minerals and mining should remain the core mandate of th ministry.
12.	Clause 6. Functions of Benefit Sharing Authority.	(k) build the capacity of local communities in negotiations for benefit sharing and implementation of related projects;	Regulation 9 of The draft Mining (Mineral Royalty Sharing) Regulations, 2023 and Regulation 7 of Legal Notice 148 of 2017 The Mining (Community Development Agreement) Regulations 2017. The two regulations establish committees to deal with the local community benefits.	The proposed Mineral Royalty Management Committee and th Community Development Agreement Committee ar established under the regulations mentioned to deal with th benefits accruing to the local community. Further, formalization of Artisanal Miners into cooperative ensures that they are incentivised and their capacity is built which is a function of the State Department for Mining.
13.	Clause 6. Functions of Benefit Sharing Authority.	(I) prepare national guidelines on benefit sharing in consultation with the relevant stakeholders;	Functions of the Director of Mines under section 20 (1) (n) promoting cooperation among state agencies, county governments, the private sector, research bodies, non-governmental organizations and other organizations which are engaged in programmes related to mining and activities to enhance the administration and operation of this Act;	SDM in collaboration with the National Treasury, office o Council of Governors and office of the Attorney General ha developed the draft Mining (Mineral Royalty Sharing Regulations, 2023 that were subjected to nationwide publi participation exercise in September 2023. Further the royalty sharing framework provided under th Mining Act was determined following wide consultation before the enactment of the Act.

14.	Clause 6. Functions of Benefit Sharing Authority.	(n) promote value addition in natural resources;	Under section 171(5) the Cabinet Secretary is required to make Regulations to govern value addition on minerals. The mandate of the State Department for Mining under Executive Order No. 1 of 2023 includes Capacity Development and Value Addition.	Value addition of minerals is under the powers of the Cabinet Secretary as provided for by the Mining Act and the Executive Order. The Ministry is currently developing the Mineral Value Addition and Processing policy The Ministry has developed the Voi Gemstone Value Addition Centre. The Ministry has initiated Mineral Value Addition Centers, including: Kakamega Gold Refinery, Granite Processing Plant, and Revival Fluorspar Factory.
15.	Clause 6. Functions of Benefit Sharing Authority.	(o) promote local content initiatives on the exploration and exploitation of natural resources under this Act;	Mining Act Section 124. (1) A person shall not be granted or be entitled to hold or acquire an artisanal mining permit, a prospecting permit or a mining permit under this Part unless that person is - a citizen of Kenya; or a body corporate, where no less than sixty percent of the shareholding is held by citizens of Kenya.	The Mining Act already promotes local content initiatives on mining and mineral exploration by limiting foreigner's participation in small scale operations. Furthermore, the Act also requires large scale mineral right holders to promote local content initiatives through the Community Development Agreements, Preferential Employment & Training of Kenyans, use of local Goods and Services, listing of at least twenty percent shares in local stock exchange. Proposal by the bill therefore will overlap with the provisions of the Act.
16.	Clause 6. Functions of Benefit Sharing Authority.	(p) promote the restoration of the environment after the exploitation of a natural resource in an affected county	180. (1) The Cabinet Secretary shall not grant a Requirement of site restoration prospecting licence, a retention licence or a mining licence and mine closure to an applicant, unless the applicant has submitted site plans. mitigation and rehabilitation or mine-closure plans for approval. 181. (1) An applicant for a prospecting licence, an Environmental retention licence or a mining licence shall provide a bond protection bond. or some other form of financial security in this section called an environmental protection bond	Environmental restoration after exploitation of minerals is already provided for in the Mining Act under the different mineral rights. It is a requirement by the holder to ensure the restoration of the environment. To ensure this is achieved, the Act provides for payment of Environmental Protection Bond by mineral right holders to act as a security for restoration of the environment. The bill does not provide clear guidelines as to how the Authority will promote the restoration of the environment after exploitation.

			sufficient to cover the costs associated with the implementation of the environmental and rehabilitation obligations of the holder under this Act.	**Proposal:** The Ministry has sufficient and well documented procedures on restoration of the environment after mineral extraction and inspectors who ensure compliance with the requirements.
17.	Clause 24 (1)	Imposition of Royalties and fees. Reads... "The Authority shall, in consultation with the Council of County Governors and relevant national government entities... "	183. (1) The holder of a mineral right shall pay royalties to the State in respect of the various mineral classes won by virtue of the mineral right. (2) The Cabinet Secretary shall prescribe the rates payable under subsection (1).	Mining is a national function and not a devolved function. The Mining Act ensures that the national government works in collaboration with the County government in the management of the resource without an overlap of powers. The proposed bill seeks to impose royalties in consultation with the County government and relevant national government, however, the onus to impose royalties on minerals is on the national government and that function is exercised by the Cabinet Secretary for Mining as per the Mining Act. **Proposal:** Prescription of royalties to remain a national function and the same to be exercised by the Cabinet Secretary as provided by the Mining Act.
18.	Clause 24 (2)	The basis for determination of Royalties. Reads... "the total capital investment "	The Mining Act Section 183 requires a mineral licence holder to pay royalties upon winning/extraction of any mineral resource.	Royalties should be based on the value of the mineral resource and should not take into account the cost of investment. This is necessary to prevent mineral curse.
19.	Clause 25 (1 & 2)	(1) The Kenya Revenue Authority shall collect royalties as determined by the Authority..., (2) KRA shall declare and pay the monies to the Consolidated Fund	Section 186 (1) of the Mining Act states that all fees, charges and royalties' payable by the holder to the State under this Act shall be paid by the holder into a designated account of the State department responsible for collecting royalties.	The proposed provision in the Bill to assign the mandate of royalty collection to KRA contradicts Section 186 of the Mining Act. Further, enforcement of payment of royalty among other payments, is a compliance function which is one of the Ministry's mandates. Also, Section 185(3) of the Mining Act provides for the Ministry (State Department for Mining) to inspect and examine mineral samples, books, records, and accounts to ascertain the quantity, quality, grade or value of minerals or mineral products for the purpose of

				charging and collecting royalties dues after the sale of minerals. Therefore, this function cannot be reassigned to the KRA as proposed in the bill.
20.	Clause 25 (3)	This section shall supersede the provisions of any law with respect to the collection of royalties and fees charged for the exploitation of natural resources in Kenya.	The mandate to govern the mining sector in Kenya is well provided by the Executive Order No. 1 of 2023, the Constitution and the Mining Act. This is a function of the Cabinet Secretary for Mining, Blue Economy and Maritime Affairs through the State Department for Mining.	The State Department for Mining collects fees and charges which are used in appropriation in aid for the overall management of the mining sector. Further the Department has a Mineral Development Levy which seeks to promote mineral resource development in Kenya. **Proposal:** The Constitution and the Mining Act have sufficiently provided for the management of minerals in kenya including the prescription of royalties, management, monitoring, value addition and development of the mining sector. The Ministry should be allowed to continue undertaking the function in order to create stability.
21.	Clause 25 (4,5 & 6)	(4) The Kenya Revenue Authority shall declare and account to the Benefit Sharing Authority the total sum collected of royalties from entities ... (5) The Authority shall submit to the respective county Government declarations received from KRA (6) The County executive committee...	Section 186 of the Mining Act provides that (1) All fees, charges, and royalties payable by the holder to the State under this Act shall be paid by the royalties holder into the designated account of the State Department responsible for collecting royalties. (2) A payment shall be accompanied by a statement from the holder stating- (a) details of the mineral or mineral product; (b) the relevant point of sale; and (c) the date and the amount of royalty paid. (3) A copy of the statement shall be delivered to the Mining Cadastre Office. (4) A mineral right holder shall report the royalty liability for each month by the fifth business day of the month. (5) Upon receipt of a royalty payment the State the	Currently, the Ministry is in the process of procuring and installing a Royalty Management System which will be integrated with the Mining Cadastre Portal to enhance the collection, mineral source tracking, and allocations to relevant counties and communities. Further, the Ministry in collaboration with the National Treasury, Council of Governors, Ministry of Industrialization, Trade, and Innovation, Commission of Revenue Allocation, and Attorney General has developed draft regulations on Mineral Royalty sharing for the County Government and Communities. The Attorney General advised that the County Government has an existing legal instrument for the distribution of the 20% royalty share through the County Government Additional Allocation Act 2022.

			department responsible for collecting royalties shall issue a receipt	
22.	Clause 26	(1) The proposed bill provides for a 60% and 40% sharing arrangement between NG and CG. (2) Further, in the 40% to the CG, 60% is assigned to the local community and 40% is utilized for the entire County Government	The Mining Act under Section 183(5) already provides for the royalty sharing arrangement of 70%, 20% and 10% for the National Government, County Government and community respectively.	Observation: The proposed mineral royalty sharing arrangemer as contained in the Bill has REDUCED the royalty share to th National Government from 70% to 60%. Reduction of th revenue sharing to the National Government could hinde sustainable mineral resource development. Regulation of th entire mining sector and policy formulation to promot investment in mining is a prerogative of the Nationa Government and a higher percentage to the national governmer ensures efficacy in the same The bill proposes that 60% of the 40% for County Government will be utilized in local community projects.
23.	Clause 27	The proposed Bill requires for an investor and the County to enter a Benefit Sharing Agreement before exploitation. The benefits may include non-monetary benefits...	The Mining Act under Section 117, grants the Cabinet Secretary the power to enter into mineral agreements with holders of mining licence.	The proposed Bill under Section 27 contradicts the Mining Ac which grants the Cabinet Secretary the mandate to grant right to exploit mineral resources.
		(2) The benefit sharing agreement shall include non-monetary benefits that may accrue to the county and the contribution of the affected entity in realizing the same.	The regulations attendant to the Mining Act provide for non-monetary benefits to communities and counties. Section 50 Preference for local goods Section 61 (1) (c) reconnaissance license applicants to provide proposal for procurement of local goods 61 (d) Local employment plan for training of Kenyan citizens	The Mining Act and subsidiary legislations provide fo promotion of local content. These regulations include; Mining (Community Development Agreement) regulations Mining (Use of Local Goods and Services) Mining (Employment and training) regulations Mining (Mine support services regulations) Mining (Use of Assets) Regulations Proposal: The Mining Act has sufficiently catered for non-monetary benefits in its provisions and implementation of the same should be allowed.

			Attached to mineral right applications is the requirement to promote local content.	
24.	Clause 40	Amendment: Delete Section (5) 183 of Mining Act No. 12 of 2016. Replace with "the royalty received by the State under this section shall be paid in the Consolidated Fund and appropriated in accordance with Section 26 of this bill.	The Mining Act Section 183(5) states that the royalties payable under sub-section (1) shall be distributed as follows— (a) seventy percent to the National Government; (b) twenty percent to the County Government; and (c) ten percent to the community where the mining operations occur.	The proposed Bill under Section 40 seeks to delete the existing royalty-sharing framework amongst the National Government, County Government, and the Community. This move will make the administration and implementation of the Mining Act difficult.
25.	Clause 38	An affected entity that, immediately before the commencement of this Act, was lawfully authorized to exploit a natural resource under this Act shall be deemed to be authorized to conduct such exploitation under this Act. (2) Despite Subsection (I), an affected entity shall comply with the provisions of this Act within two years of the commencement of the Act.		This provision may open up affected entities to civil litigation cases on account of change of terms or contracts entered into by dint of the provisions of the Mining Act. **Proposal:** The active rights that existed prior to the enactment of this act should continue being in force until expiration by passage of time without the need to enter into different regulatory regimes for the management of royalties.

	GENERAL COMMENTS	The proposed bill is largely inclined to County Governments and seeks to assume key mandates of the Ministry (State Department for Mining). Mining and minerals are a reserve of the National Government. This is well established in the Constitution and detailed in the Mining Act. Royalties are fiscal instruments and need to be determined upfront as they provide a basis for determining economic viability of resources. The Mining Act has provided for this which creates stability for the sector.

Conclusion

The Mining sector has a lot of potential and one of the ways to convert the potential into revenue generation for the benefit of the people of Kenya is to create a stable legal and regulatory framework. This is essential for a well-functioning society. It provides a number of benefits, including reduced costs and uncertainty for businesses, increased economic growth, improved consumer protection, reduced corruption, and increased social justice.

Should the bill be passed with the inclusion of minerals, the Mining Sector's functions under the Executive Order, the Constitution, and the Mining Act will be rendered null and void. The Mining Act has been quoted as one of the most progressive Mining Acts in the world because of how comprehensive, futuristic, and inclusive it is. We only pray that in the wake of the current political dispensation and goodwill by the current leadership to ensure that mineral potential is converted to revenue, the Ministry is allowed to fully take up its mandate without overlap and further instability to the sector

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND ECONOMIC PLANNING

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THE NATIONAL TREASURY
P O BOX 30007 - 00100
NAIROBI
KENYA

DD-Hac
& 11/10/23

REF: IGFR/SG/01/A/ (51)

6th October, 2023

Mr. Samuel Njoroge
Clerk of the National Assembly
Parliament Buildings
P O Box41842 - 00100
NAIROBI

Handi Hassan
to facilitate
11/10/23

Dear Mr. Njoroge,

RE: CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022 (SENATE BILLS NO.6 OF 2022)

Reference is made to your letter **Ref. SEN/DDC/EF&M/2023/045** dated 28th September, 2023 on the above subject matter. This was on an invite to the Cabinet Secretary/ National Treasury and Economic Planning by the National Assembly Departmental Committee on Environment Forestry, and Mining to deliberate on the proposed Natural Resources (Benefit Sharing) Bill, *2022 (Senate Bill No. 6 of 2022).*

We have reviewed the proposed Bill and made the following comments for consideration by the National Assembly, in as far as possible.

General Comments

1. The Bill provides for system of sharing benefit in exploitation of ALL natural resources. Given the uniqueness in exploitation of different natural resources, we recommend that the unique circumstances of each sector be taken into account to identify the impact to the National Government, County Government and the local communities necessary in determining the benefit sharing to the different players. We note for example exploitation of water resource may be different from the extraction of mining and as such justification for community compensation may vary. In addition, counties with government forests (which are water catchment areas and potential game reserves and National Parks) are already benefiting from the National Government through the Contribution in Lieu of Rates.

DIRECTOR RECEIVED 11 OCT 2023 Directorate of Departmental Committees

NATIONAL ASSEMBLY RECEIVED 11 OCT 2023 CLERK'S OFFICE P O Box 41842, NAIROBI

2. The earlier provision of the Bill was that 80% of the revenue collected shall be shared between National Government and respective County Government in the ratio of 60:40 respectively with remaining 20% being channeled into a "Sovereign Wealth Fund."

3. Currently, the Bill has been amended to eliminate creation of the Fund. It currently provides that the revenue collected shall be shared between National Government and respective County Government in the ratio of 60:40 respectively. These ratios imply that the Bill is focusing more on sharing of benefits as opposed to sustainable use of natural resources. Some of these natural resources are finite and will be depleted. The funding arising from the exploitation will therefore come to an end at some time in future. When this happens gaps will be left in budgets of the concerned government institutions. It is therefore not a good practice to assume that these resources are regular source of financing government budgets.

4. The National Treasury recommends that the Government should consider redirecting the amount set aside for budget financing and instead accumulate a significant portion in a Sovereign Wealth Fund to finance budgets for National and County Governments when there are shortfalls in revenues raised nationally. It was for this reason that the National Treasury developed a Sovereign Wealth Fund Bill, 2019 to among others, build a savings base for future generations when mineral resources are exhausted. We therefore recommend Parliament to consider unlocking the delay to ensure finalization of the Bill. Allocations to counties every year should be guided by requirements to address negative externalities arising from exploitation of natural resources.

5. The Fourth Schedule of the Constitution assigns the responsibility of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development to the National Government. It is our considered view that resources should therefore be allocated to the National Government to effectively undertake this mandate.

6. Further, this provision does not take into account the principle of equity since Counties are not equally endowed with natural resources. It is our considered view that this is the spirit protected by Article 202 (1) of the Constitution which provides that revenue raised nationally shall be shared equitably among the national and county governments.

7. Further, the Bill is silent on the share of revenue to the community who may require compensation in case of displacement or destruction of their source of livelihood in the course of extraction of the resources. There are no efforts to ringfence the share of money to communities. In this regard, there is huge probability that the funds for communities will not be utilized for the benefit of the communities affected by the exploitation of natural resources within their localities.

8. From the reading of the Bill, it can be seen that the Benefits Sharing Authority would be an entity of the National Government. It is not clear how it would oversee the administration funds set aside for the community while these funds are part of the share allocated to the County Government. Such funds will be budgeted for and administered by the respective County Government.

9. The law may consider separating community funds from county funds. Once the criteria for sharing revenues is determined by Parliament in law there is a weak case for establishing an authority.

10. The objective of this Act can be achieved by amending various legislations which have addressed the sectors and sub-sectors mentioned here. Any gaps identified can be reviewed and amended in the existing legislations. It is therefore our considered opinion that this Bill may not be necessary.

Budgeting, Accounting and Reporting

11. Section 26 of the Bill provides that the revenue collected under the Act shall be shared between the National Government and the respective County Government in the ratio of sixty to forty percent to the National Government and to the County Government respectively.

    The Bill further provides that, at least sixty percent of revenue assigned to County Government shall be utilized to implement local community projects and forty percent of that revenue shall be utilized for the benefits of the entire county.

    The Bill is not clear on how funds meant to implement local community projects will be budgeted, accounted and reported for separate from the revenue assigned to County Government to be utilized for the benefits of the entire county.

Financial Implication of Creation of an Authority

12. Section 5 of the Bill establishes the **Benefit Sharing Authority.** Further Section 6 provides the functions of the Authority which include, among others, conduct research regarding the exploitation and development of Natural Resources and benefit sharing in Kenya, advise the National Government on policy and the enactment of legislation relating to benefits sharing in resource exploration and determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements.

    Section 14 provides that the remuneration, allowances expenses and other emoluments of members and staff of the authority shall be determined by the Salaries and Remuneration Commission.

    We observe that most of the functions assigned to the Authority will result to the Authority undertaking functions of the National Government entities which includes policy formulation and research. Establishment of the Authority will therefore result into duplication of functions of the National Government entities. The resources to this Authority may be saved by addressing any gaps which exist through the respective National Government entities other than creating parallel structures which have financial implications.

Submitted for your consideration and incorporation.

Yours Sincerely,

NJUGUNA NDUNG'U, CBS
CABINET SECRETARY



REPUBLIC OF KENYA

THE NATIONAL TREASURY & ECONOMIC PLANNING

COMMENTS ON

The Natural Resources (Benefit Sharing) Bill, 2022 (Senate Bills No.6 Of 2022)

Brief by the Cabinet Secretary, National Treasury and Economic Planning During a Meeting with the National Assembly Departmental Committee on Environment Forestry, and Mining

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Date of the meeting: October 7th, 2023

INTRODUCTION

1. This brief is informed by the invite to the Cabinet Secretary/ National Treasury and Economic Planning by Senate Departmental Committee on Environment Forestry, and Mining to deliberate on the proposed Natural Resources (Benefit Sharing) Bill, 2022 (Senate *Bill No. 6 of 2022)*.

2. The object and purpose of this Bill, is to provide for establishment of a system of benefit sharing in natural resource exploitation between resource exploiters, the National Government, county governments and local communities; and for connected purposes.

3. We have reviewed the Bill and noted that most of the comments submitted earlier to the Senate were incorporated into the revised Bill. However, during the review we have identified new issues, both general and specific, that require the attention of the Senate before finalization of the Bill. In this regard, we have proposed comments for consideration and incorporation by the Senate, in as far as possible.

General Comments

4. The Bill provides for system of sharing benefit in exploitation of ALL natural resources. Given the uniqueness in exploitation of different natural resources, we recommend that the unique circumstances of each sector be taken into account to identify the impact to the National Government, County Government and the local communities necessary in determining the benefit sharing to the different players. We note for example exploitation of water resource may be different from the extraction of mining and as such justification for community compensation may vary. In addition, counties with government forests (which are water catchment areas and potential game reserves and National Parks) are already benefiting from the National Government through the Contribution in Lieu of Rates.

5. The earlier provision of the Bill was that 80% of the revenue collected shall be shared between National Government and respective County Government in the ratio of 60:40 respectively with remaining 20% being channelled into a "Sovereign Wealth Fund."

6. Currently, the Bill has been amended to eliminate creation of the Fund. It currently provides that the revenue collected shall be shared between National Government and respective County Government in the ratio of 60:40 respectively. These ratios imply that the Bill is focusing more on sharing of benefits as opposed to sustainable use of natural resources. Some of these natural resources are finite and will be depleted. The funding arising from the exploitation will therefore come to an end at sometime in future. When this happens gaps will be left in budgets of the concerned government institutions. It is therefore not a good practice to assume that these resources are regular source of financing government budgets.

7. The National Treasury recommends that the Government should consider redirecting the amount set aside for budget financing and instead accumulate a significant portion in a Sovereign Wealth Fund to finance budgets for National and County Governments when there are shortfalls in revenues raised nationally. It was for this reason that the National Treasury developed a Sovereign Wealth Fund Bill, 2019 to among others, build a savings base for future generations when mineral resources are exhausted. We therefore recommend Parliament to consider unlocking the delay to ensure finalization of the Bill. Allocations to counties every year should be guided by requirements to address negative externalities arising from exploitation of natural resources.

8. The Fourth Schedule of the Constitution assigns the responsibility of protection of the environment and natural resources with a view to establishing a durable and sustainable system of development to the National Government. It is our considered view that resources should therefore be allocated to the National Government to effectively undertake this mandate.

9. Further, this provision does not take into account the principle of equity since Counties are not equally endowed with natural resources. It is our considered view that this is the spirit protected by Article 202 (1) of the Constitution which provides that revenue raised nationally shall be shared equitably among the national and county governments.

10. Further, the Bill is silent on the share of revenue to the community who may require compensation in case of displacement or destruction of their source of livelihood in the course of extraction of the resources. There are no efforts to ringfence the share of money to communities. In this regard, there is huge probability that the funds for communities will not be utilized for the benefit of the communities affected by the exploitation of natural resources within their localities.

11. From the reading of the Bill, it can be seen that the Benefits Sharing Authority would be an entity of the National Government. It is not clear how it would oversee the administration funds set aside for the community while these funds are part of the share allocated to the County Government. Such funds will be budgeted for and administered by the respective County Government. The law may consider separating community funds from county funds. Once the criteria for sharing revenues is determined by Parliament in law there is a weak case for establishing an authority.

12. The objective of this Act can be achieved by amending various legislations which have addressed the sectors and sub-sectors mentioned here. Any gaps identified can be reviewed and amended in the existing legislations. It is therefore our considered opinion that this Bill may not be necessary.

Budgeting, Accounting and Reporting

13. Section 26 of the Bill provides that the revenue collected under the Act shall be shared between the National Government and the respective County Government in the ratio of

sixty to forty percent to the National Government and to the County Government respectively.

The Bill further provides that, at least sixty percent of revenue assigned to County Government shall be utilized to implement local community projects and forty percent of that revenue shall be utilized for the benefits of the entire county.

The Bill is not clear on how funds meant to implement local community projects will be budgeted, accounted and reported for separate from the revenue assigned to County Government to be utilized for the benefits of the entire county.

Financial Implication of Creation of an Authority

14. Section 5 of the Bill establishes the **Benefit Sharing Authority.** Further Section 6 provides the functions of the Authority which include, among others, conduct research regarding the exploitation and development of Natural Resources and benefit sharing in Kenya, advise the National Government on policy and the enactment of legislation relating to benefits sharing in resource exploration and determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements.

    Section 14 provides that the remuneration, allowances expenses and other emoluments of members and staff of the authority shall be determined by the Salaries and Remuneration Commission.

    We observe that most of the functions assigned to the Authority will result to the Authority undertaking functions of the National Government entities which includes policy formulation and research. Establishment of the Authority will therefore result into duplication of functions of the National Government entities. The resources to this Authority may be saved by addressing any gaps which exist through the respective National Government entities other than creating parallel structures which have financial implications.

Njuguna Ndung'u
Cabinet Secretary/National Treasury and Economic Planning

Dated: October 7th, 2023

MINISTRY OF TOURISM AND WILDLIFE
STATE DEPARTMENT FOR WILDLIFE

ISSUES OF CONCERN ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, SENATE BILLS, NO. 6 OF 2022

16th October, 2023

The Natural Resources (Benefit Sharing) Bill was passed by Senate on 1st August 2023. The Bill was forwarded to National Assembly. The first reading of Bill was made to the National Assembly. A call for public participation was issued on 22nd August 2023, whereby submission due date was on 4th of September, 2023.

The purpose of the Bill is to establish a system of benefit sharing in Natural Resources exploitation between exploiters, the national government, county governments and local communities.

The Bill applies to the following renewable and non- renewable resources:

a. Sunlight
b. Surface and Underground Water
c. Forests, Biodiversity & genetic resources
d. Wildlife
e. Industrial fishing
f. Wind
g. Geothermal
h. Minerals
i. Petroleum

The Bill establishes a new institution, the Benefit Sharing Authority as the main institution to oversee and implement benefit sharing. The Kenya Revenue Authority is mandated to collect royalties from natural resources and submit to the Consolidated Fund, from where benefit sharing is to occur. County Benefit Sharing Committees are responsible to enter into benefit sharing agreements with affected entity.

A benefit sharing ratio is provided as follows: National Govt at 60% and County Government at 40%. A 60% of the allocation to County government is to be utilized for community projects while the balance of 40% is for the benefit of the entire County.

Key Issues arising from the Bill:

1. The creation of a new entity, the Benefit Sharing Authority presents additional cost for governance of natural resources and potential overlap with other government agencies with mandate to manage and license use of the natural resources.
2. The Bill presents Constitutional and administrative implementation challenges. This is by assigning the development of benefit sharing agreements to County Governments, with minimal regard to distribution of function between national and county government in relation to the various natural resources under application by the Bill.
3. A common benefit sharing ratio for renewable and non-renewable/extractive resources as inequitable, by failing to:
   a) Taking into account the unique nature of each resource;
   b) Recognize the effort and additionality by respective landowner (Government, Community and Private) on which the natural resource occurs, where non-renewable resource does not require additionality. This dis-incentivizes conservation efforts of wildlife and forests among other non-renewable resources by communities and landowners.
   c) Recognize the limitation for community, private and investments in the natural resources.

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REPUBLIC OF KENYA

MINISTRY OF ENERGY AND PETROLEUM
STATE DEPARTMENT FOR ENERGY

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PRINCIPAL SECRETARY
KAWI COMPLEX, SOUTH C
P. O. BOX 30582-00100
NAIROBI

When replying please quote:
Ref. MOE/CONF/1/42

23rd October, 2023

Mr. Samuel Njoroge
Clerk of the
National Assembly
NAIROBI

Dear Mr Njoroge,

RE: SUBMISSION TO THE NATURAL RESOURCES (BENEFIT SHARING) BILL – SENATE BILL NO. 6 OF 2022

We refer to your letter ref. NA/DDC/EF/&M/2023/052 dated 18th October, 2023 on the above subject matter.

The State Department for Energy appreciates the invitation to submit comments on the Bill being one of the State Departments directly involved in natural resources exploration, exploitation and development noting the benefit of such a Bill in governing the sharing revenue and other benefits arising from exploitation of natural resources.

In compliance with constitutional duty and in response to the call for submissions to the National Assembly Departmental Committee on Environment, Forestry and Mining we hereby submit our comments as detailed in the enclosed memorandum.

ALEX K. WACHIRA
PRINCIPAL SECRETARY

Encls.

Mr. fred ohieno
P/S TNA.
DM 26/10/23

Copy to: **Mr. Davis Chirchir**
Cabinet Secretary
Ministry of Energy and Petroleum
NAIROBI



REPUBLIC OF KENYA

MINISTRY OF ENERGY AND PETROLEUM
MEMORANDUM

ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

(SENATE BILLS NO. 6 OF 2022)

PRESENTED TO:

THE NATIONAL ASSEMBLY DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING

24TH OCTOBER 2023

PART I: SUBMISSIONS BY THE STATE DEPARTMENT FOR ENERGY

1. The State Department for Energy under Ministry of Energy and Petroleum is mandated to develop and implement policies that create an enabling environment for efficient operation and growth of Kenya's energy sector. The Ministry sets strategic directions to facilitate the growth of the sector while providing long term vision for all sector players.

2. The functions of the State Department for Energy are derived from the Presidential Executive Order No. 1 of 2023 and includes National Energy Policy development and management, thermal power development, rural electrification programme, energy regulation, security and conservation, hydropower development, geothermal exploration and development and promotion of renewable energy.

3. The State Department for Energy hereby makes its submission in compliance to constitutional and statutory responsibility and in response to the call for submissions to the National Assembly Departmental Committee on Environment, Forestry and Mining on the Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022). The submission is divided into four (4) parts as follows:

Part A.	Introduction
Part B.	Revenue Sharing under the Energy Act, 2019
Part C.	General comments on the Bill
Part D	Specific comments on the Bill

A. INTRODUCTION

1. The Constitution of Kenya, 2010 recognizes the importance of sustainable exploitation of natural resources. Denoting that natural resources should be used in a way that ensures their long-term availability and benefit local communities in a sustainable environment. Sustainable exploitation can have positive impacts on both present and future generations by promoting economic growth, improve lives and livelihoods and development while protecting the environment.

2. Article 69 (1) (a) of the Constitution of Kenya, 2010 (Constitution, 2010) states that the State shall ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits. Additionally, Article 69 (1) (h) of the Constitution, 2010 requires that the State utilizes the environment and natural resources for the benefit of the people of Kenya.

3. Achieving sustainable exploitation requires careful planning, monitoring, and enforcement to ensure that natural resources are used responsibly and in accordance with environmental and social standards. Thus, natural resources benefit sharing law is an important law to provide for the distribution of revenues generated from the exploitation of natural resources among local communities, government agencies, and investors.

4. Article 61 (1) of the Constitution of Kenya, 2010 provides that all land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals and goes on to provide under Article 62 (1) (g) and (h) that Public land is all minerals and mineral oils as defined by law and government forests other than forests to which Article 63(2)(d)(i) applies, government game reserves, water

catchment areas, national parks, government animal sanctuaries, and specially protected areas.

4. The Energy Act, 2019 consolidates the laws relating to energy, to provide for National and County Government functions in relation to energy, to provide for the establishment, powers and functions of the energy sector entities, promotion of renewable energy, exploration, recovery and commercial utilization of geothermal energy, regulation of midstream and downstream petroleum and coal activities, regulation, production, supply and use of electricity and other energy forms and for connected purposes.

5. Section 73 of the Energy Act, 2019 provides that all unexploited renewable energy resources under or in any land vests in the National Government subject to any rights which, by or under any written law, have been or are granted or recognized as being vested in any other person.

6. The concept of benefit sharing in energy sector is based on recognizing that the exploration and exploitation of natural resources for energy generation affects the local community environment and disrupt the habitat. The Act recognizes:

   i. Local community as people living in a sub-county within which an energy resource under this Act is situated and are affected by the exploitation of that energy resource;

   ii. Local content is the value brought to the Kenyan economy from energy-related activities through systematic development of national capacity and capabilities and investment in developing and procuring locally available workforce, services, and supplies, for the sharing of accruing benefits;

5. Overall, natural resources benefit sharing law is important to ensure that the exploitation of natural resources contributes to sustainable development through sharing of benefits gained from any form of dealing with the resources in the local communities' environment leading to poverty reduction, improvement of lives and livelihoods of the communities while minimizing negative impacts on the environment and on local communities.

B. REVENUE SHARING UNDER THE ENERGY ACT, 2019

Resources	
Renewable Energy	PART IV Section 75 (2) The Cabinet Secretary may in conjunction with relevant agencies perform such functions and exercise such powers as may be necessary under this Act to promote the development and use of renewable energy, including but not limited to— (e) promoting the development of appropriate local capacity for the manufacture, installation, maintenance and operation of basic renewable technologies such as bio-digesters, solar systems and turbines (g) harnessing opportunities offered under clean development mechanism and other mechanisms including, but not limited to, carbon credit trading to promote the development and exploitation of renewable energy sources.

Geothermal resources	**Section 85** (1) The licensee shall pay a royalty on the value at the wellhead of the geothermal resources extracted: (a) of not less than one per centum and not more than two and half per centum of the value of geothermal energy produced from such resources during the first ten years of production under the licence. (b) of not less than two per centum and not more than five per centum of the value of the geothermal energy produced from such resources during each year after such ten-year period; but (c) shall not include any geothermal energy that is dissipated before it reaches the point of delivery to the purchaser.
	(2) For purposes of this section the value of geothermal energy at the well head is a value calculated by subtracting from the price that could reasonably be realized on sale of the energy to a genuine purchaser at arm's length from the producer, all reasonable expenses, reasonably incurred by the producer in getting the energy to the point of delivery to the purchaser.

	(3) Any royalty received by the National Government from geothermal energy produced under this section shall be paid into the Treasury of the National Government and apportioned between the National Government, County Government and the local community as follows: a) the county government's share shall be equivalent to twenty percent of the royalties: Provided that the amount allocated in accordance to this sub-section shall not exceed the amount allocated to the County Government by Parliament in the financial year under consideration. b) the local community's share shall be equivalent to five percent of the royalties and shall be payable through a trust fund managed by a board of trustees established by the local community in accordance with regulations under this Act: Provided that the amount allocated above shall not exceed one quarter of the amount due to the County Government by Parliament in the financial year under consideration. c) the remaining seventy-five per centum shall be treated as National revenue to be dealt with in accordance with Article 203 of the Constitution

	(4) Notwithstanding subsection (3), where the resource is being exploited in one or more counties the Cabinet Secretary shall, in consultation with the Commission for Revenue Allocation, determine the rate of apportionment of the county share between the counties.
	(5) The Cabinet Secretary may waive, suspend, or reduce the royalty for any licensee in the interest of encouraging the greatest utilization of geothermal resources, if the Cabinet Secretary determines that this is necessary to promote development or that the licence cannot be successfully operated under the licence terms.
	(6) The Cabinet Secretary shall publish any waiver granted under this section.

7. The State Department for Energy recognizes that the Energy Act is not explicit on benefit sharing on other renewable energy resources (solar (mini-grids), hydropower development, wind projects as well as bioenergy resources) except for geothermal.

C. GENERAL COMMENTS ON THE BILL

Policy formulation to precede the Bill

6. The Bill should have been preceded by a Policy as policy framework gives a forward-looking long-term view of the problem and provides guidance and direction for decision-making and action in a particular area. A policy outlines the

goals, objectives, and strategies for achieving those goals, as well as the roles and responsibilities of different stakeholders involved in implementing the policy.

7. It is therefore recommended that before the Bill is formulated, there should be a policy preceding it.

Memorandum of reasons and clarity on whether this is the primary law

8. The memorandum of reasons for this Bill was not availed to enable us appreciate the reasons for various provisions of the Bill. That notwithstanding, it is our understanding that the intention is to make this the primary law or the main legal instrument to govern issues or area of benefit sharing of natural resources. In developing such a primary law, it is our opinion that it is important to consider the existing laws in the relevant sector and ensure contextualization and customization which involves adapting the Bill to fit the specific needs and circumstances of the sector or area it is intended to govern. This will depend on the specific context and objectives of the law, it will involve extensive research, consultation with stakeholders, and consideration of legal and policy implications.

9. Additionally, each resource has its own unique processes for exploration, exploitation and licensing. This requires recognizing the processes and investments that go into the realization of each project depending on the nature of resource being explored and exploited and includes acknowledging the nature of contracting for each sector, financing models for the project and the length of concessions among others.

10. It is therefore proposed that stakeholder engagement should be individualized to each sector and enable the drafters of this Bill appreciate the basis of each sector setting the distribution of revenue, benefits or royalties as set out in the sector specific laws.

D. SPECIFIC COMMENTS ON THE BILL

No.	Section	Subject matter	Proposal/ Comment	Justification
1.	2	Definition of 'benefit'	The Bill defines 'benefit' as any gains, proceeds or profits from exploitation of natural resources. The Bill does not include provisions for non-monetary benefits, such as the provision of preferential rates, discounted bills, co-ownership of the assets, electrification of local social amenities at no cost, employment opportunities. Additionally, requirements such as local content are also important in	These benefits are equally important benefits often aimed at promoting sustainable development and poverty reduction, while minimizing negative impacts on the environment and engagement of local communities.

No.	Section	Subject matter	Proposal/ Comment	Justification
			ensuring sustainable promotion of local industry, facilitation of technology transfer, development of professional, skilled and unskilled labour.	
2.	6 (g)	The section provides that the Authority shall determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreement.	There should be a mechanism to enable appeal against the decisions of the Authority.	It is good practice that where an authority is given authority to resolve disputes, the parties are given a forum to appeal such decisions usually through quasi-judicial systems such as tribunal.

No.	Section	Subject matter	Proposal/ Comment	Justification
3.	6 (g)	Possible conflicts arising from provisions of section 36	There is need to be alive to the fact that there may be possible conflicts on projects that will be prioritized by County Committee, local community, socio-economic needs of the community and public interest.	People will require a forum to appeal the decisions of the Authority such as tribunal as mentioned above.
4.	6 (b), 6 (3) (a), 26 and 29 (c)	Functions of the Authority versus provisions of all existing law regulating natural resources sector in Kenya	These provisions are in conflict with each other. On one part section 6 (b) states that review and where appropriate determine royalties payable by an affected entity while section 26 provides the breakdown of the percentages. This conflict with section 6 (3) (b) which states that the Authority shall	There is need for clarity to avoid a situation where different laws or regulations apply to natural resources. If this is not addressed there may be conflict of laws when it comes to compliance and enforcement.

No.	Section	Subject matter	Proposal/ Comment	Justification
			have regard to all existing law regulating natural resources in Kenya.	
5.	9 and 16	Qualifications of the Chairperson and members of the Board.	The qualification for appointment as the chairperson or member of the board to include engineering, geologist or geophysicists.	Experts in these areas have vast knowledge on natural resources.
6.	9 and 16	Compliance with part 1.1 of the *Mwongozo* that the position in the Authority should provide a diversity of gender, competencies	The composition of the board should not be limited to the expertise listed under the section that should also include a mix of competencies to ensure effective leadership of the organization for example part 1.1 of the *Mwongozo* paragraph 6 states that at least one board member should be a financial expert.	Ensure compliance with the *Mwongozo* and the State Corporations Act and ensure effective leadership of the Authority.

No.	Section	Subject matter	Proposal/ Comment	Justification
		and skills required for the effective leader-ship of the Autho-rity.		
7.	11	The powers of Board versus the establi-shment of the Autho-rity under section 5.	Board of Directors plays a critical role in the governance of the Authority and not the day to day running of the Authority.	The role of the Board is to provide strategic direction of the Authority, oversee management, ensure accountability and protecting the interests of stakeholders. The Board is responsible for making major decisions that affect the Authority, such as approving budgets, appointing senior executives and monitoring performance.
8.	29 and 31 (6)	Responsi-bilities of the	The Bill outlines sharing benefits derived from	. It is imperative that this is protected under the law to

No.	Section	Subject matter	Proposal/ Comment	Justification
		Counties and local communities	exploitation of natural resources without placing certain responsibilities on the local community.	ensure that there is peace and security in the area, protecting the environment, and promoting sustainable development including being receptive to the projects that are fronted. The idea behind this approach is to encourage local communities to take an active role in the management of natural resources and to ensure that they have a stake in the benefits derived from such resources. However, any responsibilities placed on the local community should be reasonable and proportionate to their capacity and resources.
9.	40, 41, 42 and 43	Amendments to sections in the	Apportioning of funds paid into the Consolidated Fund may need to be	By dint of Article 114 (3) (c) of the Constitution, 2010 and section 2

No.	Section	Subject matter	Proposal/ Comment	Justification
		Mining Act, the Wildlife Conser-vation and Manage ment Act, the Energy Act and the Petro-leum Act	considered under the purview of Article 114 (3) (c) noting that the National Assembly is the house of Parliament that deals with money bills.	(appropriation and Appropriation Act) of the Public Finance Management Act, it is important to determine whether such amendments can be proposed through this Bill considering the fact that this is not a National Assembly Bill but a Senate Bill.

PART II: SUBMISSIONS BY THE STATE DEPARTMENT FOR PETROLEUM

1. The State Department for Petroleum has reviewed the Bill and have categorized our comments into two general cross cutting and specific comments.

GENERAL CROSS-CUTTING COMMENTS ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

2. The Constitution of Kenya, 2010 provides that Communities shall benefit from the Natural Resources domiciled in their areas. It is our understanding that in addition to getting a share of the revenue accruing from exploitation of natural resources, the communities benefit from resource exploitation in many other ways.

3. The exploitation of natural resources in most cases offer employment and business opportunities to locals and uplifts the general standards of living for the community. Noting that benefits may take either monetary or non-monetary forms, the Communities should exploit both forms.

4. In the exploration and exploitation of the oil and gas, communities should not only seek to receive the monetary benefits but should also take advantage by acquiring the relevant skills and investing in businesses or venture that will help them in the long term even after the oil reserves are depleted.

5. The Bill introduces Royalties which are defined as *"fees or payments by whatever name, paid by an affected entity for the exploitation or exploration of a natural resource in Kenya"*. The Bill is about benefit sharing at the time of resource exploitation. This is separate from exploration which will have no benefit.

6. It is noted that a Memorandum of Reasons would be essential in understanding the relevant problem statement(s), legislative gaps, background, commentary on the provisions of the Bill among other pertinent issues. However, we were unable to trace the Memorandum of Reasons while reviewing the Bill.

REVENUE SHARING UNDER THE PETROLEUM ACT, 2019

7. Section 58(1) of the Petroleum Act, 2019 provides for the petroleum revenue sharing formula as **national government 70%, county government 25% and local community 5%.** It is noted that the Natural Resources (Benefit Sharing) Bill, 2022 sets a revenue share of **national government 60% and county government (including community share) 40%.**

8. In the Petroleum Act, petroleum revenue is defined as the **profits** derived from upstream petroleum operations. It does not include other payments made by contractors such as taxes, training fees, etc. In addition, the revenue in petroleum is generated from exploitation and not during exploration.

9. In the Petroleum Act, the local community is defined as the residents living in the affected sub-county.

10. To date, there has not been any petroleum revenue (profits) for Kenya derived from the sale of crude oil. This is because exploration activities are still ongoing in the country. No commercial project has taken place. The contractor in blocks 10BB and 13T i.e. Tullow Kenya B.V. has submitted the Field Development Plan (FDP) to the Government. This is the plan that will pave way for commercial production of crude oil. The FDP is under

review by the Energy and Petroleum Regulatory Authority (EPRA).

11. However, in 2019 and 2022, Kenya undertook a technical extended well testing project known as the Early Oil Pilot Scheme (EOPS) which involved trucking of crude oil from Lokichar to Mombasa for export. The objective of EOPS was to test the performance of Kenya's crude qualities *(i.e. "ultra-sweet and light crude, low sulphur content of 0.11% and an API° of 30.5")* in the international markets, capacity building for Kenyans in oil production, etc. Under the project, approx. 414,000 barrels of oil were sold. The cost incurred exceeded the revenue generated, bearing in mind that the crude oil exported was small in size and the crude oil price (under USD 60 / barrel) as at that time. There were therefore no profits arising from this sale.

SPECIFIC COMMENTS ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

12. Detailed comments on the Natural Resources (Benefit Sharing) Bill, 2022 are provided in the annex. The Committee's Secretariat is invited to consider the detailed comments which are specific to the provisions of the Bill.

ANNEX: SPECIFIC COMMENTS ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
1.	Policy formu-lation	Policy on Natural Resources Benefit Sharing	i. This Act should be preceded by a Policy on Natural Resources Benefit Sharing. ii. There is lack of a Policy on Natural Resources Benefit Sharing.	a) The Policy will give Policy direction on this subject. b) It will articulate the aspirations to be achieved by the ensuing legislation. c) This approach is in line with best practices of legislative formulation.
2.	State Agencies	Roles of other State Agencies	The Bill should take a more inclusive approach by providing the roles of other State Agencies.	The Bill is silent on the roles of State Agencies such as Energy and Petroleum Regulatory Authority, National Mining Corporation, Kenya Marine Authority, KWS, KFS etc. These Agencies are also charged with the overall management of the natural resources within their dockets.

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
3.	2	Definition of "*Benefit*"	The definition of "*benefits* "is very general/ open.	There is possibility of some benefits being non-revenue/non-monetary, thus difficult to quantify.
4.	7 and Schedule	Board of the Authority	Align the appointment of the chairperson and members of the Board to existing public governance practices/provisions.	Chairpersons of other boards of state corporations are usually appointed by the President without subsequent approvals. The State Corporations Act and *Mwongozo* Code of Governance prescribe the appointment modalities.
5.	11 and schedule	Powers of the Board	The powers of the Board should be not be operational. Rather, the Board should provide overall stewardship of the Authority.	The powers accorded to the Board may not be enforceable noting that the Board is not established as a body corporate.
6.	27(2)	Benefit Sharing Agreement	It is not clear what *"non-monetary benefits"* means.	The Act should be clear on what these *"non-monetary benefits"* means. A clear list to be provided as well as methodologies for sharing the same.
7.	28 (2)	Establishment of a	The Committee to have representations from	This will promote inclusivity and

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
		County Benefit Sharing Committee	the National Government (*relevant ministries depending on the subject resource*) and Authority.	professionalize the committee.
8.	28 (3)	Tenure of the County Benefit Sharing Committee	The committee to have a term of office of 3 years. Non-renewable. The section to provide also for the grounds of removal of a committee member.	This should be provided in this law and not subject to the Regulations to be made the Cabinet Secretary.
9.	28 (1) & (2)	Establish-ment of a County Benefit Sharing Committee	There appears to be a duplication of roles as follows: a. The Kenya Wildlife Service under section 7 (f) of the Wildlife (Conservation and Management Act) 2013 has been charged with developing mechanisms for benefit sharing with communities living in wildlife areas. b. The Kenya Forest Service under Section 8 (d) of the Forest	A duplication of roles will bring about a conflict in performance of functions of this committee and the Government Agencies.

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
			Conservation and Management Act,2016 is mandated to establish and implement benefit sharing arrangements. c. The Bill is silent on whether there will be representation of these agencies in the committee. This to be reviewed.	
10	29(c)	Functions of County Sharing Committee	Delete section 29(c) which stipulates that the County Sharing Committee will determine the amount of money to be allocated to each local community from the money accrued under the benefit agreement.	This is unnecessary as the Bill in Section 26 has set the formula for this determination.
11.	31	Local Communit y Benefit Sharing Forum	This section to be deleted in its entirety.	a) The functions of this Forum can be discharged by the County Benefits Sharing Committee. It is expected that the Committee will

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
				engage the relevant stakeholders when executing its mandate. Such engagements shall be held as and when needed. b) This will remove the possibility of mis-understanding between the Committee and the Forum which may lead to a stalemate.
12	36	Uses of retained funds	Where there is a conflict as to the projects prioritized by the County Benefit Sharing Committee and those prioritized by the Local Community Benefit Sharing Forums, there needs to be a way to determine which projects takes precedence.	a) This will clearly determine which projects are prioritized and implemented to avoid underutilization of funds hence denying the communities from the accrual benefits. b) The clause on Local Community Benefit Sharing Forum to be deleted in its entirety.
13	37	Offences	The Act provides for offences in relation to the "affected entities". It should also provide	Offences can be committed by all the players under the Bill.

	Section (No.)	Subject matter	Proposed amendment(s)/ Comment(s) Raised	Justification(s)/Rationale
			for offences likely to be committed by the County Benefits Sharing Committee or its members.	The Bill is silent on these offences.
14	40, 41, 42 and 43	Amend-ment to:- the Mining Act, Wildlife Conservation and Management Act, Energy Act and Petroleum Act	To be deleted	It is proper for such amendments to go through the Finance Bill or Miscellaneous Amendment Bill as the case may be.

Signed: .....

Davis Chirchir
Cabinet Secretary
Date: 23rd October, 2023

THE NATIONAL ASSEMBLY
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When replying, please quote

REF: NA/DDC/EF&M/2023/052

18th October, 2023

23 OCT 2023 404

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NAIROBI

Dear M. Wachira

RE: CONSIDERATION OF THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

Reference is made to our letter **Ref: NA/DDC/EF&M/2023/049** dated **11th October 2023** on the above subject matter (*copy attached*).

Due to some unforeseen circumstances, the Committee resolved to reschedule the meeting to **Tuesday, 24th October 2023**. The meeting will take place at **Weston Hotel, Langata Road** at **10.00 am.** Any inconvenience caused by the change is regretted.

The officers responsible for the coordination of this activity are **Mr. Fredrick Otieno** who may be contacted on **Tel. No. 0724 561517** or email address fredrick.otieno@parliament.go.ke, **Mr. Hamdi Mohamed, Tel. No. 0724742973** or email address hamdi.mohamed@parliament.go.ke.

Yours

JEREMIAH W. NDOMBI, MBS
For: CLERK OF THE NATIONAL ASSEMBLY

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NHIF Building, Ragati Road, Upperhill
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Mr. Davis Chirchir
Cabinet Secretary
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Dr. Alfred Mutua, EGH
Cabinet Secretary
Ministry of Tourism and Wildlife
Tourism Fund Building
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Ms. Aurelia Rono
Principal Secretary for Parliamentary Affairs
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COUNCIL OF GOVERNORS

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Our Ref: COG/2/8 Vol.20 (28)

D/DC
Please deal.
06/09/23

Fred Oteno
to facilitate
7/9/23

4th September 2023

The Clerk
National Assembly
Nairobi

Dear Clerk.

LEGISLATIVE MEMORANDA ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

Greetings from the Council of Governors.

Attached herewith, please find a memorandum on the Natural Resources (Benefit Sharing) Bill (Senate Bill No. 6 of 2022) for your kind consideration.

Please accept our highest esteem and regards.

Yours Sincerely,

Mary Mwiti
Chief Executive Officer

DIRECTOR RECEIVED
07 SEP 2023
Directorate of Departmental Committees

NATIONAL ASSEMBLY
RECEIVED
06 SEP 2023
CLERK'S OFFICE
P O Box 41842, NAIROBI

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06 SEP 2023
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COUNCIL OF GOVERNORS

LEGISLATIVE MEMORANDUM ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILL NO. 6 OF 2022)

TO

THE NATIONAL ASSEMBLY

FROM

THE COUNCIL OF GOVERNORS

5TH SEPTEMBER, 2023

The Council of Governors;

In recognition of the fact that sovereign power of the state is exercised at two levels of government, that is, the National Government and the County Governments, whose distinctness is recognized by Article 6 (2);

In further recognition of the need to ensure that all legislation is cognizant of devolved governments; and

Aware of the need for coordinated action between the National and County Governments to ensure that these legislations properly respond to the key issues, and further reflects the spirit and purpose of the devolution process.

The Council recommends as follows on the Bill:

A) **General Comments:**

The Bill seeks to provide a legislative framework for the establishment and *enforcement* of a system of benefit sharing in natural resource exploitation between natural resource exploiters, the national government, county governments and local communities and to that end provides that the Benefit Sharing Authority oversees the same.

We note the following general but key issues that ought to be addressed in the Bill namely:

1. We note that the Benefit Sharing Authority is mandated to oversee benefit sharing with respect to natural resources already governed under other Acts of Parliament, i.e. minerals, petroleum, forests, wildlife and energy resources including wind and geothermal resources. One of the potential overlaps is the function of the Authority to review and determine royalties payable in natural resource exploitation and the mandate of the institutions under the relevant Acts to determine such royalties. There is need to rationalize and harmonize these functions.
2. There is need for clarity in the Bill on the convergence between '*local community projects*' as used in the Bill and 'county projects' since all projects implemented in the county offer benefits to the local community.
3. There is also need for the project identification process in counties to be aligned with the budget cycle of the county government to ensure timely availability of resources and effective use thereof.

We give our specific comments to the Bill hereunder.

B) **Specific Comments:**

Clause	Provision	COG's Proposal	Justification
Clause 3 **Application of the Act**	This Act shall apply to the following natural resources; 1. sunlight; 2. surface and underground water; 3. forests, biodiversity and genetic resources; 4. wildlife resources; 5. industrial fishing; 6. wind; 7. geothermal resources; 8. minerals; and 9. Petroleum.	Amend Clause 3 to include the following natural resources as part of the application of the Act: 1. Fossil fuels; 2. Marine resources; and 3. Sand.	The clause provides for a narrow definition of the term natural resources. As such, it does not conform to the Constitutional definition under Article 260 of 'natural resources' which includes all resources on or under the surface of the earth.
Clause 6 **Functions of the Authority**	(d) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement;	Delete this sub-clause (d)	This provision is in conflict with the functions of county governments of coordinating participation of communities in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution.
	(e) facilitate and monitor implementation of a benefit sharing agreement entered into between a county government and an affected entity;	Amend sub-clause (e) to: (e) provide technical assistance to county governments in the implementation of a benefit sharing agreements;	The framework for monitoring implementation of projects and agreements is an exclusive function of the County Governments and provided for in the county planning function as per Schedule 4 of the Constitution

	(j) ensure the proper and timely payment of funds to counties and local communities as provided under this Act;	Amend sub-clause (j) to: (j) ensure the proper and timely payment of funds to counties as provided under this Act;	County governments possess the mandate of coordinating participation of communities in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution. They receive such funds and should therefore ensure payment of the same to local communities in the county.
	(k) build the capacity of local communities in negotiations for benefit sharing and implementation of related projects;	Amend sub-clause (k) to: (k) build the capacity of county governments to assist local communities in negotiations for benefit sharing and implementation of related projects;	This provision is in conflict with the function of county governments to develop the administrative capacity of communities to effectively participate in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution.
	(n) promote value addition in natural resources;	Amend sub-clause (n) to: (n) provide assistance to county governments to promote value addition in natural resources;	This provision is in conflict with the function of county governments to develop the administrative capacity of communities to effectively participate in governance under Paragraph 14 of Part 2 of the Fourth Schedule of the Constitution. Further, value addition is implied through other functions and powers of the county including agriculture and trade development.

	(3) The Authority shall have regard to the following in performance of its functions- (a) all existing law regulating the natural resources sector in Kenya;	Amend paragraph (a) to: (a) all existing law regulating the natural resources sector in Kenya and the distribution of functions between the national government and county governments;	Regard for the distribution of functions in the Constitution is important to prevent any claw backs on the powers of county governments as highlighted above.
Clause 7 **Board of the Authority**	(1) The management of the Authority shall vest in a Board which shall consist of- (f) two persons of the opposite gender nominated by the Council of County Governors to represent such communities as the Council shall determine; (g) one person nominated by a registered association representing a majority of county assemblies to represent local communities;	Delete paragraph (g) and Amend (f) to: (f) three persons nominated by the Council of County Governors to represent the interests of counties as the Council shall determine;	Good practice is to exclude legislative bodies from participating in executive functions. The Council of County Governors can therefore nominate three people to the Board to represent the interests of counties.
Clause 25 (5) **Kenya Revenue Authority to collect royalties**	(5) The Authority shall submit to the respective county government declarations received from the Kenya Revenue Authority under Subsection (4) at least once every quarter.	Amend the clause sub-section to read as follows: (5) The Authority shall submit to the respective county government declarations received from the Kenya Revenue Authority under Subsection (4) within twenty-one days of receipt.	There is need for the county governments to be regularly apprised of the revenues generated by the resources since they are responsible for maintaining most of them.

Clause 26 (1) **Revenue Sharing ratio**	(1) The revenue collected under this Act shall, subject to Subsection (2), be shared between the National Government and respective county governments in the ratio of **sixty per cent to the National Government** and **forty per cent to the county governments.** (2) At least **sixty** percent of the revenue assigned to county governments under subsection (1) shall be used to implement local community projects and **forty** percent of that revenue shall be utilized for the benefit of the entire county.	Amend the clause sub-section b to read as follows: (1) The revenue collected under this Act shall, subject to Subsection (2), be shared between the National Government and respective county governments in the ratio of forty per cent to the National Government and sixty per cent to the county governments. (2) At least forty percent of the revenue assigned to county governments under subsection (1) shall be used to implement local community projects and sixty percent of that revenue shall be utilized for the benefit of the entire county.	The revenue sharing ratio for County Governments needs to be increased because it is to be apportioned between local community projects and those meant for the benefit of the county. Most of the said resources are in direct control and management of County governments. The bearer of the cost of maintenance should get a significant amount of benefit. Further, 40% of the revenue should be used for implementing community-specific projects with the county government retaining 60% for the benefit of the larger county.

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September 4, 2023

Clerk of the National Assembly
P.O. Box 41842-00100
Main Parliament Buildings, Nairobi

By email: **cna@parliament.go.ke**

Dear Sir/Madam:

RE: Submission of Memoranda on the Natural Resources (Benefit Sharing) Bill, 2022

Conservation International (CI) writes to express its concerns regarding the proposed Bill before the Senate of the Republic of Kenya, entitled Natural Resources (Benefit Sharing) Bill, 2022 (Senate Bills No. 6 of 2022) ("the Bill"). We write this letter for consideration by the Departmental Committee on Environment, Forestry and Mining ("Committee"), in response to a public invitation by the Clerk of the National Assembly dated 22 August 2023, calling for the submission of memoranda on the Bill.

Unfortunately, the Bill, as drafted, penalizes the conservation of Kenya's natural resources, efforts to combat climate change, discourages sustainable development and environmentally friendly investments into Kenya, and conflicts with Kenya's stated national and international policy goals and commitments.

As articulated here and in the annexed table setting out our schedule of proposed amendments, we recommend several changes to the Bill that aim to preserve Kenya's position as a destination for environmentally beneficial investment, while providing for an equitable natural resource benefit sharing framework with government and local communities.

CI is an international conservation organization whose mission is building upon a strong foundation of science, partnerships, and field demonstration to empower societies to care for nature responsibly and sustainably, our global biodiversity, for the well-being of humanity. CI promotes innovative science, partnerships, policies, and investments that secure the health of Earth's climate ecosystems and biodiversity. CI's Africa headquarters are here, in Nairobi, Kenya.

In our view, the Bill contains several provisions which if implemented have the potential to severely discourage investment into natural climate solutions and environmentally beneficial activities in Kenya. We share the Government's vision to encourage investment into Kenya, encourage green growth, and support local communities in an environment where benefits accruing from natural resource activities are equitably shared. However, we fear that the proposed draft natural resources benefit sharing framework fails to properly account for the economic realities of carbon projects and jeopardizes their continued activity.

The Bill implicitly includes carbon projects in its ambit based on its wide definition of "natural resources" and "exploitation", and its cumulative effect together with the recently assented Climate Change (Amendment) Bill, 2023, will be to make carbon projects, which are instrumental in conservation and climate action in Kenya, unduly burdensome and financially unviable. The Bill therefore ought to be rectified prior to enactment to align its content with international best practice on benefit sharing in the context of carbon projects, and to ensure it fits national circumstances and Kenya's development goals and aspirations. To avoid these unintended consequences, **we urge the National Assembly not to pass the Bill in its current form, but to amend it to uphold property rights and interests by focusing only on public forests and activities on public land, and also to exclude from its scope of application activities directly causing a net conservation or enhancement of natural resources and reduction of greenhouse gas emissions**, and in effect carve out carbon projects from its ambit. We make this recommendation on the following basis:

a) **Exclude environmentally beneficial activities from the meaning of "natural resource exploitation"**: The Bill broadly seeks to tax and distribute revenue from "natural resource exploitation" – a laudable goal, because traditional natural resource exploitation covering minerals and fossil fuels has significant negative environmental externalities. However, the Bill contains an overly broad definition of "*natural resources*" to include, among other things, forests and biodiversity, which desperately need conservation, and broadly defines "*exploitation*" to mean "*the extraction or use of a natural resource for commercial benefit*."

The Bill thus taxes and fails to differentiate between revenue-generating activities that *conserve* natural resources, such as water, forests, biodiversity, and wildlife, and mitigate greenhouse gas emissions, as opposed to traditional natural resource *exploitative* activities covering minerals and fossil fuels with significant negative externalities, such as air, water, and land pollution, and contributing to climate change. The implication of these costs on carbon and other conservation projects is that where improperly imposed, they constitute perverse economic policy that penalizes the conservation of Kenya's natural resources and efforts to combat climate change, discourages sustainable development and environmentally friendly investments into Kenya, and conflicts with Kenya's stated national and international policy goals and commitments.

b) **Eliminate costs that hinder access to much needed carbon finance flows into the country**: The Bill requires the sharing of "benefits" defined as "*any gains, proceeds or profits from the exploitation of natural resources*" and the payment of "*royalties*" for the exploitation of natural resources, broadly defined as "*fees or payments by whatever name paid by an affected entity for the exploitation or exploration of a natural resource*." As a non-profit organization that seeks to promote natural solutions to climate change, CI works hand-in-hand with local communities to develop projects that enhance their well-being while preventing deforestation, absorbing carbon dioxide, and promoting sustainable management practices. From our experience, considerable labour and expense go into these projects, which often generate carbon credits for sale to finance their continued operation. Subject to the terms of benefit-sharing agreements, much of this revenue is already returned to the local communities, ensuring that they are the primary beneficiaries. It is therefore important to ensure that carbon projects are not unduly limited and burdened by the imposition of additional costs and fees, which would lead to reduced investment in the sector.

c) **Enact a holistic framework for benefit sharing for Kenya's carbon projects as opposed to a scattered piecemeal regime**: We note that the Bill is overlapping with other proposed laws in the country touching on benefit sharing in carbon projects, such as the Climate Change (Amendment) Bill 2023, (National Assembly Bill No. 42 of 2023) (the "Climate Change Bill"). This creates an expensive, time consuming and bureaucratic process to be complied with by carbon project proponents forced to comply with two different laws touching on the same subject-matter. The different laws on benefit sharing create institutions with overlapping mandate, increases undue county and national government oversight on projects, provides for potential double-taxation, and raises expenses in terms of time and cost due to a requirement for multiple contracts on benefit sharing across the different laws.

For example, the Climate Change Bill, Section 23(E)(5), already requires land-based carbon projects to provide an annual social contribution of at least forty percent (40%) of the "aggregate earnings of the previous year to the community." It defines "aggregate earnings" under Section 2 as "the total of all income in a carbon project without adjustment for inflation, taxation or types of double counting." Faced with the prospect of also having to pay carbon registry fees (see e.g., Verra fee schedule) and significant royalties (akin to a tax on projects) under the Natural Resources (Benefit Sharing) Bill, 2022, project proponents may find themselves with insufficient funds to cover project costs, ultimately leading to the collapse of carbon projects in Kenya and the benefits they bring to local communities and the nation as a whole.

Hypothetically, a project proponent might pay 20% in royalties, 5% in official project development fees, and 40% to communities, leaving only 35% of revenue to cover project start-up and operational costs, legal expenses, marketing costs, salaries, among other costs. In most cases, this will not be nearly enough to run a carbon project fees, and 40% to communities, leaving only 35% of revenue

to cover project start-up and operational costs, legal expenses, marketing costs, salaries, among other costs. In most cases, this will not be nearly enough to run a carbon project.

The two bills are also unnecessarily duplicative of one another. For example, the Climate Change Bill requires project proponents to enter into "community development agreements" with local communities. Meanwhile, Section 27 of the Natural Resources (Benefit Sharing) Bill, 2022 requires "affected entities" (e.g., project proponents) to also enter into "benefit sharing agreements" with county governments, regardless of whether or not the county has any involvement in the project or owns the lands at issue. This provides for potential interference in project design and benefit distribution and makes it significantly more difficult to commence a project due to unnecessary multiple legal agreements. Further, the Bill envisages that county governments will allocate money to local communities from the monies accruing under a benefit sharing agreement, yet communities are also envisaged to be receiving benefits from the project under the community development agreement, which amounts to a burdensome double benefit approach at the expense of project proponents. Given that most carbon projects are already marginally "profitable" or heavily reliant on philanthropic funds, **the cumulative result of these laws is that many carbon projects may cease to exist, and investors would likely move to other jurisdictions, depriving Kenya and its communities of revenue and environmental benefits**.

The scope of the Bill should therefore be limited to natural resource activities that exclude carbon projects as the issue of benefit sharing in carbon projects is already the subject of another law. This will ensure there is legislative clarity and a coherent approach to Kenya's engagement in the global carbon markets, and will stimulate further investment in the sector, enhance environmental conservation and provide a vast array of socio-economic benefits for local communities.

d) **Prevent interference with private constitutional property rights by ensuring the Bill's application is limited to public lands**: The Bill does not uphold constitutional property rights as it encompasses within its ambit all forests and activities on all types of land, yet Kenya's land and forest-holding comprises public, private and community land/forests, which have different ownership and should therefore not all be subjected to similar requirements on benefit sharing. The Constitution is clear on the protection of the right to property and that the State shall not deprive a person of any interest in, or right over property. Mandating benefit sharing for communal and privately held interests as set out under the Bill is therefore unconstitutional as it serves to illegally deprive these owners of interest in and right over their property. As such, the Bill should be amended to only apply to natural resource exploitation on public land, as defined in the Constitution.

e) **Safeguard Kenya's global climate leader status**: Increasing costs of conservation through the provisions of the Bill as highlighted in the points above conflicts with Kenya's pre-existing international climate commitments and domestic policy. Under Kenya's Nationally Determined Contribution to the UN Framework Convention on Climate Change's Paris Agreement, Kenya has committed itself to reduce greenhouse gas emissions by 32% by 2030, while conditioning such commitment on the receipt of international support. The legislation also conflicts with the government's proposed Green Fiscal Incentives Policy, which seeks to implement green fiscal reforms that will "stimulate a shift in production, consumption, and investment in low-carbon climate resilient and environmentally sustainable practices." Kenya has long subscribed to the principle of sustainable development and is a leader on the African continent in adopting measures to combat climate change. The Bill should not be adopted and passed into legislation as currently drafted as it would weaken Kenya's ability to meet its stated commitments and sends the wrong message to its citizens and the global community.

As noted, most carbon projects are marginally "profitable" at best or rely on donor or charitable funding. CI wishes to express its grave concern that the combination of even modest taxes and a rigid benefit-sharing arrangement (without deductions for taxes, fees, royalties, or project costs) as mandated by the Climate Change (Amendment) Bill 2023 will likely make numerous carbon projects financially unviable. As a result, existing projects may cease to exist and interest in investing in projects in Kenya will drop. Recently, other jurisdictions in Africa have announced or enacted laws with regulations or taxes intended to benefit the host country but have ultimately had a chilling effect on climate investment in their countries. We worry, if passed

as is, the present Bill could have a similar effect on climate investment in Kenya. **By making climate investment in Kenya unattractive, the Bill may have the unintended effect of depriving the very governments and local communities of revenue and much needed environmental and societal benefits that it seeks to support.**

Drawing on our long experience in working with communities to sustainably manage nature, including through carbon projects, we suggest certain modifications to ensure that Kenya remains an attractive destination for investment in these projects, while ensuring the maximum amount of carbon revenue flows to local communities. Through this letter, we include our proposed amendments to the Bill and welcome an opportunity for an audience to present our oral submissions before the Honourable Committee. CI remains committed to supporting the legislative process in Kenya and we can be reached anytime on email at **sndiku@conservation.org**, or on telephone through +254 716 190 074 .

Yours faithfully,

Shalom M. Ndiku
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Policy Director, Africa

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ANNEXURE: SCHEDULE OF PROPOSED AMENDMENTS TO THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022

In the table below we highlight in greater detail our proposed amendments to key provisions of the Bill:

Bill Section	Current Provision in the Bill	Proposed Recommendation	Rationale and Justification
2	**"affected entity"** means an organization or person involved in the exploitation of a natural resource to which this Act applies;	**"affected entity"** means any for-profit organization or person involved in the exploitation of a natural resource to which this Act applies;	The Bill's scope of application should only extend to for-profit entities and should exclude non-profit entities whose activities are intended to promote social benefits such as relief of poverty and environmental preservation.
2	**"exploitation"** means the extraction or use of a natural resource for commercial benefit;	**"exploitation"** means the extraction or non-renewable use of a natural resource for commercial benefit and excludes activities directly causing a net conservation or enhancement of natural resources and reduction of greenhouse gas emissions.	This new definition is necessary in conformity with Kenya's sustainable development priorities and climate policies. It is essential for example for promoting conservation activities related to forests such as Reducing Emissions from Deforestation and forest Degradation (REDD+), as well as the use of public goods such as the "Use" of "sunlight" and "wind" for good and not environmentally harmful, which as currently drafted under the Bill cannot be "used" for commercial benefit without being deemed exploitation. We submit that no costs should be imposed on such activities and only

			environmentally destructive activities, as opposed to measures that promote their conservation or net climate mitigation should be penalized.
2	**"Local community"** means (a) people living in a ward within which a natural resource is situated; and (b) people displaced to make way for the exploitation of a natural resource;	**"local community"** means people, including marginalized communities in accordance with the provisions of Article 260 of the Constitution, living within or nearby an area where a natural resource is situated, who are displaced to make way for the exploitation of a natural resource or whose livelihood is directly or indirectly affected by the exploitation of that natural resource.	The proposed definition of local community should be expanded to reference marginalized communities and the effect of natural resource exploitation should be broadened to cover more than just displacement of a local community.
2	N/A	**"non-monetary benefits"** means any benefit, other than monetary, such as job creation, improved community infrastructure for health, education and social amenities, among others.	The term non-monetary benefits has not been defined in the Bill despite being used in Section 27. There is need to define this term in order to bring clarity to Section 27 which calls for the inclusion of non-monetary benefits in the benefit sharing agreement between affected entities and county governments.
2	N/A	**"stakeholders"** means any affected entities, affected counties, local communities and national government entities directly involved in the exploitation of a natural resource.	The term "stakeholders" has been used in Section 6(1)(l) of the Bill. It therefore needs to be defined in order to lay out the various stakeholders engaged in the exploitation of natural resources and entitled to benefits from the project, for clarity.
3	This Act shall apply to the following natural resources: (a) sunlight; (b) surface and underground water;	This Act shall apply to the following natural resources where the exploitation is on land defined as public land under Article 62 of the Constitution: (a) sunlight;	Under the Bill the use of a natural resource for commercial benefit is deemed exploitation and an organization or person involved in the

	(c) forests, biodiversity and genetic resources; (d) wildlife resources; (e) industrial fishing; (f)wind; (g) geothermal resources; (h) minerals; and (i) petroleum	(b) surface and underground water; (c) forests, biodiversity and genetic resources; (d) wildlife resources; (e) industrial fishing; (f) wind (g) geothermal resources; (h) minerals; and (i) petroleum	exploitation of the natural resource must enter into a benefit sharing agreement with the County within which the natural resource is exploited. However, the Bill does not take cognisance of the fact that not all exploitation is public owned. For example, some exploitation may be on privately held or community held land as allowed under Kenya's land tenure system. In this cases, mandatory benefit sharing with the county as envisioned under the Bill infringes on property rights of private and communal landowners which is unconstitutional, and also serves to disincentivize investment in these natural resources.
4	All persons shall be guided by the following principles in the performance of their functions under this Act – (a) transparency and inclusivity; (b) revenue maximization and adequacy; (c) efficiency and equity; (d) accountability and participation of the people; (e) rule of law and respect for human rights of the people; (f) sustainable natural resources management; and (g) environmental protection and restoration.	All persons shall be guided by the following principles in the performance of their functions under this Act – (a) transparency and inclusivity; (b) revenue maximization and adequacy; (c) efficiency and equity; (d) accountability and participation of the people; (e) rule of law and respect for human rights of the people; (f) sustainable natural resources management; (g) environmental protection and restoration; and	This addition is necessary to emphasize that all actions carried out under the Bill shall be underpinned by the use economic and tax policy to encourage, as opposed to discourage, environmentally friendly activities, such as climate mitigation and adaptation and natural resource conservation.

		(h) incentivization of environmental conservation activities	
6	(1) The functions of the Authority shall be to - (a) coordinate the preparation of benefit sharing agreements between an affected county and an affected entity; (b) review and, where appropriate, determine the royalties payable by an affected entity engaged in natural resource exploitation; (c) identify counties that are required to enter into a benefit sharing agreement under this Act in consultation with the respective county governments; (d) oversee the administration of funds set aside for community projects to be implemented under a benefit sharing agreement; (e) facilitate and monitor the implementation of a benefit sharing agreement entered into between a county government and affected entity; (f) conduct research regarding the exploitation and development of natural resource and benefit sharing in Kenya; (g) determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements; (h) advise the national government on policy and the enactment of legislation relating to benefit sharing in resource exploitation; (i) oversee the establishment of benefit sharing committees;	(1) The functions of the Authority shall be to - ... ~~(g) determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements;~~	Section 6(1)(g) of the current Bill provides that the Authority should determine appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements. This is despite the fact that the Authority coordinates the preparation of the agreements. Section 6(1)(g) should therefore be deleted to comply with the concept of *nemo judex in causa sua* which is a natural justice principle that means "no person can judge a case in which they have an interest". Instead, we propose the inclusion of a new separate dispute resolution clause that enables access to independent mechanisms for resolving conflict.

	(j) ensure the proper and timely payment of funds to counties and local communities as provided under this Act; (k) build the capacity of local communities in negotiations for benefit sharing in consultation with the relevant stakeholders; (l) prepare national guidelines on benefit sharing in consultation with the relevant stakeholders; (m) identify, in consultation with sector-specific organizations, incentives and benefits to promote the conservation of natural resources; (n) promote value addition in natural resources; (o) promote local content initiatives on the exploration and exploitation of natural resources under this Act; (p) promote the restoration of the environment after the exploitation of a natural resource in an affected county.		
6(3)	The Authority shall have regard to the following in performance of its functions – (c) obligations imposed on Kenya under any international treaty or agreement relating to the exploitation of natural resources.	(c) obligations imposed on Kenya under any international treaty or agreement relating to the exploitation of natural resources, their conservation, environmental protection, including but not limited to the Convention on Biological Diversity and the United Nations Framework Convention on Climate Change and any protocol or agreement thereto.	Kenya has committed itself to a variety of international environmental law treaties or agreements that promote natural resource conservation and climate mitigation. Such obligations should also be considered beyond traditional "exploitation."
7	(2) (a) The Chairperson shall be competitively recruited by the Public Service Commission and appointed by the President by notice in the *Gazette*.	(2) (a) The Chairperson shall be competitively recruited by the Public Service Commission and appointed by the President by notice in the *Gazette*. (b) The Chairperson shall perform the following functions: (i) chairing and leading board meetings;	The functions of the chairperson have not been outlined in the Bill. It is important to state the functions to in order to distinguish the roles from the Chairperson from those of the Director-General (DG) who is the Chief Executive

		(ii) ensuring that meetings are conducted in an orderly and efficient manner; (iii) coordinating the recruitment and selection of members of the Authority; and (iv) managing the relationships between the Authority, the public and all relevant stakeholders.	Officer of the Authority and secretary to the Board. While the roles of the DG are enumerated, those of the Chairperson are not.
15	The Board shall conduct its affairs in accordance with the provisions of the Schedule	The Board shall conduct its affairs in accordance with the provisions of the Constitution of Kenya, relevant legislations, and the Schedule of this Act.	The proposed definition has an expanded scope to ensure that the Board complies with the important regulatory framework of the country.
24	(1) The Authority shall, in consultation with the Council of County Governors and relevant national government entities and upon conducting public participation, determine and review the amount of royalties and fees payable by affected entities in respect of a particular sector where a written law does not prescribe the royalties or fees. (2) In making a determination under Subsection (1), the Authority shall take into account – (a) the total capital investment of the affected entity; (b) the prevailing international market value of the commodity from which royalty is payable; (c) the commercial viability of natural resource being exploited; (d) the impact of the exploitation on the local community, the affected county and the environment; and (e) obligations of the affected entity under any existing benefit sharing agreement with the affected county.	We recommend the modification of Section 24(1)(e) and adding a new section (f) as follows: (e) obligations of the affected entity under any existing benefit sharing agreement with the affected county, any community development agreement with impacted communities, any agreement with other relevant stakeholders, or obligations imposed by existing laws and regulations. (f) the activity's positive contribution to the environment as a justification for reduced or zero royalties or fees.	Section 24(1) (e) has been modified in the proposed recommendation in recognition of the fact that existing benefit-sharing agreements are not usually made just between affected entities and county governments. On the contrary, there usually exist other parties such as individuals, community organizations, government entities and many others, that impose obligations on the affected entity. In fact, the Climate Change (Amendment) Bill, 2023, already requires project proponents to enter into a "community development agreement" with impacted communities. Sub-section (f) is added to ensure the positive contribution of an activity is taken into account when determining

			royalties as a means of incentivising more of such projects.
24	2) In making a determination under Subsection (1), the Authority shall take into account – (d) the impact of the exploitation on the local community, the affected county and the environment; and	Amend this Section by inserting the words **direct and indirect:** (d) the direct and indirect impacts of the exploitation on the local community, the affected county and the environment;	To ensure comprehensiveness with respect to the different impacts that the exploitation can have on local communities, both direct impacts (e.g., employment) and indirect impacts (e.g., law enforcement) should be expressly stated in this Clause.
26	(4) In determining the ratio of sharing the retained revenue amongst counties sharing a resource under sub-section (3) the Authority shall take into account – (a) The contribution of each affected county in relation to the resource; (b) The inconvenience caused to the county in the exploitation of the natural resource; and (c) Any existing benefit sharing agreement with an affected entity	(4) In determining the ratio of sharing the retained revenue amongst counties sharing a resource under sub-section (3) the Authority shall take into account – (a) The contribution of each affected county in relation to the resource; (b) The inconvenience caused to the county in the exploitation of the natural resource; (c) The benefits enjoyed and costs incurred by each county in the exploitation of the natural resource; and (d) Any existing benefit sharing agreement with an affected entity.	The exploitation of resources usually results in benefits and costs. It is essential to determine the benefits and costs borne by each county when determining the benefit sharing ratios. For example, the resource may majorly be based in one county but another county faces majority of the side-effects from the exploitation going on in the other county.
27	(1) Every affected entity shall enter into a benefit sharing agreement with the relevant county government before the exploitation of a natural resource in the affected county.	(1) Every affected entity shall enter into a benefit sharing agreement in the form of agreement substantially reflecting that set out in the [Second] Schedule with the relevant county government before the exploitation of a natural resource in affected county, and the county government shall	There is currently only one schedule in the Bill, set out to guide the conduct of business of the board of the benefit sharing authority. We recommend the Bill create a second schedule that sets out a standard template for all benefit sharing

		ensure that the benefit sharing agreement is entered into without inordinate delay, and in any case no later than sixty days following the request for agreement being made by the affected entity. Where the county government rejects a request to enter a benefit sharing agreement with an affected entity or fails to enter the agreement within the sixty days, it shall provide the affected entity with its reasons in writing and make best efforts to complete the agreement immediately thereafter.	agreements outlining minimum provisions for a fair and equitable benefit sharing agreement. Should the Bill not adopt our proposal to create the schedule providing a benefit sharing template we propose that the benefit sharing authority develop one to guide parties and this requirement be set out in the Bill. There is also need for county governments to enter benefit sharing agreements without causing undue delays that jeopardize the operations of affected entities, hence the proposal for a prescribed timeline within which these agreements need to be considered and entered into.
27	1) Every affected entity shall enter into a benefit sharing agreement with the relevant county government before the exploitation of a natural resource in the affected county.	Insert a new Section 27 (3) stating as follows: The following shall be exempt from the requirement to enter into benefit sharing agreements under this section: (a) an affected entity conducting environmentally beneficial activities; or (b) an affected entity already subject to benefit sharing under an existing written law. Where any dispute arises on whether an affected entity is conducting environmentally beneficial activities under sub-section (a), this dispute shall be	Agreements with counties may be duplicative or unnecessary in some cases, including where a project is entirely located on private or communal lands, and a community development agreement or other such benefit-sharing agreement already exists. We propose an exemption for affected entities that are already subject to benefit sharing agreements under other written laws (to for example capture those running carbon projects and

		settled in accordance with the dispute resolution provisions set out in Section 44.	already covered under the Climate Amendment Bill for example); or entities carrying environmentally beneficial activities. A new dispute resolution provision (Section 44) is proposed to deal with any arising disputes.
30	30 (1) Every benefit sharing agreement shall be approved by the respective county assembly prior to the execution of the agreement by the respective county government	Insert additional wording as below- 30 (1) Every benefit sharing agreement shall be approved by the respective county assembly prior to the execution of the agreement by the respective county government , and the county assembly shall review and approve the benefit sharing agreement within thirty days of receipt of the agreement, failure of which the agreement shall be deemed as approved.	The requirement in this section involves the affirmative vote of a political body and has the potential to mire the project developers in potentially drawn-out negotiations and multiple layers of approvals, above and beyond what is already a very costly and time-intensive process. These added burdens will discourage project developers from establishing environmentally beneficial projects to conserve natural resources or combat climate change in Kenya. We propose a 30 day timeline within which a county assembly shall hear and approve benefit sharing agreements, otherwise they are deemed approved automatically to ensure the process is not drawn out.
31	Local Benefit Sharing Forum	Insert the following new sub-section (8): The County Government shall facilitate and ensure the unrestricted access to information necessary for the Local Community Benefit Sharing Forum to carry out its functions, within the limits of any written law.	This new wording is proposed to enable the Local Benefit Sharing Forum to be able carry out its community representative role under the Bill effectively, by having full information that is necessary for negotiating benefit

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			sharing agreements and identifying and overseeing the implementation projects.
37	(1) A person who – (a) Fails to furnish information required to be furnished to the Authority under this Act: (b) Makes a statement which the entity knows to be false or which the entity has no reason to believe to be true; or (c) Knowingly makes a false statement under this Act; commits an offence. (2) A person who is found guilty of an offence under subsection (1) is liable, on conviction, - (a) In the case of a natural person to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment; and (b) In the case of a body corporate to a fine not exceeding five million shillings. (3) Where a body corporate is found guilty of an offence under this Act, every officer of that corporation is deemed to have committed an offence and is liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.	Deletion of sub-section 3 in its entirety ~~(3) Where a body corporate is found guilty of an offence under this Act, every officer of that corporation is deemed to have committed an offence and is liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.~~ (4) An affected entity ~~that continues to be in breach of this Act~~ that is convicted of an offence within this Act, may be liable to the cancellation of its license	Sub-section 3 of this section is unreasonable. The sub-section aims to impose criminal liability on every officer of a corporation regardless of knowledge or intent and should be struck off. Such punitive punishments will only discourage project proponents from investing in Kenya. Sub-section 4 is vague, unclear and creates an opportunity for negative exploitation. It is not clear what breach of this Act means, there is need for clarity on what would possibly warrant an affected entity's loss of its license. Punitive punishments issued without clarity of reason and or process would discourage project developers from investing in the country.

	(4) An affected entity that continues to be in breach of this Act may be liable to cancellation of its license.		
38	Transitional provisions	Add a new sub clause 38(3) that states: Where an affected entity has prior to the commencement of the Act already entered into a benefit sharing agreement with a relevant county government for an ongoing project, the terms agreed shall continue to apply between the parties until their contractual expiry.	Our suggested amendment is aimed to prevent the reopening of negotiations on the commercial and non-commercial terms already agreed in benefit sharing agreements for ongoing projects.
44	N/A	Insert the following new Section 44 o n dispute resolution: 44 (1) Any dispute arising under this Bill shall be subject in the first instance to the dispute resolution mechanism set out in the benefit sharing agreement between parties and be resolved within thirty days from the date the dispute is raised. (2) Where a dispute is not resolvable in accordance with subsection (1) as a benefit sharing agreement is not yet in force; the benefit sharing agreement does not contain a dispute resolution mechanism clause; or the dispute is not resolved within thirty days as required, the dispute shall be referred to the National Environmental Tribunal.	The Bill does not contain a standalone dispute resolution mechanism and it is important to include one. The one instance dispute resolution is mentioned in the Bill is in Section 6 (1) (g) where the Benefit Sharing Authority is granted the function of *"determin[ing] appeals arising out of conflicts regarding the preparation and implementation of benefit sharing agreements."* We submit that the National Benefit Sharing Authority is not an appropriate body to determine resolve disputes between the parties since it is involved in matters such as the preparation of benefit sharing agreements which may present a conflict of interest, and we

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		(3) Where a party to a dispute in subsection (2) above is dissatisfied with the decision of the National Environmental Tribunal the party may lodge an appeal before the Environment and Land Court.	propose a more neutral party through this proposed addition.

PEACE AND DEVELOPMENT NETWORK TRUST
(Peace-Net Kenya)

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10/10/2023

The Clerk, National Assembly.

Dear Sir,

RE: MEMORANDUM ON THE NATURAL RESOURCES (BENEFIT SHARING), BILL 2022 BY PEACE AND DEVELOPMENT NETWORK TRUST (PEACENET)-NORTH EASTERN REGION

Pursuant to the invitation for memoranda for Kenya Gazette Supplement No. 177 (Senate Bills No. 6), the Natural Resources (Benefit Sharing) Bill 2022, Peace and Development Network Trust-North Eastern Region, wishes to make the following submission as it relates to the bill and how it can contribute to equitable and mutually beneficial sharing of water resources between farmers and herders. The submission is based on experiences arising from conflicts between herders and farmers along the 400 kilometres boundary between Garissa and Tana River counties.

Considering that the bill aims at providing an overarching framework for establishing and enforcing a system of benefit sharing between resource exploiters, the national government, county governments and local communities, considering that due to climate change induced vulnerabilities, water is becoming increasingly scarce, and a cause of intercommunal conflicts driven by competition over who gets to benefit from accessing and using water resources, there is a need to have a dedicated sub-section in the bill that addresses equitable and reasonable access to water resources between counties and communities therein.

Background to Conflict over access and use of Tana River between Communities

Devolution in Kenya has had immense benefits accruing from giving citizens an opportunity to participate in governance at local levels, equitable share of resources nationally and decentralization of development. However, it has had downside especially emergence of county-based interests which are exacerbating already existing conflict formations may they be ethnic, religious or clan based among other fault lines. Among the interests are access, control and sharing of transboundary resources especially in zones where county boundaries remain contested. Demographic pressures, climate change induced vulnerabilities, competing access and exploitation of resources inevitably have continued to incubate and intensify these conflicts.

Along the border areas between Garissa and Tana River counties, conflicts have persisted arising out of contested borders and territories, access to resources especially water and pasture and competing resource uses-land and water- particularly between pastoralists and

farmers. There is a contested 3-mile strip territory to the Tana riverbank which serves as the boundary between Garissa and Tana river counties.

Though many official justifications for the three-mile strip exists, within the historical context, the most plausible rationale for the three-miles strip is that the colonial government and post-colonial government retained the three-mile strip largely due to fears-real and imagined-that the predominantly Somali regions on Northern Kenya wanted to secede and join the "Greater Somalia". In case of such secession, the three-mile strip sought to ensure that Tana River remained in Kenya. Decades later, this unresolved three-mile strip question remains a classic case of historical injustice especially for a county that has had very painful experiences in the past.

This three-mile strip between Garissa and Tana River counties is a flashpoint for farmer-herder conflict which has been enduring. Factors which have led to these conflicts are:

- ✓ Strong sense of historical grievances especially by pastoralists on the colonial boundary between the two counties;
- ✓ Climate change induced vulnerabilities which are intensifying conflicts over access to land and water resources leading to frequent incidences of violence causing deaths, injuries and losses;
- ✓ Demographic pressures;
- ✓ Political incitements and administrative dynamics;
- ✓ Blockage of access to the river and ddestruction of crops: On one hand, herders often find it challenging to access the river due to farmers blocking access and this forces them to drive their livestock through farms where they destroy crops. In retaliation, the farmers slash the livestock with machetes. This has led to a loss-loss situation, with farmers losing their crops and herders losing their livestock. At times, this has led to armed clashed between farmers and herders.

In the light of the ongoing conflicts over access to water between the herders and farmers, we observe that, access to water is a right enshrined in the constitution and is critical to sustaining livelihoods, and the **Constitution of Kenya, 2010:** Article 69 (1) obliges the state to ensure sustainable exploitation of the environment and natural resources and the equitable sharing of the accruing benefits.

Thus, we recommend the following for inclusion in the bill:

i. To make the bill more inclusive of different scenarios where natural resources are exploited, in part one, sub-section 2 on definitions:
   a. Expand the definition of affected entity to include **communities** that have to share a natural resource either for subsistence or commercial purposes;
   b. Expand the definition of exploitation to include **non-commercial benefits** such as subsistence.
   c. Redefine local community to mean people living in an **area** within which a natural resource is situated instead of in a **"Ward"**
   d. In place of people displaced to make way for the exploitation of natural resources, redefine as "people **negatively and directly** affected by the exploitation of natural resources".

ii. Among the principles guiding the bill, include the principle of "**Equitable but differentiated needs**". The principle recognizes that while addressing a particular issue, resource allocation, or policy development, different individuals or groups have **distinct needs or requirements**. These needs should be addressed in a **fair and just manner**, ensuring that everyone has access to the necessary resources or support to meet their specific requirements.

iii. Considering the critical importance of water as a natural resource, have a sub-section on beneficial and equitable access to water resources. The section should make provisions for establishing and demarcating water corridors for herders at intervals of 10 kilometers. This will affirm the principle of **"Equitable but differentiated needs"**. Importantly, it will help address the many violent conflicts between pastoralists and farmers over access to water resource.

iv. On Part II, Section 6 which addresses the functions of the Benefit Sharing Authority, give the authority a mandate to develop guidelines on natural resources sharing between communities in situations where equitable share of a natural resource is essential to survival and livelihoods of affected communities. E.g. riverine resources.

v. A broader and inclusive definition of benefit sharing to capture equity, monetary and non-monetary gains such as access to water resources e.g. rivers.

vi. In section 28, 2 (d), on composition of County Benefit Sharing Committee, include inclusion of youth in the membership.

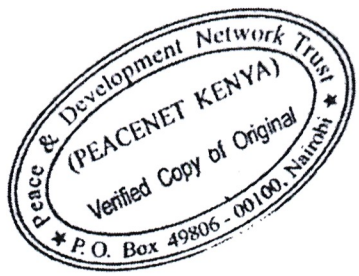
vii. In section 29 (8), include "the County Chief Officers responsible for matters relating to natural resources in the respective counties shall serve as joint secretaries to the Committee.

Thank you.

Signed

Mohamed Sharif Abdi

PeaceNet Coordinator, North Eastern Region.



NatureKenya
THE EAST AFRICA NATURAL HISTORY SOCIETY

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NATIONAL ASSEMBLY
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04 SEP 2023
CLERK'S OFFICE
P.O. Box 41842, NAIROBI

D/DC
Please deal.
05/09/23

The Clerk of the National Assembly.
P.O. Box 41842-00100
Nairobi. Kenya

Fred otieno
to facilitate
6/9/23

1st September 2023

Dear Sir.

Re: Submission of Memoranda on Natural Resource (Benefit Sharing) Bill (Senate Bills No.6 of 2022)

Nature Kenya – the East Africa Natural History Society - appreciates the National Assembly for this consultation.

We have reviewed the bill and noted that the bill proposes a revenue sharing formula as follows: 20% to sovereign wealth fund of National Government (60% futures fund; and 40% natural resources fund). Of the balance of 80% to be shared 60% to national and 40% to county (40% community projects and 60% county expenditure).

Nature Kenya requests your consideration of the following recommendations, based on public participation and equity, being our submissions:

1. Amend the definition of "benefit; to read as follows:
   "benefit" means any gains, proceeds or profits from the exploitation of natural resources, that are determined not to lead to the following risks:
   a. Reduction of returns on green projects thus reducing the incentive to invest in green economy projects.
   b. Increase in the cost of solar power which will discourage people from installing solar panels, and drive some users back to fossil fuels such as kerosene.
   c. Increase the cost of wind power, keeping electricity bills high and driving up inflation.
   d. Increase cost of exploiting water legally, driving people to continue illegal abstraction".

2. Amend definition of **"benefit sharing"** to read "means the sharing of any benefits arising from the exploitation of natural resources in a fair and equitable manner where the costs accruing to communities conserving the resource as the most important custodians are offset for local communities to see net benefits from natural resources projects in order to preserve the natural resources".

3. Nature is undergoing serious degradation. Urgent action is needed now! The best investment for the future generation is intact natural resource base. Therefore change Clause 8 (2) as follows:

Clause 8 (2) The monies paid into the sovereign wealth fund under subsection (1)(a) shall be paid as follows into the following funds constituting the sovereign wealth fund —

(a) Two per cent shall be paid into a futures fund; and
(b) Ninety-eight per cent shall be paid into a functional natural resources fund, to be used for natural resource conservation, rehabilitation of depleted natural resources and social and economic development of communities.

4. The bill needs to factor in management and conservation of the natural resources in addition to exploitation. Natural resources do not manage themselves hence the cost incurred by management

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agencies need to be met before sharing of benefits accrued. These agencies include mandated government agencies, national non-governmental and civil society organizations. Community Based Organizations such as Water Resource Users Associations, Community Forest Associations and Site Support Groups and others who can demonstrate their contribution in conservation and management of natural resources.

Specific comments:

Preliminary: Clause 1 – Review the definition of the terms "*affected entity*" currently reading *"an organization or person involved in the exploitation of a natural resource"* to read:

Affected entity, *"an organization or person involved in the **conservation, management** or exploitation of a natural resources"*.

Application of the Act: Clause 3 – The bill needs to recognize that there are natural resources whose value today is yet to be determined. The ecosystem services offered by the resources need to have a value. This will increases the natural resources benefits and contributions. These services include clean air, rainfall, clean water, shelter, carbon sequestration and medicinal values. Amend Clause 3 as 90follows:

ADD (g) soil and sand.

ADD (h) Ecosystem services whose value is yet to be determined.

Guiding principles of benefit sharing: Clause 4 – Amend to include the principle of costs and costs sharing. The bill is skewed to focus on **benefits** without factoring those that interact with natural resources by managing them. Those managing conservation areas incur huge costs including human injuries, deaths, livestock predation and destruction of property. These costs should be included to cushion communities that have suffered without any forms of compensation. Therefore amend to add *"recognition and factoring of costs and cost sharing"* as a principle to read:

Clause 4, (g) *"recognition and factoring of costs and cost sharing"*

Collection of royalties and fees: Clause 6 - Amend Clause 6 (1) by adding *"relevant stakeholders and communities"* to read as:

*Clause 6 (1) "the commission shall in consultation with the Council of County Governors and relevant national government entities, **and relevant stakeholders and communities**, determine and review the amount of royalties and fees payable by affected entities in respect of a particular sector where the written law does not prescribe the royalties or fees"*.

Collection of royalties and fee: Clause 8 (3): Communities bear the greatest responsibility and costs towards protection and conservation of natural resources. The Bill needs to provide for adequate incentives.

Amend clause 8 (3) to increase the percentage for community projects from 40 to 60% to read as:

*60% of the revenue assigned to the County Government shall be utilized to implement local community **projects geared towards protecting, conserving and promoting sustainable use of natural resources** while 40% shall be utilized for the benefit of the entire County.*

Since Kenya doesn't have a large, highly-profitable extractive industry on which to base a Sovereign Wealth fund, the Government should consider tapping global natural resource extraction such as by adding a carbon border tax such as the EU is doing.

Yours sincerely

Paul Matiku,
Executive Director, **Nature Kenya**

A short history of Nature Kenya is attached for your information.

Background information about Nature Kenya

Nature Kenya - the East Africa Natural History Society (EANHS) - is Africa's oldest environmental Society, established in 1909 to promote the study and conservation of nature in eastern Africa. We remain a non-political and not for profit membership Society. Our mission is connecting nature and people. Our work is firmly based on partnership, science and action. We use the best available science to inspire positive action for biodiversity by and for partners - Government, local communities and private sector.

Nature Kenya takes practical action. We work with and for people - to improve their quality of life alongside, and as a result of, nature conservation. We collaborate with others wherever possible, at local, national, regional or global levels, linking with community groups, governments, businesses, universities and civil society groups to increase the impacts of our efforts.

Some of our achievements include:

- Founded the National Museums of Kenya, now a world-renowned institution for research and education.
- Published, since 1910, the *Journal of East African Natural History*, a respected scientific journal now jointly produced with the National Museums.
- Established and maintained, with the National Museums of Kenya, a comprehensive natural history library.
- Engaged its members in the study, enjoyment and conservation of nature in Eastern Africa, through field trips, lectures, publications, and opportunities to take part in research activities since 1909.
- Identified and designated Important Bird Areas (IBAs) for Kenya, in collaboration with the National Museums; and documented the plants, animals and other biodiversity of Eastern Africa as a contribution to expanding the taxonomic scope of priority setting from IBAs to Key Biodiversity Areas (KBAs). Since IBAs are KBAs based on birds, they are today referred to as Important Bird and Biodiversity Areas.
- Encouraged and supported community-based organizations to become Site Support Groups (SSGs) promoting conservation and alternative livelihoods at Important Bird Areas, especially those without official protection status.
- Developed partnerships among Government and non-government organizations for sustainable conservation action at IBAs through the Important Bird Areas National Liaison Committee (IBA-NLC). We work with others in the development of policies, legislation and institutional frameworks that safeguard the ecological sustainability of IBAs in Kenya
- Mobilized resources to connect nature and people to take action for biodiversity conservation through development and implementation of donor funded projects at priority IBAs in Kenya.
- Work globally through the Birdlife International Partnership and its network of like-minded organizations in Eastern Africa and beyond in 117 countries and territories.

For more information visit our website at www.naturekenya.org

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The Clerk of the National Assembly
P.O.Box 41842-00100
Nairobi,
Kenya

4th September 2023

Fred otieno
to facilitate
LG 6/9/23

Dear Sir,

Wildlife Works is pleased to send you the following comments on The Natural Resources (Benefit Sharing) Bill, 2022

Who we are

- Wildlife Works is a community-centred forest conservation company that develops and implements reducing emissions from deforestation and forest degradation (REDD+) projects.
- Through our projects, we aim to enable local communities and governments to protect forests and biodiversity, develop sustainable livelihoods, and meet the goals of the Paris Agreement.
- Wildlife Works is the largest REDD+ project developer in the world by historic carbon credit issuance, and the largest project developer in Africa.
- Our first REDD+ project was the Kasigau Corridor Project in Taita Taveta County. It was also the world's first ever REDD+ project registered under Verra.
- The Kasigau Corridor Project is 200,000 ha, generating over 1.5M tons of carbon credits per year. As part of the benefit sharing agreement with communities, over US$1.6 million has been invested in Taita Taveta's public services over the last three years at the direction of the local community, including in water infrastructure, roads, healthcare, education, and agriculture.

Introduction

We welcome the Kenyan Governments efforts to ensure the benefits of any natural resource exploitation are shared fairly, and the rights of indigenous peoples and local communities are respected. Clearly Kenya is pioneering the way forward in these areas.

However, we are concerned that conservation projects, including those that issue carbon credits, could be interpreted as falling within the definition of 'exploitation' of natural resources in the bill. It is also not clear how this bill links to other, related bills, such as The Climate Change (Amendment) Bill and The Carbon Credit Trading and Benefit Sharing Bill.

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Comments

There are other bills assented and in development that will make benefit sharing requirements of carbon projects:

- The Climate Change (Amendment) Bill 2023 requires community development agreements in carbon projects. These agreements see that 40% of aggregate earnings from land-based projects is managed and disbursed to the community.
- The Carbon Credit Trading and Benefit Sharing Bill, currently in draft form, is also making benefit sharing requirements of carbon projects.

As such, we would ask that the Natural Resources Bill makes it clear that these projects do not fall within its jurisdiction. It will not be possible to satisfy the financial requirements of all three bills in their current form. Nor will it enable any future land-based projects to be developed in Kenya, as they will be financially unviable.

The bill itself asks the Benefit Sharing Authority to identify incentives and benefits to promote the conservation of natural resources. One way to do this is by incentivizing nature-based solutions, that are made feasible by selling carbon credits on the carbon market, removing any requirement for public funding.

Recommendations

Make clear that conservation and nature positive projects do not qualify under the definition of 'exploitation'. The definition is unclear, as it refers to the 'use' of natural resources. This could encompass conservation or even projects which uplift biodiversiuy.

Defer to the Climate Change (Amendment) Bill 2023 for all carbon related benefit sharing requirements, so as not to double tax or confuse.

Remove reference to the Wildlife Conservation and Management Act (WCMA) at Article 41. The inclusion of the Natural Resources (Benefit Sharing) Bill in the WCMA will disincentivize wildlife and biodiversity conservation, making it more difficult for Kenya to achieve its sustainability targets.

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05/09/23

MEMORANDUM ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL, 2022.

TO: THE CLERK OF THE NATIONAL ASSEMBLY
DEPARTMENTAL COMMITTEE ON ENVIRONMENT, FORESTRY AND MINING.

Fred Obiero
To facilitate
6/9/23

FROM: THE NATURAL RESOURCES OF KENYA WORKING GROUP including;

1. **Transparency International Kenya**

   Transparency International Kenya (TI-Kenya) is a non-profit organization founded in 1999 in Kenya with the aim of developing a transparent and corruption free society through good governance and social justice initiatives. TI-Kenya is one of the autonomous chapters of the global transparency international movement that are all bound by a common vision of a corruption free world. The mission is to champion the fight against corruption by promoting integrity, Transparency and accountability.

2. **Kenya Oil and Gas Working Group (KOGWG)**

   The Kenya Oil and Gas Working Group (KOGWG) is a public interest network that advocates for sustainable development and good governance of the nascent Oil and Gas Development Sector in Kenya.

3. **Community Action for Nature Conservation (CANCO)**

   Community Action for Nature Conservation is a public interest Environmental Civil Society Organization registered under the NGO Coordination Act (1990) of the laws of Kenya in 2008. It consists of multi-disciplinary professionals and practitioners motivated and committed in advocating for and contributing to good environmental governance, conservation and sustainable use of natural resources and responsible development.

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4. **Conservation Alliance of Kenya**

Conservation alliance of Kenya a membership organization registered in Kenya as an umbrella body to advance the preservation, protection and management of wildlife and its habitats and features of landscape with geological an physiographical value in Kenya.

5. **NATIONAL ALLIANCE OF COMMUNITY FOREST ASSOCIATIONS**

This is an umbrella association of all registered Community Forest Associations in Kenya. Its main activity is to lobby policies and advocate for the rights of communities.

6. **KENYA WILDLIFE CONSERVANCIES ASSOCIATION**

The Kenya Wildlife Conservancies Association (KWCA) is a national landowner and community led membership organization, established in 2013 to catalyse the growth of, and act as a collective voice for community and private conservancies in Kenya. KWCA works to create an enabling environment for conservancies to thrive by advocating for the right policies, laws and incentives, and supporting them through information sharing and capacity building. KWCA's network consists of 184 wildlife conservancies from across 31 Counties covering more than 7.1 million hectares, directly impacting the lives of 930,000 households and securing the 65% of the country's wildlife that is found outside national parks and reserves.

7. **KENYA NATIONAL ASSOCIATION OF WATER RESOURCES USERS' ASSOCIATION**

The Kenya National Association of Water Resources Users Association is a national forum bringing together all the Water Resources Users in Kenya. The Association advocates for good Water governance and sustainable management of Water Resources Management in Kenya.

8. **NATIONAL ENVIRONMENT CIVIL SOCIETY ALLIANCE OF KENYA**

This is an Alliance of individual CSOs that articulate and advocate for issues on the environment and Natural Resource Management in Kenya.

9. **EAST AFRICA WILDLIFE SOCIETY**

This is an organization dedicated to maintaining and improving one of the most pristine and rich natural resources left on the planet.

10. **INTER-RELIGIOUS COUNCIL OF KENYA**

This is a coalition of all major faith communities in Kenya that works together to deepen interfaith dialogue and collaboration among members for a common endeavour to mobilize the unique, moral and social resources of religious people and address shared concerns.

11. **SUSTAINABLE ENERGY ACCESS FORUM OF KENYA**

This is a forum bringing together energy sector players in Kenya to enhance multi-stakeholder engagement in addressing challenges facing energy sector.

12. **KENYA CHAMBER OF MINES**

This is an organization representing the interests of Kenya Miners and Mineral traders.

ASSOCIATION OF WOMEN IN ENERGY AND EXTRACTIVES IN KENYA

This is a Nationwide organization that aims to connect women in Kenya with professional and business opportunities in the extractives value chain through fostering relationships and sharing knowledge and experiences.

13. **NATURAL JUSTICE**

This is a Pan-African Organization for lawyers for communities and the environment specializing in human rights and environmental law in pursuit of both social and environmental justice.

14. **Drylands Learning and Capacity Building Initiative (DLCI)**

    This is a national organization with aims to improve policy and practice in the horn of Africa.

INTRODUCTION

Environmental Civil Society Organizations and Community Based Organizations listed above convened and had an opportunity to review the Natural Resources (Benefit Sharing) Bill 2022. This written submission is premised on civil society and public participation requirements and duty to ensure good governance by duty bearers that will ensure revenues accrued from the sustainable utilization of natural resources benefit the people of Kenya as well as ensure the protection of both the environment and human life.

The Natural Resource (Benefit Sharing) Bill 2022 is a positive step in establishing a system of benefit sharing in Natural Resource utilization by both the National Government, County Governments and local communities. The Kenyan Constitutional under Article 69 gives the National Assembly the obligations to legislate laws and Regulations on the environment and Natural Resources for intergenerational and intragenerational wealth.

Based on the expertise, experiences and tacit and explicit knowledge, all the above-listed organizations wish to make the following general and specific submissions and recommendations for consideration towards the improvement of the bill: -

GENERAL COMMENTS

1. The bill needs to be harmonized with existing laws that govern natural resources including the Mining Act, 2016, Petroleum Act, 2019, Energy Act, 2019 and Fisheries (management and development) Act 2016, Natural Resources (classes of transactions subject to ratification) Act no. 14 of 2016, Environmental Management and Coordination Act, 1999, Wildlife Conservation and Management Act 2013, Community Land Act 2016 in order to avoid conflict on between the bill and already enacted laws.

2. While the bill proposes to include a provision on Access to Information under the Miscellaneous Provisions Section, Access to information is a fundamental right provided for under Article 35 of the Constitution of Kenya. It is very critical for enhancing the participation of citizens in decision making processes that affect them including the management of natural resources. In this case, access to information including contracts and benefit sharing agreements entered into will also help enhance transparency and accountability among the duty bearers.

3. Inclusion of a local community benefit sharing agreement in addition to the county benefit sharing agreement, or rather, an elaborate guidance on how local communities' interests will be reflected in the county benefit sharing agreement.

4. The Bill should propose a model benefit sharing agreement to be included as an Appendix, outlining basic provisions, including rights and obligations that must be contained in benefit sharing agreements.

5. Transition provisions should provide for timelines for the establishment of the various Funds referenced under the Bill.

6. The Bill should incorporate provisions specifying a transparency and accountability criteria for the allocation and investment of the benefits.

7. The Bill does not clearly bring out the element of public participation. It is not clear at what point in the benefit sharing cycle the public should be involved. The public/local community should have power to negotiate.

8. The Natural Resources (Benefit Sharing) Bill 2022 makes reference to the draft Sovereign Wealth Fund Bill, 2019. Proposal to fast-track the enactment of the Sovereign Wealth Fund Bill 2019 in order to operationalize the futures fund and the natural resources fund proposed under section 8 (2).

Specific Recommendations

Clause	Concern	Recommendation	Rationale/ Justification
Clause 1, Interpretation	Definition of revenue	Term revenue should be defined as anchored in the Kenya Revenue Authority Act, 2012.	The term revenue is applicable differently in sectors covered by the Act
	Definition of royalties	Replace the term royalties with the definition of Revenues from section 2 of the Kenya Revenue Authority Act, 2012.	Need for the bill to adopt a more comprehensive definition which Includes taxes, duties, fees, levies, penalties, fees or other monies collected by government from an affected entity.
	Definition of Benefits	Revise the definition to include both monetary and non-monetary proceeds from	This definition will be wholistic and thus prevent limiting the Benefit Sharing Agreements to revenues only.

		exploitation of natural resources	The provisions Benefit Sharing Agreement are inclusive of both monetary and non-monetary benefits. Important in the harmonization of the definition with the provision under the section.
	Definition of Benefit Sharing Agreement	Replace the term revenues with monetary and non-monetary benefits	
			Anchoring the SWF is important in fast-tracking of the enactment of the SWF Bill 2019.
	Definition of sovereign wealth fund. The SWF Bill 2019 provides for the administration and efficient management of minerals and petroleum revenues. 2022	Need for the bill to retain the Sovereign Wealth Fund. This is factoring the principle of inter-generational equity and consideration of present exploitation and exploration for future generations.	The establishment of the futures fund and the natural resources fund in the SWF bill 2019 depends on the enactment of the SWF Bill 2019.
			Genetic Resources are unique and expensive despite the fact that there is no

	Definition of Genetic Resources Definition of a local community "Natural Resources" interpretation and meaning	There is need to adopt the definition under the Wildlife Conservation and Management Act There is a need to ensure that the word used is "or" and not "and" to ensure that the communities that are not displaced but are found near a natural resource benefit from the natural resource. Include definition to the provided in the Constitution of Kenya 2010	Legal Framework governing the same. E.g. snake Antivenom The definition of a local community bars communities who are affected by the exploitation of natural resources in other ways other than displacement from falling under the definition of a local community. Has the meaning assigned to it in Article 260 of the Constitution to incorporate rocks and other sources of energy.
Clause 3, Application of the Act.	List of Natural Resources	Inclusion of schedule that incorporates all natural resources	This will allow leeway for the bill to legislate natural resources sectors not outlined under section 3.
Clause 3, Application of the Act.	Clause 3(d) wildlife resources	Replace with:	The issue of land ownership in wildlife conservation and management ought to

		Wildlife resources in National Parks	be considered in benefit sharing regimes. This is because the cost of conservation is borne by the host of wildlife, only as a land use (s. Land Act) whether private or community conservancies. It is therefore not justifiable that the same regime is applied for public lands vis-à-vis private and community lands.
Clause 4, Guiding principles of benefit sharing	Principles	Inclusion of principle of inter-generational equity	This will take into consideration of present exploitation of natural resources that can benefit future generations.
Clause 6(1), Paragraph (g)	Functions of the Authority	We recommend the deletion of this clause and the inclusion of a separate provision in the Bill which provides that appeals arising out of conflicts be heard and determined by the Cabinet Secretary. Further appeals from decisions of the Cabinet Secretary can be made to the	As the body responsible for overseeing the implementation of the provisions of this Bill, appeals arising out of conflicts relating to benefit sharing agreements should be lodged with and determined by a different independent body. This is because it is likely that such conflicts may not only arise between parties to the benefit sharing agreement but also arise

Clause 6(1), Paragraph (o)		High Court all the way to the Court of Appeal whose decision shall be final. Inclusion of Regulations on local content	out of certain actions and decisions of the Commission. Due to lack of an existing law on Local Content, affected entities may take advantage hence the Authority should oversee, coordinate and manage development of local content. Affected entities should be mandated to submit to the Authority local content plans.
Clause 7 (1), Board of the Authority	Composition of the Benefit Sharing Authority board	Inclusion of; • PS Wildlife • PS Water • PS Forestry • At least 4 Non-Government officials (CSOs and indigenous communities)	In order to ensure inclusivity taking into consideration the sectors outlined under section 3.

Clause 24(3), *"Where a written law prescribes the royalty, fees, payments or benefit sharing in a particular natural resource, the relevant written law shall apply with respect to that sector."*	Imposition of royalties and fees	6 (3) Where a written law prescribes the royalty, fees, payments or benefit sharing in a particular natural resource sector, the relevant written law shall apply with respect to that sector. Provided that, where the terms under the provisions of this Act conflict with terms under the relevant written law referred to above, the provisions of the law with terms that best promotes local content and the trickling down	Although there are provisions regarding benefit sharing under other sector specific laws, these provisions are not necessarily suitable and favorable to communities. Therefore, where the specific laws conflict with the provisions of this Bill, the provisions of this Bill or the law with favorable terms should prevail. This will promote local content.

		of benefits to local communities shall prevail.	
		Alternatively, this Part be amended to make the Bill the primary statutory framework on benefit sharing.	Where the aim of the Bill is to supersede existing legislative frameworks governing benefit sharing in other sectors, it can be to harmonize various fragmented sectoral provisions on benefit sharing into a single and authoritative benefit sharing framework applicable across sectors.
Clause 25 (1) , Collection of Royalties		Inclusion of fees after the word royalties	To ensure consistency with section 24 (1) that covers both royalties and fees.
Clause 27 (2) , Benefit Sharing Agreement	Benefit Sharing Agreement	Inclusion of monetary benefits as well as non-monetary which will accrue to the county.	Need to harmonize the bill in ensuring that benefits are monetary and non-monetary.
Clause 28 (2) (d) five persons, two of whom shall be of the opposite gender, elected by the local communities where	Add person with disability and Youth representative	Section 10 (2) (d) should include representation of persons abled differently and youth	Inclusiveness and Equal Opportunities to Persons with Disabilities and youth.

the natural resource is found and representing the areas with the main natural resources within the county.			
clause 30	Add sections in line with the right to access to information	Section 30 (3) Subject to Article 35 of the Constitution of Kenya and section 4 of the Access to Information Act, 2016 and any other written law and regulations.	Access to Information is a constitutional right.
Clause 30 (2) : Approval of a Benefit Sharing Agreement	Timeline for depositing the Benefit Sharing Agreement with the Authority	Section should be revised to read '..Each benefit sharing agreement shall be deposited with the authority within twenty one days of its execution and a copy shall simultaneously be submitted to the Senate..'	21 days provide adequate time to for the Benefit Sharing Agreement to be deposited with the Authority.
31. (1) There shall be established by each affected	Delete the term affected	Section 31. (1) to read 'There shall be established by each	All natural resources are on land hence the justification to use Community Land

local community a Local Benefit Sharing Forum comprising of five persons, two of whom shall be of the opposite gender, elected by the residents of the local community.		local community a Local Benefit Sharing Forum comprising of five persons, two of whom shall be of the opposite gender, elected by the residents of the local community.'	Act, 2016 which provides a wholistic and comprehensive definition of local community.
31.(3) Appointment of members of the Local community benefit sharing forum		Delete section.	Contradicts section 31 (1) which provides that the members of the local community benefit sharing forum shall be elected by the members of the local community. This clause provides for democracy in the election as opposed to section 31 (3) that may be subject to manipulation and interest by the respective County Executive Committee. The local community benefit sharing forum shall be gazetted
Clause 41	Amendment to section 76 of Act no. 47 of 2013	Revision of clause to read Section 76 of the Wildlife Conservation and	Incentives in Wildlife conservation is a key aspect that needs to be retained in law.

	(Wildlife Conservation and Management Act)	Management Act is amended by: - a) Deleting the following words in subsection (1) "in consultation with the Commission on Revenue Allocation, formulate guidelines regarding... benefit sharing, and the nature and manner in which the same shall be distributed." b) Inserting subsection (1B) 'The revenues received by the National Government from wildlife in National Parks shall be paid into the National Treasury and apportioned in accordance with section 26 of the	There is therefore need to retain the aspect of incentives in Section 76(1)

		Natural Resources (Benefit Sharing) Act.	

On behalf of the Natural Resources of Kenya Working Group, a coalition of organizations interested in natural resources management, that have jointly worked towards the review of the bill and collation of recommendations;

Muturi Kamau

National Network Coordinator
Kenya Oil and Gas Working Group
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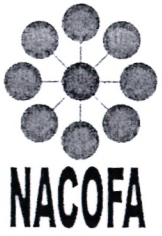
TRANSPARENCY
INTERNATIONAL
KENYA


KENAWRUA
Maji Yetu, Jukumu Letu


KENYA OIL & GAS
WORKING GROUP


CONSERVATION
ALLIANCE
OF KENYA


NACOFA


THE EAST AFRICAN
WILDLIFE SOCIETY


COMMUNITY ACTION FOR NATURE CONSERVATION
CANCO


NECSA
NATIONAL ENVIRONMENT CIVIL
SOCIETY ALLIANCE OF KENYA


OXFAM


SWIOTUNA


NATURAL
JUSTICE
LAWYERS FOR COMMUNITIES AND THE ENVIRONMENT


TuFA
KENYA


AWEiK


INTER-RELIGIOUS COUNCIL of KENYA


HAKI MADINI
KENYA
Madini Yetu, Wajibu Wetu

ATUDIS
Agency for Turkana Development Initiatives

KFWG
KENYA FORESTS WORKING GROUP

DLCI
Drylands Learning and Capacity Building Initiative

KWCA
Kenya Wildlife Conservancies Association
Living nature, Living people

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SWT/Ref/9/4/2023

September 4, 2023

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CLERK'S OFFICE
P.O. Box 41842, N

The Clerk
National Assembly
Nairobi

Dear Sir/Madam,

RE: THE NATURAL RESOURCES (BENEFIT SHARING) SENATE BILL NO. 6 OF 2022

This is the brief memorandum of the Samburu Women's Trust, an indigenous women-led institution based in Nanyuki working for the advancement of women and girl rights among indigenous communities in the country, on the BENEFIT SHAIRING BILL, 2022. Our concerns and issues are captured below;

Section 3 of the Bill is on preliminaries of the proposed legislation and makes a definition of the various natural resources it covers;

The question of Land as a natural resource is not incorporated here. The indigenous and marginalized people of Northern Kenya live in a large swathe of land territory widely exploited for infrastructural development and other national projects. Way leave for programs such as LAPSSET or KETRACO power transmissions eat into large community land without compensation or consultations leaving people helpless and subjugated to the national administration. The context of land as a community natural resource should be reviewed.

Section 4 of the Bill expounds the guiding principles of the proposed law. They includes a) transparency and inclusivity; (b) revenue maximization and adequacy; (c) efficiency and equity; (d) accountability and participation of the people; (e) rule of law and respect for human rights of the people; and (f) sustainable natural resources management. This is good.

The Samburu Women's Trust proposes that in addition, a sub clause in the section should ADD that *the guiding principles shall be interpreted in a manner that permits the advances the rights and interests of the host communities*

The Benefit Sharing Board of the Authority is established under Sec 7 of the Bill
We propose for a review of the various theme sectors identified to rationalize or reduce them (they are too many and other pertinent ones such as fishing and wildlife are not even included). This aspect of nomination may consider source categories of Board representation from stakeholder groups such as Private Sector, NGOs, Traditional Community Members, etc. instead of the sectoral theme groups.

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The Benefit Sharing Authority has wide ranging and important functions including the potentially controversial responsibility of identifying counties that require to enter into a benefit sharing agreement for the commercial exploitation of natural resources within the counties. As such an appeal framework against some of its decisions is required/necessary

PART III of the Bill is on Collection of Royalties and Fees.

We propose for a review of the formulae to a 50: 50 ratio for the reason that the host counties play significant historical and moral obligations to keep/maintain the natural resources and should enjoy the benefits of the resources equal to the national government.

The County Benefit Sharing Committees are established under Sec 28 of the Bill with powers, among others, to negotiate on behalf of the County Government prior to entering into a county benefit sharing agreement.

The committees are actually important for devolved governance in natural resource extraction and benefit sharing. We propose that membership of the committees, of five community members elected by the people from amongst themselves as envisaged in Section 28 (2) (c) although a big improvement from the previous bills, should ENSURE that social and ethnic minorities are represented in the committees

Also, it is our view that the provision in Sec 29 (c) and (f) giving the committee powers to respectively "determine the amount of money to be allocated to each local community from sums devolved under the Act" and "make recommendations to the county government on projects to be funded using monies which accrue to the county government pursuant to this Act" should be removed altogether. This is because the functions infringe on representation and allocation roles of Members of County Assemblies and also ran counter to the roles of Local County Benefit Sharing Forums as envisaged in the law.

Finally, regarding the financial provisions on the proposed law

We suggest that the House should review the removal of National Wealth Sovereignty Fund and National Royalties Fund considered in the previous versions of this law with a view of including a sustainability national fund into which the country can save into for the common good of tomorrow and the future generations. Natural resources do get depleted and it is only critical to reconsider this anomaly with the law.

Also we pray that this section can give guidance in encouraging corporate social responsibility programs of willing investors in the affected areas, and encourage compensations into community initiatives for common good. An example would be where mass technology transfer initiatives would be suggested as some of the benefit sharing models by the investors.

Thank you for the Opportunity

Yours Sincerely,



Jane Meriwas,
Executive Director
Samburu Women Trust/President Indigenous Women Council

NECA
NORTH EASTERN CONSERVANCIES ASSOCIATION

The Northeastern Conservancies Association (NECA)
P.O. Box 1774-70100, Garissa, Kenya
info@neca.or.ke / **www.**neca.or.ke

30th August 2023

TO:

S. NJOROGE,
Clerk of the National Assembly
P.O.BOX 41842-00100,
NAIROBI, KENYA.

DDC
Please deal.
31/08/23

Fred otieno
to facilitate
4/9/23

From:
North Eastern Conservancies Association (NECA)

SUBJECT: SUBMISSION ON THE NATURAL RESOURCES (BENEFIT SHARING) BILL (SENATE BILLS NO. 6 OF 2022)

We, the North Eastern Conservancies Association (NECA), having reviewed the Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022), hereby submit our proposals and feedback.

Our primary aim is to ensure that the provisions of the bill guarantee equitable distribution of natural resources, especially for community landowners.

1. Exclusion of Wildlife from the Bill:
Wildlife is an integral component of our natural heritage. It should not be categorized as an "extractive natural resource." As such, we propose that wildlife be excluded from the bill's provisions.

2. Factor in Conservation Costs:
It is paramount to factor in the cost of wildlife conservation when determining the benefit-sharing ratio for wildlife resources. This will provide a more accurate representation of the financial challenges and commitments faced by stakeholders involved in conservation efforts. Especially community conservation.

3. Consideration of Land Ownership:
The bill should give explicit consideration to land ownership, notably the distinction between national parks, reserves, private, and community conservancies. The benefits accrued from these areas should be apportioned in line with ownership and the contributions made by respective stakeholders.

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NECA
NORTH EASTERN CONSERVANCIES ASSOCIATION

The Northeastern Conservancies Association (NECA)
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4. Maintain Section 76 of the WCMA:
Section 76 of the Wildlife Conservation and Management Act (WCMA) provides vital incentives for wildlife conservation. We strongly advocate for its retention as it is essential for incentivizing and promoting conservation efforts.

5. Alignment with the Community Lands Act 2016:
The bill should be reconciled and aligned with the provisions of the Community Lands Act of 2016 to ensure that community rights and interests are adequately protected and championed.

6. Community Participation in Decision-Making:
To foster a sense of ownership and responsibility, local communities should be actively involved in decision-making processes regarding the exploitation and management of natural resources within their jurisdictions.

7. Environmental Impact Assessments:
Any exploitation of natural resources should be preceded by comprehensive Environmental Impact Assessments (EIA) to ensure that activities are sustainable and will not lead to irreversible environmental degradation.

8. Revenue Reinvestment:
A percentage of the revenues generated from natural resource exploitation should be reinvested in environmental conservation and community development projects to ensure sustainability and enhance community welfare.

In conclusion, we believe that these proposals will promote the equitable and sustainable distribution of natural resources benefits, especially for community landowners. We appreciate the opportunity to provide input and look forward to a bill that genuinely safeguards the interests of all Kenyans.

Kind regards,

Sharmake Mohamed Sheikh
Chairperson, North Eastern Conservancies Association (NECA)
sharmake@neca.or.ke

D/D'C
Please deal-
05/09/23

Pastoralists Alliance for Resilience and Adaptation Across Nations

Building and strengthening resilient, transformational partnerships and social movements

Memorandum to the National Assembly Departmental committee of Environment, Forestry and Mining on The Natural Resources (Benefit Sharing) Bill 2022 by Pastoralists Alliance for Resilience and Adaptation Across Nations (PARAAN)

PARAAN Office Physical Address: - Kimathi Road
KIO PLAZA
2nd Floor - Room No. 207
P.O.Box 94-100400,
Nanyuki town, Laikipia County
Email: - paran.alliancekenya@gmail.com,
info@paranalliance.org

Fred ohieno
to facilitate
6/9/23

Contact person: - Mr. Liban Golicha
Membership Coordinator - PARAAN
Cell phone: - +254 725 016 982
Email: - libangolicha@yahoo.com

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1.0. BACKGROUND INFORMATION

1.1. Introduction.

On behalf of member organizations of Pastoralists Alliance for Resilience and Adaptation Across Nations (PARAAN), I wish to thank Hon. Sen. Danson Mungatana for sponsoring this historic bill that seek to provide a legislative framework for establishment and enforcement of a system of benefit sharing in natural resources exploitation amongst the concerned parties of interest.

Once enacted as a law, this legislation will open a new chapter in the history of this country and the nation, the chapter of advantage to custodians of natural resources and respects to basic rights of indigenous peoples as enshrined in Constitution of Kenya 2010, United Nations Declarations on the Rights of Indigenous Peoples (2007), the African Convention on the conservation of nature and natural resources (1968), the Africa Union Agenda of 2063 and the ILO convention 169 (1989) among other such national and international legal instruments.

This memorandum which seeks to add a voice to settling of the protracted conflicts among investors/state and custodians of natural resources against unwarranted exploitations of such resources, is developed as response to print communication on daily newspaper dated 22nd August 2023 from National Assembly inviting the public and stakeholders for participation in formulation of The Natural Resources (Benefit Sharing) Bill (Senate Bills No. 6 of 2022).

Taking this advantage as provided for in Article 118(1)(b) of Constitution of Kenya, the leaders of various indigenous communities under the burner of PARAAN converged on Friday 1st September 2023 in Nanyuki and developed this memorandum for consideration by the relevant committee of national assembly. The alliance membership comprises thirty-one (31) indigenous people organizations drawn from across eight (8) counties as detailed in the Annex1 of this memorandum.

Further, it's important to note that, PARAAN is a social justice movement with the purpose of consolidating a collective voice on the inclusion and rights of indigenous peoples to promote self-action for the mutual benefit and well-being of indigenous peoples and minorities.

The alliance environs protecting and promoting collective rights and resources of indigenous peoples and minorities for sustainable livelihoods in Kenya and the entire EA Region. In recent years, the natural resources of these indigenous communities have come under unprecedented external pressures that are seriously affecting the unique rights of indigenous peoples and, by extension, their food and livelihood sovereignty, a situation that make this bill so timely.

2.0. SUMMATION OF THE ISSUES/CONCERNS

Under the current arrangement, we wish to highlight the followings: -

1. Almost all natural resources envisioned under this bill are found in the territories/landscapes occupied and owned by different indigenous communities collectively.

2. That due to systemic deep-rooted marginalization's from all successive regimes, the indigenous communities who are major custodians of the targeted natural resources have limited access to information including the print communication inviting public for participation in formulation of this bill.
3. That, the limited number of days slotted for public participation (22nd Aug. to 4th Sep. 2023) is insufficient and so is the means of communication used, as print media is not easily accessed by all communities across the country.
4. That, the bill is not clear on prior knowledge required of any community to be possibly affected by the exploitation of any natural resources in question.
5. That, the bill is still vague regarding the selection processes of community representatives, that are supposed to sit in the benefit sharing fora of the respective counties. It is inevitable that selection processes are conducted in a democratic and informed manner and that the finally elected community members are rightly approved by the respective governor and are protected from other interest groups.
6. That the bill is still vague in how to operationalize the resource exploitation and benefit sharing administratively. We propose the bill to be accompanied by an explicit by-law that states clear procedures.
7. That, some of the natural resources are found in areas that are inhabited by a various number of indigenous communities of whom some are even more marginalized and less represented than others.

3.0. OUR PRAYERS TO THE THIS RELEVANT HOUSE COMMITTEE

In regard to the above, we hereunder briefly make the following prayers to this honorable departmental committee as follows: -

1. The concerned authority be compelled to allocate more time for comprehensive public participation to ensure that the voice of all concerned were heard as required the law.
2. The invitations for public participation in the bill to be made through local radio FMs to ensure wider audiences and participation.
3. The Title of the Bill to read: -
   - The Natural Resources Benefit Sharing Bill 2022.

   INSTEAD OF: - The Natural Resources (Benefiting Sharing) Bill 2022
4. The benefit sharing rations out of revenues generated by the action of concerned entity be clearly quantified in the provision of the bill; by indicating what percent of the total revenue to be given out by affected entity as benefit other concerned parties.
5. The bill to have clear provision for free prior informed consent as provided in the law.
6. The concerned authority in this and any other matter of this nature to be compelled to observe the rule of law.
7. The bill to be accompanied by an explicit by-law that states clear procedures of resource exploitation and benefit sharing.
8. The concerned authority to look into rightful selection processes for community representatives (especially in the case of extremely marginalized communities) and into their protection of the rightfully appointed community members from other interest groups.

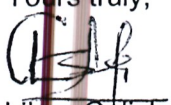
9. That, this honorable departmental committee grants any other favorable remedy as it deems fit and justiciable.

That in summation to this memorandum, we the leaders of indigenous people organizations (listed in annex 1 of this memo) emphatically believe in what is stated above and hereby request the honorable relevant departmental committee to consider our above stated prayer and further engage as on this as situation allows.

The spirit and the letter of the supreme law is explicit in its reference to public and stakeholder participation in formulation of new laws and we will therefore stand to resist any attempts from any quarters to the contrary against our full participation in formulation of this law, which destined to affect us more than any other interest groups.

Many Thanks

Yours truly,



Liban Golicha

For PARAAN Member Organizations

Annex 1: - PARAAN MEMBER ORGANIZATIONS: -

NO.	*ORGANIZATION*	*CONTACT*	*COUNTY OF OPERATION*
1.	Indigenous Movement for Peace Advancement and Conflict Transformation (IMPACT) TRUST	Mali Ole Kaunga +254 722 663 090	Laikipia, Isiolo, Samburu and Marsabit
2.	Kivulini Trust	Dr. Hussein A. Isack +254 721 301 150	Isiolo and Marsabit
3.	Land, Environment, Advocacy and Research Net (LEARN) – Waso	Guyo Adi +254 711 963 593	Isiolo
4.	Indigenous Strategies and Institution for Development (ISID)	Mohamed Dida +254 721 881 397	Marsabit and Isiolo
5.	Samburu Women Trust	Jane Meriwas +254 722 889 973	Laikipia, Samburu, Isiolo and Marsabit
6.	Isiolo Gender Watch	Grace Lolim +254 727 046 313	Isiolo
7.	Pastoralists Women for Health & Education (PHWE)	Shoba Mohamed Liban +254 726 844 850	Isiolo
8.	Isiolo Peace Link	Halima A. Racho +254 710 961 194	Isiolo
9.	The New Dawn Pacesetter[TNDP]	Emily Rosa +254 711 595 100	Laikipia and Isiolo
10.	Yaaku Laikipia Trust	Jeniffer Koinante +254 705 375 288	Laikipia
11.	Indigenous Women and Girls Initiative	Monicah Yator +254 722 597 332	Baringo
12.	Mukogodo Girls Empowerment Program	Josphine Ndirias +254 713 634 728	Laikipia
13.	Pastoralist Peoples Initiative	Margaret Seraiyon +254 702 624 224	Marsabit

14.	Maasai Cultural Heritage	Linda Lissah +254 718 156 173	Laikipia
15.	Nasaru Women Group	Juliana Rono +254 720 805 235	Kajiado
16.	Endorois Indigenous Women Empowerment Network	Christine Kandie +254 726 017 464	Baringo
17.	Endorois Welfare Council	Wilson Kipkazi +254 721 549 649	Baringo
18.	Indigenous Peoples Climate Change Watch	Mohamed Yusuf +254 723 071 576	Garissa
19.	Environmental Justice Team Samburu	Trizah Rono +3254 724 513 775	Samburu
20.	Community Empowerment and Development Initiative (CEDI)	Salad Boru +254 722 915 699	Isiolo
21.	Laikipia North Community Conservation Initiative (LANCCI)	Bernad Lolasho +254 743 208644	Laikipia
22.	Baringo Women and Youth Organization	Eunice Lepariyo +254 722 232 007	Baringo
23.	Center for Research and Development in Drylands (CRDD)	Hussein Tadicha +254 721 839 306	Marsabit
24.	Kaptur Resource Management Organization (KARMO)	Ekitela Fredrick Lucas +254 721 848 474	Turkana
25.	Marti Elite Home Grown Peace Initiative	Benjamen Lokor +254 721 813 060	Samburu
26.	Gurapau Women Group	Christine Louwai +254 722 662 798	Marsabit
27.	Livestock Direct	Edward Ramat +254 726 968 030	Laikipia
28.	Marsabit Women Advocacy and Development	Nuria Golo	Marsabit

	Organization (MWADO)	+254 725 401 221	
29	Samburu Well-Being Initiative for All (SWIFA)	Gabrella Lorere +254 700 388 808	Samburu
30	Rebuilding Pastoralist Livelihoods	James Orre +254 704 000 204	Marsabit
31	Laikipia Paralegals Organization (LAPO)	Manasseh +254 723 121262	Laikipia