



THE SENATE

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THIRD SESSION

2024  
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SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL  
RESOURCES

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

Clerk's Chambers,  
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COMMITTEE	
CLERK AT THE TABLE	Kavata

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## **LIST OF ABBREVIATIONS AND ACRONYMS**

KAM	-	Kenya Association of Manufacturers
WASPA	-	Water Services Providers Association
WASREB	-	Water Services Regulatory Board
WSPs	-	Water Service Providers

## **LIST OF ANNEXURES**

1. Minutes
2. Copy of the newspaper advertisement for public participation
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## PREFACE

### 2.1 Establishment of the Committee

The Standing Committee on Land, Environment and Natural Resources is established under standing order 228(3) of the Senate Standing Orders. The mandate and the functions of the Committee are set out under the Fourth Schedule of the Senate Standing Orders which mandates the Committee to consider all matters relating to lands and settlement, housing, environment, forestry, wildlife, mining, water resource management and development.

### 3.1 Membership of the Committee

The Committee is comprised of the following members -

1. Sen. John Muhia Methu, MP - **Chairperson**
2. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP - **Vice - Chairperson**
3. Sen. William Cheptumo Kipkiror, CBS, MP
4. Sen. Johnes Mwashushe Mwaruma, MP
5. Sen. Issa Juma Boy, MP
6. Sen. Agnes Kavindu Muthama, MP
7. Sen. Wamatinga Wahome, MP
8. Sen. Mariam Sheikh Omar, MP
9. Sen. Beatrice Akinyi Ogola, MP

#### **Mr. Speaker,**

The Constitution of Kenya recognizes water as an essential resource, laying the foundation for its conservation, equitable distribution, efficient management, and sustainable use. Specifically, Article 43(1)(d) of the Constitution affirms every Kenyan's right to clean and safe water in adequate quantities. Additionally, Article 60, which encapsulates the principles of land policy, underscores sustainable and productive management of land resources, inclusive of water bodies. The Fourth Schedule of the Constitution delineates the shared responsibility between the national and county

governments for water management, emphasizing collaborative efforts in overseeing this vital resource.

In light of these constitutional provisions, the Water Act, No. 43 of 2016, was enacted. It represented a significant shift in the management and regulation of water resources and water services in the Country. Since its enactment, there have been rapid changes in the socio-economic landscape, technological advancements, and emerging best practices in water resource management. These shifts necessitate a periodic review of existing laws to align them with current realities and future aspirations.

The Bill primarily addresses the need to refine specific provisions of the Water Act, No. 43 of 2016, offering more clarity on terminologies, expanding the scope of various entities, enhancing the operational ambit of water-related agencies, and instituting a stronger framework for Public-Private Partnerships in the water sector.

**Mr. Speaker Sir,**

Pursuant to Standing Order 46(3) & (5), the Speaker received a Message, from the Speaker of the National Assembly regarding the passage of the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023).

The Bill was passed by the National Assembly with amendments on August 23<sup>rd</sup>, 2023.

Pursuant to Standing Order 163 a Bill originating in the National Assembly is required to be proceeded with in the same manner as a Bill introduced in the Senate by way of First Reading. In accordance with Standing Order 144, the speaker directed that, the said Bill be read First Time.

The Bill was published on 4<sup>th</sup> July, 2023, and read a First Time in the Senate on 19<sup>th</sup> September, 2023. Following the First Reading in the Senate, the Bill stood committed, pursuant to standing order 145(1) of the Senate Standing Orders, to the Standing Committee on Land, Environment and Natural Resources for facilitation of public participation.

Subsequently, the Committee, pursuant to Article 118(1) (b) of the Constitution and standing order 145(5) of the Senate Standing Orders, invited submissions from members of the public on the Bill via an advertisement in the Standard and the Daily Nation Newspapers on Friday, 22<sup>nd</sup> September, 2023.

**Adoption of the Report of the Standing Committee on Land, Environment and Natural Resources on the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023)**

	<b>Name</b>	<b>Designation</b>	<b>Signature</b>
<b>1</b>	Sen. John Muhia Methu, MP	<b>Chairperson</b>	
<b>2</b>	Sen. (Dr.) Steve Lelegwe Ltumbesi, MP	<b>Vice - Chairperson</b>	
<b>3</b>	Sen. William Cheptumo Kipkiror, CBS, MP	Member	
<b>4</b>	Sen. Johnes Mwashushe Mwaruma, MP	Member	
<b>5</b>	Sen. Issa Juma Boy, MP	Member	
<b>6</b>	Sen. Agnes Kavindu Muthama, MP	Member	
<b>7</b>	Sen. Wamatinga Wahome, MP	Member	
<b>8</b>	Sen. Mariam Sheikh Omar, MP	Member	
<b>9</b>	Sen. Beatrice Akinyi Ogola, MP	Member	

## CHAIRPERSON'S FOREWORD

This report contains proceedings of the Standing Committee on Land, Environment and Natural Resources on its consideration of the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) which was published on 4<sup>th</sup> July, 2023. The Bill went through the First Reading on 19<sup>th</sup> September, 2023 and was thereafter committed to the Land, Environment and Natural Resources Committee for consideration and reporting to the House pursuant to the provision of Standing Order 127.

The Water (Amendment) Bill 2023 aims to refine the Water Act No. 43 of 2016 by clarifying roles and functions of key water management entities, expanding operational scopes, and establishing a stronger foundation for Public-Private Partnerships. It addresses rapid socio-economic changes, technological advancements, and emerging water management practices, proposing amendments that enhance clarity in terminology, broaden entity scopes, and reinforce water sector operations and partnerships, crucial for sustainable management and equitable water distribution in line with constitutional guarantees.

Following placement of advertisements in the print media on Friday, 22<sup>nd</sup> September, 2023 seeking public and stakeholder views on the Bill pursuant to Article 18(1) (b) of the Constitution and Standing Order 145(5) of the Senate Standing Orders, the Committee received twelve (12) memoranda from the following institutions and individuals-

- 1) Kenya Association of Manufacturers (KAM);
- 2) The Council of Governors;
- 3) Members of the County Budget and Economic Forum of Taita Taveta County;
- 4) Water Services Provider Association (WASPA);
- 5) Water Services Regulatory Board (WASREB);
- 6) The National Treasury & Economic Planning-Public Private Partnerships Directorate; and
- 7) The Ministry of Water, Sanitation and Irrigation

The Committee also invited the Ministry of Water, Sanitation and Irrigation who appeared before the Committee on 6<sup>th</sup> November, 2023, for a stakeholders engagement meeting on the Bill whereby the Committee was able to arrive at a consensus on some of the proposals.

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate as well as the Secretariat for the support extended to it in the conduct of the public hearings and in fulfilling its mandate.

Further, the Committee wishes to thank members of the public and stakeholders who sent written submissions including the general public.

**Mr. Speaker,**

It is now my pleasant duty, pursuant to standing order 148 of the Senate Standing Orders, to present the Report of the Standing Committee on Land, Environment and Natural Resources on the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023).

Signed:  \_\_\_\_\_ Date: 20/2/24

**SEN. JOHN MUHIA METHU, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL  
RESOURCES**

## CHAPTER ONE

### INTRODUCTION

#### 1.0 Purpose of the Bill

1. The objective of this Bill is to amend the Water Act, Act No. 43 of 2016 to enhance clarity on the roles and functions of key entities in water resource management, expand the operational scope of water-related agencies, and establish a stronger foundation for Public-Private Partnerships in the water sector.

#### 2.0 Background

2. The Constitution of Kenya recognizes water as an essential resource, laying the foundation for its conservation, equitable distribution, efficient management, and sustainable use. Specifically, Article 43(1)(d) of the Constitution affirms every Kenyan's right to clean and safe water in adequate quantities. Additionally, Article 60, which encapsulates the principles of land policy, underscores sustainable and productive management of land resources, inclusive of water bodies. The Fourth Schedule of the Constitution delineates the shared responsibility between the national and county governments for water management, emphasizing collaborative efforts in overseeing this vital resource.
3. In light of these constitutional provisions, the Water Act, No. 43 of 2016, was enacted. It represented a significant shift in the management and regulation of water resources and water services in the Country. Since its enactment, there have been rapid changes in the socio-economic landscape, technological advancements, and emerging best practices in water resource management. These shifts necessitate a periodic review of existing laws to align them with current realities and future aspirations.
4. The Bill primarily addresses the need to refine specific provisions of the Water Act, No. 43 of 2016, offering more clarity on terminologies, expanding the scope of various entities, enhancing the operational ambit of water-related agencies, and instituting a stronger framework for Public-Private Partnerships in the water sector.
10. The Bill was published on 4<sup>th</sup> July, 2023, and read a First Time in the Senate on 19<sup>th</sup> September, 2023. Following the First Reading in the Senate, the Bill stood committed,

pursuant to standing order 145(1) of the Senate Standing Orders, to the Standing Committee on Land, Environment and Natural Resources for facilitation of public participation.

11. Subsequently, the Committee, pursuant to Article 118(1) (b) of the Constitution and standing order 145(5) of the Senate Standing Orders, invited submissions from members of the public on the Bill via an advertisement in the Standard and the Daily Nation Newspapers on Friday, 22<sup>nd</sup> September, 2023.

### **3.0 Overview of the Bill**

12. This Bill originated from the National Assembly and was passed by the National Assembly with amendments on August 23<sup>rd</sup>, 2023. It contains the following twelve (12) clauses:

13. **Clause 2** of the Bill seeks to amend section 2 of the Water Act, No. 43 of 2016 (the 'Act') in the following manner:

- (a) by inserting the definition of a 'contracting authority' to mean a national or county governmental body seeking to delegate its functions to a private entity.

- (b) by deleting and inserting a new definition for 'bulk water'. The Act currently defines 'bulk water' as water supplied to a water services provider by the water services provider making the supply. The Bill proposes to amend this definition by specifying that only a water works development agency or the Water Storage Authority can supply bulk water.

- (c) by deleting and inserting a new definition for 'water services provider'. The Act currently defines 'water services provider' as a company, public benefits organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence. The Bill now proposes to expand this definition by including the words 'agency, authority and state corporation', which expands the scope of entities that can be considered as water services providers.

14. **Clause 3** of the Bill proposes amendments to section 32 of the Act. Currently, section 32 delineates the Water Storage Authority's roles, which include overseeing national water works development, managing water storage infrastructure, formulating water storage strategies, enforcing water harvesting policies, managing drought interventions, and advising the Cabinet Secretary on relevant matters. The amendment seeks to broaden the Authority's roles, enabling it to:

- (a) enter into bulk water purchase agreements with investors as per the Public Private Partnerships Act; and
- (b) enter into bulk water purchase agreements with water works development agencies.

15. **Clause 4** of the Bill proposes an amendment to section 68 of the Act by inserting a new paragraph (ba) immediately after paragraph (b). Section 68 of the Act details the roles and responsibilities of the water works development agencies, including developing, maintaining, and managing national public water works and providing technical support to the Cabinet Secretary. The proposed amendment broadens the agencies operational scope by introducing specific methods and partnerships through which the water works development agencies can operate waterworks and provide water services:

- (a) Through bulk water purchase agreements with private investors as per the Public Private Partnerships Act, 2021.
- (b) Through bulk water purchase agreements with other water services providers.
- (c) By operating as a water services provider until the agency transfers the responsibility for the operation and management of water works to a county government or a water services provider.

16. Additionally, the proposed new paragraph (ba) further states that a national public water work shall not be transferred to a county government.

17. **Clause 5** of the Bill introduces a new section 68A to the Act. The proposed new section 68A will require every water works development agency to obtain a license from the Regulatory Board based on the functions outlined in Clause 4 of the Bill. Furthermore, the proposed new section tasks the Regulatory Board, with the approval of the Cabinet Secretary, to publish in the *Gazette* and on its website the standards and conditions for the licensing of these agencies.

18. **Clause 6** of the Bill seeks to amend Section 69 of the Act. Specifically, the amendment narrows the scope of completed waterworks that are to be handed over by a waterworks development agency, by excluding national public water works from those to be handed over. Additionally, the amendment proposes the omission of references to the 'joint committee' and 'authority of county governments'.

19. Section 69 stipulates that following the commissioning of all waterworks, the waterworks development agency must enter into an agreement with either the county government, the joint committee, or the authority of county governments. This is done jointly with the water service provider whose service area encompasses the said water works. The intent behind this agreement is to authorize the use of the water works to furnish water services, either by the joint committee, the authority, or the water services provider.
20. **Clause 7** of the Bill proposes amendments to section 72 of the Act, introducing a new mandate for the Water Services Regulatory Board to evaluate and approve water, sewerage, and bulk water tariffs across various domains, including domestic, commercial, and irrigation uses. This proposed change expands the Board's existing role, which involves recommending tariffs. Additionally, the amendment seeks to remove the Board's function to accredit water services providers. Within the Act, section 72 broadly outlines the powers and functions of the Regulatory Board. These include setting national water service standards, recommending water and sewerage tariffs with a keen eye on consumer protection, overseeing and regulating water service providers, ensuring compliance, managing a national water services database, addressing consumer grievances, and offering counsel to the Cabinet Secretary on pertinent water service issues.
21. **Clause 8** of the Bill proposes to amend section 75 of the Act, which pertains to the "Register of licensed water services providers." The proposed amendments encompass two primary changes:
- (a) The details required for the registration of all licensed water services providers are expanded. While the original text of section 75(1)(a) mandates the inclusion of "their names and addresses" in the register, the amendment seeks to replace this with a more detailed set of contact information: "their names, telephone numbers, electronic mail and postal addresses."
  - (b) The proposed amendment also changes the terminology in section 75(1)(c). The original text makes reference to the services for which the water services providers are "accredited." The amendment proposes the replacement of "accredited" with "licensed."
22. **Clause 9** of the Bill seeks to introduce multiple amendments to section 93 of the Act, which pertains to Public Private Partnerships (PPP) in the realm of water services:

- (a) The current Section 93(1) of the Act empowers a "water services provider" to engage in a PPP. The proposed amendment seeks to replace this subsection by allowing a "contracting authority" instead to initiate a PPP.
- (b) Section 93(3) of the Act provides for cases where a third party, involved in a PPP with a water services provider, possesses assets or infrastructure for water services. The amendment intends to revise this subsection, underscoring that the PPP agreement must outline the specific terms and conditions governing the utilization of these assets.
- (c) A proposed new subsection, (3A), addresses situations where a third party does not fulfill their commitment to complete a project. Under such circumstances, the contracting authority assumes the responsibility to ensure the project's completion.
- (d) A subsequent proposed subsection, (3B), dictates that if both a third party and the contracting authority contribute to a project, they are mandated to coordinate their activities and consult regularly throughout the project's duration.
- (e) Additionally, subsection (3C) requires parties in a PPP agreement to clearly identify and allocate specific project segments. Furthermore, this subsection directs the parties to distinctly outline both their financial and non-financial obligations associated with each project component.

23. **Clause 10** of the Bill proposes amendments to Section 100 of the Act, which deals with the supply of bulk water. Specifically, the clause proposes the insertion of two new subsections, (4) and (5), after subsection (3) in Section 100 of the Act.

- (a) New subsection (4) aims to make an explicit provision, stating that notwithstanding any other stipulations in this Act, all bulk water supply services, which primarily aim to supply water in bulk to a water services provider in a county or multiple counties different from the county where the bulk water abstraction works are situated must be executed by waterworks development agencies. These agencies should be established under Section 65 of the Act and should be licensed under section 100.
- (b) Additionally, the proposed new subsection (5) empowers the Cabinet Secretary to create regulations that dictate the methodology in which an application for a license for bulk water supply is to be made.

24. **Clause 11** of the Bill proposes a focused amendment to Section 114 of the Act, which outlines the objectives of the Water Sector Trust Fund. The amendment aims to broaden the entities to which the Fund caters. Specifically, the introductory part in Section 114 will be enhanced by including the phrase “or any water works development agency” immediately after the term “counties”. This ensures that not just counties, but also any water works development agencies, are eligible to benefit from the provisions and financial grants of the Fund, especially for the development and management of water services in marginalized or underserved areas.
25. **Clause 12** of the Bill seeks to amend Section 119 of the Act, which establishes the Water Tribunal by elaborating on the composition of the Tribunal. The proposed amendment provides that the Water Tribunal is to consist of:
- (a) a Chairperson who shall be an advocate of the High Court of Kenya with no less than ten years of post-qualification experience.
  - (b) two technical experts, one of whom shall be a registered civil engineer and the other a registered water engineer, both with a minimum of ten years' professional experience.
  - (c) two additional members, each holding a degree from a university recognized in Kenya, coupled with at least five years of experience in their relevant fields.
26. Further, the proposed amendment provides for the tenure of the Chairperson and the members as a term of three years, renewable once, and their remuneration and allowances are to be determined by the Judicial Service Commission, in consultation with the Salaries and Remuneration Commission.

## CHAPTER TWO

### PUBLIC PARTICIPATION

#### 2.1 Attendance by Stakeholders

27. The Committee, pursuant to Article 118 of the Constitution and standing order 145(5) of the Senate Standing Orders, invited submissions from members of the public on the Bill via an advertisement in the Standard and Daily Nation Newspapers on Wednesday, 30<sup>th</sup> August, 2023.

**The Committee received submissions from the following stakeholders-**

- 1) Kenya Association of Manufacturers (KAM);
- 2) The Council of Governors;
- 3) Members of the County Budget and Economic Forum of Taita Taveta County;
- 4) Water Services Regulatory Board (WASREB);
- 5) The National Treasury & Economic Planning-Public Private Partnerships Directorate; and
- 6) Ministry of Water, Sanitation and Irrigation

The Committee met the Cabinet Secretary, Ministry of Environment, Climate Change and Forestry together with relevant Ministry officials on Wednesday, 30<sup>th</sup> August, 2023 with the main aim of enlightening the Committee further on the provisions as outlined in the Bill and a justification for each of the provisions as proposed in the Bill.

Water Services Provider Association (WASPA) appeared before the Committee but did not supply the Committee with written submissions and were requested to submit the same. However, by the time the Committee was finalizing its report on the Bill, WASPA had not yet submitted their written submissions.

## **Submissions from Stakeholders and Committee Observations and Determinations on stakeholder proposals**

28. The Committee received submissions on specific clauses of the Bill and made various observations and determinations on each proposal as follows-

### **A. COUNCIL OF GOVERNORS (COG)**

In the memorandum, they proposed the following amendments to the Bill-

1. *Clause 2* of the Bill seeks to amend section 2 of the Water Act, No. 43 of 2016 (the 'Act') in the following manner-
  - (a) by inserting the definition of a 'contracting authority' to mean a national or county governmental body seeking to delegate its functions to a private entity.
  - (b) by deleting and substituting the deletion of 'bulk water'. The Act currently defines 'bulk water' as water supplied to a water services provider by the water services provider making the supply. The Bill proposes to amend this definition by specifying that only a water works development agency or the Water Storage Authority can supply bulk water.

**Propose- To amend clause 2(b) to read as follows: "bulk water" means supply of water in bulk by water works development agency or Water Storage Authority of the County Public Works and Services to water service providers for retail.**

**Justification- County Public Works and Services include storm water management systems in built-up areas and water sanitation services and are thus an exclusive function of the County Governments under the Fourth Schedule of the Constitution. The Gazette Notice of 9<sup>th</sup> August, 2013 on the transfer of functions unbundled County Public Works and Services in detail.**

### **Committee's Observation/Recommendation**

**The Committee considered the proposal and resolved to provide a definition of 'bulk water services provider' which would include the County Governments.**

- (c) by deleting and substituting the definition of 'water services provider'. The Act currently defines 'water services provider' as a company, public benefits organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence. The Bill now proposes to expand this definition by including the words 'agency, authority and state corporation', which expands the scope of entities that can be considered as water services providers.

**Propose-** To amend clause 2 (c) to read as follows: “Water Services Provider” means a company, agency, authority, state corporation, public benefit organization or any other person established/contracted by County Government providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license.

**Justification-** Water and Sanitation Services are functions vested exclusively under the County Governments which are mandated to establish Water Service Providers under Section 77 of the Act. Further, the Regulatory Board in issuing licenses for provision of water services shall ensure it does not claw back on County functions and shall empower county governments to effectively perform their functions and exercise their powers.

**Committee’s Observation/Recommendation**

The Committee resolved to retain the definition of ‘water services provider’ as provided for under section 2 of the Water Act, thereby affirming the provision of water services at the retail level as a function of the County Government.

2. Clause 4 of the Bill proposes an amendment to section 68 of the Act by inserting a new paragraph (ba) immediately after paragraph (b).

(ba) operate water works and provide water services-

(a) Through bulk water purchase agreements with private investors as per the Public Private Partnerships Act, 2021.

(b) Through bulk water purchase agreements with other water services providers.

(c) By operating as a water services provider until the agency transfers the responsibility for the operation and management of water works to a county government or a water services provider.

Additionally, the proposed new paragraph (ba) further states that a national public water work shall not be transferred to a county government.

**Propose-** To amend the proposed Section 68 (ba) (i) to read as follows- (i) By entering into a bulk water purchase agreement with an investor in accordance with a no objection issued by County Government for the agreement with an investor in accordance with a no objection issued by County Government for the and in accordance with the provisions of the Public Private Partnerships Act, 2021. Provided that a national public water works shall not be transferrable to a county government; and no/any transfer of county water works to the national government shall be done upon arrival by the relevant county government.

**Justification-** The jurisdiction of WWDAs is limited to operating waterworks and providing water services as a WSP. County Governments therefore need to be part of the negotiations to enter into agreements with investors in PPP agreements meant to enhance water and sanitation service delivery to Counties.

The proviso doesn't provide for consultation between the national and county governments in designation of county waterworks as national public waterworks which is needed as the national government has repeatedly designated and gazetted waterworks and basin areas without involvement and/ or consultation of county governments.

**Committee's Observation/Recommendation**

The Committee concurred that there is need for consultation between the two levels of Government and there is need for public participation before the Water Works Development Agencies enter into bulk water purchase agreements. As such, the Committee proposed an amendment to this clause by incorporating a requirement for public participation and consultation with the relevant county government.

3. *Clause 6 -Section 69* of the Principal Act is amended-
- (a) by deleting subsection (1) and substituting therefore the following new subsection;
  - 1) As soon as possible, following the commissioning of water works other than national public water works, the water works development agency shall enter into an agreement with any county government or water services provider to provide water services within whose area of jurisdiction the services are located.
  - (b) in subsection (2), by deleting the words, “the joint committee, authority”
  - (c) in subsection (3), by deleting the words . “the joint committee, the authority”

**Propose-** Oppose deletion of joint committee and authorities in these subsections.

**Justification-** The establishment of Joint Authorities and Committees aligns to the principle of cooperation in Article 189 (2) of the Constitution and Section 23 of the Intergovernmental Relations Act, 2012.

**Committee's Observation/Recommendation**

The Committee recognizes the establishment of 'joint committees,' involving representatives from various government levels for specific mandates, as proposed in section 32 of the Intergovernmental Relations Act, 2012 and

aligned with Article 189(1) of the Constitution. This structure supports the principle of cooperative governance, especially vital for water management—which is a shared function. However, the lack of a precise definition for 'joint committees' in the Water Act may hinder the effective implementation of section 69 of the Water Act. As such the Committee concurred that joint committees should be retained and further recommended the inclusion of cross-county water service providers.

4. *Clause 7- Section 72* of the Principal Act is amended in subsection (1)-
- a) by inserting a new paragraph immediately after paragraph (b)-
    - ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;
  - b) by deleting paragraph (c) and substituting therefor the following new paragraph –
    - (C) issue and set conditions for licensing of water services providers.

**Propose-** To amend the proposed Section 72 (ba) to read as follows- (ba) evaluate and approve bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes.

**Justification-** This proposed subsection (ba) purports to vest the functions of county governments in entities controlled by the national government.

**Committee's Observation/Recommendation**

The Committee concurred with this proposal because the task of evaluating and recommending water and sewerage tariffs for county water service providers is already covered under section 72(b) of the Water Act. Therefore, the focus needed to shift to providing for the evaluation and approval of bulk water tariffs.

5. *Clause 9 -Section 93* of the Principal Act is amended by deleting subsection (1) and substituting therefore the following new sub section-
- (1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.

**Propose-** To amend the proposed Section 93 (1) to read as follows: A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions.

**Justification- Allowing a Contracting Authority at National Level to exercise functions in water service provision under a PPP framework encroaches upon functions of County Governments and Water Service Providers.**

*Committee's Observation/Recommendation*

**The Committee addressed the concerns raised with a proposed amendment to Clause 4, requiring consultation with the County Governments and ensuring public participation. Additionally, the Committee has narrowed the application of the Public-Private Partnership (PPP) framework in the context of the National Government to exclusively cover the provision of bulk water services.**

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

**Propose- To delete 'the provision of water services' from the above amendment.**

**Justification- Restrict to the 'Contracted Function' to clearly delineate the scope of agreements to avoid any overlaps of functions between National and County Governments.**

*Committee's Observation/Recommendation*

**The Committee concurred with this proposal to delete the words 'provision of water services and insertion of the words 'contracted function'. This clarifies that any use of assets or infrastructure must be directly related to the specific functions or services agreed upon. This precision can help prevent ambiguities in agreements and ensure that assets are used appropriately and as intended.**

6. *Clause 10- Section 100* of the Principal Act is amended by inserting the following new subsections immediately after subsection (3)-

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a license for bulk water supply shall be made.

**Propose-** To amend (4) to include the County Public Works and Services, Joint Committees and Joint Authorities of County Governments together with Waterworks Development Agencies to supply water in bulk to water service providers.

To amend (5) to include ‘consultation with County Governments’

**Justification-** Assigning the bulk water supply solely to Water Works Development Agencies serves to limit the scope of the county functions and powers.

This is guided by and aware of the need for consultations and cooperation between both levels of Government in the conduct of their mutual relations.

*Committee’s Observation/Recommendation*

The Committee resolved to amend the clause by deleting “waterworks development agencies established under section 65 of this Act” and inserting “bulk water services providers.” This change includes counties within the definition of bulk water services providers, thereby eliminating the exclusivity previously granted to Water Works Development Agencies as the sole providers of bulk water supply services.

7. New Clauses -

- i.) **Propose-** Amend section 78(b) of the Principal Act to define the county assets in context.

**Justification-** The Act needs to be reviewed to clarify functions of water development agencies which touch on county assets. There is need for streamlining section 69 on management of liabilities between national and county government.

*Committee’s Observation/Recommendation*

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

- ii.) **Propose-** Amend section 29, 30, 42, 26, 64 and 65.

**Justification-** Review to ensure harmonization of functions, effective representation of county government where there are cross-cutting functions such as water service standards, basis water management, and flood management among others.

Committee's Observation/Recommendation

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

- iii.) **Propose**- Amend section 74, 97, 98 and Sections 101, 106.

**Justification**- Amend the Act to incorporate participation of county governments in such provision and regulation of provision of water services sections 74, 97, 98 as recognized under sections 101, 106 on the role of county government regarding complaints received on service provision and enforcement.

Amend the Act to clarify that water service provision as captured under Section 76 and 79 and other sections of the Act is a function of County Governments.

Committee's Observation/Recommendation

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

- iv.) **Propose**- Amend section 94.

**Justification**- To comply with the duty of governments to progressively realise the right to water in rural and undeveloped areas.

Committee's Observation/Recommendation

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

- v.) **Propose**- Amend section 109 and 117.

**Justification**- To remove the role of counties in sewerage and sanitation from the ambit of both the Regulatory Board and the water Sector Trust Fund.

Committee's Observation/Recommendation

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

- vi.) **Propose**- Amend sections 87 and 92.

**Justification-** Amend or clarify through regulations low public participation in licencing and monitoring provision of water services.

*Committee's Observation/Recommendation*

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

**B. WATER SERVICE REGULATORY BOARD**

The Water Service Regulatory Board proposed the following amendments-

1. Long Title - The '*Title of the Act*' to read as follows-  
**Propose-** 'An ACT of Parliament to amend the Water Act, 2016 to provide for Public Private Partnerships arrangements, licencing and for connected purposes.

*Committee's Observation/Recommendation*

The Committee considered this proposal and found that the term 'for connected purposes' as provided in the long title as, already covers all aspects that may be related to private partnership agreements including licensing of the Water, Works Development Agencies.

2. *Clause 2 - Section 2* of the Principal Act be amended by inserting the following new definition in proper alphabetical sequence-
  - a. "contracting authority" means at the national government level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or at the county government level the county government or county corporation which intends to have its functions undertaken by a private party

**Purpose-** the amendment intends to align the definition of a contracting authority in line with the Public Private Partnerships Act for purposes of operationalizing PPP arrangements in the water sector.

- b. by deleting the definition of "water services provider" and substituting therefore with the following new definition;  
'water services provider' means a company, agency, authority, state corporation, public benefit organization or any other person providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license

**Purpose-** the amendment seeks to widen the scope of water service providers including those providing bulk water supplies. This shall ultimately allow WASREB

to license all the water service providers covered under this category in accordance with the provisions of the ACT.

**Propose- To add 'county agency' under the definition of a contracting authority under (ii). Additionally, WASREB supports the expansion of the scope of 'water service providers' as the current definition is restrictive to companies who operate as either county or private water service provider.**

*Committee's Observation/Recommendation*

**The Committee adopted this proposal.**

3. *Clause 3 - Section 32 of No. 43 of 2016* is proposed to be amended in subsection (1) by inserting the following new paragraphs immediately after paragraph (f)-  
(g)enter into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act;  
(h)enter into a bulk water purchase agreement with a water works development agency.

**Propose- To amend (h) to allow National Water Harvesting and Storage Authority to enter into a bulk water purchase agreement with other Water Service Providers subject to economic efficiency criteria determined by the Regulatory Board is in line with consumer protection standards.**

*Committee's Observation/Recommendation*

**The Committee concurred that the bulk water purchase agreements entered into by the National Water Harvesting and Storage Authority should be subject to criteria set by the Water Services Regulatory Board to ensure their financial integrity, safeguard consumer interests, and guarantee equitable access to water services at fair prices. The Committee adopted this proposal.**

4. *Clause 4 - Section 68 of No. 43 of 2016* is proposed to be amended by inserting the following new paragraph immediately after paragraph (b):  
(ba) *operate water works and provide water services:*
- i. *by entering into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act, 2021;*
  - ii. *by entering into a bulk water purchase agreement with a water service provider; or*
  - iii. *as a water service provider until such a time as the water works development agency transfers responsibility for the operation and*

*management of water works to a county government or water services provider in whose area of jurisdiction the water works is located:  
Provided that a national public water works shall not be transferable to a county government.*

**Propose- To amend 68 (ba) (ii) to read "by entering into a bulk water purchase agreement with a water services provider subject to economic efficiency criteria determined by the Regulatory Board. Further, delete section (ba) (ii) as this is already catered for under section 68 (b) of the Water Act 2016.**

**Committee's Observation/Recommendation**

The Committee concurred that the bulk water purchase agreements entered into by the Water Works Development Agencies should be subject to criteria set by the Water Services Regulatory Board to ensure their financial integrity, safeguard consumer interests, and guarantee equitable access to water services at fair prices. The Committee adopted this proposal. However, on the proposal to delete clause (ba)(iii), the Committee resolved to clarify that the agreements to which the clause would apply would be for bulk water purchase agreements.

5. *Clause 5* - on the Proposal of insertion of a new section 68A in No. 43 of 2016 immediately after section 68 as follows-

68A (1) Each water works development agency shall be licensed by the Regulatory Board with respect to the functions under section 68 (b) and (c) of this Act.

(2) The Regulatory Board shall, upon commencement of this Act and as may be necessary thereafter, and with the approval of the Cabinet Secretary publish the standards and conditions for licensing of water works development agencies under this section.

**Propose- The phrase "with the approval of the Cabinet Secretary" under section 68A (2) to be deleted as it negates the statutory powers donated to the Regulatory Board under section 71 of the Water Act 2016.**

**Justification - It negates the statutory powers donated to the Regulatory Board under section 71 of the Water Act, 2016.**

**Committee's Observation/Recommendation**

The Committee adopted this proposal in view of sections 71 and 72(1) (a) of the Water Act, as they relate to the functions and powers of the Regulatory Board.

6. *Clause 6 -Section 69* of the Principal Act is amended-
- (a) by deleting subsection (1) and substituting therefore the following new subsection;
  - 2) As soon as possible, following the commissioning of water works other than national public water works, the water works development agency shall enter into an agreement with any county government or water services provider to provide water services within whose area of jurisdiction the services are located.
  - (b) in subsection (2), by deleting the words, “the joint committee, authority”.
  - (c) in subsection (3), by deleting the words “the joint committee, the authority”.

**Propose- Section 69 (1) to be deleted in entirety as it contravenes Article 189 of the COK which ensures collaboration between the National and County Governments.**

*Committee’s Observation/Recommendation*

**The Committee recognizes the establishment of 'joint committees,' involving representatives from various government levels for specific mandates, as proposed in section 32 of the Intergovernmental Relations Act, 2012 and aligned with Article 189(1) of the Constitution. This structure supports the principle of cooperative governance, especially vital for water management—which is a shared function. However, the lack of a precise definition for 'joint committees' in the Water Act may hinder the effective implementation of section 69 of the Water Act. Further, the Committee resolved to insert a definition of 'joint committees' and retain section 69 as provided for in the Water Act.**

7. *Clause 7 Section 72* of the Principal Act is amended in subsection (1)-
- c) by inserting a new paragraph immediately after paragraph (b)-
    - ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;
  - d) by deleting paragraph (c) and substituting therefor the following new paragraph –

(C) issue and set conditions for licensing of water services providers

**Propose- To maintain the previous section 72 (b) but replace the word "recommend" with approve. Add sub-section (bb) to read as follows: "Evaluate and approve tariffs for irrigation purposes" Section 72 (c) to be rephrased to read-; "Issue licenses and set conditions for water service provision"**

Committee's Observation/Recommendation

The Committee concurred with the proposal to insert subsection (bb) for the reason that this clause would enable WASREB to regulate water use for irrigation more effectively; ensuring water is utilized efficiently and sustainably. By setting and approving tariffs, WASREB can incentivize the adoption of water-saving technologies and practices, and prevent over-extraction of water resources, thus protecting ecosystems and securing water availability for future generations.

The Committee further concurred with the proposal to rephrase section 72(c) to "*issue licenses and set conditions for water service provision*". This clearly outlines two distinct but related regulatory functions: the issuance of licenses and the setting of conditions that govern the provision of water services. This delineation ensures that the regulatory authority's roles are comprehensively covered, encompassing both the licensing process and the broader regulatory framework that guides service provision.

However, the Committee maintained that section 72(b) of the Water Act, 2016 in so far as it relates to the Regulators role in recommending and approving water and sewerage tariffs to the water services providers be retained. The focus needed to shift to providing for the evaluation and recommendation of bulk water tariffs.

8. *Clause 8 - Section 75* of the Principal Act is amended in subsection 1 paragraph (c) by deleting the word "accredited" and substituting therefor the word "licensed".  
**Comments- WASREB supports this amendment as it is.**

9. *Clause 9 -Section 93* of the Principal Act is amended by deleting subsection (1) and substituting therefore the following new sub section-

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

**Comments- The amendments allow all water service providers under the Act to enter into PPP arrangements as the current provision under Water Act 2016 only allows county water service providers to enter into PPP arrangements.**

10. *Clause 10- Section 100* of the Principal Act is amended by inserting the following new subsections immediately after subsection (3)-

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

**Propose- Delete the proposed subsection 100(4).**

**Justification - The provision violates Article 189 of the COK and section 86 of the Water Act, 2016 on the requirement of commercial viability.**

*Committee's Observation/Recommendation*

**The Committee resolved to amend the clause to provide that bulk water supply services shall be undertaken a bulk water service provider which includes agencies at both levels of Government.**

(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a license for bulk water supply shall be made.

**Propose- To delete the proposed subsection 100 (5).**

**Justification- Section 100 (5) to be deleted since these powers are already donated to the Regulatory board under section 71.**

*Committee's Observation/Recommendation*

**The Committee considered this proposal and rejected it on the basis that Section 142 of the Water Act already grants the Cabinet Secretary the authority to make regulations.**

#### C. KENYA ASSOCIATION OF MANUFACTURERS

In the memorandum, they proposed the following amendments to the Bill:

1. *Clause 3, Section 32* of the principal Act is amended in subsection (1) by inserting the following new paragraphs immediately after paragraph (f):
  - (g) enter into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act;
  - (h) enter into a bulk water purchase agreement with a water works development agency.

**Propose- That a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.**

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

**Committee's Observation/Recommendation**

The Committee did not carry this proposal for the following reasons:

- (a) Water supply needs and conditions can vary significantly across different regions and over time. A one-size-fits-all template may not be able to accommodate the unique aspects of each agreement, potentially leading to inadequate or inefficient agreements that don't meet the specific needs of the parties involved.
- (b) The water sector is dynamic, with frequent advancements in technology, shifts in market conditions, and evolving environmental regulations. A static template embedded in the Water Act would likely become out-dated quickly, necessitating frequent legislative amendments to remain relevant.

2. *Clause 7, Section 72* of the principal Act is amended in sub-section (1):

a. by inserting a new paragraph immediately after paragraph (b):

(ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;

b. by deleting paragraph (c) and substituting therefor the following new paragraph: (c) issue and set conditions for licensing of water services providers.

**Propose-** That this clause is deleted.

**Justification-** This power should remain with the Regulatory Board. The clause has removed the Regulatory Board's power to accredit water service providers. Further, the Bill has not indicated the alternative entity that will have the power to accredit water service providers. Accreditation of water service providers has the following benefits:

- a. ensures that water service providers meet set standards for delivering high quality services. Consequently, customers can have confidence in the quality and reliability of the services they receive;
- b. ensures that water service providers comply with health and safety standards in their operations. This includes water treatment processes and testing protocols to prevent contamination of water; and
- c. enhances the reputation and credibility of water service providers, making them more attractive to investors.

Committee's Observation/Recommendation

The Committee concurred that accreditation is vital and serves as a mechanism for quality assurance, indicating that a WSP meets certain standards beyond the minimum regulatory requirements. It can be seen as a mark of excellence or higher competency in service provision. As such, rather than deleting the clause, the Committee proposed an amendment to clause 7 that would incorporate licensing, setting conditions and accreditation of the WSP's.

3. *Clause 10, Amendment of Section 100 of the Water Act 2016 to provide that all water bulk water supply services in a county shall be undertaken by waterworks development agencies. Section 100 - Supply of bulk water*

Section 100 of the principal Act is amended by inserting the following new subsections immediately after subsection (3):

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by water works development agencies established under section 65 of this Act and licensed under this section.

(5) The cabinet Secretary may make regulations prescribing the manner in which an application for a licence for bulk water supply shall be made.

**Propose- The deletion of this amendment**

**Justification-** Counties should be exempt from the requirements of the proposed amendment to ensure water remains affordable to water users within counties as there is a need for the cost of water supplied to residents and businesses in a county to be maintained at a low level, to ensure it remains affordable. This will ensure that Kenya attains the right to clean and safe water in adequate quantities is an economic and social right under Article 43 (1) (d) of the Constitution. The Bill seeks to make it mandatory for counties that do not produce their own water to purchase the commodity, consequently, this proposal will lead to an increase in the price of water paid by the consumers.

Committee's Observation/Recommendation

The Committee resolved to amend the clause to provide that bulk water supply services shall be undertaken a bulk water service provider which includes agencies at both levels of Government.

4. (Water use charges for the salt sector) - Propose the introduction of *new provisions* under *section 100* on bulk water under the Water Act to provide for the development of regulations on bulk water and purchase agreements and a schedule to prescribe the agreement forms as follows:

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

**Justification-** The proposed new provisions for bulk water purchase agreements are progressive provisions and will support industries that utilize bulk water for their operations. Additionally, there is a need to develop regulations to further expand on the new provisions and allow for schedules to be included outlining items such as templates to guide agreements which will enhance uniformity.

*Committee's Observation/Recommendation*

The Committee observed that section 142(1) empowers the Cabinet Secretary to make regulations with respect to any matter which by the Act is required or permitted to be prescribed, or which is necessary or expedient to be prescribed. Therefore, this matter has adequately been provided for and therefore the Committee rejected the proposal.

5. *New provision-* Water use charges for the salt sector.

**Propose-** The charges for water use for the salt sector be reduced.

**Justification-** Water use charges were increased at almost 90% and the requirement is monthly. The increment has led to a huge financial implication to the salt industry as they require huge water use from boreholes. Charges on renewal of permits for bore holes have increased drastically. A single borehole increased to 90,000 shillings for the renewal permit. This has increased the cost of doing business for the salt sector, which has contributed to the increase in the cost to the consumer. This is further compounded by a delay in the time taken to acquire a borehole permit. Permits applied for and paid for in the past year or prior to the application of the Act have not been issued. This may negatively affect manufacturers as the Water Resource Authority may charge them at the new rates or charges.

*Committee's Observation/Recommendation*

The Committee reviewed the proposal and determined it was not within the scope of the Bill as published. Consequently, it may be considered in future deliberations.

D. THE NATIONAL TREASURY AND ECONOMIC PLANNING

(PUBLIC PRIVATE PARTNERSHIPS (PPP) DIRECTORATE

The National Treasury and Economic Planning proposed the following amendments-

1. *Clause 2*, on the proposed amendment of the definition of the term “water service provider”

**Propose- Amending the definition of “water service provider” to adopt the following definition:**

“water service provider” to mean a company, agency, authority, **contracting authority**, state corporation, public benefit organization or any other person providing water services in accordance with a licence issued by the Regulatory Board for the services areas specified in the licence.

**Justification- The proposed adoption of the definition is aligned to the definition of a contracting authority under clause 2.**

Committee’s Observation/Recommendation

The Committee resolved that the term ‘contracting authority’ would be inserted in the definition of ‘*bulk water services provider*’ rather than in the definition of ‘*water services provider*’.

2. *Clause 9-* Entering into a public private partnership or public partnerships

**Propose- Clause 9 be amended to read as follows:**

“A contracting authority may enter into a public private partnerships arrangement for the exercise...”

**Justification- The words “entering into a public private partnerships arrangement” is in tandem with the syntax used in the PPP Act, 2021.**

Committee’s Observation/Recommendation

The Committee rejected this proposal on the basis that limiting partnerships exclusively to PPPs could unnecessarily restrict the scope of collaboration, excluding potentially beneficial partnerships solely between public entities. The water sector often involves infrastructure and resources that span multiple jurisdictions. Limiting partnerships to PPPs could restrict the ability of water service providers to

collaborate across county lines or with other public entities in managing shared water works efficiently.

3. *Clause 93 (1)*- Entering into a public private partnership or public partnerships

**Propose-** Clause 93 (1) be amended to read as follows:

*“A Water Service provider may enter into a public private partnerships arrangement for the exercise...”*

**Justification-** The words “entering into a public private partnerships arrangement” is in tandem with the syntax used in the PPP Act, 2021.

*Committee’s Observation/Recommendation*

The Committee observed that the Bill did not have a Clause 93(1) to which the amendment was being proposed.

E. MEMBERS OF THE COUNTY BUDGET AND ECONOMIC FORUM OF TAITA TAVETA COUNTY

In their memorandum, they proposed the following amendment to the Bill:

1. **Clause 2 – Definition of Contracting Authority**

- i. **Proposal-**Under the definition of ‘contracting authority’ there is need for an interpretation of the word used therein ‘private party’.

**Justification-** Section 2 of the Water Act, 2016 does not give an interpretation over the same.

*Committee’s Observation/Recommendation*

The Committee adopted the definition of a ‘private party’ as provided for under section 2 of the Public Private Partnerships Act, 2021.

- ii. **Proposal-** The interpretation of the service provider remains as in Section 2 of the Water Act, 2016 ("the principal Act") and an interpretation of the word “company”

- *a water services provider established by county government as a public limited liability company under the Companies Act, 2015*

**Justification-** For the definition of “water services provider”, the term was already defined in the principal Act. However, the Bill has added “agency, authority and state corporations” as new entities that can be water service providers in this Bill.

The Bill has widened the scope of the definition to allow more entities to be water service providers but it is important to also ensure we live to the spirit of the COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT PART 2—ENVIRONMENT AND NATURAL RESOURCES

Obligations in respect of the environment.

69. (1) The State shall—

(d) encourage public participation in the management, protection and conservation of the environment;

*Committee’s Observation/Recommendation*

**The Committee resolved to retain the definition of a ‘water service provider’ as provided in the Water Act. Further, the Committee resolved to insert the definition of ‘bulk water services provider’ in order to differentiate between a ‘water service provider’ and further provide a funding option for the Water Works Development Agencies through Public Private Partnerships.**

## 2. Clause 3 –

**Proposal-** A template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.

**Justification-** We conclude that: Section 32 of the Water Act, 2016 ("the principal Act") is unconstitutional. The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))

Distribution of Functions between the National Government and the County Governments

PART 1—NATIONAL GOVERNMENT

19. National public works.

33. Public investment.

PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012 and The Public Finance Management (Public Investment Management) Regulations, 2022 (Legislative Supplement No. 29) Kenya Gazette Supplement No. 52 of 1st April, 2022 has provided a very clear and elaborate process to undertake Public Investment.

We further recommend that there is need to amend the entire Section 32 of the ("the principal Act") and all agreements should be developed in reference to the PFM Act,2012 and the Regulations.

Committee's Observation/Recommendation

The Committee did not carry this proposal for the following reasons:

- a) Water supply needs and conditions can vary significantly across different regions and over time. A one-size-fits-all template may not be able to accommodate the unique aspects of each agreement, potentially leading to inadequate or inefficient agreements that don't meet the specific needs of the parties involved.
- b) The water sector is dynamic, with frequent advancements in technology, shifts in market conditions, and evolving environmental regulations. A static template embedded in the Water Act would likely become out-dated quickly, necessitating frequent legislative amendments to remain relevant.

3. Clause 4 –

Proposal- they conclude that:

1. Section 68, 69, of the Water Act, 2016 ("the principal Act") is unconstitutional.

Justification- The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))

Distribution of Functions Between the National Government and the County Governments

PART 1—NATIONAL GOVERNMENT

19. National public works.

In addition, COK 2010 CHAPTER FIVE— LAND AND ENVIRONMENT

Obligations in respect of the environment.

69. (1) The State shall—

(d) encourage public participation in the management, protection and conservation of the environment;

The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))

Distribution of Functions Between the National Government and the County Governments

PART 2 – COUNTY GOVERNMENTS

10. Implementation of specific national government policies on natural resources and environmental conservation, including—

- (a) soil and water conservation; and
- (b) forestry.

11. County public works and services, including—

- (a) storm water management systems in built-up areas; and
- (b) water and sanitation services. Finally, CHAPTER FOUR – THE BILL OF RIGHTS

## PART 2 – RIGHTS AND FUNDAMENTAL FREEDOMS

Economic and social rights.

43. (1) Every person has the right—

- (d) to clean and safe water in adequate quantities;

## CHAPTER FOUR—THE BILL OF RIGHTS PART 1—GENERAL PROVISIONS RELATING TO THE BILL OF RIGHTS

Application of Bill of Rights.

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(5) In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

- (a) it is the responsibility of the State to show that the resources are not available;
- (b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- (c) the court, tribunal or other authority may not interfere with a decision by a state organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.

### Committee's Observation/Recommendation

**Article 189(2) of the Constitution acknowledges that certain functions or powers can be assigned to multiple levels of government, thereby placing them within the shared jurisdiction of both the National and County Governments. In this context, the responsibility for developing, maintaining, and managing national public water works is allocated to the National Government. Conversely, the management of county public works and services, which includes water and sanitation services, falls**

under the purview of the county governments. Based on this, the Committee did not concur with this proposal.

4. Clause 7 –

**Proposal-** For paragraph (ba), the Bill has added bulk water tariffs as one of the tariffs that the Regulatory Board will evaluate and approve. It is important to note that bulk water tariffs were not present in the principal Act.

For new paragraph (c), the clause has removed the Regulatory Board's power to accredit water service providers.

We do not agree with this proposal as the Bill has not indicated the alternative entity that will have the power to accredit water service providers.

Consequently, we propose that this power remains with the Regulatory Board.

**Justification-** Accreditation of water service providers has the following benefits:

- a. accreditation ensures that water service providers meet set standards for delivering high quality services. Consequently, customers can have confidence in the quality and reliability of the services they receive;
- b. accreditation ensures that water service providers comply with health and safety standards in their operations. This includes water treatment processes and testing protocols to prevent contamination of water; and
- c. accreditation enhances the reputation and credibility of water service providers.

Committee's Observation/Recommendation

The Committee concurred that accreditation is vital and serves as a mechanism for quality assurance, indicating that a WSP meets certain standards beyond the minimum regulatory requirements. It can be seen as a mark of excellence or higher competency in service provision. As such, rather than deleting the clause, the Committee proposed an amendment that would incorporate licensing, setting conditions and accreditation of the WSP's.

5. Clause 9 –

**Proposal-** We propose that Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section:

(1) A contracting authority may enter into a public investment for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision as in the PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012 and The Public Finance Management (Public Investment Management) Regulations, 2022 (Legislative Supplement No. 29) Kenya Gazette Supplement No. 52 of 1<sup>st</sup> April, 2022.

**Justification- Not Provided**

*Committee's Observation/Recommendation*

**This proposal to amend Section 93 has the potential to dilute the benefits offered by Public-Private Partnerships (PPPs). PPPs are designed to leverage the strengths of the private sector, including its efficiency, innovation, and capacity for risk management, to enhance the provision of public services like water supply. By shifting the framework to a broader public investment model, as suggested, there's a significant risk of losing these critical benefits. This change could lead to decreased efficiency, slower project implementation, and potentially higher costs for water service provision, undermining the goal of improving access to quality water services for the public. The existing PPP model provides a structured approach for attracting private investment and expertise, crucial for addressing infrastructure gaps and ensuring sustainable, high-quality water service delivery. As such, the Committee rejected this proposal.**

**6. Clause 10 –**

**Proposal-** We conclude that Section 100 of the Water Act, 2016 ("the principal Act") is unconstitutional since;

COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT

PART 2—ENVIRONMENT AND NATURAL RESOURCES

Obligations in respect of the environment.

69. (1) The State shall—

(d) encourage public participation in the management, protection and conservation of the environment;

The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))

Distribution of Functions Between the National Government and the County Governments

PART 2 – COUNTY GOVERNMENTS

10. Implementation of specific national government policies on natural resources and environmental conservation, including—
  - (a) soil and water conservation; and
  - (b) forestry.
11. County public works and services, including—
  - (a) storm water management systems in built-up areas; and
  - (b) water and sanitation services.

**They propose that the same be deleted.**

**Justification- Not Provided**

**Committee's Observation/Recommendation**

**The Committee resolved to amend the clause to provide that bulk water supply services shall be undertaken a bulk water service provider which includes agencies at both levels of Government.**

**F. THE MINISTRY OF WATER, SANITATION AND IRRIGATION**

The Ministry had an extensive deliberation with the Committee making reference to some of the proposals raised by the various Stakeholders outline above and agreed on the following proposals below -

1. *Clause 2* of the Bill seeks to amend section 2 of the Water Act, No. 43 of 2016 (the 'Act') in the following manner-
  - (a) by inserting the definition of a 'contracting authority' to mean a national or county governmental body seeking to delegate its functions to a private entity.
  - (b) by deleting and substituting the deletion of 'bulk water'. The Act currently defines bulk water' as water supplied to a water services provider by the water services provider making the supply. The Bill proposes to amend this definition by specifying that only water works development agency or the Water Storage Authority can supply bulk water.

**Observation**

**The Committee noted with concern that Clause (2b) essentially leaves out the Counties and ignores their mandate as provided for in the Constitution, further, County Public Works and Services include storm water management systems in built-up areas and water sanitation services and are thus an exclusive function of the County Governments under the Fourth Schedule of the Constitution. The Gazette Notice of 9<sup>th</sup> August, 2013 on the transfer of functions unbundled County Public Works and Services in detail.**

### Ministry Response

The Cabinet Secretary assured the Members that going forward all the projects initiated by the Ministry would be going the full mile as initially Counties would fail in the last mile of distribution and at the time of amending the Water Bill no County had developed any County Public Works and Services thus the omission. Further, on the definition of 'bulk water' on Clause (2b) it was based on the fact that investors would want to engage with a water works development for security of payment.

### Joint Resolution

*The agreement was that the amendment should include County Government's role in Clause (2b) to also supply bulk water. Further the inclusion of the National Water Harvesting & Storage Authority in entering into the water purchase agreements with the Water Works development Authority.*

(c) by deleting and substituting the definition of 'water services provider'. The Act currently defines 'water services provider' as a company, public benefits organization or other person providing water services under and in accordance with a license issued by the Regulatory Board for the service areas defined by the license. The Bill now proposes to expand this definition by including the words 'agency, authority and state corporation', which expands the scope of entities that can be considered as water services providers.

**Observation-** Members noted that the proposed definition would have a ripple effect and thus the definition should read as follows- "Water Services Provider" means a company, agency, authority, state corporation, public benefit organization or any other person established/contracted by County Government providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license as Water and Sanitation Services are functions vested exclusively under the County Governments which are mandated to establish Water Service Providers under Section 77 of the Act.

**Ministry Response-** The Ministry's intention was to try and have a funding option for the WWDAs through PPPs. The intention is to meter in bulk and be able to sell the water to Water Service Providers.

Further, the Committee was informed that they picked the definition of a contracting authority from the PPP Act.

### Joint Resolution

*The joint agreement was to consider having a definition for a bulk water service provider instead, so as to make it different from a water service provider.*

2. *Clause 4* of the Bill proposes an amendment to section 68 of the Act by inserting a new paragraph (ba) immediately after paragraph (b).

(ba) operate water works and provide water services-

(a) Through bulk water purchase agreements with private investors as per the Public Private Partnerships Act, 2021.

(b) Through bulk water purchase agreements with other water services providers.

(c) By operating as a water services provider until the agency transfers the responsibility for the operation and management of water works to a county government or a water services provider.

Additionally, the proposed new paragraph (ba) further states that a national public water work shall not be transferred to a county government.

#### **Observation**

The Committee noted that it was essential to add the phrase ‘in consultation with the County Government’ as the jurisdiction of WWDAs is limited to operating waterworks and providing water services as a WSP. County Governments therefore need to be part of the negotiations to enter into agreements with investors in PPP agreements meant to enhance water and sanitation service delivery to Counties.

#### **Ministry Response**

The Ministry informed the Committee that on the No objection Clause by the County Government, the request is to have the words public participation instead.

#### **Joint Resolution**

*The joint agreement was that the adoption of the words in consultation with the County Governments and Public Participation be carried.*

3. *Clause 6 -Section 69* of the Principal Act is amended-

(a) by deleting subsection (1) and substituting therefore the following new subsection;

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

(b) in subsection (2), by deleting the words, “the joint committee, authority”

(c) in subsection (3), by deleting the words, “the joint committee, the authority”

#### **Observation**

**The Committee needed clarification on why the proposal for the deletion of the term joint authority. What would be the danger of having several joint authorities in the various regions?**

#### **Ministry’s Response**

**The Ministry informed the Committee that the joint authorities were not practical since it introduced several state corporations all over the country that were unmanageable. Since this was not tenable, they decided to have the WWDAs doing the bulk water since it was not achievable.**

4. *Clause 7 Section 72* of the Principal Act is amended in subsection (1)-

a) by inserting a new paragraph immediately after paragraph (b)-

ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;

b) by deleting paragraph (c) and substituting therefore the following new paragraph –

(C) issue and set conditions for licensing of water services providers

#### **Observation**

**The Committee observed that there was need for public participation in the area of concern to ensure there’s a standardized way of charging across all regions through guidelines provided by regulators in consultation with County Governments. Further, the Committee was concerned with the inclusion of irrigation and the argument supporting it.**

#### **Ministry’s Response**

**The Ministry informed the Committee that they had conducted public participation widely and thus the proposed amendment should remain as is. Water needs to be collected, transported and eventually disposed of safely and thus the cost is what informs the tariff and is normally at 75% of the cost of water.**

**On irrigation, the reason to have it included is to attract investors and to spread the cost of investment to make it viable and commercial as opposed to only relying on domestic consumption which may be unsustainable to pay debts.**

There is no intention to make water an expensive commodity to the consumers.

### **Joint Resolution**

*The joint agreement was that it's important to guide and give a uniform charge across all the Counties. The regulator could do this in consultation with the Counties.*

5. *Clause 9 -Section 93 of the Principal Act is amended by*
- (a) deleting subsection (1) and substituting therefore the following new subsection-
- (1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.
- (b) deleting subsection (3) and substituting therefor the following new subsection -
- (3) Where the person entering into an agreement with the contracting authority owns or possesses assets or infrastructure used for the provision of water services, the agreement shall set out the terms and conditions under which assets may continue to be used.

### **Observation**

**The Committee was concerned with why the proposal for deletion of the Clauses mentioned in the Bill is necessary.**

### **Ministry's Response**

**The Ministry explained that the contracting authority would not directly supply water to county utilities but would instead sell water in bulk to Water Works Development Agencies (WWDAs), which in turn would supply to utilities. This model ensures the investor's engagement ends with the WWDAs, streamlining the process and potentially enhancing efficiency in water service provision.**

### **Joint Resolution**

*The Committee concurred with the Ministry.*

6. *Clause 10- Section 100 of the Principal Act is amended by inserting the following new subsections immediately after subsection (3)-*
- (4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are

located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a license for bulk water supply shall be made.

### **Observation**

To amend (4) to include the County Public Works and Services, Joint Committees and Joint Authorities of County Governments together with Waterworks Development Agencies to supply water in bulk to water service providers. As proposed by the Council of Governors in their submission, assigning the bulk water supply solely to Water Works Development Agencies serves to limit the scope of the county functions and powers.

Further, to amend (5) to include ‘consultation with County Governments’. This is guided by and aware of the need for consultations and cooperation between both levels of Government in the conduct of their mutual relations.

### **Ministry’s Response**

The Ministry informed the Committee that both proposals in sub clause (4) and (5) is tenable and that they have always and consistently consulted counties even in the past.

### **Joint Resolution**

*The Committee recommended the proposal to adopt a definition of the term ‘bulk water service provider’ which would incorporate both the National Government agencies as well as the County Government agencies when it comes to the provision of bulk water.*

## CHAPTER THREE

### COMMITTEE OBSERVATIONS

The Committee made the following observations in line with its consideration of the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) –

1. **Clause 2**

- (a) The Committee noted the necessity of incorporating the words 'county agency' into the definition of a 'contracting authority', specifically in part (b), to accurately reflect the array of county government entities involved in provision of water services . This observation underscores the importance of a legislative framework that inclusively represents the organizational diversity within county governments, ensuring clarity and effectiveness in water service governance at the county level.
- (b) The Committee observed that the term 'private party' had been used under the definition of the term 'contracted authority' but no definition had been provided in the Bill, therefore causing ambiguity and uncertainty as to who a private party is.
- (c) The Committee further observed that the proposal to broaden the definition of 'water services provider' to include 'agency, authority, and state corporation' conflicts with sections 77, 78, and 79 of the Water Act, 2016 which specify that water services providers are established by County Governments. This expansion could introduce contradictions within the Act regarding the designation and governance of water services providers.
- (d) The Committee observed that the proposal in the Bill to amend the definition of the term 'bulk water' to solely mean water supplied only by water works development agencies or the National Water Harvesting and Storage Authority contradicts paragraph 11 of Part 2 of the Fourth Schedule to the Constitution, which assigns water and sanitation services to County Governments. While acknowledging the importance of facilitating funding for these agencies through Public Private Partnerships, the Committee underscored the imperative to include County Governments in these arrangements, preserving their Constitutional role in water service provision.

- (e) Arising from the above observation, the Committee identified the need to introduce a definition of 'bulk water services provider' in the Bill. This definition would provide that a bulk water service provider would include: a water service provider, contracting authority, or any other person providing bulk water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license. This would broaden the scope to include various entities licensed by the Regulatory Board, ensuring a more inclusive approach that aligns with constitutional and regulatory frameworks.
- (f) The Committee identified the absence of a clear definition of 'joint committees' within section 69 of the Water Act, 2016, which introduces uncertainty about the nature and scope of such committees. Noting that section 23 of the Intergovernmental Relations Act provides for the establishment of joint committees by the national or county governments for collaboration between national and county governments to fulfil the objectives of devolution, the Committee observed a critical need to define 'joint committee' in the Water Act. This definition would explicitly include committees formed by both national and county governments, aiming to dispel the existing ambiguity.

2. **Clause 3**

The Committee noted that while this clause sought to expand the mandate of the Water Storage Authority, enabling it to enter into bulk water purchase agreements, these agreements need to be subjected to economic efficiency criteria set by the Water Services Regulatory Board. This approach would promote financial integrity, protect consumer interests, and ensure fair access to water services.

3. **Clause 4**

The Committee observed that, while this proposed amendment seeks to broaden the water works development agencies operational scope by introducing specific methods and partnerships through which the water works development agencies can operate waterworks and provide water services, there is need to specify that: -

- (a) there must be consultation between the two levels of Government and public participation before the water works development agencies enter into bulk water purchase agreements;
- (b) the water works and development agencies can only operate water works and provide bulk water services; and,

- (c) the bulk water purchase agreements must be subjected to an economic efficiency criteria set by the Water Services Regulatory Board.

Further, the Committee observed that the proviso under clause 4 that seeks to provide that national public works shall not be transferrable to a county government goes against the principles of devolution as outlined in the Constitution promoting autonomy and empowering county governments to manage resources for tailored community development. Moreover, it conflicts with sections 69 and 153 of the Water Act, 2016, which already address the transfer of assets.

4. **Clause 5**

The Committee noted that Section 71(1) of the Water Act specifies the Water Services Regulatory Board's independence in exercising its powers and functions, with Section 72(1)(a) affirming its role in setting national standards for water service provision and asset development. Thus, clause 5 of the Bill which requires the Cabinet Secretary to approve the standards and licensing conditions for water works development agencies set by the Regulatory Board, undermines the Board's statutory autonomy. This proposed amendment contradicts the established legislative framework granting the Regulatory Board the authority to operate independently.

5. **Clause 6**

The Committee observed that the proposed clause 6 aims to prevent the handover of national public water works to county governments, water service providers, or joint committees of national and county governments, including the authority of these county governments over such works. This clause contradicts the cooperative governance principle outlined in Article 189 of the Constitution, given that water management is a shared function. Further, the committee acknowledged that section 23 of the Intergovernmental Relations Act provides that: - The national or a county government may establish a joint committee with a specific mandate where such a committee is necessary for the achievement of the objects and principles of devolution provided in Articles 174 and 175 of the Constitution.

6. **Clause 7**

The Committee observed that:

- (a) the proposed insertion of paragraph (ba) which seeks to provide that the Water Services Regulatory Board shall evaluate and approve water and sewerage

tariffs has already been covered under section 72(b) of the Water Act, and therefore the text of the proposed paragraph (ba) should only include the Regulatory Board's function to evaluate and recommend bulk water tariffs.

(b) there was need to separate the aspect of the evaluation and approval of tariffs for irrigation purposes. Allowing the Regulatory Board to regulate water use for irrigation will ensure that water is utilized efficiently and sustainably. By setting and approving tariffs, WASREB can incentivize the adoption of water-saving technologies and practices, and prevent over-extraction of water resources, thus protecting ecosystems and securing water availability.

(c) there was need to rephrase the proposal under clause 7(b) by clearly stating that the Regulatory Board shall issue licenses, set conditions and accredit water services providers. This clearly outlines two distinct but related regulatory functions: the issuance of licenses and the setting of conditions that govern the provision of water services. Further, the Committee observed that accreditation is vital and serves as a mechanism for quality assurance, indicating that a WSP meets certain standards beyond the minimum regulatory requirements. It can be seen as a mark of excellence or higher competency in service provision, and therefore should not be deleted from the functions of the Regulator.

7. **Clause 9**

The Committee observed that under clause 9(b) of the Bill which provides for cases where a third party, involved in a PPP with a water services provider, possesses assets or infrastructure for the provision of water services, specific terms and conditions governing the utilization of these assets must be outlined in the Bill. There is need to clarify that any use of assets or infrastructure must be directly related to the specific functions or services agreed upon. This precision helps prevent ambiguities in agreements and ensure that assets are used appropriately and as intended.

8. **Clause 10**

The Committee observed that clause 10 of the Bill aims to make an explicit provision, stating that notwithstanding any other stipulations in the Act, all bulk water supply services, which aim to supply water in bulk to a water services provider in a county or multiple counties different from the county where the bulk water abstraction works are situated shall be undertaken by waterworks development agencies. In view of the Committee's deliberation on the insertion of the definition of a 'bulk water service

provider’, the Committee noted that there would be need to amend this clause to provide that bulk water supply services shall be undertaken by the bulk water service providers licensed by the Regulatory Board and this would include agencies at both levels of Government.

9. **Clause 12**

The Committee observed that this clause seeks to broaden the composition of the Water Tribunal as established under section 119 of the Water Act. It was noted that the jurisdiction of the Tribunal as outlined in section 121 of the Act includes adjudicating disputes from decisions or orders by various authoritative bodies within the water sector and handling disputes involving water resources or services under business contracts. Recognizing the constitutional role of counties in water and sanitation services, the Committee underscored the need to include two persons (man and a woman) nominated by the Council of County Governors as members of the Tribunal. This would ensure that the Tribunal's composition is comprehensive and reflective of the diverse interests and structures within the Country's water governance framework.

## 10. CHAPTER FOUR

### **COMMITTEE RECOMMENDATIONS**

The Committee having reviewed the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) and conducted public participation, made the following recommendations:

#### 1. **Clause 2**

- (a) The Committee recommends the insertion of the definition of the term 'private party' as provided for under section 2 of the Public Private Partnerships Act, 2021.
- (b) The Committee resolved to retain the definition of a 'water service provider' as provided in the Water Act. Accordingly, it proposed the deletion of the definition of 'water services provider' as contained in the Bill.
- (c) The Committee resolved to delete the definition of 'bulk water' as contained in the Bill and insert a new definition that encompasses the provision of water in bulk by a bulk water services provider to a water service provider. This recommendation aims to ensure that the definition aligns with broader legislative and constitutional mandates, recognizing the role of both county governments and designated agencies in the supply of bulk water, thereby maintaining the integrity and inclusiveness of water service governance.
- (d) The Committee recommends the inclusion of the term 'county agency' within the definition of 'contracting authority' in part (b) to acknowledge county governments' varied organizational roles in water service delivery. This adjustment aims to ensure the law fully captures the range of county-level entities engaged in managing water services, promoting a comprehensive legal structure that supports efficient water governance at the local government level.
- (e) The Committee recommends the insertion of a definition of the term 'joint committee' to address current ambiguities. This definition would include the meaning that a joint committee is a committee established by the national or a county government consisting of the national government and a county government or two or more county governments. This amendment aims to clarify the composition and collaborative nature of joint committees in order to facilitate

better coordination and execution of water management projects, aligning with the broader objectives of devolution and efficient resource management across different levels of government.

2. **Clause 3**

The Committee recommends that Clause 3 be amended by subjecting the bulk water purchase agreements entered into by the Water Storage Authority to economic efficiency criteria set by the Water Services Regulatory Board. This amendment emphasizes the importance of regulatory oversight to ensure these agreements are financially sound and beneficial to consumers.

3. **Clause 4**

The Committee recommends that Clause 4 be amended to clarify the operational scope of water works development agencies in relation to entering into bulk water purchase agreements by incorporating specific provisions that:

- (a) require consultation with the concerned county governments and public participation prior to entering into bulk water purchase agreements, ensuring transparency and inclusivity.
- (b) limit the agencies' operational scope to managing water works and providing bulk water services, defining their roles and preventing operational overreach; and,
- (c) requiring that bulk water purchase agreements adhere to economic efficiency criteria established by the Water Services Regulatory Board, safeguarding financial integrity and consumer interests.

Further, the Committee recommended the deletion of the proviso under clause 4 that provides that: 'Provided that a national public water work shall not be transferrable to a county government'.

4. **Clause 5**

The Committee recommends that clause 5 be amended by deleting the requirement for the approval of the Cabinet Secretary for the standards and licensing conditions for water works development agencies set by the Regulatory Board. Section 71(1) of the Water Act already specifies the Water Services Regulatory Board's independence in exercising its powers and functions, with Section 72(1)(a) affirming its role in setting national standards for water service provision and asset development.

5. **Clause 6**

The Committee recommends that clause 6 be amended to provide that following the commissioning of all waterworks, the water works development agency shall enter into an agreement with a county government, cross-county water service provider, a joint committee, or water services provider to provide water services within whose area of jurisdiction the services are located. This proposed amendment to clause 6 seeks to clarify the entities that a water works development agency may enter into an agreement with when it comes to the handover of completed works. Further, the Committee has recommended the insertion of a definition of ‘joint committees’ therefore removing any ambiguities that may arise.

6. **Clause 7**

The Committee recommends that clause 7 be amended by:

- (a) separating the functions of the Water Services Regulatory Board to evaluate and recommend water and sewerage tariffs for water service providers which has already been covered under section 72(b) of the Water Act, with the proposed function to evaluate and recommend bulk water tariffs. Therefore, the new paragraph (ba) should only provide for the evaluation and recommendation of bulk water tariffs.
- (b) inserting a new paragraph that provides for the function of the Regulatory Board to evaluate and recommend tariffs for irrigation purposes.
- (c) stating that the Regulatory Board shall issue licenses, set conditions and accredit water services providers under clause 7(b).

11. **Clause 9**

The Committee recommends the amendment of clause 9(b) of the Bill to replace the term ‘provision of water services’ with ‘contracted function.’ This change ensures that the use of assets or infrastructure in Public-Private Partnership (PPP) agreements is strictly aligned with the specific functions or services outlined in the agreement.

12. **Clause 10**

The Committee recommends that clause 10 of the Bill be amended to provide that all bulk water supply services shall be done by the bulk water service providers and not just the water works development agencies.

13. **Clause 12**

The Committee recommends that Clause 12 of the Bill be amended to insert a new paragraph (d) that provides for the addition of two members being a man and a woman, nominated by the Council of County Governors, who possess a degree from a university recognized in Kenya and have at least five years' experience in the water sector.

## APPENDICES

- Annex I:**           **Minutes of the meetings**
- Annex II:**         **Newspaper Advert**
- Annex III:**       **Stakeholder Submissions/ Public Views**

**ANNEX I - MINUTES**

## **ANNEX II – PUBLIC ADVERT**

REPUBLIC OF KENYA



THIRTEENTH PARLIAMENT | SECOND SESSION

THE SENATE

### **INVITATION FOR SUBMISSION OF MEMORANDA**

At sittings of the Senate held on Tuesday, 19<sup>th</sup> September, 2023 the Bills listed at the second column below were introduced in the Senate by way of First Reading and thereafter stood committed to the respective Standing Committees indicated at the third column.

Pursuant to the provisions of Article 118 of the Constitution and Standing Order 145 (5) of the Senate Standing Orders, the Senate Standing Committees now invite interested members of the public to submit any representations that they may have on the Bills.

The representations may be made by way of written memoranda on email to the Clerk of the Senate on the address [clerk.senate@parliament.go.ke](mailto:clerk.senate@parliament.go.ke) and copied to the email addresses of the respective Committee indicated at the fourth column below, to be received on or before **Tuesday, 3<sup>rd</sup> October, 2023 at 5.00 p.m.**

	<b>Bill</b>	<b>Committee Referred To</b>	<b>Email Address</b>
a)	The Equalization Fund Appropriation Bill (Senate Bills No. 30 of 2023)	Standing Committee on Finance and Budget.	<a href="mailto:Financebudgetcomm.senate@parliament.go.ke">Financebudgetcomm.senate@parliament.go.ke</a>
b)	The Food and Feed Safety Control Coordination Bill (National Assembly Bills No. 21 of 2023)	Standing Committee on Agriculture, Livestock and Fisheries.	<a href="mailto:agriculturelfcommittee.senate@parliament.go.ke">agriculturelfcommittee.senate@parliament.go.ke</a>
c)	The Water (Amendment) Bill (National Assembly Bills No. 33 of 2023)	Standing Committee on Land, Environment and Natural Resources.	<a href="mailto:Landenvironcommittee.senate@parliament.go.ke">Landenvironcommittee.senate@parliament.go.ke</a>

The Bills may be accessed on the Parliament website at <http://www.parliament.go.ke/the-senate/house-business/bills>.

**J.M. NYEGENYE, CBS,  
CLERK OF THE SENATE.**



**MINUTES OF THE SECOND (2<sup>ND</sup>) SITTING OF THE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON TUESDAY, 20<sup>TH</sup> FEBRUARY, 2024 IN VIP ANNEX I, FIRST FLOOR, KICC BUILDING AT 9:00 AM**

**PRESENT**

- |  |                    |
|--|--------------------|
| 1. Sen. John Muhia Methu, MP             | - Chairperson      |
| 2. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP | - Vice Chairperson |
| 3. Sen. Johnes Mwashushe Mwaruma, MP     | - Member           |
| 4. Sen. Wamatinga Wahome, MP             | - Member           |
| 5. Sen. Agnes Kavindu Muthama, MP        | - Member           |
| 6. Sen. Mariam Sheikh Omar, MP           | - Member           |
| 7. Sen. Beatrice Akinyi Ogola, MP        | - Member           |

**ABSENT WITH APOLOGIES**

- |  |          |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. Sen. Issa Juma Boy, MP                  | - Member |

**SECRETARIAT**

- |                        |                               |
|------------------------|-------------------------------|
| 1. Mr. Victor Bett     | - Clerk Assistant I           |
| 2. Ms. Ivy Nyambura    | - Clerk Assistant III         |
| 3. Ms. Angela Kagunyi  | - Legal Counsel II            |
| 4. Ms. Keziah Muthama  | -Fiscal Analyst III           |
| 5. Mr. John Gichia     | -Research Officer III         |
| 6. Ms. Janice Naserian | -Research Officer III         |
| 7. Mr. Jack Lemeteki   | - Media Relations Officer III |
| 8. Ms. Shirley Milimu  | - Audio Officer III           |
| 9. Mr. Daniel Kirwa    | - Serjeant at Arms            |
| 10. Mr. David Muthuri  | -Intern                       |
| 11. Ms. Eva Muturim    | -Intern                       |

**MINUTE SEN/LENR/008/2024: PRELIMINARIES**

The Chair called the meeting to order at 9.25 am. This was followed by a word of prayer.

**MINUTE SEN/LENR/009/2024:**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted after having been proposed by Sen. Agnes Kavindu Muthama, MP and seconded by Sen. Mariam Sheikh Omar, MP as follows-

1. Prayer;
2. Adoption of the Agenda;
3. Confirmation of Minutes of the previous sitting;
4. Matters Arising;
5. **Consideration of-**
  - i. **The Budget Policy Statement (BPS) for Financial Year 2024/2025; and**
  - ii. **Adoption of the draft Report on the Water (Amendment) Bill, 2023 (National Assembly Bill No. 33 of 2023)**
6. Any Other Business; and
7. Date of the Next Meeting and Adjournment.

**MINUTE SEN/LENR/010/2024:**

**CONFIRMATION OF MINUTES OF THE PREVIOUS MEETING**

The Committee confirmed the Minutes of the First (1<sup>st</sup>) meeting held on 15<sup>th</sup> February, 2024 as a true record of events after having been proposed by Sen. Johnes Mwaruma, MP and seconded and Sen. Mariam Sheikh Omar, MP respectively.

**MINUTE SEN/LENR/011/2024:**

**MATTERS ARISING**

There were no matters arising.

**MINUTE SEN/LENR/012/2024:**

**CONSIDERATION OF THE BUDGET POLICY STATEMENT (BPS) FOR FINANCIAL YEAR 2024/2025**

This agenda was deferred to the next meeting.

**MINUTE SEN/LENR/013/2024:**

**CONSIDERATION AND ADOPTION OF THE DRAFT REPORT ON THE WATER (AMENDMENT) BILL, 2023 (NATIONAL ASSEMBLY BILL NO. 33 OF 2023)**

The Committee reviewed the Draft Committee Report on the Water (Amendment) Bill, 2023 (*National Assembly Bill No. 33 of 2023*) clause by clause noting the various recommendations and observations the Members agreed to during prior deliberations.

The Committee recommended that Clause 12 of the Bill be amended to insert a new paragraph (d) that provides for the addition of two members being a man and a woman, nominated by the Council of County Governors, who possesses a degree from a

university recognized in Kenya and have at least five years' experience in the water sector.

The Committee having reviewed the *Water (Amendment) Bill, 2023 (National Assembly Bill No. 33 of 2023)* and conducted Public Participation recommended that the House approves the Bill with the proposed amendments as indicated in its Report.

**The Committee adopted the report having been proposed and seconded by Sen. Wahome Wamatinga, MP and Sen. Maria Sheikh Omar, MP respectively.**

**MINUTE SEN/LENR/014/2023**

**ANY OTHER BUSINESS**

There was no other Business.

**MINUTE SEN/LENR/015/2023**

**ADJOURNMENT AND DATE OF NEXT MEETING**

The meeting was adjourned at 10:29 am. The date of the next meeting was to be called on notice.

Signed \_\_\_\_\_



Date 20/2/2024

**SEN. JOHN MUHIA METHU, MP**

**CHAIRPERSON**

**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES**



**MINUTES OF THE FIRST (1<sup>ST</sup>) SITTING OF THE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON THURSDAY, 15<sup>TH</sup> FEBRUARY, 2024 IN VIP ANNEX 1, FIRST FLOOR, KICC BUILDING AT 9:00 AM**

**PRESENT**

- |  |                    |
|--|--------------------|
| 1. Sen. John Muhia Methu, MP             | - Chairperson      |
| 2. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP | - Vice Chairperson |
| 3. Sen. Johnes Mwashushe Mwaruma, MP     | - Member           |
| 4. Sen. Mariam Sheikh Omar, MP           | - Member           |
| 5. Sen. Agnes Kavindu Muthama, MP        | - Member           |
| 6. Sen. Beatrice Akinyi Ogola, MP        | - Member           |

**ABSENT WITH APOLOGIES**

- |  |          |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. Sen. Issa Juma Boy, MP                  | - Member |
| 3. Sen. Wamatinga Wahome, MP               | - Member |

**SECRETARIAT**

- |                       |                        |
|-----------------------|------------------------|
| 1. Mr. Victor Bett    | - Clerk Assistant II   |
| 2. Ms. Ivy Nyambura   | - Clerk Assistant III  |
| 3. Ms. Angela Kagunyi | - Legal Counsel II     |
| 4. Mr. John Muiruri   | - Research Officer III |
| 5. Ms. Keziah Muthama | - Fiscal Analyst III   |
| 6. Ms. Shirley Milimu | - Audio Officer III    |
| 7. Mr. Ibrahim Odindo | - Serjeant at arms     |
| 8. Ms. Eva Muturi     | - Intern               |
| 9. Mr. David Muthuri  | - Intern               |

**MINUTE SEN/LENR/001/2024**

**PRELIMINARIES**

The Chair called the meeting to order at 9:18 am. This was followed by a word of prayer.

**MINUTE SEN/LENR/002/2024**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted after having been proposed by Sen. Agnes Kavindu Muthama, MP and seconded by Sen. Mariam Sheikh Omar, MP as follows-

1. Prayer;
2. Adoption of the Agenda;
3. Confirmation of Minutes of previous sittings;
4. Matters Arising;
5. **Consideration of -**
  - i. **The Work Plan of the Committee for the remainder of the Financial Year, 2023/2024; and**
  - ii. **The status of legislative business before the Committee.**
6. Any Other Business; and
7. Date of the Next Meeting and Adjournment.

**MINUTE SEN/LENR/003/2024**

**CONFIRMATION OF MINUTES OF PREVIOUS SITTINGS**

The following minutes were confirmed as true records of proceedings after being proposed and seconded as follows-

- i. Minutes of the *51<sup>st</sup> Sitting* held on Tuesday, 31<sup>st</sup> October, 2023 proposed by Sen. Agnes Kavindu Muthama, MP and seconded by Sen. Beatrice Akinyi Ogola, MP;
- ii. Minutes of the *52<sup>nd</sup> Sitting* held on Monday, 6<sup>th</sup> November, 2023 proposed by Sen. Beatrice Akinyi Ogola, MP and seconded by Sen. Agnes Kavindu Muthama, MP;
- iii. Minutes of the *53<sup>rd</sup> Sitting* held on Thursday, 9<sup>th</sup> November, 2023 proposed by Sen. Mariam Sheikh Omar, MP and seconded by Sen. Johnes Mwashushe Mwaruma, MP;
- iv. Minutes of the *54<sup>th</sup> Sitting* held on Wednesday, 15<sup>th</sup> November, 2023 proposed by Sen. Mariam Sheikh Omar, MP and seconded by Sen. Beatrice Akinyi Ogola, MP;
- v. Minutes of the *55<sup>th</sup> Sitting* held on Friday, 24<sup>th</sup> November, 2023 (Morning Session) proposed by Sen. Johnes Mwashushe Mwaruma, MP and seconded by Sen. Mariam Sheikh Omar, MP;
- vi. Minutes of the *56<sup>th</sup> Sitting* held on Friday, 24<sup>th</sup> November, 2023 (Afternoon Session) proposed by Sen. Beatrice Akinyi Ogola, MP and seconded by Sen. Agnes Kavindu Muthama, MP;

- vii. Minutes of the 57<sup>th</sup> Sitting held on Saturday, 25<sup>th</sup> November, 2023 (Morning Session) proposed by Sen. Johnes Mwashushe Mwaruma, MP and seconded by Sen. Agnes Kavindu Muthama, MP; and
- viii. Minutes of the 58<sup>th</sup> Sitting held on Saturday, 25<sup>th</sup> November, 2023 (Afternoon Session) proposed by Sen. Beatrice Akinyi Ogola, MP and seconded by Sen. Mariam Sheikh Omar, MP.

**MINUTE SEN/LENR/004/2024**

**MATTERS ARISING**

**1. Under Minute SEN/LENR/306/2023- Meeting with the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development and the Chairperson, National Land Commission**

*Statement sought by Sen. Johnes Mwaruma, MP concerning the status of adjudication of Kaloleni Majengo Settlement Scheme in Voi Sub-County, Taita Taveta County;*

Senator Johnes Mwaruma, MP informed the secretariat to ensure that this particular Statement is among the statements that the Cabinet Secretary, Ministry of Lands, Public Works, Housing and Urban Development is expected to respond to

**2. Under Minute SEN/LENR/311/2023- Meeting with Petitioners on the Petition regarding the Changara Water Pan, A World Bank Funded project in Busia County**

The Committee reiterated on the importance of conducting a site visit to Changara Water Pan in Busia County to ascertain the concerns raised by the petitioners. The Committee was informed that plans are underway with tentative dates set for 15<sup>th</sup> March, 2024.

**MINUTE SEN/LENR/005/2024**

**CONSIDERATION OF THE WORK PLAN OF THE COMMITTEE FOR THE REMAINDER OF THE FINANCIAL YEAR, 2023/2024 AND THE STATUS OF LEGISLATIVE BUSINESS BEFORE THE COMMITTEE**

The Secretariat took Members through the draft proposal of the Committee's work plan for the remainder of the financial year 2023/2024 highlighting pending legislative work before the Committee and the proposed meeting dates and action.

The Committee resolved not to schedule meetings on Wednesday mornings to meet with petitioners due to time constraints.

The Legal counsel took members through Clause 6 and Clause 4 of the Water (Amendment) Bill, 2023 (National Assembly Bill No. 33 of 2023) that the Committee was yet to make determinations on.

On further deliberations the Committee resolved to-

- i. Consider and adopt the Water (Amendment) Bill, 2023 (National Assembly Bill No. 33 of 2023) on Tuesday 20<sup>th</sup> February, 2024 in readiness for tabling in the Senate the same day;
- ii. Adopt the Work Plan of the Committee for the remainder of the Financial Year, 2023/2024 with amendments;
- iii. Retreat on Thursday 22<sup>nd</sup> February, 2024 to Monday 25<sup>th</sup> February, 2024 to conduct public participation and consideration the matrix on the following Bills-
  - The Real Estate Regulation Bill (Senate Bills No.35 of 2023)
  - The National Rating Bill, 2022 (National Assembly Bill No. 55 of 2022)
  - The Meteorology Bill, 2023 (Senate Bills No. 45 of 2023)

**MINUTE SEN/LENR/006/2024**


**ANY OTHER BUSINESS**

The Committee noted the necessity to meet the CS Tourism and Wildlife on Human Wildlife Conflict.

**MINUTE SEN/LENR/007/2024**

**ADJOURNMENT AND DATE OF NEXT MEETING**

The meeting was adjourned at 10:27 am. The date of the next meeting was to be held on Tuesday, 20th February, 2024 at 9.00 am.

Signed  Date 20/2/2024  
SEN. JOHN MUHIA METHU, MP

**CHAIRPERSON**  
**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL**  
**RESOURCES**



**MINUTES OF THE FIFTY FIFTH (55<sup>TH</sup>) SITTING OF THE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON FRIDAY, 24<sup>TH</sup> NOVEMBER, 2023 IN SERENA HOTEL, MOMBASA COUNTY AT 9:30 AM**

**PRESENT**

- |                                      |               |
|--------------------------------------|---------------|
| 1. Sen. John Muhia Methu, MP         | - Chairperson |
| 2. Sen. Agnes Kavindu Muthama, MP    | - Member      |
| 3. Sen. Issa Juma Boy, MP            | - Member      |
| 4. Sen. Johnes Mwashushe Mwaruma, MP | - Member      |
| 5. Sen. Wamatinga Wahome, MP         | - Member      |
| 6. Sen. Beatrice Akinyi Ogola, MP    | - Member      |
| 7. Sen. Mariam Sheikh Omar, MP       | - Member      |

**ABSENT WITH APOLOGIES**

- |  |                    |
|--|--------------------|
| 1. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP   | - Vice Chairperson |
| 2. Sen. William Cheptumo Kipkiror, CBS, MP | - Member           |

**IN ATTENDANCE**

**SECRETARIAT**

- |                       |                                 |
|-----------------------|---------------------------------|
| 1. Mr. Victor Bett    | - Clerk Assistant II            |
| 2. Ms. Ivy Nyambura   | - Clerk Assistant III           |
| 3. Ms. Angela Kagunyi | - Legal Counsel II              |
| 4. Ms. Lydia Kagumba  | - Public Communications Officer |
| 5. Mr. Jack Lemeteki  | - Media Relations Officer       |
| 6. Ms. Shirley Milimu | - Audio Officer III             |
| 7. Mr. Ibrahim Odindo | - Serjeant at Arms              |

**MINUTE SEN/LENR/314/2023**

**PRELIMINARIES**

The Chair called the meeting to order at 9:55 am. This was followed by a word of prayer.

The Committee considered the matrix of the following stakeholders-

- i. Members of the County Budget and Economic Forum of Taita Taveta County.
- ii. Water Services Provider Association.
- iii. Water Services Regulatory Board (WASREB).
- iv. Kenya Association of Manufacturers (KAM).
- v. The National Treasury & Economic Planning – Public Private Partnerships Directorate.
- vi. The Council of Governors.
- vii. Ministry of Water, Sanitation and Irrigation

#### **CLAUSE- LONG TITLE**

1. WASREB proposed that the long title of the Bill be amended to read:

*“An Act of Parliament to amend the Water Act to provide for public private partnerships arrangements, licensing and for connected purposes.”*

#### **Committee Determination**

**The Committee considered this proposal and found that the term ‘for connected purposes’ as provided in the long title as, already covers all aspects that may be related to private partnership agreements including licensing of the Water, Works Development Agencies.**

Under the definition of ‘contracting authority’ there is need for an interpretation of the word used therein ‘private party’.

#### **Committee Determination**

**The Committee adopted the definition of a ‘private party’ as provided for under section 2 of the Public Private Partnerships Act, 2021.**

#### **CLAUSE 2**

2. Members of the County Budget and Economic Forum of Taita Taveta County proposed that The interpretation of the service provider remains as in Section 2 of the Water Act, 2016 ("the principal Act") and an interpretation of the word “company”

- *a water services provider established by county government as a public limited liability company under the Companies Act, 2015.*

#### **Committee Determination**

**The Committee resolved to retain the definition of a ‘water service provider’ as provided in the Water Act. Further, the Committee resolved to insert the definition of ‘bulk water services provider’ in order to differentiate between a ‘water service provider’ and further provide a funding option for the Water Works Development Agencies through Public Private Partnerships.**

3. WASREB proposed to add ‘county agency’ under the definition of a contracting authority under (ii)

#### **Committee Determination**

**The Committee adopted this proposal.**

4. The National Treasury & Economic Planning – Public Private Partnership Directorate proposed amending the definition of ‘water service provider’ to adopt the following definition:

*“water service provider” to mean a company, agency, authority, **contracting authority**, state corporation, public benefit organization or any other person providing water services in accordance with a license issued by the Regulatory Board for the services areas specified in the license.*

#### **Committee Determination**

**The Committee resolved that the term ‘contracting authority’ would be inserted in the definition of ‘*bulk water services provider*’ rather than in the definition of ‘*water services provider*’.**

5. Council of Governors proposed to amend to read as follows;  
“bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority or the County Public Works and Services to water service providers for retail;

#### **Committee Determination**

**The Committee considered the proposal and resolved to provide a definition of ‘bulk water services provider’ which would include the County Governments.**

**The Committee considered the proposal and resolved to provide a definition of ‘bulk water services provider’ which would include the County Governments.**

6. Council of Governors proposed to amend to read as follows;

“Water Services Provider” means a company, agency, authority, state corporation, public benefit organization or any other person established/Contracted by County Government providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the licence.

### **Committee determination**

**The Committee resolved to retain the definition of ‘water services provider’ as provided for under section 2 of the Water Act, thereby affirming the provision of water services at the retail level as a function of the County Government.**

### **CLAUSE 3**

7. Members of the County Budget and Economic Forum of Taita Taveta County proposed that A template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.

### **Committee determination**

**The Committee did not carry this proposal for the following reasons:**

- a) **Water supply needs and conditions can vary significantly across different regions and over time. A one-size-fits-all template may not be able to accommodate the unique aspects of each agreement, potentially leading to inadequate or inefficient agreements that don't meet the specific needs of the parties involved.**
- b) **The water sector is dynamic, with frequent advancements in technology, shifts in market conditions, and evolving environmental regulations. A static template embedded in the Water Act would likely become outdated quickly, necessitating frequent legislative amendments to remain relevant.**

8. KAM proposed that a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.

#### **Committee determination**

**The Committee did not carry this proposal for the following reasons:**

- a) **Water supply needs and conditions can vary significantly across different regions and over time. A one-size-fits-all template may not be able to accommodate the unique aspects of each agreement, potentially leading to inadequate or inefficient agreements that don't meet the specific needs of the parties involved.**
- c) **The water sector is dynamic, with frequent advancements in technology, shifts in market conditions, and evolving environmental regulations. A static template embedded in the Water Act would likely become outdated quickly, necessitating frequent legislative amendments to remain relevant.**

#### **CLAUSE 4**

9. **Members of the County Budget and Economic Forum of Taita Taveta County concluded that Section 68, 69, of the Water Act, 2016 ("the principal Act") is unconstitutional.**

#### **Committee determination**

**Article 189(2) of the Constitution acknowledges that certain functions or powers can be assigned to multiple levels of government, thereby placing them within the shared jurisdiction of both the National and County Governments. In this context, the responsibility for developing, maintaining, and managing national public water works is allocated to the National Government. Conversely, the management of county public works and services, which includes water and sanitation services, falls under the purview of the county governments. Based on this, the Committee did not concur with this proposal.**

10. **Council of Governors proposed to amend the proposed Section 68 (ba) (i) and the provision to:**
  - (i) **By entering into a bulk water purchase agreement with an investor in accordance with a no objection issued by County Government for the service**

area specified in the contract agreement and in accordance with the provisions of the Public Private Partnerships Act, 2021.

Provided that a national public water works shall not be transferrable to a county government; and no/ any transfer of county water works to the national government shall be done upon approval by the relevant county government.

#### **Committee determination**

**The Committee concurred that there is need for consultation between the two levels of Government and there is need for public participation before the Water Works Development Agencies enter into bulk water purchase agreements. As such, the Committee proposed an amendment to this clause by inserting the words: ‘and subject to consultation with the relevant county government and conducting public participation.’.**

#### **CLAUSE 5**

11. WASREB proposed the phrase “*with the approval of the Cabinet Secretary*” under clause 68A (2) to be deleted.

#### **Committee determination**

**The Committee adopted this proposal in view of sections 71 and of the Water Act, as they relate to the Functions and Powers of the Regulatory Board.**

#### **CLAUSE 6**

12. Council of Governors proposed the deletion of proposed amendments (b) and (c).

#### **Committee determination**

**The Committee did not make a determination on this clause.**

#### **CLAUSE 7**

13. Members of the County Budget and Economic Forum of Taita Taveta County observed that For paragraph (ba), the Bill has added bulk water tariffs as one of the tariffs that the Regulatory Board will evaluate and approve. It is important to note that bulk water tariffs were not present in the principal Act.

For new paragraph (c), the clause has removed the Regulatory Board's power to accredit water service providers.

We do not agree with this proposal as the Bill has not indicated the alternative entity that will have the power to accredit water service providers. Consequently, they proposed that this power remains with the Regulatory Board.

#### **Committee determination**

**The Committee concurred that accreditation is vital and serves as a mechanism for quality assurance, indicating that a WSP meets certain standards beyond the minimum regulatory requirements. It can be seen as a mark of excellence or higher competency in service provision. As such, rather than deleting the clause, the Committee proposed an amendment that would incorporate licensing, setting conditions and accreditation of the WSP's.**

14. WASREB made the following proposal-

- (i) Maintain the previous section 72(b) but replace the word '*recommend*' with '*approve*'.
- (ii) Add subsection (bb) to read as follows:  
*'Evaluate and approve tariffs for irrigation purposes'*
- (iii) Section 72(c) to be rephrased to read: -  
*'Issue licenses and set conditions for water service provision'*

#### **Committee determination**

**The Committee concurred with the proposal to insert subsection (bb) for the reason that this clause would enable WASREB to regulate water use for irrigation more effectively, ensuring water is utilized efficiently and sustainably. By setting and approving tariffs, WASREB can incentivize the adoption of water-saving technologies and practices, and prevent over-extraction of water resources, thus protecting ecosystems and securing water availability for future generations.**

**The Committee further concurred with the proposal to rephrase section 72(c) to "*issue licenses and set conditions for water service provision*". This clearly outlines two distinct but related regulatory functions: the issuance of licenses and the setting of conditions that govern the provision of water services. This delineation ensures that the regulatory authority's roles are comprehensively covered, encompassing**

**both the licensing process and the broader regulatory framework that guides service provision.**

15. KAM proposed that the clause be deleted

#### **Committee determination**

**The Committee concurred that accreditation is vital and serves as a mechanism for quality assurance, indicating that a WSP meets certain standards beyond the minimum regulatory requirements. It can be seen as a mark of excellence or higher competency in service provision. As such, rather than deleting the clause, the Committee proposed an amendment that would incorporate licensing, setting conditions and accreditation of the WSP's.**

16. Council of Governors proposed to amend the proposed section 72(ba) to:

(ba) evaluate and approve ~~water and sewerage tariffs~~ bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes

#### **Committee determination**

**The Committee concurred with this proposal because the task of evaluating and recommending water and sewerage tariffs for county water service providers is already covered under section 72(b) of the Water Act. Therefore, the focus needed to shift to providing for the evaluation and approval of bulk water tariffs.**

#### **CLAUSE 9**

17. Members of the County Budget and Economic Forum of Taita Taveta County proposed that Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section:

(1) A contracting authority may enter into a public investment for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision as in the PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012 and The Public Finance Management (Public Investment Management) Regulations, 2022 (Legislative Supplement No. 29) Kenya Gazette Supplement No. 52 of 1<sup>st</sup> April, 2022.

### **Committee determination**

**This proposal to amend Section 93 has the potential to dilute the benefits offered by Public-Private Partnerships (PPPs). PPPs are designed to leverage the strengths of the private sector, including its efficiency, innovation, and capacity for risk management, to enhance the provision of public services like water supply. By shifting the framework to a broader public investment model, as suggested, there's a significant risk of losing these critical benefits. This change could lead to decreased efficiency, slower project implementation, and potentially higher costs for water service provision, undermining the goal of improving access to quality water services for the public. The existing PPP model provides a structured approach for attracting private investment and expertise, crucial for addressing infrastructure gaps and ensuring sustainable, high-quality water service delivery. As such, the Committee rejected this proposal.**

18. Council of Governors proposed to amend the proposed Section 93(1) to:

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

### **Committee determination**

**The Committee addressed the concerns raised with a proposed amendment to Clause 4, requiring consultation with the County Government and ensuring public participation. Additionally, the Committee has narrowed the application of the Public-Private Partnership (PPP) framework to exclusively cover the provision of bulk water services.**

19. Council of Governors proposed to delete the proposed amendments

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

### **Committee determination**

**The Committee concurred with this proposal to delete the words 'provision of water services' and insertion of the words 'contracted function'. This clarifies that any use**

of assets or infrastructure must be directly related to the specific functions or services agreed upon. This precision can help prevent ambiguities in agreements and ensure that assets are used appropriately and as intended.

#### CLAUSE 10

20. Members of the County Budget and Economic Forum of Taita Taveta County concluded that Section 100 of the Water Act, 2016 ("the principal Act") is unconstitutional since;

#### COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT

#### PART 2—ENVIRONMENT AND NATURAL RESOURCES

Obligations in respect of the environment.

69. (1) The State shall—

(d) encourage public participation in the management, protection and conservation of the environment;

The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))

Distribution of Functions Between the National Government and the County Governments

#### PART 2 – COUNTY GOVERNMENTS

10. Implementation of specific national government policies on natural resources and environmental conservation, including—

(a) soil and water conservation; and

(b) forestry.

11. County public works and services, including—

(a) storm water management systems in built-up areas; and

(b) water and sanitation services.

They thus proposed that the same be deleted.

#### **Committee determination**

**The Committee resolved to amend the clause by deleting “waterworks development agencies established under section 65 of this Act” and inserting “bulk water services providers.” This change includes counties within the definition of bulk water services providers, thereby eliminating the exclusivity previously granted to Water Works Development Agencies as the sole providers of bulk water supply services.**

21. WASREB proposed the deletion of the proposed subsection 100(4) and section 100(5).

**Committee determination**

**The Committee resolved to amend the clause by deleting “waterworks development agencies established under section 65 of this Act” and inserting “bulk water services providers.” This change includes counties within the definition of bulk water services providers, thereby eliminating the exclusivity previously granted to Water Works Development Agencies as the sole providers of bulk water supply services.**

**The Committee considered the proposal to delete section 100(5) and rejected it on the basis that Section 142 of the Water Act already grants the Cabinet Secretary the authority to make regulations.**

22. KAM proposed deletion of this proposal.

**Committee determination**

**The Committee resolved to amend the clause by deleting “waterworks development agencies established under section 65 of this Act” and inserting “bulk water services providers.” This change includes counties within the definition of bulk water services providers, thereby eliminating the exclusivity previously granted to Water Works Development Agencies as the sole providers of bulk water supply services.**

23. KAM proposed the introduction of new provisions under section 100 on bulk water under the Water Act to provide for the development of regulations on bulk water and purchase agreements and a schedule to prescribe the agreement forms as follows:

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

**Committee determination**

**The Committee observed that section 142(1) empowers the Cabinet Secretary to make regulations with respect to any matter which by the Act is required or permitted to be prescribed, or which is necessary or expedient to be prescribed.**

**Therefore this matter has adequately been provided and therefore the Committee rejected the proposal.**

24. Council of Governors proposed Amend the proposed Section to include the following:

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the County in which the bulk water abstraction works are located shall be undertaken by 'County Public Works and Services, Joint Committees and Joint Authorities of County Governments, water works development agencies established under section 65 of this Act and licensed under this section.

**Amend the proposed Section to include the following:**

(5) The Cabinet Secretary shall make regulations in consultation with County Governments prescribing the manner in which an application for a licence for bulk water supply shall be made.

#### **Committee determination**

**The Committee resolved to amend the clause by deleting "waterworks development agencies established under section 65 of this Act" and inserting "bulk water services providers." This change includes counties within the definition of bulk water services providers, thereby eliminating the exclusivity previously granted to Water Works Development Agencies as the sole providers of bulk water supply services.**

#### **NEW CLAUSES**

25. Council of Governors proposed to amend section 78(b) of the Principal Act to define the county assets in context.

#### **Committee determination**

**The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.**

26. Council of Governors proposed to amend section 29, 30, 42, 26, 64 and 65.

#### **Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

27. Council of Governors proposed to amend section 74, 97, 98 and Sections 101, 106.

**Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

28. Council of Governors proposed to amend section 94.

**Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

29. Council of Governors proposed to amend section 109 and 117

**Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

30. Council of Governors proposed to amend section 87 and 92

**Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

**NEW CLAUSE (WATER USE CHARGES FOR THE SALT SECTOR)**

31. KAM proposed that the charges for water use for the salt sector be reduced.

**Committee determination**

The Committee reviewed the proposal and determined it was not within the Amendment Bill's current scope as published. Consequently, it may be considered in future deliberations.

MINUTE SEN/LENR/316/2023

ANY OTHER BUSINESS

There was no other business discussed.

MINUTE SEN/LENR/317/2023

ADJOURNMENT AND DATE OF  
NEXT MEETING

The meeting was adjourned at 12:10 pm. The next meeting was to be held at 2.00pm on Friday, 24th November, 2023.

Signed



Date 15/2/2024

SEN. JOHN MUHIA METHU, MP

CHAIRPERSON  
STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL  
RESOURCES



**MINUTES OF THE FIFTY SECOND (52<sup>ND</sup>) SITTING OF THE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON MONDAY, 6<sup>TH</sup> NOVEMBER, 2023 IN COMMITTEE ROOM 15, MAIN PARLIAMENT BUILDING AT 2:00 PM**

**PRESENT**

- |  |                    |
|--|--------------------|
| 1. Sen. John Muhia Methu, MP             | - Chairperson      |
| 2. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP | - Vice Chairperson |
| 3. Sen. Agnes Kavindu Muthama, MP        | - Member           |
| 4. Sen. Beatrice Akinyi Ogola, MP        | - Member           |
| 5. Sen. Wamatinga Wahome, MP             | - Member           |

**ABSENT WITH APOLOGIES**

- |  |          |
|--|----------|
| 1. Sen. William Cheptumo Kipkiror, CBS, MP | - Member |
| 2. Sen. Johnes Mwashushe Mwaruma, MP       | - Member |
| 3. Sen. Mariam Sheikh Omar, MP             | - Member |
| 4. Sen. Issa Juma Boy, MP                  | - Member |

**IN ATTENDANCE**

**A. MINISTRY OF WATER, SANITATION AND IRRIGATION**

- |                        |                                   |
|------------------------|-----------------------------------|
| 1. Mr. Zachary Njeru   | - Cabinet Secretary               |
| 2. Mr. Julius K. Korir | - Principal Secretary             |
| 3. Eng. S.O Alima      | - Water Secretary                 |
| 4. Ms. Rose Nyankwama  | - Dep. Chief State Counsel        |
| 5. Mr. Stephen Kihara  | - Sec. Administration State dept. |
| 6. Ms. Caroline Mueni  | - Legal Officer                   |
| 7. Mr. Geoffrey Rono   | - PS Officer                      |
| 8. Ms. Eunice Mbithi   | - CS Officer                      |

**B. SECRETARIAT**

- |                       |                       |
|-----------------------|-----------------------|
| 1. Mr. Victor Bett    | - Clerk Assistant II  |
| 2. Ms. Ivy Nyambura   | - Clerk Assistant III |
| 3. Ms. Angela Kagunyi | - Legal Counsel II    |

- |                       |                                 |
|-----------------------|---------------------------------|
| 4. Mr. John Muiruri   | - Research Officer III          |
| 5. Ms. Keziah Muthama | - Fiscal Analyst III            |
| 6. Ms. Shirley Milimu | - Audio Officer III             |
| 7. Ms. Lydia Kagumba  | - Public Communications Officer |
| 8. Mr. Jack Lemeteki  | - Media Relations Officer       |
| 9. Mr. John Lekampule | - Serjeant at arms              |

**MINUTE SEN/LENR/297/2023**

**PRELIMINARIES**

The Chair called the meeting to order at 9:19 am. This was followed by a word of prayer.

**MINUTE SEN/LENR/298/2023**

**ADOPTION OF THE AGENDA**

The agenda of the meeting was adopted after having been proposed by Sen. Beatrice Akinyi Ogola, MP and seconded by Sen. Agnes Kavindu Muthama, MP as follows-

1. Prayer;
2. Adoption of Agenda;
3. Confirmation of Previous Minutes;
4. Matters Arising from the Confirmed Minutes;
5. **Meeting with the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation, to receive Memorandum on the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) (Committee Paper No. 47);**
6. Any Other Business; and
7. Date of the Next Meeting and Adjournment.

**MINUTE SEN/LENR/299/2023**

**CONFIRMATION OF PREVIOUS MINUTES**

The confirmation of previous minutes was deferred to the next meeting.

**MINUTE SEN/LENR/300/2023**

**MATTERS ARISING FROM THE CONFIRMED MINUTES**

There were no matters arising.

**MINUTE SEN/LENR/301/2023**

**MEETING WITH THE CABINET SECRETARY, MINISTRY OF WATER, SANITATION AND IRRIGATION, TO RECEIVE MEMORANDUM ON THE WATER (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 33 OF 2023) (COMMITTEE PAPER NO. 47)**

The Chairperson began by inviting the Cabinet Secretary to take the Committee through the Bill, since they are the originators of the Bill and thereafter the Committee can interrogate the provisions in the Bill further.

The Committee made the following observations and comments on the Bill -

1. *Clause 2* of the Bill seeks to amend section 2 of the Water Act, No. 43 of 2016 (the 'Act') in the following manner-

(a) by inserting the definition of a 'contracting authority' to mean a national or county governmental body seeking to delegate its functions to a private entity.

(b) by deleting and substituting the definition of 'bulk water'. The Act currently defines 'bulk water' as water supplied to a water services provider by the water services provider making the supply. The Bill proposes to amend this definition by specifying that only water works development agency or the Water Storage Authority can supply bulk water.

### **Observation**

**The Committee noted with concern that Clause (2b) essentially leaves out the Counties and ignores their mandate as provided for in the Constitution, further, County Public Works and Services include storm water management systems in built-up areas and water sanitation services and are thus an exclusive function of the County Governments under the Fourth Schedule of the Constitution. The Gazette Notice of 9<sup>th</sup> August, 2013 on the transfer of functions unbundled County Public Works and Services in detail.**

### **Ministry Response**

**The Cabinet Secretary assured the Members that going forward all the projects initiated by the Ministry would be going the full mile as initially Counties would fail in the last mile of distribution and at the time of amending the Water Bill no County had developed any County Public Works and Services thus the omission. Further, on the definition of 'bulk water' on Clause (2b) it was based on the fact that investors would want to engage with a water works development for security of payment.**

### **Joint Resolution**

***The agreement was that the amendment should include County Government's role in Clause (2b) to also supply bulk water. Further the inclusion of the National Water Harvesting & Storage Authority in entering into the water purchase agreements with the Water Works development Authority.***

(c) by deleting and substituting the definition of 'water services provider'. The Act currently defines 'water services provider' as a company, public benefits organization or other person providing water services under and in accordance with a license issued by the Regulatory Board for the service areas defined by the license. The Bill now proposes to expand this definition by including the words

‘agency, authority and state corporation’, which expands the scope of entities that can be considered as water services providers.

**Observation-** Members noted that the proposed definition would have a ripple effect and thus the definition should read as follows- “Water Services Provider” means a company, agency, authority, state corporation, public benefit organization or any other person established/contracted by County Government providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the license as Water and Sanitation Services are functions vested exclusively under the County Governments which are mandated to establish Water Service Providers under Section 77 of the Act.

**Ministry Response-** The Ministry’s intention was to try and have a funding option for the WWDAs through PPPs. The intention is to meter in bulk and be able to sell the water to Water Service Providers.

Further, the Committee was informed that they picked the definition of a contracting authority from the PPP Act.

#### **Joint Resolution**

*The joint agreement was to consider having a definition for a bulk water service provider instead, so as to make it different from a water service provider.*

2. *Clause 4* of the Bill proposes an amendment to section 68 of the Act by inserting a new paragraph (ba) immediately after paragraph (b).

(ba) operate water works and provide water services-

(a) Through bulk water purchase agreements with private investors as per the Public Private Partnerships Act, 2021.

(b) Through bulk water purchase agreements with other water services providers.

(c) By operating as a water services provider until the agency transfers the responsibility for the operation and management of water works to a county government or a water services provider.

Additionally, the proposed new paragraph (ba) further states that a national public water work shall not be transferred to a county government.

#### **Observation**

The Committee noted that it was essential to add the phrase ‘in consultation with the County Government’ as the jurisdiction of WWDAs is limited to

operating waterworks and providing water services as a WSP. County Governments therefore need to be part of the negotiations to enter into agreements with investors in PPP agreements meant to enhance water and sanitation service delivery to Counties.

#### Ministry Response

The Ministry informed the Committee that on the No objection Clause by the County Government, the request is to have the words public participation instead.

#### Joint Resolution

*The joint agreement was that the adoption of the words in consultation with the County Government instead of Public Participation be carried.*

3. *Clause 6 -Section 69* of the Principal Act is amended-
- (a) by deleting subsection ( 1) and substituting therefore the following new subsection;
  - 1) As soon as possible, following the commissioning of water works other than national public water works, the water works development agency shall enter into an agreement with any county government or water services provider to provide water services within whose area of jurisdiction the services are located.
  - (b) in subsection (2), by deleting the words, “the joint committee, authority”
  - (c) in subsection (3), by deleting the words . “the joint committee, the authority”

#### Observation

The Committee needed clarification on why the proposal for the deletion of the term joint authority. What would be the danger of having several joint authorities in the various regions?

#### Ministry’s Response

The Ministry informed the Committee that the joint authorities were not practical since it introduced several state corporations all over the country that were unmanageable. Since this was not tenable, they decided to have the WWDAs doing the bulk water since it was not achievable.

4. *Clause 7 Section 72* of the Principal Act is amended in subsection (1)-
- a) by inserting a new paragraph immediately after paragraph (b)-

ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;

b) by deleting paragraph (c) and substituting therefore the following new paragraph –

(C) issue and set conditions for licensing of water services providers

### **Observation**

**The Committee observed that there was need for public participation in the area of concern to ensure there's a standardized way of charging across all regions through guidelines provided by regulators in consultation with County Governments. Further, the Committee was concerned with the inclusion of irrigation and the argument supporting it.**

### **Ministry's Response**

**The Ministry informed the Committee that they had conducted public participation widely and thus the proposed amendment should remain as is. Water needs to be collected, transported and eventually disposed of safely and thus the cost is what informs the tariff and is normally at 75% of the cost of water.**

**On irrigation, the reason to have it included is to attract investors and to spread the cost of investment to make it viable and commercial as opposed to only relying on domestic consumption which may be unsustainable to pay debts.**

**There is no intention to make water an expensive commodity to the consumers.**

### **Joint Resolution**

***The joint agreement was that it's important to guide and give a uniform charge across all the Counties. The regulator could do this in consultation with the Counties.***

5. *Clause 9 -Section 93* of the Principal Act is amended by
  - (a) deleting subsection (1) and substituting therefore the following new subsection-
    - (1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.
  - (b) deleting subsection (3) and substituting therefor the following new subsection -

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

#### **Observation**

**The Committee was concerned with why the proposal for deletion of the Clauses mentioned in the Bill is necessary.**

#### **Ministry's Response**

**The Ministry requested the Committee to retain the proposal in the Bill since a contracting authority is not going to contract to supply water to the County utilities. The contracting authority will sell water in bulk to WWDAs and give to the utilities to sell the water. The investor will end with the WWDAs.**

#### **Joint Resolution**

*The Committee was convinced with the argument and resolved to leave it as is.*

6. *Clause 10- Section 100 of the Principal Act is amended by inserting the following new subsections immediately after subsection (3)-*

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a license for bulk water supply shall be made.

#### **Observation**

**To amend (4) to include the County Public Works and Services, Joint Committees and Joint Authorities of County Governments together with Waterworks Development Agencies to supply water in bulk to water service providers. As proposed by the Council of Governors in their submission, assigning the bulk water supply solely to Water Works Development Agencies serves to limit the scope of the county functions and powers.**

**Further, To amend (5) to include 'consultation with County Governments'. This is guided by and aware of the need for consultations and cooperation between both levels of Government in the conduct of their mutual relations.**

#### **Ministry's Response**

The Ministry informed the Committee that both proposals in sub clause (4) and (5) is tenable and that they have always and consistently consulted counties even in the past.

**Joint Resolution**

*The Committee adopted the proposal by the Council of Governors.*

On further deliberation the Members noted that while the Bill was generally positive it was important to ensure that water as a commodity doesn't become expensive for the general population. Further, it is important for the Ministry to offer capacity building initiatives to ensure there's efficient water management and proper policy direction at the County level.

On their part the Ministry assured the Committee that the Bill was not there to take away the County functions as mandated in the constitution but rather it would make water provision more efficient should the Bill be passed.

**MINUTE SEN/LENR/302/2023**

**ANY OTHER BUSINESS**

There was no other business discussed.

**MINUTE SEN/LENR/303/2023**

**ADJOURNMENT AND DATE OF NEXT MEETING**

The meeting was adjourned at 3:35 pm. The date of the next meeting was to be called on notice.

Signed \_\_\_\_\_



Date 15/2/2024

SEN. JOHN MUHIA METHU, MP

**CHAIRPERSON**  
**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL**  
**RESOURCES**



**MINUTES OF THE FIFTY FIRST (51<sup>ST</sup>) SITTING OF THE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES HELD ON TUESDAY, 31<sup>ST</sup> OCTOBER, 2023 AT IMPALA BOARDROOM, KICC AT 9:00 AM**

**PRESENT**

- |  |                    |
|--|--------------------|
| 1. Sen. John Muhia Methu, MP               | - Chairperson      |
| 2. Sen. (Dr.) Steve Lelegwe Ltumbesi, MP   | - Vice Chairperson |
| 3. Sen. William Cheptumo Kipkiror, CBS, MP | - Member           |
| 4. Sen. Johnes Mwashushe Mwaruma, MP       | - Member           |
| 5. Sen. Mariam Sheikh Omar, MP             | - Member           |
| 6. Sen. Agnes Kavindu Muthama, MP          | - Member           |
| 7. Sen. Beatrice Akinyi Ogola, MP          | - Member           |

**ABSENT WITH APOLOGIES**

- |                              |          |
|------------------------------|----------|
| 1. Sen. Issa Juma Boy, MP    | - Member |
| 2. Sen. Wamatinga Wahome, MP | - Member |

**IN ATTENDANCE**

**A. COUNCIL OF GOVERNORS**

1. Hon. Andrew Mwadime - Gov. Taita Taveta County/Chair Water Committee COG
2. Mr. Kizito Wangalwa - Director, COG
3. Ms. Naomi Kefa – Legal Officer
4. Mr. Brian Mithoka - Technical Lead, Water, Environment, Climate Change & Forestry

**B. SECRETARIAT**

- |                       |                        |
|-----------------------|------------------------|
| 1. Mr. Victor Bett    | - Clerk Assistant II   |
| 2. Ms. Ivy Nyambura   | - Clerk Assistant III  |
| 3. Ms. Angela Kagunyi | - Legal Counsel II     |
| 4. Mr. John Gichia    | - Research Officer III |
| 5. Ms. Keziah Muthama | - Fiscal Analyst III   |
| 6. Ms. Shirley Milimu | - Audio Officer III    |

7. Ms. Lydia Kagumba
8. Mr. Ibrahim Odindo

–Public Communications  
– Serjeant at arms

#### MINUTE SEN/LENR/292/2023

#### PRELIMINARIES

The Chair called the meeting to order at 9:19 am. This was followed by a word of prayer.

#### MINUTE SEN/LENR/293/2023

#### ADOPTION OF THE AGENDA

The agenda of the meeting was adopted after having been proposed by Sen. Agnes Kavindu Muthama, MP and seconded by Sen. Mariam Sheikh Omar, MP as follows-

1. Prayer;
2. Adoption of the Agenda;
3. **Meeting with the Council of Governors on the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) (Committee Paper 47);**
4. Any Other Business; and
5. Date of the Next Meeting and Adjournment.

#### MINUTE SEN/LENR/294/2023

#### MEETING WITH THE COUNCIL OF GOVERNORS ON THE WATER (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 33 OF 2023) (COMMITTEE PAPER 47)

#### COUNCIL OF GOVERNORS SUBMISSIONS

The Council of Governors made the following submissions on the Bill -

1. *Clause 2* of the Bill seeks to amend section 2 of the Water Act, No. 43 of 2016 (the ‘Act’) in the following manner-
  - (a) by inserting the definition of a ‘contracting authority’ to mean a national or county governmental body seeking to delegate its functions to a private entity.
  - (b) by deleting and substituting the deletion of ‘bulk water’. The Act currently defines bulk water’ as water supplied to a water services provider by the water services provider making the supply. The Bill proposes to amend this definition by specifying that only a water works development agency or the Water Storage Authority can supply bulk water.

**Propose- To amend clause 2(b) to read as follows: “bulk water” means supply of water in bulk by water works development agency or Water Storage Authority of the County Public Works and Services to water service providers for retail.**

**Justification-** County Public Works and Services include storm water management systems in built-up areas and water sanitation services and are thus an exclusive function of the County Governments under the Fourth Schedule of the Constitution. The Gazette Notice of 9<sup>th</sup> August, 2013 on the transfer of functions unbundled County Public Works and Services in detail.

(c) by deleting and substituting the definition of ‘water services provider’. The Act currently defines ‘water services provider’ as a company, public benefits organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence. The Bill now proposes to expand this definition by including the words ‘agency, authority and state corporation’, which expands the scope of entities that can be considered as water services providers.

**Propose-** To amend clause 2 (c ) to read as follows: “Water Services Provider” means a company, agency, authority, state corporation, public benefit organization or any other person established/contracted by County Government providing water services in accordance with a licence issued by the Regulatory Board for the service areas specified in the license.

**Justification-** Water and Sanitation Services are functions vested exclusively under the County Governments which are mandated to establish Water Service Providers under Section 77 of the Act. Further, the Regulatory Board in issuing licenses for provision of water services shall ensure it does not claw back on County functions and shall empower county governments to effectively perform their functions and exercise their powers.

2. *Clause 4* of the Bill proposes an amendment to section 68 of the Act by inserting a new paragraph (ba) immediately after paragraph (b).

(ba) operate water works and provide water services-

(a) Through bulk water purchase agreements with private investors as per the Public Private Partnerships Act, 2021.

(b) Through bulk water purchase agreements with other water services providers.

(c) By operating as a water services provider until the agency transfers the responsibility for the operation and management of water works to a county government or a water services provider.

Additionally, the proposed new paragraph (ba) further states that a national public water work shall not be transferred to a county government.

**Propose-** To amend the proposed Section 68 (ba) (i) to read as follows- (i) By entering into a bulk water purchase agreement with an investor in

accordance with a no objection issued by County Government for the agreement with an investor in accordance with a no objection issued by County Government for the and in accordance with the provisions of the Public Private Partnerships Act, 2021. Provided that a national public water works shall not be transferrable to a county government; and no/any transfer of county water works to the national government shall be done upon arrival by the relevant county government.

**Justification-** The jurisdiction of WWDAs is limited to operating waterworks and providing water services as a WSP. County Governments therefore need to be part of the negotiations to enter into agreements with investors in PPP agreements meant to enhance water and sanitation service delivery to Counties.

The proviso doesn't provide for consultation between the national and county governments in designation of county waterworks as national public waterworks which is needed as the national government has repeatedly designated and gazetted waterworks and basin areas without involvement and/ or consultation of county governments.

3. *Clause 6 -Section 69* of the Principal Act is amended-

(a) by deleting subsection ( 1) and substituting therefore the following new subsection;

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

(b) in subsection (2), by deleting the words, “the joint committee, authority”

(c) in subsection (3), by deleting the words . “the joint committee, the authority”

**Propose-** Oppose deletion of joint committee and authorities in these subsections.

**Justification-** The establishment of Joint Authorities and Committees aligns to the principle of cooperation in Article 189 (2) of the Constitution and Section 23 of the Intergovernmental Relations Act, 2012.

4. *Clause 7 Section 72* of the Principal Act is amended in subsection (1)-

a) by inserting a new paragraph immediately after paragraph (b)-

ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;

b) by deleting paragraph (c) and substituting therefor the following new paragraph –

(C) issue and set conditions for licensing of water services providers

**Propose-** To amend the proposed Section 72 (ba) to read as follows- (ba) evaluate and approve bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes.

**Justification-** This proposed subsection (ba) purports to vest the functions of county governments in entities controlled by the national government.

5. *Clause 9 -Section 93* of the Principal Act is amended by deleting subsection (1) and substituting therefore the following new sub section-

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

**Propose-** To amend the proposed Section 93 (1) to read as follows: A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions.

**Justification-** Allowing a Contracting Authority at National Level to exercise functions in water service provision under a PPP framework encroaches upon functions of County Governments and Water Service Providers.

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

**Propose-** To delete ‘the provision of water services’ from the above amendment.

**Justification-** Restrict to the ‘Contracted Function’ to clearly delineate the scope of agreements to avoid any overlaps of functions between National and County Governments.

6. *Clause 10- Section 100* of the Principal Act is amended by inserting the following new subsections immediately after subsection (3)-

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

**Propose-** To amend (4) to include the County Public Works and Services, Joint Committees and Joint Authorities of County Governments together with Waterworks Development Agencies to supply water in bulk to water service providers.

**Justification-** Assigning the bulk water supply solely to Water Works Development Agencies serves to limit the scope of the county functions and powers.

(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a license for bulk water supply shall be made.

**Propose-** To amend (5) to include ‘consultation with County Governments’

**Justification-** This is guided by and aware of the need for consultations and cooperation between both levels of Government in the conduct of their mutual relations.

**MINUTE SEN/LENR/295/2023**

**ANY OTHER BUSINESS**

The Committee resolved to meet the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation on the Water (Amendment) Bill (National Assembly Bills No. 33 of 2023) on Monday, 6<sup>th</sup> November, 2023.

**MINUTE SEN/LENR/296/2023**

**ADJOURNMENT AND DATE OF NEXT MEETING**

The meeting was adjourned at 10:20 am. The date of the next meeting was to be called on notice.

Signed \_\_\_\_\_



Date 15/2/2024

SEN. JOHN MUHIA METHU, MP

**CHAIRPERSON**

**STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES**



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REPUBLIC OF KENYA

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PARLIAMENT

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NATIONAL ASSEMBLY BILLS

*(Bill No. 33 of 2023)*

**THE WATER (AMENDMENT) BILL, 2023**

(A Bill published in the ~~Kenya~~ *Gazette* Supplement No. 108 of 4<sup>th</sup> July 2023 and passed by the National Assembly, with amendments, on 23<sup>rd</sup> August 2023.)

THE WATER (AMENDMENT) BILL, 2023

A Bill for

AN ACT of Parliament to amend the Water Act, 2016 to provide for Public Private Partnerships arrangements and for connected purposes

ENACTED by the Parliament of Kenya as follows—

1. This Act may be cited as the Water (Amendment) Act, 2023. Short title.
2. Section 2 of the Water Act, 2016 (hereinafter referred to as “the principal Act”) is amended— Amendment of section 2 of No. 43 of 2016.
  - (a) by inserting the following new definition in proper alphabetical sequence—
 

“contracting authority” means—

    - (a) at the national government level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or
    - (b) at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party; and
  - (b) by deleting the definition of “bulk water” and substituting therefor with the following new definition—
 

“bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority to water service providers for retail;
  - (c) by deleting the definition of “water services provider” and substituting therefor with the following new definition—
 

“water services provider” means a company, agency, authority, state corporation, public ~~benefit~~ organization or any other person providing water

services in accordance with a licence issued by the Regulatory Board for the service areas specified in the licence.

3. Section 32 of the principal Act is amended in subsection (1) by inserting the following new paragraphs immediately after paragraph (f)—

Amendment of section 32 of No. 43 of 2016.

No. 14 of 2021.

(g) enter into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act;

(h) enter into a bulk water purchase agreement with a water works development agency.

4. Section 68 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (b)—

Amendment of section 68 of No. 43 of 2016.

No. 14 of 2021.

(ba) operate water works and provide water services—

(i) by entering into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act, 2021;

(ii) by entering into a bulk water purchase agreement with a water services provider; or

(iii) as a water services provider until such time as the water works development agency transfers responsibility for the operation and management of water works to a county government or water services provider in whose area of jurisdiction the water works is located:

Provided that a national public water works shall not be transferable to a county government.

5. The principal Act is amended by inserting the following new section immediately after section 68—

Insertion of a new section 68A in No. 43 of 2016.

Licensing of water works development agencies.

**68A.** (1) Each water works development agency shall be licensed by the Regulatory Board with respect to the functions under section 68 (ba) of this Act.

(2) The Regulatory Board shall, upon commencement of this Act and as may be necessary thereafter, and with the approval of the Cabinet Secretary, publish in the *Gazette* and on its website the standards and conditions for licensing of water works development agencies under this section.

6. Section 69 of the principal Act is amended—

Amendment of section 69 of No. 43 of 2016.

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

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

(b) in subsection (2), by deleting the words “the joint committee, authority”;

(c) in subsection (3), by deleting the words “the joint committee, the authority”.

7. Section 72 of the principal Act is amended in sub section (1)—

Amendment of section 72 of No. 43 of 2016.

(a) by inserting a new paragraph immediately after paragraph (b)—

(ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of

water for domestic, commercial and irrigation purposes;

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

(c) issue and set conditions for licensing of water services providers.

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

Amendment of section 75 of No. 43 of 2016

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

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

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

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

Amendment of section 93 of No. 43 of 2016.

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

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

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

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

continue to be used.

(c) Inserting the following new subsections immediately after subsection (3)—

(3A) Where a person entering into an agreement with the contracting authority fails to complete the project, the contracting authority shall take up the remaining works and complete the project.

(3B) Where a party to an agreement and the contracting authority jointly or concurrently participate in undertaking the project works, the party and the contracting authority shall undertake mutual co-ordination, integration and consultation in the implementation of the whole project.

(3C) Subject to subsection (3B) each party to an agreement shall select identifiable components of the project and set out specific financial and non-financial responsibilities attached to each party on each of the components of the project.

10. Section 100 of the principal Act is amended by inserting the following new subsections immediately after subsection (3)—

Amendment of  
section 100 of No.  
43 of 2016.

(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.

(5) The Cabinet Secretary ~~may~~ make regulations prescribing the manner in which

an application for a licence for bulk water supply shall be made.

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

Amendment of section 114 of No. 43 of 2016.

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

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

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

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

- (a) a Chairperson who shall be an advocate of the High Court of Kenya with not less than ten years' post qualification experience;
- (b) two persons one of whom shall be a registered civil engineer and the other a registered water engineer, with at least ten years' experience; and
- (c) two persons who possess a degree from university recognized in Kenya and at least five years' experience in a relevant field.

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

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

Commission, determine.

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*Section 2 of No. 43 of 2016 which it is proposed to amend —*

**2. Interpretation**

In this Act, unless the context otherwise requires —

"Authority" means the Water Resources Authority established under section 11;

"aquifer" means an underground geological formation able to store and yield water;

"basin area" means an area designated as such under section 24;

"basin water resources committee" means a water basin organization established under section 25;

"bulk water" means water supplied to a water services provider by the water services provider making the supply;

"Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to water;

"catchment area" means an area that is part of a basin designated as such under section 22;

"charges" in relation to the use of water from a water resource includes fees, levies and premiums of any kind;

"county government" means a county government as provided for under Chapter 11 of the Constitution Kenya;

"county government executive" means the county executive committee member responsible for matters relating to water;

"cross-county water services provider" means a water services provider providing water services to more than one county;

"easement" means the right to occupy so much of the land of another as may be necessary for or incidental to the construction or maintenance of works authorised, or the exercise of rights conferred by a permit;

"Equalisation Fund" means the Equalisation Fund provided for in Article 204 of the Constitution;

"Fund" means the Water Sector Trust Fund established in section 113;

"ground water" means the water of underground streams, channels, artesian basins, reservoirs, lakes and other bodies of water in the ground, and includes water in interstices below the water table;

"inspector" means a person appointed by the Cabinet Secretary, the Authority, a water basin resources committee, or the Regulatory Board, to exercise the powers of an inspector under this Act;

"in-stream habitat" includes the physical structure of a water resource and the associated vegetation in relation to the bed of the water course;

"international waters" means the ocean water beyond territorial waters; "Land and Environment Court" means the Land and Environment Court as established under article 162(2) of the Constitution;

"landholder" in relation to land, means the registered owner of the land or the person in whom the land is otherwise vested by law, and includes—

- (a) any person who by any established right, custom or estate is entitled to be the holder or possessor of land;
- (b) any person lawfully holding or occupying land in accordance with the provisions of any law empowering the allotment of land upon the promise of title, subject to the fulfilment by the allottee of prescribed conditions; and
- (c) any person to whom a mining lease or mining location has been granted under the Mining Act, 2016 (No. 12 of 2016);

"licence" means a licence in force under this Act;

"licensee" means a water service provider licensed by the Regulatory Board under this Act;

"limits of supply", in relation to a water undertaking, means the limits within which the licensee is for the time being authorised to supply water;

"Management Board" means the Board of the Authority established under section 14;

"management of water resources" means the development, augmentation, conservation or protection of a water resource;

"peri-urban water services" means services provided in peri-urban areas as shall be defined by the Regulatory Board from time to time;

"permit" means a permit for the time being in force under this Act;

"person" includes a company, association or other body of persons whether incorporated or unincorporated;

"pollution", in relation to a water resource, means any direct or indirect alteration of the physical, thermal, chemical or biological properties of the water resource so as to make it —

- (a) less fit for any beneficial purpose for which it is or is reasonably be expected to be used; or
- (b) harmful or potentially harmful to—
  - (i) the welfare, health or safety of human beings;
  - (ii) any aquatic or non-aquatic life or property; or
  - (iii) the environment;

"public consultation", in relation to any application made, or action proposed to be taken under this Act, has the meaning assigned to it in section 139;

"reasonable water use" means the use of water without wastage  
"Regulatory Board" means the Water Services Regulatory Board established under section 70;

"reserve" in relation to a water resource, means that quantity and quality of water required—

- (a) to satisfy basic human needs for all people who are or may be supplied from the water resource; and
- (b) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the water resource;

"resource quality", in relation to a water resource, means the quality of all the aspects of a water resource including—

- (a) the water quality stipulated for the reserve;
- (b) the quantity, pattern, timing, water level and assurance of in-stream flow;
- (c) the physical, chemical and biological characteristics of the water;
- (d) the character and condition of the in-stream and riparian habitat; and
- (e) the characteristics, condition and distribution of the aquatic biota;

"resource quality objectives", in relation to a water resource, means the level to be achieved and maintained in each aspect of resource quality for the water resource;

"riparian habitat" means the dynamic complex of plant, animal and micro-organism communities and their non-living environment adjacent to and associated with a watercourse;

"rural water services" means services provided in rural areas as shall be defined by the Regulatory Board;

"Salaries and Remuneration Commission" means the Salaries and Remuneration Commission established under Article 230 of the Constitution;

"sanitation" means the provision of on-site sanitation services including latrines, septic tanks and conservancies including the associated exhauster services;

"sector wide approach" means coordinated development in the sector to achieve national goals, effectiveness of funds and ownership of government institutions including sector wide planning and coordination, national monitoring and information and national implementation concepts;

"sewerage services" means the development and management of infrastructure for transport, storage, treatment waste water originating from centralized and decentralized systems but shall not include household sanitation facilities;

"spring" means water emerging from beneath the surface of the ground other than as a result of drilling or excavation operations;

"state organ" has the meaning assigned in Article 260 of the Constitution; "stream" means the water contained in a watercourse, and includes a river;

"supply of water in bulk" means a supply of water to a licensee for distribution by or on behalf of the licensee taking the supply;

"swamp" means any shallow depression in which water collects either intermittently or permanently and where there is a small depth of surface water or a shallow depth of ground water and a slight range of fluctuation either in the surface level of the water or of the ground water level so as to permit the growth of aquatic vegetation;

"transboundary waters" means water resources shared between Kenya and another State;

"urban water services" means services provided in urban areas as shall be defined by the Regulatory Board from time to time;

"use of water", in relation to a water resource includes, without any limitation to—

- (a) abstraction, obstruction, impoundment or diversion of water forming part of a water resource;
- (b) the discharge of materials or substances into a water resource or
- (c) any activity of a kind prescribed by Regulations under this Act, in relation to a water resource;

"watercourse" means any natural channel or depression in which water flows regularly or intermittently, unless declared not to be a watercourse under this Act;

"water resource" means any lake, pond, swamp, marsh, stream, watercourse, estuary, aquifer, artesian basin or other body of flowing or standing water, whether above or below the ground, and includes sea water and transboundary waters within the territorial jurisdiction of Kenya;

"water right" means the right to have access to water through a water permit;

"water resource management" means the conservation, including soil and water conservation, protection, development and utilization of water resources; and

"water services" means any services of or incidental to the supply or storage of water and includes the provision of sewerage services;

"water services provider" means a company, public benefit organization or other person providing water services under and in accordance with a licence issued by the Regulatory Board for the service areas defined by the licence;

"water storage" means a location or structure where water is stored for future use;

"Water Storage Authority" means the National Water Harvesting and Storage Authority established in section 30;

"Water Storage Board" means the Board of the National Water Harvesting and Storage Authority established under section 31;

"Water Strategy" means the Integrated National Water Services Strategy formulated by the Cabinet Secretary in section 64;

"water table" means —

- (a) impervious granular or detrital material, the upper surface of the body of free water which fills all openings in material that is sufficiently pervious to permit percolation; and

(b) in fractured impervious rocks and in solution openings, the surface at the contact between the water body in the openings and the overlying ground air;

"water user" means a person using water from a water resource; "water works development agencies" means the agencies of the national government established under section 65;

"works" means any structure, apparatus, contrivance, device or thing for storing, recharging, treating, carrying, conducting, providing or utilizing water or liquid waste, but does not include hand utensils or such other contrivances as may be prescribed by Regulations made under this Act.

*Section 32 of No. 43 of 2016 which it is proposed to amend—*

**32. Powers and functions of the Water Storage Authority**

(1) The functions and powers of the Water Storage Authority shall be to—

- (a) undertake on behalf of the national government, the development of national public water works for water resources storage and flood control;
- (b) maintain and manage national public water works infrastructure for water resources storage;
- (c) collect and provide information for the formulation by the Cabinet Secretary of the national water resources storage and flood control strategies;
- (d) develop a water harvesting policy and enforce water harvesting strategies;
- (e) undertake on behalf of the national government strategic water emergency interventions during drought; and
- (f) advise the Cabinet Secretary on any matter concerning national public water works for water storage and flood control.

(2) The Water Storage Authority may appoint agents for the operation, management, maintenance and safety of any storage infrastructure that it has developed.

(3) The Water Storage Authority shall have such other powers and functions as may be conferred or imposed on it by this or any other Act.

*Section 68 of No. 43 of 2016 which it is proposed to amend—*

**68. Powers and functions of the water works development agency**

The powers and functions of the water works development agency shall be to —

- (a) ~~undertake the development, maintenance and management of the~~ national public water works within its area of jurisdiction;
- (b) operate the waterworks and provide water services as a water service provider, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or water services provider within whose area of jurisdiction or supply the waterworks is located;
- (c) provide reserve capacity for purposes of providing water services where pursuant to section 103, the Regulatory Board orders the transfer of water services functions from a defaulting water services provider to another licensee;
- (d) provide technical services and capacity building to such county governments and water services providers within its area as may be requested; and
- (e) provide to the Cabinet Secretary technical support in the discharge of his or her functions under the Constitution and this Act.

*Section 69 of No. 43 of 2016 which it is proposed to amend—*

**69. Handover of completed works**

(1) As soon as possible, following the commissioning of the waterworks, the waterworks development agency shall enter into an agreement with the county government, the joint committee or authority of the county governments within whose area of jurisdiction the water works is located, jointly with the water service provider within whose area of supply the water works are located for the use by the joint committee, authority or water services provider, as the case may be, of the water works to provide water services.

(2) The agreement shall make provision for the assumption by the county government, the joint committee, authority or water services provider of the responsibility for the repayment of any loans or liabilities of the waterworks and until full repayment of the loans and discharge of any outstanding liabilities, ownership of the waterworks shall remain in the waterworks development agency.

(3) In the event that the county government, the joint committee, the authority or water services provider defaults in the repayment of any

outstanding loans arising from the development, rehabilitation or maintenance of the works, the waterworks development agency may petition the Regulatory Board to declare a default and order the transfer of the water services provider's functions to the waterworks development agency, to exercise such functions until full repayment of the loan.

*Section 72 of No. 43 of 2016 which it is proposed to amend—*

**72. Powers and functions of the Regulatory Board**

- (1) The powers and functions of the Regulatory Board shall be to —
- (a) determine and prescribe national standards for the provision of water services and asset development for water services providers;
  - (b) evaluate and recommend water and sewerage tariffs to the county water services providers and approve the imposition of such tariffs in line with consumer protection standards;
  - (c) set licence conditions and accredit water services providers;
  - (d) monitor and regulate licensees and enforce licence conditions;
  - (e) develop a model memorandum and articles of association to be used by all water companies applying to be licensed by the Regulatory Board to operate as water services providers;
  - (f) monitor compliance with standards including the design, construction, operation and maintenance of facilities for the provision of water services by the water works development bodies and the water services providers;
  - (g) advise the Cabinet Secretary on the nature, extent and conditions of financial support to be accorded to water services providers for providing water services;
  - (h) monitor progress in the implementation of the Water Strategy and make appropriate recommendations;
  - (i) maintain a national database and information system on water services;
  - (j) establish a mechanism for handling complaints from consumers regarding the quality or nature of water services;
  - (k) develop guidelines on the establishment of consumer groups and facilitate their establishment;
  - (l) inspect water works and water services to ensure that such works and services meet the prescribed standards;

- (m) report annually to the public on issues of water supply and sewerage services and the performance of relevant sectors and publish the reports in the Gazette;
- (n) make Regulations on water services and asset development which shall include business, investment and financing plans in order to ensure efficient and effective water services and progressive realization of the right to water services;
- (o) advise the Cabinet Secretary on any matter in connection with water services; and
- (p) make recommendations on how to provide basic water services to marginalised areas.

(2) The Regulatory Board shall have such powers and functions as may be conferred on it by this or any other Act, or as may be reasonably incidental to the exercise or performance of any power or function so conferred.

*Section 75 of No. 43 of 2016 which it is proposed to amend—*

**75. Register of licensed water services providers**

(1) The Regulatory Board shall maintain the register of all licensed water services providers containing —

- (a) their names and addresses;
- (b) in the case of a registered association, or public benefit organization, the nature of the association or organization and the particulars of its registration;
- (c) the nature of services in respect of which the water services providers are accredited;
- (d) the conditions, if any, attaching to their license; and
- (e) any other matter prescribed in Regulations.

(2) The register of the licensed person shall be a public document accessible for inspection at no charge and shall be publicized, placed or posted in accessible formats at such places as the Regulatory Board shall determine.

(3) The register referred to in this section shall be published from time to time by the Authority.

(4) The Regulatory Board shall develop and publish guidelines to regulate the conduct of licensed water services providers.

*Section 93 of No. 43 of 2016 which it is proposed to amend—*

**93. Public Private Partnerships**

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

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

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

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

*Section 100 of No. 43 of 2016 which it is proposed to amend—*

#### **100. Supply of bulk water**

(1) A person shall not supply water in bulk to a water services provider without a licence issued by the Regulatory Board.

(2) A water service provider may enter into an agreement with any other licensee or water services provider on terms and conditions to be approved by the Regulatory Board —

- (a) for the supply of water in bulk for a specific period; or
  - (b) where the supply is to be given by a water services provider, either within or outside the area of service of that water services provider.
- (3) Where it appears to the Regulatory Board that —
- (a) it is expedient for—
    - (i) any licensee or water services provider to give the supply of water in bulk to another licensee or water service provider;
    - (ii) the other licensee or water services provider to take such supply; and
  - (b) giving and taking of such a supply cannot be secured by agreement, the Regulatory Board may, by order served on the parties, require the licensees concerned to give and take the supply of water in bulk for such a period and on such terms as the Regulatory Board may specify.

*The Water (Amendment) Bill, 2023*

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I certify that this printed impression is a true copy of the Bill passed by the National Assembly on the 23<sup>rd</sup> August, 2022.

  
*Clerk of the National Assembly*

Endorsed for presentation to the Senate in accordance with the provisions of Standing Order 144 of the National Assembly Standing Orders.

  
*Speaker of the National Assembly*

PRINTED BY THE CLERK OF THE NATIONAL ASSEMBLY

**ANEX III – STAKEHOLDER SUBMISSIONS**



COUNCIL OF GOVERNORS

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Nairobi.

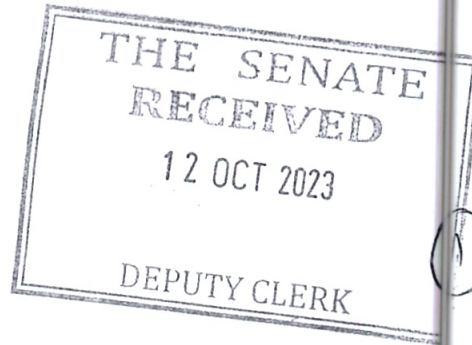
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Our Ref: COG/6/57 Vol.13 (52)

9<sup>th</sup> October 2023

Jeremiah Nyegenye, CBS  
The Office of the Clerk of the Senate,  
Main Parliament Buildings,  
P.O Box 41482-00100,  
Nairobi.



① DSEC  
DLG  
—  
kindly deal.  
E. Nyropas

Dear Clerk,

LETTER FORWARDING THE LEGISLATIVE MEMORANDUM ON THE WATER  
(AMENDMENT) BILL, 2023

Greetings from the Council of Governors.

Reference is made to the above matter.

Attached herewith, please find a memorandum on the Water (Amendment) Bill, 2023  
passed by the National Assembly for your kind consideration.

Please accept the assurance of our highest esteem and consideration.

Yours sincerely,

Mary Mwititi  
Chief Executive Officer

② DSEC  
—  
kindly deal  
—  
12/10/2023

Mr. Bett  
—  
Also deal  
Sub.  
13/10/23.



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

TO  
THE SENATE STANDING COMMITTEE ON LAND, ENVIRONMENT AND NATURAL RESOURCES

FROM  
THE COUNCIL OF GOVERNORS

9<sup>TH</sup> OCTOBER, 2023

The Council of Governors,

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

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

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

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

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

- i. Inclusion of private water service providers (WSPs) in the water sector through the Public Private Partnerships (PPP) framework presents the risk of running county water service providers (WSPs) out of business due to economies of scale. This presents the need to balance the interests of private WSPs and county WSPs for equitability of opportunities.
- ii. The Bill presents the need for a balance between opportunities for bulk water supply given to water works development agencies (WWDAs) and private WSPs/investors in order to operationalize the PPP framework in the water sector. Clause 10 of the Bill for instance seems to prioritize WWDAs as WSPs in inter-county bulk water supply.
- iii. The Bill raises the need for consultation between the national and county governments in designation of county waterworks as national public waterworks. In fact, various provisions in the Act allow the national government to designate and gazette waterworks and basin areas without the involvement and/or consultation of county governments as we shall highlight hereinafter.
- iv. Licensing of WWDAs by the Water Services Regulatory Board (WASREB) under Clause 5 of the Bill presents the need for robust checks and balances to prevent potential conflict of interest in WASREB discharging this function to ensure quality water services.
- v. The Bill needs to provide for inclusion of county governments/WSPs in discussions for PPP agreements entered into for national public works since the WWDAs will not only be serving national functions but also water service provision which is a county function.
- vi. The Bill should define Clearly the county public water works and scope of county water works. Anything not defined as a national public water works to be deemed to be a county public water works.

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

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

CLAUSE	PROVISION of Section in the Bill	PROPOSED AMENDMENT	Rationale/Justification for the Amendment
Clause 2(b)	<p>“bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority to water service providers for retail;</p>	<p>Amend to read as Follows;            “bulk water” means supply of water in bulk by a water works development agency or the Water Storage Authority or the County Public Works and services to water service providers for retail;</p>	<p>County Public Works and Services include storm water management systems in built-up areas and water sanitation services and are thus an exclusive function of County Governments under the Fourth Schedule of the Constitution. The Gazette Notice of 9<sup>th</sup> August 2013 on the transfer of functions unbundled County Public works and services to include:            ‘Water and sanitation services including rural water and sanitation services; water and sanitation service in small and medium towns without formal service providers, water harvesting (specific to counties); Urban water and sanitation services with formal service provision including water, sanitation and sewerage companies.’            Bulk supply and or bulk water services provision is equally undertaken by either the county water services providers or joint authorities which should be supported and facilitated to implement projects including Public Private Partnership (PPP) projects in</p>

			the water sector. WASREB should be guided by the requirements in section 100 of the Act wherein bulk supply arrangements must be undertaken by two licensed water service providers.
Clause 2(c)	<p>“Water Services Provider” means a company, agency, authority, public benefit organization or any other person providing water services in accordance with a licence issued by the Regulatory Board for the service areas specified in the licence.</p>	<p>Amend to read as Follows;</p> <p>“Water Services Provider” means a company, agency, authority, state corporation, public benefit organization or any other person established/Contracted by County Government providing water services in accordance with a license issued by the Regulatory Board for the service areas specified in the licence.</p>	<p>Water and Sanitation services are functions vested exclusively under the County Governments. County Governments are mandated to establish Water Service Providers under Section 77 of the Act and this ought to be included in this definition.</p> <p>The Regulatory Board in issuing licenses for provision of water services shall ensure it does not claw back on County Functions and shall empower county governments to effectively perform their functions and exercise their powers.</p>
Clause 4	<p>Section 68 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (b):</p> <p>(ba) operate water works and provide water services-</p> <p>i) By entering into a bulk purchase water</p>	<p>Amend the proposed Section 68 (ba) (i) and the proviso to:</p> <p>(i) By entering into a bulk water purchase agreement with an investor in accordance with a no objection issued by County Government for the</p>	<p>The jurisdiction of WVDAs is limited to operating waterworks and providing water services as a WSP, until such a time as responsibility for the operation and management of the waterworks are handed over to a county government, joint committee, authority of county governments or WSP within whose area of jurisdiction or supply the waterworks is located.</p> <p>County Governments therefore need to be part of the negotiations to enter into</p>

	<p>agreement with an investor in accordance with a no objection issued by County Government for the and in accordance with the provisions of the Public Private Partnerships Act, 2021</p> <p>Provided that a national public water works shall not be transferrable to a county government.</p>	<p>service area specified in the contract agreement and in accordance with the provisions of the Public Private Partnerships Act, 2021</p> <p>Provided that a national public water works shall not be transferrable to a county government; and no/any transfer of county water works to the national government shall be done upon approval by the relevant county government.</p>	<p>agreements with investors in PPP agreements meant to enhance water and sanitation service delivery to Counties.</p> <p>The proviso does not provide for consultation between the national and county governments in designation of county waterworks as national public waterworks. We need this provision as the national government has repeatedly designated and gazetted waterworks and basin areas without the involvement and/or consultation of county governments.</p>
<p>Clause 6</p>	<p>(b) in subsection (2) by deleting the words “the joint committee, authority”</p> <p>(c) in subsection (3) by deleting the words “the joint committee, the authority.”</p>	<p>Delete the proposed amendments (b) and (c)</p>	<p>We are opposed to deletion of joint committee and authorities in these subsections. The establishment of Joint Authorities and Committees aligns to the principle of cooperation in Article 189 (2) of the Constitution and Section 23 of the Intergovernmental Relations Act, 2012 Section 23 on establishment of joint committees and joint authorities to ensure Counties are able to cooperate in effective performance of their responsibilities in bulk and cross-county water service provision and serve as entities for dispute resolution. These</p>
			<p>Counties are able to cooperate in effective performance of their responsibilities in bulk and cross-county water service provision and serve as entities for dispute resolution. These</p>

<p>Clause 7</p>	<p>Section 72 is amended by in subsection (1)-  (a)by inserting a new paragraph immediately after paragraph (b)-  (ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes;</p>	<p>Amend the proposed Section 72 (ba) to:  (ba) evaluate and approve water and sewerage tariffs bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic commercial and irrigation purposes;</p>	<p>entities are therefore key entities to whom waterworks may be handed over to by WWDAs.  This proposed subsection (ba) purports to vest the functions of county governments in entities of or entities controlled by the national government.</p>
<p>Clause 9</p>	<p>(1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.</p>	<p>Amend the proposed Section 93 (1) to:  A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part of the whole of its area of water service provision.</p>	<p>Allowing a Contracting Authority at National Level to exercise functions in water service provision under a PPP framework encroaches upon functions of county Governments and Water service providers.</p>

	<p>3) Where the person entering into an agreement with the Contracting authority owns or possesses assets or infrastructure used for the provision of water services, the agreement shall set out the terms and conditions under which the assets may continue to be so used.</p>	<p>Delete the proposed amendments</p> <p>3) Where the person entering into an agreement with the Contracting authority owns or possesses assets or infrastructure used for a contracted function <del>the provision of water services,</del> the agreement shall set out the terms and conditions under which the assets may continue to be so used.</p>	<p>Restrict to the 'Contracted Function' to clearly delineate the scope of agreements to avoid any overlaps of functions between National and County Governments.</p>
<p>Clause 10</p>	<p>(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the County in which the bulk water abstraction works are located shall be undertaken by water works development agencies established under section 65 of this Act and licensed under this section</p>	<p>Amend the proposed Section to include the following: (4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the County in which the bulk water abstraction works are located shall be undertaken by 'County Public Works and Services, Joint Committees and Joint Authorities of County Governments' aligned with Section 100(2) of the Water Act where a water service provider may enter into an agreement with any other licensee or water services provider on terms and conditions to be approved by the Regulatory Board for the supply of water in bulk for a specific period.</p>	<p>Assigning the Bulk Water supply solely to Water Works Development Agencies serves to limit the scope of the county functions and powers. Inclusion of the 'County Public Works and Services Joint Committees and Joint Authorities of County Governments' aligns the amendment with Section 100(2) of the Water Act where a water service provider may enter into an agreement with any other licensee or water services provider on terms and conditions to be approved by the Regulatory Board for the supply of water in bulk for a specific period.</p>

	(5) The Cabinet Secretary may make regulations prescribing the manner in which an applications for a licence for bulk water supply shall be made.	this Act and licensed under this section. <b>Amend the proposed Section to include the following:</b> 5) The Cabinet Secretary shall make regulations in consultation with County Governments prescribing the manner in which an applications for a licence for bulk water supply shall be made.	This is guided by and aware of the need for consultations and cooperation between both levels of Government in the conduct of their mutual relations.
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**C) General Comments on the Water Act, 2016**

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

- i. it vests the functions of county governments in institutions of the national government, contrary to the provisions of (inter alia) (6) (2) and 186 (1) Of the Constitution as read with the Fourth Schedule thereto;
- ii. it excludes or omits county governments in the performance of the shared functions of the two levels of government, contrary to the provisions of (inter alia) articles (6) (2) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- iii. It establishes a centralized framework for the provision of water and sanitation services, contrary to the provisions of (inter alia) articles (6) (2), (3) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- iv. it establishes a centralized framework for the protection, management and regulation of water resources, contrary to the provisions of (inter alia) articles (6) (2), (3) and 186 (1) of the Constitution as read with the Fourth Schedule thereto;
- v. it diverts funds otherwise meant for sharing and/or allocation to county governments to unnecessary multiple institutions of the national government, contrary to the provisions of (inter alia) article (6) (2), 174, 202 md 203 of the Constitution is read with section 15 of the Sixth Schedule thereto;

- vi. its overall object and/or effect is inconsistent with the objects, principles and structure of devolution as set out in (inter alia) (6) (2), (3), 174, 186 (1) and 189 of the Constitution as read with the Fourth Schedule thereto;
- vii. it was enacted without adequate consultation and/or in flagrant disregard of concerns raised by county governments and members of the public, contrary to the provisions of (inter alia) article (6) (2), (3), 118, 174, 186 (41) and 189 of the Constitution;
- viii. it undermines the constitutional objective of proximate and universal access to clean, safe and adequate water, contrary to the provisions of (inter alia) articles (6) (2), (3), 43 (1) (d), 56 (e), 174, 186 (1) and 189 of the Constitution; and
- ix. the centralized approach to water, sanitation and related works and services set out in the Impugned Act will;
  - leave most Kenyan citizens without access to clean, safe and adequate water;
  - leave most Kenyan citizens without access to sewerage and sanitation; and
  - expose most Kenyan citizens to the ravages of (inter alia) poverty, malnutrition and waterborne and communicable diseases

D) Specific Comments on the Water Act, 2016

CLAUSE	COMMENTS ON THE PROVISION
Section 6	<p>(i) purports to transfer the mandate of the National Lands Commission to the Water Resources Authority; and</p> <p>(ii) Diverts funds otherwise meant for sharing and/or allocation to county governments to an unnecessary institution/bureaucracy of the national government (i.e. the Water Resources Authority and its Board and Secretariat).</p>
Section 8	<p>to the extent that it purports to:</p> <p>(i) assigns the provision of water services, a devolved function, to the national government;</p> <p>(ii) assigns storm water management and water conservation, both being either devolved or shared functions, to the national government;</p> <p>(iii) allows the national government to designate and gazette waterworks without the involvement and/or consultation of county governments; and</p> <p>(iv) allows the national government to use its share of revenues to perform or duplicate the functions of county governments;</p>

<p>Section 12(b), (d), (e), (f), 36 to 38, 40 to 54, 57 to 62, 85 to 91, 95 to 101 and 130</p>	<p>(i) excludes or omit county governments in the management and regulation of water resources;  (ii) excludes or omit county governments in the issuance of permits and licences for devolved functions;  (iii) excludes or omit county governments in the levying of permit fees and licence fees in respect of devolved functions; and  (iv) denies county governments potential revenue streams, through the issuance of relevant permits and licences and the levying of relevant fees</p>
<p>Section 13 (c) and (d)</p>	<p>the extent that it purports to allow the Water Resources Authority to perform and/ or micromanage the performance of the functions of county governments.</p>
<p>Section 14 (1)</p>	<p>to the extent that it does not provide for the involvement and/or consultation of county governments in the appointment of the members of the Management Board of the Water Resources Authority.</p>
<p>Sections 22 and 23</p>	<p>To the extent that they vest environmental and water conservation, both being shared functions, exclusively in organs of the national government.</p>
<p>Section 24</p>	<p>to the extent that it purports to allow the Cabinet Secretary to designate and gazette basin areas without the involvement and/or consultation of county governments.</p>
<p>Sections 25 and 26</p>	<p>(i) purport to allow Basin Water Resources Committees to perform or duplicate the functions of county governments; and  (ii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. Basin Water Resources Committees).</p>
<p>Section 27</p>	<p>to the extent that it purports to allow Basin Water Resources Committees to perform or duplicate the functions of county governments.</p>
<p>Section 29</p>	<p>(i) vest a devolved function, namely the establishment and regulation of water resources users associations, in the Water Resources Authority; and</p>

	(ii) allow Basin Water Resources Committees to contract out a function of county governments.
Sections 30 and 32	(i) exclude or omit county governments in the performance of a shared function of the two levels of government (i.e. water harvesting and storage); (ii) exclude or omit county governments in the appointment of the members of the Water Harvesting and Storage Board; (iii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. the National Water Harvesting and Storage Authority and its Board and Secretariat).
Sections 65 and 66	the extent that they do not provide for the involvement and/or consultation of county governments in: i. the establishment of waterworks development agencies; and ii. the appointment of the members of waterworks development agencies;
Sections 68, 69, 72 and 74 to 78	to the extent that they purport to vest the functions of county governments in entities of or controlled by the national government.
Section 84	to the extent that it envisions the transfer of assets to county governments later than three years from the date of the first elections of county assemblies;
Section 109	(i) purports to vest a function of county governments (i.e. sewerage services) in the Water Resources Authority; and (ii) Purports to allow the Water Resources Authority to impose levies in relation to a function of county governments.
Sections 117 and 126	(i) purport to allow national government institutions to perform or duplicate the functions of county governments; and (ii) divert funds otherwise meant for sharing and/or allocation to county governments to unnecessary institutions/ bureaucracy of the national government (i.e. the Water Resources Authority, the Water Sector Trust Fund, the Water Harvesting and Storage Authority, Waterworks Development agencies and their respective Boards and staff).

Sections 148 to 150	to the extent that they provide a transition involving a transfer of assets to institutions of the national government instead of county governments.
<b>Additional Amendments</b>	
Section 78(b) to define the county assets in context.	The Act needs to be reviewed to clarify functions of water development agencies which touch on county assets. There is need for streamlining section 69 on management of liabilities between national and county government.
Section 29, 30, 42, 26, 64 and 65	Review to ensure harmonization of functions, effective representation of county government where there are cross-cutting functions such as water service standards, basis water management, and flood management among others.
Section 74, 97, 98 and Sections 101, 106	Amend the Act to incorporate participation of county governments in such provision and regulation of provision of water services sections 74, 97 98 as recognized under sections 101, 106 on the role of county government regarding complaints received on service provision and enforcement.  Amend the Act to clarify that water service provision as captured under Section 76 and 79 and other sections of the Act is a function of County Governments.
Section 94	to comply with the duty of governments to progressively realise the right to water in rural and undeveloped areas.
Section 109 and 117	to remove the role of counties in sewerage and sanitation from the ambit of both the Regulatory Bard and the water Sector Trust Fund
Sections 87 and 92	Amend or clarify through regulations how public participation in licencing and monitoring provision of water services.

## E) Conclusion

The Council concludes that there is need to:

- i. Align the Act as a whole to the Constitution, mainstreaming the principles for implementation of the Act should include chapter VI, principles of devolution, right to water and Articles 69-72 of the Constitution.
- ii. Review the roles of various institutions that claw back on the functions of county governments. Harmonize and mainstream the role of county governments in the entire chain of institutional framework of provision, regulation and overall management of water services.
- iii. Amend the Act to harmonize functions between national and county governments with clear demarcation and collaboration where appropriate for instance in regulation of water service providers.

**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

		<p>b) by deleting the definition of "<b>water services provider</b>" and substituting therefor with the following new definition;</p> <p><b>"water services provider"</b> means a company, agency, authority, state corporation, public benefit organization or any other person providing water services in accordance with a licence issued by the Regulatory Board for the service areas specified in the licence.</p>	<p>The amendment seeks to widen the scope of water service providers including those providing bulk water supply. This shall ultimately allow WASREB to licence all the water service providers covered under this category in accordance with the provisions of the Act.</p>	<p>WASREB supports the expansion of the scope of 'water service providers' as the current definition is restrictive to companies who operate as either county of private water service provider.</p>
3. Clause 3	section 32 of No. 43 of 2016	<p>Section 32 of the principal Act is amended in subsection (1) by inserting the following new paragraphs immediately after paragraph (f)-;</p>	<p>This amendment seeks to expand the functions of National Water Harvesting and Storage Authority to enable them enter into PPP arrangements and in</p>	<p>To amend (h) to allow NWHSA to enter into a bulk water purchase agreement with other WSPs subject to economic efficiency criteria determined by</p>
		<p>g) enter into a bulk water purchase agreement with an investor in</p>	<p>them enter into PPP arrangements and in</p>	<p>economic efficiency criteria determined by</p>



**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

		<p>accordance with the provisions of the Public Private Partnerships Act;</p> <p>h) enter into a bulk water purchase agreement with a water works development agency.</p>	<p>turn sell bulk water to Water Works Development Agencies.</p>	<p>the Regulatory Board in line with consumer protection standards.</p>
4.	section 68 of No. 43 of 2016	<p>Section 68 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (b):</p> <p>ba) operate water works and provide water services:</p> <p>i. by entering into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act, 2021;</p>	<p>This seeks to expand the functions and powers of Water Works Development Authorities to allow them to enter into PPP arrangements for purposes of supplying water in bulk to other water service providers alongside their current functions.</p>	<p>To amend 68 (ba) (ii) to read          "by entering into a bulk water purchase agreement with a water services provider subject to economic efficiency criteria determined by the Regulatory Board</p> <p>Delete section (ba)(iii) as this is already catered for under</p>



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NO.	PROPOSED SECTION FOR AMENDMENT UNDER THE BILL	PROPOSED AMENDMENT	IMPLICATION OF THE AMMENDMENT	WASREB'S PROPOSAL
1.	Title of the Act	AN ACT of Parliament to amend the Water Act, 2016 to provide for Public Private Partnerships arrangements and for connected purposes		The title to read-;  AN ACT of Parliament to amend the Water Act, 2016 to provide for Public Private Partnerships arrangements, licencing and for connected purposes.



**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

2.	Section 2 of No. 43 of 2016	<p>Section 2 of the Water Act, 2016 (hereinafter referred to as "the principal Act") is amended;</p> <p>a) by inserting the following new definition in proper alphabetical sequence:</p> <p><b>"contracting authority"</b> means -;</p> <p>i. at the national government level, a state department, agency or state corporation which intends to have its functions undertaken by a private party; or</p> <p>at the county government level, the county government or county corporation which intends to have its functions undertaken by a private par</p>	<p>This amendment intends to align the definition of a contracting authority in line with the Public Private Partnerships Act for purposes of operationalizing PPP arrangements in the water sector.</p>	<p>To add 'county agency' under the definition of a contracting authority under (ii)</p>
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**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

		<p>ii. by entering into a bulk water purchase agreement with a water services provider; or</p> <p>iii. as a water services provider until such time as the water works development agency transfers responsibility for the operation and management of water works to a county government or water services provider in whose area of jurisdiction the water works is located:</p> <p>Provided that a national public water works shall not be transferable to a county government.</p>	<p>It further seeks to reaffirm the non-transferability of National Public Water Works developed by the Water Works Development Agencies that are gazetted as such.</p>	<p>section 68 (b) of the water Act 2016.</p>
5.	Insertion of a new section 68A in No. 43 of 2016	The principal Act is amended by inserting the following new section immediately after section 68 -;	This amendment allows Water Works Development Agencies	



**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

		<p>68A (1) Each water works development agency shall be licensed by the Regulatory Board with respect to the functions under section 68 (b) and (c) of this Act.</p> <p>(2) The Regulatory Board shall, upon commencement of this Act and as may be necessary thereafter, and with the approval of the Cabinet Secretary, publish the standards and conditions for licensing of water works development agencies under this section.</p>	<p>to be licensed by WASREB as water service providers.</p> <p>This will enhance consumer protection since the regulatory regime protects the rights of consumers.</p>	<p>The phrase "with the approval of the Cabinet Secretary" under section 68A (2) to be deleted as it negates the statutory powers donated to the Regulatory Board under section 71 of the Water Act 2016.</p>
6.	section 69 of No. 43 of 2016	<p>Section 69 of the principal Act is amended-;</p> <p>a) by deleting subsection (1) and substituting therefor the following new subsection;</p>	<p>This amendment seeks to provide clarity on the handover process of water works, that are not national public water works, that are developed by the</p>	<p>Section 69 (1) to be deleted in entirety as it contravenes article 189 of the COK which ensures collaboration between the National</p>



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		<p>1) As soon as possible, following the commissioning of waterworks other than national public water works, the waterworks development agency shall enter into an agreement with any county government or water services provider to provide water services within whose area of jurisdiction the services are located.</p> <p>b) in subsection (2), by deleting the words ",the joint committee, authority"</p> <p>c) in subsection (3), by deleting the words "the joint committee, the authority"</p>	<p>WWDAS on behalf of the County Governments and how such loans shall be repaid.</p>	<p>and County Governments.</p>
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**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

7.	section 72 of No. 43 of 2016	<p>Section 72 of the principal Act is amended in sub section (1) -;</p> <p>a) by inserting a new paragraph immediately after paragraph (b)-</p> <p>ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;</p> <p>b) by deleting paragraph (c) and substituting therefor the following new paragraph –</p> <p>(C) issue and set conditions for licensing of water services providers</p>	<p>This shall authorize WAREB to approve water, sewerage and bulk water tariffs for purposes of domestic, commercial and irrigation purposes.</p>	<p>To maintain the previous section 72 (b) but replace the word "recommend" with approve.</p> <p>Add sub-section (bb) to read as follows: "Evaluate and approve tariffs for irrigation purposes"</p> <p>Section 72 (c) to be rephrased to read-;</p> <p>"Issue licences and set conditions for water service provision"</p>
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**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

8.	section 75 of No. 43 of 2016	Section 75 of the principal Act is amended in subsection 1 paragraph (c) by deleting the word "accredited" and substituting therefor the word "licensed".	This amendment removes the requirement of accreditation of water service providers under section 75 1(c).	WASREB supports this amendment as it is.
9.	section 93 of No. 43 of 2016	Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section –  1) A contracting authority may enter into a public private partnership or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision.	This shall allow any contracting authority to enter into PPP arrangements.	The amendments allows all water service providers under the act to enter into PP arrangements as the current provision under Water Act 2016 only allows county water service providers to enter into PPP arrangements.



**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

<p>10.</p> <p><i>Clause 10</i></p>	<p>section 100 of No. 43 of 2016</p>	<p>Section 100 of the principal Act is amended by inserting the following new subsections immediately after subsection (3) -</p> <p>4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by waterworks development agencies established under section 65 of this Act and licensed under this section.</p>	<p>This amendment shall permit WWDAs to provide bulk water services to other water service providers in relation to national public water works that are cross county in nature.</p>	<p>Delete the proposed subsection (100) 4. The provision violates article 189 of the COK and section 86 of the Water Act 2016 on the requirement of commercial viability.</p> <p>WASREB Proposes that this section be deleted.</p> <p>Section 100 (5) to be deleted since these powers are already donated to the Regulatory board under section 71.</p>
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**SUBMISSIONS ON THE WATER (AMENDMENT) BILL NO. 33 OF 2023**

		5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a licence for bulk water supply shall be made.		
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THE NATIONAL TREASURY & ECONOMIC PLANNING  
PUBLIC PRIVATE PARTNERSHIPS (PPP) DIRECTORATE

A BILL PUBLISHED IN THE KENYA GAZETTE SUPPLEMENT NO. 108 OF 4<sup>TH</sup> JULY 2023 (NATIONAL ASSEMBLY BILL NO. 33 OF 2023)

MEMORANDUM TO THE WATER (AMENDMENT) BILL 2023, SUBMITTED TO PARLIAMENT ON 12<sup>TH</sup> OCTOBER 2023

	<u>ISSUE</u>	<u>PROPOSED CHANGES</u>	<u>RATIONALE</u>
1.	Clause 2 The definition of the term “water service provider”	We propose amending the definition of “water service provider” to adopt the following definition:  “water service provider” to mean a company, agency, authority, <b>contracting authority</b> , state corporation, public benefit organization or any other person providing water	- The proposed adoption of the definition is aligned to the definition of a contracting authority under clause 2.

		services in accordance with a licence issued by the Regulatory Board for the services areas specified in the licence.	
2.	<b>Clause 9</b> Entering into a public private partnership or public partnerships	We propose that Clause 9 be amended to read as follows:  <i>“A contracting authority may enter into a public private partnerships arrangement for the exercise...”</i>	The words “entering into a public private partnerships arrangement” is in tandem with the syntax used in the PPP Act, 2021.
3	<b>Clause 93 (1)</b> Entering into a public private partnership or public partnerships	We propose that Clause 93 (1) be amended to read as follows:  <i>“A Water Service provider may enter into a public private partnerships arrangement for the exercise...”</i>	The words “entering into a public private partnerships arrangement” is in tandem with the syntax used in the PPP Act, 2021.



REPUBLIC OF KENYA  
MINISTRY OF WATER, SANITATION AND IRRIGATION

SUBMISSIONS TO THE SENATE STANDING COMMITTEE ON  
LAND, ENVIRONMENT AND NATURAL RESOURCES ON THE  
WATER AMENDMENT BILL HELD ON MONDAY 6<sup>TH</sup>  
NOVEMBER 2023

1. **Hon. Chair**, the core mandate of the Ministry of Water, Sanitation and Irrigation is to ensure progressive realization of human right to water, adequate sanitation and food security under article 43 (b) (c) and (d). The Ministry therefore implements programs and projects to ensure this mandate is realized and International Obligations, like SDG and Africa Agenda 2063 targets are met.
2. **Hon. Chair**, Kenya has low service level as only 2.6 million households out of 12.5 million households in the country have access to piped water systems in their yards while safely managed sanitation is only 32%.

3. The Investment required to meet the Constitutional requirement of Universal Access to water and sanitation is very high and estimated at Kshs.1.8 trillion; according to the National Water Master Plan of 2013 and Kshs. 995 billion according to the Kenya National Water and Sanitation Investment and Financing Plan (NAWASIP) developed in 2022. The NAWASIP is an Investment and Financing Plan developed by the National and County Governments. The Framework for the Investment and Financing Plan was entered into between the National and County Governments in January 2022 and the Plan was launched by the Ministry of Water, Sanitation and Irrigation and the Council of Governors in February 2023.

4. The Plan identified sources of Investment in the Sector as 40% concessional loan, 31% PPP, 8% commercial funding, 11% National and County Revenue, 8% grants and 2% self-financing.

5. While the sector has embraced self-financing, Grants, National and County Revenue, Commercial Funding and Concessional loans, the sector has not embraced PPP Funding model.

6. Through the NAWASIP, the sector has commenced negotiation with the World Bank to Finance Kenya Water, Sanitation and Hygiene (K-WASH) Program and the PPP funding model. In this regard the Government targets to implement 100 large Dams through PPP financing model.

7. However, **Hon. Chair**, the current Water Act 2016 section 93 provides for Public Private Partnership as a funding option to benefit only the water services providers who are utilities in the Counties. The major national infrastructure development institutions like National Water Harvesting and Storage Authority (NWHSA) and Water Works Development Agencies (WWDA) do not have the capacity. The Act therefore requires amendment to embrace Public Private Partnership (PPP) model of funding for the relevant national water sector institutions. In this regard, I take this opportunity to appreciate all the members of the Standing Committee on Land, Environment and Natural Resources for inviting me and my team to discuss the Water amendment bill 2023. This bill was conceived after consultation with the PPP Unit of National Treasury and Attorney General's office to

align the Water Act no 43 of 2016 and on board the PPP funding option to the water sector.

8. The Proposed amendments herein include section 2 of the Act on interpretations provisions which have since defined 'Contracting Authority' in the Water Sector by lifting the definition from the PPP Act 2021 and placing it in the Water Act 2016. Another important definition introduced as an amendment in the Water Act 2016 is the 'Water Service Provider' which now *'means a company, agency, authority, state corporation, public benefits organization or any other person providing water services under and in accordance with a license issued by the regulatory board for the service areas defined by the license'*. The other important provisions in the Water Act 2016 that have since been proposed for amendments include Section 32, 68, 68A, 69, 72, 93 and 100 details of which are in your possession.

9. **Hon Chair**, the main purpose for the proposed amendments is to encourage investors to undertake Public Private Partnership in water Projects by making the relevant water sector institutions bankable. The proposed amendments enable WASREB to set tariff for bulk water and

to license the Water Works Development Agencies to supply water in bulk to utilities. This would guarantee investment return.

10. I assure you that the proposed Water amendments to on-board Public Private Partnership were developed by the Ministry of Water, Sanitation and Irrigation together with the relevant Water sector institutions, National Treasury and Office of the Attorney General. The amendments have further been subjected to countrywide Public Participation. The evidence of Public Participation is hereby attached.

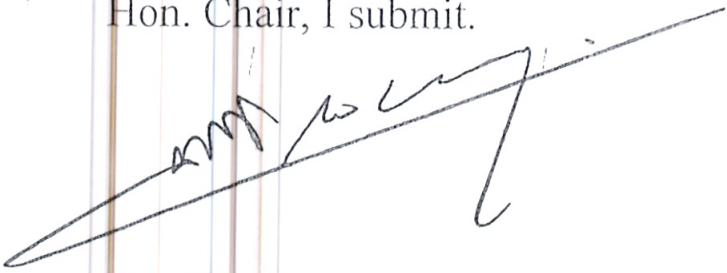
11. **Hon. Chair,** This is an effort by my Ministry to support the implementation of the Bottom up Economic Transformation Agenda (BETA) by bringing on board a Public-Private-Partnership (PPP) funding framework, particularly for large capital projects in the water sector. As you are aware, His Excellency the President, Dr. William Ruto since ascending to leadership of Kenya, has always emphasized that "the Government will upscale investment in sustainable water-related infrastructure which will ensure that the country is water secure to save lives and improve people's health. In his very first State of the Nation Address to both Houses of Parliament sometime in September

2022, His Excellency emphasized the need for a Public-Private-Partnership (PPP) funding framework, particularly for large capital projects in the Water Sector.

12. **Hon. Chair and Members,** Kenya is classified as one of the water scarce countries with per capita annual renewal fresh water of 452 m<sup>3</sup> per person per year; this means that a lot of efforts are required in terms of funding from relevant resources to ensure quality and adequate water is served on the fifty (50) million citizens. We must plan to bridge the financing gap and address diminishing water resources. It is predicted that by 2035 there will only be 235 m<sup>3</sup> per person per year. The construction of large dams is a key priority for the Ministry and the National Government.

13. **Hon. Chair and Members;** I have an obligation to ascertain predictable and improved sanitation coverage and access to safe water in adequate quantities. I therefore urge you to support my Ministry, provide your expertise; comments and guidance to finalize this critical amendment which shall enable our Country to position itself to effectively benefit from Public Private Partnership funding option.

Hon. Chair, I submit.

A handwritten signature in black ink, appearing to read 'Zachariah M. Njeru', written over a diagonal line.

**ZACHARIAH M. NJERU**  
**CABINET SECRETARY**  
**6<sup>th</sup> November 2023**





**MEMORANDUM ON THE WATER (AMENDMENT) BILL, 2023**

Submitted to

**THE CLERK  
SENATE  
PARLIAMENT BULIDINGS  
P O BOX 41842-00100,  
NAIROBI**

Presented By

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

**OCTOBER 2023 – NAIROBI, KENYA**

## 1.0 INTRODUCTION

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

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

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

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

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

### 3.0 General Comments

#### Revenue Leakages.

When private investors sell bulk water, the revenues to pay the private investors will ultimately be generated from collections by Water Service Providers. NRW reduces the amount of money that WSPs may obtain from the end users. This means that the WSPs and eventually the WWDAs may not generate enough revenue to pay for water under the bulk water purchase agreements. The Government will therefore either have to buck-stop the payment responsibilities of WWDAs or structure the PPPs to include oversight at the WSP level to limit revenue leakage.

4.0 Specific Comments (per clause)

	CLAUSE	PROPOSAL	JUSTIFICATION
1.	<p><b>Clause 3</b></p> <p><del>Section 32 of the principal Act is</del></p> <p><b>amended in subsection (1) by inserting the following new paragraphs immediately after paragraph (f):</b></p> <p><b>(g) enter into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act;</b></p> <p><b>(h) enter into a bulk water purchase agreement with a water works development agency.</b></p>	<p>We propose that a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.</p>	<p>The proposal is based on the following justifications:</p> <ul style="list-style-type: none"> <li>• A template ensures consistency in formatting and structure across multiple documents. This makes the document easier to read and reduces the risk of errors and omissions.</li> <li>• Furthermore, the use of a template enhances uniformity.</li> </ul>
2.	<p>Section 72 of the principal Act is amended in sub-section (1):</p> <p>a. by inserting a new paragraph immediately after paragraph (b):</p> <p>(ba) evaluate and approve water and sewerage tariffs, bulk water tariffs and approve the imposition of such tariffs in line with consumer protection standards for use of water for domestic, commercial and irrigation purposes;</p>	<p>We propose that this clause is deleted.</p>	<p>This proposal is based on the following justification:</p> <ul style="list-style-type: none"> <li>• This power should remain with the Regulatory Board.</li> <li>• The clause has removed the Regulatory Board's power to accredit water service providers.</li> <li>• the Bill has not indicated the alternative entity that will have the power to accredit water service providers.</li> <li>• Accreditation of water service providers has the following benefits: <ul style="list-style-type: none"> <li>a. ensures that water service providers meet set standards for delivering high quality services.</li> </ul> </li> </ul>

	<p>b. by deleting paragraph (c) and substituting therefor the following new paragraph:</p> <p>(c) issue and set conditions for licensing of water services providers.</p>		<p>Consequently, customers can have confidence in the quality and reliability of the services they receive.</p> <p>b. accreditation ensures that water service providers comply with health and safety standards in their operations. This includes water treatment processes and testing protocols to prevent contamination of water; and</p> <p>c. accreditation enhances the reputation and credibility of water service providers, making them more attractive to investors.</p>
3.	<p><b>Clause 10</b> Amendment of section 100 of the Water Act 2016 to provide that all water bulk water supply services in a county shall be undertaken by waterworks development agencies.</p> <p><b>Section 100 - Supply of bulk water</b></p> <p><b>Section 100 of the principal Act is amended by inserting the following new subsections immediately after subsection (3):</b></p> <p><b>(4) Notwithstanding any provision in this Act, all bulk water supply services which</b></p>	<p>We propose the deletion of this proposal.</p>	<p>We make this proposal based on the following justifications:</p> <ul style="list-style-type: none"> <li>• counties should be exempt from the requirements of the proposed amendment to ensure water remains affordable to water users within counties.</li> <li>• There is a need for the cost of water supplied to residents and businesses in a county to be maintained at a low level, to ensure it remains affordable.</li> <li>• This will ensure that Kenya attains the right to clean and safe water in adequate quantities is an economic and social right under Article 43 (1) (d) of the Constitution.</li> </ul>

	<p>are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction</p>		<ul style="list-style-type: none"> <li>• Currently, Nairobi County does not pay other counties for the water it sells to consumers.</li> <li>• The Bill seeks to make it mandatory for</li> </ul>
	<p>works are located shall be undertaken by water works development agencies established under section 65 of this Act and licensed under this section.</p> <p>(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a licence for bulk water supply shall be made.</p>		<ul style="list-style-type: none"> <li>• counties that do not produce their own water to purchase the commodity.</li> <li>• Consequently, this proposal will lead to an increase in the price of water paid by the consumers.</li> <li>• Counties like Nairobi County to not pay for the water it sells to its residents. This will ensure the price of water does not increase and therefore, makes water affordable to residents.</li> <li>• Furthermore, the right to clean and safe water in adequate quantities is an economic and social right under Article 43 (1) (d) of the Constitution.</li> </ul>
4.		<p>We propose the introduction of new provisions under section 100 on bulk water under the Water Act to provide for the development of regulations on bulk water and purchase agreements and a schedule to prescribe the agreement forms as follows:</p> <p><i>Section 100 (3) The Cabinet Secretary shall make Regulations for better carrying into effect provisions on bulk water purchase agreements and prescribed agreement forms for bulk water purchase</i></p>	<ul style="list-style-type: none"> <li>• The proposed new provisions for bulk water purchase agreements are progressive provisions and will support industries that utilize bulk water for their operations.</li> <li>• There is a need to develop regulations to further expand on the new provisions and allow for schedules to be included to outline items such as templates to guide agreements. Furthermore, the use of a template enhances uniformity</li> </ul>
<p><b>NEW PROPOSALS</b></p>			

	CLAUSE	PROPOSAL	JUSTIFICATION
5.	<b>New Provision</b> <b>Water use charges for the salt sector</b>	We propose that the charges for water use for the salt sector be reduced.	<p>We make this proposal based on the following justifications:</p> <ul style="list-style-type: none"> <li>• Water use charges were increased at almost 90% and the requirement is monthly. The increment has led to a huge financial implication to the salt industry as they require huge water use from boreholes.</li> <li>• Charges on renewal of permits for bore holes have increased drastically. A single borehole increased to 90,000 shillings for the renewal permit. This has increased the cost of doing business for the salt sector, which has contributed to the increase in the cost to the consumer.</li> <li>• This is further compounded by a delay in the time taken to acquire a borehole permit. Permits applied for and paid for in the past year or prior to the application of the Act have not been issued. This may negatively affect manufacturers as the Water Resource Authority may charge them at the new rates or charges.</li> </ul>



# Water Services Regulatory Board

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REF: WASREB/SENATE/2023(3)

DATE: 11<sup>TH</sup> OCTOBER 2023


J. M Nyeganya, CBS  
Hon. Clerk of the Senate  
Clerk's Chambers  
Parliamentary Buildings  
P.O. Box 41842-00100  
**NAIROBI**

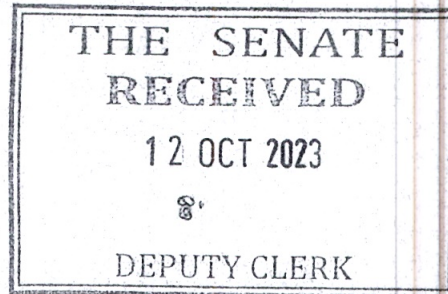
① DSEC  
DK  
Kindly deal.  
12/10/2023  
② DDSEE  
Kindly deal  
12/10/2023  
Eg

RE: MEMORANDA ON THE WATER (AMENDMENT) BILL, 2023 (NATIONAL ASSEMBLY BILL NO. 33 OF 2023)

Reference is made to your letter Ref. SEN/DSEC/LENR/2023/2 (19) dated 4<sup>th</sup> October 2023.

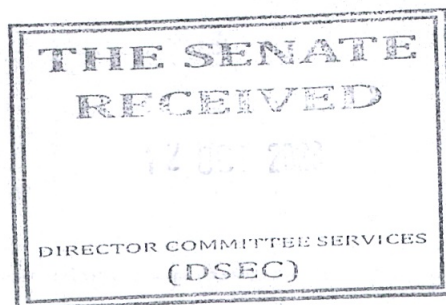
Please find attached herewith the written memoranda by Water Services Regulatory Board (WASREB).

  
Dr. Julius K. Munga, PhD  
Ag. CHIEF EXECUTIVE OFFICER



cc.

Mr. Julius K. Korir, CBS  
Principal Secretary  
State Department of Water and Sanitation  
Ministry of Water, Sanitation and Irrigation  
P.O. Box 49720-00100  
**NAIROBI**



③ Mrs Bell  
Kindly deal.  
Emb  
13/10/23

We the Budget Champions and Member of County Budget and Economic Forum of Taita Taveta County do hereby present the following comments and recommendations for consideration and action by Standing Committee on Land Environment and Natural Resources of the Thirteenth Parliament / second Session – The Senate  
 Dated 2<sup>nd</sup> October, 2023

THE WATER (AMENDMENT) BILL, 2023

An Act Of Parliament To Amend The Water Act, 2016 To Provide For Public Private Partnerships Arrangements.

PROPOSED PROVISION FOR AMENDMENT	PROPOSED AMENDMENT	OUR COMMENTS/RECOMMENDATIONS
<p>Clause 2                      Amendment of section 2 of No. 43 of 2016</p>	<p>Section 2 of the Water Act, 2016 ("the principal Act") is amended:</p> <p>(a) by inserting the following new definition in the proper alphabetical sequence:</p> <p>"contracting authority" means:</p> <p>a. at the national government level, a state department, agency, or state corporation which intends to have its functions undertaken by a private party; or</p> <p>b. at the county government level, the county government or county corporation which intends to have its functions undertaken by a private party; and</p> <p>(b) by deleting the definition of "water services provider" and substituting therefor with the following new definition:</p> <p>"water services provider" means a company, agency, authority, state corporation, public benefit organization or any other person providing water services in accordance with a licence issued by the Water Services Regulatory Board ("the Regulatory Board") for the service areas specified in the licence.</p>	<p>There is need for an interpretation on the word used herein "private party" since Section 2 of the Water Act, 2016 ("the principal Act") does not give an interpretation over the same.</p> <p>For the definition of "water services provider", the term was already defined in the principal Act.</p> <p>However, the Bill has added "agency, authority and state corporations" as new entities that can be water service providers in this Bill.</p> <p>The Bill has widened the scope of the definition to allow more entities to be water service providers but it is important to also ensure we live to the spirit of the COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT                      PART 2—ENVIRONMENT AND NATURAL RESOURCES                      Obligations in respect of the environment.                      69. (1) The State shall—                      (d) encourage public participation in the management, protection and conservation of the environment;</p> <p>We propose that the interpretation of the service provider remain as in Section 2 of the Water Act, 2016 ("the principal Act") and an interpretation of the word "company"</p> <ul style="list-style-type: none"> <li>- a water services provider established by county</li> </ul>

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		government as a public limited liability company under the Companies Act, 2015
Clause 3 Amendment of section 32 of No. 43 of 2016	Section 32 of the principal Act is amended in subsection (1) by inserting the following new We propose that a template of a bulk water purchase agreement is added to the Schedule or subsidiary legislation of this Bill.  paragraphs immediately after paragraph (f):  (g) enter into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act;  (h) enter into a bulk water purchase agreement with a water works development agency.	We conclude that : 1. Section 32 of the Water Act, 2016 ("the principal Act") is unconstitutional. The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2)) Distribution of Functions Between the National Government and the County Governments PART 1—NATIONAL GOVERNMENT 19. National public works. 33. Public investment.  PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012 and The Public Finance Management (Public Investment Management) Regulations, 2022 (Legislative Supplement No. 29) Kenya Gazette Supplement No. 52 of 1st April, 2022. has provided a very clear and elaborate process to undertake Public Investment. We further recommend that there is need to amend the entire Section 32 of the ("the principal Act") and all agreements should be developed in reference to the PFM Act,2012 and the regulations
Clause 4 Amendment of section 68 of No. 43 of 2016	Section 68 of the principal Act is amended by inserting the following new paragraph immediately after paragraph (b):  (ba) operate water works and provide water services:  i. by entering into a bulk water purchase agreement with an investor in accordance with the provisions of the Public Private Partnerships Act, 2021;	We conclude that : 1. Section 68, 69, of the Water Act, 2016 ("the principal Act") is unconstitutional. The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2)) Distribution of Functions Between the National Government and the County Governments PART 1—NATIONAL GOVERNMENT 19. National public works.  In addition, COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT

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<p>Clause 5  Insertion of a new section 68A in No. 43 of 2016</p>	<p>ii. by entering into a bulk water purchase agreement with a water services provider; or  iii. as a water services provider until such time as the water works development agency transfers responsibility for the operation and management of water works to a county government or water services provider in whose area of jurisdiction the water works is located:</p> <p>The principal Act is amended by inserting the following new section immediately after section 68:</p> <p>68A. (1) Each water works development agency shall be licensed by the Regulatory Board with respect to the functions under section 68 (b) and (c) of this Act.</p> <p>(2) The Regulatory Board shall, upon commencement of this Act and as may be necessary thereafter, and with the approval of the Cabinet Secretary, publish the standards and conditions for licensing of water works development agencies under this section.</p>	<p>PART 2—ENVIRONMENT AND NATURAL RESOURCES  Obligations in respect of the environment.  69. (1) The State shall—  (d) encourage public participation in the management, protection and conservation of the environment;  The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2))  Distribution of Functions Between the National Government and the County Governments  PART 2 – COUNTY GOVERNMENTS  10. Implementation of specific national government policies on natural resources and environmental conservation, including—  (a) soil and water conservation; and  (b) forestry.  11. County public works and services, including—  (a) storm water management systems in built-up areas; and  (b) water and sanitation services.</p>
<p>Clause 6  Amendment of section 69 of No. 43 of 2016</p>	<p>Section 69 of the principal Act is amended:  a. by deleting subsection (1) and substituting therefor the following new subsection:  (1) As soon as possible, following the commissioning of water works other than national public water works, the water works development agency shall enter</p>	<p>Finally, CHAPTER FOUR – THE BILL OF RIGHTS  PART 2 – RIGHTS AND FUNDAMENTAL FREEDOMS  Economic and social rights.  43. (1) Every person has the right—  (d) to clean and safe water in adequate quantities;  CHAPTER FOUR—THE BILL OF RIGHTS  PART 1—GENERAL PROVISIONS RELATING TO THE BILL OF RIGHTS  Application of Bill of Rights.  20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.  (5) In applying any right under Article 43, if the State claims that it does not have the resources to</p>

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	<p>into an agreement with any county government or water services provider to provide water services within whose area of jurisdiction the services are located.</p> <p>b. in subsection (2), by deleting the words “, the joint committee, authority”; and</p> <p>c. in subsection (3), by deleting the words "the joint committee, the authority".</p>	<p>implement the right, a court, tribunal or other authority shall be guided by the following principles—</p> <p>(a) it is the responsibility of the State to show that the resources are not available;</p> <p>(b) in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and</p> <p>(c) the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.</p>
<p>Clause 7  Amendment of section 72 of No. 43 of 2016</p>	<p>Section 72 of the principal Act is amended in sub-section (1): For paragraph (ba), the Bill has added bulk water tariffs as one of the tariffs that the Regulatory Board will evaluate and approve. It is important to note that bulk water tariffs were not present in the principal Act.</p> <p>For new paragraph (c), the clause has removed the Regulatory Board’s power to accredit water service providers.</p>	<p>For paragraph (ba), the Bill has added bulk water tariffs as one of the tariffs that the Regulatory Board will evaluate and approve. It is important to note that bulk water tariffs were not present in the principal Act.</p> <p>For new paragraph (c), the clause has removed the Regulatory Board’s power to accredit water service providers.</p> <p>We do not agree with this proposal as the Bill has not indicated the alternative entity that will have the power to accredit water service providers.</p> <p>Consequently, we propose that this power remains with the Regulatory Board.</p> <p>Accreditation of water service providers has the following benefits:</p> <p>a. accreditation ensures that water service providers meet set standards for delivering high quality services. Consequently, customers can have</p>

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		<p>confidence in the quality and reliability of the services they receive;</p> <p>b. accreditation ensures that water service providers comply with health and safety standards in their operations. This includes water treatment processes and testing protocols to prevent contamination of water; and</p> <p>c. accreditation enhances the reputation and credibility of water service providers.</p>
<p>Clause 8 Amendment of section 75 of No. 43 of 2016</p>	<p>Section 75 of the principal Act is amended in subsection 1 paragraph (c) by deleting the word "accredited" and substituting therefor the word "licensed".</p>	<p>For sub-section (1) (a) of the principal Act, we propose the deletion of paragraph (a) and replacing it with the words "their names, telephone numbers, e-mails and postal addresses".</p> <p>Providing a water service provider's telephone number and e-mail address allows customers and the public to directly contact the water service providers.</p> <p>This facilitates communication for enquiries, reporting issues, seeking assistance, or providing feedback.</p>
<p>Clause 9 Amendment of section 93 of No. 43 of 2016</p>	<p>Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section:</p> <p>(1) A contracting authority may enter into a public private partnership ("PPP") or public partnerships for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water</p>	<p>We propose that Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section:</p> <p>(1) A contracting authority may enter into a public investment for the exercise and performance by another person as a licensee, of some or all of its functions with respect to a part or the whole of its area of water service provision as in the PUBLIC FINANCE MANAGEMENT ACT</p>

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	service provision.	NO. 18 OF 2012 and The Public Finance Management (Public Investment Management) Regulations, 2022 (Legislative Supplement No. 29) Kenya Gazette Supplement No. 52 of 1st April, 2022.
Clause 10 Amendment of section 100 of No. 43 of 2016	<p>Section 100 of the principal Act is amended by inserting the following new subsections immediately after subsection (3):</p> <p>(4) Notwithstanding any provision in this Act, all bulk water supply services which are primarily intended to supply water in bulk to a water services provider in a county or counties other than the county in which the bulk water abstraction works are located shall be undertaken by water works development agencies established under section 65 of this Act and licensed under this section.</p> <p>(5) The Cabinet Secretary may make regulations prescribing the manner in which an application for a licence for bulk water supply shall be made.</p>	<p>We conclude that Section 100 of the Water Act, 2016 ("the principal Act") is unconstitutional since;</p> <p>COK 2010 CHAPTER FIVE—LAND AND ENVIRONMENT PART 2—ENVIRONMENT AND NATURAL RESOURCES Obligations in respect of the environment. 69. (1) The State shall— (d) encourage public participation in the management, protection and conservation of the environment; The COK 2010 FOURTH SCHEDULE (Article 185(2), 186(1) and 187(2)) Distribution of Functions Between the National Government and the County Governments PART 2 – COUNTY GOVERNMENTS 10. Implementation of specific national government policies on natural resources and environmental conservation, including— (a) soil and water conservation; and (b) forestry. 11. County public works and services, including— (a) storm water management systems in built-up areas; and (b) water and sanitation services. We propose that the same be deleted.</p>

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