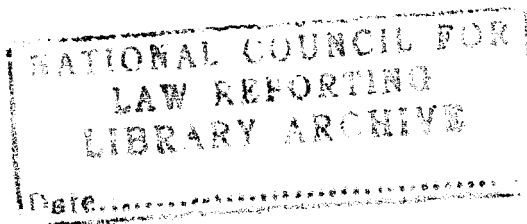


SPECIAL ISSUE



Kenya Gazette Supplement No. 108 (National Assembly Bills No. 33)



REPUBLIC OF KENYA

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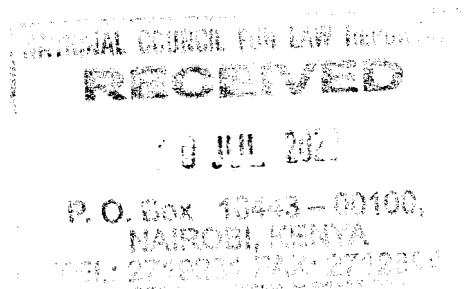
NATIONAL ASSEMBLY BILLS, 2023

NAIROBI, 4th July, 2023

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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 “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.

(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.

- (ba) operate water works and provide water services—

No. 14 of 2021.

- (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 (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.

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

Amendment of section 75 of No. 43 of 2016

9. Section 93 of the principal Act is amended by deleting subsection (1) and substituting therefor the following new sub section—

Amendment of section 93 of No. 43 of 2016.

(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.

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.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons of the Bill

The principal object of the Bill is to amend the Water Act, 2016, for the purpose of operationalizing public private partnership in the water sector.

Clause 1 of the Bill provides for the short title of the Act. Clause 2 of the Bill proposes the amendment of section 2 of the Act to provide for new definitions as used in the Act.

Clause 3 of the Bill proposes the amendment of section 32 of the Act to provide for additional powers of the National Water Harvesting and Storage Authority. Clause 4 of the Bill proposes the amendment of section 68 of the Act to provide for additional functions of waterworks development agencies. Clause 5 of the Bill proposes the insertion of a new section 68A to the Act to provide for licensing of waterworks development agencies by the Water Services Regulatory Board.

Clause 6 of the Bill proposes the amendment of section 69 of the Act to provide for clarity between the roles of waterworks development agencies and water service providers. Clause 7 of the Bill proposes the amendment of section 72 of the Act to provide for additional functions of the Water Services Regulatory Board and to remove the Water Services Regulatory Board's power to accredit water services providers. Clause 8 of the Bill proposes the amendment of section 75 to remove the requirement of accreditation of water services providers.

Clause 9 of the Bill proposes the amendment of section 93 of the Act to provide that a contracting authority may enter into public private partnerships agreements. This is for purposes of aligning the Water Act to the Public Private Partnerships Act, No. 14 of 2021. Clause 10 of the Bill proposes the amendment of section 100 of the Act to provide for supply of bulk water in counties by waterworks development agencies established under the Act.

Statement on whether the Bill concerns County Governments

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

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Cabinet Secretary but it does not limit fundamental rights and freedoms.

Statement as to whether the Bill is a money Bill within the meaning of Article 114 of the Constitution

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated 29th June, 2023.

KIMANI ICHUNG'WAH,
Leader of Majority.

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 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;

"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.

